

Syllabus

IN THE MATTER OF
THE JUVENILE SHOE CORPORATION OF AMERICA
COMPLAINT, FINDINGS AND, ORDERS IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 5976. Complaint, Apr. 2, 1952—Decision, Nov. 13, 1952

Voluntary abandonment or discontinuance of challenged advertising matter, where it appeared that the respondent became aware that related advertising representations were under investigation by the Commission and declined to desist the same through the informal stipulation procedure, or to enter into a consent settlement under the provisions of the Commission's Rule V, is not a guarantee that such advertising will not be resumed, and such discontinuance does not constitute a bar to an order to cease and desist where a question may arise as to the resumption of unfair practices.

In order to effect competent treatment to cure any specific malcondition of the feet, according to the uncontradicted testimony of experts, proper diagnosis followed by appropriate measures thereby indicated is necessary, treatment for both feet is not necessarily the same, and treatment for any abnormal condition should be particularly adapted to the exigencies of the specific case since haphazard, unscientific methods might well aggravate the condition.

In said further connection massage is an effective and accepted procedure in the treatment of certain pathological conditions of various parts of the anatomy including the feet, and is used principally following an accident or any injury where there is decreased efficiency of circulation and where it is desired to stimulate circulation to reduce swelling to promote recovery, but normal feet do not require it, and in the absence of the foregoing or analogous exigencies, it is not indicated or deemed necessary.

A healthy foot may be described as one which will enable one to stand, walk or run without adverse symptoms of pain or tiring, and almost all shoes will keep feet healthy in the sense that they afford a measure of protection against environmental hazards, such as protection from bruises, etc., and, all things being equal, any properly fitted shoe will serve such purposes.

Where a corporation engaged in the manufacture, in substantial volume, of its "Lazy Bones" shoes, and in the interstate sale and distribution thereof; through statements on labels and display cards, advertisements in magazines of general circulation, in folders and circulars, and through radio broadcasts—

- (a) Represented that through the wearing of its said shoes, the feet, including the muscles and arches, would be massaged in the process of walking and would thereby benefit;
- (b) Represented that such shoes would exercise and stimulate the arches; and
- (c) Represented that they would help children's feet to develop healthily and keep them healthy;

The facts being that said shoes were stock shoes, and while they contained features not found in some other stock shoes, wearing them would not accomplish the aforesaid results;

With tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous belief that said representations were true and thereby induce it to purchase substantial quantities of said shoes; and with effect of placing in the hands of dealers therein means whereby they might deceive and mislead the purchasing public in the aforesaid respects:

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.

As respects respondent's contention that the proof failed to sustain that portion of the complaint which charged it with the use of "unfair and deceptive acts and practices": cross-examination developed that walking in respondent's shoes would have no beneficial massaging effect by reason of design or otherwise; that almost all shoes would keep feet healthy as respects the measure of protection provided against environmental hazards; and that respondent's shoes in such respects were no different from or superior to those made by others.

In the aforesaid connection the attempted defense that respondent had never represented its shoes as possessing therapeutic, remedial or curative properties and that hence no infraction of law might be charged: reading of the complaint disclosed that no such charges had been made, but merely that the actual statements used by respondent as to the qualities of its said shoes and the results produced were false, misleading and deceptive; and the further defense that any rubbing, no matter how slight, insignificant or non-beneficial, fell within the literal definition of the word "massage", was rejected as chimerical and unreal.

With further respect to respondent's contention that the complaint should be dismissed because of non-use by it in its advertisements of the word "therapeutic": the query was made as to what then was meant by such expressions as "massages the muscles", "stimulates the feet", "exercises and stimulates the arches", "helps feet to develop healthily", and "helps feet stay healthy".

As further respects the fact that respondent in August, 1951, withdrew from the hands of its customers all mats containing the challenged representations, as a result of being advised, according to it, through the press or otherwise that the Commission had under investigation the advertising of many shoe manufacturers, and its insistence that because of such abandonment, no order predicated on such advertisements should issue: the Commission took official notice of its own records which, while not in evidence, disclosed a chain of correspondence between the Commission and the respondent extending over several years, during the course of which respondent's various advertising representations were criticized and discussed in detail by it with the respondent, and the latter was given ample opportunity to enter into a stipulation to cease and desist in lieu of formal action which it declined, as it did also opportunity to enter into a consent settlement under the provisions of the Commission's Rule V.

Before *Mr. James A. Purcell*, hearing examiner.

Mr. B. G. Wilson and *Mr. J. M. Doukas* for the Commission.

Lewis, Rice, Tucker, Allen & Chubb, 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 The Juvenile Shoe Corporation of America, a corporation, hereinafter referred to as the respondent, has violated the provisions of said Act and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, The Juvenile Shoe Corporation of America, is a corporation organized and existing under and by virtue of the laws of the State of Missouri with its office and principal place of business located at 1221 Locust Street, St. Louis 3, Missouri.

PAR. 2. Respondent is now, and for several years last past has been, engaged in the manufacture, sale and distribution in commerce of shoes designated as "Lazy Bones" shoes.

PAR. 3. Respondent causes and has caused said shoes 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 maintains, and at all times mentioned herein has maintained a course of trade in its said shoes in commerce between and among the various States of the United States and in the District of Columbia. Respondent's volume of business in the sale of said shoes in commerce is and has been substantial.

PAR. 4. In the course and conduct of its business, and for the purpose of inducing the purchase of its said shoes, respondent has made certain statements and representations concerning the nature and usefulness of said shoes by means of labels on its shoes; display cards, advertisements inserted in magazines of general circulation and in folders and circulars; also, by radio continuities broadcast from various radio stations. Among and typical of such statements and representations are the following:

* * * Massage the muscles of your feet every time they touch the ground * * *.
 * * * the shoes actually massage and stimulate the feet with every step * * *.
 * * * they actually massage the muscles of your children's feet with every step taken.

Their built-in features massage your arch with every step.

* * * exercise and stimulate the arches * * *.

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* * * helps young children's feet to develop healthily * * * .
* * * help children's feet stay healthy * * * .

PAR. 5. Through the use of the statements and representations appearing in the aforesaid advertisements, respondent represented that by wearing its "Lazy Bones" shoes the feet, including the muscles and arches, will be massaged in the process of walking and will thereby benefit the feet; that they exercise and stimulate the arches; will help children's feet to develop healthily and helps to keep them healthy.

PAR. 6. The aforesaid statements and representations are false, misleading and deceptive. In truth and in fact, said shoes are stock shoes and while they contain features not found in some other stock shoes, the wearing of said shoes will not in the process of walking or otherwise, massage the feet or the arches and muscles thereof in any sense that might be regarded as beneficial. The wearing of said shoes will not stimulate or exercise the muscles or arches of the feet. Said shoes will not help children's feet to develop healthily or keep them healthy.

PAR. 7. The use by respondent of the foregoing false, deceptive and misleading statements and representations with respect to its shoes has had the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that the representations are true and to induce them, because of such erroneous and mistaken belief, to purchase substantial quantities of respondent's shoes and has placed in the hands of dealers of said shoes means and instrumentalities whereby they may deceive and mislead the purchasing public in the respects stated therein.

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 section 5 of the Federal Trade Commission Act.

DECISION OF THE COMMISSION

Pursuant to Rule XXII of the Commission's Rules of Practice, and as set forth in the Commission's "Decision of the Commission and Order to File Report of Compliance," dated November 13, 1952, the initial decision in the instant matter of hearing examiner James A. Purcell, as set out as follows, became on that date the decision of the Commission.

INITIAL DECISION BY JAMES A. PURCELL, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on April 2, 1952, issued and subse-

quently served its complaint in this proceeding upon respondent, The Juvenile Shoe Corporation of America, a corporation, charging it with the use of unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act. On April 21, 1952, the corporate respondent filed its answer and, after seasonable notice, hearings were held at which testimony and other evidence in support of and in opposition to the allegations of said complaint were introduced before the above-named Hearing Examiner theretofore duly designated by the Commission. Said testimony and other evidence were reduced to writing, duly filed and recorded in the office of the Commission.

Thereafter the proceeding regularly came on for final consideration by said Hearing Examiner on the complaint, the answer thereto, testimony and other evidence, as also proposed findings as to the facts and conclusions presented by counsel in support of the complaint and counsel for the respondent, oral argument thereon not having been requested.

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 therefrom, and order:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, The Juvenile Shoe Corporation of America, is a corporation organized and existing under and by virtue of the laws of the State of Missouri with its office and principal place of business located at No. 1221 Locust Street, St. Louis 3, Missouri.

PAR. 2. Respondent is now, and for several years last past has been, engaged in the manufacture, sale and distribution in commerce of shoes designated as "Lazy Bones" shoes.

PAR. 3. Respondent causes said shoes 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 maintains a course of trade in its said shoes in commerce between and among the various States of the United States and in the District of Columbia. Respondent's volume of business in the sale of said shoes in commerce is and has been substantial, amounting to approximately \$500,000.00 in sales of its "Lazy Bones" shoes for the years 1950 and 1951.

PAR. 4. In the course and conduct of its business, and for the purpose of inducing the purchase of its said shoes, respondent has made certain statements and representations concerning the nature and usefulness of said shoes by means of labels on its shoes; display cards,

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advertisements inserted in magazines of general circulation and in folders and circulars; also, by radio continuities broadcast from various radio stations. Among and typical of such statements and representations are the following:

1. * * * Massage the muscles of your feet every time they touch the ground * * *.
2. * * * the shoes actually massage and stimulate the feet with every step * * *.
3. * * * they actually massage the muscles of your children's feet with every step taken.
4. Their built-in features massage your arch with every step.
5. * * * exercise and stimulate the arches * * *.
6. * * * helps young children's feet to develop healthily * * *.
7. * * * help children's feet stay healthy * * *.

PAR. 5. Through the use of the statements and representations appearing in the aforesaid advertisements, respondent represented that by wearing its "Lazy Bones" shoes the feet, including the muscles and arches, will be massaged in the process of walking and will thereby benefit the feet; that they exercise and stimulate the arches; will help children's feet to develop healthily and helps to keep them healthy.

PAR. 6. The aforesaid statements and representations are false, misleading and deceptive. In truth and in fact, said shoes are stock shoes and while they contain features not found in some other stock shoes, the wearing of said shoes will not in the process of walking or otherwise, massage the feet or the arches and muscles thereof in any sense that might be regarded as beneficial. The wearing of said shoes will not stimulate or exercise the muscles or arches of the feet. Said shoes will not help children's feet to develop healthily or keep them healthy.

As aforesaid, the complaint herein was issued on April 2, 1952, and respondent by its answer, supplemented by testimony of record, admitted the use and dissemination of the various advertisements containing the statements and representations set forth in Paragraph Four above, and which are for convenience hereinafter, numbered from One to Seven inclusive. Respecting representations denoted 1, 2, 3 and 4 (having to do with claimed beneficial massaging of the feet), and representations denoted 5, 6 and 7 (having to do with exercise and stimulation of the arches and assistance in developing and preserving foot health) respondent abandoned such on August 17, 1951, at which time, all of respondent's outstanding advertising mats containing these representations were withdrawn from the hands of respondent's customers and new mats substituted from which were deleted all of the objectionable matters and misrepresentations forming the basis of the complaint. This action was taken by respondent as a result of being advised, according to the respondent, through the

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press or otherwise, that the Commission had under investigation the advertising representations of many shoe manufacturers. Respondent urges that because of such abandonment, no order predicated on such advertisements should issue.

The records of the Commission, of which, while not in evidence the Examiner takes official notice, disclose a chain of correspondence between the Commission and the respondent from April 22, 1948, to February 6, 1952, during the course of which the various advertising representations of respondent respecting its shoes were criticised by the Commission and discussed in detail by the Commission and the respondent; such correspondence also discloses the respondent was given ample opportunity to enter into a stipulation to cease and desist in lieu of formal action, which it declined, and the testimony herein discloses that respondent was tendered an opportunity to enter into a Consent Settlement under provisions of Rule V of the Commission's Rules of Practice, which was likewise declined.

EXPERT TESTIMONY

The Commission, to maintain the issue on its part joined, introduced the testimony of two experts, one qualified as an orthopedic surgeon who had practiced his profession for eighteen years, and the other a practitioner of physical medicine, which has to do with the use of physical aids to the correction of morbid, abnormal and diseased conditions, such aids consisting of the use of heat, massage, exercise, mechanical supports, braces and prophylactic devices, etc. This witness has been teaching his subject since 1945 and is now so engaged in the George Washington Medical School of Washington, D. C. The professional qualifications of the experts were never questioned.

Both witnesses agreed that to effect competent treatment to cure any specific malcondition of the feet, proper diagnosis is first necessary and that appropriate measures should then be taken in light of the result of the diagnosis; that the treatment for both feet is not necessarily the same; that normal feet do not need treatment and that any treatment for an abnormal condition should be particularly adapted to the exigencies of the specific case—in other words, no standard or universal device or treatment would be appropriate in all cases and haphazard, unscientific methods might well aggravate the condition; that massage is an effective and accepted procedure in the treatment of certain pathological conditions of various parts of the anatomy including the feet, and use of the words: "helps your children's feet to develop healthily" and "help children's feet stay healthy" is a direct and unqualified representation that foot "health" will

ensue, continue and remain as a result of use of respondent's shoes. Respondent challenges seriously that portion of the complaint charging it with the use of "unfair and deceptive acts and practices" in this particular whereas, in order to sustain an order in the premises, such must be proved and found to exist, which is hereby done. Cross-examination developed that walking in respondent's shoes would have no beneficial massaging effect or result and there is nothing in the design of the shoe which would be at all conducive to this effect; that almost all shoes will keep feet healthy in the sense that they afford a measure of protection against environmental hazards, i. e., protection from bruises, nails, foreign objects, the exclusion of excessive heat and cold as the case may be, and, all things being equal, any properly fitted shoe will serve these purposes, and respondent's shoes, in this connotation, are no different or superior to shoes manufactured by others.

A healthy foot may be described as one which will allow one to stand, walk and run without adverse symptoms of pain or tiring.

Witnesses noted no features in respondent's shoes different from other shoes customarily found on the market.

Webster's International Dictionary defines massage as:

A method of treating the superficial parts of the body for remedial or hygienic purposes, consisting in rubbing, stroking, kneading, tapping, etc., with the hand or with an instrument.

One of the physicians defined massage as a rubbing or kneading of the skin and underlying muscles in a particular manner to induce or arrive at a desired result, and is used primarily following an accident or any injury where there is present decreased efficiency of blood circulation and where it is desired to stimulate the circulation by rubbing or massaging to reduce swelling to promote recovery. Normal feet do not require massage and in the absence of the foregoing or analogous exigencies massage is not indicated or deemed necessary. Respondent's shoes will not exercise or massage the feet nor the arches thereof, nor stimulate the muscles of the feet so as to effect any beneficial result but will massage the foot in the limited sense that any shoe will rub or massage the foot in the normal process of flexing same when in motion.

The respondent adduced no expert testimony to maintain the issues on its part joined.

At this juncture consideration is given to the emphasis stressed by respondent that it has never represented its shoes as possessing therapeutic, remedial or curative properties, ergo, no infraction of law may be charged. However, a reading of the complaint will disclose that no such charges, *eo nomine*, have been made but, on the contrary,

Paragraphs Five and Six of the complaint merely charge the actual statements used by respondent to be false, misleading and deceptive and that respondent's shoes will not do the various things, nor produce the various results, attributed to their use. Further, respondent, in its defense, laid emphasis on the literal meaning of the word "massage," contending that any rubbing, no matter how slight, insignificant or non-beneficial such may be, yet falls within the literal definition of the word "massage," hence there has been no misrepresentation. This attempted defense is merely a semantic fantasy, chimerical and unreal, as is also the contention that the complaint should be dismissed because of non-user by respondent in its advertisements of the word "therapeutic" when in fact no such charge was made, although it might be pertinent to inquire, *arguendo*, that if respondent did not desire and attempt to import to the public, by inference, innuendo or oblique hint, some such quality inherent in the use of its shoes, then what, in fact, was meant by such expressions as: "massages the muscles," "stimulates the feet," "exercises and stimulates the arches," "helps feet to develop healthily" and "helps feet stay healthy?"

PAR. 7. The use by respondent of the foregoing false, deceptive and misleading statements and representations with respect to its shoes has the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that the representations are true and to induce them, because of such erroneous and mistaken belief, to purchase substantial quantities of respondent's shoes and has placed in the hands of dealers of said shoes means and instrumentalities whereby they may deceive and mislead the purchasing public in the respects stated therein.

CONCLUSIONS

1. The aforesaid acts and practices of the respondent, 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 section 5 of the Federal Trade Commission Act.

2. Voluntary abandonment or discontinuance of the advertising matter prior to issuance of the complaint as herein stated is not a guarantee that such will not be resumed (*F. T. C. v. Wallace*, 75 F. (2d) 733, 738); nor does discontinuance render the controversy moot, (*F. T. C. v. Goodyear*, 304 U. S., 257, 260); nor is such discontinuance a bar to an order to cease and desist where a question may arise as to the resumption of unfair practices. (*Deere v. F. T. C.*, 152 F. (2d) 65). Also see *Corn Products Refining Co. v. F. T. C.*, 144 F. (2d) 211; *Fairyfoot Products v. F. T. C.*, 82 F. (2d) 684.

Order

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ORDER

It is ordered, That the respondent, The Juvenile Shoe Corporation of America, 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 in commerce, as "commerce" is defined in the Federal Trade Commission Act, of respondent's shoes designated "Lazy Bones" or any other shoe of similar construction, irrespective of the designation applied thereto, do forthwith cease and desist from representing, directly or by implication:

- (1) That the wearing of said shoes will massage the feet, or the arches or muscles thereof;
- (2) That the wearing of said shoes will stimulate or exercise the muscles or arches of the feet;
- (3) That the wearing of said shoes will help children's feet to develop healthily or will help to keep them healthy.

ORDER TO FILE REPORT OF COMPLIANCE

It is ordered, That the respondent herein 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 [as required by said declaratory decision and order of November 13, 1952].

Syllabus

IN THE MATTER OF
PAUL T. LYNCH TRADING AS LYNCH'S DIATHERMY
COMPANY

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

Docket 5999. Complaint, June 16, 1952—Decision, Nov. 18, 1952

The use of a diathermy device in applying high frequency electrical current to produce heat in body tissues for therapeutic purposes is a form of treatment powerful enough to do serious injury to the user if improperly applied. Application of such treatment by an unskilled person in cases where there are advanced blood vessel changes of the legs, usually characterized by severe pains in the extremities, may, in excess dosage, not only cause serious burns but may lead to gangrene and necessitate amputation of the leg; and application of heat produced thereby in any area of the body where appreciation of heat has been impaired or lost may result in serious burns and destruction of tissue.

Pains commonly believed to be associated with neuritis are frequently symptomatic of some underlying cause or disease, such as tumor, tuberculosis, syphilis, cancer and diabetes, and an attempt to relieve the pain resulting from such conditions by the use of a diathermy device such as respondent's without securing proper diagnosis may result in fatal delay in the treatment of the underlying cause.

Where an individual engaged in the interstate sale and distribution of his "Lynch's Short Wave Diathermy" to members of the purchasing public for use in treatment of self-diagnosed diseases by self-application in the home; in advertising through newspapers, booklets and circulars, and otherwise—Represented that said device, used by members of the general public in the treatment of self-diagnosed diseases, would relieve the pains of chronic arthritis, neuritis, sciatica, sinus, and rheumatism, and might be safely used by them in their homes, without revealing that the safe use of such a device by the public required diagnosis by a competent physician, determination of whether or not diathermy was indicated and, if so, the frequency and rate of application, thorough and adequate instruction by a trained technician in the use thereof, including proper placement of the electrodes, control and regulation of the amount of heat applied, and preventive measures against burns and tissue destruction;

With tendency and capacity to mislead a substantial portion of the purchasing public into the erroneous belief that said device was entirely safe and its use free from ill effects, and with effect of inducing such public, because of its mistaken belief, to purchase the device:

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.