

Syllabus

IN THE MATTER OF
SCHENLEY INDUSTRIES, INC. ET AL.CONSENT SETTLEMENT IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT*Docket 6048. Complaint, Sept. 24, 1952—Decision, Mar. 2, 1954*

Where a corporation which had caused to be created or acquired, and owned directly through subsidiaries, a large number of subsidiary corporations engaged in the production, sale, and distribution of alcoholic beverages; and four subsidiary members of said corporate subsidiary organization, which was utilized, among other purposes, to facilitate the sale and distribution of alcoholic beverages under various trade-marks, brands, and trade names so that at least some of said respondents should sell or distribute to persons other than those owned or controlled by any of them, i. e., those outside the group, such beverages for public consumption under trade-marks, brands, and trade names which were in competition, except insofar as restricted as below set forth, with similar alcoholic beverages likewise sold or distributed such to persons, under different trade-marks, brands, and trade names, by other similar subsidiary respondents; were engaged in the interstate sale of such beverages to wholesalers or others located throughout the country; constituted collectively, along with their affiliated and subsidiary corporations, one of the largest producers and sellers of alcoholic beverages in the United States, the gross sales of which as such were in excess of \$200,000,000 in 1951; and, in the case of each, were in competition with one or more of the other respondents in such sales, except as hindered, lessened, or suppressed as below set forth—

With intent and effect of restricting and hindering their aforesaid competition in commerce in the sale and distribution of such beverages to persons other than those owned or controlled by any of them, through combination, conspiracy, cooperation, and planned common courses of action, and as part thereof, for more than five years past—

- (a) Raised, fixed, stabilized, or maintained prices;
- (b) Discussed, conferred, and exchanged information by correspondence and otherwise between and among themselves or with other concerns affiliated with or wholly or partly owned or controlled by them, for the purpose or with the effect of establishing or maintaining prices, terms, or conditions of sale or of securing adherence to prices, terms, or conditions of sale;
- (c) Met with one another or with retail liquor dealers or with representatives of retail liquor dealer associations for the purpose or with the effect of reaching agreement as to the employment of resale price maintenance contracts or arrangements; of adjusting or increasing resale prices after tax rate changes; and of reaching agreements as to the use of resale price maintenance contracts or arrangement as a means of fixing, raising, stabilizing, or maintaining prices;
- (d) Used common directors or officers as a means of raising, fixing, stabilizing, or maintaining prices; and
- (e) Policed or enforced, or attempted to police or enforce, illegal resale price maintenance contracts or arrangements:

Consent Settlement

50 F. T. C.

Held, That such acts and practices constituted unfair acts and practices in commerce and unfair methods of competition therein.

Before *Mr. Frank Hier*, hearing examiner.

Mr. Lynn C. Paulson and *Mr. Joseph J. Gercke* for the Commission.

Chadbourne, Parke, Whiteside, Wolff & Brophy, of New York City, for respondents.

CONSENT SETTLEMENT¹

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on September 24, 1952, issued and subsequently served its complaint on the respondents named in the complaint, charging them with the use of unfair methods of competition and/or unfair acts and practices in violation of the provisions of said Act.

The respondents, desiring that this proceeding be disposed of by the consent settlement procedure provided in Rule V of the Commission's Rules of Practice, solely for the purpose of this proceeding, and review thereof, and the enforcement of the order consented to, and conditioned upon the Commission's acceptance of the consent settlement hereinafter set forth, and in lieu of the answers to said complaint heretofore filed and which, upon acceptance by the Commission of this settlement, are to be withdrawn from the record, hereby (and prior to the commencement of the taking of any testimony herein):

1. Admit all the jurisdictional allegations set forth in the complaint as to them.

2. Consent that the Commission may enter the matters hereinafter set forth as its findings as to the facts, conclusion and order to cease and desist. It is understood that the respondents, in consenting to the Commission's entry of said findings as to the facts, conclusion and order to cease and desist, specifically refrain from admitting or denying that they have engaged in any of the acts or practices stated therein to be in violation of law.

3. Agree that this consent settlement may be set aside in whole or in part under the conditions and in the manner provided in paragraph (f) of Rule V of the Commission's Rules of Practice.

¹ The Commission's "Notice" announcing and promulgating the consent settlement as published herewith, follows:

Counsel supporting the complaint having stated that evidence is not available to support the allegations of the complaint other than those covered by the consent settlement tendered by the parties in this proceeding, a copy of which is served herewith, the said consent settlement was accepted by the Commission on March 2, 1954, and ordered entered of record as the Commission's findings as to the facts, conclusion, and order in disposition of this proceeding.

The time for filing report of compliance pursuant to the aforesaid order runs from the date of service hereof.

The admitted jurisdictional facts, the statement of the acts and practices which the Commission had reason to believe were unlawful the conclusion based thereon, and the order to cease and desist, all of which the respondents consent may be entered herein in final disposition of this proceeding, are as follows :

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Schenley Industries, Inc., is a corporation organized and existing under and by virtue of the laws of the State of Delaware, and has its main office and principal place of business at 350 Fifth Avenue, New York, New York.

Respondent Schenley Distillers, Inc., is a wholly owned subsidiary of respondent Schenley Industries, Inc., and is a corporation organized and existing under and by virtue of the laws of the State of Delaware, and has its main office and principal place of business at 350 Fifth Avenue, New York, New York.

Respondent Schenley Distributors, Inc., is a wholly owned subsidiary of respondent Schenley Industries, Inc., and is a corporation organized and existing under and by virtue of the laws of the State of New York, and has its main office and principal place of business at 350 Fifth Avenue, New York, New York.

Respondent Melrose Distillers, Inc., is a wholly owned subsidiary of respondent Schenley Industries, Inc., and is a corporation organized and existing under and by virtue of the laws of the State of Maryland, and has its main office and principal place of business at 122 East 42d Street, New York, New York.

Respondent Brandy Distillers Corporation is a wholly owned subsidiary of respondent Schenley Industries, Inc., and is a corporation organized and existing under and by virtue of the laws of the State of Delaware, and has its main office and principal place of business at 350 Fifth Avenue, New York, New York.

PAR. 2. Respondent, Schenley Industries, Inc., has caused to be created or acquired, and owns, directly or through subsidiary corporations, a large number of subsidiary corporations engaged in the production, sale and distribution of alcoholic beverages. Among said subsidiaries are the respondents herein, viz: Schenley Distillers, Inc., Schenley Distributors, Inc., Melrose Distillers, Inc., and Brandy Distillers Corporation. This corporate subsidiary organization is utilized, among other purposes, to facilitate the sale and distribution of alcoholic beverages under various trade-marks, brands and trade names, so that at least some of said respondents sell or distribute to persons other than those owned or controlled by any of the respond-

Findings

50 F. T. C.

ents, alcoholic beverages intended for ultimate consumption by the public under trade-marks, brands and trade names which are in competition, except insofar as competition has been restricted and lessened by the acts and practices herein set forth, with similar alcoholic beverages sold or distributed to persons, other than those owned or controlled by any of the respondents under different trade-marks, brands and trade names by other respondents herein, all of whom are subsidiaries of respondent Schenley Industries, Inc.

PAR. 3. Respondents sell or cause to be sold alcoholic beverages to wholesalers or others located throughout the several States of the United States and in the District of Columbia, and said alcoholic beverages, when sold as aforesaid, are transported to said wholesalers or others in states other than the state or place of production or sale of said alcoholic beverages, so that these respondents are now and have been for more than five years last past, engaged in the trade and commerce in said products between and among the various States of the United States and in the District of Columbia.

The respondents named herein and their affiliated and subsidiary corporations are collectively one of the largest producers and sellers of alcoholic beverages in the United States. The gross sales of all members of the Schenley group were in excess of \$200,000,000 in 1951.

PAR. 4. Each respondent has been and now is in competition with one or more of the other respondents named herein, and with others in making, or seeking to make, sales of alcoholic beverages in commerce between and among the various States of the United States, except insofar as said competition has been hindered, lessened, restricted or suppressed by the combination and practices which they engaged in and which are herein set forth.

For more than five years last past, and continuing to the present time, the respondents hereinbefore named and described have acted for the purpose and with the effect of restricting and hindering competition in commerce in the sale and distribution of alcoholic beverages to persons other than those owned or controlled by any of the respondents, in that they have, through combination, conspiracy, cooperation and planned common course of action, and as part and parcel thereof, done and performed things, acts and practices as follows:

(a) Raised, fixed, stabilized or maintained prices.

(b) Discussed, conferred, and exchanged information by correspondence and otherwise between and among themselves or with other concerns affiliated with or wholly or partly owned or controlled by them for the purpose or with the effect of establishing or maintaining prices, terms, or conditions of sale or of securing adherence to prices, terms, or conditions of sale.

747

Order

(c) Met with one another or with retail liquor dealers or with representatives of retail liquor dealer associations for the purpose or with the effect of reaching agreement as to the employment of resale price maintenance contracts or arrangements; of adjusting or increasing resale prices after tax rate charges; of reaching agreements as to the use of resale price maintenance contracts or arrangements as a means of fixing, raising, stabilizing, or maintaining prices.

(d) Used common directors of officers as a means of raising, fixing, stabilizing, or maintaining prices.

(e) Policed or enforced, or attempted to police or enforce, illegal resale price maintenance contracts or arrangements.

CONCLUSION

The aforesaid acts and practices constitute unfair acts and practices and unfair methods of competition in interstate commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act, as amended.

ORDER TO CEASE AND DESIST

It is ordered, That the respondents, Schenley Industries, Inc., a corporation, Schenley Distillers, Inc., a corporation, Schenley Distributors, Inc., a corporation, Melrose Distillers, Inc., a corporation, and Brandy Distillers Corporation, a corporation, directly or indirectly, through their officers, agents, representatives or employees, in or in connection with the offering for sale, sale or distribution in commerce between and among the several States of the United States and in the District of Columbia, of alcoholic beverages, do forthwith cease and desist from entering into, cooperating in carrying out or continuing any combination, conspiracy, cooperation or planned common course of action between any two or more of said respondents engaged in competition in the sale of alcoholic beverages to persons other than those owned or controlled by any of the respondents, or between any one or more of said respondents and any wholly or partly owned subsidiary or affiliated concern not a party hereto, engaged in competition in the sale of alcoholic beverages to persons other than those owned or controlled by any of the respondents, to do or perform any of the following acts or things:

- (1) Raise, fix, stabilize or maintain prices;
- (2) Discuss, confer or exchange information for the purpose or with the effect of establishing or maintaining prices, terms or conditions of sale, or of securing adherence to prices, terms or conditions of sale;

(3) Exchange information with or meet with any retail liquor dealer or with any representative of any retail liquor dealer association, or others for the purpose or with the effect of reaching agreement as to the employment of any resale price maintenance contract or arrangement, of adjusting or increasing resale prices after tax rate changes, or of reaching agreement as to the use of any resale price maintenance contract or arrangement as a means of raising, fixing, stabilizing or maintaining prices;

(4) Use common directors or officers as a means of raising, fixing, stabilizing, or maintaining prices;

(5) Enter into any resale price maintenance contract or arrangement, or police, enforce, or attempt to police or enforce any such contract or arrangement.

Provided, That nothing herein contained shall be construed to limit or otherwise affect any right with respect to resale price maintenance contracts or arrangements which any of the respondents may have under Section 5 of the Federal Trade Commission Act as amended by the McGuire Act (Public Law 542, 82d Cong., Chap. 745, Second Session, Approved July 14, 1952).

Provided further, That if as a result of any valid statute or regulation of any State, territory or possession or subdivision thereof, adopted pursuant to the Twenty-first Amendment to the Constitution of the United States, relating to the offering for sale, sale or distribution of alcoholic beverages, respondents, or any of them or one or more of their wholly or partly owned subsidiaries or affiliated concerns, as a condition of doing business in said State, territory, possession or subdivision thereof, engage in acts or practices which, upon a prima facie showing on the record herein (not overcome by answer) may be construed by the Federal Trade Commission as violating any provision of the foregoing order, the Commission agrees that it will reopen this order solely for the purpose of determining whether to alter, modify or set aside such provision and that it will suspend such provision of this order, pending disposition of the issue as to whether such provision should be altered, modified or set aside. This proviso shall be without prejudice to, and nothing herein contained shall be construed to limit or otherwise affect, any defence which may otherwise be available to any respondent in any proceeding to enforce the foregoing order or based on an alleged violation thereof.

It is further ordered, That Bernheim Distilling Co., a corporation, is hereby dismissed from this proceeding.

It is further ordered, That Gibson Distillers, Inc., a corporation, The Straight Whiskey Distilling Company of America, a corporation, and Three Feathers Distributors, Inc., a corporation, are hereby dismissed

747

Order

from this proceeding. Provided, however, that the dismissal of these three corporations is without prejudice and is not to be construed in any sense as exempting said corporations from the application of any of the provisions of the order to cease and desist as are applicable to any concern wholly or partly owned or controlled by or affiliated with any one or more of the respondents herein.

It is further ordered, That the respondents shall, within twelve months after the 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 this order.

Schenley Industries, Inc.

By (Sgd) S. B. Becker

SIDNEY B. BECKER,

Executive Vice President.

Schenley Distillers, Inc.

By (Sgd) Milton B. Seasonwein

MILTON B. SEASONWEIN,

Vice President.

Schenley Distributors, Inc.

By (Sgd) E. C. Gassenheimer

E. C. GASSENHEIMER,

Vice President.

Melrose Distillers, Inc.

By (Sgd) Milton B. Seasonwein

MILTON B. SEASONWEIN,

Vice President.

Brandy Distillers Corporation

By (Sgd) Edward K. Dreier

EDWARD K. DREIER,

President.

Date: November 20, 1953.

The foregoing consent settlement is hereby accepted by the Federal Trade Commission and ordered entered of record on this 2nd day of March 1954.

IN THE MATTER OF
PAUL R. DOOLEY, INC. ET AL.

CONSENT SETTLEMENT IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT

Docket 6109. Complaint, July 20, 1953, Mar. 2, 1954

Where two corporations and three officers thereof, engaged in the interstate sale and distribution of seven medicinal preparations for external use in the treatment of conditions of the hair and scalp;

In carrying on their business through the use of several methods in connection with the sale of their various preparations, in accordance with which they (1) invited persons, through extensive advertising, to come to their place of business for examination and treatment when certain series of treatments were recommended and, if agreed to, certain of their medicinal preparations were sold to such persons and thus used; (2) sold to persons thus induced to visit their offices home treatment kits, with instructions, consisting of certain of their preparations and a hair brush; and (3) following advertisements which extensively advertised in the places concerned the impending visits of their traveling representatives and invited the public to call upon them for examination and advice, sent to various cities and towns such representatives who recommended purchase of the above-described home treatment kits; directly and by implication through statements and representations in their said advertisements, principally in newspapers and other periodicals—

- (a) Falsely represented through the use of their said preparations, methods, and treatments by their operators in their places of business and by purchase and use of said preparations in users' homes, that baldness and hair loss would be prevented and overcome; that fuzz and thin hair would be replaced by thick hair; that all local scalp disorders would be prevented and overcome; and that itching of the scalp, dandruff, excessive dryness and oiliness of the scalp would be permanently eliminated;
- (b) Represented, as aforesaid, that no one else had access to the formulas for their preparations through which such alleged results were accomplished; notwithstanding the fact that they were known to others in the same business and there was nothing exclusive about their right to use them;
- (c) Represented, as aforesaid, that baldness was not inherited and in 95% of the cases was due to infections, diseases of the scalp, neglect, and abuse; the facts being that while some cases of baldness may be due to such conditions, most cases are due to hereditary factors and to that extent cannot be prevented; and
- (d) Falsely represented through referring to their operators as "Trichologists" and by other means in their advertising, that said operators had had competent training in dermatology and other branches of medicine having to do with the diagnosis and treatment of scalp disorders affecting the hair:

Held, That such acts and practices, under the circumstances set forth, were all to the prejudice and injury of the public and constituted unfair and deceptive acts and practices in commerce.

Before *Mr. Earl J. Kolb*, hearing examiner.

Mr. Joseph Callaway for the Commission.

Stephens, Jones, La Fever & Smith, of Los Angeles, Calif., for respondents.

CONSENT SETTLEMENT¹

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on July 20, 1953, issued and subsequently served its complaint on the respondents named in the caption hereof, charging them with the use of unfair and deceptive acts and practices in violation of the provisions of said Act.

The respondents, desiring that this proceeding be disposed of by the consent settlement procedure provided in Rule V of the Commission's Rules of Practice, solely for the purpose of this proceeding, any review thereof, and the enforcement of the order consented to, and conditioned upon the Commission's acceptance of the consent settlement hereinafter set forth, and in lieu of answer to said complaint heretofore filed, and which upon the acceptance by the Commission of this settlement, is to be withdrawn from the record, hereby:

1. Admit all the jurisdictional allegations set forth in the complaint.
2. Consent that the Commission may enter the matters hereinafter set forth as its findings as to the facts, conclusion, and order to cease and desist. It is understood that the respondents, in consenting to the Commission's entry of said findings as to the facts, conclusion, and order to cease and desist, specifically refrain from admitting or denying that they have engaged in any of the acts or practices stated therein to be in violation of the law.
3. Agree that this consent settlement may be set aside in whole or in part under the conditions and in the manner provided in paragraph (f) of Rule V of the Commission's Rules of Practice.
4. State that respondent Dooley Hair Experts, Inc., makes no sales or deliveries to customers located outside the State of California.

The admitted jurisdictional facts, the statement of the acts and practices which the Commission had reason to believe were unlawful, the conclusion based thereon, and the order to cease and desist, all of which respondents consent may be entered herein in final disposition of this proceeding are as follows:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Paul R. Dooley, Inc., is a corporation organized and doing business under and by virtue of the laws of the State of California. This respondent is doing business under the

¹The Commission's "Notice" announcing and promulgating the consent settlement as published herewith, follows:

The consent settlement tendered by the parties in this proceeding, a copy of which is served herewith, was accepted by the Commission on March 2, 1954, and ordered entered of record as the Commission's findings as to the facts, conclusion, and order in disposition of this proceeding.

The time for filing report of compliance pursuant to the aforesaid order runs from the date of service hereof.

Findings

50 F. T. C.

fictitious name of Associated Hair Experts and has also done business under the names of S. J. Mueller Associates and Mueller Hair & Scalp Specialists. Said corporation has its principal office in the City of San Diego, California.

Respondent Paul R. Dooley Associates was also a corporation organized and doing business under and by virtue of the laws of the State of California, with its principal place of business located at 3872 Fifth Avenue, San Diego, California. The name of this corporation was originally Mueller Hair Experts, Inc., until it was changed in 1952 to Paul R. Dooley Associates. The name has recently been changed again to Dooley Hair Experts, Inc.

Individual respondents Paul R. Dooley, Eugene P. Dooley, and Constance R. Dooley are officers of the said corporate respondents and in their capacity as said officers they have and do now formulate, direct, and control the policies, acts, and practices of said corporate respondents. Said individual respondents also have their offices and place of business at 3872 Fifth Avenue, San Diego, California. The corporate and individual respondents act and have acted in conjunction and cooperation with each other in the performance of the acts and practices hereinafter set forth.

PAR. 2. In the course and conduct of their business, the respondents for several years last past have been engaged in the sale and distribution of various medicinal preparations for external use in the treatment of conditions of the hair and scalp, including sales of such preparations through use of them in connection with treatments administered by respondents, their representatives and employees. Respondents cause said preparations when sold, other than in connection with treatment as aforesaid, to be shipped from their places of business in the State of California to purchasers thereof located in other States of the United States. Respondents maintain and at all times mentioned herein have maintained a substantial course of trade in said medicinal preparations in commerce between and among the various States of the United States.

PAR. 3. Respondents have adopted and use several methods in connection with the sale of their various preparations. First, respondents, through extensive advertising, invite persons to come to their place of business for examination and treatment, whereupon certain series of treatments are recommended. If said treatments are agreed to, certain of respondents' medicinal preparations are sold to such persons and used in the process of such treatments. Second, respondents sell home treatment kits with instructions for use to persons induced to visit respondents' said offices by virtue of said advertisements. These kits consist of certain of respondents' medicinal preparations

for the treatment of the hair and scalp and a hair brush. Third, respondents send travelling representatives to various cities and towns, whose visits are extensively advertised in the places to be visited, which advertisements invite the public to call upon said representatives for examination and advice. These representatives recommend purchase of the home treatment kits above described.

PAR. 4. In the course and conduct of their aforesaid business, respondents disseminated and caused the dissemination of advertisements concerning their said preparations by the United States mails and by various other means in commerce, as "commerce" is defined in the Federal Trade Commission Act, for the purpose of inducing, and which were likely to induce, directly or indirectly, the sale of their said medicinal preparations; and respondents also disseminated and caused the dissemination of advertisements concerning their said preparations, by various means for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of their said preparations in commerce as "commerce" is defined in the Federal Trade Commission Act.

Among and typical of the statements and representations contained in said advertisements, principally in newspapers and other periodicals, disseminated and caused to be disseminated as hereinabove set forth, are the following:

GOING BALD

Noted hair specialist analyzes scalp troubles free. Demonstrates new methods that stop hair loss, dandruff, grow stronger thicker hair.

The home treatment combines physical and chemical therapy which the individual can easily administer at home.

Because of this new method of home treatment it is no longer necessary to take expensive, troublesome office treatments.

Baldness most commonly results from infections, local disease of the scalp, neglect and abuse. At least 95 percent of today's baldness is not necessary. It isn't inherited—we inherit hair, not baldness. It isn't due to any rare and untreatable disease. It can be prevented.

Consult the Dooley Trichologists. * * * Let us determine the cause of your trouble by scientific methods, then let us help you regain hair and scalp health—and grow thicker, stronger hair. This is accomplished by the use of exclusive formulae, which eliminate dandruff, clogged follicles, itching scalp or any one or all of the 14 local scalp disorders which lead to baldness.

Enjoy thick healthy hair all your life.

If your scalp can still grow "fuzz" come to the Dooley clinic for free examination.

Are you worried about baldness? Thin hair? Dandruff? Itching scalp? Excessively dry or oily hair? Better get professional advice now and save your hair before it's too late.

Findings

50 F. T. C.

PAR. 5. The formulas for respondents' preparations as furnished by them are as follows:

No. 22:

Eurosol	40
Alkolave	750
Australian Tea Tree Oil	2%
Distillata to 1,000.	

No. 11:

Eurosol	30
Salicylic Acid	5
Tincture Cantharides	40
Alcohol to 1,000.	

No. 14:

Salicylic Acid	2
Oxyquinoline Sulfate	1
Alcohol	64
Distillata to 100.	

No. 65:

Oleoresin Capsicum	25 gr.
Menthol	5 dr.
Olive Oil	4 oz.
Castor Oil	1 dr.
Mineral oil to make one quart.	

No. 50:

Oleoresin Capsicum	30 gr.
Methyl Salicylate	5 gr.
Olive Oil (Squibb)	4 oz.
Castor Oil	1 dr.
Mineral oil to make 1 qt.	

No. 24:

Eurosol	20
Castor Oil	40
Tincture Cantharides	100
Alcohol (grain)	500
Alkolave to 1,000.	
Menthol dr	5

No. 60:

Salicylic Acid	6
Glycerine	60
Alkolave to make 1,000.	
Australian Tea Tree Oil	2%

PAR. 6. Through the use of the aforesaid statements and representations, and others similar thereto not specifically set out herein, respondents have represented directly and by implication that through the use of their said preparations, methods and treatments by their operators in their places of business and by purchasers of said preparations in their homes, baldness and hair loss will be prevented and overcome; that hair and scalp health will be regained in all instances;

Findings

that fuzz and thin hair will be replaced by thick hair; that all local scalp disorders will be prevented and overcome; that itching of the scalp, dandruff, excessive dryness and oiliness of the scalp will be permanently eliminated and that no one else has access to the formulas for their preparations through which these results are accomplished. Respondents have also represented directly and by implication that baldness is not inherited and in 95 percent of the cases is due to infections, disease of the scalp, neglect and abuse. By referring to their operators as "Trichologists" and by other means in said advertising, respondents have represented directly and by implication that their operators have had competent training in dermatology, and other branches of medicine having to do with the diagnosis and treatment of scalp disorders affecting the hair.

PAR. 7. The said advertisements are misleading in material respects and constitute "false advertisements" as that term is defined in the Federal Trade Commission Act. In truth, and in fact, regardless of the exact formulas or methods of application and whether used alone or in conjunction with heat, massage, combing, brushing, shampooing or any other manner of treatment of the hair and scalp, respondents' preparations will have no effect in either preventing or overcoming baldness or hair loss; will not cause hair and scalp health to be regained in all instances. While some cases of baldness may be due to infections, local disease of the scalp, neglect and abuse, most cases are due to hereditary factors and to that extent cannot be prevented; said preparations will not cause "fuzz" and thin hair to be replaced by thicker hair; will not prevent or overcome all local scalp disorders; and will not permanently eliminate itching of the scalp, dandruff or excessive dryness or oiliness of the scalp. Respondents' formulas are known to others in the same business, and there is nothing exclusive about respondents' right to use them. None of the individual respondents nor any of respondents' operators have undergone competent training in dermatology or any other branch of medicine pertaining to diagnosis or treatment of scalp disorders affecting the hair.

PAR. 8. The use by the respondents of the foregoing false and misleading statements and representations, disseminated as aforesaid, has had and now has the capacity and tendency to, and does, mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements and representations are true and to induce a substantial portion of the purchasing public to visit respondents' office for the purpose of obtaining examination and treatment and to purchase respondents' preparations hereinabove referred to, because of such erroneous and mistaken belief, engendered as above set forth.

Order

50 F. T. C.

CONCLUSION

The aforesaid acts and practices of respondents as hereinabove found are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices within the intent and meaning of the Federal Trade Commission Act.

ORDER TO CEASE AND DESIST

It is ordered, That the respondents Paul R. Dooley, Inc., a corporation, Dooley Hair Experts, Inc., a corporation, and the officers of said corporations, and Paul R. Dooley, Eugene P. Dooley and Constance R. Dooley, individually, and respondents' representatives, agents and employees, directly or through any corporate or other device in connection with the offering for sale or sale of treatments of the hair and scalp in which the various medicinal preparations as set out in the findings herein or any other preparation of substantially similar composition or possessing substantially similar properties are used, or in connection with the sale, offering for sale or distribution of the various medicinal preparations as set out in the findings herein, for use in the treatment of the hair and scalp, or of any other preparations of substantially similar composition or possessing substantially similar properties, do forthwith cease and desist from:

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

(a) That the use of said preparations, alone or in conjunction with, the methods of treatments by respondents or their employees in respondents' places of business or that the use of said preparations by purchasers in their homes will:

(1) Have any effect in preventing or overcoming baldness or hair loss;

(2) Cause hair or scalp health to be regained in all instances;

(3) Cause "fuzz" or thin hair to be replaced by thick hair;

(4) Prevent or overcome all scalp disorders;

(5) Cause the permanent elimination of itching of the scalp, dandruff, dryness or oiliness of the scalp;

(b) That baldness is usually caused by infection, local disease of the scalp, neglect or abuse;

(c) That the formulas used are exclusively their own or are unknown to, or cannot be used by, others;

2. Disseminating or causing to be disseminated by any means any advertisement for the purpose of inducing or which is likely to in-

754

Order

duce, directly or indirectly, the purchase of said preparations in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement contains any of the representations prohibited in subparagraphs (a) and (b) of Paragraph 1 hereof or which represents, directly or by implication, that the respondent Paul R. Dooley or any of respondents' employees who have not had competent training in dermatology or other branches of medicine having to do with the examination and treatment of scalp disorders affecting the hair have had such training or are trichologists.

It is further ordered, That 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 this order.

Paul R. Dooley, Inc.,

a corporation,

By (Sgd) Paul R. Dooley,

President.

Dooley Hair Experts, Inc.,

a corporation,

By (Sgd) Paul R. Dooley,

President.

(Sgd) Paul R. Dooley

PAUL R. DOOLEY

(Sgd) Eugene P. Dooley

EUGENE P. DOOLEY

(Sgd) Constance R. Dooley

CONSTANCE R. DOOLEY,

Individuals.

(Sgd) Peter W. Irwin

Counsel for all of the above
named respondents.

Date: Feb. 1, 1954.

The foregoing consent settlement is hereby accepted by the Federal Trade Commission and entered of record on this day of March 2, A. D., 1954.

IN THE MATTER OF
TRACTOR TRAINING SERVICE ET AL.

DECISION IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE
COMMISSION ACT

Docket 5943. Complaint, Jan. 18, 1952—Decision, Mar. 3, 1954

Where two corporations, with principal offices and places of business at Portland, Ore., and Chicago, Ill., respectively, and an individual who was an officer of both, their principal stockholder and in control of their business policies and activities; engaged in the sale and distribution by mail of a course of study and instruction in diesel engines and tractor equipment;

In promoting the sale of their said courses and to secure inquiries from prospective purchasers to whom oral sales presentations would be made in their homes, in advertisements throughout the midwestern and the western states and in Alaska, and through other advertising matter, including reply postal card and bulletin and circulars forwarded to prospects along with a questionnaire, and through oral statements in the course of sales presentations during which additional promotional matter was exhibited to prospective enrollees contacted through such advertising—

- (a) Represented directly and by implication that there was a great demand for graduates of their schools as diesel mechanics, servicemen, and in similar positions, and that employment in such positions was available and assured upon the completion of their course of study and instruction;

The facts being there was no significant demand for such graduates whose training was limited to completion of their courses of study through correspondence, and the demand for men with limited mechanical experience in diesel engines and the training in mechanical theory afforded by their course was not great or unusual; graduates would at best be hired as helpers, apprentices, or sweepers unless they had had shop experience or the substantial equivalent in repairing and servicing diesel engines; employers of diesel and other skilled mechanics generally speaking prefer to promote their own men with proven shop experience when better positions become available, rather than to hire men from the outside for such positions; and, in many establishments, as a condition to employment experience as a journeyman or other work qualifications of an applicant, are passed on by examining committees of unions;

- (b) Represented additionally through their salesmen that the schools had working agreements with manufacturers of diesel engines and tractors and other diesel equipment to place graduates in employment upon completion of their courses of instruction and that, upon such completion, said schools would secure employment for graduates in the diesel industry and secure such employment for them as a regular thing;

The facts being they had no such connection or working agreements; while they maintained a placement department and communicated with retail diesel and tractor dealers, other employers of diesel mechanics, and others, as to job vacancies, circulated information thus secured, with details as to pay and conditions of employment usually omitted, and furnished graduates expressly requesting placement help information as to any jobs believed

- open, and frequently offered to forward a statement of the applicant's qualifications, in order for a graduate to be considered, it was necessary that he follow up the leads and satisfy any prospective employer that he met latter's requirements as to training and experience, and conduct his own negotiations as to conditions of employment; and the representations expressly made in sales presentations and implicit in promotional matters that jobs were assured to graduates, due to existing great demand and by reason of respondents' aforesaid supposed connections and working arrangements and their placement service were grossly exaggerated and false;
- (c) Falsely represented through their salesmen that students were afforded "on-the-job training" for which they would be paid money while pursuing their course of study;
- (d) Represented, as aforesaid, that they provided shop training to students upon completion of their correspondence study at no cost or at only nominal cost; The facts being that while they did make available to graduates completing their courses shop training during the period from September 1950 to June 1951, through a corporation dissolved on June 29, 1951, which operated as a resident training school from Sept. 11, 1950, to June 2, 1951, such training was not available without cost or at only nominal cost; charge therefor was \$150 for a six-week term of residents' training, with cost of living accommodations extra, and, under an alternative arrangement, cost for tuition and accommodation in dormitories was \$290;
- (e) Represented, as aforesaid, that they used a system of rigid selectivity of students and accepted only a few from very large numbers of applicants for their training and placement service, setting forth in the aforesaid questionnaire, which was directed to the "Diesel Committee on Admission" purportedly to enable such committee to form an opinion as to the adaptability of the person responding, a variety of questions as to marital status, education, specialized training, and others;
- The facts being that said schools were commercial enterprises operating for profit; their agents worked on a commission basis; and, contrary to the representations in their advertising and the oral statements of their salesmen, they were not selective in accepting prospective students for enrollment, but enrolled all those with some schooling who were interested in mechanical devices, termed by them as evidencing mechanical aptitude, and who were willing or able to make the payments required; and
- (f) Represented, as aforesaid, that after graduation from said schools, their placement and advisory service would obtain jobs for graduates at \$2.50 or \$3.50 per hour or at \$75 per week and eventually higher wages;
- Notwithstanding the fact that such levels of wages were available in the diesel and heavy equipment industry only to more highly skilled operators, mechanics, and workers whose competence came from substantial shop or other experience; while completion of their course might evidence a laudable sustained interest in mechanical matters on the part of the student applicant and be indicative to prospective employers that he had some knowledge of nomenclature and how parts were assembled, ability of their graduates to command higher levels of starting pay depended essentially on their shop and other practical experience; and starting salaries usually received by their graduates, particularly those employed in the sweeper, helper, and apprentice categories were substantially below \$75 as well as \$70 per week and the hourly rates referred to by their salesmen:

Findings

50 F. T. C.

Held, That such misrepresentations constituted unfair and deceptive acts and practices in commerce.

Before *Mr. J. Earl Cox* and *Mr. Everett F. Haycraft*, hearing examiners.

Mr. R. T. Porter and *Mr. William L. Pencke* for the Commission.
Mr. McDannell Brown, of Portland, Oreg., for respondents.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on January 18, 1952, issued and subsequently served its complaint in this proceeding upon the respondents named in the caption hereof, charging them with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of that Act. After the filing of respondents' answer thereto, a hearing was held at which testimony and other evidence in support of and in opposition to the allegations of the complaint were introduced before a hearing examiner of the Commission originally designated by the Commission to act in this proceeding, and additional testimony and other evidence in support of and in opposition to the allegations of the complaint were introduced in the course of hearings subsequently held before a substitute hearing examiner designated to act in the place and stead of the original hearing examiner, and said testimony and other evidence were duly recorded and filed in the office of the Commission.

On May 1, 1953, the hearing examiner designated to act in the place and stead of the original hearing examiner filed his initial decision. Within the time permitted by the Rules of Practice of the Commission, respondents appealed therefrom, and this matter came on for final hearing upon the record, including briefs in support of and in opposition to the appeal, and oral argument; and the Commission, having duly considered the record and having ruled upon said appeal and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts, conclusion drawn therefrom, and order, the same to be in lieu of the initial decision.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Tractor Training Service, the first of the respondents referred to above in the caption, is a corporation organized under the laws of the State of Oregon. Its operations began in 1943 and its principal office and place of business is at 406 Panama Building, Portland, Oregon. Tractor Training Service, Inc., named as a re-

spondent in the complaint but erroneously designated there as Tractor Training Service, is a corporation organized in 1948 under the laws of the State of Illinois and its principal office and place of business is at 1525 East 53rd Street, Chicago, Illinois. In the interest of brevity, these two corporations will be referred to as "respondent Oregon corporation" and "respondent Illinois corporation."

Tractor Training Diesel Institute, an Oregon corporation, was dissolved on June 29, 1951. It operated as a resident training school from September 11, 1950, to June 2, 1951.

With respect to those individuals who are named in the complaint as parties to this proceeding, respondent Joy E. Badley was, prior to September 1951, president and managing director of both the respondent Oregon and respondent Illinois corporations. Since September 1951, Mr. T. W. Badley has been president of the respondent Illinois corporation, respondent Joy E. Badley remaining as president of the respondent Oregon corporation and chairman of the board of directors of the respondent Illinois corporation.

Respondent McDannell Brown, Ray J. Watson (erroneously designated in the complaint as Roy J. Watson) and Fred L. Innes, are directors of both the respondent Oregon and respondent Illinois corporations; respondent Ray J. Watson is also executive vice-president of the respondent Oregon corporation, and respondent McDannell Brown is secretary of the said respondent Oregon and Illinois corporations; and Fred L. Innes is executive vice-president of the respondent Illinois corporation. Respondents Joy E. Badley, Ray J. Watson, and McDannell Brown have their principal offices at the place of business of respondent Oregon corporation, and respondent Fred L. Innes has his principal office at the place of business of the respondent Illinois corporation.

PAR. 2. Respondent Tractor Training Service and Tractor Training Service, Inc., and respondent Joy E. Badley are now and have been for more than three years last past engaged in the sale and distribution of a course of study and instruction consisting of 46 lessons on the subject of diesel engines and tractor equipment, which course of study and instruction is given and pursued through the medium of the United States mails. They have maintained a course of trade in commerce among and between the various States of the United States, the volume of which has been substantial. The courses are sold at a price of \$275.00 less certain discounts for World War II veterans and for cash. During the year 1951, the Portland school received 1197 enrollments and the Chicago school received 1066 enrollments. The Portland Office of respondent Oregon corporation has approximately 20 employees, of which three are instructors,

and it also employs a sales force on the road of about 24 sales representatives who work on a commission basis. The volume of business in commerce in these courses has been and now is substantial.

PAR. 3. Respondent Joy E. Badley now is and has been during the time aforesaid the guiding spirit and dominant personality controlling the general business policies and activities of respondent Oregon and Illinois corporations, of which he is the principal stockholder, including the preparation and dissemination of advertising material and the over-all supervision of the sales personnel. He keeps in intimate daily touch with all the activities of the various departments and issues directives in the form of bulletins and manuals. Unless otherwise stated, the word "respondents," as it appears hereinafter, is used to designate respondents Tractor Training Service, Tractor Training Service, Inc., and Joy E. Badley.

PAR. 4. In promoting the sale of their courses of instruction and to secure inquiries from prospective purchasers to whom oral sales presentations will be made in their homes, respondents have caused advertisements to be inserted in newspapers throughout the Midwestern and Western States and in Alaska, and have utilized other advertising matter, including reply postal cards and bulletins.

Typical and illustrative statements appearing in newspaper advertisements are the following:

DIESEL

HEAVY EQUIPMENT

We need mechanically inclined and reliable men to train for positions in Tractor and Equipment industry. If you are not making better than \$70 per week you owe it to yourself to write about free facts, without obligation. No time lost on your present job while training. Selections are being made in this area for training and placement advisory service. Write at once to Tractor Training Service, Box 650 Appeal-Democrat.

DIESEL—TRACTOR

HEAVY EQUIPMENT OPPORTUNITY

In Alaska and all over the world skilled men are in demand by the DIESEL-TRACTOR and HEAVY EQUIPMENT INDUSTRY, to operate, maintain, repair and supervise Railroad, Construction, Mine, Marine and Farm DIESEL units.

ARE YOU mechanically inclined or experienced? Does this hi-pay permanent field interest you?

YOU CAN DO SOMETHING ABOUT IT!

TRACTOR TRAINING SERVICE will have its representative in the Anchorage Area in June to interview those qualified for its TRAINING and PLACEMENT ADVISORY SERVICE PROGRAM.

Those qualified can train in spare time without taking time off from your job. Resident shop training available if needed or wanted.

The following statements have appeared in respondents' postal card solicitations:

DIESEL—JOBS—TRACTOR

THOUSANDS of mechanically inclined men must be trained quickly for High-Pay Permanent Jobs in this industry—Can YOU qualify for MORE MONEY, SECURITY, SUCCESS?

Selections Are Now Being Made In This Area For
TRACTOR TRAINING AND PLACEMENT SERVICE

No Time Lost

For Full Details & Qualifications, Fill in Completely, Detach and Mail Attached Postcard. * * *

Would YOU like a job like Joe's? A BIG JOB THAT PAYS BIG MONEY. All these "JOES" earn TOP PAY!

YOU can earn TOP PAY, too, in the DIESEL and INDUSTRIAL TRACTOR FIELD. T. T. S. gives you the "KNOW HOW" To Qualify you for the job you want. Tractor Training Service is the only organization of its kind in the country; no other covers the field as completely. It trains qualified men in the operation and servicing of every type of Diesel-powered and tractor-operated equipment used in industry, agriculture, lumbering, construction and transportation. That's why T. T. S. men command respect and high pay.

Selections are being made by Tractor Training Service in this area for trainees to enter this industrialized tractor and diesel field. No time need be lost from your present job. * * *

Upon the receipt of inquiries from prospective enrollees, respondents, in instances, have forwarded a questionnaire together with a circular, the latter containing the following statements and representations:

DIESEL

A HUNDRED MILLION DOLLAR INDUSTRY!

This new industry got its big jump during the last war and is now rapidly moving ahead in a vast number of peacetime projects, such as in the mechanization of agriculture, lumbering, highway construction, building, contracting, mining, hydroelectric power, etc.

Huge strides have been made with such outstanding success that people are now beginning to realize how tremendously important this new industry has become.

The use of diesel tractors and heavy equipment is creating a revolution in construction technique. Engineers are using this new power and equipment to perform the previously "impossible" tasks. The "pick and shovel" method is rapidly becoming a thing of the past now that this new industrial giant is on the scene.

This industry is developing so fast that it is opening up opportunities for profitable employment—jobs where advancement and outstanding success are practically unlimited.

In our country to-day, there are many young men just out of school who have no trade at all, and there are others who are working at jobs offering them

Findings

50 F. T. C.

little or no chance for a decent future, because of overcrowded conditions and other factors.

Amongst these groups will be found men with ambition and intelligence, whose character and basic qualifications would enable them to succeed if they were employed in a growing industry where opportunities for promotion exist.

You may or you may NOT have the above mentioned qualifications. Obviously, every person would not be suitable. It would be impossible to adapt every one to this type of work; consequently it becomes necessary for us to determine something about a person's natural abilities beforehand.

If you are not earning better than \$70.00 per week, and are looking for a career in something really worthwhile, then fill in the enclosed questionnaire.

Upon receipt of this form, we shall furnish you with more details.

A PROMPT REPLY IS NECESSARY.

MAIL THE QUESTIONNAIRE WITHOUT DELAY.

The questionnaire form directed to the "Diesel Committee on Admissions" expressly purports to be for the purpose of enabling such committee to form an opinion as to the adaptability of the persons responding. Among the questions which a recipient is directed to answer are those relating to marital status and education and whether he has specialized training, and others inquire as to how long the prospect has been thinking of making a change for the better and whether, if acceptable, he is willing to undergo a period of training for the purpose of building a career. The form contains query also as to whether the responding party believes he has adaptability for diesel work and it concludes with an urgent direction that "This form must be completed and returned within 5 days" to Tractor Training Service.

PAR. 5. Through use of the aforesaid advertisements and by means of oral statements made by sales representatives in the course of sales presentations during which additional promotional matter is exhibited to prospective enrollees responding to the advertisements directed to establishing respondents' initial contact with them, respondents have represented, directly and by implication, that there is a great demand for graduates of respondents' schools as diesel mechanics, servicemen, and for similar positions and that employment in such positions is available and assured upon the completion of respondents' course of study and instruction. In the course of such sales presentations, respondents' representatives additionally have stated and represented that the schools have working agreements with manufacturers of diesel engines and tractors and other diesel equipment to place graduates in employment upon completion of their courses of instruction, and that upon completion of their course said schools will secure employment for graduates in the diesel industry and secure such employment for

graduates as a regular thing; that students are afforded "on-the-job training" for which they will be paid money while pursuing respondents' course of study; that respondents provide "shop training" to students upon completion of their correspondence study at no cost or at only nominal cost; that respondents use a system of rigid selectivity of students and accept only a few from very large numbers of applicants for respondents' training and placement service; and that after graduation from said schools, respondents' placement and advisory service will obtain jobs for graduates at \$2.50 or \$3.50 per hour or at \$75.00 per week and eventually higher wages.

Respondents contend, however, that such evidence received into the record as in any way attests that statements and representations having the import and meaning just noted were in fact made, is vague and equivocal evidence. In appraising respondents' contentions, however, it should be noted that the record reveals various instances in which sales representatives in effect have stated that high pay jobs were completely assured or guaranteed for graduates. In instances, the testimony of enrollees is corroborated by that of family members present during interviews, some of which last two hours or more. This evidence manifestly is not vague or equivocal. To prospects invited in the advertising literature to become "selections" if "qualified" for their training and placement service, respondents' sales manual counsels agents to emphasize as a basic sales theme that Tractor Training Service is a service organization to supply the diesel field with good men and salesmen are directed to make certain wage comparisons during their presentations to show that increased earnings will result from the course. It appears here that certain of the oral representations adopted by salesmen in making sales were inspired or suggested by respondents' printed promotional matter. Without discussing in additional detail the evidence relating to each, the Commission is of the view that it is shown by the greater weight of the evidence that the representations referred to in the preceding paragraph have been made in promoting sales of respondents' courses.

PAR. 6. (a) Contrary to the statements and representations used by the respondents and their sales representatives, there is no significant demand for graduates of respondents' schools whose training is limited to completion of their courses of study through correspondence, nor is the demand for men with limited mechanical experience in diesel engines and the training in mechanical theory afforded by respondents' course great or unusual. Moreover, graduates will at best be hired as helpers, apprentices or sweepers unless they have had shop experience or substantial equivalent in repairing and servicing diesel engines. It appears also that, generally speaking, employers of diesel and other

Findings

50 F. T. C.

skilled mechanics prefer to promote their own men with proven shop experience when better positions become available rather than to hire men from the outside for these positions. Other evidence received into the record additionally indicates that, as a condition to employment as a journeyman or for other work in many establishments, the qualifications of an applicant are passed on by examining committees of unions.

One of respondents' former students who had completed a part of the course stated in his testimony that equipment companies contacted would not take an application from him and also to be noted in passing is testimony adduced by two of respondents' graduates which is to the effect that various equipment dealers to whom they applied for employment had no interest in receiving their applications.

The greater weight of the evidence clearly demonstrates that a correspondence course without job training or other practical technical experience cannot qualify a person as a mechanic or skilled workman and that employment in positions of skill and high pay in these fields is neither available nor assured to applicants whose training in maintenance and repair of diesel and other heavy equipment is based primarily on the completion of a course of study through correspondence. The foregoing views and a conclusion corollary thereto that employers place great emphasis on shop experience when selecting workers to fill positions requiring mechanical skill are corroborated by the testimony of various equipment dealers, shop foremen, and service managers who appeared as witnesses in this proceeding. Their testimony is to the general effect that men cannot qualify as diesel mechanics from a book; that books might be helpful if students were working in the trade; that they could not command high salaries nor be qualified as skilled workmen; that graduates of respondents' schools could not qualify as completely competent mechanics; that there is no unusual demand for correspondence school graduates nor assurance that such men could secure employment as diesel mechanics; that correspondence training without practical experience would not qualify mechanics in the diesel field; that it takes years of experience to get to the point of becoming a skilled mechanic; that a correspondence course without practical experience will not make a mechanic entitled to high salary or make an inexperienced man a skilled workman; that there is no unusual demand in the tractor or diesel fields for a man with only correspondence school training; that actual practical hand work along with study is essential. Some of these experts testified to the effect that correspondence course training would qualify a person to be an apprentice; that while there was some demand for skilled mechanics, there was not for helpers or sweepers and other witnesses holding supervisory positions testified that they would employ respondents' graduates only as helpers or laborers.

The only witness called by respondents who had completed the course of training in respondents' schools was engaged in the repair business on automotive equipment and was a foreman of a garage which employed three mechanics in the tractor division. He believed that the course of instruction assisted him in his advancement and he classified himself as a journeyman, that is, able to take a job and tear it down and put it back together again. It appears, however, that he first secured employment as an apprentice through the assistance of respondents' placement and advisory service during the period when he was studying the course where he worked for four and one-half years.

(b) Contrary to the representations of respondents' sales representatives, respondents' schools have no connection with manufacturers of diesel equipment or working agreements under which manufacturers of diesel engines, tractors, and heavy equipment regularly place graduates in employment upon completion of the course.

Respondents maintain a placement department and its activities entail, among other things, communicating with retail diesel and tractor dealers and other employers of diesel mechanics, service men, operators and workers in an effort to ascertain what establishments have job vacancies or opportunities for employment. As a result of these inquiries, respondents learn of various openings and opportunities for employment and information respecting them is circularized by respondents among the graduates and others with details as to pay and conditions of employment usually omitted.

Under respondents' routine, graduates expressly requesting placement help are informed as to any jobs believed to be open in their areas or states or furnished with the names of one or more equipment dealers known to respondents as employers of help in those areas. Respondents frequently offer also to forward what they refer to as a statement of the applicant's qualifications setting out, among other things, information as to his current occupation, identities of past employers and positions held, and the grades received as a student in the course. In order to be considered for such positions, however, the graduates themselves must follow up the job leads and satisfy any prospective employers that they meet their requirements as to training and experience and conduct their own negotiations as to conditions of employment.

The testimony of two of respondents' graduates who appeared as witnesses herein is to the effect that the placement service did not secure jobs for them or furnish leads deemed by them sufficiently promising for follow up. Whether the aid available from respondents' placement service by way of leads and otherwise assures or

Findings

50 F. T. C.

secures jobs for their graduate body or in fact represents substantial assistance to many of the graduates must be weighed in the light of testimony elsewhere referred to which demonstrates that more lucrative, skilled positions existing in this field are not available upon graduation to those whose qualifications primarily consist of completion of a course of study through correspondence and which additionally indicates that the demand for sweepers or apprentices is not great or unusual. It is manifestly infeasible in a very large number of cases for graduates receiving respondents' leads to negotiate for and, perhaps moving their families, to accept jobs with pay levels set for lesser skilled work, but commensurate with their qualifications, in diesel manufacturing plants or other heavy equipment establishments. The Commission accordingly concludes that representations expressly made in sales presentations and implicit in promotional matter that jobs are assured to graduates due to an existing great demand and because respondents regularly secure jobs for graduates through working arrangement with employers or the efforts of respondents' replacement service are gross exaggerations and false. To be noted in passing also is the circumstance that respondents have not submitted data for the record as to the number of placements resulting from their leads and it appears that their placement department maintains no follow up or check as to whether a job quest turns out successfully.

(c) Students taking the course in their spare time are not offered, or placed in, full or part time paying jobs in shops or elsewhere where they can engage in work on diesel and mechanical equipment. It is concluded, therefore, that the representations which have been made in instances during the course of sales presentations that students are afforded on-the-job training for which they will be paid money while pursuing their studies are false representations.

(d) During the period from September 1950 to June 1951, shop training was available to graduates completing these correspondence courses through the now dissolved Tractor Training Diesel Institute. Such training, however, was not available without cost or at only nominal cost as represented by respondents' sales agents, but respondents instead imposed a charge of \$150 for a six-week term of residence training and cost of living accommodations was extra. It also appears that an alternative arrangement was offered whereby students were to pay \$290 for tuition and accommodations in dormitories. Shop training was abandoned when only a little over a dozen students signed up therefor.

(e) Respondents' schools are commercial enterprises operated for profit and their agents work on commission basis. Contrary to the representations appearing in the advertising and the oral statements

762

Findings

of salesmen, respondents are not selective in accepting prospective students for enrollment in their schools. With certain minor exceptions not here pertinent, respondents will enroll all persons with some schooling who are interested in mechanical devices, such interest being deemed by respondents to evidence mechanical aptitude, and who are willing or able to make the payments required. The record contains the following information with respect to schooling and employment of students at the time of enrollment:

<i>Education</i>	<i>Employment</i>
4 years high school	Service station attendant
3 years high school	Lineman
2 years high school	Wrecking cars
2 years high school	Welder
Seventh grade	Molder—iron foundry
Seventh grade	Truck driver
1 year high school	Safeway Store clerk
1 year college	Machine operator
2 years high school	Wrecking cars
Eighth grade	Welder
4 years high school	Tag Machine operator
2 years high school	Service station owner & operator
Eighth grade	Taxi driver
1 year high school	Smeltermen
4 years high school	Cleaning business
Common school	Milk truck driver
3 years high school	Street cleaner
8½ years grade school	Craneman
4 years high school	Farmer
Eighth grade and mechanical school	Automobile Mechanic
3 years high school	Maintenance Man, Ship Lines
1 year high school	
(Withdrawn from school because of mental deficiency.)	
3½ years high school	Recapping tires
Sixth grade	Railroad switchman
No data	Carpenter
Eighth grade	Laborer

(f) Untrue and not founded on the facts have been the oral representations of respondents' salesmen that, upon graduation from the school, students are able to enter on jobs paying \$2.50 or \$3.50 per

Findings

50 F. T. C.

hour or positions at \$75.00 per week. The record clearly shows that these levels of wages are available in the diesel and heavy equipment industry only to more highly skilled operators, mechanics, and workers whose competence comes from substantial shop or other practical experience. In the last analysis, while completion of respondents' course of study may evidence a laudable sustained interest in mechanical matters on the part of the student making application and also be indicative to prospective employers that he has some knowledge of nomenclature and how parts are assembled, it seems equally clear that the ability of respondents' graduates to command higher levels of starting pay depends essentially on their shop and other practical experience. Although various students accepted for the course appear to have had some contact with some farm tools or with maintenance of automobiles or the operation of other mechanical equipment prior to enrolling, others did not. Upon the basis of the entire record, it must be concluded that the starting salaries usually and customarily received by respondents' graduates, particularly those employed in the sweeper, helper and apprentice category, are substantially below \$75.00 as well as \$70.00 per week and the hourly rates referred to by respondents' salesmen.

PAR. 7. While there is some evidence in the record tending to show that salesmen may have represented to prospective students in the course of two sales presentations that diesel engine manufacturers or other business concerns were financially backing respondents' schools to the extent of defraying part of the expense of tuition, the Commission is of the opinion that there is not sufficient evidence for an informed determination of the issues relevant thereto as presented under the complaint. The additional allegations of the complaint to the effect that misrepresentations have been made that all money paid by students will be refunded in the event they discontinue the course or fail to pass final examinations or if employment is not furnished upon completion of the course are not supported by the greater weight of the evidence adduced in the proceeding and this charge accordingly is to be regarded as dismissed also. Similarly lacking in substantial support is another of the charges of the complaint raising an issue as to whether representations have been made that our Government is using respondents' schools for training purposes and that there is a great demand by the Armed Forces for respondents' graduates, and the Commission likewise is of the view that the greater weight of the evidence fails to sustain other charges in reference to whether certain allegedly false reasons have been assigned by sales representatives as to why veterans were not taking the course under the G. I. training program.

CONCLUSION

On the basis of the above-stated facts and other evidence of record, the Commission has concluded that respondents have used false and misleading representations as described in Paragraphs 5 and 6 hereof in promoting the sale of their courses of study in commerce. Misrepresentation clearly has inhered in oral statements and other representations of respondents that there is a great demand for graduates of respondents' schools as diesel mechanics, service men and for similar positions, and that employment in such positions is available and assured on completion of the course when, in fact, there is no great or unusual demand for graduates whose training is limited primarily to completion thereof and no assurance of employment. Respondents' courses have been offered and sold also through statements that the schools have working agreements with manufacturers of diesel engines and others to place graduates in employment and that the schools will secure employment for them and do so as a regular thing when, on the contrary, respondents have no connection with manufacturers or working agreements for regularly placing graduates in employment nor do the schools customarily and regularly secure jobs for graduates. Other misrepresentations, the Commission concludes, clearly have stemmed from statements of sales agents that students are afforded on-the-job training for which they will be paid and that shop training is afforded at no cost or at only nominal cost as well as from additional false representations to the effect that respondents, in accepting enrollees, adhere to a system of rigid selectivity under which only a few from a very large number of applicants are accepted for their training and placement service, and misrepresentative likewise have been statements relating to the earnings graduates will receive upon completion of the course.

Upon the basis of the record, it is additionally concluded that respondents' misrepresentations have had the capacity and tendency to deceive members of the public into the erroneous and mistaken belief that these statements and representations are true and to induce the purchase of substantial numbers of respondents' courses of instruction in commerce. The Commission accordingly concludes that respondents' misrepresentations, as hereinbefore found, have been to the prejudice and injury of the public and therefore constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

Since it is empowered and directed under the provisions of such Act to prevent the use in commerce of the methods, acts and practices referred to, the Commission has given careful consideration also to

Order

50 F. T. C.

the form of remedy which should be applied here. Other cases have come before the Commission for its determination which have presented situations where sales practices and acts used in promoting the sale of other home study courses likewise were characterized by misrepresentation as to the facilities or advantages available to students accepted for enrollment and the opportunities or assurances for employment and lucrative pay afforded upon completion of such courses. On the basis of its experience in those cases and its consideration of all of the factors involved, the Commission has concluded that the proscriptions, as adopted and set out hereinafter, are responsive to the record and will adequately protect the public interest.

ORDER

It is ordered, That the respondents Tractor Training Service, a corporation, and Tractor Training Service, Inc., a corporation, and their officers, and Joy E. Badley, individually and as an officer of said corporations, and said respondents' agents, representatives and employees, directly or through any corporate or other device in connection with the offering for sale, sale and distribution of a course of study and instruction in diesel training and training in heavy equipment in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing directly or by implication:

1. That there is a great demand for individuals completing the respondents' course of study on diesel engines, or that their employment as diesel mechanics, service men or in similar positions is assured; or misrepresenting in any manner the opportunities for employment in the diesel engine and allied products industry.

2. That the respondents have working arrangements or other contracts with members of the diesel engine manufacturing industry whereby individuals completing the respondents' course of study are assured employment, or that respondents customarily secure employment for such individuals.

3. That individuals purchasing the respondents' course of study are afforded "on-the-job training," or part-time employment, for which they are paid.

4. That shop training is provided by respondents to students at no cost or only nominal cost unless such training is in fact available without cost or at nominal cost as designated.

5. That individuals to whom the respondents' courses of study are sold are selected on any basis other than their ability to make the required down payment.

762

Order

6. That the earnings of individuals completing respondents' course of study are in excess of the average net earnings consistently made by individuals who have completed such course over substantial periods of time under normal conditions and circumstances.

It is further ordered, That the complaint be, and the same hereby is, dismissed as to respondent Tractor Training Diesel Institute, a corporation, and as to respondents Ray J. Watson, McDannell Brown, and Fred L. Innes, in their capacity as individuals but not in their capacity as officers of the respondent corporations.

It is further ordered, That respondents Tractor Training Service, Tractor Training Service, Inc., and Joy E. Badley, 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.

Commissioner Howrey not participating for the reason that he did not hear oral argument herein.

IN THE MATTER OF
BOOK-OF-THE-MONTH CLUB, INC. ET AL.

MODIFIED ORDER, OPINION, AND DISSENT IN REGARD TO THE ALLEGED
VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 5572. Order and opinion, Mar. 9, 1954

Order modifying the Commission's prior order, dated May 8, 1952, 48 F. T. C. 1297, with respect to the use of the term "Free", in the light of the Commission's present policy as announced in its opinion in the matter of *Walter J. Black, Inc., etc.*, Docket 5571, Sept. 11, 1953, *infra*, page 225, and following the remand of the proceeding to the Commission by the Court of Appeals for the Second Circuit for its consideration in the aforesaid connection, and the respondents' motion to vacate or modify said order and to dismiss the complaint (granted in part and denied in part)—

So as to require respondent corporation, its officers, etc., in connection with the offer for sale, sale, and distribution of books in commerce, to cease and desist from "using the word 'Free' or any other word or words of similar import or meaning, in advertising or in other offers to the public, to designate or describe any book or other article of merchandise" when all the conditions, etc., pertaining to the matter are not clearly and conspicuously explained at the outset, etc., or when the offerer increases the ordinary price or reduces the quality, quantity, or size of the article, as in said order below in detail set out; and

Dismissing the complaint as to respondent individuals as such, but not as officers of respondent corporation.

Before *Mr. Abner E. Lipscomb*, hearing examiner.

Mr. Jesse D. Kash for the Commission.

Wolfson, Caton & Moguel, of New York City, for respondents.

MODIFIED ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, answer of the respondents, testimony and other evidence introduced before a hearing examiner of the Commission theretofore duly designated by it, recommended decision of the hearing examiner and exceptions thereto, and briefs and oral argument of counsel, and the Commission, having made its findings as to the facts and its conclusion that the respondent Book-of-the-Month Club, Inc., had violated the provisions of the Federal Trade Commission Act, on May 8, 1952, issued its order to cease and desist, which order was subsequently affirmed by the United States Court of Appeals for the Second Circuit; and

Said Court of Appeals, acting on a petition filed by the respondents, having remanded this proceeding to the Commission for the purpose

of considering appropriate action in connection with the order to cease and desist in the light of the present policy of the Commission regarding the use of the word "free," in advertising, as announced in the Commission's opinion in the proceeding entitled "In the Matter of Walter J. Black, Inc., a corporation, trading as The Classics Club and Detective Book Club"; and

The respondents having thereafter filed with the Commission a motion to vacate or modify said order to cease and desist and to dismiss the complaint, and the Commission having entered its order granting said motion in part and denying it in part and being of the opinion that its order to cease and desist issued on May 8, 1952, should be modified in certain respects:

It is ordered, That the respondent, Book-of-the-Month Club, Inc., its officers, representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, and distribution of books in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Using the word "free," or any other word or words of similar import or meaning, in advertising or in other offers to the public, to designate or describe any book, or other article of merchandise:

(1) when all of the conditions, obligations, or other prerequisites to the receipt and retention of the "free" article of merchandise are not clearly and conspicuously explained or set forth at the outset so as to leave no reasonable probability that the terms of the advertisement or offer might be misunderstood; or

(2) when, with respect to the article of merchandise required to be purchased in order to obtain the "free" article, the offerer either (a) increases the ordinary and usual price; or (b) reduces the quality; or (c) reduces the quantity or size of such article of merchandise.

It is further ordered, That the complaint herein be, and the same hereby is, dismissed as to Harry Scherman and Meredith Wood as individuals but not in their capacity as officers of respondent Book-of-the-Month Club, Inc.

It is further ordered, That the respondent, Book-of-the-Month Club, Inc., shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this order.

Commissioner Mead dissenting.

OPINION OF THE COMMISSION

By CARRETTA, Commissioner:

This matter is before the Commission upon a motion, filed by the respondents, for reconsideration of the order to cease and desist

entered herein on May 8, 1952, and in which they request that said order to cease and desist be vacated and set aside and the complaint dismissed, or, in the alternative, that the order to cease and desist be modified. Counsel in support of the complaint filed an answer in which he objects to so much of the motion as requests that the order be vacated and the complaint dismissed, but in which he joins with the respondents in so much of the motion as requests the order's modification. The Commission's jurisdiction to entertain the motion is clear, the entire proceeding having been remanded to the Commission on December 11, 1953, by the United States Court of Appeals for the Second Circuit, for the purpose of considering and taking appropriate action on just such a motion.

The respondents do not in the present stage of the proceeding contend that the order to cease and desist issued by the Commission on May 8, 1952, was then improvident. They do contend, however, (1) that after the date of issuance of said order to cease and desist, the Commission's position on the use in advertising of the word "free" was changed, as announced in the Commission's opinion in the proceeding entitled "In the Matter of Walter J. Black, Inc., a corporation, trading as The Classics Club and Detective Book Club," Docket No. 5571, with the result that the outstanding order against these respondents prohibits practices which would not now be regarded as unfair or deceptive, and (2) that unless the order is vacated or, at least, modified the respondents will be placed at an unfair competitive disadvantage with their competitors upon whom such an order would not now be imposed.

The Commission does not disagree with either of these contentions. The outstanding order to cease and desist broadly prohibits the respondents from using the word "free," or any other word of similar meaning, in advertising, to designate or describe any book, or other merchandise, which is not in fact a gift or gratuity or is not given to the recipient without requiring the purchase of other merchandise or requiring the performance of some service inuring, directly or indirectly, to the respondents' benefit. In so doing, the order was in strict conformity with the Commission's policy in effect at the time the order was issued and was identical in all respects with orders which had theretofore been issued against many other advertisers concerning the use of the word "free." That it was proper in all respects is clearly shown by the opinion of the Court of Appeals for the Second Circuit, dated February 10, 1953, in that court's decision of the case arising out of the respondents' petition for review of the order (202 F. 2d 486). As pointed out by the respondents, however, the Commission's position on this subject has now been changed. Henceforth, the use of the

word "free," or other words of similar import or meaning, in advertising or in other offers to the public, to designate or describe an article of merchandise, will be considered to be unfair and deceptive only (1) when all of the conditions, obligations, or other prerequisites to the receipt and retention of the "free" article of merchandise are not clearly and conspicuously explained or set forth at the outset so as to leave no reasonable probability that the terms of the advertisement or offer might be misunderstood; or (2) when, with respect to an article of merchandise required to be purchased in order to obtain the "free" article, the offerer either increases the ordinary and usual price, reduces the quality, or reduces the quantity or size of such article of merchandise. (In the Matter of Walter J. Black, Inc., etc., Docket No. 5571—September 11, 1953). It is thus clear that the order against the respondents, consistent in all respects with the Commission's previous policy, does prohibit the use, in advertising, of the word "free," and other words of similar meaning, under circumstances which would not now be considered unfair or deceptive. To the extent that it does so, it obviously imposes upon the respondents requirements which would not be imposed upon their competitors.

This, however, does not mean that the order should be vacated and set aside and the complaint dismissed, for, as the original findings as to the facts in this proceeding show, the respondents have used the word "free" in their advertising in a manner which would be considered unfair and deceptive even under the new policy, in that they did not clearly and conspicuously disclose in said advertising all of the conditions, obligations, or other prerequisites to the receipt and retention of the book referred to therein as "free." Specifically, the respondents did not disclose the fact, and that it was a fact is undisputed by the respondents, that if a member of the Book-of-the-Month Club failed or refused to purchase at least four books within a year after joining the club, payment for or the return of the book theretofore designated as "free" would be required. Whether or not all of the other conditions, obligations, or prerequisites to the receipt and retention of the book described as "free" were clearly and adequately disclosed need not now be decided.

In view of the foregoing, it would not be in the public interest for this proceeding to be disposed of by dismissal of the complaint. On the other hand, the Commission has no desire to impose upon the respondents a restriction which is unnecessarily harsh or which places them at an unfair competitive disadvantage in the sale of their books. In the exercise of its administrative discretion, therefore, and in an effort to leave the respondents in the same competitive position as others who may wish to use the word "free" in advertising their prod-

ucts, the Commission has determined that the order to cease and desist in this case should be modified by so qualifying it that the prohibition against the respondents will be, in effect, the same as would be the prohibition against their competitors under similar circumstances. Applying the familiar principle that the Commission's orders should proscribe the entire illegal practice as well as the specific acts by which such illegal practice has been manifested (*Hershey Chocolate Corporation v. Federal Trade Commission*, June 30, 1941, 121 F. 2d 968 (971-972) and similar cases), such a prohibition would cover the use of the word "free" (1) when all of the conditions, obligations, or other prerequisites to the receipt and retention of the "free" article of merchandise are not clearly and conspicuously explained or set forth at the outset so as to leave no reasonable probability that the terms of the advertisement or offer might be misunderstood, or (2) when, with respect to an article of merchandise required to be purchased in order to obtain the "free" article, the offerer either (a) increases the ordinary and usual price; or (b) reduces the quality; or (c) reduces the quantity or size of such article of merchandise.

Commissioner Mead would deny respondents' motion to vacate or modify the order to cease and desist entered herein on May 8, 1952, for the reasons stated in Commissioner Mead's dissenting opinion in the matter of *Walter J. Black, Inc., et al.*, Docket No. 5571.

Decision

IN THE MATTER OF
PICKOW DISTRIBUTING CORPORATION ET AL.

DECISION IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE
COMMISSION ACT

Docket 5890. Complaint, June 27, 1951—Decision, Mar. 10, 1954

Where a corporation and its three officers engaged in the sale of sewing machine heads imported from Japan—upon which there appeared, on the back of the vertical arm, the words “Made in Occupied Japan” or “Japan”, or upon the front, the word “Japan”—and of completed sewing machines of which said heads were a part, to independent dealers and retailers and, as thus engaged, in attaching to the back of said heads, at the only place provided therefor, motors marked as “Universal Motor” and “Made in U. S. A.”—name of the well-known domestic product—and thus effectively concealing such markings—

- (a) Offered and sold the aforesaid imported sewing machines, upon some of which the word “Japan”, as included with others on the front of the vertical arm, was distinguishable only by more careful inspection than a purchaser or user would ordinarily bestow and with no adequate marking to show their place of manufacture or foreign origin;
 - (b) Falsely represented that their said machines were manufactured by or connected in some way with well-known firms through displaying in many instances on the horizontal arms of said machines the trade names “Hoover” or “Eureka”, and through the use of said names in literature distributed by them with the machines they sold, as well as in price lists and similar material distributed by them; and thereby also enhanced the erroneous belief on the part of the purchasing public that said machines were of domestic origin;
- With result of providing dealers with the means for misleading the purchasing public as to the place of origin and manufacture of said machines:

Held, That such acts and practices constituted unfair methods of competition in commerce and unfair and deceptive acts and practices therein.

Before *Mr. Frank Hier*, hearing examiner.

Mr. William L. Taggart for the Commission.

Mr. N. Randall Bassett, of New Haven, Conn., for respondents.

Mr. E. K. Gubin, of Washington, D. C., for Hoover Co., intervenor.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on June 27, 1951, issued and subsequently served its complaint in this proceeding upon the respondents, Pickow Distributing Corporation, a corporation, and Louis Pickow, Harold Gessner, and Abraham Lippman, individually and as officers of said corporation, charging them with the use of unfair methods of competition and unfair and deceptive acts and practices in commerce

Findings

50 F. T. C.

in violation of the provisions of said Act. After the issuance of said complaint and the filing of respondents' answer and amendment to their answer, hearings were held at which testimony and other evidence in support of and in opposition to the allegations of the complaint were introduced before a hearing examiner of the Commission theretofore duly designated by it, and said testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, the proceeding regularly came on for final consideration by said hearing examiner upon the complaint, amended answer thereto, testimony and other evidence, and proposed findings as to the facts and conclusions presented by counsel, and said hearing examiner, on May 5, 1953, filed his initial decision herein.

Within the time permitted by the Commission's Rules of Practice, counsel supporting the complaint filed with the Commission an appeal from said initial decision. Request was made on behalf of The Hoover Company for leave to intervene in the proceeding and said request was granted to the extent of permitting briefs on the said appeal to be filed. Thereafter, this proceeding regularly came on for final consideration by the Commission upon the record, including briefs of counsel supporting the complaint and of special counsel for the intervenor in support of the said appeal and brief of counsel for respondents in opposition thereto (oral argument not having been requested by either counsel supporting the complaint or the respondents); and the Commission, having entered its order granting in part and denying in part the said appeal and being fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and conclusions drawn therefrom and order, the same to be in lieu of the initial decision of the hearing examiner.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Pickow Distributing Corporation is a corporation organized and existing under and by virtue of the laws of the State of Connecticut with its office and principal place of business located at 55 Whalley Avenue, New Haven, Connecticut. Respondents Louis Pickow, Harold Gessner, and Abraham Lippman are, respectively, President and Treasurer, Vice-President, and Secretary of the corporate respondent, and acting as such officers, formulate, direct, and control the policies, acts, and practices of said corporation. The address of the individual respondents is the same as that of corporate respondent.

PAR. 2. Respondents are now and have been for several years last past engaged in the sale of sewing machine heads imported from

Japan and completed sewing machines of which said heads are a part, to independent dealers or retailers who, in turn, sell them to the purchasing public. In the course and conduct of their business respondents cause their said products, when sold, to be transported from their place of business in the State of Connecticut to the purchasers thereof located in various other States, and maintain, and at all times mentioned herein have maintained, a course of trade in said products in commerce among and between the various States of the United States. Their volume of trade in said commerce has been, and is, substantial.

PAR. 3. When the sewing machine heads are received by respondents the words "Made in Occupied Japan" or "Japan" appear on the back of the vertical arm either in gold decalcomania on the black enamel of the arm or else on the tin metal tag affixed by rivets to the front of the vertical arm with the word "Japan" in raised letters. These markings which appear on the back of the vertical arm are from $\frac{3}{8}$ to $\frac{1}{2}$ inch above the bed of the machine. These markings are left unchanged by respondents. The machines are designed for electric operation and when a motor is attached at the only place provided for it, the rear of the vertical arm, these markings are effectively concealed from even careful inspection, short of removing the motor or turning the machine into an awkward and unusual position from a user's standpoint; which would spring only from a desire to see that particular spot but which action is entirely unlikely to ensue from ordinary or normal use of the machine. On the sewing machines so marked, there are no other markings indicating country of origin, and there is a preponderance of substantial evidence in the record that purchaser-users never saw this concealed marking or suspected the foreign origin of their purchases. The finding is that such marking is, for practical purposes, and to the ordinary user or purchaser, completely and effectively concealed.

Some of the sewing machine heads, when received by respondents, instead of the markings hereinabove described have on the front of the vertical arm facing the user in normal operation a brass or brass-colored medallion affixed to the vertical arm by side rivets about one inch above the bed. This medallion bears the legend "DE LUXE" in raised letters approximately $\frac{1}{4}$ or $\frac{3}{8}$ inch high, and underneath that the words "Finest Family Sewing Machine" in raised letters approximately $\frac{1}{4}$ of an inch high, and underneath that the word "Japan" in raised letters approximately $\frac{1}{8}$ of an inch high. These medallions are in bright gold color in raised letters only, with no background coloring to emphasize the raised letters, so that the word "Japan" is indistinct, difficult to read, unemphasized, and distinguish-

Findings

50 F. T. C.

able only by more careful inspection than a purchaser or user would ordinarily bestow.

A number of the sewing machines, marked as hereinabove described, are part of the evidence in this proceeding. All of these machines have attached to them, on the rear of the vertical arm, small motors which provide the power for operation, and in each instance the motor is marked "Universal Motor" and, in addition, "Made in USA." The Universal Motor is to the public a well-known product of domestic manufacture. In addition to this, many of these machines are marked instances on both sides, with one of the trade names "Hoover" or "Eureka." These names are associated by members of the purchasing public with well and favorably known domestic concerns.

Although there is some conflict in the testimony in the record as to actual deception, the preponderance of substantial, reliable, and probative evidence is that purchaser-users did not see, or seeing did not comprehend, the markings appearing on respondents' sewing machines indicating their foreign origin. The finding, accordingly, is that respondents' imported sewing machines are not adequately marked to show their place of manufacture or origin.

PAR. 4. When articles of merchandise, including sewing machines, are exhibited and offered for sale by retailers to the purchasing public and such articles are not marked or are not adequately marked to show that they are of foreign origin, or if marked and the markings are covered or otherwise concealed, such purchasing public understands and believes such articles to be wholly of domestic origin.

PAR. 5. Respondents use the words "Hoover" and "Eureka" as trade or brand names for many of their said sewing machines and sewing machine heads. The sewing machines and sewing machine heads which are sold under the brand or trade name "Hoover" have the said word in gold decalcomania on the black enamel, on both sides of the horizontal arm. The word "Eureka" similarly appears on the sewing machines and sewing machine heads sold under that name. The words "Hoover" and "Eureka" also appear in literature distributed by the respondents with the machines they sell, as well as in price lists and similar material distributed by respondents to prospective purchasers.

The names "Hoover" and "Eureka" are well-known American brand or trade names. The name "Hoover" has been used for many years by The Hoover Company as a brand name for vacuum cleaners and other products. The Eureka Williams Company has used the word "Eureka" for many years as a brand name for vacuum cleaners. Vacuum cleaners and other products bearing the name "Hoover" have been advertised extensively by The Hoover Company, and the Eureka Williams Company has extensively advertised its products under the

trade name "Eureka." The names "Hoover" and "Eureka" and the concerns with which the names are identified have become well and favorably known to the purchasing public.

PAR. 6. The evidence in the record establishes, as the hearing examiner found in his initial decision, that respondents' use of the said brand or trade names for their sewing machines and sewing machine heads causes confusion in the minds of many members of the purchasing public. For example, one witness testified that if she saw a sewing machine with the name "Hoover" on it, she would think the machine was made by the manufacturer of Hoover vacuum cleaners. Another witness testified that if he heard advertisements for Hoover sewing machines on the radio, he would assume the machines were manufactured by the Hoover Company. Still another witness testified that he would imagine a sewing machine bearing the name "Hoover" was made in the United States maybe by a "company connected with the Hoover vacuum." The testimony in the record with respect to the name "Eureka" is similar to that with respect to the name "Hoover." There is also in the record a stipulation between opposing counsel to the effect that respondents could call several witnesses who would testify that they purchased sewing machines bearing the name "Hoover" or "Eureka," and that these names did not to their minds indicate that the machines had any connection whatsoever with either The Hoover Company or the Eureka Williams Company.

The Commission is of the opinion, and therefore finds, that respondents, by using the words "Hoover" and "Eureka" as trade or brand names for their sewing machines and sewing machine heads in the manner hereinabove found, have represented, contrary to the fact, that their said products are manufactured by, or connected in some way with, the well-known firms with which said names have long been associated. Respondents' use of these words has also enhanced the erroneous and mistaken belief on the part of the purchasing public that respondents' sewing machines are of domestic origin.

PAR. 7. The complaint in this proceeding also alleges that the respondents, by using the word "Mercury" as a brand or trade name for their sewing machines and sewing machine heads, have represented, contrary to fact, that said products are manufactured by well-known American firms with which the name "Mercury" has long been associated. The Commission is of the opinion, and finds, that such allegation has not been sustained by the evidence.

PAR. 8. There are among members of the purchasing public a substantial number having a decided preference for products manufactured in the United States over products manufactured in whole or in part in foreign countries, including sewing machine heads. There

are also many members of the purchasing public who prefer to purchase products, including sewing machines, which are manufactured by, or connected in some way with, well and favorably known American firms, rather than products manufactured by a firm or firms not well known to the purchasing public.

PAR. 9. Respondents, by placing in the hands of dealers their sewing machine heads and completed sewing machines inadequately marked as to place of origin, as hereinabove described, and by using the trade or brand names "Hoover" and "Eureka," provide said dealers with the means and instrumentality whereby they may mislead and deceive the purchasing public as to the place of origin of said machines and the manufacturer thereof.

PAR. 10. Respondents, in the course and conduct of their business, are in substantial competition in commerce with makers and sellers of domestic-made sewing machines and also with sellers of imported sewing machines.

PAR. 11. The failure of respondents to adequately disclose on the sewing machine heads that they are manufactured in Japan and the use of the brand or trade names "Hoover" and "Eureka," have the tendency and capacity to lead members of the purchasing public into the erroneous and mistaken belief that respondents' said products are of domestic origin and are manufactured by, or connected in some way with, well and favorably known domestic manufacturers, and into the purchase of sewing machines of which said heads are a part because of such erroneous and mistaken belief.

As a result thereof, trade in commerce has been unfairly diverted to respondents from their competitors, and injury has been and is being done to competition in commerce.

CONCLUSION

Respondents sell completed sewing machines of which imported heads are a part and imported sewing machine heads without adequately disclosing the country of origin of the sewing machine heads. The respondents use the words "Hoover" and "Eureka" as brand or trade names for some of their sewing machines and sewing machine heads. These words are placed on the sewing machine heads and are also used in respondents' advertising literature. As a result of the failure to adequately disclose on the sewing machine heads that they are imported from Japan and the use of the names "Hoover" and "Eureka," purchasers and prospective purchasers are led to believe that respondents' sewing machines and sewing machine heads are of domestic origin and are manufactured by, or connected in some way

with, well and favorably known domestic manufacturers. Many members of the purchasing public have a decided preference for sewing machines manufactured in the United States over sewing machines manufactured in whole or in part in Japan. There are also many persons who prefer to purchase sewing machines manufactured by, or connected in some way with, well and favorably known American firms, rather than sewing machines manufactured by a firm or firms not well known to the purchasing public.

The fact, if it be so, that respondents' imported sewing machine heads were inspected and passed by United States Customs officers at the port of entry as being properly or adequately marked is immaterial and no defense (*L. Heller & Son, Inc. v. Federal Trade Commission*, 191 F. 2d 954). Also, whether or not the Singer Sewing Machine Company or The Hoover Company or any other concern or individual imports into this country articles of foreign manufacture which are not marked, or are inadequately marked, as to place of origin is immaterial and no defense to this proceeding (*Independent Directory Corp. v. Federal Trade Commission*, 188 F. 2d 468; *Ford Motor Co. v. Federal Trade Commission*, 120 F. 2d 175).

The fact that respondents sell only to dealers, many or all of whom are aware of the origin of the sewing machine heads or are informed thereof by respondents, is no defense to the charge of inadequate or concealed marking, since the sewing machines of which the imported heads are a part are obviously intended for ultimate consumer purchase and respondents as sellers have placed into the hands of the dealers the means and instrumentality whereby the ultimate purchaser may be misled and deceived. The sewing qualities, efficiency, and performance of respondents' sewing machines as compared with sewing machines of domestic manufacture or other makes or designs of imported sewing machines are not in issue in this proceeding.

The Commission, therefore, concludes that the acts and practices of the respondents as hereinabove found are all to the injury and prejudice of the public and of respondents' competitors and constitute unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered, That the respondents, Pickow Distributing Corporation, a corporation, and its officers, and Louis Pickow, Harold Gessner, and Abraham Lippman as officers of said corporation, and said respondents' representatives, agents, and employees, directly or through

Order

50 F. T. C.

any corporate or other device, in connection with the offering for sale, sale, or distribution of sewing machine heads or sewing machines in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Offering for sale, selling, or distributing foreign-made sewing machine heads or sewing machines of which foreign-made heads are a part, without clearly and conspicuously disclosing on the heads, in such a manner that it will not be hidden or obliterated, the country of origin thereof.

2. Using the words "Hoover" or "Eureka," or any simulations thereof, as brand or trade names to designate, describe, or refer to their sewing machines or sewing machine heads; or representing through the use of any other words or in any other manner that their sewing machines or sewing machine heads are made by anyone other than the actual manufacturers.

It is further ordered, That 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.

Decision

IN THE MATTER OF
AR. WINARICK, INC., ET AL.

DECISION, AND DISSENTING OPINION IN REGARD TO THE ALLEGED VIOLATION
OF THE FEDERAL TRADE COMMISSION ACT

*Docket 6032. Complaint, Nov. 12, 1952*¹—*Decision, Mar. 10, 1954*

Where a corporation and its three officers, engaged in the competitive interstate sale of their "Jeris Antiseptic Hair Tonic", for use in addition to its cosmetic purposes, in the treatment and prevention of hair and scalp diseases, and of an after-shave lotion called "Fore"; in advertising their said "Hair Tonic" in magazines—

- (a) Falsely represented that the use of said tonic with massage would help promote hair growth and prevent excessive falling hair, through such statements as "helps promote healthy hair growth" and "relieves * * * excessive falling hair"; and
- (b) Falsely represented that barbers, by reason of their training, are capable of diagnosing and treating diseased conditions of the hair and scalp through such statements as "For hair and scalp care you can depend on your Barber's recommendation! Your barber is trained in hair and scalp care and qualified to advise you. So if you happen to be troubled with dandruff, falling hair or some other hair problem, as so many men are, remember to consult your barber":

Held, That such representations constituted false advertisements within the meaning of Sec. 12, and that use thereof constituted unfair and deceptive acts and practices in commerce.

Before *Mr. J. Earl Cox*, hearing examiner.

Mr. J. W. Brookfield, Jr., for the Commission.

Mr. Lewis G. Bernstein, of New York City, for respondents.

DECISION OF THE COMMISSION

STATEMENT OF THE CASE

The Federal Trade Commission on August 18, 1952, issued a complaint and on November 12, 1952, issued an amended complaint charging respondent Ar. Winarick, Inc., and three of its officers, Jules Winarick, Nathan Winarick and Floyd H. Pepper, with having violated the Federal Trade Commission Act by disseminating false advertisements in connection with the sale of their products "Jeris Antiseptic Hair Tonic" and "Fore," an after shave lotion. Respondents filed an answer denying that their advertisements were in violation of law.

Pursuant to notice, hearings were held in New York City on January 5 and 6 and February 10, 1953, before J. Earl Cox, a hearing examiner,

¹ Amended.

designated by the Commission to hear this proceeding. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues was afforded respondents and counsel supporting the complaint. All testimony and other evidence was recorded and filed in the office of the Commission.

After receiving proposed findings of fact, the hearing examiner filed this initial decision on May 21, 1953, in which he concluded that respondents had violated the Federal Trade Commission Act by falsely advertising that a bottle of after shave lotion is given free where, in fact, it was given only on the purchase of a bottle of hair tonic and by advertising that barbers are capable of diagnosing and treating diseased conditions of the hair and scalp. He dismissed the other allegations of the complaint which charged respondents with falsely representing that the use of their hair tonic will cure dandruff, relieve itchy scalp, prevent excessive falling hair, promote hair growth and result in a healthy scalp.

Thereafter, counsel supporting the complaint appealed to the Commission from his initial decision. Respondents filed a brief in opposition to this appeal in which they request the Commission to dismiss all of the allegations of the complaint. By agreement of counsel, this appeal was submitted to the Commission for decision without oral argument.

Upon consideration of the entire record herein, the Commission has determined that the rulings of the hearing examiner made at the hearings are free of prejudicial error, and makes the following:

FINDINGS OF FACT

I. Business Of The Respondents

Respondent Ar. Winarick, Inc., is a New York corporation having its principal place of business at 805 East 140th Street, New York, New York. Respondents Jules Winarick, Nathan Winarick, and Floyd H. Pepper, individuals, are officers of Ar. Winarick, Inc., who directed and controlled its policies with respect to the advertising herein set out.

Respondents sell "Jeris Antiseptic Hair Tonic" and an after shave lotion called "Fore" to purchasers located in various States of the United States other than New York, and during the period of time involved herein have regularly caused these products, when sold, to be shipped from their place of business in the State of New York to these purchasers, in interstate commerce. They are now, and during the period of time involved herein, have been in substantial competition with others engaged in the sale of other hair tonics and after shave preparations.

The active ingredients of Jeris Antiseptic Hair Tonic are shown by the label to be:

8-Hydroxyquinoline
 Resorcinol Monoacetate
 Tincture of Capsicum
 Fixed and Volatile Oils
 Ethyl-alcohol.

The directions for use are as follows: "Brush or massage the scalp to remove any dust or foreign substance. Apply Jeris freely, massaging the scalp briskly with fingertips. This treatment will assure you a clean scalp, lustrous hair, free from loose dandruff."

II. *The Advertisements*

In the course of their business respondents have placed advertisements containing the following excerpts in magazines which were disseminated throughout the States of the United States.

"The Truth About Dandruff * * * Itchy Scalp * * *
 Falling Hair

IT'S A FACT

- . DANDRUFF is often caused by neglect * * *
 by improper care of hair and scalp * * *
- . THE HAIR itself cannot grow. Growth comes
 from the root.
- . HELP THE ROOT and you help the hair.

JERIS GETS AT THE ROOT OF THE TROUBLE

Jeris Antiseptic Hair Tonic contains a special ingredient not found in ordinary hair tonics. It acts to stimulate blood flow which nourishes the roots. Thus, Jeris not only relieves dandruff, itchy scalp and dresses your hair handsomely * * * but it helps promote healthy hair growth. * * *

(Life Magazine, 1948)

KEEP HAIR WELL-GROOMED

Free of Dandruff Too * * *

(1) JERIS KILLS DANDRUFF GERMS* on contact!
 antiseptic action instantly removes unsightly dandruff flakes.

(2) JERIS STIMULATES THE SCALP! Daily massage with Jeris awakens blood flow. Helps promote healthy hair growth, relieve dry scalp and excess falling hair.

* * *

*(Pityrosporum ovale), which many authorities recognize as the cause of infectious dandruff.

(Saturday Evening Post, 1948)

Findings

50 F. T. C.

Scalp-stimulation: Daily JERIS massage helps promote healthy hair growth, relieves dry scalp, excessive falling hair.

(Saturday Evening Post, 1952)

Respondents have made representations similar to the last quote above in their recent radio and newspaper advertisements in addition to their magazine advertising.

Respondents' 1952 Saturday Evening Post advertising also contained claims of killing dandruff germs, pity-rosporum ovale, and removing dandruff flakes in substantially the same form as quoted from the 1948 Saturday Evening Post.

In certain of their newspaper advertising in 1951, respondents made the following representations:

For hair and scalp care you can depend on your Barber's recommendation!
Your barber is trained in hair and scalp care and qualified to advise you. So if you happen to be troubled with dandruff, falling hair or some other hair problem, as so many men are, remember to consult your barber.

III. *Meaning of the Advertising Claims*

The amended complaint charges that respondents have represented:

- (1) That the use of Jeris Antiseptic Hair Tonic will—
 - (a) Cure dandruff
 - (b) Relieve itchy scalp
 - (c) Prevent excessive falling hair
 - (d) Promote hair growth
 - (e) Result in a healthy scalp.

(2) That barbers, by reason of their training, are capable of diagnosing and treating diseased conditions of hair and scalp.

The record does not contain any consumer testimony as to the meaning of these advertisements. However, the Commission is of the opinion that such testimony is not needed, that it is capable of determining the meaning of these claims to the public.

For the reasons stated below, the Commission is of the opinion that respondents have represented that the use of Jeris with massage will help promote hair growth and prevent excessive falling hair,* and that barbers, by reason of their training, are capable of diagnosing and treating diseased conditions of hair and scalp.

*Respondents' advertising was characterized by their counsel during examination of a witness called by respondents, as follows:

"The Jeris people have stated that this product will help to do certain things—help to keep your scalp clean and help to prevent excessive falling hair and help to promote the growth of hair by the use of this product."

In their appeal brief they adopt the hearing examiner's interpretation.

Analyzing these claims in the same order as their meanings as alleged in the complaint are listed above:

(1) (a) Respondents' advertisements clearly state that Jeris destroys dandruff germs (*pityrosporum ovale*) on contact and that it removes dandruff flakes. They make no claim of cure for dandruff in excess of these statements.

(b) The record does not contain any representation as to itchy scalp since 1948. Respondents' claims have been revised to "relieves dry scalp."

(c) The hearing examiner interpreted the phrase "relieves . . . excessive falling hair" to mean merely that massaging and cleaning the hair will remove from the head that hair which comes out with combing or falls to the shoulders during the course of a day. The Commission, however, is of the opinion that the ordinary meaning of the words shows that "relieves" means more than removing loose hair from the head, and that "excessive" means more than a normal condition of hair fall. This advertising in the ordinary sense of the words claims that the use of Jeris, as directed, will be of value in relieving the conditions causing abnormal hair loss. It means the use of Jeris will prevent excessive falling hair. The testimony of the medical witnesses shows that they recognize "excessive falling hair" to mean an abnormal condition for which they list many possible causes.

(d) Similarly the phrase "helps promote healthy hair growth" represents that the use of Jeris, as directed, will help to promote the growth of hair.

(e) Respondents' claims as to the scalp are limited to claims that the use of Jeris with massage will stimulate the scalp and relieve dry scalp. These claims do not constitute a representation that the use of Jeris will result in a healthy scalp.

(2) Respondents' advertising as above quoted expressly states that barbers are trained in hair and scalp care and are qualified to advise you. It directs the reader to consult his barber if troubled with dandruff, falling hair or some other hair problem. The implication of this advertisement is that the instruction of barbers qualifies them to diagnose and treat disturbances of the hair which might be caused by or related to diseases.

IV. *Expert Medical Opinion Testimony*

The testimony of the medical witnesses as to the truth of these representations is conflicting. The testimony of Dr. Markel supports respondents' claims while that of Dr. Peck and Dr. Behrman disputes their correctness. A full analysis of the pertinent testimony of these

experts and of their professional qualifications is felt necessary to resolve this conflict.

Qualifications of the Witnesses

Three doctors, all specialists in the field of dermatology, testified in this matter. All are diplomates of the American Board of Dermatology and Syphilology.

Doctor Samuel M. Peck is Chief of the Department of Dermatology, Mt. Sinai Hospital, Clinical Professor of Dermatology, New York Medical College, Associate Clinical Professor of Dermatology at Columbia, and President of the Society for Investigative Dermatology. He has written three textbooks on dermatology and has published about 100 scientific publications. He is the associate editor of the journal for investigative dermatology.

Doctor Howard T. Behrman is an Assistant Clinical Professor of Dermatology, New York University College of Medicine, Adjunct Dermatologist, Mt. Sinai Hospital, and Assistant Dermatologist, Hillside Hospital. He is the author of approximately 100 articles and four books in this field.

Doctor Joseph Markel has been engaged in private practice as a specialist in Dermatology for over seven years. He is presently attached to Mt. Sinai Hospital in the Dermatology Division. Previously he was in the Therapeutic Research Division on the dermatology staff on the New York Post Graduate Medical School.

Testimony as to Truth of Claims

Dr. Peck testified that Jeris does not contain any special ingredient not usually found in hair tonics. It has a cleansing action due to its alcohol and water content. It acts as a counter irritant and, especially if applied with massage, will have a temporary stimulating effect on the flow of blood to the scalp.

He believes that Jeris might aid in removing dandruff scales and relieve itching to some extent. He testified that the great majority of cases of excessive falling hair are due to either hereditary factors, endocrine changes or nutrition. To a lesser extent it is caused by various diseased conditions. He does not list dandruff as a cause of excessive falling hair. In his opinion, Jeris would not be an effective treatment for those conditions which cause excessive falling hair, and Jeris used as directed would not prevent excessive falling hair.*

*It is apparent from the record that the word "cause" in line 24, page 55, is the result of a stenographic error and should be "prevent." Also from the remainder of Dr. Peck's testimony, it is clear that he is of the opinion that the use of "Jeris," as directed, will not prevent excessive falling hair.

He further testified that Jeris used with massage would have a temporary stimulating effect on the flow of blood to the scalp. He does not believe that this increased blood flow would nourish the hair roots or that the application of Jeris will promote or in any way cause healthy hair growth. He has not been able to effectively treat falling hair or to cause hair to regrow by using chemicals like Jeris or by increasing the blood flow to the scalp even with much more effective methods than massage with Jeris. In his opinion, nothing which dermatologists have at their disposal today promotes the growth of hair.

Dr. Behrman testified that the primary effect of Jeris would be to dissolve dandruff cells. It might temporarily relieve certain cases of itchy scalp. Jeris, especially when used with massage, would increase the blood flow in the scalp.

He testified that the consensus of scientific thought is that male hair loss is due to three basic things, heredity, amount of hormones produced and the aging process. In addition to these, Dr. Behrman listed many disturbances and disorders which also cause excessive falling hair. He testified that Jeris is not an effective treatment for these conditions and that its use as directed would not prevent excessive falling hair. He recognized dandruff as a sign of a diseased scalp but does not list dandruff as a cause of falling hair. He testified that some dermatologists believe that dandruff might conceivably accelerate the balding process. He also testified that increasing the blood flow in the scalp by massage with Jeris for a few minutes would not be beneficial, that hair nourishment depends on the content of the blood, and that the application of Jeris will not promote or in any way cause healthy hair growth.

Both Dr. Peck and Dr. Behrman testified that in their opinion a barber is not qualified by training and experience to diagnose and effectively treat diseased conditions of the hair and scalp.

Dr. Markel testified that Jeris is a good cleansing agent for the scalp, contains an antiseptic ingredient and a drug that stimulates the scalp and that used with massage it will increase the lymphatic circulation of the scalp. He testified that the use of this product will result in a healthier scalp, will temporarily relieve itchy scalp due to some conditions, and will help to promote the growth of healthy hair due to its cleansing action.

He testified that 85 percent of all baldness is due to dandruff and that Jeris is a good product for certain types of dandruff. He further testified that Jeris would help preserve a man's hair longer than if he used nothing at all, by keeping the scalp clean, free of scales and permitting normal tissue respiration. He also testified that, by increas-

Findings

50 F. T. C.

ing the lymphatic circulation by massage, you may have a tendency to prevent your hair falling out as rapidly as it would without massage. He was of the opinion that "A man can save his crop of hair."

V. Conclusions From the Expert Testimony

Dr. Peck and Dr. Behrman are of the opinion that Jeris used as directed is of no value in preventing excessive falling hair and in promoting the growth of healthy hair. They do believe that it will remove dandruff flakes from the head, will temporarily increase circulation in the scalp, and help the scalp by keeping it clean. They express no opinion as to its effectiveness in destroying the germ, *pityrosporum ovale*. They are both of the opinion that barbers are not qualified by training and experience to diagnose and effectively treat diseased conditions of the hair and scalp.

Dr. Markel's views as to the value of Jeris in cases of excessive falling hair are based on the premise that dandruff is the cause of 85 percent of the cases of baldness. This premise is in conflict with the testimony of the other expert witnesses in this proceeding and with the consensus of scientific thought on this subject. His views that healthy hair growth is promoted by cleaning the scalp and allowing increased tissue respiration are rejected as being contrary to the weight of the evidence.

VI. Advertising Free Goods

The amended complaint alleged and the hearing examiner found that respondents falsely represented that they were giving a bottle of "Fore," after shave lotion, away free, as the bottle of Fore was only furnished in connection with the purchase of a bottle of Jeris Antiseptic Hair Tonic.

Respondents, in fact, advertised that they would give a regular sized bottle of Fore, after shave lotion, free with a purchase of a bottle of Jeris Antiseptic Hair Tonic. The advertisements clearly showed that respondents were making a combination offer of a regularly priced 83-cent bottle of Jeris Antiseptic Hair Tonic plus a regularly priced 63-cent bottle of Fore, after shave lotion, at a combined price of 74 cents.

VII. Contentions of the Parties

Respondents contend that the initial decision is correct in all respects except: (1) the conclusion that their claim of giving a bottle of Fore free was false because it was only given upon the purchase of a bottle of Jeris, and (2) the conclusion that they represented that barbers are qualified to treat diseases of the hair and scalp.

In support of the initial decision, respondents cite the Commission's decision in the matter of *Lambert Pharmacal Company* as authority for the truthfulness of their advertising claims as to dandruff. In this connection, they also point out that there is no evidence that Jeris will not destroy the pityrosporum ovale germ as advertised. They contend they have not represented that the use of their product will prevent excessive falling hair or result in a healthy scalp. They further contend that Jeris will destroy the pityrosporum ovale germ, will remove dandruff scales, relieve itchy scalp and aid the growth of hair.

Counsel supporting the complaint contend that all of the allegations of the complaint have been proven.

VIII. *General Conclusions*

On the basis of the above-stated facts and other evidence of record, the Commission concludes that respondents falsely advertised that the use of Jeris Antiseptic Hair Tonic with massage will help promote hair growth and prevent excessive falling hair and that barbers by reason of their training are capable of diagnosing and treating diseased conditions of the hair and scalp.

It further concludes that the record does not establish that respondents advertised that the use of Jeris will result in a healthy scalp or that it will have any beneficial effect on dandruff in excess of destroying pityrosporum ovale germs and removing dandruff flakes. There is no showing that the claims as to dandruff are false. Respondents' advertising as to claims of relief of itchy scalp have not been shown to have been used since 1948. The record indicates that such claims have been modified and the original claim abandoned.

The claim that a bottle of "Fore" was given away free is found not to be false or deceptive in any way. All of the conditions as to the offer were clearly stated. The price of 74 cents for the Jeris Antiseptic Hair Tonic in the special combination offer is less than the regular price of 83 cents for the same sized bottle of Jeris. This conclusion follows the reasoning of the Commission's decision in the matter of *Walter J. Black, Inc., et al.*, issued September 11, 1953.

Respondents' representations concerning the preparation Jeris Antiseptic Hair Tonic hereinabove found to be false are misleading in a material respect. They have the capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the mistaken belief that they are true, and into the purchase of substantial quantities of this preparation as a result thereof. Jeris Antiseptic Hair Tonic, in addition to its cosmetic purposes, is intended for use in the treatment and prevention of hair and scalp diseases in humans.

CONCLUSIONS OF LAW

The Commission, therefore, concludes that respondents' false representations of Jeris Antiseptic Hair Tonic constitute false advertisements likely to induce the purchase of a drug and cosmetic within the meaning of section 12 of the Federal Trade Commission Act. The Commission further concludes that respondents' use of the false representations as hereinabove found is to the prejudice and injury of the public and constitutes unfair and deceptive acts and practices in commerce within the meaning of the Federal Trade Commission Act.

ORDER OF APPEALS

It is ordered, That the appeal of counsel supporting the complaint from the initial decision of the hearing examiner is hereby granted insofar as it relates to the dismissal by the initial decision of the allegations of the complaint charging that respondents have falsely advertised that Jeris Antiseptic Hair Tonic will prevent excessive falling hair and promote hair growth. In all other respects said appeal is denied.

It is further ordered, That respondents' appeal from the initial decision of the hearing examiner is hereby granted insofar as it relates to the conclusion that respondents' free offer was in violation of the Federal Trade Commission Act. In all other respects said appeal is denied.

THE REMEDY

The Commission, having determined on the basis of the record that respondents have falsely advertised, must now determine the necessary and proper form of relief.

Respondents' advertising is not flagrantly false. They advertise their product largely as a cosmetic. But they have made several advertising claims of a medical nature. Certain of these have not been found to be false, one appears to have been abandoned and certain of them, respondents state, are only meant as claims of a cosmetic nature. Respondents, however, have contended throughout this proceeding that the use of their products will help promote or aid the growth of hair and that their claim of relieving excessive falling hair is proper.

The Commission's experience in this field has informed it that members of the public are particularly sensitive about loss of hair and are overly susceptible to claims that a product or treatment will help guard against hair loss or help promote hair growth. There is a great temptation to sellers of hair preparations to make such claims or at least to imply that such benefits will result from the use of their product.

The Commission has issued orders in other cases prohibiting the dissemination in commerce of false representations that hair preparations, used with massage, will have any effect in preventing loss of hair or will promote the growth of hair.

For these reasons the Commission is of the opinion that the proper relief herein is an order prohibiting the dissemination of advertisements which represent that the use of Jeris as directed will relieve or prevent excessive falling hair or promote or help to promote hair growth. For similar reasons, it is believed that respondents should be prohibited from misrepresenting the qualifications of barbers as found herein.

ORDER TO CEASE AND DESIST

It is ordered, That the respondent Ar. Winarick, Inc., a corporation, and its officers, and respondents Jules Winarick, Nathan Winarick, and Floyd H. Pepper, individually and as officers of Ar. Winarick, Inc., and their respective officers, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of the preparation "Jeris Antiseptic Hair Tonic" or any product of substantially the same composition or possessing substantially similar properties, whether sold under the same name or under any other name, do forthwith cease and desist from directly or indirectly:

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

- (a) Relieve or help to prevent excessive falling hair.
- (b) Promote or help to promote hair growth.

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

It is further ordered, That the respondent Ar. Winarick, Inc., a corporation, and its officers, and respondents Jules Winarick, Nathan Winarick and Floyd H. Pepper, individually and as officers of Ar. Winarick, Inc., and their respective officers, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of their preparations "Jeris Antiseptic Hair Tonic" and "Fore," or any other preparation of sub-

stantially the same composition or possessing substantially similar properties, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Representing, directly or by implication, that barbers are qualified for or capable of diagnosing or treating diseased conditions of the hair or scalp.

It is further ordered, That 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.

Commissioner Mead concurring except for the finding regarding use of the word "free." (See Mead dissent in *Walter J. Black, Inc., et al.*, Docket 5571). Commissioners Mason and Gwynne dissent except for the finding regarding use of the word "free."

DISSENTING OPINION

By GWYNNE, Commissioner:

Paragraph Six of the Amended Complaint charges that respondents represented:

- (1) that the use of their preparation Jeris Antiseptic Hair Tonic—
 - (a) will cure dandruff;
 - (b) will relieve itchy scalp;
 - (c) will prevent excessive falling hair;
 - (d) used with massage will stimulate blood flow in the scalp to the extent that the hair roots will be nourished and hair growth promoted;
 - (e) will result in a healthy scalp;
- (2) that barbers by reason of their training are capable of diagnosing and treating diseased conditions of hair and scalp.

The hearing examiner found against counsel supporting the complaint as to all charges except that contained in (2) above.

The majority opinion reverses the hearing examiner as to (1) (c) and (1) (d), and approves his conclusions as to (1) (a), (1) (b), (1) (e), and (2).

This dissent has to do only with (1) (c), (1) (d), and (2).

(1) (c) *That the use of respondents' preparation will prevent excessive falling hair.*

As to this claimed representation, the hearing examiner found that the advertisements used the word "relieve" rather than "prevent" and that the two words are not synonymous.

In this I agree with the hearing examiner. An examination of the exhibits fails to find any use of the word "prevent" in connection with the words "excessive falling hair." The words "relieves excessive fall-

ing hair" are found in Commission's Exhibits 1, 5, 6, and 8. In none of these exhibits is any language used which would justify the charge that respondents' product is capable of preventing excessive falling hair.

That there is a difference in the meaning of the two words is obvious. A witness for counsel for the complaint (in connection with his testimony as to dandruff) said: "I would say the word 'relief' means a temporary minimizing."

On this part of the case the hearing examiner said:

"As to the effect of Jeris upon excessive falling hair the record is scanty. It is clear that Jeris will neither prevent nor cure baldness, but there is no charge to that effect. It will not prevent falling hair. The advertisements do not say that it will. Through massage and cleansing, incident to the use of Jeris, loose hairs will be removed. 'Excessive falling hair' was not defined and is a term of indefinite connotation. It might refer to the hair that comes out with combing or falls to the shoulders during the course of a day. This certainly will be reduced by daily massage and cleansing. In the absence of more specific evidence and upon the state of the record the charge in respect to excessive falling hair cannot be found to have been established."

The evidence, however, goes a little beyond that. A witness for counsel for the complaint testified that dandruff might cause falling hair and that the removal of dandruff might help in that regard. There is other evidence that preparations such as the one in question are an aid in the removal of dandruff and that, coupled with massage, might lessen the amount of falling hair.

(1) (d) *That used with massage, respondents' preparation will stimulate blood flow in the scalp to the extent that hair roots will be nourished and hair growth promoted.*

The complaint does not charge respondents with representing that its product "will promote hair growth" used independently of massage.

There is testimony that massage would temporarily increase the flow of blood to the scalp and that such process would be aided by a product such as Jeris, which acts as a counter-irritant and also helps remove dandruff scales. There is a dispute as to the amount of good, if any, that increasing the circulation in the scalp would accomplish in promoting hair growth. The expert witness for the respondents testified it would have good results. The testimony of the experts for counsel supporting the complaint is not a categorical denial of this proposition. In fact in their own work they apparently recognize that increasing the flow of blood to the scalp might be beneficial to the scalp and hair.

All the expert witnesses were commendably frank in their testimony. They point out that there is no complete agreement as to what will affect hair growth and that scientific opinion on the subject has been and is subject to change. It is interesting to note that there is not the certainty among the experts on this subject that seems to exist in other quarters.

The hearing examiner did not attempt to resolve the disputed questions of fact as to (1) (c) and (1) (d). Faced by this uncertainty and conflict of opinion, he held that the party having the burden of proof had failed to sustain it. In such a situation the findings of the hearing examiner who saw and heard the witnesses should be given considerable weight by the Commission. (*See Universal Camera Corp. v. National Labor Relations Board*, 340 U. S. 474, and *Folds v. Federal Trade Commission*, 187 F. 2d 658.)

(2) *That barbers by reason of their training are capable of diagnosing and treating diseased conditions of the hair and scalp*

This charge is based on the following advertisement:

“For hair and scalp care you can depend on your barber’s recommendation. Your barber is trained in hair and scalp care and qualified to advise you. So, if you happen to be troubled with dandruff, falling hair, or some other hair problem, as so many men are, remember to consult your barber.”

The evidence is that dandruff, itchy scalp, and falling hair are symptoms which may arise from many causes, including certain diseases which could be treated only by qualified members of the medical profession. However, it appears that the percentage due to diseases (as that word is generally understood) is relatively small. There is evidence that 85 percent of all dandruff is “ordinary” dandruff which may be removed by certain cleansing agents and other attention which barbers rather than doctors are qualified to render.

To conclude from the above advertisement that barbers are qualified to treat diseases would seem to be unrealistic. If a barber should publish a similar advertisement about his qualifications, it is difficult to imagine any local prosecuting attorney bringing him into court on the ground that he was holding himself out as a doctor. The functions and duties of the barber and the physician are well known. We should not conclude that the public will fail to interpret this advertisement against their background of general human experience and knowledge.

The reasonable interpretation of the language of the advertisement is that the barber is qualified to advise you *as a barber* in that field in which barbers normally operate. His advice to a person suffering

from some scalp diseases might be to consult a doctor. Most general practitioners in the medical profession refer a patient to a specialist when the situation requires it. That would not prevent them from holding themselves out as physicians capable of administering to most of the needs of their patients and of directing them to specialists when that was the proper course.

I suspect that on every working day thousands of people do consult their barbers in regard to hair and scalp care. They will be interested to learn that an agency of the Federal Government now proposes that they first go to their physician or perhaps their psychiatrist.

The following statement of the hearing examiner is worthy of thoughtful consideration.

“About the meaning to the public of any particular advertisements there may well be honest differences of opinion but there are certain principles which should be controlling. Statements should not be read out of context. Words of simple and well established meaning should be accepted at their ordinary connotation. The advertisement should be considered in relationship to the product advertised.

“The product at issue in this proceeding is a hair tonic not a medicament. The general public would not look upon the advertisements of a hair tonic with the same expectancy as they would upon an advertisement of a medicament having alleged curative powers. The language used by respondents is simple language which those of even the most modest education should be able to read and understand. There is nothing mysterious or involved in the phraseology. Respondents' product is harmless.”

In the words of a distinguished jurist in *Prima Products, Inc. v. Federal Trade Commission* (decided January 7, 1954, by the United States Circuit Court of Appeals for the Second Circuit): “The controversy now before us bears a marked resemblance to the proverbial tempest in a teapot.”

I would dismiss the complaint.

Commissioner MASON joins in this dissent.

IN THE MATTER OF
JAMES H. SEWELL AND GEORGE PEPPERDINE, TRADING
AS BURNS CUBOID COMPANY

DECISION IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE
COMMISSION ACT

Docket 5850. Complaint, Feb. 21, 1951—Decision, Mar. 12, 1954

Where two partners engaged in the manufacture of a device designated as "Cuboids," "Burns Cuboids," or "Cuboid Foot Balancers," made of cork, felt, leather, with no metal, and in the interstate sale of said products and of a similar supplemental device known as "Doggies" to numerous department stores and shoe stores; in advertising through circulars and advertisements in newspapers, magazines, and other periodicals—

- (a) Represented that the use of their devices would assist the wearer to obtain body balance and foot balance, would relieve aches and pains regardless of the cause, would result in more normal foot action, assure the user of a posture poise and balance and assist in improving the stance;
- (b) Represented that housework would be rendered less tiresome by wearing said devices, that use thereof would afford increased foot health and comfort and beneficially assist in the distribution of the body weight;
- (c) Represented that upon correct position of the cuboid bone depended the relative position of every other bone in the foot and that if such bones were maladjusted as to position, use of such device would serve or assist to normalize their position and that calloused feet would be relieved by the use thereof; and
- (d) Additionally represented through the use of the term "Foot Balancers" in the designation and description of their device, that use thereof would assist the wearer to balance the feet or body;

The facts being that foot disorders or foot troubles generally would not be benefited by wearing said devices; instances in which they would serve beneficially to change the area of pressure would be fortuitous and rare; use thereof might aggravate the condition for which used; they were not an effective treatment for ordinary foot aches and pains and had no therapeutic value in the treatment thereof; could not be relied upon to lessen the fatigue caused by housework or other physical effort; would not favorably influence the position, action, or function of the cuboid bone which plays only a minor role in balancing the body; nor realign, etc., the position of other bones in the feet; and there was no reasonable possibility that those wearing respondents' shoe inserts secured through fitting and recommendation of respondents' representatives or by other sales personnel would receive the orthopedic corrective or therapeutic benefits which their advertisements promised would be afforded to them:

Held, That such acts and practices, under the circumstances set forth, were all to the prejudice and injury of the public and constituted unfair and deceptive acts and practices in commerce.

Before *Mr. Everett F. Haycraft*, hearing examiner.

Mr. R. P. Bellinger for the Commission.

Mr. George R. Maury, of Los Angeles, Calif., for respondents.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on February 21, 1951, issued and subsequently served its complaint in this proceeding upon James H. Sewell and George Pepperdine, co-partners trading as Burns Cuboid Company, charging said respondents with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of said Act. After the issuance of said complaint and the filing by respondents of their answer thereto, hearings were held at which testimony and other evidence in support of and in opposition to the allegations of the complaint were introduced before a hearing examiner of the Commission, theretofore designated by it, and such testimony and other evidence were duly recorded and filed in the office of the Commission. On December 31, 1952, the hearing examiner filed his initial decision.

Thereafter, within the time permitted by the Rules of Practice of the Commission, respondent James H. Sewell appealed from the initial decision of the hearing examiner and this matter came on for final hearing upon the complaint, answer, testimony and other evidence, briefs in support of and in opposition to such appeal and oral argument; and the Commission, having duly considered the record herein and having ruled upon said appeal and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes the following findings as to the facts, conclusion drawn therefrom, and order, the same to be in lieu of the initial decision of the hearing examiner.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. At the time of the issuance of the complaint herein, respondents James H. Sewell and George Pepperdine were co-partners trading as Burns Cuboid Company having their principal place of business at 414 East 4th Street, Santa Ana, California. On or about May 1951, respondent George Pepperdine disposed of his entire interest in said business to his co-partner respondent James H. Sewell and since that time has had no connection whatever with that business. Respondent James H. Sewell, being the sole owner thereof, has operated the business in the name of Burns Cuboid Company, the address of the business remaining the same.

PAR. 2. Said respondents for several years last past have been, and respondent James H. Sewell now is, engaged in the business of manufacturing and selling a device, as "device" is defined in the Federal Trade Commission Act, generally designated as "Cuboids," "Burns

Findings

50 F. T. C.

Cuboids" or "Cuboid Foot Balancers" and an experimental device which is similar thereto known as "Doggies." Respondents' device is made of cork, felt and leather, containing no metal whatsoever, and has elevations along its sides beginning where the forward sides of the wearer's heel will be placed when worn. These elevations extend forward and are intended to end as an elevation across the area of the ball of the foot behind the metatarsal joints. Respondents' products are sold in pairs for insertion in shoes for the purpose of relieving foot troubles, aiding in balancing the feet and the body, assisting the bones of the feet to regain and hold their normal positions, and to generally add comfort otherwise to the feet of the wearer. Respondents have caused said devices to be transported from their place of business in the State of California to purchasers thereof and to numerous department stores and shoe stores located in various other States of the United States, in which department stores and shoe stores respondents have representatives for the purpose of fitting the device into the shoes of customers and selling the same to the individual customers. During the times mentioned herein, respondents have maintained a course of trade in said products in commerce between and among the various States of the United States.

PAR. 3. Respondents, since 1947, have disseminated and are now disseminating advertisements concerning their said device by the United States mails and by various other means in commerce as "commerce" is defined in the Federal Trade Commission Act for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said device; and respondents have disseminated and have caused the dissemination of advertisements concerning their said device by various means for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of their device in commerce as "commerce" is defined in the Federal Trade Commission Act. Included in the circulars, leaflets, pamphlets and advertisements appearing in newspapers, magazines and other periodicals of interstate circulation, which respondents have disseminated or caused to be disseminated, have been the following statements and representations:

Cuboids help to balance your body weight * * *

CUBOID
FOOT BALANCERS

* * * the foot and body balance, the relief from aches and pains CUBOIDS afford. Better poise and balance replace aches and pains.

* * * Enjoy more normal foot action with Cuboids.

They're the modern way to foot relief—combining scientific principles of balance and support to lessen fatigue and help improve your stance.

Now everyone can enjoy better posture, poise and balance with * * * Cuboids.
Metal-Free Cuboids.

Especially designed to help you enjoy increased foot health and comfort.

With Cuboids foot pains often disappear as if by magic.

Cuboids foot balancers make housework less tiring.

Cuboids help to distribute body weight * * *

The feet are the body's foundation. Cuboids balance this foundation and provide the basis for correct posture.

The Cuboid bone is the keystone of the outer or weight-bearing arch and its position determines the relative position of every other bone in the foot. Cuboid metal-free foot balancers are scientifically designed to help bring these bones into normal position.

Cuboids afford effective relief to aching and calloused feet.

PAR. 4. Through use of the advertisements containing the statements and representations hereinabove set forth, respondents have represented, directly and by implication, that the use of their device will assist the wearer to obtain body balance and foot balance; that it will relieve aches and pains regardless of the cause thereof; that more normal foot action will result from the use of said device; that respondents' device will assure the user better posture, poise and balance and that it will assist in improving the stance; that housework will be rendered less tiresome by wearing Cuboids; that the use of respondents' device will afford increased foot health and comfort and beneficially assist in the distribution of body weight; that upon the correct position of the Cuboid bone depends the relative position of every other bone in the foot, and that if these bones are maladjusted as to position the use of such device will serve or assist to normalize their position; and that calloused feet will be relieved by the use of Cuboids.

Through use of the term "Foot Balancers" in the designation and description of their device, respondents additionally represent and indicate that the use of their device will assist the wearer to balance the feet or body.

PAR. 5. Conflicting testimony was presented and received with respect to the truth or falsity of the foregoing representations. Orthopedic surgeons well trained in their field expressed opinions during the course of their testimony which support conclusions that such representations were false and misleading. On the other hand, the witnesses supporting the contention of the respondents that said representations were for the most part true consisted of a general practitioner who had not been in active practice for a number of years but who testified that he had given study to the question of posture of human beings; and another doctor of medicine who is also an osteopathic physician and who, in addition to conducting a practice primarily devoted to the treatment of foot conditions, has been engaged for many years as an adviser to a manufacturer of shoes featuring a

Findings

50 F. T. C.

device similar to that manufactured and sold by respondents. Considered also by the Commission in reaching its decision here, in the same manner as if the physician therein referred to had appeared as a witness in this proceeding, have been the evidentiary matters set forth in respondents' "offer of proof," appearing at pages 871 to 877 of the transcript of hearings.

PAR. 6. In attaining body balance in the foot, a person stands on what is called a tripod made up of the calcaneus (heel bone), the first metatarsal head, and the fifth metatarsal head, bound together with ligaments, tendons, and muscles, all of which are used, together with nerve supplies to those muscles, to maintain equilibrium. The main arch of the foot, known as the longitudinal arch, extends from the heel to the metatarsal area on the inner side of the foot and its components include the following bones: the calcaneus or heel bone, the astragalus or ankle bone, the scaphoid or navicular, the internal cuneiform and the first metatarsal. Most of the body weight thrust from the tibia bone of the leg is received and distributed through the medial group of bones just enumerated, both in a standing position and during locomotion.

The human foot is constructed to adequately bear the weight of the body without any further aid to nature. Before correct treatment can be decided upon for any person complaining of trouble with his feet, which requires realignment or readjustment of the foot bones, it is essential to obtain a complete history of the case including a thorough and expert diagnosis. Consideration must be given to the shoes being worn and sometimes X-rays must be taken. Frequently, treatment which may be beneficial for one foot may not be appropriate for the other foot of the same individual. A layman cannot make an accurate diagnosis of the conditions causing foot disorders.

PAR. 7. Testimony was introduced by respondents to the effect, among other things, that their device tends to fill in areas in the rear of the shoe where it is asserted, in many instances, a shoe does not fit or conform to the foot properly, that the device serves as a foundation for the Cuboid Bone where the weight assertedly is being balanced, and that its use acts to throw weight to the outer border of the foot and elevate the forward metatarsal area. These attributes, respondents contend, demonstrate, among other things, that the use of Cuboids aids in the distribution of weight and assists the wearer to attain foot and body balance.

Although it is true that respondents' device when inserted occupies or takes up some physical space in the shoe and that some depression of the Cuboids' rear surface may result from wear, other testimony presented in support of the allegations of the complaint indicates that

the device cannot be expected to grasp or grip sufficiently on the sides of the heel of the foot to correct all rolling tendencies of the heel or significantly support the back of the heel. Probative evidence was received also to the effect that respondents' device will not be instrumental in throwing the weight to the outer border of the foot should modification in these respects be of advantage. One reason why respondents' device manifestly cannot be depended upon to have this specific effect is the circumstances that both sides of the device are raised and there is the tendency for these lateral elevations to balance one another out.

Similar considerations give reason to doubt if the frontal elevation intended to end behind the metatarsal joints necessarily in all instances of use will raise materially the frontal area in relation to the heel bone. Assuming that elevation is afforded, however, there would be no assurance that a corresponding depression would exist in the metatarsal area so that pressure might be relieved and an improvement in balance or weight distribution stem therefrom. Respondents' support is so constructed, moreover, that it cannot affect the ligaments, the bony structures or the neuromuscular mechanism entering into the balance of the foot. Clear and convincing also is other testimony presented by witnesses called by counsel supporting the complaint to the effect that the elevations in Cuboids do not support or serve as a foundation for the Cuboid Bone.

Foot disorders or foot troubles generally, will not be benefitted by wearing respondents' device. The only way that foot troubles can be corrected or relieved by using respondents' device would be through the relief of pressure in the metatarsal area in the region of the ball of the foot. As stated by one witness with respect to respondents' device: "* * * if it happens to fit correctly and the particular person happened to have a foot which was adapted to this device, then the position of this metatarsal pad might happily hit the right spot * * *." It appears from the greater weight of the evidence that the instances in which Cuboids would serve beneficially to change the area of pressure would be happenstances and merely occasional or rare instances. On the other hand, the use of respondents' device might aggravate the condition for which it was being used to correct. Upon the basis of its consideration of the testimony and its consideration of the device itself, the Commission has concluded that the greater weight of the evidence demonstrates that there is no reasonable probability that those wearing respondents' shoe inserts secured through fitting and recommendation of respondents' representatives or by other sales personnel will receive the orthopedic, corrective, or therapeutic benefits which respondents' aforesaid advertising promises will be afforded to them.

PAR. 8. Upon the basis of the greater weight of the evidence, the Commission has concluded that the use of Cuboids will not assist the wearer to attain body balance or foot balance, or assist beneficially in the distribution of body weight. Such use will not be generally effective in affording the user better posture or poise or an improvement in stance nor will more normal or improved foot action result therefrom. The wearing of respondents' device will not afford or increase general foot health. Although the wearing of Cuboids may in some instances aid strained, tired feet, respondents' device cannot be relied upon to give comfort to users who have foot troubles or to correct or relieve conditions caused by misfitted shoes. Respondents' device is not an effective treatment for ordinary foot aches and pains and has no therapeutic value in the treatment of aching or painful feet. Cuboids will not be generally effective in treating or relieving calloused foot conditions and the use of Cuboids cannot be relied upon to lessen the fatigue caused by housework or other physical effort.

The Cuboid Bone is a bone shaped roughly in the form of a cube and is located toward the outer side of the foot near the fifth metatarsal. It is not recognized as initiating or activating any important function of the foot and although every bone in the foot is essential, the role of the Cuboid Bone in balancing the body is minor in degree. It is not the focal point or keystone for weight bearing either in stance or during locomotion, and in no sense do the forces of thrust concentrate upon the Cuboid Bone as the weight is being taken from the foot. The wearing of Cuboids will not favorably influence the position, action or function of the Cuboid Bone, nor will such use realign, readjust or normalize or improve the position of other bones of the feet.

PAR. 9. As previously stated, Cuboids will not assist in balancing the foot or the body or assist beneficially in the distribution of body weight nor will respondents' device be effective in improving the position of the bones of the feet. The Commission has accordingly concluded that respondents' use of the term "Foot Balancers" in the advertising for the device Cuboids has been false, misleading and deceptive and that only by excision of such term from respondents' advertising can the deception which has been engendered by its use in respondents' advertising be eliminated.

PAR. 10. (a) The complaint in this proceeding additionally charged that respondents in their advertising have represented that their device will strengthen weak muscles and feet, will improve poor circulation and will be effective in relieving pressure from sensitive parts of the feet such as nerve centers, and alleged in such connection that these statements and representations constituted false advertisements. It

806

Order

appears from the record, however, that the advertising statements to which these allegations refer have been discontinued and that they have not been used by respondents since the year 1947, which time is more than three years prior to the date when this proceeding was instituted. In the circumstances, the Commission is of the view that these charges of the complaint should be dismissed without prejudice to the right of the Commission to reopen this proceeding or to take such further or other action in the future as may be warranted by the then existing circumstances.

(b) The complaint also charges that respondents have represented that the use of Cuboids will afford relief to strained, tired feet and alleges, in such connection, that respondents' device possesses no therapeutic value as an aid to strained, tired feet. The greater weight of the evidence adduced in this proceeding does not support a conclusion that respondents' device possesses no value as an aid to strained, tired feet and the Commission is, accordingly, of the view that the charges relating to this issue of the proceeding should be dismissed.

PAR. 11. The use by respondents of the statements and representations, as found in Paragraphs 3 and 4 hereof, has the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous belief that such statements and representations are true and to induce a substantial portion of the purchasing public because of such erroneous and mistaken belief to purchase respondents' device.

CONCLUSION

The aforesaid acts and practices of respondents, as herein found, 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.

ORDER

It is ordered, That the respondents James H. Sewell and George Pepperdine, individually and as copartners trading as Burns Cuboid Company, or under any other name, their agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of respondents' device, designated generally as "Cuboids," "Burns Cuboids," "Cuboid Foot Balancers," or "Doggies," or any device of substantially similar construction or composition, whether sold under the said names or any other names, do forthwith cease and desist from:

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

(a) That the wearing of respondents' device will assist in balancing the feet or body.

(b) That respondents' device possesses therapeutic value for aching or painful feet.

(c) That the wearing of respondents' device will enable the user to achieve better posture or poise or will improve the stance.

(d) That the wearing of respondents' device will result in more normal foot action or improved foot action or foot health.

(e) That the wearing of respondents' device will afford increased comfort for the feet or decrease the fatigue resulting from housework or other physical efforts except to the extent that respondents' device may in instances reduce or relieve the discomfort associated with strained or tired feet.

(f) That the wearing of respondents' device will have beneficial effect upon the distribution of body weight.

(g) That the wearing of respondents' device will in any way aid the Cuboid Bone or its position or stability with respect to other bones of the feet or will serve to readjust, realign, normalize, or improve the position of the bones of the feet.

(h) That said device possesses therapeutic value in the treatment of calloused feet.

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

It is further ordered, That respondents, in connection with the offering for sale, sale or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of their device, as aforesaid, do forthwith cease and desist from use of the expression "Foot Balancers" or any other term or words of similar import or meaning to designate, describe or refer to their device.

It is further ordered, That the charges of the complaint referred to in subparagraph (a) of Paragraph 10 of the Commission's findings as to the facts be, and the same hereby are, dismissed without prejudice, and that the allegations of said complaint to which subparagraph (b) thereof relates be, and the same hereby are, dismissed.

806

Order

It is further ordered, That the 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 to cease and desist.

Commissioner Mead not participating for the reason that he did not hear oral argument and Commissioner Gwynne not participating for the reason that oral argument herein was heard prior to his appointment to the Commission.

IN THE MATTER OF
EMPIRE PRESS, INC., ET AL.

DECISION IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE
COMMISSION ACT

Docket 6086. Complaint, Mar. 20, 1953—Decision, Mar. 12, 1954

Where a corporation, and two individuals who controlled it, engaged in the manufacture and interstate sale and distribution of many kinds of push cards and punchboards so arranged as to involve games of chance, gift enterprises, or lottery schemes when used in making sales of merchandise to the consuming public, and including (1) "merchandise boards"; (2) "money boards" which provided for the distribution of cash amounts rather than merchandise to those securing winning numbers; and (3) "plain boards" with a blank "label" upon which purchaser-dealers, peddlers, or operators placed their own label or legend, for use in combination with other merchandise—

Sold and distributed such devices to many dealers in commerce in candy, cigarettes, clocks, razors, wallets, firearms, and other articles, who assembled with them assortments of various articles, which they exposed and sold to the purchasing public in accordance with the aforesaid sales plans; and
Thereby supplied to and placed in the hands of others the means of conducting lotteries, games of chance, or gift enterprises in the sale or distribution of their merchandise, contrary to an established public policy of the United States Government and in violation of criminal laws, and means for engaging in unfair acts and practices:

Held, That such acts and practices were all to the prejudice and injury of the public and constituted unfair acts and practices in commerce.

Before *Mr. John Lewis*, hearing examiner.

Mr. J. W. Brookfield, Jr. for the Commission.

Mr. Maurice J. Walsh and *Mr. Joseph F. Burns*, of Chicago, Ill.,
for respondents.

INITIAL DECISION BY JOHN LEWIS, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on March 20, 1953, issued and subsequently served its complaint in this proceeding upon the respondents named in the caption hereof, charging them with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of said Act. After the issuance of said complaint and the filing of respondents' answer thereto, hearings were held at which testimony and other evidence in support of the allegations of said complaint were introduced before the above-named hearing examiner,

theretofore duly designated by the Commission, and said testimony and other evidence was duly recorded and filed in the office of the Commission. Although respondents received due notice of all hearings and appeared by counsel at the first of said hearings they made no appearance at subsequent hearings and waived the opportunity afforded them to offer evidence in opposition to the allegations of the complaint. Thereafter, the proceeding regularly came on for final consideration by the hearing examiner on the complaint, the answer thereto, testimony and other evidence, and proposed findings as to the facts and conclusions presented by counsel, oral argument not having been requested; 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, conclusion drawn therefrom, and order:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Empire Press, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 466 West Superior Street in the City of Chicago, Illinois. Respondents Sylvea Zimmerman, Evelyn Zimmerman and Joseph Zimmerman are president, secretary, and general manager, respectively, of said corporate respondent. Respondent Sylvea Zimmerman is the wife of respondent Joseph Zimmerman and owns 98 percent of the stock of the corporate respondent. Said corporate respondent is dominated, controlled and directed by the individual respondents Joseph Zimmerman and Sylvea Zimmerman, and said respondents have cooperated and acted together in the performance of the acts and practices hereinafter found. Respondent Evelyn Zimmerman, although an officer of the corporate respondent, has not been employed by it for a period of approximately a year and a half and there is no evidence that said respondent now has or has had a dominant part in the affairs of said respondent. For that reason the complaint will be dismissed as to said individual respondent and the term "respondents" as hereinafter used will not include said individual.

Respondents are now, and for more than three years last past have been, engaged in the manufacture of devices commonly known as push cards and punchboards, and in the sale and distribution of said device to jobbers and dealers in various articles of merchandise in commerce between and among the various States of the United States, and to jobbers and dealers in various articles of merchandise and to operators of said devices located in the various States of the United States.

Respondents cause and have caused said devices, when sold, to be transported from their place of business in the State of Illinois to purchasers thereof at their points of location in the various States of the United States other than Illinois. There is now and has been for more than three years last past a course of trade in such devices by said respondents in commerce between and among the various States of the United States.

PAR. 2. In the course and conduct of their said business, as described in Paragraph 1 hereof, respondents sell and distribute, and have sold and distributed, to said jobbers and dealers in merchandise and to operators thereof, pushcards and punchboards so prepared and arranged as to involve games of chance, gift enterprises or lottery schemes when used in making sales of merchandise to the consuming public. Respondents sell and distribute, and have sold and distributed, many kinds of pushcards and punchboards, but all of said devices involve the same chance or lottery features and vary only in detail.

Many of said pushcards and punchboards have a printed legend or instructions on the face thereof, commonly referred to as a label, which explains the manner in which said devices are to be used or may be used in the sale or distribution of merchandise. The prices of the sales on said pushcards and punchboards vary in accordance with the individual device. Each purchaser is entitled to one punch or push from the pushcard or punchboard, and when a push or punch is made, a disc or printed slip is separated from the pushcard or punchboard and a number is disclosed. The numbers are effectively concealed from the purchasers and prospective purchasers until a selection has been made and the push or punch completed. Certain specified numbers entitle purchasers to designated articles of merchandise. Persons securing lucky or winning numbers receive articles of merchandise without additional cost at prices which are much less than the normal retail price of said articles of merchandise. Persons who do not secure such lucky or winning numbers generally receive nothing for their money other than the privilege of making a push or punch from said card or board. The articles of merchandise are thus distributed to the consuming or purchasing public wholly by lot or chance.

Such punchboard devices, with printed labels providing for their use in connection with the distribution of merchandise, are commonly referred to as "merchandise boards." Respondents also sell and distribute boards with printed labels which provide for the distribution of cash amounts rather than merchandise to persons securing lucky winning numbers. The latter type of board is commonly referred to as a "money board."

In addition to pushcard and punchboard devices containing printed labels with specific instructions regarding their use, either as merchandise boards or money boards, respondents also sell and distribute a substantial number of pushcards and punchboards with no instructions of legend thereon as to their use. Such boards with a blank label are commonly referred to as "plain boards." The purchasers thereof place their own labels or instructions thereon which are similar to the instructions or labels used by respondents. Such plain boards are sold by respondents to jobbers and wholesalers, who make up so-called "merchandise deals" consisting of assortments of various articles of merchandise together with said pushcard or punchboard devices, and prepare their own labels for use on said boards by the retailer to whom said assortment is sold. Such boards are also sold to peddlers and operators who prepare their own labels for use at the retail location where the boards are distributed on a sale, consignment, or percentage basis. The labels provide for the distribution of merchandise as prizes, such merchandise being either supplied by the peddler or operator who prepares the label or by the retailer who may have certain merchandise which is not moving rapidly enough.

While the so-called plain boards are sometimes used to distribute cash prizes, this is the exception rather than the rule since a person desiring to use a money board can ordinarily purchase a board already prepared by the manufacturer with a printed label providing for stipulated cash prizes. Because of the variety of merchandise which dealers desire to sell or distribute it is more difficult to prepare a standard merchandise board with a printed label suitable for different types of merchandise. Hence dealers and operators make wide use of plain boards which permit them the desired latitude in making up labels suitable for the particular merchandise which they desire to sell or distribute at the time. The primary use made of such plain pushcards and punchboards and the manner in which they are normally and commonly used, by the ultimate purchasers thereof, is in combination with other merchandise so as to enable said ultimate purchasers to sell or distribute said other merchandise by means of lot or chance as hereinabove found.

PAR. 3. Many persons, firms and corporations who sell and distribute, and have sold and distributed, candy, cigarettes, clocks, razors, wallets, firearms and other articles of merchandise in commerce between and among the various States of the United States, purchase and have purchased respondents' said pushcard and punchboard devices, and pack and assemble, and have packed and assembled, assortments comprised of various articles of merchandise together

Conclusion

50 F. T. C.

with said pushcards and punchboard devices. Retail dealers who have purchased said assortments, either directly or indirectly, have exposed the same to the purchasing public and have sold or distributed said articles of merchandise by means of said pushcards and punchboards in accordance with the sales plan, as described in Paragraph 2 hereof. Because of the element of chance involved in connection with the sale and distribution of said merchandise by means of said pushcards and punchboards, many members of the purchasing public have been induced to trade or deal with retail dealers selling or distributing said merchandise by means thereof. As a result thereof, many retail dealers have been induced to deal with or trade with wholesalers, jobbers, peddlers, and operators who sell and distribute said merchandise, together with said devices.

PAR. 4. The sale of merchandise to the purchasing public through the use of, or by means of, such devices in the manner above found involves a game of chance or the sale of a chance to procure articles of merchandise at prices much less than the normal retail price thereof and teaches and encourages gambling among members of the public, all to the injury of the public. The use of said sales plan or methods in the sale of merchandise and the sale of merchandise by and through the use thereof, and by the aid of said sales plan or method is a practice which is contrary to an established public policy of the Government of the United States and in violation of criminal laws, and constitutes unfair acts and practices in said commerce.

The sale or distribution of said pushcards and punchboard devices by respondents, as hereinabove found, supplies to and places in the hands of others the means of conducting lotteries, games of chance, or gift enterprises in the sale or distribution of their merchandise. The respondents thus supply to, and place in the hands of, said persons, firms, and corporations the means of, and instrumentalities for, engaging in unfair acts and practices within the intent and meaning of the Federal Trade Commission Act.

CONCLUSION

The aforesaid acts and practices of respondents, as hereinabove found, are all to the prejudice and injury of the public and constitute unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

Since the record discloses that respondents, on October 26, 1950, entered into a stipulation and agreement to cease and desist from the use of methods, acts, and practices substantially the same as, or similar to, those hereinabove found, and since the methods, acts, and prac-

tices hereinabove found are in violation of said stipulation and agreement to cease and desist, it is the conclusion of the examiner that there is a reasonable likelihood the remedial purposes of the Act will be thwarted unless the order issued herein is sufficiently broad to prevent the recurrence of such conduct in the future. The possibility of circumvention is particularly enhanced by the fact that respondents sell and distribute plain pushcards and punchboards which the record discloses are normally and commonly used in combination with merchandise rather than to distribute cash prizes. (See *Feitler v. F. T. C.*, 201 F. 2d 790, cert. denied, U. S. Sup. Ct., Oct. 12, 1953.)

ORDER

It is ordered, That respondents Empire Press, Inc., a corporation, and its officers and respondent Sylvea Zimmerman, individually and as an officer of said corporation, and Joseph Zimmerman, individually, and their respective agents, representatives, and employees, directly or through any corporate or other device, do forthwith cease and desist from:

Selling or distributing in commerce as "commerce" is defined in the Federal Trade Commission Act, pushcards, punchboards, or other lottery devices which are intended to be used or which, due to their design, are commonly and normally used in the sale or distribution of merchandise to the public by means of a game of chance, gift enterprise, or lottery scheme.

It is further ordered, That the complaint herein be, and it hereby is, dismissed as to respondent Evelyn Zimmerman.

DECISION OF THE COMMISSION

This matter came before the Commission upon cross-appeals by counsel supporting the complaint and respondents from an initial decision prohibiting respondents Empire Press, Inc., Sylvea Zimmerman and Joseph Zimmerman from:

"Selling or distributing in commerce as 'commerce' is defined in the Federal Trade Commission Act, push cards, punchboards, or other lottery devices which are *intended to be used or which, due to their design, are commonly and normally* used in the sale or distribution of merchandise to the public by means of a game of chance, gift enterprise, or lottery scheme." (Italics supplied.)

The complaint was dismissed as to respondent Evelyn Zimmerman.

Both parties in their appeals object to the portion of the order in the initial decision which is italicized above. Both request the Commission to modify this order to conform to the order approved by the

courts in *United States Printing and Novelty Co., Inc., et al. v. Federal Trade Commission*, 204 F. 2d 737 (C. A., D. C. 1953) and *Hamilton Manufacturing Co. v. Federal Trade Commission*, 194 F. 2d 346 (C. A., D. C. 1952). The change in the order desired by the parties would strike the above italicized words from the order and substitute for them the words "designed or intended to be." This modification would conform the order to those which are currently being issued by the Commission in similar cases and which have been approved by the courts. Such modification would be proper in all respects in this matter and should be granted. Either form of order would prohibit the sale of push cards or punchboards labeled as merchandise boards or sold for use as merchandise boards.

Respondents' only other contention in their appeal is that they take exception to the finding in the initial decision to the effect that many of respondents' push cards and punchboards have a printed legend or instructions on their face which explain the manner in which they are to be used or may be used in the sale of specified articles of merchandise. Respondents contend that with the possible exception of a cigarette board there is no card or board in evidence which has a label explaining how it is to be used in the sale of specified articles of merchandise.

The record contains two labels for punchboards which explain how they are to be used in the sale of cigarettes. In addition, it contains two of respondents' catalogs which specifically advertise certain of their punchboards as "merchandise boards." Illustrations of certain of these boards show that their labels explain how they are to be used to sell merchandise although the type of merchandise to be sold is not specified. Thus strictly construed, the excepted to finding should be modified by striking from it the words "various specified articles of." This inconsequential modification in the findings, however, in no way changes the conclusion in this case that respondents' acts and practices as found are in violation of the Federal Trade Commission Act.

The Commission being of the opinion that the findings as to the facts and order in the initial decision should be modified as hereinabove indicated and that as so modified it is appropriate in all respects to dispose of this proceeding:

It is ordered, That the appeals of counsel supporting the complaint and of respondent are hereby granted to the extent hereinabove indicated.

It is further ordered, That the initial decision is hereby modified by striking from the first sentence of the second paragraph of Paragraph 2 of the findings as to the facts the words "various specified

816

Order

articles of”; that as so modified the findings as to the facts and conclusion in the initial decision are hereby adopted as the findings and conclusion of the Commission; and that in lieu of the order contained in the initial decision the Commission issues the following as its order to cease and desist.

ORDER

It is ordered, That respondents Empire Press, Inc., a corporation, and its officers and respondent Sylvea Zimmerman, individually and as an officer of said corporation, and Joseph Zimmerman, individually, and their respective agents, representatives, and employees, directly or through any corporate or other device, do forthwith cease and desist from:

Selling or distributing in commerce as “commerce” is defined in the Federal Trade Commission Act, push cards, punchboards, or other lottery devices which are designed or intended to be used in the sale or distribution of merchandise to the public by means of a game of chance, gift enterprise, or lottery scheme.

It is further ordered, That the complaint herein be, and it hereby is, dismissed as to respondent Evelyn Zimmerman.

It is further ordered, That the respondent 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.

Decision

50 F. T. C.

IN THE MATTER OF
JOSEPH M. MOORE TRADING AS J. M. MOORE IMPORT-
EXPORT CO.

Docket 6087. Complaint, Mar. 20, 1953—Order and dissenting opinion, Mar. 13, 1954

Charge: Neglecting to disclose source of "Valiant Knight" and "Mor-Flex" expansion watch bands.

Before *Mr. John Lewis*, hearing examiner.
Mr. Jesse D. Kash for the Commission.

DECISION OF THE COMMISSION

Pursuant to Rule XXII of the Commission's Rules of Practice, the attached initial decision of the hearing examiner shall, on March 13, 1954, become the decision of the Commission.

Commissioner Mead dissenting.

ORDER DISMISSING COMPLAINT WITHOUT PREJUDICE

INITIAL DECISION BY JOHN LEWIS, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on March 20, 1953, issued and subsequently served its complaint in this proceeding upon the above-named respondent, charging him with the use of unfair and deceptive acts and practices and unfair methods of competition in commerce in violation of the provisions of said Act. After the issuance of said complaint, motions were filed by both respondent and counsel supporting the complaint requesting that all further proceedings in this matter be suspended pending the decision of the Commission in Matter of Manco Watch Strap Co., Inc., Docket No. 5854, a case involving issues substantially the same as the instant case. By order of the undersigned dated May 22, 1953, all proceedings in the instant case were suspended pending the issuance of a decision in Matter of Manco Watch Strap Co., Inc. Thereafter, by order and decision issued December 21, 1953, the Commission ordered the dismissal of the complaint in Matter of Manco Watch Strap Co., Inc.

This matter has now come before the hearing examiner on motion of counsel supporting the complaint, requesting that the complaint herein be dismissed without prejudice, for the reason that the facts in this proceeding are substantially the same as those in the Manco case and in the interest of uniform treatment of related cases.

The undersigned hearing examiner having duly considered said motion and the record herein, and it not appearing therefrom that the public interest requires any further proceedings upon the complaint at this time, and respondent not opposing the relief requested,

It is ordered that the complaint herein be, and it hereby is, dismissed, without prejudice to the right of the Commission to institute such further proceedings as future facts may warrant.

DISSENTING OPINION OF COMMISSIONER MEAD

A complaint in this case has been dismissed on the basis of the Commission action in dismissing the complaint in re Manco Watch Strap Company, Inc., Docket 5854. I dissented in the Manco case but did not state for the record the reasons for my dissent.

In view of the fact that this complaint is being dismissed because of the Commission action in the Manco case, I am stating herewith my reasons for disagreeing with such action, and these reasons apply to both cases.

In the Manco case the respondent imported watch bands from China and Japan into the United States. Respondent sold the bands in interstate commerce without adequately informing retailers and the ultimate consumers that the bands were imported from China and Japan.

The Commission on December 21, 1953 issued an order dismissing the Manco complaint and in such order stated:

“The evidence in the record indicates that there are no domestic watch or wrist bands which are sold at prices comparable to the prices at which the respondent’s imported bands are sold. There is no evidence in the record showing a preference on the part of a substantial number of members of the purchasing public for the higher priced domestic bands over respondent’s lower priced imported bands. The Commission is therefore of the opinion that the complaint herein should be dismissed.”

Commissioners Howrey and Gwynne did not participate in the decision in the Manco case, and I dissented. The decision was made by a majority of a quorum.

The Commission has found in a number of cases that a substantial number of persons in the United States believe that any commodities offered for sale in retail stores in the United States are manufactured in the United States unless the commodities are marked to indicate foreign origin.

In *Segal vs. Federal Trade Commission* (142 F. 2d 255), the Court referred to such a finding by the Commission and affirmed an order

the Commission requiring adequate markings of foreign-made goods. The Court referred to the testimony of a disinterested witness as follows:

“One witness was, for example, a buyer from the Woolworth Stores who testified that in his opinion American buyers had become accustomed to the marking of foreign goods, and assumed that goods were made at home when they carried no foreign mark.”

The Commission in its decision in the Manco case substantially narrowed and qualified the principle that sellers of foreign-made goods should disclose the fact that the goods are manufactured abroad. The Commission in effect stated that this disclosure is necessary only if there is a domestic product sold at a price comparable to the price at which the imported product is sold. That decision introduced into the law a principle which will be very difficult and complicated to enforce. For illustration, what is a “comparable” price? If the price of a domestic product is \$5.00 and the price of the imported product is \$4.00—are such prices comparable? If the answer is in the negative, what are the exact prices expressed in terms of dollars and cents for the prices to be “comparable?” Is not quality as well as price important to the consumer?

In my opinion the decision of the majority in the Manco case places an intolerable burden on the Government in enforcing the statute in this particular field. Under the decision the Government must attempt to prove the particular price range in which the American consumer will refuse to pay a higher price for the domestic product and will choose to purchase in turn the foreign-made product.

In my opinion the correct approach has been and should be to determine:

(1) whether or not the fact that products made in America or abroad is a material fact to a substantial number of consumers in the United States because such consumers prefer to buy American made goods;

(2) whether or not the failure to reveal the foreign origin of products causes such consumers to believe the products are made in the United States.

If the answers to Questions (1) and (2) are in the affirmative then it is an unfair practice for the seller to fail to reveal the material fact that the products are made in a foreign country.

This approach does not favor American-made products or foreign-made products. It simply requires the seller to state a material fact regarding his foreign-made product, that is, the fact that such product is foreign made, and the country of origin. The consumer, thus informed, can make up his own mind.

The Commission does not have to guess what is in the consumer's mind regarding comparative prices or quality. This principle is enforceable, informative, and effective.

For the reasons stated, I dissent from the action of the Commission in the Manco case and in this case in adopting a new principle regarding foreign markings. In my opinion this new principle will prove inadequate and ineffective.

IN THE MATTER OF
DORIS SAVITCH TRADING AS PERSONAL DRUG CO., AND
LEO SAVITCH

DECISION AND OPINION IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT

Docket 6089. Complaint, Mar. 31, 1953—Decision, Mar. 24, 1954

Where an individual trading as Personal Drug Co., and her manager who directed and controlled the business, engaged in the interstate sale and distribution of medicinal preparations which they designated as "Quick-Kaps" and as "D-Lay Capsules"; in advertising in newspapers of interstate circulation, including the "Afro-American"—

Falsely represented by implication that the use of their preparations would provide relief from delayed menstruation due to pregnancy; and specifically represented that its use would provide relief from said condition due to minor functional disorders and borderline anemia; when said product was of value only in those infrequent cases due to iron-deficiency anemia and then only if taken as directed for at least 30 days:

Held, That such acts and practices, under the circumstances set forth, were to the prejudice of the public and constituted unfair and deceptive acts and practices.

Before *Mr. William L. Pack*, hearing examiner.

Mr. Edward F. Downs for the Commission.

Mr. George Landesman, of New York City, for respondents.

DECISION OF THE COMMISSION

The Federal Trade Commission on March 31, 1953, issued a complaint charging Doris Savitch, an individual trading as Personal Drug Co., and Leo Savitch, individually and as manager of said company, with having violated the Federal Trade Commission Act by disseminating false advertisements of a drug preparation sold by them under the names "Quick-Kaps" and "D-Lay Capsules." Respondents filed an answer denying that their advertisements were false or misleading.

Pursuant to notice, hearings were held in Washington, D. C., on June 25, 1953, and in New York City on September 9, 1953, before William L. Pack, a hearing examiner, designated by the Commission to hear this proceeding. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues was afforded all parties. The testimony and other evidence were recorded and filed in the office of the Commission.

Filing of proposed findings and conclusions having been waived, the hearing examiner filed his initial decision on October 9, 1953, in

which he concluded that respondents have not advertised their preparation as an abortifacient as alleged but have violated the Federal Trade Commission Act by falsely advertising that their preparation is effective in the treatment of delayed menstruation due to functional troubles other than iron deficiency anemia.

Thereafter, counsel supporting the complaint appealed to the Commission from this initial decision. This appeal was submitted to the Commission upon briefs of the parties, oral argument not having been requested.

Upon consideration of the entire record herein, the Commission, for the reasons stated in the written opinion of the Commission issued herewith, hereby grants the appeal of counsel supporting the complaint insofar as it takes exception to the conclusion in the initial decision that respondents have not falsely advertised their preparation as an abortifacient and insofar as it does not find that respondents falsely advertised that borderline anemia is a cause of delayed menstruation. In lieu of the initial decision the Commission issues its findings of fact, conclusion, and order as follows:

FINDINGS OF FACT

I. Business of the Respondents

Respondent Doris Savitch is an individual trading as Personal Drug Co., with her principal place of business located at 6 Hester Street, New York, New York. Respondent Leo Savitch is the manager of this business and directs and controls its operations. Respondents' business consists of the sale and distribution of a medicinal preparation designated by them as "Quick-Kaps" and as "D-Lay Capsules." Respondents also sell this preparation while trading under the name "New York Drug Co."

Respondents sell this preparation to purchasers located in various States of the United States, other than New York, and during the period of time involved herein have regularly caused this preparation, when sold to be shipped from their place of business in the State of New York to these purchasers, in interstate commerce.

The preparation is compounded by respondents in capsule form and is usually sold in boxes containing 21 capsules. Each capsule contains the following ingredients:

Powdered Extract of Pulsatilla.....	1/10th grain
Powdered Extract of Cimicifuga.....	1/10th grain
Ferrous Sulphate.....	3 grains
Thiamin Hydrochloride.....	1 milligram
Manganese Dioxide.....	1/4th grain
Lactose, quantity sufficient to complete filling of capsule.	

The directions for use of the preparation are as follows: "Average Dose:—Adults One capsule three times a day until relieved. If condition persists, a physician should be consulted."

II. Respondents' Advertisements

Sales of the preparation are solicited by respondents principally through the medium of newspaper advertisements. Certain of these advertisements have been carried in newspapers having interstate circulation. Others have been carried in newspapers circulated within States other than the State of New York for the purpose of inducing and which were likely to induce the purchase of respondents' preparation in interstate commerce. A typical advertisement reads as follows:

PERIOD DELAYED?

(Overdue)

Don't Risk Disaster

Don't Worry

At last—it CAN BE SOLD, a new, extra effective Doctor-approved formula—"Quick-Kaps" capsules may relieve you of your biggest worry—when due to minor functional menstrual delay or borderline anemia. Scientifically prepared by registered Pharmacists "Quick-Kaps" capsules contain only medically recognized drugs, having no harmful after effects—Complete supply—packed in a confidential box only \$5.00. Send no money and we will mail C. O. D. plus small postal and C. O. D. charges or send \$5.00 cash and we will rush AIR MAIL. "Just the thing to have on hand."

For the reasons stated in the written opinion of the Commission issued herewith, the Commission believes that these advertisements, by implication, represent that the use of respondents' preparation will provide relief from delayed menstruation due to pregnancy. In addition, they specifically represent that its use will provide relief from delayed menstruation due to minor functional disorders and borderline anemia.

III. Value of Respondents' Preparation

The greater weight of the evidence is that the only ingredient present in respondents' preparation in a therapeutic dosage is ferrous (iron) sulphate. This ingredient is present in sufficient quantity to constitute a minimum therapeutic dosage in the treatment of iron deficiency anemia if given as directed over a period of at least thirty days.

The very great majority of cases of delayed menstruation are due to pregnancy. One of the infrequent causes may be iron deficiency

828

Order

anemia. Borderline anemia is not a cause of delayed menstruation. Respondents' product is of no value in any case of delayed menstruation other than in those infrequent cases due to iron deficiency anemia and then only if taken as directed for at least thirty days.

IV. *General Conclusion*

To the extent that respondents have advertised that their preparation will relieve cases of delayed menstruation due to pregnancy or borderline anemia or any other cause other than iron deficiency anemia, their advertisements are false and misleading in a material respect. Their use of such advertisements has the tendency and capacity to mislead and deceive a substantial portion of the public as to the value of respondents' preparation and to cause them to buy respondents' preparation because of their mistaken belief.

CONCLUSION

The acts and practices of respondents as hereinabove set out are to the prejudice of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered, That the respondents, Doris Savitch, individually, trading as Personal Drug Co., or trading under any other name, and Leo Savitch, as manager of her said business, their representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of their medicinal preparation designated "Quick-Kaps" or "D-Lay Capsules" or any preparation of substantially similar composition or possessing substantially similar properties, whether sold under the same names or under any other name, do forthwith cease and desist from:

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

- (a) That the use of said preparation will terminate pregnancy;
- (b) That said preparation is of any value in cases of delayed menstruation, unless such representations be expressly limited to those cases due to iron deficiency anemia and in which the use of said preparation is continued for a period of time not less than one month;
- (c) That borderline anemia will cause delayed menstruation.

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 preparation, which advertisement contains any representation prohibited in paragraph 1 hereof.

It is further ordered, That 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.

OPINION OF THE COMMISSION

By GWYNNE, Commissioner :

This matter is before the Commission on the appeal of counsel supporting the complaint from the initial decision of the hearing examiner denying in part the relief demanded in the complaint. Written briefs have been submitted and oral argument was not requested.

The complaint charges that respondents are violating the Federal Trade Commission Act in the sale and distribution of a preparation containing drugs, as "drugs" are defined in the Federal Trade Commission Act, designated by them as "Quick-Kaps" and as "D-Lay Capsules."

The questions presented are :

(1) Have the respondents represented directly or by implication that their preparation is an abortifacient when used as directed?

(2) If so, is said representation true?

(3) Have respondents represented that their preparation will provide affective relief from delayed menstruation when due to minor functional disorders, that borderline anemia will cause delayed menstruation, and that their preparation will provide effective relief therefor?

(4) If so, are these representations true?

Respondent Doris Savitch is an individual trading as Personal Drug Company with her principal place of business in the city of New York. Respondent Leo Savitch is the manager of the business and controls its operations. Respondents are engaged in the sale and distribution of a medicinal preparation designated by them as "Quick-Kaps" and as "D-Lay Capsules" and cause this preparation when sold to be transported from their place of business in New York to purchasers in various other States and in the District of Columbia, and maintain a course of trade in their preparation in commerce among the various States and in the District of Columbia.

S28

Opinion

On or about August 2, 1952, respondents caused the following advertisement to be published in a newspaper, to wit, the Afro-American, which advertisement was disseminated in interstate commerce:

PERIOD DELAYED?

(Overdue)

Don't Risk Disaster

Don't Worry

At last—it CAN BE SOLD, a new, extra effective Doctor-approved formula—"Quick-Kaps" capsules may relieve you of your biggest worry—when due to minor functional menstrual delay or borderline anemia. Scientifically prepared by registered Pharmacists "Quick-Kaps" capsules contain only medically recognized drugs, having no harmful after effects—Complete supply—packed in a confidential box only \$5.00. Send no money and we will mail C. O. D. plus small postal and C. O. D. charges or send \$5.00 cash and we will rush AIR MAIL. "Just the thing to have on hand."

The first question is, does the above advertisement represent directly or by implication that Quick-Kaps is an abortifacient when used as directed?

Some of the words and phrases used in the advertisement are significant. For example: "Don't worry"—"Don't Risk Disaster"—"May relieve you of your biggest worry"—"Medically recognized drugs having no harmful after effects"—"complete supply—packed in a confidential box." These are not the words ordinarily used to advertise a preparation whose sole claim is that it will relieve delayed menstruation due to minor functional disorders, or borderline anemia. "At last—it CAN BE SOLD, a new, extra effective Doctor-approved formula." The testimony of the medical experts was to the effect that the drugs making up the preparation were known and had been in use for some time. The above-quoted phrase would seem to imply that either because of a change in the law or recent medical discoveries, a new preparation was now being put on the market, a statement not borne out by the evidence. The advertisement also reads: "Send \$5.00 cash and we will rush AIR MAIL." "Just the thing to have on hand."

The physical makeup of the advertisement is also worthy of consideration. The words "Period Delayed (Overdue) Don't Risk Disaster, Don't Worry" are all at the beginning of the advertisement and in heavy type. The qualifying clause "when due to minor functional menstrual delay or borderline anemia" is in small type as is much of the rest of the advertisement.

In determining the construction that may reasonably be put upon an advertisement, it should, of course, be considered as a whole and

against a background of general experience and knowledge. It is a well-known fact that the selling and distribution of preparations or devices for the producing of an abortion is generally prohibited by law. Persons looking for such a product would not expect to find it advertised with the same clarity and directness as in the case of products not so prohibited. This advertisement seems to invite a reading between the lines. It is reminiscent of the situation existing in bootlegging days when a knowing wink might convey to the prospective purchaser the thought that the liquid being sold as "cold tea" was in fact illegal intoxicating liquor. As pointed out by the court in *Aronberg, trading as Positive Products Company v. F. T. C.*, 132 F. 2d 165:

"The ultimate impression upon the mind of the reader arises from the sum total of not only what is said but also all that is reasonably implied."

The medical testimony is to the effect that the most common cause of delayed menstruation is pregnancy. All the medical witnesses testified that when a patient comes to them because of delayed menstruation, the first thing they look for is pregnancy. One of the witnesses for respondent testified that some of his patients in such a situation were worried because they might be pregnant. He also testified that in the early part of a pregnancy, the patient would have no way of knowing whether the delayed menstruation was due to a pregnancy, a minor functional disorder, or anemia, or any other cause.

In view of this medical testimony, it is reasonable to believe that some persons "worry" about delayed menstruation and might think it was due to pregnancy. To such persons desiring for any reason to terminate that condition, respondents' advertisement could well be construed as promising relief. In any event, the mental condition of such person is an element to be considered in arriving at which construction might reasonably be put upon the advertisement.

As to this issue, the hearing examiner found that it is possible that in isolated instances, respondents' advertisement might be interpreted as representing that the product is an abortifacient, but concluded that the advertisement was not reasonably subject to such construction and that it does not have the tendency and capacity to cause any substantial portion of the public to believe that the preparation is offered as an abortifacient.

We disagree with this finding and find the facts to be to the contrary.

Counsel supporting the complaint, after laying the proper foundation, asked his medical witnesses as to their observations of the impressions created by the advertisement on their patients suffering from de-

layed menstruation. This evidence was offered and offer of proof was made on the authority of the following cases: *Benton Announcements, Inc. v. F. T. C.* (July 6, 1942), 130 F. 2d 254; *Charles of the Ritz Distributing Corporation v. F. T. C.* (July 6, 1944), 143 F. 2d 676; *Stanley Laboratories, Inc. v. F. T. C.* (October 20, 1943), 138 F. 2d 388.

Because of the view we take as to the sufficiency of the evidence in the record, we find it unnecessary to pass on the correctness of the ruling of the hearing examiner in refusing to admit this evidence.

On the second question, it is undisputed that the preparation is not an abortifacient.

As to the third question, we find that the advertisement does represent that the preparation will provide effective relief from delayed menstruation when due to minor functional disorders, that borderline anemia will cause delayed menstruation, and that the preparation will provide effective relief therefor. The remaining question, therefore, is as to the truth of these representations.

Although there is some difference of opinion among the medical witnesses, we believe that counsel supporting the complaint has sustained the burden of proving that borderline anemia, as defined by the doctors, will not cause delayed menstruation. The evidence indicates that there are various causes for delayed menstruation and that, with the exception of iron deficiency anemia, the various ingredients of respondents' preparation in the amounts indicated would have no therapeutic effect in correcting such causes.

The testimony does indicate (as found by the hearing examiner) that the ferrous sulfate (iron) in the preparation would be of therapeutic benefit in the treatment of delayed menstruation when the condition was due to that type of anemia known as iron deficiency anemia provided the preparation was taken over an extended period of time of not less than one month. We do not regard this as particularly material because neither in the complaint nor in respondents' advertisement was any such issue presented. So far as anemia is concerned, the respondents claim that borderline anemia will cause delayed menstruation and that their preparation will remedy the conditions. The proof is that anemia in the degree known as borderline will not cause delayed menstruation and also that anemia may be caused by other causes than iron deficiency. It is only for anemia due to iron deficiency that ferrous sulfate is indicated as having therapeutic value.

In addition to the jurisdictional facts before referred to, we find that respondents falsely represented directly or by implication:

- (1) That their preparation is an abortifacient;

(2) That their preparation has therapeutic value in cases of delayed menstruation caused by minor functional disorders;

(3) That borderline anemia will cause delayed menstruation and that their preparation will relieve delayed menstruation when caused by borderline anemia.

We further find that the acts and practices of respondents as hereinabove set out are all to the prejudice of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

It is directed that an order issue in accordance with this opinion

Order

IN THE MATTER OF
DENVER CHEMICAL MANUFACTURING CO.

Docket 5755. Complaint, Mar. 22, 1950—Order, Mar. 25, 1954

Charge: Advertising falsely "Antiphlogistine" drug preparation.

Mr. Joseph Callaway for the Commission.

Davies, Richberg, Beebe, Landa & Richardson, of Washington, D. C., for respondent.

ORDER DISMISSING COMPLAINT

This matter came before the Commission for consideration of the motion of counsel supporting the complaint to dismiss this proceeding without prejudice and respondent's answer stating that it has no objection to the motion.

The complaint herein alleges that respondent has disseminated false advertisements of its drug product "Antiphlogistine," which it recommends for use as a medicated poultice or dressing. Respondent's answer denies that its advertisements were false or misleading. Proceedings in this matter were held in abeyance because respondent changed its formula, directions for use, and advertising claims. In an affidavit dated February 26, 1954, respondent set out its advertising claims made since the issuance of the complaint herein and stated that it did not intend to make any additional claims which would run contrary to the allegations of the complaint.

Counsel supporting the complaint thereupon filed his motion, now under consideration, stating that respondent's present advertising claims do not justify further proceedings in this matter and moving that the Commission dismiss the allegations of the complaint without prejudice. Respondent filed its answer consenting to this motion being granted.

Upon consideration of this entire matter including respondent's affidavit, the Commission is of the opinion that there is no public interest in further proceedings in this matter at this time.

It is ordered, therefore, that the motion of counsel supporting the complaint is hereby granted, and that the allegations of the complaint are hereby dismissed without prejudice to the right of the Commission to issue a new complaint as to the alleged practices or to take such other action in regard thereto as future circumstances may require.

IN THE MATTER OF
PHILO BURT MANUFACTURING COMPANY

DECISION IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE
COMMISSION ACT

Docket 6079. Complaint, Feb. 4, 1953—Decision, Mar. 30, 1954

Where a corporation engaged in the manufacture and interstate sale and distribution of certain devices designated "Philo Burt Appliances," which were made by it for each customer in accordance with measurements made by him and inserted in a form supplied by the respondent; in advertising in newspapers, periodicals, circulars, and pamphlets in which were included references to and reproductions of various testimonials, and in which advertisements its primary emphasis was on ailments of the back and the spine—

- (a) Represented falsely that the use of said appliances would cure or constitute a competent and effective treatment for asthma, extreme sensitiveness of the skin, sensations of uneasiness, tingling, girdle pains, itching, headache, sleeplessness or loss of sleep, melancholy, spine sensitive to pressure, feeling of irritation, muscular weakness, fidgets, sudden starts, cramps of the legs or abdomen, sensations of heat and cold, skin flushed and hot, clammy sweats, worry, indigestion, loss of appetite, outbursts of temper, forgetfulness, and distaste for either work or society:

Held, That such acts and practices, under the circumstances set forth, were all to the prejudice and injury of the public and constituted unfair and deceptive acts and practices in commerce.

Before *Mr. John Lewis*, hearing examiner.

Mr. B. G. Wilson and *Mr. John J. McNally* for the Commission.

INITIAL DECISION BY JOHN LEWIS, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on February 4, 1953, issued and subsequently served its complaint in this proceeding upon respondent, Philo Burt Manufacturing Company, a corporation, charging it with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of said Act. Said respondent filed an answer and a supplemental answer to the complaint herein but failed to appear at the time and place fixed for hearing. At said hearing, testimony and other evidence in support of the allegations of the complaint were introduced before the above-named Hearing Examiner, theretofore duly designated by the Commission, and said testimony and other evidence were duly recorded and filed in the office of the Commission. The respondent was thereafter advised that, despite its failure to appear at the aforesaid hearing, a further hearing could be held

for the purpose of enabling it to offer testimony and other evidence in opposition to the allegations of the complaint. After first requesting such a hearing, which hearing was scheduled for June 15, 1953, in Jamestown, New York, respondent later requested that said hearing be cancelled and said hearing was accordingly cancelled. No testimony or other evidence in opposition to the allegations of the complaint was offered by respondent, except an affidavit as to the discontinuance of certain practices, which affidavit was made a part of the record in this proceeding by agreement of counsel in support of the complaint. Thereafter, the proceeding regularly came on for final consideration by said Hearing Examiner on the complaint, the answer and the supplemental answer thereto, testimony and other evidence, and the aforesaid affidavit of respondent, no proposed findings as to the facts and conclusions having been submitted by the attorney in support of the complaint or respondent and oral argument not having been requested; 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, conclusion drawn therefrom, and order:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, Philo Burt Manufacturing Company, is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located at Jamestown, New York. The respondent is now and for some time last past has been engaged in the business of manufacturing, selling, and distributing certain devices, as "device" is defined in the Federal Trade Commission Act, designated "Philo Burt Appliances." The devices are manufactured by respondent for each customer in accordance with measurements made by the customer and inserted by the customer in a form supplied by the respondent.

PAR. 2. In the course and conduct of its aforesaid business, the respondent causes its devices, when thus manufactured and sold, to be transported from its place of business in the State of New York to purchasers thereof located in various other States of the United States and in the District of Columbia. At all times mentioned herein respondent has maintained a course of trade in said devices in commerce between and among the various States of the United States and in the District of Columbia. The volume of business in said commerce has been and is substantial.

PAR. 3. In the course and conduct of its aforesaid business, respondent has disseminated and has caused the dissemination of advertise-

Findings

50 F. T. C.

ments concerning its said devices by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of said devices, including, but not limited to, advertising matter inserted in newspapers and periodicals and by means of circulars and pamphlets; and respondent has also disseminated and has caused the dissemination of advertisements concerning its said devices by various means, including, but not limited to, the aforesaid advertising media, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said devices in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Through the use of the said advertisements, respondent has represented, directly and by implication, that the use of "Philo Burt Appliances" will cure or constitute a competent and effective treatment for asthma, extreme sensitiveness of the skin, sensations of uneasiness, tingling, girdle pains, itching, headache, sleeplessness or loss of sleep, melancholy, spine sensitive to pressure, feeling of irritation, muscular weakness, fidgets, sudden starts, cramps of the legs or abdomen, sensations of heat and cold, skin flushed and hot, clammy sweats, worry, indigestion, loss of appetite, outbursts of temper, forgetfulness, distaste for either work or society, backache, contraction of the muscles, weariness, fatigue, spinal tuberculosis, spinal irritation, spinal weakness, inflamed spine, injury and deformity of the spine, arthritis of the spine, lordosis and spinal curvature.

While respondent admits having represented that its product is of significant value and benefit in the relief and treatment of most of the conditions above mentioned, it denies (1) that it has ever represented its product to be a "cure" or (2) that it has ever made any claim for the efficacy of its product in the case of "asthma." The evidence in the record requires a finding contrary to the contention of respondent on both of these matters. With respect to whether respondent has represented its product to be a "cure," a review of respondent's advertising literature discloses that, both expressly and by clear implication, respondent has represented its product as having permanent curative effects. Thus, in a 16-page booklet entitled: "An Aid in Spinal Ailments," where most of the above symptoms and conditions are referred to, there appears the following language descriptive of the subject matter of the publication:

The causes and the symptoms in spinal troubles and how they may be relieved, benefited or *overcome*¹ by means of proper Anatomical Support.

¹ All emphasis in quotations appearing in this paragraph have been supplied by the undersigned.

Other statements appearing in the same booklet are as follows:

Tonics, patent foods, various forms of treatment and fancy baths, merely serve to *temporarily relieve* the symptoms. Elongation of the spine to separate the vertebrae and hold the spine in normal alignment is considered proper procedure in bringing *permanent relief*. The Philo Burt Appliance gives an extension or lifting support to remove the pressure and thus aid in overcoming the cause.

* * * * *

No matter how severe your condition or how discouraged you may become, we urge the importance of making every effort toward *a cure or complete recovery*. This appliance has been *successfully used* in over eighty thousand cases.

The same booklet also contains excerpts from testimonial letters by alleged users of the device which are characterized by respondent as follows: "These Letters Give Proof of Relief, Benefit and *Recovery*, in Many Cases of Spinal Trouble." One of the excerpts states that the appliance brought about "complete recovery" from a curvature of the spine despite a previously unsuccessful spinal operation. Another testimonial refers to a person who had a "tubercular condition of the spine which left her with a weakened and curved back" and who, as a result of wearing respondent's device, had "no signs of her ever being afflicted with a curvature of any kind." Another testimonial refers to a person who was unsuccessfully treated by three doctors for a back injury but who, after wearing respondent's device for less than two months, had no sign of his former trouble and no longer required the device.

Similar references to testimonials appear in other advertising literature used by respondent as follows:

A woman, aided by Philo Burt support, writes: "Now, I can walk, run, dance, ride without aches and pains." A man, invalided by a bad fall, was enabled to walk, ride horseback and play tennis. A child paralyzed from a spinal deformity was playing around the house within four weeks. In our Free Book, many users tell of relief, improved appearance, *even permanent correction*.

* * * * *

Thousands of letters from Physicians and Patients tell of relief, benefit and *recovery*. These constitute indisputable evidence of the effective, anatomical support provided by our Appliances.

The testimonials are also separately printed by respondent and when it receives an inquiry from some person concerning its appliance, it frequently sends such persons copies of testimonials purporting to be from others who have had a similar condition. In a number of these testimonials there appear references to "permanent" results, to "recovery," to the fact that the wearer no longer has any "trouble" and is able to get along without the support, and to the wearer's "trouble" having been "overcome." Respondent has given the testimonials such headings as "Permanent Results," "A Cured Case!," and "A Complete Recovery."

Findings

50 F. T. C.

From respondent's advertising literature as a whole, including the excerpts above referred to, it seems clear, and it is so found, that respondent has represented that its product can be expected in many cases to achieve permanent results and to effect a complete cure or recovery. Respondent's contention to the contrary appears to be based on the claim that it has not specifically used the word "cure" in describing the effectiveness of its product. The record discloses that this word or words of similar import have been used by it. Moreover, irrespective of whether the word "cure" was used, it is clear from the context of its advertising literature that it has held out the hope of permanent curative effects to the wearers of its product and that, in any event, it has reasonably implied that if its product will not effect a complete cure in all cases it may be expected to at least substantially aid in the removal of the cause of failure of normal functions.² Respondent also relies on the fact that many of the claims made for its product are based on reports received from users of the device. However, without considering at this point the truth or falsity of these reports, it seems clear that to the extent respondent has caused such testimonials to be printed and to be distributed to prospective customers, it has thereby represented to such persons that they may expect similar results in their own cases.

With respect to the making of any claim of effectiveness in the case of "asthma," the record discloses that respondent distributed a testimonial in which the purported writer referred to the fact that respondent's device, in addition to helping her young son's spinal cord, also "cured [him] of the asthma." In an affidavit submitted by its president, respondent admits having published this testimonial but claims that it was printed in 1929, was given "limited circulation," and is no longer in print. However, on the issue of whether respondent did represent its device as a cure or effective treatment for asthma, it cannot be denied that the allegation of the complaint in this respect has been sustained.

PAR. 5. The aforesaid advertisements are misleading in material respects and constitute "false advertisements," as that term is defined in the Federal Trade Commission Act, for the following reasons:

(a) It is clear from the record that respondent's devices will not cure nor will they be of any significant value in the treatment of asthma, extreme sensitiveness of the skin, sensations of uneasiness, tingling, girdle pains, itching, headache, sleeplessness or loss of sleep, melancholy, spine sensitive to pressure, feeling of irritation, muscular weakness, fidgets, sudden starts, cramps in the legs or abdomen, sensations of heat and cold, skin flushed and hot, clammy sweats, worry,

² See *Aronberg v. F. T. C.*, 132 F. 2d 165 (C. A. 7).

indigestion, loss of appetite, outbursts of temper, forgetfulness, or distaste for either work or society. While respondent's primary emphasis in its advertisements is on ailments of the back and spine, it does refer to most of the above as symptoms arising from "spinal ailments," and claims that the wearing of one of its devices will help bring "permanent relief" from these conditions by "[e]longation of the spine to separate the vertebrae and hold the spine in normal alignment." However, according to the uncontradicted medical testimony in the record, the above-mentioned symptoms or conditions generally have their origin in parts of the body remote from the area treated by a support, and the wearing of a support such as respondent's would therefore not be of any significant value in their cure or treatment.³

(b) The use of respondent's devices will not cure backache, contraction of muscles, weariness or fatigue, spinal tuberculosis, spinal irritation, spinal weakness, inflamed spine, injury or deformity of the spine, arthritis of the spine, lordosis or spinal curvature; nor are said devices of any significant benefit in the treatment of said conditions or symptoms except under certain limited circumstances which are not present under respondent's method of sale and distribution of its products. Some of the conditions or symptoms above referred to are of a rather vague and general nature, being more in the nature of subjective complaints of patients than of specific ailments of the spine or back. In order to determine the cause of such symptoms or conditions, or to verify the existence of and determine the cause of specific ailments such as spinal tuberculosis, arthritis of the spine, lordosis or spinal curvature, a proper examination must be made by a competent physician. Such examination ordinarily includes the taking of a case history and a thorough physical examination of the patient, and frequently involves the making of laboratory tests and the taking of X-rays. Only after such an examination can the exact nature of the ailment be ascertained with any reasonable degree of accuracy and a proper course of treatment prescribed. The course of treatment may or may not involve the wearing of a support, depending on the

³ The only competent evidence in the record concerning the effectiveness of the devices is the testimony of two doctors called by the attorney in support of the complaint. One is an orthopedic specialist and the other a specialist in physical medicine and rehabilitation. Since both of these men appeared to be amply qualified as experts in the subject matter of this proceeding, and their testimony was reasonably plausible and credible on its face, and since no competent contradictory evidence was offered by respondent, their testimony has been accepted by the undersigned as the basis for many of the findings made herein with respect to the therapeutic value of respondent's device. The record does contain a number of respondent's testimonials and case records, which were offered in evidence by the attorney in support of the complaint. While such exhibits are admissible to show the type of representations made by respondent and as reflecting its general mode of operation, they are not competent to establish the truth of the statements therein made concerning the effectiveness of respondent's product since the persons purporting to have made such statements were not available for cross-examination.

Findings

50 F. T. C.

diagnosis of the physician. For example, in some cases of arthritis of the spine, it may be advisable to have the patient exercise and keep his spine mobile, rather than immobilized by a support. In some types of lordosis it may be harmful to wear a support which would restrict the normal functions of supporting muscles. While the wearing of a support may be indicated in some cases, it will not cure the condition but is merely an adjunct to more basic treatment measures, such as medical treatment, immobilization, exercise, and even surgery. For example, in the case of inflamed or infected spine, or spinal tuberculosis it would be gross error to confine treatment to the wearing of a support, since medical measures such as the use of antibiotics and possibly the use of surgery may be necessary to save the life of the patient and return him to normal health.

Even in those cases where the course of treatment properly involves the wearing of some form of support, the precise nature of the support should be prescribed by a competent physician. In some cases the support required may be of a more rigid nature than those of respondent, such as a plaster cast or a steel brace. Even where a support similar to respondent's is called for, the measurements should be taken by the manufacturer of the device or by a physician or some similar person familiar with the proper anatomical landmarks.

Under respondent's method of sale and distribution there is no reasonable assurance that the appliance will be of any benefit in the relief or treatment of any of the above conditions. Any benefit which does occur would be purely accidental. While some of the users of respondent's devices have been referred by physicians, and respondent mentions in some of its advertisements its desire to cooperate with physicians, the proper examination of the user and diagnosis by competent medical authority is not a prerequisite to the sale and distribution of the devices. Many of the users are persons who have seen respondent's devices advertised and who have written to respondent describing their symptoms or complaints. In such instances respondent has attempted by mail, and without proper physical examination, to prescribe a support suitable for the condition described, despite the fact that some of the conditions described are of a rather vague and general nature and may be due to a variety of causes which may or may not require a support. In some instances, a support has been sold despite the fact that the user's physician advised other treatment measures or other types of support. Moreover, the users and prospective users are given the impression, from respondent's advertising literature, that the wearing of the support is alone sufficient, or is a major factor, in curing, treating, or bringing relief from various ailments of the back and spine, thus causing them to overlook or neglect

more basic and effective methods of treatment. While the measurements for one of respondent's supports are sometimes prepared by the customer's physician, they are frequently made by the customer himself or some other untrained persons on a form supplied by respondent and there is therefore no assurance that a proper fit will be obtained.

It is therefore found that respondent's representations concerning the effectiveness of its devices in the cure and treatment of the above conditions or symptoms are false and misleading, since:

(1) The devices will not cure any of the above conditions or symptoms;

(2) The wearing of a support will not be of any benefit in the treatment of any of the above symptoms or conditions except as an adjunct to more basic treatment measures;

(3) When the wearing of a support is desirable as part of a course of treatment, the proper type of support should be prescribed by competent medical authority, after proper examination, and the measurements made by a properly trained person; prescribing by mail, on the basis of symptoms and measurements submitted by lay persons, is not calculated to assure that the user will receive a support best suited to his needs and one which will properly fit, nor will it assure that other necessary treatment measures, to which such support is merely an adjunct, will be undertaken.

PAR. 6. The use by respondent of the foregoing false and misleading statements contained in its advertisements, disseminated as aforesaid, has had and now has the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that all of such statements are and were true, and to induce a substantial portion of the purchasing public, because of such erroneous and mistaken belief, to purchase its said devices.

CONCLUSION

The aforesaid acts and practices of respondent, as hereinabove found, 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.

In determining the nature of the order to be issued herein, the undersigned has considered whether it should include a prohibition with respect to any claim of effectiveness for respondent's devices in the case of asthma. In view of the fact that this claim was not made in respondent's main booklet, but only in a single testimonial which was published in 1929 and given only limited circulation, and in view of the fact that respondent presently makes no claim of effectiveness for

Order

50 F. T. C.

its devices in the case of asthma and has no intention of making such claim, the remedial purposes of the Act will, in the opinion of the undersigned, be satisfied if a specific reference to asthma is not included in the order to be issued herein.

ORDER

It is ordered, That the respondent, Philo Burt Manufacturing Company, a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of its devices designated as Philo Burt Appliances, or designated by any other name, or any other product of substantially similar design or construction, do forthwith cease and desist from:

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

(a) That the use of respondent's said devices will cure or will be of any significant value in the treatment of extreme sensitiveness of the skin, sensations of uneasiness, tingling, girdle pains, itching, headache, sleeplessness or loss of sleep, melancholy, spine sensitive to pressure, feeling of irritation, muscular weakness, fidgets, sudden starts, cramps in the legs or abdomen, sensations of heat and cold, skin flushed and hot, clammy sweats, worry, indigestion, loss of appetite, outbursts of temper, forgetfulness, or distaste for either work or society;

(b) That the use of respondent's devices will cure backache, contraction of the muscles, weariness or fatigue, spinal tuberculosis, spinal irritation, spinal weakness, inflamed spine, injury to or deformity of the spine, arthritis of the spine, lordosis or spinal curvature;

(c) That the use of respondent's devices is a competent or effective treatment for backache, contraction of the muscles, weariness or fatigue, spinal tuberculosis, spinal irritation, spinal weakness, inflamed spine, injury to or deformity of the spine, arthritis of the spine, lordosis or spinal curvature, unless such representation is limited to cases where:

(1) the particular condition or symptom has been diagnosed by a competent physician as one requiring the wearing of a support,

(2) the type of support sold by respondent is recommended by the physician,

(3) the proper measurements have been made by respondent, the physician, or other properly qualified person, and

(4) the support is used in conjunction with other necessary treatment measures, as prescribed by the physician.

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 respondent's said devices, which advertisement contains any of the representations prohibited in Paragraph 1 hereof.

DECISION OF THE COMMISSION

The complaint in this case charges respondent, the Philo Burt Manufacturing Company, of Jamestown, New York, with falsely advertising its corset type of back supporters and braces which it sells as the "Philo Burt Appliance" or "Spinal Appliance." Respondent, which is not represented by counsel, denied that it had falsely advertised its products, in an answer filed for it by its President, Mr. R. J. Barrows.

A hearing was held on March 30, 1953, in New York City at which respondent's advertising was placed in the record and two expert medical witnesses testified as to the value of using respondent's devices for those conditions for which its use was recommended in its advertising. Full opportunity to present evidence and to examine and cross-examine witnesses was given to respondent, but it was not represented at the hearing. Respondent, however, did file an affidavit of its President stating that respondent's representations as to asthma were given limited circulation years ago, are now out of print and will not be reprinted. Opportunity to present proposed findings was given both parties but none were filed.

On June 29, 1953, the hearing examiner filed his initial decision in which he describes respondent's representations, fully discusses the effect of using respondent's devices on the symptoms, disorders and ailments for which its use is recommended, as shown by the testimony of the medical experts, and concludes that respondent has falsely advertised that the use of its devices will cure any of these conditions, are of no significant value in treating certain of these conditions and as to the other named conditions said devices are only of value as an adjunct to more basic medical treatment and only if properly fitted. The hearing examiner also found that those conditions for which respondent's device is beneficial can only be determined by a physician, and that the measurements used in making the device should be taken by the manufacturer, a physician or some other properly trained person. He concluded that, inasmuch as respondent's claims as to asthma had long been discontinued, no remedial action was necessary as to them.

Based on this record the hearing examiner in his initial decision prohibited respondent from disseminating advertisements which claim the use of its device will cure any of the named conditions (other than asthma), that it is of any significant value in the treatment for those conditions for which it had been found to be valueless (other than asthma) and that it is a competent or effective treatment for any of the other conditions named unless the claim is limited to cases where:

- (1) the particular condition or symptom has been diagnosed by a competent physician as one requiring the wearing of a support,
- (2) the type of support sold by respondent is recommended by the physician,
- (3) the proper measurements have been made by respondent, the physician, or other properly qualified person, and
- (4) the support is used in conjunction with other necessary treatment measures, as prescribed by the physician.

From this initial decision respondent appealed to the Commission.

Respondent has taken general exception to the entire decision and has specifically excepted to the findings that its business is substantial, that its acts and practices are unfair and deceptive, that respondent's method of selling does not assure that its device will fit and that it has sold its spinal support where the user's physician advised other treatment. Exception has also been specifically taken to paragraph 1 (c) of the order and to the findings on which it is based.

The business of the respondent is small. Its gross annual business amounts to approximately \$30,000. However, in cases of this type the extent of public interest is not controlled entirely by the total sales of the company involved. This respondent has made claims for permanent relief of serious back diseases and disorders by the use of a device which, if used without proper diagnosis, fitting and other more basic treatment measures, could make the condition worse. The public interest in such matters is great even though the gross sales are comparatively small.

Respondent also states that at the end of May, two months after the hearing herein, it discontinued all advertising in lay publications. It has requested an opportunity to enter into informal discussions for the purpose of agreeing on necessary revisions in its advertising material. The record shows, however, that in 1937 respondent entered into an agreement with the Commission to cease and desist from making many misrepresentations as to its devices. This stipulation has not been complied with. For example, respondent stipulated that it would not represent or circulate testimonials claiming that its spinal appliance is a competent treatment or an effective remedy for spinal disease. Despite this, respondent has recommended its device for "cases of * * *

Tuberculosis or any Disease or Arthritic condition of the Spine.” And it has circulated testimonials claiming complete recovery in cases of “Spinal Tuberculosis,” “Potts Disease” and “Chronic Spinal Arthritis” through the use of its device. Under these circumstances the Commission believes that this formal proceeding is required in the public interest.

Respondent makes each appliance to conform to the measurements submitted with the order on a “Measurement Blank” furnished by it. In its directions on how to order, it states that the measurements needed to make a perfect fit can be taken by any person or physician. The testimony of the medical witnesses in this case is that the average untrained individual is completely unqualified to make the required measurements, that such measurements can only be made by the manufacturer of the appliance, a competent physician or other trained person. Thus, respondent’s exception to the finding that its method of selling does not assure that its device will fit, is rejected.

Several of the testimonials used by respondent as advertisements clearly state that their authors used respondent’s device against the advice of their physicians. By the circulation of such testimonials, respondent minimized the importance of proper medical advice in the treatment of serious spinal diseases and disorders. Its objection to the finding that certain of its users purchased its device contrary to their physicians’ advice is groundless.

Respondent’s contention that paragraph 1 (c) of the order is improper upon this record is also rejected. The medical testimony clearly shows that a layman cannot distinguish between those cases where the use of respondent’s device would be proper and those where it would be injurious. This requires a physician’s diagnosis. Also, it shows that untrained laymen cannot take measurements which would provide a basis for the construction of a proper fitting appliance. It further shows that the services of a physician are required to prescribe the other necessary treatment measures for those conditions.

Paragraph 1 (c) of the order prohibits respondent from advertising its device as providing an effective treatment for those conditions where properly used it would be a part of the indicated treatment, without describing the other requirements needed to provide a proper treatment. Under this order respondent is not restricted to selling its device only to persons under a physician’s care, as respondent apparently fears. But it cannot advertise that its device will provide an effective treatment for the named conditions, as it will not unless the other requirements are complied with. The order permits respondent to describe its product as providing an effective treatment where the circumstances under which it will be effective are set out.

The Commission, therefore, being of the opinion that respondent's appeal from the hearing examiner's initial decision is of no merit and that said initial decision is appropriate in all respects to dispose of this proceeding:

It is ordered, That the appeal of respondent from the initial decision of the hearing examiner be, and it hereby is, denied.

It is further ordered, That the initial decision of the hearing examiner shall on the 30th day of March 1954 become the decision of the Commission.

It is further ordered, That the respondent shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with the order to cease and desist contained in said initial decision, a copy of which is attached hereto.