

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)

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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-

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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 Commisison, 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

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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

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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 calcaneous (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.

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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

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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.

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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

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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

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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.