

Decision

IN THE MATTER OF

WYBRANT SYSTEM PRODUCTS CORP. ET AL.

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

Docket 6472. Complaint, Nov. 21, 1955—Decision, May 29, 1958

Order requiring operators in New York City of "The Wybrant System" involving treatment and sale of preparations to prevent baldness and grow hair, to limit to cases other than those of male pattern baldness claims in advertising that use of their preparations and treatment would prevent or overcome excessive hair fall or baldness or cause hair to grow; and to reveal that the great majority of cases of excessive hair fall and baldness are stages of male-pattern baldness and that in such cases their preparations would be of no value.

Mr. Harold A. Kennedy and Mr. Jerome Garfinkel supporting the complaint.

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

INITIAL DECISION BY JOSEPH CALLAWAY, HEARING EXAMINER

The complaint in this proceeding was originally issued November 21, 1955, charging the respondents with the dissemination of false advertising for certain medicinal and cosmetic preparations, allegedly advertised to prevent baldness, grow new hair on bald heads and permanently eliminate dandruff and itching of the scalp. The language of the complaint brings the charges within the purview of section 12 of the Federal Trade Commission Act, the violation of which is made an unfair and deceptive act within the meaning of section 5 of the act. The complaint was amended by order of the hearing examiner on March 12, 1956, to charge that failure to reveal in the advertising that respondents' preparations were ineffective in cases of male pattern baldness was of itself a cause of deception, it being alleged that cases of that type constitute the vast majority of the cases of baldness.

Answer to the complaint as amended filed April 20, 1956, denied that respondents were engaged in the sale or distribution of cosmetics or medicinal products either in local or interstate commerce; alleged that their business was confined to that of administering service treatments in their offices in New York City; that a very small amount of preparations were shipped from its New York

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City offices by the respondent corporation to clients in other states who had previously received treatments in a New York City office of the partnership; alleged that the partnership advertised exclusively in two New York City newspapers inviting persons to come to the New York City offices for diagnosis and treatment and for no other purpose; that the corporate respondent does no advertising; denied that such advertising as is done by the partnership is false and denied jurisdiction of the Commission over the acts and practices of respondents. In said answer respondents renewed motion to dismiss, previously made to the original complaint, before amendment, which was denied.

Thereafter hearings were held in New York, Philadelphia, and Chicago for the taking of evidence in support of the allegations of the complaint; in New York City and Washington, D.C., in opposition to the allegations of the complaint; in Chicago and Washington, D.C., in rebuttal and in Washington, D.C., in sur-rebuttal. Following the hearing mentioned in sur-rebuttal the record was closed for the reception of evidence. Subsequently the hearing examiner of his own motion reopened the hearing for the taking of additional testimony. In a motion to set aside the order reopening the case for further evidence, respondents made certain admissions which made further hearings unnecessary. The record was again closed insofar as the taking of testimony was concerned. All parties were represented by counsel and given full opportunity to and did introduce evidence pertinent to the issues, examine and cross-examine witnesses and argue points of law and evidence. All parties were given opportunity to and did file for the consideration of the hearing examiner proposed findings, conclusions, orders and the reasons therefor. All such findings, conclusions and orders not hereinafter adopted, found or concluded are hereby specifically rejected.

Upon the entire record of the proceedings and from observation of the witnesses while testifying, the hearing examiner makes the following findings as to the facts, conclusions and order:

FINDINGS AS TO THE FACTS AND CONCLUSIONS

A. The Business of Respondents

The respondents in this proceeding are William W. Wybrants, Wade M. Wybrants, two brothers and their mother Adel Wybrants, doing business as a partnership under the trade name of "The Wybrant System," and Wybrant System Products Corp., a New York corporation. The principal place of business of the partnership and the corporation are both located at 353 West 54th Street

in New York City. The individual respondents are the officers of the corporate respondent and direct and control its acts, practices and policies.

The said partnership maintains six branch offices or treatment parlors in New York City where hair and scalp treatments known as the "Wybrant System Treatment" are given.

The corporate respondent bottles and sells shampoos and lotions (that are used by the partnership in the scalp treatments) to some of the members of the public who have received hair and scalp treatments by the partnership at one of the six offices in New York City where such treatments are given. These shampoos and lotions are found to be cosmetics within the intent and meaning of the Federal Trade Commission Act.

The gross receipts of the partnership for such treatments during the years 1953, 1954 and 1955 were respectively as follows: \$235,268.84; \$383,936.90 and \$461,855.53. During the same periods of time the corporate respondent made out-of-state sales of items for use in connection with hair and scalp treatments to some of the members of the public who had received hair and scalp treatments by the partnership at the partnership offices in New York City as follows:

1955—Lotion No. 2, \$432; Shampoos \$92; steamers and parts \$70.75; vibrators and brushes \$62.50; commercial steamers and parts \$46.38; applicators for vibrators \$4.50; total \$718.13.

1954—Lotion No. 2, \$337.50; Shampoos \$90.25; steamers and parts \$241; vibrators and brushes \$129.50; commercial steamer and parts \$18; oil \$4; total \$820.25.

1953—Lotion No. 2 \$320; Shampoos \$65.75; steamers and parts \$73.50; vibrators and brushes \$46.75; oil \$2.50; total \$508.50.

The gross receipts of the corporate respondent for the years 1955, 1954 and 1953 were as follows: 1955, \$25,987.84; 1954, \$21,478.46; 1953, \$16,951.49.

Respondents have admitted in an amendment to their answer that subtracting the out-of-State sales of items by the corporate respondent for use in connection with hair and scalp treatments for each of the years 1955, 1954, and 1953 given above, from the gross receipts of the corporate respondent for each of those years, given above, leaves the amount of sales by the corporate respondent in the State of New York of the items listed above, sold for use in connection with hair and scalp treatments. There is no evidence of the partnership selling any of the shampoos or lotions unless use of these preparations in giving the treatments mentioned be considered sales.

B. Dissemination of the Advertising

The corporate respondent does no advertising. The partnership advertised extensively in the Mirror a New York City daily newspaper in 1953 and in the Mirror and the News, another New York daily newspaper in 1954 and 1955. Typical of representations contained in respondents said advertising are the following:

STOP HAIR LOSS with six treatments or YOU PAY NOTHING**Wybrant Guarantee:**

With just six invigorating scalp treatments the Wybrant System will stop your abnormal hair loss, overcome dandruff and itchy scalp and in general make your scalp feel better than it has in years * * * or your money will be promptly refunded

* * * * *

There is nothing to buy or to do at home while taking our treatment (below "before" and "after" pictures of a man's bald head).

Many clients want to do more than just stop excessive hair fall—they want to grow new hair on thin or bald areas. Wybrant has been outstandingly successful in helping the majority of these clients. (Com. Ex. 4.)

We've been saying for a long time now that we can grow hair for the overwhelming majority of men. We have surveys, testimonials and pictures to prove it.

* * * * *

It's easy to get started. You can come in at any time and get a free hair and scalp examination. And you can get an introductory treatment for only \$1.00. It is a refreshing 45 minute treatment, consisting of a triple shampoo, two applications of the famous Wybrant formula, two soothing steam sessions and 10 minutes of wonderful scalp massage. (Com. Ex. 1.)

Now who are these people? Are they selected clients who were suffering from some mysterious ailment which cleared up over night while they happened to be treating at WYBRANT? No sir! They were suffering from normal baldness. (Com. Ex. 3.)

The respondents' advertisements appeared in the city and suburban edition of the Mirror and the metropolitan edition of the Daily News. These editions circulated in New York City and within a 50-mile radius of the city. The average daily circulation figures for the city and suburban edition of the Mirror in 1953 were 742,656. This included circulation in cities, towns, townships, and counties in New Jersey and Connecticut. In Hudson County, N.J., alone such average daily circulation was 20,356. In Fairfield, Greenwich, New Canaan, Ridgefield, Stamford, and Westport the average daily circulation of the city and suburban edition was 4,313. The average daily circulation of the metropolitan edition of the News during 1955 was 1,829,671. This included circulation in cities, towns, townships, and counties in New Jersey and Connecticut. In Hudson County, N.J.,

alone such daily circulation was 65,859. In Fairfield County, Conn., in the town above mentioned such daily circulation was approximately 14,480. These figures do not purport to be complete as to the circulation outside of the State of New York of the editions of the two newspapers carrying respondents' advertising. They are merely used to illustrate the fact that such out-of-the-State circulation was substantial. There is no showing of substantial distribution by mail either in New York City or elsewhere of the editions of these papers carrying respondents' advertising. The evidence shows that respondents could not advertise in a New York newspaper that confined its circulation to the State of New York, because no newspaper so confined its circulation.

C. The Preparations

It was agreed in an amendment to respondents' answer that for the purpose of this case the composition of respondents' lotion No. 2 or the Wybrant formula described in the complaint is as follows:

Water.....	97-98%
A sulfated or sulfanated surface active agent. Oil of Wintergreen. A trace of light carbon Gum. Perfume and/or other essential oil.....	
	3%

The record shows that respondents' shampoo No. 5 mentioned in the complaint, from chemical analysis has the same composition as alleged in the complaint, which is

Water.....	approx. 90%
Alkanolamine—fatty acid condensate. Soap. Perfume. Color_ approx. 10-11%	

The record further shows that the ingredients of the shampoos 6, 7, and 8 mentioned in the complaint are basically the same as shampoo No. 5, the quantity of the ingredients varying for use with fine, course, dry, and oily hair. These are all detergent base shampoos.

D. Jurisdiction

If respondents' advertisements are false and were disseminated for the purpose of inducing or were likely to induce directly or indirectly the purchase of respondents' preparations (lotion No. 2 and the shampoos), such is a violation of section 12(a)(1) of the Federal Trade Commission Act.

Corporate respondents' gross receipts for the year 1955 were \$25,987.84. These receipts consist of sales of items for use in connection with hair and scalp treatments both out of the State and within the State. Out-of-State sales for such items that year totaled \$718.13, of which lotion No. 2 accounted for \$432 and shampoos \$92. Thus

lotion No. 2 represented approximately 60 percent of the out-of-State sales of such items that year and shampoos accounted for something over 12 percent. If sales of lotion No. 2 and the shampoos account for the same percentage of items sold within the State during that year for use in connection with hair and scalp treatments such within the State sales of lotion No. 2 were approximately \$15,592 and the within State sales of the shampoos were approximately \$3,119. But the admission of respondents in regard to such sales within the State of New York do not break the receipts down into dollars and cents for each individual item as is done by testimony in regard to the out-of-State sales of such items. However in the absence of any evidence to the contrary, the within and without the State sales of lotion No. 2 were substantial and within and without the State sales of the shampoos cannot be considered negligible. The fact that such sales of lotion No. 2 and of the shampoos took place during the same period of time within which the partnership was disseminating its advertising and were only to persons who had received treatment at the partnership offices leads to the inevitable conclusion that such sales were induced indirectly by the partnership advertising. Lotion No. 2 was compounded by respondents and its composition was regarded as a trade secret. It is therefore found that the dissemination of the advertising by the partnership was likely to induce indirectly the purchase of lotion No. 2 and the shampoos from corporate respondent.¹

The fact that all of the advertising was done by the partnership and the sales above mentioned were by the corporate respondent is of no moment. Under the evidence, for the purpose of this proceeding, sales by the corporate respondent should be considered and are considered the same as if they had been made by the partnership. The members of the partnership owned and controlled the corporate respondent.

It is also contended that the use of respondents' preparations in giving treatments in their various offices in New York City constituted sales of respondents' preparations. That is a different question to the one just decided or the questions decided in the *O-Jib-Wa* case, *supra*, and the case of *U.S. v. Thomas Management Corp.*² Such a finding is not believed necessary to a decision in this case under the pleadings or the evidence, and is therefore refused.

¹ See Comm. Opinion in the Matter of *O-Jib-Wa Medicine Co., et al*, docket No. 6548, dated June 27, 1957.

² (1952) CCH Trade Cases, par. 67, 251.

E. Analysis of Representations Made in the Advertising

The next question to be determined is what did respondents represent in the advertising.

The complaint alleges that by the representations in the advertising respondents have falsely represented that through the use of their preparations (lotion No. 2 and the shampoos mentioned in the complaint) regardless of their exact formula in the homes of users and in conjunction with their methods and treatments, dandruff and itching of the scalp will be permanently eliminated, baldness and excessive hair loss will be prevented and new hair will be grown on bald areas in the majority of cases. In regard to baldness and excessive hair loss, it is also alleged that the advertisements are false because they fail to reveal that the vast majority of cases of excessive hair loss and baldness are the beginning and more fully developed stages of what is known to dermatologists as male pattern baldness and that in cases of that type of baldness the use of respondents' preparations regardless of their exact formula will be of no value. All of these allegations are denied.

1. Dandruff and itching

The charge that respondents have represented that their preparations in conjunction with their methods and their treatments will permanently eliminate dandruff and itching of the scalp may be disposed of first. The representation is that dandruff and itching or itchy scalp will be "overcome" and in other instances that dandruff will be "removed" and scalp itch "relieved." "Permanently eliminated" are the words of the complaint. They are not in the advertising. "The Commission cannot interpolate into the petitioners' representations words not there and then find the petitioner guilty of misrepresentation because the petitioners' product does not meet the Commission's revised representations."³ To this hearing examiner "overcome," "remove," and "relieve" are far from "permanently eliminate." "To overcome" or "remove" dandruff and "relieve" itchy scalp does not mean that those who take respondents' treatment will never again have dandruff or itchy scalp. The testimony of witnesses on that point was not needed.⁴

2. Excessive hair fall, baldness and growth of new hair

Respondents' advertising did not represent that the use of their preparations in the homes of users will prevent excessive hair fall or

³ *International Parts Corp., v. F.T.C.*, 133 F. 2d 883.

⁴ *Zenith Radio Corp., v. F.T.C.*, 143 F. 2d 29.

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baldness and cause new hair to grow on bald areas in a majority of cases. The representations were that respondents' treatments in which the preparations were used would achieve these results. In the *Matter of Thomas Management Corp., et al.* Docket No. 4422⁵ the Commission held that similar advertising represented that "said preparations and treatments * * * would stop loss of hair, cause new hair to grow and promote the normal growth of hair on thin or bald spots." In that case, on the basis of such advertising and a finding that it was false an order was issued directing respondents to cease and desist from disseminating any advertisement in commerce, which represented that respondents' preparations would prevent the abnormal loss of hair or induce a normal growth of hair on thin or bald spots. Later the U.S. District Court found that similar advertising was violative of the order to cease and desist.⁶ It is therefore found that respondents' advertising represented directly and by implication that the use of respondents' preparations and treatment will prevent excessive hair fall and baldness and cause new hair to grow in bald areas in a majority of cases.

On the point of growing new hair respondents' advertisements are found to convey the impression that new full bodied hair will be grown of like texture and color as the other hair on the head, in contrast with thin, fuzzy hair, called lanugo hair by the experts.

F. Evidence on the Effect of Respondents' Preparations and Treatment

Three medical experts were called to support the allegations of the complaint that respondents' advertisements were false. They were Dr. John W. Daughtery of New York City, Dr. Albert M. Kligman of Philadelphia, and Dr. Adolph Rostenberg, Jr. of Chicago. In opposition respondents offered two medical experts who testified, Dr. Irvin I. Lubowe of New York City and Dr. Moses Wharton Young of Washington, D.C., and 39 satisfied clients. In rebuttal, the testimony of one medical expert, Dr. Rattner and 14 clients and former clients of respondents was received. One expert on photography from the Federal Bureau of Investigation also testified in rebuttal in regard to his evaluation of certain pictures put in evidence by respondents. Two photographic experts also testified in sur-rebuttal. Various exhibits were also received in evidence in connection with the testimony of the witnesses, including three published articles by Dr. Lubowe which were received by agreement for the opinions expressed

⁵ 34 F.T.C. Decisions, p. 1305.

⁶ *U.S. v. Thomas Management Corp., et al.*, 1952 CCH Trade Cases, par. 67,251.

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in the articles by Dr. Lubowe. The qualifications of all experts are shown in the record.

In the cross-examination of the medical experts each side was allowed to read to the witness from the writings of other recognized experts, but the quotations so read were not considered as evidence unless the witness agreed with them.

1. Expert medical testimony

(a) *Dandruff and itching*

Every expert who was asked the question agreed that respondents' preparations and their treatment will remove and overcome dandruff and relieve itching of the scalp. There was no evidence to the contrary. It is therefore found that the representations in the advertising in regard to these two conditions were true.

(b) *Excessive hair fall, baldness, and growing new hair*

Dr. Daughtery, Dr. Kligman and Dr. Rostenberg all expressed the opinion that respondents' preparation regardless of their formula and their treatment will not prevent baldness or excessive hair loss or cause new full bodied hair to grow on bald areas in that type of baldness known as male pattern baldness which type comprises the great majority of all cases of baldness. The estimates given by them of the percentage of all baldness that is male pattern baldness varied from 80 to 95 percent. They further testified in effect that male pattern baldness has its origin in heredity endocrine balance and aging, although the precise method of causation is unknown.

Dr. Lubowe had made observations over a period of time of a number of clients of respondents while they were taking treatment. These cases numbered 29 to begin with, but later were reduced to 21 because 8 of them failed to return for further treatment. He said that 19 of the 21 had premature alopecia which he recognized as the same thing as male pattern baldness. Basing his opinion on his observation of these 21 cases, he said respondents' treatments did cause new hair to grow in bald areas during the period of observation. Pictures of these 21 clients were received in evidence as respondents' exhibit 8-A through 8-Z-3. The pictures included "before" and "after" pictures of the 21 on which he based his opinion. Dr. Lubowe made no differentiation between lanugo hair and full bodied pigmented hair in his evaluation of these cases. He further stated that one cannot make a clinical scientific evaluation on that small number of cases. At another place in his testimony he said, "I cannot make a general

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statement. My conclusions are purely based on 19 patients, clients of premature alopecia."

Dr. Lubowe also was of the opinion that hair follicles, from which the hairs on the head grow, may lie dormant for several years without producing hair and then be stimulated to reproduce. He had in an experiment of his own, not connected with the Wybrant study, caused follicles that had been dormant for 10 to 25 years to reproduce hair in cases of total baldness by treating the patients with cortisone. Respondents' preparations contain no cortisone and there is no relationship between total baldness and male pattern baldness. He agreed that an atrophied follicle could not produce hairs, but said that it was hard to determine whether the follicle is dormant or atrophied without pulling it out. He further stated that there was a possibility that in the 21 cases studied for the Wybrants, increased circulation in the scalp due to the treatments may have been a factor in causing dormant hair follicles to grow new hair. He refused to state that was the cause of hair regrowth in the Wybrant study, because he said there were many factors that will affect the regrowth or the stimulation of a dormant hair follicle.

Dr. Lubowe's testimony on what respondents called the "Hair Fall Survey" was disregarded. The methods used and what was done in this so-called survey are shown in the evidence in regard to respondents' exhibit No. 6 for identification. The exhibit was rejected.

Dr. Moses Wharton Young testified as to the research he had conducted on the cause of male pattern baldness. He stated that, based on his research, he was of the opinion that the hair falls out from the top of the head in human males because there is insufficient blood supply to maintain the growth and reproduction of the hair in this area; that his studies indicated that in men who had male pattern baldness the soft tissues of the scalp were thinner than in men with good heads of hair, thus reducing the vascular bed. In other words the skin is tight over the top of the head of a man with male pattern baldness and there is less blood flowing into the area to support the growth of hair. He further said that anything that would increase the blood supply in that area would be desirable, that manual massage and heat would increase the flow, stimulate the flow of the blood supply to the top of the head. He disagreed with the experts who had testified in support of the allegations of the complaint to the effect that male pattern baldness has its origin in heredity, endocrine balance and aging.

Dr. Young did not attempt to state what would be a sufficient blood supply to sustain the growth of hair on the top of the head, or how much massage or heat would be needed. He had never observed the Wybrant treatment in operation. When asked on cross-examination whether he had any opinion as to whether the Wybrant System treatment grows hair he said he had never observed the treatment in operation; that his studies were started 15 years ago and made before he ever heard of the Wybrant case.

Dr. Herbert Rattner testifying in rebuttal criticized Dr. Young's theory and the sufficiency of the evidence to support his theory of the cause of male pattern baldness with which Dr. Rattner disagreed. He also stated the Wybrant treatment of applying heat and massage to the scalp would in his opinion cause the circulation of the blood in the scalp to be stimulated a few hours at most after each treatment. He further testified with reference to Dr. Lubowe's clinical evaluation of the effect of the Wybrant treatment on 21 patients, 19 of whom had male pattern baldness, that such test was not a scientifically good test; that for a disease as common as ordinary (male pattern) baldness "You should be able to get hundreds of people, before you can make a test." He gave other testimony in criticism of another experiment or survey offered in evidence by respondents. Since the conclusion from the other experiment was not admitted in evidence, Dr. Rattner's criticism of that experiment is not considered.

Dr. Rattner also agreed with the other medical experts who testified in support of the allegations of the complaint, that male pattern baldness has its origin in heredity, endocrine balance and aging.

The complaint defines male pattern baldness as that type of baldness having its origin in heredity, endocrine balance and aging, and alleges that such type of baldness comprises the vast majority of all cases of baldness; that respondents' preparations and their treatments will not prevent baldness, excessive hair loss or cause new hair to grow in bald areas in cases of that type of baldness. It therefore becomes necessary to determine the preponderance of the medical testimony on the allegation that male pattern baldness has its origin in heredity, endocrine balance and aging.

The medical experts who testified in support of that allegation were all specialists in the field of dermatology. They all stated that excess hair loss and baldness come within the field of their specialty. The evidence shows that each of them had come in contact with patients suffering from these conditions as a part of their work over a number of years. Dr. Daughtery, Dr. Kligman, and Dr. Rattner have been

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in private practice as dermatologists over a number of years. Dr. Rostenberg while not in private practice has seen such patients regularly as they come into the hospital clinic. Dr. Kligman has done considerable research on hair and scalp problems. Their opinions were based in part on their experience. They also keep up with the literature in their field of specialization.

The main challenge to this evidence on the origin of male pattern baldness from a medical expert comes from Dr. Moses Wharton Young. He is not a specialist in dermatology, nor does he practice dermatology. He sees only about 10 cases a year of male pattern baldness such persons coming to him from having read about his theories in the newspapers, although he did state he had observed hundreds of such cases in his research. His specialty is anatomy and neuroanatomy. The latter is that branch of anatomy which deals particularly with the nervous system, with the brain and nerves and associated structures. He stated that his work with respect to the scalp had been "limited to scientific and anatomical investigation of the scalp and its associated structures and not to treating patients or anything else." His explanation as to the cause of male pattern baldness must therefore be regarded as purely theoretical, and in a field in which he has not specialized. His theory is rejected by the other experts mentioned, who are practical men and who come in contact with cases of male pattern baldness in the practice of their specialty.

The only challenge to the testimony of Dr. Daughtery, Dr. Kligman, and Dr. Rostenberg from a medical expert on the lack of effect of respondents' preparations and treatment in cases of male pattern baldness comes from Dr. Lubowe. He bases his conclusions solely on 21 cases and refuses to make a general statement.

It is therefore found that a preponderance of the medical expert testimony establishes that male pattern baldness has its origin in heredity, endocrine balance and aging and that in cases of male pattern baldness, the use of respondents' preparations, regardless of their formula, and treatment will not prevent baldness or excessive hair loss or cause new hair to grow on bald areas.

There is no dispute among the experts that the great majority of all cases of excessive hair loss and baldness are the beginning and more fully developed stages of male pattern baldness. The estimates range from 75 percent in the case of Dr. Lubowe to over 95 percent by several of the experts who were called to testify in support of the complaint.

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2. Lay testimony

In addition to the medical testimony on the point of whether respondents' preparations and treatment will prevent excessive hair fall and baldness and cause new hair to grow on bald areas in a majority of cases, there is to be considered (1) the lay testimony of the 39 clients of respondents who testified in their defense (2) the lay testimony of the 14 clients and former clients of respondents who testified in rebuttal and (3) the testimony of the photographic experts, Mr. Shaneyfelt of the Federal Bureau of Investigation, Mr. Hagget and Mr. DeVincent who testified about the "before" and "after" pictures of the 29 clients of respondents. The 21 cases, 19 of whom Dr. Lubowe said had male pattern alopecia and on which he based his opinions were a part of these 29.

The hearing examiner gave careful attention to the testimony of the 39 clients of respondents who testified in their defense and to the testimony of the 14 clients and former clients of respondents who testified in rebuttal. He also observed the head and hair of each of these 53 lay witnesses. Of those who testified that they had thin hair on the top or crown of their head before starting treatment, most of them still had thin hair in that area, but they said it was not as thin as before starting treatment. Most of those who had frontal baldness before starting treatment still had "high foreheads" where they stated it had been bald or thinner before treatment. Most of these witnesses were continuing treatment and hopeful of better results than they had experienced up to date. One of the most enthusiastic of these witnesses was a man who had started treatments approximately eight years before and was still continuing them. His head was almost completely bald on top but he was very hopeful that the very few full bodied hairs and the fuzz there would eventually mature into a full head of normal hair.

The hearing examiner is of the opinion that some of these witnesses had deluded themselves into believing what they wanted to believe. At the same time it cannot be said that they all had deluded themselves. Out of this number some must have grown new hair of the same color and texture as their other hair while taking treatment, and decrease in hair fall after starting treatment must have occurred in a considerable number. However, it cannot be said from the testimony of these witnesses that they had male pattern baldness before starting treatment, or that if they did that the decreased hair fall and new hair grown was the result of the Wy-

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brant treatment. Dr. Lubowe himself said that many factors, including nutritional and metabolic factors may play a part in stimulating a dormant hair follicle to produce new hair.

The testimony of Mr. Shaneyfelt of the Federal Bureau of Investigation and that of Mr. Martin Hagget and Mr. DeVincent in regard to the "before" and "after" photographs, respondents' exhibits 8-A through 8-Z-3, and the other exhibits offered in connection with their first mentioned exhibits remain to be discussed. Mr. Shaneyfelt seemed to think that the "before" and "after" photographs did not show any increase in the amount of hair, basing his opinion upon an examination of these exhibits and his experience in photography including his interpretation of photographs for the Federal Bureau of Investigation. Mr. Hagget and Mr. DeVincent in their testimony including the exhibits showing "blow-ups" of some of the original pictures convinced the hearing examiner that the "after" pictures did show more hair than the "before" pictures. These exhibits, respondents' exhibits, 8-A through 8-Z-3, included pictures of the 21 clients of respondents, 19 of whom Dr. Lubowe testified had premature alopecia (male pattern baldness). In view of Dr. Lubowe's statement in regard to these cases, already discussed, the question of whether the "after" pictures showed more hair than the "before" pictures becomes academic.

3. Preponderance of the evidence

The conclusion is that considering both the medical expert testimony, the lay testimony and all the exhibits in evidence, the preponderance of all the evidence supports the conclusion that the use of respondents' preparations regardless of their formula and their treatment will not prevent baldness or excessive hair fall or cause new hair to grow on bald areas in cases of male pattern baldness.⁷ There was no lay testimony offered to disturb the conclusions from the medical testimony that male pattern baldness has its origin in heredity, endocrine balance and aging and that the great majority of all cases of baldness are of the male pattern type.

G. *Final Conclusions*

As to whether the use of respondents' preparations and their treatment will prevent excessive hair fall and baldness and cause new hair to grow in bald areas in other types of baldness than male pattern baldness, is not involved in this proceeding. Under the allegations of the complaint and the evidence, the questions remaining are:

⁷ *Bristol Meyers Co., v. F.T.C.*, 185 F. 2d 58.

(a) Whether respondents' advertising is false because they have advertised that their preparations, their methods and their treatment will prevent excessive hair fall and baldness and cause new hair to grow in bald areas, when the evidence shows such is not true in the great majority of all cases of baldness;

(b) Whether respondents failure to reveal in their advertising that the great majority of all cases of baldness are of that type in which their preparations and their treatment will be of no value for the purposes mentioned above, is itself a cause of deception, and

(c) Whether the Commission has authority to require respondents to make the revelation mentioned in (b) above, in their advertising.

Under (a) above the advertising of the partnership is misleading in a material respect and therefore false advertising within the intent and meaning of the Federal Trade Commission Act, because it does not limit their claims for their preparations and their treatment to cases of baldness and excessive hair fall other than those coming within the classification of male pattern baldness. The advertising further emphasizes that they can help 7 out of 10 cases of baldness coming to them, that they can grow hair for the overwhelming majority of men and that the people for whom they have grown hair were suffering from normal baldness. By this type of advertising respondents have represented that their preparations and their treatment will prevent baldness and excessive hair fall and cause hair to grow in bald areas, in cases of male pattern baldness. This was definitely false advertising in view of the preponderance of the evidence in this proceeding, and it is so found.

Under (b) above it is found that the statements and representations in said advertisements have the capacity and tendency to suggest and do suggest to persons who have excessive hair fall or who are bald that there is a reasonable probability that they are threatened with or have a type of baldness which will be prevented or overcome by the use of respondents' preparations and their treatment and to spend their money therefor. This being true, it follows that failure of respondents to reveal in their advertising that the great majority of all cases of excessive hair fall and baldness are the beginning and more fully developed states of male pattern baldness which will not be helped by respondents' preparations and their treatment is itself a cause of deception.

In considering whether the Commission has authority to require respondents to make the revelation mentioned in the advertising, the court has held that the Commission may require affirmative disclosures where necessary to prevent deception in cases brought under

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section 5 of the Federal Trade Commission Act, not involving foods, drugs, cosmetics or devices.⁸

Section 15(a) of the act in defining a false advertisement of food, drugs, devices and cosmetics provides as follows:

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. [Underscoring supplied.]

In the *Alberty* case⁹ which involved the dissemination of advertising for drugs the court said in effect that the Commission could not require such an affirmative disclosure in advertising, because there had been no finding in that case, that failure to make such disclosure was in itself a cause of deception. Here there is such a finding based upon evidence in the record. The complaint, as amended, also alleges in this proceeding that failure to make such revelation was in itself a cause of deception. So it is concluded that in this proceeding the Commission has authority to require respondents to reveal in their advertising disseminated in commerce that the great majority of all cases of excessive hair fall and baldness are of the type known as male pattern baldness and that in that type of baldness, respondents' preparations and their treatment will not be of value in preventing excessive hair fall, overcoming baldness, or causing new hair to grow in bald areas.

The aforesaid acts and practices of respondents, Adel Wybrants, William W. Wybrants, and Wade M. Wybrants, as herein found are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered, That respondents Wybrant System Products Corp., a corporation, and Adel Wybrants, William W. Wybrants, and Wade M. Wybrants, individually and as officers of said corporation, and as copartners trading as The Wybrant System, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of their lotion No. 2, also known as the Wybrant

⁸ *Haskelite Manufacturing Co., v. F.T.C.*, 127 F. 2d 165.

⁹ 182 F. 2d 36.

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formula, or their shampoos, the compositions of which are set out in the findings herein, for use in the treatment of conditions of the hair and scalp, or any preparation of substantially similar composition, do forthwith cease and desist from:

1. Disseminating or causing to be disseminated, by means of the United States mails, or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which represents, directly or by implication, that the use of any such preparations, alone or in conjunction with any method or treatment, will prevent or overcome excessive hair fall or baldness or cause new hair to grow, unless any 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 the fact that the great majority of cases of excessive hair fall and baldness are the beginning and more fully developed stages of male pattern baldness and that in such cases said preparations will be of no value in preventing or overcoming excessive hair fall or baldness or in causing new hair to grow.

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 any such preparations in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement contains any representation prohibited in paragraph 1 above, or which fails to comply with the affirmative requirements of paragraph 1 above.

OPINION OF THE COMMISSION

By TAIT, Commissioner:

The complaint, as amended, charges respondents, by its language, with violating sections 12(a) (1) and 12(a) (2) of the Federal Trade Commission Act through disseminating, or causing to be disseminated, false advertisements.¹⁰ The advertising claims involved include those which represent that respondents' preparations and treatments will prevent baldness and grow hair. The hearing examiner in an initial decision filed September 30, 1957, held that the allegations of the complaint (with several exceptions not involved in the appeals)

¹⁰ SEC. 12(a). It shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement—

(1) By U.S. 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 food, drugs, devices, or cosmetics.

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were sustained by the evidence, and ordered respondents, except the corporate respondent, to cease and desist the advertising found to be unlawful. Counsel for respondents and counsel in support of the complaint have filed cross-appeals.

The respondents are Wybrant System Products Corp., a corporation, and Adel Wybrants, William W. Wybrants, and Wade M. Wybrants. Adel Wybrants is the mother of William and Wade. The three Wybrants are named in the complaint individually and as officers of the said corporation and also as copartners, trading and doing business as "The Wybrant System." This partnership and the corporation both have their principal place of business at 353 West 54th Street, New York, N.Y. The individual respondents control the stock of the corporation and direct and control its policies and practices. Six branch offices or treatment parlors are maintained by The Wybrant System in New York City where hair and scalp treatments are given.

The advertisements involved in this proceeding were published under the name "The Wybrant System" and appeared in two New York papers with interstate distribution, the Mirror and the News. The out-of-State circulation of these papers was found to be substantial. The record shows some distribution by mail of the editions of the papers carrying respondents' advertising. For instance, there is evidence of the circulation of at least 225 copies of these editions by mail. This advertising represents directly and by implication that the use of respondents' preparations and treatment will prevent excessive hair fall and baldness and will cause new hair to grow in a majority of cases.

The corporate respondent bottles and sells shampoos and lotions to persons who have received The Wybrant System hair and scalp treatments. These are the same preparations or some of the same preparations that are used for the treatments. Sales of such preparations, found to be cosmetics within the intent and meaning of the Federal Trade Commission Act, include sales made outside of the State of New York.

RESPONDENTS' APPEAL

One of the principal contentions of the respondents is that there has been a failure to prove the jurisdictional requirement of interstate commerce under section 12. In arguing that there has been no showing the advertisements were disseminated in commerce for the purpose or with the likelihood of inducing a purchase within the meaning of section 12, respondents appear to be relying largely upon

their position that the advertisements relate solely to a treatment which, as such, is not covered by the statute, and which was not advertised to sell the preparations.

The record, we believe, contains sufficient evidence to satisfy the jurisdictional requirement not only of section 12(a)(1), but also of section 12(a)(2). Respondents advertised in newspapers with interstate distribution. Respondent corporation sold preparations to purchasers in interstate commerce. The testimony of many witnesses shows that as a direct result of the advertisements, prospective clients were induced to call at an office of The Wybrant System for treatment of the hair and scalp. It is also shown by the testimony that such persons after becoming clients purchased respondents' preparations for home use. The preparations were in fact sold only to clients or former clients. It is apparent that purchases were induced indirectly as a result of the advertising, regardless of whether the advertisements mention the preparations. From such showing it follows that the minimum statutory requirement of a likelihood of the purchase of preparations is met. Under 12(a)(1), there is here shown the dissemination of advertisements in interstate commerce which were at least "likely to induce, directly or indirectly, the purchase of * * * cosmetics." Under 12(a)(2), there is shown the dissemination of advertisements which were at least "likely to induce, directly or indirectly, the purchase in commerce of * * * cosmetics."

It is also urged that counsel supporting the complaint failed to prove that respondents' advertisements contain any false representations and that the examiner erroneously evaluated the evidence. What the examiner essentially found was that the weight of the evidence supports a conclusion that the use of respondents' preparations and their treatment will not prevent baldness or excessive hair fall or cause new hair to grow in cases of male pattern baldness. In so finding, it appears that he carefully considered all the evidence, including the testimony of expert medical witnesses for and against the allegations of the complaint. It is our opinion that he properly weighed this evidence and that his findings in respect thereto are fully supported by the record.

Finally, on their appeal respondents assert that the examiner erred in ruling that passages from medical treatises were inadmissible as evidence. Respondents offered as evidence four excerpts from books on dermatology, described by them as written by well-recognized authorities. The examiner refused to admit the excerpts because the authors were not present for cross-examination. Respondents argue

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that this ruling conflicts with the holding in *Dolcin Corporation, et al. v. Federal Trade Commission*, 219 F. 2d 742 (1954), cert. denied 75 S. Ct. 571 (1955). The Commission does not so understand the Dolcin decision. The court there stated that:

When used to prove the truth of their contents scientific writings are clearly hearsay and are rejected as judicial evidence in all but a few jurisdictions.

It went on to say that cogent arguments can be made in favor of their use, but recognized the difficulty under the hearsay rule. "Yet that objection," the court said, "may be largely obviated by requiring the introduction of the articles through experts in the field who will, themselves, be subject to cross-examination." No such procedure was followed herein. Moreover, not only did the court in *Dolcin* note that the examiner should have a certain broad discretion in this connection, it did not reverse the decision because of the exclusion of the scientific writings. It stated that it would do this only where substantial justice so requires and that it would hesitate in most cases to say that a rule almost universal in the courts would, in an administrative proceeding, deny the parties substantial justice. Under the circumstances, we cannot find that the examiner committed error here in refusing to admit the scientific writings.

APPEAL OF COUNSEL SUPPORTING THE COMPLAINT

Counsel first takes exception to the examiner's failure to find that the use of respondents' preparations during the course of a Wybrant treatment involves a sale and a purchase of such preparations. This is a distinct question from that relating to the sale of preparations in bottles for home use. It appears that the treatment consists not only of applying preparations to the hair and scalp but some additional service as well, such as brushing and massaging. The issue here raised is one of fact which can be resolved only upon consideration of all relevant circumstances. It is not determinative of the question that some preparations are used in the giving of treatments and that such are necessary to the sought-after results. Rather, we believe the answer lies in the essential character of the transaction; that is, does it consist mainly of a transfer of goods or is it basically the rendering of a service in which the use of preparations is purely incidental thereto? In resolving such a question, factors to be considered would include the following:

- (a) The significance of the preparations in the overall performance with reference to purposes and effects;

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(b) The percentage of the monetary value of the preparations used to the total cost of the entire treatment to the client;

(c) The importance of the skill of the operator giving the treatment compared to the importance of the functions of the preparations; and

(d) The necessity for taking office treatments as the only way to obtain desired preparations, when such are considered by potential purchasers to be efficacious in themselves and apart from the treatments.

Because of an insufficiency in the record, we make no ruling as to whether the use of preparations in connection with an office treatment may or may not constitute a sale; the holding here is simply that the evidence is not such as to permit a decision on the question one way or the other. In the matter of *Gilbert S. Bishop, d/b/a Bishop Hair Experts*, docket No. 6554 (May 1958), it was not necessary to decide any such question since preparations were sold in bottles for home use to clients in connection with visits for office treatments.

It is also argued that the examiner should not have limited his findings and order with respect to hair growing claims to bald areas alone. This point is well taken since, as the record clearly shows, male pattern baldness is a condition in which the hair follicles gradually atrophy and disappear. In the earlier stages there may be a thinning of the hair on the scalp, but no bald areas. The weight of the evidence supports a finding and conclusion that not at any stage of male pattern baldness, whether or not there is a bald area, will respondents' preparations and treatment cause the growth of new hair.

With respect to the order it is urged that respondents should be required to disclose in connection with claims for the prevention of baldness and the growth of hair that their preparations will have no value in the "great majority" of cases rather than merely the "majority" of cases. We believe the record showing of estimates of male pattern baldness as constituting from 75 to 95 percent of the cases, which was found to constitute the great majority, clearly justifies a requirement of disclosure that such is the great majority.

In further connection with the order, it is counsel's contention that the examiner should have additionally proscribed dissemination by the United States mail. We agree. Since some distribution by mail of the papers carrying respondents' advertising is shown by the evidence, the prohibitions of the order should include dissemination by this means.

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Counsel's final contention is that the examiner improperly dismissed the complaint as to the respondent Wybrant System Products Corp. The examiner found, improperly, we believe, that the corporate respondent does no advertising. In this instance we have a partnership composed of the individual respondents and a corporation in which the individual respondents are the officers and controlling stockholders. It is well settled that a corporation can act only through its agents. In view of the circumstances in this record, it cannot be assumed that when the officers of the corporation acted, they were acting solely as copartners in a distinct and separate enterprise.

All the sales of the preparations here involved for home use were made to clients of The Wybrant System. Thus, it is clear that to the extent that the advertising attracted clients, it was such as to result in benefits to the corporation. Moreover, the testimony is to the effect that in the regular course of business, orders for preparations (although not every such order) are taken by employees of the partnership and turned over to the corporation. It is clear, therefore, that the corporation and the partnership were not acting independently so far as there existed a program of advertising which brought in clients and so far as such clients thereafter became purchasers from the corporation. The effect was an adoption by the corporation of the advertising of the partnership. In our opinion, these factors in conjunction with the close identification in ownership and control as between the partnership and the corporation in this case justify a conclusion that the practices herein involved of the copartners were in fact the practices of the corporation, the latter acting through its agents, the officers. Thus, the corporation is also responsible for the advertising and should be named in the order.

Respondents' appeal is denied and the appeal of counsel supporting the complaint is granted in part and denied in part as indicated herein. The findings, conclusions, and order in the initial decision are modified to conform with this opinion.

FINAL ORDER

Counsel for the respondents and counsel in support of 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 respondents and granting in part and denying in part the appeal of counsel in support of the complaint, and modifying certain findings and conclusions of the initial decision in the

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manner indicated in the accompanying 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 the said initial decision :

ORDER

It is ordered, That respondents Wybrant System Products Corp., a corporation, and Adel Wybrants, William W. Wybrants, and Wade M. Wybrants, individually and as officers of said corporation, and as copartners trading as The Wybrant System, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of their lotion No. 2, also known as the Wybrant formula, or their shampoos, the compositions of which are set out in the findings herein, for use in the treatment of conditions of the hair and scalp, or any preparation of substantially similar composition, do forthwith cease and desist from :

1. Disseminating or causing to be disseminated, by means of the United States mails, or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which represents, directly or by implication, that the use of any such preparations, alone or in conjunction with any method or treatment, will prevent or overcome excessive hair fall or baldness or cause new hair to grow, unless any 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 the fact that the great majority of cases of excessive hair fall and baldness are the beginning and more fully developed stages of male pattern baldness and that in such cases said preparations will be of no value in preventing or overcoming excessive hair fall or baldness or in causing new hair to grow.

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 any such preparations in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement contains any representation prohibited in paragraph 1 above, or which fails to comply with the affirmative requirements of paragraph 1 above.

It is further ordered, That the respondents shall, within sixty (60) days after service upon them of this order, file with the Commission

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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, be, and it hereby is, adopted as the decision of the Commission.

Decision

IN THE MATTER OF
MARTIN BERDY

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL
TRADE COMMISSION AND THE WOOL PRODUCTS LABELING ACTS

Docket 6950. Complaint, Nov. 20, 1957—Decision, May 30, 1958

Order requiring an individual in New York City to cease violating the Wool Products Labeling Act by tagging as "wool," interlining materials which contained substantial amounts of nonwoolen fibers, and failing to label such products as required by the Act.

Mr. Daniel T. Coughlin for the Commission.

No appearances for respondent.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

This proceeding involves charges that respondent Martin Berdy, an individual, has violated the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, together with the rules and regulations promulgated under said latter act, by falsely and deceptively stamping, tagging, and labeling certain wool products with respect to the character and amount of the constituent fibers therein; by misbranding such products; and by otherwise misrepresenting such products as 100 percent wool or 100 percent reprocessed wool. The complaint was filed November 20, 1957, and was lawfully served thereafter upon respondent who failed to answer said complaint or otherwise appear herein.

Upon proper order served upon said respondent, initial hearing was held in New York, N.Y., whereat Commission counsel appeared but respondent did not appear. The respondent's default of answer and of other appearance prior to or at the hearing was taken and entered of record by the hearing examiner. Commission's counsel presented evidence in support of his case-in-chief and rested. Such evidence, in substance, consisted of statements and exhibits, the latter including affidavits, certificates, and other documentary evidence as well as certain physical exhibits identified as samples correctly taken from the wool products so misrepresented, mislabeled and sold in commerce. The record contains evidence that the respondent, after being fully advised that his products and transmission and sale thereof in commerce were violative of the acts herein involved, nevertheless knowingly and willfully proceeded to sell considerable quanti-