

IN THE MATTER OF
GILBERT S. BISHOP DOING BUSINESS AS BISHOP HAIR
EXPERTS

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

Docket 6554. Complaint, May 15, 1956—Decision, May 12, 1958

Order requiring an individual with principal place of business in Cincinnati, Ohio, and operating treatment offices at Pittsburgh, Pa.; Buffalo, N.Y., and Cincinnati, to cease advertising falsely—in newspapers and by means of advance advertising of traveling representatives who invited the public to call on a certain date at a certain place for diagnosis and advice—that by use of his preparations and treatments, excessive hair loss or baldness would be prevented or overcome in almost every case; that hair would be induced to grow upon the heads of all but about five percent of the cases; that fuzz and thin hair would be replaced by stronger and thicker hair; and that dandruff, itching, dryness, and oiliness of the hair and scalp would be permanently eliminated; to cease representing falsely by use of the designation "trichologist" that he and certain of his employees had been trained in dermatology and the branches of medicine having to do with the diagnosis and treatment of scalp disorders affecting the hair and that he had "expanded quickly from 1 office to 14 affiliated offices in North America."

Mr. Harold A. Kennedy for the Commission.

Howrey & Simon, by *Mr. Edward F. Howrey*, *Mr. Harold F. Baker*, and *Mr. John Bodner, Jr.*, of Washington, D.C., for respondent.

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

BACKGROUND STATEMENT

Complaint in this case issued May 15, 1956, charging violation of the Federal Trade Commission Act through the use by respondent of false, misleading and deceptive advertising and the dissemination thereof by the United States mails and other means in commerce concerning various cosmetic preparations of the respondent and represented by him to prevent excessive hair loss or baldness, to grow hair, replace fuzz, or thicken hair with thicker or stronger hair, or permanently eliminate dandruff, itching, dryness or oiliness of hair and scalp. Misrepresentation is also alleged in respondent's representations that he and associates were trichologists and that he had expanded from 1 to 14 treatment offices in the United States. The

1600

Findings

answer denied substantially everything except respondent's identity and his business address. After nine hearings in four cities, counsel supporting the complaint completed his case. Motion to dismiss for lack of jurisdiction and failure to make out a prima facie case was made by counsel for respondent, denied, appealed, and the appeal denied. Thereafter, respondent offered in evidence several excerpts from medical tests, admission of which was refused, and after this ruling was appealed and denied, offered by way of defense a stipulation with reference to dissemination. The case was thereupon closed and date fixed for submission of proposed findings and conclusions by all counsel. These were filed August 30, 1957. The record consists of 1,108 pages of testimony, 63 exhibits in support of the allegations of the complaint, and five tendered but rejected exhibits by respondent. On consideration of the entire record, together with the proposed findings submitted by both sides and the law applicable thereto, the hearing examiner finds that this proceeding is in the public interest, and in addition makes the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent Gilbert S. Bishop is an individual doing business as Bishop Hair Experts with his office and principal place of business located at 1620 Madison Road, Cincinnati, Ohio. Respondent also maintains offices at 1305 Union Trust Building 14th and Walnut Streets, Cincinnati, Ohio; 717 Liberty Avenue, Pittsburgh, Pa.; and 516 Walbridge Building, 43 Court Street, Buffalo, N.Y.

2. Respondent, after working as an employee for Thomas Management Corp., sometimes known as Thomas Hair Experts, and for the Mueller Hair Experts, entered this scalp treatment business on his own in 1952, and since that time has advertised widely his proficiency in treating conditions of the hair and scalp, and as a necessary and integral part thereof, has had concocted a number of preparations which are applied to the scalp either by operatives in his various offices or at home by his customers. These preparations are composed of the following ingredients in various combinations:

Boric Acid	Glyceryl Monostearate
Castor Oil	Oil of Bay Terpeneless
Cetyl Alcohol	Oxyquinoline Sulfate
Detergent	Perfume
Deltyl Prime (isopropyl esters of fatty acids)	Phenol
Dyes	Propylene Glycol
	Resorcin

Findings

54 F.T.C.

Stearic Acid	Water
Sulfonated Castor Oil	Glycinol
(Nopco #1034)	60L (detergent)
Glycerin	AA 62 (foam stabilizer)
Color	Lecithin
Liquid Soap	Coal Tar
Hexachlorophene	Benzyl Benzoate
Hyamine No. 1622	G-11 (antiseptic)
Isopropyl Alcohol	G-4 (fungicide)
Mineral Oil	Beta Naphthol
Tincture Capsicum	Petroleum Base
Triethanolamine	Ammoniated Mercury

3. Respondent's preparations are concocted from the above ingredients by a commercial laboratory in Cincinnati, Ohio, according to formulas and directions supplied by respondent, bottled and packaged by the laboratory and shipped by it, on respondent's order, either to his principal office for reshipment as needed to his other offices, or directly to those other offices, or shipped in kits, called Home Treatment Kits, directly to a purchaser. In any event, there has been, and is, a constant and substantial movement in commerce of these preparations.

4. Respondent divides his operations into two parts which he calls office treatment and home treatment. In the former, the customer has his scalp looked at by respondent or one of his employees in the offices in Cincinnati, Pittsburgh, or Buffalo, and a course of respondent's treatments prescribed. Frequently this means 60 visits at \$5 each with a discount for lump-sum payment in advance. The treatment consists of massaging, brushing, shampooing, ultraviolet ray, and the application of one or more of respondent's preparations, plus the purchase of four bottles of cleansing agents—Shampoo, Glycinol, Triseptal and Solvent—and a hair brush. To reach customers in other cities, respondent will advertise in a local paper the advent of one of his "trichologists" at a given day in some local hotel room. Those who respond have their scalps looked at, treatment recommended, and are sold one of respondent's Home Treatment Kits at \$65-75, containing a 3 months' supply of the above-mentioned 4 bottles of cleansing agents, plus 64 assorted vials of respondent's other preparations of 2 drams each, plus a booklet of instructions. No treatment is given in these hotel rooms. Respondent's overall income from these operations has been from \$150,000 to \$200,000 a year, of which something less than half comes from the Home Treatment Kit

1600

Findings

operation. Substantially all of it results from respondent's extensive advertising.

5. Between January 1, 1953, and September of 1956, respondent advertised by 1 or repeated insertions in some 276 newspapers, published in 25 States, inviting readers to come to his places of business, or to hotel rooms visited by his traveling employees, for diagnosis and treatment. Typical excerpts from such advertising are as follows:

(a) An interview with G. S. Bishop, Director, Bishop Hair Experts. DO YOU BELIEVE: That baldness is inherited? That it's natural to lose hair as you get older? That baldness can not be prevented? That you can't grow thicker hair? "Outdated ideas," says one of the country's foremost authorities. "Baldness is not inherited, though some few people inherit a tendency toward it that may be overcome. Hair naturally grows fastest in the years from 35 to 60, according to scientific tests. Baldness can be prevented in almost every case if you start in time. You can grow thicker hair in any area where the 'hair factories' have not already closed down." * * *

"In my experience", Bishop said, "there's hardly a man or woman who won't benefit from our treatment. Our records show that 95 percent of the people who take treatment are satisfied with the results.

"Only about five percent are refused treatment, usually because they waited so long that they are slick-bald. We do not waste their time and money by accepting such 'hopeless' cases." * * *

"We can save and thicken the hair you have, improve its appearance. In areas where there is fuzz growing, you may have strong, vigorous, healthy hair. Best of all, we teach you how to keep it that way all your life.

"One of the most satisfactory things about Bishop treatment is that you notice results at once. After the first visit, in fact, your scalp will have a feeling of glowing, tingling health. Itching and dandruff soon disappear. Excess oiliness or dryness clears up. Before long, hairfall slows down to normal and replacement hairs are stronger and thicker."

In other words, no more messy coat collars * * * no more embarrassing dryness or oiliness to make your hair unmanageable and offensive * * * no more unfunny jokes about "Old Baldy". Instead, you'll have a good head of healthy hair that you can be proud of. * * *

For Out-of-Towners. In order to help hair-worried men and women who live out of town, or who travel a lot, Bishop's experts have developed a highly effective combination home-and-office treatment. Only occasional visits to the Bishop office are necessary, sometimes just the one examination visit. The rest you can do in your home. * * *

(b) "It's never too late TO SAVE YOUR HAIR." City's leading scalp specialist backs up his statement with money back guarantee * * * by Will Blair, Special Writer.

"ALL POPULAR notions to the contrary notwithstanding, it is never too late to save your hair. That holds true whether you are 16 or 60, whether you have a little hair or a lot." * * *

"Merely saving your hair, keeping what you have, is actually the minimum benefit you can expect from Bishop treatment and the program of aftercare we give you. Your hair will certainly look better and feel better.

Findings

54 F.T.C.

"In most cases, your hair will also grow better—stronger and thicker." * * *

* * * Bishop boils down his accumulation of experience and thousands of case histories to one simple, matter-of-fact conclusion. That healthy scalp grows healthy hair! "Think about it a minute", Bishop urges. "It seems so obvious, you might say no intelligent person would deny its truth. But when you accept it as true, then you must rule out practically all the common beliefs about baldness. "For instance, most people think that baldness is handed down from father to son—inherited. Yet nobody would argue that you can inherit an unhealthy scalp. So you can't very well inherit baldness can you?"

"Another common idea is that a man just naturally loses his hair as he gets older. Why should he? There's no reason why he shouldn't keep his scalp healthy and his hair growing.

"You've also heard men say that nothing can be done to stop hair loss, once it starts. Why not? It's just a question of correcting an unhealthy scalp condition, and trading bad habits of haircare for good habits." * * *

(c) HOW TO END HAIR WORRIES * * * There'll be an examination first. Very painstaking, but absolutely free. By it we determine two things: 1. Will you benefit from Bishop treatment? 2. What should your treatment include?

You'll flunk this examination if you are already slick-bald, or if you have one of several abnormal systemic conditions. About five percent of those who come to see us are rejected for these reasons. But if you pass, and enroll, your hair worries are over. You'll *enjoy* the treatments. Yes, and the *results*. The least you can expect is to keep the hair you have now. All of it. And if you don't wait *too* long, you ought to be able to re-grow much of the hair you lost.

(d) Where you're growing fuzz you can usually grow real hair, trichologist says. * * *

Cincinnati, Ohio. New home treatment methods for growing thicker hair—and preventing baldness—will be demonstrated in Indianapolis, Indiana, this Sunday, September 26.

Trichologist C. O. Brown, of the famous Bishop Hair Experts organization, will be in charge. He will personally examine hair-worried men and women from 2 p.m. to 9 p.m. Sunday at the Hotel Lincoln.

(e) It's a one way TICKET DANDRUFF ITCHINESS DRY HAIR OILINESS THINNING BALDNESS THE TRIP to baldness is practically non-stop for most men. But it needn't be.

You can transfer from the "Baldness Line" by calling a stop to those common hair troubles * * * dandruff, itchy scalp, dry or oily hair, thinning * * * by acting decisively, intelligently, and quickly. See an expert—a Bishop hair expert, nationally famous. * * *

Life Long Benefits. Best of all, the benefits of Bishop treatment last the rest of your life. For when treatment is over, and your scalp is in condition to grow healthy hair, the Bishop expert gives you a program of home aftercare to ward off further trouble in the future. * * *

(f) * * * To get your hair to growing as it should, and to keep it growing, you need expert help. You need BISHOP HAIR EXPERTS' help. Take Bishop treatment to put your scalp into hair-growing condition. Follow the Bishop plan of after-treatment care to make sure your hair lasts a life-time.

(g) THIS WE CAN DO. These are the *present* facts about baldness. Come

1600

Findings

to us with hair and we save that hair. All of it. In those areas of your scalp where the "hair factories" are not locked shut, we can *grow thicker hair*. Mere "fuzz" may be replaced with hair of full body and color. * * *

(h) As *professional* experts, we believe that this will not be true always—but it is certainly true today.

(i) Excessive hair loss, dandruff due to dry or oily hair, itchy scalp—all these conditions are so easy to correct in their early stages with the help of Bishop Hair Experts.

(j) Consider the vital matter of formulas. None of the common property medication is ever employed in our offices. We have surer, faster-acting formulas based on newer discoveries and research.

(k) Does Bishop grow hair? Best evidence that he does is that his organization expanded quickly from one office to 14 affiliated offices in North America: Buffalo, Pittsburgh, Cincinnati, Miami, Tampa, Houston, Dallas, San Antonio, Fort Worth, Oklahoma City, Tulsa, San Francisco, Montreal, Mexico City. And in addition to these permanent offices, their staff trichologists regularly do extension work in many other cities.

6. The above-quoted statements taken in full context fairly represent, either directly or by implication, to the reader, that through the use of respondent's preparations, methods and treatments, excessive hair loss or baldness will be prevented and overcome in almost every case, that hair will be induced to grow in almost every case, that fuzz and thin hair will be replaced by thicker and stronger hair, and that hair will grow in about 95 percent of the cases. Representing as respondent does that after his treatments "itching and dandruff soon disappear—excess oiliness or dryness clears up" or that these conditions "are so easy to correct * * * with the help of Bishop Hair Experts" connote to this hearing examiner elimination and cure. Disappearance, clearing up, and correction, imply permanent relief.

7. Trichology is a branch of dermatology and dermatology itself is a branch of medicine, and through the use of the designation "trichologist" the respondent has represented, directly and by implication, that he and his employees have had competent and thorough training in dermatology.

8. The last above-quoted representation (k) likewise fairly represents that respondent operates 14 permanent offices in the United States, Canada, and Mexico.

9. All of these representations are either false, deceptive, or misleading. The uncontradicted and unanimous testimony of three experienced and highly qualified dermatologists is to the effect that from 85-95 percent of all baldness, consummated or progressive, is male pattern type, or in medical terms, alopecia prematura, that it is preceded or accompanied frequently by itching, dandruff, oiliness or dryness, that its cause is unknown but suspected to be either heredity or

Findings

54 F.T.C.

hormone secretion and balance, or the aging process, that the cause here being unknown, there is neither a preventive or cure therefor, that no treatment has been found effective therefor, and that respondent's preparations, alone or in combination, will neither prevent nor cure it, will not restore or regrow hair, nor correct, except temporarily, itching, dandruff, oiliness or dryness and will do so then only if continued indefinitely, nor replace fuzz or thin hair with thicker or stronger hair. The fact that none of them had employed respondent's treatments or used his preparations is immaterial.

10. Respondent's advertising directly represents that baldness is arrestable and, by implication, curable, whereas dermatological opinion is that 85-95 percent of it is neither. Although respondent's treatments and preparations, particularly his shampoos, do have beneficial effects on those with dirty or uncared for hair and scalps, ordinary hygiene will in most instances produce the same results, and in either case, benefit is permanent only if continued indefinitely. The main impact of the advertising is on those who are growing bald, as shown by all the consumer witnesses who testified, and by the advertising itself, which is, therefore, deceptive and misleading, and are words of promise to the eye to be broken to the hope. Respondent's advertising creates an expensive illusion in any reader with alopecia prematura.

11. Since neither respondent nor any of his "staff" have had any training in medicine or dermatology, the use of the word "trichologist" in his advertising is plainly false. In fact, the testimony shows that some members of this staff, hired from such occupations as supervisor for the International Harvester Co. were, after a few weeks of watching respondent examine scalps under a magnifying glass, put to doing the same thing. The deception is further enhanced by pictures of respondent in a white coat appearing in the advertisements and by letters signed by respondent's secretary as "technician."

12. Respondent's representation that "his organization expanded quickly from one office to 14 affiliated offices" is also false. Respondent maintains only three treatment offices—in Cincinnati, Pittsburgh, and Buffalo. The fact that he refers his customers who travel or move to other cities to "hair experts" in those cities, for one or more interim treatments, or for continuation, does not warrant the claim of expansion of his organization.

13. Respondent's advertisements are misleading in a further material respect and constitute "false advertisements" by reason of failure to reveal material facts in the light of representations made

1600

Findings

therein. By advertising his preparations as a cure or remedy for baldness caused by scalp disorders, which respondent has represented as the cause in almost every case of baldness, he has suggested that there is a reasonable probability that baldness is due to the presence of a scalp disorder and that his preparations will be of benefit, and will constitute an effective treatment therefor. In truth and in fact the instances in which baldness is due to scalp disorders are rare. In the great majority of cases baldness is a male pattern type, having no relation to scalp disorders, and when baldness is of this type, respondent's preparations are of no value in the treatment thereof. Thus, there is no reasonable probability that any particular case of baldness is caused by a condition for which respondent's preparations may be beneficial, and respondent's advertising is misleading because of respondent's failure to reveal the fact that in most cases, baldness is of the type known as male pattern baldness and that when baldness is of that type, respondent's preparations are of no value in the treatment thereof.

14. Respondent attempts to defeat liability for some of this advertising by his claim and testimony that he sold the so-called "Home Treatment Division" to his brother-in-law, one C. O. Brown, a resident of Louisville, Ky., on July 1, 1953, and did not repossess it until October or November of 1955, and that during this period he was completely divorced from that end of the business except to give advice on request, and therefore is not responsible for any of its activity. There is in the record an executed sales agreement dated July 1, 1953, whereby respondent agrees to sell and Brown to buy for \$5,000 cash, receipt of which is acknowledged, plus 25 percent of gross receipts for 3 years, all of the inventory, good will, trade name, advertising and records of "Bishop Hair Experts, Home Treatment Division."

15. Brown, the purported purchaser, testified, however, that at Bishop's insistence he left in early 1953 a secure position as supervisor for International Harvester Co. in Louisville, Ky., to join respondent, that the latter took him to the office of the latter's lawyer in Cincinnati and told him to "Sign this paper in case the Federal Trade Commission should walk in to see me some day. I will have this contract to say I don't own the business, therefore, you still have got a job, I have still got a job, Ted Zimmer has still got a job." Brown further testified that he never paid the \$5,000, never received any bill of sale, never even got a copy of the contract, and that the understanding was that it was never to go into effect but was merely a subterfuge, and that the contract was never mentioned between

them until early in 1956. Brown further testified that throughout the remainder of 1953, and during all of 1954, he traveled 18-25 days a month as a salesman for respondent selling home treatment kits to prospects in hotel rooms in various cities, that the orders therefor were sent into respondent's main office at 1620 Madison Road, Cincinnati, Ohio, from which place the kits were shipped to the purchasers at their homes, that he made all remittances to that office and sent all reports there, that he had nothing else to do with the operation of the business, and nothing to do with the advertising.

16. He further testified that in December of 1954, while on a visit to Cincinnati, respondent told him that an investigator for the Federal Trade Commission had called at respondent's principal office and, respondent not being there at the time, had talked to one of respondent's employees, making inquiries about the advertising involved in this proceeding and the operation of the business, and that respondent then said, "Let's move it to Louisville immediately," to which Brown agreed. Thereupon Brown and Bishop orally agreed that Brown would open up an office in Louisville, handle the home treatment business from there, under Bishop's supervision, pay the bills, and pay Bishop \$800 a month, plus \$100 a month for every salesman whom Brown might hire to work for him. According to his testimony he, thereafter, in February 1955, rented an office, hired an office girl, bought some furniture, and sent orders for home treatment kits into 1620 Madison Road as before. However, these kits were there packed and addressed, but instead of being shipped directly to the purchaser from there, the packages were put in large boxes and shipped to Brown at Louisville where Brown's office girl unpacked them and took them to the post office for mailing from Louisville. Being already sealed and addressed only postage had to be added. Although these kits were costing Bishop only \$4.15 each, he charged Brown \$7.50 each, and Brown in turn sold them to credulous prospects for \$65 or \$70 each—a sad commentary on male vanity. Additionally, Brown testified that Bishop told him to keep the office help in the dark as to the operation and that if a Federal Trade Commission investigator showed up to say nothing and be out of town.

17. The issue of credibility raised by these directly contradictory statements is resolved against the respondent. I found him an evasive, devious and, at times, a supercilious witness, with a convenient "forgettery," vague on crucial points, with a lot of unsatisfactory explanations, usually couched in the subjunctive. His testimony on this point was either fabrication or prevarication; in any event unre-

1600

Findings

liable. Brown, on the other hand, made an opposite impression and was corroborated in essential detail by his wife, who worked in the Louisville office, and by the office girl, both of whom testified that Bishop frequently inspected the office, examined records, gave orders, prepared or exercised veto over travel itineraries, had the sales reports sent first to Cincinnati and then later remailed to Louisville, dictated letters over the telephone from Cincinnati to be mailed out from Louisville, and generally exercised authority and control. Although Bishop obviously had a motive to prevaricate and Brown possibly, because Bishop has sued him civilly for a money judgment, neither of these female witnesses had any such motive.

18. Moreover, there are in this record three distinct instances of Bishop's testimony being flatly contradicted by wholly disinterested witnesses. Thus, he testified that he was trained at Chappelle Beauty College in New Orleans, yet the records of the institution and the knowledge of its teacher there since 1942 prove the contrary. Bishop also testified it was his policy never to accept for treatment in his Cincinnati office anyone from out of town, yet at least two witnesses from Kentucky were treated by him and sold his cleansing preparations, and finally he testified that any preparations sold with office treatment were included in the \$5 visit fee, whereas most of his customers who testified had to buy the four bottles of cleansing liquids and pay for them in addition to the treatment fees.

19. Furthermore, there are many concrete and uncontradicted facts in the record which support Brown's version and give the lie to Bishop's. Thus, during 1954, Bishop withheld social security taxes from Brown and filed W-2 form showing Brown as his employee, reported substantial income from the "Home Treatment Division" as his own in 1953, 1954, and 1955 to the Internal Revenue Department and took deductions therefor, made collections and made refunds claimed by disillusioned purchasers of home treatment kits. Furthermore, Bishop had learned the business working for the Thomas and Mueller outfits, both of whom had had their somewhat bolder but substantially similar advertising to that involved here stopped by the Federal Trade Commission, and he was apparently aware that he too was skating on thin ice. Furthermore, he was getting, unknown apparently to Brown, a rebate from the laboratory on all kits purchased by Brown in 1955, the prices of which were fixed by him, not by the laboratory or by Brown. And why the devious means of shipment of these kits?

20. The conclusory finding on this point is that the alleged "sale" of the "Home Treatment Division of Bishop Hair Experts" by

Findings

54 F.T.C.

the respondent to Brown in 1953 was wholly fictitious and ineffective, that respondent was, remained, and is, the sole owner of the entire business, was and is responsible for all of its operations and business practices, including the advertising involved here.

21. Respondent's second contention of immunity from this proceeding is that respondent in his "office treatment division" is selling a service rather than a commodity and that none of his advertising of office treatment refers in any way to any product, preparation, or commodity, and that, therefore, sections 12 and 15 of the Federal Trade Commission Act grant no jurisdiction over respondent's office treatments.

22. Section 12(a) of the act 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 foods, drugs, devices, or cosmetics * * *."

Section 15(e) states:

The term "cosmetic" means (1) articles to be rubbed, poured, sprinkled, or sprayed on, introduced into, or otherwise applied to the human body or any part thereof intended for cleansing, beautifying, promoting attractiveness, or altering the appearance, and (2) articles intended for use as a component of any such article; except that such term shall not include soap.

Section 15(a) (1) states:

The term "false advertisement" means an advertisement, other than labeling, which is misleading in a material respect; and in determining whether any advertisement is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent of which the advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual. No advertisement of a drug shall be deemed to be false if it is disseminated only to members of the medical profession, contains no false representation of a material fact, and includes, or is accompanied in each instance by truthful disclosure of, the formula showing quantitatively each ingredient of such drug.

23. There can be no question that respondent's advertisements of his office treatment were disseminated in commerce as the record shows substantial out of state circulation of the Cincinnati, Pittsburgh, and Buffalo newspapers, as well as others, in which these advertisements of "office treatment" at respondent's offices there ap-

1600

Findings

peared, and the fact is so found. Respondent argues, however, that because there were no newspapers of purely intrastate circulation available in these cities, that because he did not want any interstate business, and instructed his offices to confine treatments to city residents only, he is not within Commission jurisdiction. The answer is, of course, that choice of media was freely his, that the statute is concerned with acts, practices and their effect, not with motives or desires, and that, instructions or not, he did treat and sell preparations to out of state customers who responded to these advertisements.

24. Nor can there be any question either that all of respondent's preparations, whether the cleansing agents, or the vial medications, are cosmetics within the above definitions, and the fact is so found.

25. It is true that most of the "office treatment" advertisements do not offer for sale any "commodity" or preparation or make any mention thereof but, on the other hand, some of these advertisements prominently invite travelers to take "do-it-yourself" or home treatments. Other advertisements state that respondent does not employ "common property" medication but that he has surer, faster acting formulas.

26. The sale of respondent's cosmetics is an integral part of the treatments advertised. Thus, of the ten witnesses who visited respondent's Cincinnati office for examination or treatment, all had been induced to do so by respondent's Cincinnati newspaper advertising, all had been sold the four bottles of cleansing agents and a brush for use at home, eight of them at an additional price to the cost of the treatments, and several had been urged to buy respondent's home treatment kits additionally. Respondent's manager, who had worked in all three offices for 6 months, further testified that the four bottles were regularly and customarily sold to office "clients" and that respondent's three offices regularly sell home treatment kits as well.

27. Under the law it is sufficient if the first contact or interview is secured by deception. *F.T.C. v. Standard Education Society, et al.*, 302 U.S. 112, 115; *Carter Products, Inc., et al. v. F.T.C.*, 186 F. 2d 821; *Fairyfoot Products Co. v. F.T.C.*, 80 F. 2d 684, 689.

28. The same specific claim on substantially the same basic facts was urged and rejected by the District Court for the Northern District of Illinois in *U.S. v. Thomas Management Corp.*, 1952 C.C.H. Trade Cases, paragraphs 67 and 251.

29. Finally, this question was extensively and squarely presented to the Commission in this proceeding in respondent's appeal of

Order

54 F.T.C.

February 28, 1957, and ruled on adversely to the respondent by the Commission May 15, 1957, by which ruling the hearing examiner is, of course, bound.

30. The conclusory finding, therefore, is that respondent has been, and is disseminating by United States mails and in commerce, false, deceptive, and misleading advertisements which induce, and have induced, and which are likely to induce, the purchase of cosmetics.

31. The use by the respondent of the foregoing false, misleading, and deceptive statements and representations, disseminated as aforesaid, has had and now has, the capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements and representations are true, and to induce a substantial portion of the purchasing public to visit respondent's various offices for the purpose of obtaining treatments and to purchase respondent's preparations, and to order said preparations because of such erroneous and mistaken belief, engendered as above set forth.

32. The aforesaid acts and practices of respondent 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 respondent Gilbert S. Bishop, an individual doing business as Bishop Hair Experts, or under any other name, and respondent's agents, representatives, and employees, directly or through any corporate or any other device, in connection with the offering for sale, sale, or distribution of the various cosmetic or other preparations as set out in the findings herein, or any other preparations for use in the treatment of hair or scalp conditions, 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 preparations, alone or in conjunction with any method or treatment, will:

(a) Prevent or overcome excessive hair loss or baldness unless such representation be expressly limited to cases other than those known as male pattern baldness and unless the advertisement clearly and conspicuously reveals that in the great majority of cases of

1600

Opinion

baldness or excessive hair loss respondent's said preparations are of no value whatever;

(b) Induce hair to grow or will otherwise grow hair unless such representation be expressly limited to cases other than those arising by reason of male pattern baldness, and unless the advertisement clearly and conspicuously reveals that the use of said preparations will not grow hair in the great majority of cases;

(c) Replace fuzz or thin hair with thicker or stronger hair;

(d) Eliminate or cure dandruff, itching, dryness or oiliness of the hair or scalp.

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 preparations in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement contains any of the representations prohibited in paragraph 1 hereof.

3. Representing, directly or by implication, that respondent, his agents, representatives, or employees have had competent training in dermatology or other branches of medicine having to do with the diagnosis and treatment of scalp disorders affecting the hair, or are trichologists.

4. Representing, directly or by implication, that respondent owns, controls or operates more than three treatment offices.

OPINION OF THE COMMISSION

By Gwynne, Chairman:

The complaint charges respondent with violation of the Federal Trade Commission Act through the dissemination of false, misleading, and deceptive advertising by the United States mails and by other means in commerce. After hearings, the hearing examiner made findings and entered the following order, which requires respondent to 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 preparations, alone or in conjunction with any method or treatment, will:

(a) Prevent or overcome excessive hair loss or baldness unless such representation be expressly limited to cases other than those known as male pattern baldness and unless the advertisement clearly and conspicuously reveals that in the great majority of cases of baldness or excessive hair loss respondent's said preparations are of no value whatever;

Opinion

54 F.T.C.

(b) Induce hair to grow or will otherwise grow hair unless such representation be expressly limited to cases other than those arising by reason of male pattern baldness, and unless the advertisement clearly and conspicuously reveals that the use of said preparations will not grow hair in the great majority of cases;

(c) Replace fuzz or thin hair with thicker or stronger hair;

(d) Eliminate or cure dandruff, itching, dryness or oiliness of the hair or scalp.

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 preparations in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement contains any of the representations prohibited in paragraph 1 hereof.

3. Representing, directly or by implication, that respondent, his agents, representatives or employees have had competent training in dermatology or other branches of medicine having to do with the diagnosis and treatment of scalp disorders affecting the hair, or are trichologists.

4. Representing, directly or by implication, that respondent owns, controls, or operates more than three treatment offices.

From this order and from certain findings and rulings of the hearing examiner, respondent has appealed.

Respondent Gilbert S. Bishop, doing business as Bishop Hair Experts, has been in operation since 1952. Paragraph 4 of the initial decision sets out sufficiently the general methods of operation:

Respondent divides his operations into two parts which he calls office treatment and home treatment. In the former, the customer has his scalp looked at by respondent or one of his employees in the offices in Cincinnati, Pittsburgh, or Buffalo, and a course of respondent's treatments prescribed. Frequently this means sixty visits at \$5 each with a discount for lump-sum payment in advance. The treatment consists of massaging, brushing, shampooing, ultra-violet ray, and the application of one or more of respondent's preparations, plus the purchase of four bottles of cleansing agents—Shampoo, Glycerin, Trisepal and Solvent—and a hair brush. To reach customers in other cities, respondent will advertise in a local paper the advent of one of his "trichologists" at a given day in some local hotel room. Those who respond have their scalps looked at, treatment recommended, and are sold one of respondent's Home Treatment Kits at \$65-\$75, containing a 3 months' supply of the above-mentioned 4 bottles of cleansing agents, plus 64 assorted vials of respondent's other preparations of 2 drams each, plus a booklet of instructions. No treatment is given in these hotel rooms. Respondent's overall income from these operations has been from \$150,000 to \$200,000 a year, of which something less than half comes from the Home Treatment Kit operation. Substantially all of it results from respondent's extensive advertising.

Respondent's brief presents for consideration on this appeal the following questions:

1. Whether section 12 of the Federal Trade Commission Act applies to advertisements which relate solely to a treatment and not a commodity.

1600

Opinion

2. Whether the examiner erroneously excluded from evidence passages from well-known medical treatises.

3. Whether the examiner unduly restricted respondent's right of cross-examination by limiting cross-examination with learned treatises to those treatises upon which the witness relied in the formation of his opinions.

4. Whether respondent's advertisements contain any representations that the treatment will "permanently eliminate" dandruff, scalp itch, excessive oiliness and excessive dryness of the hair and scalp.

5. Whether the evidence of record is legally sufficient to support the examiner's order.

I

Section 12(a) of the Federal Trade Commission Act provides in part:

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; * * *

Section 15 provides in part:

For the purposes of sections 12, 13, 14—

(a)(1) The term "false advertisement" means an advertisement, other than labeling, which is misleading in a material respect; and in determining whether any advertisement is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual.

The record contains a number of respondent's advertisements in newspapers, some of which were circulated in interstate commerce. At least two of respondent's advertisements did refer directly to a product in the following language: "Surer, faster-acting formulas" and "Consider the vital matter of formulas. None of the 'common property' medications is ever employed in our office. We have surer, faster-acting formulas based on newer discoveries and research."

We do not think that the presence of the word "treatment" or the absence of mention of a commodity or a description of its qualities is necessarily conclusive. The question is whether the net effect of the advertisement was likely to induce directly or indirectly the purchase of cosmetics. That it did have such effect is well illustrated by the following finding of the hearing examiner:

The sale of respondent's cosmetics is an integral part of the treatments advertised. Thus, of the 10 witnesses who visited respondent's Cincinnati office for examination or treatment, all had been induced to do so by respondent's Cincinnati newspaper advertising, all had been sold the four bottles of cleansing agents and a brush for use at home, eight of them at additional price to the cost of the treatments, and several had been urged to buy respondent's home treatment kits additionally. Respondent's manager, who had worked in all three offices for 6 months, further testified that the four bottles were regularly and customarily sold to office "clients" and that respondent's three offices regularly sell home treatment kits as well.

The four bottles of cleansing agents, known as "Shampoo," "Glycinol," "Triseptol," and "Solvent" are cosmetic within the meaning of section 12. These bottles were regularly sold and delivered to persons taking the office treatment for use in their own homes. The usual price was \$14. Office treatments, of which a series, usually 60, were recommended, cost \$5 each.

In other words, respondent's advertising brought interested parties to his office. There, they arranged for treatments and also bought cosmetics. This satisfies the requirements of the statute as to advertising "for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of cosmetics."

In *U.S. v. Thomas Management Corporation*, 1952-3 CCH Trade Cases, sec. 67,250, the court imposed civil penalties for violation of an order of the Commission entered after a stipulation between the parties. The order prohibited the dissemination of false advertising in connection with the offering for sale, sale, and distribution of various cosmetics.

The advertisements considered contained the following:

Important—Genuine, original Thomas treatments for the hair and scalp are available only in the form of professional services, given only in a Thomas office. (p. 67, 401)

The Court made the following conclusion of law:

While only one of the advertisements charged as a violation of the Commission's order makes direct reference to preparations, all of the claims therein relate to the results to be obtained by application of the preparations to the hair and scalp of persons attracted by the advertisements, either in the form of office treatments or home treatments, and are therefore representations about the preparations.

II

After the conclusion of the evidence in behalf of the complaint, respondent introduced four typed copies of excerpts from four different medical books as proof of the facts which they purported to state. The hearing examiner sustained an objection to the excerpts

1600

Opinion

on the ground that they were hearsay. The record does not disclose that an offer of proof was made as to the contents of the excerpts. Thereafter, respondent took an interlocutory appeal to the Commission questioning this and other rulings of the hearing examiner. The appeal was dismissed and, on July 10, 1957, the case was again before the hearing examiner. On that date, respondent made "an offer of proof" in substance as follows:

That if allowed to do so, respondent could prove through the works of well-recognized dermatologists, that contrary to some of the testimony of the so-called experts who testified on behalf of Commission counsel, the leading dermatologists recommend the use of physiotherapy and preparations similar to those used by respondent for the treatment of itchiness, dandruff and baldness; that in treatment of itchiness, dandruff, dryness, oiliness and baldness, including male pattern baldness, local applications are recommended which are similar in composition to those used by respondent in administering his treatments; that in the treatment of male pattern baldness and other types of baldness, attention to the care of the hair is of great importance; that early and persistent massage of the scalp should be carried out daily; that massage and vibration of the scalp are important means of improving the local circulation, and hence stimulating growth of hair; that the use of treatments like respondent's will eliminate dandruff, itchiness, dryness, oiliness; will prevent or stop the excessive loss of hair and will induce the growth of new hair.

Respondent made no further or specific offer of any medical books or parts thereof.

The great weight of authority is that medical books and treatises are not admissible to prove statements therein contained. 32 C.J.S., p. 428; *U.S. v. One Device* (1947), 160 F. 2d 193; *Farmers Union Federated Cooperative Shipping Association v. McChesney* (Jan. 10, 1958), 251 F. 2d 441. Wigmore (3d ed., vol. 6, sec. 1690) points out that this is the general rule applied in all but one or two jurisdictions, although he urges that such books should be received under safeguarding procedures which he suggests. In *Dolcin Corp. v. F.T.C.* (1954), 219 F. 2d 742, the Court said:

We think authoritative scientific writings can and should be freely used by administrative agencies.

The decision, however, was put on other grounds.

The Commission has consistently followed the rule laid down by a great majority of the courts. Even if the minority rule were to be followed, a proper foundation (such as suggested by Wigmore) to insure truthfulness would need to be established. The Alabama court which follows the minority rule has pointed out that excerpts must be from recognized authorities and must be relevant and applicable to the facts. *Watkins v. Potts* (1929), 122 So. 416.

Opinion

54 F.T.C.

It may be true that the hearing examiner would have followed the majority rule and not allowed the offer in any event. Nevertheless, the record is insufficient to determine whether the books, intended to be offered after the interlocutory appeal, were authoritative, or, if so, whether the excerpts were proper under the issues presented.

III

Respondent's claim that the hearing examiner unduly restricted his right of cross-examination is based on the cross-examination of three doctors who testified in behalf of the complaint.

There is considerable difference of opinion as to the permissible extent of cross-examination of an expert medical witness by the use of medical books and writings. It is generally held that if the witness bases his testimony in whole or in part on a certain medical book, he may be cross-examined thereon and excerpts therefrom may be read to him for the purpose of discrediting his testimony. 32 C.J.S., p. 428. In case of such use, no other foundation is necessary. See *Farmers Union Federated Cooperative Shipping Association v. McChesney*, *supra*.

Many authorities extend the rule to reliance on medical authorities generally and permit cross-examination on any text which the witness recognizes as authoritative. *Garfield Memorial Hospital v. Marshall* (1953), 204 F. 2d 721; *Farmers Union Federated Cooperative Shipping Association v. McChesney*, *supra*.

Where the witness relies on his own experience and not on medical books, there is a difference of opinion as to the use of such books for impeachment purposes.

Some authorities hold that it may not be done. *E. I. DuPont de Nemours & Co. v. White* (1925), 8 F. 2d 5. The court there was applying the New Jersey law but concluded that the Federal rule was the same; *Woelfle v. Conn. Mut. Life Ins. Co.* (1939), 103 F. 2d 417, where the court held the refusal not to be reversible error. For a list of cases both pro and con, see 82 A.L.R. 440.

There are cases holding that such cross-examination is proper. *Victor American Fuel Co. v. Tomljanovich* (1916), 232 F. 662; *Lawrence v. Nutter* (1953), 203 F. 2d 540; *Kern v. Pullen*, Oreg. (1931), 6 P. 2d 224; *Laird v. Boston and M. R.R., N.H.* (1922), 117 A. 591; *Bowles v. Bourdon*, Tex. (1949), 219 S.W. 2d 779; *Cooper v. Atchison T. & S.F.R. Co.* (1941), 148 S.W. 2d 773, holding also that cross-examination is not limited to matters with which the witness agrees.

1600

Opinion

Reilly v. Pinkus (1949), 338 U.S. 269, had to do with proceedings for a Postal Department fraud order. The evidence of experts called by the Government rested on their general professional knowledge. To some extent, this knowledge was acquired from medical textbooks and publications on which these experts placed reliance. On cross-examination, respondent sought to question the witnesses concerning statements in other medical books, some of which, at least, were shown to be respectable authorities. The questions were not permitted. The Supreme Court said:

We think this was an undue restriction on the right to cross-examine. It certainly is illogical, if not actually unfair, to permit witnesses to give expert testimony based on book knowledge, and then deprive the party challenging such evidence of all opportunity to interrogate them about divergent opinions expressed in other reputable books.

The court pointed out in reversing the decision that the issues in a fraud case make such cross-examination peculiarly appropriate because an actual intent to deceive is necessary.

At least one court has apparently taken the view that the reasoning of the Supreme Court ruling does not apply in cases where no issue of fraudulent intent is involved. See *Carter Products, Inc. v. F.T.C.* (1953), 201 F. 2d 446. Other courts give the ruling a more general application. In *Dolcin Corporation v. F.T.C.*, *supra*, the court said:

Reilly v. Pinkus, we think, stands for the general proposition that an expert witness who bases an opinion to a significant degree upon his reading may be cross-examined as to that opinion by reference to other reputable works in his field. It is not necessary for the witness to have relied in his testimony upon the particular authority the cross-examiner seeks to use. And we do not think that the Court limited its ruling to cases involving fraud. (See also *Lawrence v. Nutter*, *supra*.)

We think that the language of *Reilly v. Pinkus* and *Dolcin*, *supra*, support the more liberal rule as to cross-examination, even though the actual decision may be explained on other and more limited grounds. This rule has also been announced by many of the later authorities and is more consistent with principles of justice and courtroom realities. It seems a strange rule which would permit an expert to bolster his own view by a certain text and then not permit the opposition to question him concerning other authoritative texts which do not agree with him.

In spite of the differences of opinion on some phases of this subject, there is substantial agreement on two propositions:

- (1) The trial judge has a high degree of discretion in the matter

of cross-examination. In *Woelfle v. Conn. Mut. Life Ins. Co.*, *supra*, the court said:

Whatever the correct rule may be, it is apparent that the scope of such cross-examination must necessarily be left largely to the good common sense and sound judgment of the trial court, whose rulings should be upheld unless they constitute a clear abuse of a sound judicial discretion.

This has been emphasized in many cases. See, for example, *Mutual Benefit Health & Accident Assn. v. Francis* (1945), 148 F. 2d 590.

(2) Where the witness has not relied on a particular book or treatise, the reading of excerpts from such books where no foundation was laid establishing the volume as a standard recognized authority is improper. See *Farmers Union Federated Cooperative Shipping Association v. McChesney*, *supra*, where the error was considered sufficient for reversal. The authoritative character of the book may be established by the witness being cross-examined. Some cases indicate that it may be established by other witnesses. See discussions in *Dolcin Corp.* and also *Reilly v. Pinkus*.

The first witness, Dr. Robert Brandt was cross-examined at some length concerning certain medical books. The record indicates that his cross-examination was not unduly restricted.

The second witness was Dr. Donald Birmingham. Many objections were made to the cross-examination of this witness. The rulings of the hearing examiner were in many instances based on the view that a medical book cannot be used in cross-examination unless the witness has relied on the book, at least in part, in his testimony. Nevertheless, counsel was eventually allowed to cross-examine as to the Ormsby and Montgomery and as to the Savill books. In accordance with stipulation between counsel, the witness was, in effect, interrogated about the following additional books: "Diseases of the Hair" by Dr. Lee McCarthy. "Practical Dermatology" by Dr. George M. Lewis. "Your Hair and Its Care" by Levin and Behrman.

It was stipulated that the questions asked of Dr. Brandt should be considered propounded to the witness as to each of these books mentioned and should be considered as overruled on the grounds of improper cross-examination. The record indicates that the witness had not read the books; nor is there any evidence that he accepted them as recognized authorities; nor that they were, in fact, so recognized generally.

Dr. James Willis Burks, Jr., insisted that his opinions were based on his own experience and not on books, although he had read and reviewed and was familiar with many called to his attention. The

1600

Opinion

doctor was not permitted to say what books dealing with hair and scalp he did classify as the outstanding authorities, although he did say later that Ormsby and Montgomery was an outstanding authoritative work. The hearing examiner did not permit the use of books in cross-examination for the reason that the opinion of the witness was based on experience, not on books. However, use of the Ormsby and Montgomery book was permitted to refute the witness' statement that no practicing dermatologist treats male pattern baldness. Thus, it appears that Dr. Brandt was cross-examined as to various texts and that Dr. Birmingham was cross-examined as to the only texts which met the test of authoritative quality. Although the questioning of Dr. Burks was more restricted, it appears to us that on the whole record the opportunity to compare statements of the witnesses with statements of other recognized authorities as to the important matters in controversy was not unduly restricted. The hearing examiner has considerable discretion in these matters. While we disagree with some of his rulings, we do not believe that there was any abuse of discretion or any denial of substantial justice.

IV

Respondent challenges that part of the order which requires him to cease and desist from representing his preparations will eliminate or cure dandruff, itching, dryness or oiliness of the hair or scalp on the ground that such order is not warranted by the advertising complained of.

The advertising contains the following:

You can transfer from the "Baldness Line" by calling a stop to those common hair troubles. * * * dandruff, itchy scalp, dry or oily hair, thinning. * * * by acting decisively, intelligently, and quickly. See an expert—a Bishop hair expert, nationally famous. * * *

In other words, no more messy coat collars * * * no more embarrassing dryness or oiliness to make your hair unmanageable and offensive. * * * no more unfunny jokes about "Old Baldy." Instead, you'll have a good head of healthy hair that you can be proud of.

Excessive hair loss, dandruff due to dry or oily hair, itchy scalp—all these conditions are so easy to correct in their early stages with the help of Bishop Hair Experts.

We conclude the findings and order of the hearing examiner on this point are correct.

V

Respondent finally questions the sufficiency of the record to support the examiner's order.

Order

54 F.T.C.

The evidence of counsel supporting the complaint covers over 1,100 pages, together with many exhibits. It includes both expert and lay testimony. The initial decision sets it out in summary and makes findings as to the ultimate facts. We have examined the record and conclude that the hearing examiner correctly decided this issue.

The findings and order of the hearing examiner are adopted as the findings and order of the Commission. Respondent's appeal is denied and it is directed that an order issue accordingly.

Mr. Tait did not participate in the decision of this matter.

FINAL ORDER

This matter having been heard by the Commission upon respondent's appeal from the hearing examiner's initial decision, and upon briefs and oral argument in support thereof and in opposition thereto; and the Commission having rendered its decision denying the appeal and adopting the initial decision as the decision of the Commission:

It is ordered, That the respondent, Gilbert S. Bishop, shall, within sixty (60) days after service upon him of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which he has complied with the order to cease and desist contained in the initial decision.

Commissioner Tait not participating.

Decision

IN THE MATTER OF
DELL PUBLISHING CO., INC.CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT*Docket 6759. Complaint, Apr. 3, 1957—Decision, May 17, 1958*

Consent order requiring a publishing company in New York City to make adequate disclosure when books were abridgments or newly entitled reprints.

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

Denning & Wohlstetter, by *Mr. William I. Denning*, of Washington, D.C., for respondent.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The complaint charges respondent with failing to make adequate disclosure of abridgments and changes of title in their reprint books, which failure constitutes unfair and deceptive acts and practices and unfair methods of competition in commerce, in violation of the Federal Trade Commission Act.

After the issuance of the complaint, respondent, its counsel, and counsel supporting the complaint entered into an agreement containing consent order to cease and desist, which was approved by the Director and an Assistant Director of the Commission's Bureau of Litigation, and thereafter transmitted to the hearing examiner for consideration.

The agreement identifies respondent Dell Publishing Co., Inc., as a New York corporation, with its office and principal place of business located at 261 Fifth Avenue, New York, N.Y.

The agreement provides, among other things, that respondent admits all the jurisdictional facts alleged in the complaint, and agrees that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations; that the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement; that the agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission; that the complaint may be used in construing the terms of the order agreed upon, which may be altered, modified or set aside in the manner provided for other orders; that the agreement is for settlement purposes only and does not constitute an admission by respondent that it has violated the law as alleged in the complaint; and that the order

Decision

54 F.T.C.

set forth in the agreement and hereinafter included in this decision shall have the same force and effect as if entered after a full hearing.

Respondent waives any further procedural steps before the hearing examiner and the Commission, the making of findings of fact or conclusions of law, and all of the rights it may have to challenge or contest the validity of the order to cease and desist entered in accordance with the agreement.

The order agreed upon fully disposes of all the issues raised in the complaint, and adequately prohibits the acts and practices charged therein as being in violation of the Federal Trade Commission Act. Accordingly, the hearing examiner finds this proceeding to be in the public interest, and accepts the agreement containing consent order to cease and desist as part of the record upon which this decision is based. Therefore,

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

1. Offering for sale or selling any abridged copy of a book unless one of the following words, "abridged," "abridgment," "condensed," or "condensation," or any other word or phrase stating with equal clarity that said book is abridged appears in clear conspicuous type upon the front cover and upon the title page of the book, either in immediate connection with the title or in another position adapted readily to attract the attention of a prospective purchaser;

2. Using or substituting a new title for, or in place of, the original title of the reprinted book unless the original title of the book as previously published appears in clear and conspicuous type upon the front cover and upon the title page of the book, either in immediate connection with the title or in another position adapted readily to attract the attention of a prospective purchaser.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to section 3.21 of the Commission's rules of practice, the initial decision of the hearing examiner shall, on the 17th day of May 1958, become the decision of the Commission; and, accordingly:

It is ordered, That respondent Dell Publishing Co., Inc., a corporation, shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist.

Decision

IN THE MATTER OF
AMERICAN CHICLE CO.CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT*Docket 6791. Complaint, May 13, 1957—Decision, May 17, 1958*

Consent order requiring a distributor in Long Island City, N.Y., to cease representing falsely in advertising by television that its drug preparation "Roloids" was endorsed generally by the medical profession and that stomach acid is capable of burning a hole in a cloth napkin.

Mr. Daniel J. Murphy and *Mr. Thomas A. Sterner* supporting the complaint.

Mr. H. Thomas Austern and *Mr. Henry P. Sailer* of *Covington & Burling*, of Washington, D.C. and *Mr. E. F. Moore* of Long Island City, N.Y., for respondent.

INITIAL DECISION BY JOHN B. POINDEXTER, HEARING EXAMINER

The complaint in this proceeding alleges that the American Chicle Co., a corporation, hereinafter referred to as respondent, violated the provisions of the Federal Trade Commission Act by the use of alleged false advertising in a film which was telecast over television broadcasting stations at the direction of respondent, advertising the merits of its preparation "Roloids."

After issuance and service of the complaint the respondent filed an answer, admitting the jurisdictional allegations contained therein but denying the other allegations. Thereafter, hearings were held and the receipt of evidence and testimony in support of the complaint was completed.

Before beginning the presentation of testimony in behalf of respondent, respondent, its counsel, and counsel supporting the complaint entered into agreement for a consent order. The proposed order contains prohibitions with respect to all violations of the act specifically alleged in the complaint with the exception of the allegation contained in paragraph 6(2) thereof. As to this allegation, respondent, its counsel, and counsel supporting the complaint recommend that same be dismissed without prejudice for the reason that this allegation refers to an interpretation based upon the chemical neutralizing properties of the preparation and not to its therapeutic efficacy, and the prohibitions contained in the proposed order which

Order

54 F.T.C.

pertain to the remainder of the film complained about effectively achieve the purposes of the complaint with respect to that film.

The agreement has been approved by the Director and the Assistant Director of the Bureau of Litigation and, with the exception noted above, disposes of all issues in the proceeding. The pertinent provisions of the agreement are as follows: Respondent admits all jurisdictional facts; the complaint may be used in construing the terms of the order; the order shall have the same force and effect as if entered after a full hearing and the said agreement shall not become a part of the official record of the proceeding unless and until it becomes a part of the decision of the Commission; the record herein shall consist solely of the complaint and the agreement; respondent waives the requirement that the decision must contain a statement of findings of fact and conclusion of law; respondent waives further procedural steps before the hearing examiner and the Commission, and the order may be altered, modified, or set aside in the manner provided by statute for other orders; respondent waives any right to challenge or contest the validity of the order entered in accordance with the agreement and the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that it has violated the law as alleged in the complaint.

Upon consideration of the allegations of the complaint, the provisions of the agreement and the proposed order, the hearing examiner is of the opinion that said order constitutes a satisfactory settlement and disposition of the matters complained about in this proceeding and the acceptance thereof will be in the public interest.

Accordingly, the hearing examiner accepts such agreement, makes the following jurisdictional findings and issues the following order:

JURISDICTIONAL FINDINGS

1. Respondent, American Chicle Co., is a corporation existing and doing business under the laws of the State of New Jersey, with its office and principal place of business located at 30-30 Thomson Avenue, Long Island City, N.Y.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

It is ordered, That the respondent American Chicle Co., a corporation, and its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the

offering for sale, sale, or distribution of the preparation Roloids, or any other preparation of similar composition or possessing substantially similar properties whether sold under the same name or under any other name, do forthwith cease and desist from:

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

(a) Stomach acid or concentrated stomach acid is capable of burning a hole in a cloth napkin;

(b) By the use of a white coat or any other object, device, or words indicative of the medical profession, that doctors or the medical profession recommend Roloids, unless the representation is limited to numbers of doctors not greater than has been ascertained to be the fact.

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

It is further ordered, That subparagraphs 6(2) and 7(2) of the complaint be, and the same hereby are, dismissed, without prejudice.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to section 3.21 of the Commission's rules of practice, the initial decision of the hearing examiner shall, on the 17th day of May 1958, become the decision of the Commission; and, accordingly:

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

Complaint

54 F.T.C.

IN THE MATTER OF
FEDERAL-MOGUL CORP.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2 (a)
OF THE CLAYTON ACT

Docket 5769. Complaint, May 1, 1950—Decision, May 20, 1958

Consent order requiring a Detroit manufacturer of automotive products and supplies, to cease discriminating in price in violation of section 2(a) of the Clayton Act by selling its products at higher and less favorable prices to numerous small businessmen than to various larger purchasers competing with them and with purchasers from its competitors.

Mr. Eldon P. Schrup for the Commission.

Dickinson, Wright, Davis, McKean & Cudlip, of Detroit, Mich., for respondent.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof and hereinafter more particularly designated and described, since June 19, 1936, has violated and is now violating the provisions of subsection (a), section 2 of the Clayton Act, as amended by the Robinson-Patman Act, approved June 19, 1936 (U.S.C., Title 15, sec. 13), hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Federal-Mogul Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Michigan, with principal office and place of business located at 11031 Shoemaker Avenue, Detroit, Mich.

PAR. 2. Respondent is now and for several years last past has been engaged in the business of the manufacture, sale, and distribution of automotive products and supplies to different purchasers of the same located in the various States of the United States and in the District of Columbia. Said products and supplies are sold by the respondent for use, consumption or resale within the United States and the District of Columbia, and respondent causes said products and supplies so sold to be shipped and transported from the State or States of location of its places of business to the purchasers thereof located in States other than the State or States wherein said shipment or transportation originated. Respondent maintains, and at all times mentioned herein has maintained, a course of trade and commerce in said products and supplies among and between the States of the United States and in the District of Columbia.

PAR. 3. Respondent, in the course and conduct of its business as