

IN THE MATTER OF  
R. H. WHITE CORP.

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

*Docket 6884. Complaint, Sept. 11, 1957—Decision, June 9, 1958*

Order dismissing complaint charging misbranding of fur products in violation of the Fur Products Labeling Act for the reason that the practices complained of were discontinued over a year before it was filed and there was no likelihood that they would be resumed in the future.

*Mr. Michael J. Vitale* and *Mr. Thomas A. Ziebarth* supporting the complaint.

*Mr. Richard K. Lyon of Lyon, Wilner & Bergson*, of Washington, D.C. for respondent.

INITIAL DECISION BY JOHN B. POINDEXTER, HEARING EXAMINER

On September 11, 1957, the Federal Trade Commission issued a complaint charging respondent with misbranding and falsely and deceptively invoicing and advertising fur products in violation of the Federal Trade Commission Act and the Fur Products Labeling Act.

After service of the complaint on respondent, respondent by and through its attorneys, filed an answer and motion to dismiss the complaint. Respondent admitted and explained the violations charged against it and, as grounds for its motion to dismiss, stated the following:

During the early part of 1956, respondent entered into an arrangement with S. Mann Furs, Inc. of New York, N.Y., a manufacturer of fur products, whereby Mann would ship fur products to respondent on consignment for promotion and sale in the basement of respondent's department store in Boston, Mass. (At that time and prior thereto respondent also conducted a highly reputable fur business in its upstairs fur department.) Mann agreed to pay for transportation and promotional advertising and to accept the return of any fur products not sold. Mann's personnel were to supervise and assist in the pricing and selling of the furs and respondent was to pay only for the merchandise actually disposed of during the promotion.

In carrying out the arrangement with S. Mann Furs Inc., on two isolated occasions, to wit January 24, 1956 and May 6-8, 1956, certain of the fur products being sold in the basement of the respondent's department store in Boston were not labeled as required by the Fur Products Labeling Act. However, respondent states that the legal onus of such violations of the act rightfully should be borne by its consignor S. Mann Furs, Inc., of New York, which concern was the owner of the furs sold on a consignment basis in respondent's basement on the two isolated occasions and was responsible, among other things, for the labeling, invoicing and advertising of the furs offered for sale during the two promotions in question. S. Mann Furs, Inc., paid for the advertisements complained about.

Respondent closed its Boston store on June 15, 1957, prior to the filing of the complaint herein and respondent's sole and principal place of business is now at Worcester, Mass., where it has been operating since 1954. Prior to respondent's cessation of business in Boston on June 15, 1957, respondent had been serving the Boston community for more than 100 years and has enjoyed an enviable reputation for fair dealing and business integrity and has never engaged in or followed the practice of misbranding, misadvertising, or other unethical conduct.

Since the closing of its Boston store on June 15, 1957, respondent has only operated the store in Worcester and none of the persons involved in the basement store promotion in Boston are now employed by respondent. Furthermore, to the extent that the Worcester store may sell furs in the future, it plans to do so through a leased department under a license to a lessee of a good business reputation.

The record discloses that the violations complained about last occurred on May 8, 1956, more than 1 year prior to the filing of the complaint herein. The president of respondent corporation has submitted an affidavit stating, among other things, that respondent does not intend to violate the act in the future. Accordingly, respondent requests that the complaint be dismissed. Counsel supporting the complaint has filed an answer in opposition to the motion to dismiss.

When it is considered that the violations complained about occurred and were discontinued more than 1 year prior to the filing of the complaint herein, all of the other unusual circumstances of this case, and the sworn assurances of respondent's president that the practices complained about will not be revived, the examiner, like the Commission in *Bell & Howell Co.*, docket No. 6729, is persuaded that the "practices alleged have been surely stopped and there is no likelihood that they will be resumed in the future."

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Everything that could be accomplished by a cease and desist order has been accomplished. It would not be in the public interest for the Commission to issue an order to cease and desist at this time. It is the opinion of the examiner that the complaint in this proceeding should be dismissed without prejudice.

## ORDER

*It is ordered,* That the complaint in this proceeding be, and it hereby is, dismissed without prejudice to the right of the Commission to issue a new complaint or to take such further or other actions against the respondent at any time in the future as may be warranted by the then existing circumstances.

## OPINION OF THE COMMISSION

By KERN, Commissioner:

The initial decision filed by the hearing examiner ruled on the motion to dismiss which the respondent submitted as part of its answer. The hearing examiner held that because the unlawful practices were discontinued more than a year prior to the institution of this proceeding and it appeared that there was no likelihood of their being revived, issuance of an order to cease and desist was not in the public interest. The proposed order accordingly would dismiss this proceeding without prejudice and counsel supporting the complaint under their appeal except to that action as erroneous.

No oral testimony was received. The record which was the basis for the hearing examiner's challenged ruling was composed of the complaint and the respondent's combined answer and motion, and attached memorandum, together with counsel's reply in opposition to the motion and an affidavit submitted by the respondent. Hence our consideration of the appeal is likewise limited to those record matters.

The complaint issuing on September 11, 1957, charged misbranding and other practices by the respondent in violation of the Fur Products Labeling Act, and the rules promulgated thereunder. The respondent then filed its combined answer and motion to dismiss containing admissions of certain of the complaint's allegations. It also included recitations explaining the unlawful practices as inadvertent and as discontinued and asserting that their use was limited to two sales promotions engaged in by the respondent's Boston store which were conducted under the supervision of the consignor of the fur products being offered, the last of which promotions occurred in May, 1956; and the answer further expressed "firm and positive assur-

ances" by the respondent against the resumption of such practices in the future.

Staff counsel's reply opposing the motion to dismiss stated that the facts alleged in the complaint were substantially admitted under the respondent's combined answer and motion. The reply also averred, among other things, that while counsel had no reason to doubt the truth of the facts stated by respondent, the fact that the unlawful acts were limited to and had not recurred after the two special promotions in 1956, was not necessarily controlling to disposition of the proceeding. The respondent subsequently filed an affidavit by its president corroborating certain of the statements in its answer. The foregoing matters accordingly constituted the record presented for the hearing examiner's consideration when he filed his initial decision on December 17, 1957.

In their appeal, counsel states in effect that if this case had proceeded to hearings and its exigencies had so required, they would have presented evidence showing that, before the second sales promotion, the respondent had notice that the marketing practices followed in the earlier one were being questioned in a Commission investigation as not in conformity with the act. Counsel accordingly requests that we regard the respondent's subsequent abandonment of its violations as an effort to forestall adversary proceedings by the Commission rather than a good-faith expression of a desire to abide by the law.

Counsel supporting the complaint have advanced cogent reasons, both in their brief and in oral argument, why the defense of abandonment should not be here considered. The contentions in this vein are advanced, however, for the first time on appeal. After the motion to dismiss was filed, counsel supporting the complaint took no exception to the basic or essential facts asserted in the respondent's answer and affidavit and made no effort to supplement the record with additional facts bearing on the good faith of the respondent's discontinuance. They thus permitted the motion to go to the hearing examiner for decision virtually by default and, on the record presented to him, the hearing examiner's action of dismissal without prejudice clearly was appropriate.

Under the circumstances, we are of the opinion that our action should be governed similarly. We recognize, of course, the Commission's power to remand a proceeding to a hearing examiner for the reception of such evidence as may be necessary to provide an adequate basis for an informed decision on any question presented for review. But such a procedure is costly, time-consuming, and, to a degree, harassing to the respondent. We believe

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that in the instant matter the public interest will best be served by allowing the initial decision to stand undisturbed and by underwriting the professions of respondent's affidavit of abandonment by continued close scrutiny of its future operations.

To the extent that one of the statements contained in the initial decision may be construed as holding that no legal liability attached to the respondent for the unlawful practices engaged in, the initial decision is erroneous. The record supports determinations that the respondent participated in the profits derived from the sales promotions conducted in its store and in its name and it, therefore, shared legal responsibility for the admitted violations occurring in the course of those sales. Therefore, the initial decision will be modified accordingly. While the initial decision, including the order of dismissal without prejudice, is adopted as the Commission's decision, such action in the unique procedural situation presented here is not to be regarded as a precedent applicable to motions for dismissal similarly bottomed on alleged abandonment.

## FINAL ORDER

Counsel supporting the complaint having filed an appeal from the hearing examiner's initial decision in this proceeding and the matter having come on to be heard upon the record, including the oral arguments of counsel; and the Commission having determined that the appeal should be denied and the initial decision modified by striking the third sentence of the fourth paragraph thereof, and that the initial decision as thus modified should be adopted as the decision of the Commission:

*It is ordered*, That the initial decision of the hearing examiner be, and it hereby is, modified by striking the third sentence of the fourth paragraph thereof.

*It is further ordered*, That the complaint herein be, and it hereby is, dismissed without prejudice to the right of the Commission to issue a new complaint or to take such further or other action against the respondent at any time in the future as may be warranted by then existing circumstances.

## Decision

## IN THE MATTER OF

LEO O. JOHNSON DOING BUSINESS AS JOHNSON  
HAIR & SCALP CLINIC ET AL.ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE  
COMMISSION ACT*Docket 6497. Complaint, Jan. 18, 1956—Decision, June 10, 1958*

Order requiring individuals with main office in New Orleans, La., and operating hair and scalp clinics also in several other States, to cease representing falsely in advertising that use of their hair and scalp preparations would prevent or overcome baldness or excessive hair loss or induce the hair to grow or become thicker, without clearly revealing that the great majority of cases of excessive hair fall and baldness are stages of male pattern baldness, and that in such cases the preparations would be of no value; and to cease representing that respondent Johnson was America's foremost professional authority on hair and scalp disorders, and that respondents and their agents were trichologists.

*Harold A. Kennedy*, Esq., for the Commission.

*James I. McCain*, Esq., of New Orleans, La., for respondent Leo O. Johnson.

## INITIAL DECISION BY ROBERT L. PIPER, HEARING EXAMINER

## STATEMENT OF THE CASE

On January 18, 1956, the Federal Trade Commission issued its complaint against Leo O. Johnson, an individual doing business as Johnson Hair & Scalp Clinic, and William G. Thompson, Harry B. Hause, and Charles L. Anderson, individually (all except Hause hereinafter collectively called respondents), charging them with disseminating false advertisements in violation of sections 5 and 12 of the Federal Trade Commission Act (hereinafter called the Act), 15 U.S.C. 41, *et seq.* Copies of said complaint together with a notice of hearing were duly served on respondents. Service was not obtained upon Harry B. Hause, and accordingly the complaint against him will be dismissed without prejudice.

The complaint alleges in substance that respondents in connection with the operation of their hair and scalp clinics in various cities of the United States, disseminated or caused to be disseminated false advertisements by the United States mails and various other means in commerce, for the purpose of inducing the purchase of cosmetic preparations used by them in the operation of their clinics. Respond-