

Syllabus

IN THE MATTER OF
KOKEN COMPANIES, INC.COMPLAINT, FINDINGS, AND ORDERS IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 5743. Complaint, Mar. 1, 1950—Decision, Dec. 20, 1951

On appeal in the instant matter from the initial decision of the hearing examiner upon two grounds, one of which was that respondent, pursuant to an agreement to cease and desist, discontinued the dissemination of all false advertisements, the Commission was of the opinion that the facts of record showed that respondent had violated its agreement to cease and desist through the dissemination of a certain advertisement which, while some of the phrases were vague and obscure in their meaning, taken in its entirety had the effect of representing that respondent's preparation was an effective treatment for causes of dandruff, the subject of the agreement to cease and desist in the stipulation in question.

As respects respondent's second ground of appeal, namely, that the order, by including advertisement of any product possessing substantially similar properties, could prohibit respondent from truthfully advertising other products and, therefore, is not warranted by the Federal Trade Commission Act: the Commission's power to prevent unfair and deceptive acts and practices is not limited to prohibiting only representation of the identical act found to be illegal, the purpose of an order to cease and desist being to prevent unfair and deceptive acts and practices, the threat of which in the future is indicated because of their similarity or relation to those unlawful acts found to have been committed by the respondent in the past.

As respects the inclusion in an order prohibiting misrepresentation of product, of language including any preparation of substantially similar composition or possessing substantially similar properties, should respondent decide in the future to market such a preparation, which could truthfully be represented in any respect prohibited by the order to cease and desist, it may then petition the Commission to modify the order to permit such truthful representation.

As regards respondent's appeal from the initial decision of the hearing examiner, as above indicated, the Commission accordingly was of the opinion that its appeal was without merit, and that said initial decision was appropriate in all respects to dispose of the proceeding, and accordingly denied the appeal.

Where a corporation engaged in the interstate sale and distribution, among beauty and barber shop supplies, of a product designated as "Vanish" for use in the treatment of dandruff and other scalp disorders; in advertising through radio broadcasts, newspapers, magazines and circulars—

Falsely represented that its said product was a cure or remedy and a competent and effective treatment for dandruff and other scalp disorders, and that use thereof promoted the health of the scalp and hair;

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With tendency and capacity to mislead a substantial portion of the purchasing public and thereby cause its purchase of substantial quantities of its said product:

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

As regards respondent's appeal from the decision of the hearing examiner, on the ground that pursuant to agreement to cease and desist it had discontinued the dissemination of all false advertisements, the Commission was of the opinion that through the use of a vague and obscurely phrased advertisement since the time of the stipulation, it had violated its agreement to cease and desist.

In view of said fact, and the fact that such violation of the stipulation was continued even after it was brought to the attention of the respondent, and the further fact that the record contained no assurance by respondent or any of its officials that they did not intend to continue to so advertise, the Commission was of the opinion that the public interest required that respondent be ordered to cease and desist from the dissemination of false advertisements in the form of order contained in the hearing examiner's initial decision.

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

Mr. Jesse D. Kash for the Commission.

Shepley, Kroeger, Fisse & Ingamells, of St. Louis, Mo., for respondent.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Koken Companies, Inc., a corporation, hereinafter referred to as respondent, has violated the provisions of the said Act and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, Koken Companies, Inc., is a corporation organized and existing under the laws of the State of Missouri, with its office and principal place of business located at Broadway at Tyler, St. Louis, Missouri.

PAR. 2. The Respondent is now and for more than one year last past has been engaged in the business of selling and distributing a drug product, as "drug" is defined in the Federal Trade Commission Act, designated "Vanish," intended for the treatment of dandruff and other scalp disorders. The active ingredients of "Vanish" are:

Sodium Salicylate
Oxyquinalin sulphate
Arsenate trioxide, 5/100 of 1%
Denatured alcohol. 8%

PAR. 3. Respondent causes and has caused said product when sold to be transported from its place of business in the State of Missouri to purchasers thereof located in various other States of the United States and in the District of Columbia, and at all times mentioned herein maintained and has maintained a course of trade in said product in commerce among and between the various States of the United States and in the District of Columbia. Respondent's volume of business in such commerce is substantial.

PAR. 4. In the conduct of its business, respondent subsequent to March 31, 1938, has disseminated and caused the dissemination of certain advertisements concerning said product by the United States mails and by various means in commerce as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, radio continuities emanating from Radio Station WIL, St. Louis, Missouri, February 2, 18, 19, 22, 23, 26, 27, 1943; March 3, 6, 9, 10, 11, 15, 1943; Radio Station KWK, St. Louis, Missouri, March 4, 5, 15, 1943; April 7, 1943; and advertisements in "Modern Beauty Shop," March and November issues, 1944, and March 1945 issue; "St. Louis Post Dispatch," June 22, 1945 issue; and "American Hair Dresser," October 1945 issue, all of which were sent through the United States mails, and folders distributed in commerce entitled, "I Am After Your Customers' Scalps," for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said product; and respondent has disseminated and caused the dissemination of advertisements concerning its said product, including, but not limited to, the advertisements, radio continuities and circulars referred to above, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said product in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Among the statements and representations contained in said advertisements disseminated as aforesaid are the following:

Simply massage VANISH into your scalp between or after shampoos, let it dry naturally, and in an incredibly short time, see if every trace of dandruff hasn't disappeared completely.

That's all there is to it—and after 1 or 2 treatments, you should be absolutely free from dandruff.

Last summer I had quite a problem with my little girl who was 2½ years old at the time.

She had a scalp condition that is hard to explain. It was sore in spots and would form large thick scales.

Whenever I combed her hair, her scalp would start to bleed. I tried everything I knew for it, but nothing helped her. Then I was told about "VANISH." I tried it for 2 or 3 weeks. From the very first treatment her scalp showed marked improvement. In all I used ½ of a \$1 sized bottle and her scalp was completely clear again.

VANISH FOR DANDRUFF.

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When you want to get rid of irritating unsightly dandruff VANISH is the answer.

* * * dandruff I've got just the thing that will put him out of business in short order, too—VANISH.

VANISH, the dandruff banisher.

* * * don't take a chance with old fashioned remedies. * * * eliminate dandruff the modern way with VANISH.

This Public Enemy No. One, old man dandruff, but cheer up—you can put an end to his dirty work in a jiffy with VANISH.

* * * VANISH is not a cure-all. It is made to do just one job and do it thoroughly—get rid of dandruff.

Use VANISH to keep the hair well groomed and in good condition. VANISH is that remarkable new dandruff treatment so highly recommended by many leading hairdressers.

VANISH is the modern way of treating common dandruff that gets right to the root of the trouble in a jiffy.

Besides the pleasant feeling of the scalp, customers have also remarked how healthy the hair appears between shampoos.

Vanish encourages healthy scalps because they are dandruff free * * * and healthy, glossy well-groomed hair is a natural result of a healthy scalp.

* * * Joe's hair was smooth, healthy and well groomed. Joe used VANISH.

* * * How healthy the hair looks between shampoos.

VANISH for healthy hair.

Lovely hair grows in healthy scalps. VANISH is quick, simple, effective, exhilarates the scalp, refreshes the hair, removes dandruff.

PAR. 6. Through the use of the advertisements containing the statements and representations hereinabove set forth and others similar thereto, not specifically set out herein, respondent has represented directly and by implication that the use of Vanish is a cure or remedy and constitutes a competent and effective treatment for dandruff and other scalp troubles and promotes health of scalp and hair.

PAR. 7. The said advertisements are misleading in material respects and are "false advertisements," as that term is defined in the Federal Trade Commission Act. In truth and in fact "Vanish" is not a cure or an effective treatment for dandruff. Said product does not have any beneficial therapeutic effects in the prevention, treatment, or cure of any unhealthy scalp or hair condition nor will its use promote or be conducive to health of the scalp or hair.

PAR. 8. The aforesaid acts and practices of the respondent, as herein alleged, 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.

ORDERS AND DECISION OF THE COMMISSION

Order denying respondent's appeal from initial decision of the hearing examiner and decision of the Commission and order to file report of compliance, Docket 5743, December 20, 1951, follows:

This matter came on to be heard by the Commission upon the respondent's appeal from the hearing examiner's initial decision herein and brief in opposition thereto filed by counsel in support of the complaint (oral argument not having been requested).

The facts in this matter are as follows: Respondent manufactures and sells in commerce a drug preparation designated as "Vanish." In connection with the sale of this preparation, respondent has disseminated in commerce advertisements which represented that this preparation would prevent and cure dandruff and unhealthy scalp conditions. In fact, this preparation has no beneficial effect in the treatment of dandruff other than facilitating the removal of loose dandruff scales, has no therapeutic effect in the treatment of any scalp disorder, and does not promote the health of the scalp or hair. Upon this record, the hearing examiner issued an initial decision in which he found that respondent had disseminated false advertisements in violation of the Federal Trade Commission Act and ordered respondent to cease and desist from such dissemination in connection with its "* * * product designated 'Vanish,' or any product of substantially similar composition or possessing substantially similar properties, whether sold under the same name or any other name, * * *." From this initial decision, respondent made its appeal now being considered.

The grounds relied upon in support of this appeal are (1) that respondent, pursuant to an agreement to cease and desist, discontinued the dissemination of all false advertisements, and (2) that the order, by relating to advertisements of any product possessing substantially similar properties, could prohibit respondent from truthfully advertising other products and, therefore, is not warranted by the Federal Trade Commission Act.

The record shows that in 1948 respondent entered into with the Commission an agreement to cease and desist from disseminating advertisements containing the representations alleged to be false in the complain herein. Since the time of the said stipulation, respondent, in connection with the sale of said preparation, has disseminated in commerce the following advertisement:

Guaranteed?
vanish for dandruff
Vanish for dandruff is unconditionally
guaranteed, but users write us they
want to be guaranteed Vanish is always
available. Profitable Vanish dandruff
treatments in the shop increase sales
of the retail bottle.

After advising respondent that the new advertising was not in compliance with respondent's agreement to cease and desist, and

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upon respondent's continued use of this advertisement, the Commission issued its complaint in this proceeding alleging that respondent was disseminating false advertisements in violation of the Federal Trade Commission Act. The advertisements referred to in the complaint included those disseminated by respondent prior to its agreement to cease and desist.

The Commission is of the opinion that the facts of record show that respondent has violated its agreement to cease and desist by the dissemination of the above-quoted advertisement. Although some of the phrases in this advertisement are vague and obscure in their meaning, taken in its entirety this advertisement has the effect of representing that respondent's preparation is an effective treatment for the causes of dandruff. This violation of the stipulation was continued even after it was brought to the attention of the respondent by the Commission. Furthermore, this record does not contain any assurance by respondent or any of its officials that they do not intend to continue to so advertise. Under these circumstances the Commission is of the opinion that the public interest requires that respondent be ordered to cease and desist from the dissemination of false advertisements in the form of order contained in the hearing examiner's initial decision.

The Commission is of the further opinion that the order in this matter properly applies to advertisements relating not only to this preparation but also to any other of respondent's products of substantially similar composition or possessing substantially similar properties. The Commission's power to prevent unfair and deceptive acts and practices is not limited to prohibiting only repetition of the identical act found to be illegal. The purpose of an order to cease and desist is to prevent unfair and deceptive acts and practices, the threat of which in the future is indicated because of their similarity or relation to those unlawful acts found to have been committed by the respondent in the past. If respondent should decide in the future to market a preparation of substantially similar composition or possessing substantially similar properties which could truthfully be represented in any respect prohibited by this order to cease and desist, respondent may at that time petition the Commission to modify this order to permit such truthful representations.

The Commission, therefore, being of the opinion that the respondent's appeal is without merit and that the hearing examiner's initial decision is appropriate in all respects to dispose of this proceeding:

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

It is further ordered, That the initial decision of the hearing examiner shall on the 20th day of December 1951 become the decision of the Commission.

It is further ordered, That the respondent Koken Companies, 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 the attached order to cease and desist.

Said initial decision, thus adopted by the Commission as its decision, follows:

INITIAL DECISION BY WILLIAM L. PACK, TRIAL EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on March 1, 1950, issued and subsequently served its complaint in this proceeding upon the respondent, Koken Companies, Inc., a corporation, charging it with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of that Act. After the issuance of the complaint and the filing of respondent's 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 the above-named trial examiner theretofore duly designated by the Commission, and such 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 the trial examiner on the complaint, the answer thereto, and testimony and other evidence; and the trial 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. The respondent, Koken Companies, Inc., is a corporation organized and existing under the laws of the State of Missouri, with its office and principal place of business located at Broadway and Tyler Streets, St. Louis, Missouri. It is now and for a number of years last past has been engaged in the sale and distribution of furniture and other equipment and supplies to barber shops and beauty shops. One of the numerous items sold by respondent is a drug product designated by it as "Vanish," this product being intended for use in the treatment of dandruff and other scalp disorders. While during recent years the volume of sales of this product has constituted

less than one percent of respondent's total volume of sales, the volume of business in the product has been substantial.

PAR. 2. Respondent causes and has caused this product, when sold, to be transported from its place of business in the State of Missouri to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondent maintains and has maintained a course of trade in the product in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 3. In the course and conduct of its business respondent has advertised its product "Vanish" by means of radio broadcasts and by means of advertisements inserted in newspapers and magazines, and by means of circulars distributed through the United States mails among prospective purchasers. All of these advertisements either were disseminated in commerce, as "commerce" is defined in the Federal Trade Commission Act, or were for the purpose of inducing the purchase of the product in such commerce. Among the statements appearing in such advertisements were the following:

Simply massage VANISH into your scalp between or after shampoos, let it dry naturally, and in an incredibly short time, see if every trace of dandruff hasn't disappeared completely.

That's all there is to it—and after 1 or 2 treatments, you should be absolutely free from dandruff.

Last summer I had quite a problem with my little girl, who was 2½ years old at the time.

She had a scalp condition that is hard to explain. It was sore in spots and would form large thick scales.

Whenever I combed her hair, her scalp would start to bleed. I tried everything I knew for it, but nothing helped her. Then I was told about "VANISH." I tried it for 2 or 3 weeks. From the very first treatment her scalp showed marked improvement. In all I used ½ of a \$1 sized bottle and her scalp was completely clear again.

VANISH FOR DANDRUFF.

When you want to get rid of irritating unsightly dandruff VANISH is the answer.

* * * dandruff I've got just the thing that will put him out of business in short order, too—VANISH.

VANISH, the dandruff banisher.

* * * don't take a chance with old fashioned remedies. * * * eliminate dandruff the modern way with VANISH.

This Public Enemy No. One, old man dandruff, but cheer up—you can put an end to his dirty work in a jiffy with VANISH.

* * * VANISH is not a cure-all. It is made to do just one job and do it thoroughly—get rid of dandruff.

Use VANISH to keep the hair well groomed and in good condition. VANISH is that remarkable new dandruff treatment so highly recommended by many leading hairdressers.

VANISH is the modern way of treating common dandruff that gets right to the root of the trouble in a jiffy.

Besides the pleasant feeling of the scalp, customers have also remarked how healthy the hair appears between shampoos.

Vanish encourages healthy scalps because they are dandruff free * * * and healthy, glossy well-groomed hair is a natural result of a healthy scalp.

* * * Joe's hair was smooth, healthy and well groomed. Joe used VANISH.

* * * How healthy the hair looks between shampoos.

VANISH for healthy hair.

Lovely hair grows in healthy scalps. VANISH is quick, simple, effective, exhilarates the scalp, refreshes the hair, removes dandruff.

GUARANTEED?

Vanish for Dandruff.

Vanish for dandruff is unconditionally guaranteed, but users write us they want to be guaranteed Vanish is always available. Profitable Vanish dandruff treatments in the shop increase sales of the retail bottle.

PAR. 4. Through the use of these statements respondent has represented that its product is a cure or remedy and a competent and effective treatment for dandruff and other scalp disorders, and that the use of the product promotes the health of the scalp and hair.

PAR. 5. The active ingredients of the product are sodium salicylate, oxyquinolin sulphate, arsenate trioxide 5/100 of 1%, and denatured alcohol 8%. The record establishes and the examiner therefore finds that the product is not a cure or remedy for dandruff, nor has it any beneficial effects in the treatment of dandruff other than to facilitate the removal of such loose dandruff scales as may be accumulated upon the scalp at the time the product is applied. The product has no therapeutic effect upon the underlying cause of dandruff and therefore it will not prevent the recurrence of such scales. The use of the product has no therapeutic effects upon any unhealthy scalp or hair condition, nor will it promote the health of the scalp or hair.

PAR. 6. The examiner therefore finds that the representations made by respondent with respect to the product, as set forth above, are erroneous and misleading and constitute false advertisements.

PAR. 7. The record indicates that, with one exception, all of these advertisements have been discontinued by respondent, the exception being the last advertisement in Paragraph 3 above.

PAR. 8. The use by respondent of these advertisements has the tendency and capacity to mislead and deceive a substantial portion of the purchasing public with respect to the properties and efficacy of respondent's product, and the tendency and capacity to cause such portion of the public to purchase substantial quantities of the product as a result of the erroneous and mistaken belief so engendered.

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CONCLUSION

The acts and practices of the respondent 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.

ORDER

It is ordered, That the respondent, Koken Companies, Inc., a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution of respondent's product designated "Vanish," or any product of substantially similar composition or possessing substantially similar properties, whether sold under the same name or 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:

(a) That said product is a cure or remedy for dandruff; or that it has any beneficial effect in the treatment of dandruff other than facilitating the removal of loose dandruff scales.

(b) That said product has any therapeutic effect in the treatment of any scalp disorder, or that it promotes the health of the scalp or hair.

2. Disseminating or causing to be disseminated 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 product, any advertisement which contains any representation prohibited in paragraph 1 of this order.

ORDER TO FILE REPORT OF COMPLIANCE

It is further ordered, That the respondent Koken Companies, 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 the attached order to cease and desist [as required by aforesaid orders and decision of the Commission].

Complaint

IN THE MATTER OF

EWALD A. THALACKER, DOING BUSINESS AS TOP
MANUFACTURING COMPANYCOMPLAINT, FINDINGS, AND ORDERS IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 5831. Complaint, Dec. 4, 1950—Decision, Dec. 24, 1951*

Where an individual engaged in the interstate sale and distribution of push cards, which, bearing explanatory legends (or spaces therefor), were designed for use in the sale and distribution of articles of merchandise to the ultimate purchasers by means of varying games of chance, under a plan whereby the purchasers of a push who, by chance, selected a concealed winning name or number, secured articles without additional cost at less than the normal retail price thereof, others receiving nothing or, in some cases, a small consolation prize of less value than the price of the push (amount of which in some cases was similarly chance determined);

Sold and distributed such devices to dealers in various articles of merchandise, assortments of which, along with said devices, were made up by the direct and indirect retail dealer purchasers thereof, and exposed and sold to the purchasing public in accordance with the aforesaid sales plan, involving sale of a chance to procure articles of merchandise at much less than their normal retail price; and

Thereby supplied to and placed in the hands of others the means of conducting lotteries in the sale and distribution of their merchandise, contrary to an established public policy of the United States Government;

With the result that many members of the public were induced to deal with retailers who sold and distributed merchandise by means of said devices; many retailers were thereby induced to trade with manufacturers, wholesalers and jobbers who sold and distributed merchandise together with such devices; gambling was taught and encouraged; and said individual thereby supplied to and placed in the hands of others means and instrumentalities for engaging in unfair acts and practices within the intent and meaning of the Federal Trade Commission Act:

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

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

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

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Ewald A. Thalacker, individually and doing business as Top Manufacturing Company,