

Decision

IN THE MATTER OF
KENNETH W. SHAFE TRADING AS
O-JIB-WA MEDICINE CO. ET AL.

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

Docket 6548. Complaint, Apr. 30, 1956—Decision, June 27, 1957

Order requiring two individuals in Flint, Mich., to cease representing falsely in advertisements in newspapers that their medicinal preparation "O-Jib-Wa Bitters", and the similar product "Oscoda Bitters" prepared for out-of-State distribution, constituted effective treatments for rheumatism, arthritis, and other diseases and their symptoms, and requiring one of them to cease making the same representations for the latter product on order sheets and in letters.

Mr. Harold A. Kennedy supporting the complaint.

Mr. Edward J. Neithercut, of Flint, Mich., for respondents.

INITIAL DECISION BY JOSEPH CALLAWAY, HEARING EXAMINER

Formal complaint issued April 30, 1956 charged both respondents with disseminating and causing the dissemination of false advertisements for two drug products called O-Jib-Wa Bitters and Oscoda Bitters. Respondent Morrish was also separately charged with disseminating and causing the dissemination of false advertisements for Oscoda Bitters. The allegations of the complaint in effect charge violations of Section 12(a) of the Federal Trade Commission Act which is by Section 12(b) made an unfair and deceptive Act within the meaning of Section 5.

After the filing of separate answers by the respondents, the undersigned hearing examiner was on June 19, 1956, by authority of the Commission duly appointed to hear this proceeding in the place and stead of hearing examiner Robert L. Piper, who had been previously appointed. Thereafter, pursuant to notice and agreement of counsel, hearings were held for the taking of evidence before the undersigned in Flint, Port Huron and Detroit, Michigan.

All parties were represented by counsel, participated in the hearings and afforded full opportunity to be heard, to introduce evidence pertinent to the issues and to examine and cross-examine witnesses. Proposed findings of fact, conclusions of law and orders were submitted by all parties.

The facts found, the conclusions reached and the order entered herein are based upon the entire record and hearing the witnesses

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testify. All findings of fact, conclusions of law and orders proposed by all parties hereto not adopted and included in this Initial Decision are specifically rejected.

FINDINGS OF FACT

A. As to O-Jib-Wa Bitters

The facts are not in dispute. Respondent Kenneth W. Shafe took over the business of the O-Jib-Wa Medicine Company, now located at 2101 South Saginaw Street in Flint, Michigan when his father died in 1939 and since then has operated it as an individual enterprise. It is a small business now employing six people. The manufacture and sale of O-Jib-Wa Bitters, formerly called O-Jib-Wa Indian Bitters comprises 75 to 80 percent of the business which in 1954 and 1955 grossed approximately \$180,000 annually. More than 99% of the sales of O-Jib-Wa Bitters are to drug stores located in Michigan. The remainder is sold at retail across the counter at the manufacturing plant in Flint. O-Jib-Wa Bitters is not and has not been sold outside the State of Michigan.

O-Jib-Wa Bitters is a ten percent glycerine and water decoction made with equal parts of the herbs herein after listed in powdered crude form and the herb mandrake in liquid extract form with one-tenth of one percent sodium benzoate added as a preservative:

Burdock
Yellow Dock
Wild Cherry Bark
Quassia
Dandelion Root
Black Cohosh
Cape Aloes
Sarsaparilla
Tag Alder
Licorice Root
Life Root

The directions for use of O-Jib-Wa Bitters are as follows:

DIRECTIONS

Shake well before using. For Adults: Place 2 teaspoonsful or a dessert-spoonful of these bitters in a half glass of cold water and take 3 times a day preferably before meals. For children: From 2 to 5 years, use same directions except use $\frac{1}{2}$ teaspoonful of bitters. For children from 5 to 12 years, use the same directions, except use 1 teaspoonful of bitters.

The formula and directions for use have not been changed since Respondent Shafe took over the business. Shortly after he took over the business, Respondent Shafe hired Respondent Kenneth G.

Morrish as General Manager and he has continued in that capacity since then. Morrish supervises the manufacture of O-Jib-Wa Bitters, waits on the retail trade across the counter, aids Respondent Shafe in the writing of advertising, does part of the invoicing and bookkeeping and handles the correspondence with customers.

O-Jib-Wa Bitters was advertised extensively in 35 or 40 newspapers throughout Michigan during 1953, 1954 and 1955 and the spring of 1956. Advertisements in newspapers in cities of over 25,000 were run once or twice a week. In newspapers in smaller cities and towns in Michigan advertisements were limited to once a week. Advertisements published in the Flint, Journal, Flint Michigan, Detroit Times and Detroit News, Detroit, Michigan, Port Huron Times Herald, Port Huron Michigan and the Grand Rapids Press, Grand Rapids, Michigan during the period of time mentioned are typical of respondents' advertising. These advertisements read in part as follows:

A great many people suffering from rheumatism and arthritis for a long period of time have become discouraged and feel that there is not much hope for them—The facts are that a great many sufferers, among them some of the most severe cases have tried O-Jib-Wa Bitters as a last resort and to their happy surprise now are free of painful and crippling arthritis and rheumatism.

I am an elevator operator and naturally I am on my feet for long periods of time. About eight years ago I began to get arthritis and rheumatism in my feet and legs. My feet would get so sore from standing that I had to sit down. Then when I got up I could hardly stand. The pain was so unbearable that I would walk around trying to ease the soreness out * * * I saw an ad * * * for O-Jib-Wa Bitters so I thought I would see if it was as good as everybody claims. * * * in just three weeks the pains were all gone. I'm not tired, have more pep, sleep good and feel better all over.

My arms and shoulders were so crippled up with arthritis and rheumatism that I couldn't take my coat off by myself. * * * Lifting my knife and fork or even holding the evening newspaper up to read caused vicious pain. My feet swelled up when I walked and I had to take my shoes off for relief. I decided to see if O-Jib-Wa Bitters would help me. I was half way through the second bottle when I knew it was really bringing results. The pains stopped and the stiffness started to leave. It made me feel ten years younger. I am no longer bothered with arthritis in my neck, shoulders or arms and my feet haven't swollen up since I started taking this great medicine.

* * * O-Jib-Wa Bitters works through the blood and gets at the cause of sore muscles, stiff swollen joints and agonizing pains * * * everyone suffering from rheumatism, arthritis, blood, stomach, liver and kidney ills should start taking O-Jib-Wa Bitters now.

O-Jib-Wa Bitters works to cleanse the blood of poisons and waste that have accumulated in the system which leads to much suffering. It stimulates the digestive juices, promoting better digestion. It flushes the poison from tired kidneys and stops backache, night rising, etc. It also works to naturally steady over taxed nerves. As a tonic and stomach medicine it is the greatest.

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If you suffer from rheumatism, arthritis or stomach trouble or perhaps just need a Fall Tonic to pep you up—remember that the very best medicine you can buy is O-Jib-Wa Bitters.

It is found that through the above quoted advertisements and others similar thereto, respondents have represented directly and by implication:

1. That O-Jib-Wa Bitters constitutes an adequate, effective and reliable treatment for, will arrest the progress of, correct the underlying causes of and cure all forms of arthritis and rheumatism;

2. That O-Jib-Wa Bitters constitutes an adequate, effective and reliable treatment for the symptoms and manifestations of all forms of arthritis and rheumatism including pain swelling and stiffness and will afford permanent relief from the aches, pains and other discomforts thereof;

3. That O-Jib-Wa Bitters will stop backache, cleanse the blood of poisons and waste, promote better digestion and give one pep and vitality;

4. That O-Jib-Wa Bitters is an adequate, effective and reliable treatment for indigestion, overtaxed nerves and diseases and disorders of the stomach, liver, kidneys and blood and the symptoms thereof.

Respondents stipulated on the record that well qualified medical experts were available who if called would testify that they knew the composition of O-Jib-Wa Bitters and the pharmacological effects thereof with relation to the diseases, disorders, conditions and symptoms named and that the record should be taken as if such witnesses had been called and testified that O-Jib-Wa Bitters was not an adequate, effective or reliable treatment for any of the diseases, disorders or conditions mentioned or the symptoms or manifestations thereof and would not have any of the effects which it is found that respondents have claimed for it in the above mentioned advertisements. It is therefore found that the advertisements making such representations were false advertisements.

The Flint Journal, Detroit News, Detroit Times, Port Huron Times Herald and Grand Rapids Press during 1953, 1954, 1955 and in the spring of 1956 had considerable out of the state circulation and many copies of each issue of these papers were sent through the U.S. Mails to subscribers. The average daily circulation through the mail and into other states of issues of these newspapers carrying respondents' advertising for O-Jib-Wa Bitters was as follows:

Flint Journal.—Approximately 2,600 copies through the mail to subscribers both inside and outside the State. Excluding those mailed to subscribers within a 25-mile radius of Flint, the number

mailed to subscribers was 1,562. This includes out of the State circulation by mail.

Detroit News.—Approximately 1,800 copies to carriers outside of Detroit by mail and 1,500 to individual mail subscribers. Approximately 6,000 of the paid circulation to out of the State subscribers.

Detroit Times.—Approximately 3,000 through the mail to dealers and individual subscribers. Over 32,000 were sent to dealers and carriers outside the retail trading zone of Detroit some of which went to dealers and carriers outside the State.

Port Huron Times Herald.—Approximately 5,600 through the mail including 225 subscribers in other states.

Grand Rapids Press.—Approximately 16,000 copies by mail to subscribers both within Michigan and out of the State. Circulation outside of Michigan approximately 570.

The mail circulation and the out of the State circulation overlap in regard to each of these newspapers. There were no figures given breaking down mail circulation in the State and out of the State.

It is therefore found that both respondents have caused the dissemination of false advertisements for O-Jib-Wa Bitters by the United States Mails and in commerce, as "commerce" is defined in the Federal Trade Commission Act for the purpose of inducing and which were likely to induce the purchase of the product in violation of subsection 12(a)(1) of the Federal Trade Commission Act. The fact that there is no proof of sales outside the State is not material. The Act was violated by causing the dissemination of the false advertising.

B. As to Oscoda Bitters

In 1948 respondent Morrish saw an opportunity to make some money on a private venture of his own that did not interfere with his working for respondent Shafe. Morrish and Shafe agreed that Morrish, might, on his own time, make a product similar to O-Jib-Wa Bitters for sale outside the State of Michigan. Morrish established a small manufacturing plant in his own home in Flint, Michigan for a product which he called Oscoda Bitters, doing business under the name of Continental Products Company. This is the same preparation as O-Jib-Wa Bitters except that it has an herb called "Western Skull Cap" added. The directions for use are the same as those given for O-Jib-Wa Bitters. The record contains testimony showing in detail how both O-Jib-Wa Bitters and Oscoda Bitters are made.

Respondent Morrish has purchased all the ingredients for Oscoda Bitters and the bottles in which it is and has been sold from respond-

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ent Shafe, but Shafe has never had any interest in the business. When orders for O-Jib-Wa Bitters are received from without the State of Michigan they are and have been in the past returned to the sender with the statement that O-Jib-Wa Bitters is sold only in Michigan. From the time he established his own business in 1948 until the fall of 1953, respondent Morrish in handling the business of the O-Jib-Wa Medicine Company would return orders for O-Jib-Wa Bitters from without the State with a form letter on the stationery of the O-Jib-Wa Medicine Company. This letter stated in part as follows:

We are sorry that we cannot supply you directly as we limit our sales to drug stores in Michigan only. The very same medicine is available to you, however under the name of Oscoda Bitters and we are enclosing their order sheet if you wish to order from them.

Enclosed was an order form of the Continental Products Company for Oscoda Bitters.

Respondent Shafe testified and it is undisputed that he did not find out that Morrish was recommending his (Morrish's) medicine in letters from the O-Jib-Wa Medicine Company until the Federal Trade Commission began investigation of this matter in 1953; that he immediately told Morrish to stop using that form letter; that he (Morrish) would have to send his order forms to the people under his own cover; that Morrish would have to, on his own time, under separate cover sell his medicine. Other than saying that another medicine was available, he was to say nothing at all on the stationery or over the name of O-Jib-Wa Medicine Company.

Morrish has continued to work for Shafe since then with the same duties and has also continued to operate his small business from his home in which respondent Shafe has no interest.

Since Shafe made his objection, Morrish has returned the money to would-be out of the State purchasers of O-Jib-Wa Bitters and then from his home sent such prospects an order blank for Oscoda Bitters under the name of Continental Products Company and a letter telling them that it was identical or nearly identical to O-Jib-Wa Bitters. The order blank for Oscoda Bitters sent with such letters and to others out of the State making inquiry contained the following claims for Oscoda Bitters:

Taken by thousands for the relief of rheumatism, arthritis, neuritis, sciatica, blood, stomach, liver, kidney and nervous ills.

This was in effect a representation that Oscoda Bitters is an adequate, effective and reliable treatment for the diseases and disorders named and the symptoms thereof. *Earl Aronberg trading as Posi-*

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tive Products Company v. F.T.C., 132 F. 2d 165, and cases therein cited.

The stipulation on the record mentioned earlier in regard to the availability of medical experts as witnesses included a provision that such experts if called would testify that they knew the composition of Oscoda Bitters and the pharmacological effects with relation to the diseases and conditions named above. Further that the record should be taken as if such witnesses had been called and testified that Oscoda Bitters however taken was not an adequate effective or reliable treatment for any of the diseases or disorders or the symptoms thereof mentioned in the above quotation taken from the order blank.

According to the stipulation these representations for Oscoda Bitters were false. Since such representations were disseminated by Morrish across State lines from Michigan to persons in other states and were for the purpose of inducing and likely to induce the purchase of Oscoda Bitters by such persons from Morrish in the State of Michigan, the dissemination of such advertising was a violation of both sub-sections 12(a)(1) and 12(a)(2) of the Federal Trade Commission Act by Morrish.

Morrish's business in Oscoda Bitters runs approximately \$2800 per year of which he says no more than 17% has come from orders obtained through his connection with the O-Jib-Wa Medicine Company. Whatever the percentage was or is of business coming from that connection has no bearing on the liability of Morrish.

Paragraph six of the complaint alleges in part that the dissemination of the false advertisements by both respondents for O-Jib-Wa Bitters was for the purpose of inducing and likely to induce the purchase of Oscoda Bitters in violation of Section 12 of the Act. This part of the allegation cannot be sustained under the evidence. Where Oscoda Bitters was purchased, the purchase was induced by the acts of Morrish after the dissemination of the advertising. The advertising itself was not likely to induce its purchase, nor can it be said that the dissemination of the advertising was for the purpose of inducing the purchase of Oscoda Bitters. The most that can be said, even in regard to Morrish, on this score, is that he probably had a secret hope that through such advertising he would obtain the names of some people in other states who he could induce to purchase Oscoda Bitters.

Paragraph twelve of the complaint alleges that Morrish by his conduct, particularly telling his prospects in letters that Oscoda Bitters is identical or substantially identical to O-Jib-Wa Bitters, has made the same false representations for Oscoda Bitters as are

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made for O-Jib-Wa Bitters in the newspaper advertising. Even if this be true, the charge is the dissemination of false advertising in violation of Section 12 of the Federal Trade Commission Act. It is not believed that section is violated by such conduct.

Counsel supporting the complaint contends that because both respondents admit in their answers that they have represented O-Jib-Wa Bitters as an adequate, effective and reliable treatment for neuritis and sciatica when it is not, a prohibition against such claims should be included in the order. It is noted that both answers deny the dissemination of the advertising in the manner alleged in the complaint. Hence there is no such admission as would justify a finding that Section 12 has been violated.

Counsel for respondents seems to contend that because the more recent advertising for O-Jib-Wa Bitters has been limited to testimonial advertising no order should be issued against its advertising. There would be no merit in such contention even if this had been the only kind of advertising ever disseminated. *U.S. v. John J. Fulton*, 33 F. 2d 506, 507.

CONCLUSIONS OF LAW

Both respondents Kenneth W. Shafe and Kenneth G. Morrish have caused dissemination of false advertisements by U. S. mail and in "commerce" for the purpose of inducing and which were likely to induce the purchase of a drug preparation called O-Jib-Wa Bitters in violation of subsection 12(a)(1) of the Federal Trade Commission Act.

Respondents Kenneth G. Morrish has also disseminated false advertisements in "commerce" for the purpose of inducing and which were likely to induce the purchase in "commerce" of a drug preparation called Oscoda Bitters in violation of subsections 12(a)(1) and 12(a)(2) of the Federal Trade Commission Act. Respondent Kenneth G. Morrish is also engaged in "commerce" in the sale of Oscoda Bitters.

The acts and practices of both respondents herein constitute unfair and deceptive acts and practices in "commerce" under the Federal Trade Commission Act.

This proceeding is in the public interest and an order to cease and desist from the above found unlawful practices should be issued.

ORDER

I. *It is ordered*, That the respondent Kenneth W. Shafe, individually and trading as O-Jib-Wa Medicine Company, or trading

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under any other name, and the respondent Kenneth G. Morrish, individually and trading as Continental Products Company, or trading under any other name, and as manager of O-Jib-Wa Medicine Company, and said respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of either of the preparations now designated as "O-Jib-Wa Bitters" and "Oscoda Bitters," or any other product of substantially the same composition or possessing substantial similar properties, whether sold under the same name or any other names, do forthwith cease and desist from:

(A) 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 either of said preparations, however taken:

(a) Constitutes an adequate, effective or reliable treatment for, will arrest the progress of, correct the underlying causes of or cure any form of arthritis or rheumatism;

(b) Constitutes an adequate, effective or reliable treatment for the symptoms or manifestations of any form of arthritis or rheumatism, including pain, swelling and stiffness or will afford relief from the aches, pains or other discomforts thereof;

(c) Will stop backache, cleanse the blood of poisons or waste, promote better digestion or give one pep or vitality;

(d) Is an adequate, effective or reliable treatment for indigestion, overtaxed nerves or any disease or disorder of the stomach, liver, kidneys, blood or the symptoms thereof.

(B) Disseminating or causing to be disseminated any advertisement by any means for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase in commerce as "commerce" is defined in the Federal Trade Commission Act, of the preparation designated "Oscoda Bitters," which advertisement contains any of the representations prohibited in Paragraph I(A) hereof.

II. *It is further ordered*, That the respondent Kenneth G. Morrish, individually and trading as Continental Products Company, or trading under any other name, and his agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of the preparation now designated as "Oscoda Bitters," or of any other 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:

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(A) Disseminating or causing to be disseminated by means of the United States mails or by any other means in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which represents directly or by implication that said preparation, however taken, constitutes an adequate, effective or reliable treatment for any form of rheumatism, arthritis, neuritis, sciatica or the symptoms thereof or for any disease or disorder of the blood, stomach, liver, kidneys or nervous system or the symptoms thereof.

(B) Disseminating or causing to be disseminated any advertisement by any means for the purpose of inducing or which is likely to induce directly or indirectly the purchase in commerce as "commerce" is defined in the Federal Trade Commission Act of the respondent's said preparation, which advertisement contains any of the representations prohibited in Paragraph II(A) hereof.

OPINION OF THE COMMISSION

By TAIT, Commissioner:

The complaint charged that the respondents were engaged in the dissemination of false advertisements in violation of Sections 12(a)(1) and 12(a)(2) of the Federal Trade Commission Act. Counsel for the respondents and counsel supporting the complaint have filed cross-appeals.

Respondent Kenneth W. Shafe trades as O-Jib-Wa Medicine Company and engages in the manufacture and distribution of a potion known as O-Jib-Wa Bitters. It is offered for the treatment of arthritis and rheumatism and their symptoms and various other disorders. Respondent Kenneth G. Morrish is its production and sales manager. Except for a few sales across the counter at the office located in Flint, Michigan, O-Jib-Wa Bitters is distributed to consumers through drug stores and other retail outlets located in that State. Orders received from outside the State are returned to the sender with a statement that O-Jib-Wa Bitters is sold only in the State of Michigan.

The hearing examiner held that respondents Shafe and Morrish had engaged in unfair and deceptive acts and practices in commerce within the meaning of Section 12(a)(1) of the Act, in causing certain false advertising statements relating to O-Jib-Wa Bitters to be published; and the initial decision additionally held that other advertisements disseminated by respondent Morrish for promoting sales of another potion, Oscoda Bitters, contravened both Sections 12(a)(1) and 12(a)(2) of the Act. An agreement between

counsel fully supports our conclusion that each of the preparations is lacking in therapeutic value in the respects alleged in the complaint. The respondents' appeal attacks the initial decision's holding that by falsely advertising O-Jib-Wa Bitters under the circumstances here presented, the respondents have caused the dissemination of advertisements by the United States mails and in commerce within the meaning of the Act.

The Wheeler-Lea amendment to the Federal Trade Commission Act was approved March 21, 1938. Section 12 deals with advertising for four categories of products, namely, drugs, foods, cosmetics and therapeutic devices. Section 12(b) provides that the dissemination of the causing to be disseminated of any false advertisement within the provisions of subsection (a) thereof shall be an unfair or deceptive act or practice in commerce within the meaning of the Act. Subsection (a) thereof reads:

It shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement—

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

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

Respondents contend that they are not legally liable for disseminating advertisements of O-Jib-Wa Bitters. They state that the chain of causation attributable to them stopped when the advertisements appeared in the newspapers and that any later dissemination constituted dissemination of the newspapers rather than of the advertisements. This contention is untenable. To accept the interpretation advanced by the respondents would impose sole responsibility for the false advertising of foods, drugs, cosmetics and therapeutic devices upon disseminating media and leave free therefrom the party primarily standing to benefit from such advertising. Under Section 14, the disseminating medium is accorded immunity from criminal penalties when it furnishes the name and address of the party who "caused him" to disseminate the advertisement. That Section 12 is fully applicable to the advertiser is plain. The Section provides:

"It shall be unlawful for any person, * * * to disseminate, or *cause to be disseminated*, any false advertisement." [Emphasis supplied.]

The respondents also argue that out-of-state subscribers to the newspapers carrying the advertisements for O-Jib-Wa Bitters com-

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prise only a small percentage of the average daily circulation of those publications. They say that this circumstance refutes conclusions that any dissemination "in commerce" of the advertisements occurred. By various means, including the mails, 227 to 6000 copies of certain newspapers were circulated daily among out-of-state subscribers; and more than 35 Michigan newspapers carried the advertising of O-Jib-Wa Bitters. The hearing examiner properly held that the respondents had caused the advertisements' dissemination in commerce.

The United States mails were used by one newspaper in distributing 17% of its daily circulation; for another it was 14%, and approximately 3% for three others. This evidence, when considered with the preceding paragraph, affords ample legal basis for the hearing examiner's sound holding that the respondents have caused the dissemination of advertisements for O-Jib-Wa Bitters by the United States mails. We deny respondents' exceptions thereto. Congress' plenary power to prevent use of the mails for purposes adverse to sound public policy is well established. The Government's right to decline to become an agent in the circulation of printed matter which Congress regards as injurious to its citizens long has been judicially recognized. *In re Rapier*, 143 U.S. 110 (1891).

The respondents contend that violation of Section 12(a)(1) is contingent on the showing of sales in commerce, that is, interstate commerce. The section does not impose such a requirement and the jurisdictional criteria which are provided in lieu thereof are clear and explicit. While this consideration is not controlling here, Section 12 does not expressly require that any form of sale be shown as a condition precedent to legal liability for false advertising; a showing of likelihood of sale therefrom is sufficient. The prohibitions of Section 12(a)(2) against false advertising extend to all methods and channels of dissemination. Section 12(a)(1), on the other hand, is limited to the two categories of dissemination designated, namely, by mail and by any means in commerce.

Sections 12(a)(1) and 12(a)(2) were designed to complement each other. To require under Section 12(a)(1) the showing of a sale in commerce or a likelihood thereof manifestly is the same as though Section 12(a) were comprised solely of Section 12(a)(2) and Section 12(a)(1) never enacted at all. Where the intention of the legislature is so apparent from the face of a statute that there can be no question as to its meaning, there is no room for construction. *People ex rel Wood v. Sands*, 36 P. 404 (1894); *Van Camp & Sons*

v. *American Can Company, et al.*, 278 U.S. 245 (1929); *U.S. v. Missouri Pacific Railroad Company*, 278 U.S. 269 (1929).

The initial decision held in effect that legal responsibility for the false advertising disseminated in promoting sales of Oscoda Bitters rested solely on respondent Morrish. The advertising claims held relevant thereto were limited to those contained in an order form for Oscoda Bitters which he disseminated. Notwithstanding Shafe's aforementioned policy against shipments outside the State of Michigan, O-Jib-Wa Machine Company frequently received out-of-state mail orders for its product. Many accepted Morrish's offer of Oscoda Bitters as a substitute for O-Jib-Wa Bitters.

Counsel supporting the complaint argues on appeal that the newspaper advertisements containing the false therapeutic claims for O-Jib-Wa Bitters were disseminated under circumstances likely to induce, albeit indirectly, the purchase of Oscoda Bitters. Counsel also contends that the hearing examiner further erred in failing to hold that the role of respondent Shafe in causing the dissemination of the advertisements for O-Jib-Wa Bitters has constituted, as a matter of law, his dissemination of false advertisements for Oscoda Bitters, in violation of Section 12(a)(1) and 12(a)(2) of the Act.

It appears from the record that after Morrish had been in Shafe's employment for a number of years, Shafe agreed that Morrish might make and sell on his own time a product similar to O-Jib-Wa Bitters, provided it was sold outside of Michigan. In 1948, Morrish began preparing at home a product very similar to O-Jib-Wa Bitters. Designated as Oscoda Bitters and distributed by him under the name of Continental Products Company, Morrish has restricted its sales to areas beyond the borders of Michigan, as agreed with Shafe. Shafe has never had a financial interest in Continental Products Company. The ingredients and bottles used for Oscoda Bitters have been purchased from him.

Morrish's management duties for O-Jib-Wa Medicine Company long have included disposition of remittances received with out-of-state orders for O-Jib-Wa Bitters. From 1948 until late in 1953, they, in instances, were returned by him under the letterhead of O-Jib-Wa Medicine Company, with a statement that the same medicine was available under the name of Oscoda Bitters, and an order sheet for Oscoda Bitters, bearing the name of Continental Products Company was enclosed. In other instances, the person ordering was informed on the letterhead of Continental that his order had been referred to it by O-Jib-Wa Medicine Company and that shipment of Oscoda Bitters, prepared under the same formula, was being made forthwith with privilege of refund.

Shafe testified that when Morrish's procedures came to his attention during the course of an investigation by the Commission in 1953, he instructed Morrish that other than stating that another medicine was available, he was not to refer to Oscoda Bitters in correspondence conducted in the name of O-Jib-Wa Medicine Company. Morrish was authorized, however, to continue to contact returnees of O-Jib-Wa orders on his own time and under his trade name. No advertising in the name of Oscoda Bitters is placed with newspapers or other media by Morrish. His promotional literature has consisted of an order sheet containing various false claims of therapeutic value for Oscoda Bitters in the treatment of arthritis and other disorders, together with a letter by Continental Products Company emphasizing that Oscoda Bitters is identical, or nearly so, to O-Jib-Wa Bitters.

In rejecting counsel's contentions that the advertisements published for inducing sales of O-Jib-Wa Bitters also constituted advertising likely to induce indirectly the purchase of Oscoda Bitters, the hearing examiner deemed it legally controlling that sales of the latter were completed by additional acts of inducement by Morrish. The claims contained in the advertising for O-Jib-Wa Bitters referred solely to that product. Hence, the hearing examiner thought that they were unlikely, in and of themselves, to induce purchases of another preparation, Oscoda. As noted previously, the promotional activities for O-Jib-Wa Bitters routinely yielded orders from persons requesting out-of-state shipments of O-Jib-Wa Bitters. Because they were in quest of therapeutic benefits promised by O-Jib-Wa Bitters in its advertising, those persons were receptive to offers of a similar preparation on learning that O-Jib-Wa Bitters would not be sold to them. Morrish's desire to market a preparation similar to O-Jib-Wa Bitters obviously stemmed from Shafe's prior policy of rejecting out-of-state orders and the extensive advertising engaged in for O-Jib-Wa Bitters.

That in some instances sales of Oscoda Bitters in commerce would be a natural and probable result of the advertising of O-Jib-Wa Bitters was implicit in the Morrish-Shafe agreement. The record confirms that the newspaper advertising engaged in by the respondents in promoting the sale of O-Jib-Wa Bitters in Michigan had the likelihood of indirectly inducing purchases of Oscoda Bitters in commerce. Shafe caused the dissemination of the false advertisements for O-Jib-Wa Bitters, and in the circumstance here presented his false advertisements were *likely to induce indirectly* the purchase of Oscoda Bitters. His acts in the latter respect were violative of Sections 12(a)(1) and 12(a)(2) of the Act. The

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findings as to the facts and conclusions contrary hereto which are contained in the initial decision are modified accordingly.

In letters directed to rejected purchasers of O-Jib-Wa Bitters, Morrish represented that his Oscoda Bitters was identical, or substantially identical, to O-Jib-Wa Bitters. Thus he made the same false representations for Oscoda Bitters as the respondents made for O-Jib-Wa Bitters. This constitutes an additional violation of Section 12 by respondent Morrish.

As modified hereby, the findings as to the facts and conclusions contained in the initial decision are adopted as the decision of the Commission. An appropriate order is issuing herewith.

FINAL ORDER

Counsel for the respondents and counsel supporting the complaint having respectively filed their cross-appeals from the initial decision of the hearing examiner, and the matter having been heard on briefs and oral argument; and the Commission having rendered its decision denying the appeal of the respondents and granting the appeal of counsel supporting the complaint, and modifying certain findings and conclusions of the initial decision in the manner indicated in the Commission's opinion and further directing modification of the order to cease and desist contained in the initial decision:

It is ordered, That the following order be, and it hereby is, substituted for the order contained in said initial decision:

I. *It is ordered*, That the respondent Kenneth W. Shafe, individually and trading as O-Jib-Wa Medicine Company, or trading under any other name, and the respondent Kenneth G. Morrish, individually and trading as Continental Products Company, or trading under any other name, and as manager of O-Jib-Wa Medicine Company, and said respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of either of the preparations now designated as "O-Jib-Wa Bitters" and "Oscoda Bitters," or any other product of substantially the same composition or possessing substantial similar properties, whether sold under the same name or any other names, do forthwith cease and desist from:

(A) 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 either of said preparations, however taken:

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(a) Constitutes an adequate, effective or reliable treatment for, will arrest the progress of, correct the underlying causes of or cure any form of arthritis or rheumatism;

(b) Constitutes an adequate, effective or reliable treatment for the symptoms or manifestations of any form of arthritis or rheumatism, including pain, swelling and stiffness or will afford relief from the aches, pains or other discomforts thereof;

(c) Will stop backache, cleanse the blood of poisons or waste, promote better digestion or give one pep or vitality;

(d) Is an adequate, effective or reliable treatment for indigestion, overtaxed nerves or any disease or disorder of the stomach, liver, kidneys, blood or the symptoms thereof.

(B) Disseminating or causing to be disseminated any advertisement by any means for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase in commerce as "commerce" is defined in the Federal Trade Commission Act, of the preparation designated "Oscoda Bitters," which advertisement contains any of the representations prohibited in Paragraph I (A) hereof.

II. *It is further ordered*, That the respondent Kenneth G. Morish, individually and trading as Continental Products Company, or trading under any other name, and his agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of the preparation now designated as "Oscoda Bitters," or of any other 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:

(A) Disseminating or causing to be disseminated by means of the United States mails or by any other means in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which represents directly or by implication that said preparation, however taken, constitutes an adequate, effective or reliable treatment for any form of rheumatism, arthritis, neuritis, sciatica or the symptoms thereof or for any disease or disorder of the blood, stomach, liver, kidneys or nervous system or the symptoms thereof.

(B) Disseminating or causing to be disseminated any advertisement by any means for the purpose of inducing or which is likely to induce directly or indirectly the purchase in commerce as "commerce" is defined in the Federal Trade Commission Act of the respondent's said preparation, which advertisement contains any of the representations prohibited in Paragraph II(A) hereof.

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Order

It is further ordered, That the respondents, Kenneth W. Shafe and Kenneth G. Morrish, 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.

It is further ordered, That the initial decision of the hearing examiner, as modified by the Commission, is hereby adopted as the decision of the Commission.

IN THE MATTER OF
RENOR COMPANY, INC., ET AL.

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

Docket 6617. Complaint, Aug. 22, 1956¹.—Decision, June 27, 1957

Order requiring a corporation in Milwaukee, Wis., and a partnership of its officers doing business in Chicago, Ill., each selling only in its own State a laxative preparation under the names "Renor Concentrate" and "Rennel Concentrate", respectively, to cease disseminating in commerce advertisements which represent that the preparation constitutes an effective treatment for obesity or will reduce the weight of the user.

Mr. R. P. Bellinger supporting the complaint.

Mr. Harlan W. Kelley, of Baraboo, Wis., for respondents.

INITIAL DECISION BY JOSEPH CALLAWAY, HEARING EXAMINER

Formal complaint, issued August 22, 1956, charged respondents with disseminating and causing the dissemination of false advertisements for a drug preparation called "Renor Concentrate" and also "Rennel Concentrate." The allegations of the complaint in effect charge violation of Section 12(a)(1) of the Federal Trade Commission Act which is, by Section 12(b), made an unfair or deceptive act within the meaning of Section 5.

The complaint was, on motion, dismissed without prejudice as to respondents Glenn W. Braun and Clyde Witt, copartners trading as Rennel Products and Charles J. Braun and Rose Marie Witt, copartners trading as Rennel Sales because of misjoinder of parties.

Two separate answers were filed by the other respondents. Renor Company, Inc. a corporation and John T. Benson, Craig Benson and Charles B. Ryan, individually and as officers of said corporation filed one answer. John T. Benson and Craig Benson, copartners, trading as The Rennel Company filed the other answer.

Subsequent to the filing of these answers the complaint was amended to allege dissemination of the advertisements complained of, by broadcasts from radio stations which have the power and capacity to and do convey their messages across state lines to listeners in other states. The original complaint had limited the allegation concerning dissemination of the advertising to newspapers having interstate circulation. Separate answers were also filed to the amended complaint.

¹ Complaint amended and dismissed as to certain respondents Nov. 5, 1956.