

## Decision

IN THE MATTER OF  
GEORGE M. VOSS TRADING AS  
VOSS HAIR EXPERTS OF GEORGIA

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

*Docket 6498. Complaint, Jan. 27, 1956<sup>1</sup>—Decision, Feb. 9, 1959*

Order requiring an individual in Atlanta to cease representing falsely, particularly in newspaper advertising, that through use of his hair and scalp preparations, methods, and treatments, in his place of business and by purchasers of the preparations in their homes, baldness would be prevented and overcome, growth of new and thicker hair would be promoted and lost hair restored, dandruff cured, etc.; and to cease representing himself falsely as a "Trichologist" and the "Nation's leading hair expert."

*Mr. Harold A. Kennedy and Mr. Thomas F. Howder* supporting the complaint.

*Gettleman & Gettleman* of Chicago, Ill., by *Mr. Frank E. Gettleman* and *Mr. Franklin M. Lazarus* for respondent.

INITIAL DECISION BY JOSEPH CALLAWAY, HEARING EXAMINER

## PRELIMINARY STATEMENT

The complaint issued herein and duly served, as subsequently amended, charges respondent with the dissemination through the mails and in commerce of false advertisements for certain cosmetic and medicinal preparations, advertised for external use in the treatment of conditions of the hair and scalp. Misrepresentation by respondent is also alleged in referring to himself in said advertisements as a "Trichologist" and as the "Nation's Leading Hair Expert." The answer to the complaint, as amended, denies all the material allegations thereof, except the name and address of respondent.

Hearings were held in Atlanta, Ga. and New Orleans, La., for the taking of evidence in support of the allegations of the complaint. Motion by the respondent to dismiss the complaint at the end of the testimony in support of the allegations of the complaint was denied and interlocutory appeal to the Commission from the denial of the motion by the hearing examiner was denied. Thereupon, respondent elected not to introduce any evi-

<sup>1</sup> Amended Oct. 16, 1957.

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dence. The case is therefore before the hearing examiner for an initial decision upon the pleadings, evidence in the record and proposed findings, conclusions, and orders and the reasons therefor filed by both sides.

Both sides were represented by counsel and given full opportunity to introduce evidence pertinent to the issues, examine witnesses and argue points of law and evidence. The proposed findings, conclusions and orders and the reasons therefor and respondent's motion to dismiss, and the answer thereto, were given careful consideration by the hearing examiner. All such proposed findings, conclusions and orders not hereafter adopted, found or concluded are hereby specifically rejected.

Upon the entire record of the proceeding and from the observation of the witnesses while testifying, the hearing examiner makes the following findings as to the facts, conclusions and orders.

## FINDINGS AS TO THE FACTS AND CONCLUSIONS

1. Respondent George M. Voss is an individual trading and doing business as Voss Hair Experts of Georgia with his office and place of business located at 703 Grand Theater Building in the city of Atlanta, Ga. He had conducted this business for about five and one-half years at the time of the hearing there on February 18, 1958. It consists of giving local treatments for conditions of the hair and scalp. He has been in this type of business for thirty three years, having worked for others prior to owning this business in Atlanta. The only education he has is two years in high school. Those coming to him for treatment are usually afflicted with dandruff, itching, irritation of the scalp and what they think is excessive loss of hair.

2. When one having any or all of these conditions comes to him for treatment he first attempts to determine whether or not he can do them any good. In reaching a decision on this he examines their scalp, takes a history of their scalp troubles and inquires about their teeth and tonsils. The examination of the scalp consists of the use of an orange wood stick to part the hair, looking at the scalp with the aid of a lens having a light attached to get a better view, and manipulation of the scalp to determine how tight it is. If accepted for treatment, the treatment as described by respondent consists of the application of certain formulas to the scalp together with ultra-violet light, massage, heat, vibration and the use of what is called a high frequency

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machine. The formulas used will depend on what the man is complaining of. For instance, if he is complaining of dandruff, one set of formulas will be used first. If he is complaining of hair loss, the formulas used will depend on the oiliness or dryness of the hair and scalp. The amount of each formula applied each time will vary from one to one and one-half ounces, depending on the amount of hair on the scalp. A shampoo, a solvent and an antiseptic hair dressing called Triseptol are supplied the client, as he is called, for use at home between treatments.

3. A charge of \$5.00 is made for a single office treatment. If a client can come in twice a week for treatment, a course of forty treatments is offered for \$170. If a client lives too far away to come in regularly, a home treatment kit for use at home in conjunction with the office treatment is available, but the home treatment kit is never supplied to one who has not been first examined and treated at the office by respondent. One furnished a home treatment kit must come in for office treatment at least once a month. The home treatment kits have in them the same formulae that are applied during office treatments. The shampoo, solvent, and Triseptol are also included in the kit together with a hair brush and a booklet of instructions. Refills of the shampoo, solvent and Triseptol are charged for extra to both those taking office treatments only and also those receiving the home treatment kit.

4. Respondent's gross business was \$31,000 during the year 1957 and about \$41,000, two years before that. He was unable to give any percentage of the business that applied to those who used home treatment kits, that is to those who might be classified as home and office clients. He has given office treatments to people from out of the state, but has always refused to ship anything into another state. He doesn't ship anything through the mail to anybody even in Georgia unless that person has first presented himself at the office for an examination. He has sent kits to a relative of a client, the relative living in the State of Georgia, for transshipment or delivery to a client out of the State.

5. There was no evidence as to how frequently this has been done. One home treatment kit contains enough of the formulas for 32 home treatments. For \$80.00 a client gets this home treatment kit and as many office treatments as he can take. The home treatment kits are not sold separately.

6. All of the respondent's preparations used in the office treatments and contained in the home treatment kits, including the

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shampoo, solvent and Triseptol, are composed of the following ingredients in various combinations:

- Ammoniated mercury (white precipitate)
- Boric acid
- Betanaphthol
- Castor oil
- Carborwax 4000: Carbide & Carbon Chemicals Co., (a solid polyethylene glycol)
- Detergent 77: Peck's Products Co. (a nonionic general household and industrial cleaner)
- Dyes
- Hyamine 1622: Rohm & Haas Co., (di-isobutyl phenoxy ethoxy ethyl dimethyl benzyl ammonium chloride)
- Isopropyl alcohol
- Isopropyl alcohol bay rum
- Liquid soap
- Methol
- Mineral oil
- Nopco 1034: Nopco Chem. Co. (a sulfonated oil)
- Oil of bay, terpeneless
- Oil of tar, rectified
- Oxyquinoline sulfate
- Perfume
- Phenol
- Polyethylene Glycol 400: Carbide & Carbon Chemicals Co., (a liquid polyethylene glycol)
- Propylene glycol
- Resorcin
- Salicylic acid
- Sulfonated castor oil
- Tegasept M: Goldschmidt Chem. Corp. (methyl paraben)
- Tincture capsicum
- Tween 60: Atlas Powder Co., (Polyoxyethylene sorbitan monostearate)
- Veegum: R. T. Vanderbilt Co., (colloidal magnesium aluminum silicate)
- Water

7. Respondent advertises and has advertised in the Atlanta Journal, the Atlanta Constitution and the joint paper put out by these two on Sunday. There are in evidence copies of advertisements in these papers as follows:

- Atlanta Journal, January 31, 1955 (Com. Ex. 4)
- Atlanta Journal, August 29, 1955 (Com. Ex. 5)
- Atlanta Journal, August 22, 1955 (Com. Ex. 6)
- Atlanta Journal, January 24, 1955 (Com. Ex. 7)
- Atlanta Journal, February 7, 1955 (Com. Ex. 8)
- Atlanta Journal, April 11, 1955 (Com. Ex. 9)
- Atlanta Journal, May 2, 1955 (Com. Ex. 10)
- Atlanta Journal and Constitution Magazine, April 17, 1955 (Com. Ex. 11)

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Atlanta Journal and Constitution Magazine, January 9, 1955 (Com. Ex. 12)  
Atlanta Constitution, February 17, 1953 (Com. Ex. 13)  
Atlanta Journal and Constitution Magazine, March 6, 1955 (Com. Ex. 14)  
Atlanta Journal, April 25, 1955 (Com. Ex. 15)  
Atlanta Constitution, January 7, 1958 (Com. Ex. 16)  
Atlanta Constitution, January 14, 1958 (Com. Ex. 17)  
Atlanta Journal and Constitution, September 15, 1957 (Com. Ex. 18)  
Atlanta Journal, October 21, 1957 (Com. Ex. 19)  
Atlanta Journal, November 18, 1957 (Com. Ex. 20)

8. Since there is no question of discontinuance of the alleged offensive advertising involved here, Commission Exhibits 16 through 20 are disregarded in determining whether respondent's advertising is false advertising as alleged in the complaint. These were published after the issuance of the complaint. Commission Exhibit 13 is also disregarded because there was no proof of dissemination by mail or in commerce of the Atlanta Constitution for the year 1953.

9. It was stipulated that the average paid daily circulation of the Atlanta Journal going by mail to people inside and outside of Georgia during the year 1955 was 12,077 and the average paid Sunday circulation during 1955 of the combined paper going by mail to people inside and outside of Georgia was approximately 6,340; that the average number of copies of the daily Atlanta Journal going outside of the State by any means (mail, bus, airline, etc.) during the year 1955 was 7,427 and that the average Sunday circulation of the combined paper during 1955 going outside the State by any means was approximately 45,041. The average daily circulation of the Journal during 1955 was 253,992 and the average Sunday circulation of the combined paper during 1955 was 492,890.

10. Following are some quotations from the advertisements mentioned above:

DANDRUFF, the commonest hair problem, is also the commonest cause of baldness!

Not dandruff as you see it, but imbedded dandruff . . . the kind that lodges down in your hair tubes to choke off hair growth . . . the kind that plays a "perfect host" to hair-killing bacteria. (Com. Ex. 4)

You can't get rid of it with "tonics," shampoos, or other ordinary methods.

But you can get rid of it with Voss treatment.

THINK TWICE before you adopt and follow the old "do nothing" method of preserving your hair.

Time was when nothing could be done to prevent baldness, and it didn't matter a bit if you believed that baldness was due to heredity, age, or what have you.

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Not now. This is the mid-20th-century. Going bald now, in this city where the nation's most famous scalp specialist *guarantees* to stop excess hair loss, just doesn't make sense.

If you have hair now, you can keep it—with the help of Voss Hair Experts.

Even "fuzz" can be replaced with long and strong hairs—with the professional help of Voss Hair Experts.

Excessive hair loss, dandruff, itchiness, dryness or oiliness can be corrected in short order—with the help of Voss Hair Experts. (Com. Ex. 5)

When you're losing hair—no matter how gradually—something is wrong. It's not normal. And you're going bald unless you take steps to prevent it. (Com. Ex. 6)

## Specialized Treatment

First thing to remember, Voss pointed out, is that hair loss may start from any one of 18 common causes. Dandruff in its various forms is one of the most frequent causes. Others are tight scalp, itching and infection, dry or oily hair.

Now ask yourself this question: Is it likely that any kind of bottled "cure-all" could do much to correct so many conditions and stop hair loss?

"But any and all of these disorders," Voss said, "can be easily and completely corrected by our specialized treatment. You see the results at once: Dandruff goes, itching stops, your hair and scalp feel better and look better. Soon, hair fall decreases as much as 90 per cent."

## Examination Free

"Best of all, your invigorated hair follicles start to replace lost hair with healthy new hair."

As the treatment progresses, you'll witness the re-growth of stronger, more virile hair.

And best of all, probably you'll acquire sound new habits of hair-care to keep your hair healthy and growing after treatment is over. (Com. Ex. 7)

If you do need treatment, and enroll for it, you'll see quick improvement. Dandruff, itching clear up at once. Excess oiliness or dryness are soon corrected. Hair fall slows down to normal. New hair grows stronger—and *thicker!* (Com. Ex. 9)

The healthy scalp grows healthy hair—naturally!

"It seems so obvious," says Director George M. Voss, of Voss Hair Experts, "you might think no intelligent person would deny its truth. But when you accept it, you must rule out practically all the common beliefs about baldness."

For instance, most people are convinced that baldness is hereditary—"runs in families," so to speak. Yet I've never heard any body argue that you can inherit an unhealthy scalp. So you can't very well inherit baldness, can you? (Com. Ex. 11)

## How it Works

You mail in regular reports to the Voss Hair Experts, to keep them informed of your progress. This enables them to change your treatment if necessary to get best results.

Voss home treatment has saved the hair of hundreds of men who were unable to take regular office treatment. Men and women from all the towns and cities around Atlanta—Sewanee, Rome, Marietta, Toccoa, Cairo, Griffin, Brinson—have been lavish in their praise of the home method.

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True, some few men do inherit a scalp structure that may predispose to early baldness. But any such tendency can be overcome by proper hair care. (Com. Ex. 12)

The expert talking was George M. Voss, head of Voss Hair Experts here. He is a trichologist of 30 years experience—More experience in fighting baldness than any other man in the United States. (Com. Ex. 14)

11. Respondent argues that he is in no way responsible for the dissemination of his advertising by United States mails and in commerce since all he did was to place the advertisements in the newspapers. Such argument is rejected. If respondent had not placed his advertisements in these newspapers they would not have been disseminated by United States mails or in commerce through this medium. Respondent's acts were the moving cause, or the proximate cause of the dissemination by United States mails and in commerce of the advertisements. The advertisements so disseminated resulted in people coming in for consultation and treatment.

12. Through the advertisements, so disseminated, respondent represented directly and by implication that excessive hair loss and baldness in the great majority of cases are caused by local disorders of the scalp such as dandruff, tight scalp, itching and infection, dry or oily scalp; that the use of his treatment will permanently eliminate and cure these disorders,<sup>1</sup> and result in (1) fuzz being replaced with long and strong hairs, (2) excessive hair loss and baldness being prevented and overcome (3) the growth of new and thicker hair and (4) lost hair being replaced with healthy new hair. The advertisements also refer to respondent as the Nation's leading hair expert and as a trichologist.

13. The complaint alleges that the said advertisements are false advertisements within the meaning of the Federal Trade Commission Act, that is that they are misleading in the following material respects:

14. The great majority of cases of baldness and excessive hair loss is the common type known as male pattern baldness. Regardless of the exact formula or combination of the preparations used and regardless of the method of treatment in respondent's office or the method of application in home treatments, respondent's preparations will not in such cases prevent or overcome baldness; will not cause hair to grow thicker and will not grow new hair or restore old hair. Moreover the ingredients contained

<sup>1</sup> See finding on similar advertising in regard to dandruff and itching in *Bishop Hair Experts*, Docket No. 6554, adopted by the Commission on May 12, 1958.

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in respondent's preparations will not permanently eliminate dandruff, itching, dryness or oiliness of the scalp and will not cause fuzz to be replaced by long and strong hair. Neither the respondent nor his employees have undergone competent professional training in dermatology or any other branch of medicine pertaining to treatment of scalp disorders affecting the hair.

15. To support these allegations, the testimony of two expert dermatologists was offered, Dr. Hiram M. Sturm of Atlanta, Ga., and Dr. James W. Burks, Jr., of New Orleans, La. Their qualifications as experts are in the record.

16. There was complete unanimity of opinion by Dr. Sturm and Dr. Burks, Jr. on the following points:

17. The most common type of baldness is the type known as male pattern baldness, which comprises 95% of all cases of baldness. Fuzz on the head of an adult is never replaced by mature hair or what is called terminal hair. The hearing examiner understands this to be the same as "long and strong hair" referred to in one of respondent's advertisements. No combination of the ingredients in respondent's preparations applied to the scalp, with or without the physical therapy, employed by respondent or any other kind of therapy will permanently eliminate or cure dandruff, itching, oiliness or dryness of the scalp, or cause fuzz to be replaced by long or strong hair. No combination of the ingredients in respondent's preparations applied to the scalp with or without the physical therapy employed by respondent or any other kind of therapy will prevent or overcome male pattern baldness, or in cases of male pattern baldness, cause hair to grow thicker, or longer or stronger, or cause new hair to grow, or cause lost hair to be replaced with new hair.

18. Dr. Sturm further testified that one may have fuzz on the scalp and still have male pattern baldness. In such cases the hair follicles gradually atrophy and cease to produce hair. The hearing examiner understands this to mean that one does not have to be completely bald to have male pattern baldness. It is a gradual process, that may be going on long before it is apparent.

19. Doctor Sturm thought the terms "scalp specialist" and "trichologist" used in the advertisements implied a degree of learning in the field of the hair and scalp that could only be possessed by a dermatologist. Dr. Burks testified that while a dermatologist is an expert in the field of the skin and its appendages, including the hair and scalp, the terms "scalp specialist"

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and "trichologist" imply a degree of learning in the field of the hair and scalp greater than that possessed by the average dermatologist. It should only be applied to a dermatologist who had gone further and made a special study of the hair and scalp.

20. There was some disagreement between the two doctors as to the cause of male pattern baldness. Dr. Sturm said that the causes were heredity, involving the endocrine glands, and ageing. Dr. Burks thought these two things were a part of the background of male pattern baldness, but he would not go so far as to say they were the cause. In fact he did not think the cause had been definitely established.

21. Each doctor was cross examined at length as to the endocrine system and genetics and each stated that they were not specialists in these fields. Respondent urges that for this reason the testimony of both of these physicians should be stricken or disregarded.

22. In Commission cases, opinion evidence based on the general medical and pharmacological knowledge of qualified experts has been held to constitute substantial evidence even where witnesses who had personally observed the effect of the product testified to the contrary.<sup>2</sup> Furthermore the questions about the endocrine system and genetics asked on cross-examination were on the point of the cause of male pattern baldness, which is not an issue in the case. Both of the experts who testified were familiar with the ingredients in respondent's preparations and with the methods of physical treatment employed by respondent. Their answers were based upon that and their experience as dermatologists. Their testimony is not disputed by anything else in the record. Respondent asks the hearing examiner to take "judicial notice" of the writings of Doctors McCarthy and Savill. This request is rejected, nor will the hearing examiner take official notice of their writings. Even if such writings had been offered in evidence, to accept them would establish a precedent for flooding the record with scientific writings without the authors being presented for cross-examination.<sup>3</sup> Furthermore scientific writings are usually in technical language and the help of an expert is needed in many instances for the hearing examiner to clearly

<sup>2</sup> *Bristol-Myers Co. v. F.T.C.*, 185 F.2d 58 and cases therein cited; *Irwin v. F.T.C.*, 143 F.2d 316; See also article in *Indiana Law Journal*, Spring 1957 entitled "Proving the Falsity of Advertising: The McAnnulty Rule and Expert Evidence."

<sup>3</sup> See Opinion of Commission in *Wybrant System Products Corporation, et al.*, issued May 29, 1958.

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understand them. In addition to that, without the author being present for cross-examination, there is no way of knowing whether such writings express the current opinions of the authors. Because of new experiments, or for other reasons the writers may have changed their opinions since the articles were written.

23. It is therefore found that respondent's said advertisements were false in representing that his treatments will permanently eliminate or cure dandruff, itching and dryness or oiliness of the scalp and result in fuzz being replaced with long and strong hair. The advertising claims that respondent's treatments will result in excessive hair loss and baldness being prevented and overcome; will result in the growth of new and thicker hair and in lost hair being replaced with new hair are also false because such claims are not limited to cases other than those coming within the classification of male pattern baldness. Respondent's said advertising is also false in representing him as a trichologist and as a scalp specialist.

24. Respondent's said advertisements were also false advertisements as alleged in the complaint for another reason. Section 15 of the Federal Trade Commission Act provides that in determining whether any advertisement is misleading there shall be taken into account the extent to which the advertisement fails to reveal facts material in the light of the representations made. Respondent's advertisements imply that his treatments will prevent or overcome baldness in all cases, or at least the great majority of cases, whereas under the evidence they will be totally ineffective for these purposes in 95% of all cases of baldness. Failure of respondent to reveal this last mentioned fact in his advertisements is itself misleading. It is so found. As alleged in the complaint:

In advertising that his preparations (i.e., treatments) will cause hair to grow and will overcome baldness, respondent suggests that there is a reasonable probability that hair loss or baldness in any particular case may be due to a cause for which his preparations (i.e., treatments) will be of benefit and constitute an effective treatment. In truth and in fact the instances in which loss of hair or baldness is due to a cause or condition for which respondent's preparations (i.e., treatments) will be of benefit and will constitute an effective treatment are rare.

25. The hearing examiner finds himself entirely in accord with this quotation, and with the statement that "there is no reasonable probability that any particular case of baldness is caused

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by a condition for which respondent's preparations may be beneficial."<sup>4</sup>

26. Section 12(a) (1) of the Federal Trade Commission Act reads as follows:

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

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 and cosmetics.

27. It has been found that respondent's advertisements were false and that they were disseminated by the United States mails and in commerce. The evidence shows the preparations to be cosmetics. They were to be applied to the hair and scalp and were intended for cleansing and promoting attractiveness.

28. There only remains to be considered whether the dissemination of the advertising was for the purpose of inducing or likely to induce the purchase of the preparations. The advertising does not mention the preparations but advertises the Voss Hair treatments. In the matter of *Bishop Hair Experts, et al.*, Docket No. 6554, the Commission said that the presence of the word "treatment" or the absence of the mention of a commodity or a description of its qualities in the advertising is not conclusive.

29. The hearing examiner refuses to hold that a sale of the preparations was involved when they were used in giving a treatment as described in the record by respondent. In the opinion of the Commission in the *Wybrant* case, Docket No. 6472 there is a statement as to the factors to be included in considering whether such use of preparations in giving treatments constitutes a sale. Here, as there, the record is insufficient to support such holding.

30. The record fully supports conclusions that the furnishing of cosmetic and medicinal preparations in the form of a treatment kit to some clients for use at home constitutes sales of such preparations. The evidence further shows that both those taking office treatments solely and those receiving home treatment kits in addition to office treatments were charged for refills of the shampoo, solvent and Triseptol, in addition to the cost of the treatments and to the cost of the kits. These were also sales. It is not controlling that there is no showing as to the amount of

<sup>4</sup> For precedents on this point see *Initial Decision in the Matter of William T. Loesch, et al.*, Docket No. 6305, adopted by the Commission, (with modification on another point) November 14, 1957; *Bishop Hair Experts, et al.*, Docket No. 6554, adopted by the Commission May 12, 1958.

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home treatment kits or refills that were sold during any year or any other particular period of time. There evidently were sufficient sales of the latter item to justify respondent's sending out a printed card showing the price thereof. All purchases of the kits and refills were by those who had taken treatments and who presumably originally presented themselves for diagnosis and treatment as a result of the said advertisements. 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." Sales in "commerce" are not necessary for a violation of Section 12(a) (1).

31. Consideration has been given to the question as to whether there is sufficient public interest to justify an order to cease and desist. The dissemination of the said advertising, through the United States mails and in commerce was substantial. The fact that such advertising was substantial and was false and the circumstance that such advertising has served to induce the purchase of the aforementioned items supply the necessary public interest.

32. The use by the respondent of the false advertisements, 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 the statements and representations in said advertisements were true and to induce a substantial portion of the purchasing public to visit respondent's office for the purpose of consultation and treatment and to purchase respondent's preparations because of such erroneous and mistaken belief.

33. 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 George M. Voss trading as Voss Hair Experts of Georgia or under any other name or names, and respondent's agents, representatives and employees, directly or through any corporate or other device in connection with the offering for sale, sale or distribution of the various cosmetic or other preparations set out in the findings herein, or of any other preparations for use in the treatment of hair and scalp conditions, do forthwith cease and desist from directly or indirectly:

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

(a) That the use of such preparations alone or in conjunction with any method of treatment will:

(1) Permanently eliminate or cure dandruff, itching, dryness or oiliness of the scalp,

(2) Cause fuzz to be replaced with long or strong hair,

(3) 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 and excessive hair loss, respondent's said preparations and treatments are of no value whatever.

(4) Cause new hair to grow, cause hair to grow thicker, cause lost hair to be replaced with new hair, or otherwise grow hair, 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 the use of said preparations and treatment will be of no value whatever in the great majority of cases,

(b) 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 or scalp specialists.

## OPINION OF THE COMMISSION

By SECREST, Commissioner:

The complaint, as amended, charges respondent with violation of the Federal Trade Commission Act through the dissemination in commerce and by the United States mail of false advertisements for various cosmetic and medicinal preparations, advertised for external use in the treatment of conditions of the hair and scalp. The hearing examiner in his initial decision held that the allegations of the complaint were sustained by the evidence and ordered respondent to cease and desist the advertising found to be unlawful. Respondent has appealed from the initial decision and from certain rulings by the hearing examiner.

Taking first the issues raised by the appeal from the findings

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and order, respondent contends that his business is not subject to the jurisdiction of the Commission under Section 12(a)(1) of the Federal Trade Commission Act in that he did not disseminate or cause to be disseminated advertisements by mail or in commerce. The argument that an advertiser has no control over the methods of circulation of newspapers in which his advertising appears and cannot be held responsible for the dissemination of such advertising lacks sound legal basis. *Shafe, et al. v. Federal Trade Commission* (C.A. 6, 1958); *Sidney J. Mueller v. United States* (C.A. 5, 1958); and *Johnson Hair & Scalp Clinic*, Docket No. 6497 (Decided June 10, 1958). The hearing examiner, therefore, properly concluded that by placing advertisements in newspapers which are distributed by the United States mail and in commerce, respondent had caused the dissemination by mail and in commerce of such advertisements.

The appeal also excepts to the hearing examiner's holding that through use of the word "trichologist" and by other means in his advertising, respondent has falsely represented that he has had competent training in dermatology and other branches of medicine having to do with the treatment of scalp disorders affecting the hair. Respondent has described himself in his advertising as a "trichologist," a "hair expert" and a "scalp specialist." According to the uncontradicted testimony of the expert witnesses, the term "trichologist" denotes a dermatologist specializing in the branch of medicine having to do with the hair and diseases affecting the hair and scalp. They also testified that the terms "hair expert" and "scalp specialist" imply a degree of learning in the field of hair and scalp that could only be possessed by a dermatologist. The evidence is also clear that respondent has not undergone competent professional training in dermatology or any other branch of medicine pertaining to treatment of disorders affecting the hair. We therefore concur in the hearing examiner's findings on this point.

Respondent also contends that the prohibition in the order against use of the term "scalp specialist" goes beyond the issues raised by the complaint. The advertising's designation of respondent as a "scalp specialist" is merely a variation or expansion of the basic theme whereby, as charged in the complaint, respondent has misrepresented his qualifications and scientific training in treating hair disorders. Hence, there is sound legal basis for including in the order a specific prohibition against use of

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this term. *Consumer Sales Corporation v. Federal Trade Commission*, 198 F.2d 404 (1952).

Respondent also contends that the hearing examiner erred in finding that respondent had represented through his advertising that his treatments will permanently eliminate dandruff, itching, dryness or oiliness of the scalp.

The advertising contains the following claims:

Excessive hair loss, dandruff, itchiness, dryness or oiliness can be corrected in short order—with the help of Voss Hair Experts.

When you're losing hair—no matter how gradually—something is wrong. It's not normal. And you're going bald unless you take steps to prevent it.

Specialized Treatment

First thing to remember, Voss pointed out, is that hair loss may start from any one of 18 common causes. Dandruff in its various forms is one of the most frequent causes. Others are tight scalp, itching and infection, dry or oily hair.

Now ask yourself this question: Is it likely that any kind of bottled "cure-all" could do much to correct so many conditions and stop hair loss?

"But any and all of these disorders," Voss said, "can be easily and completely corrected by our specialized treatment. You see the results at once: Dandruff goes, itching stops, your hair and scalp feel better and look better. Soon, hair fall decreases as much as 90 percent."

Examination Free

"Best of all, your invigorated hair follicles start to replace lost hair with healthy new hair."

Through use of the foregoing statements, respondent is representing that dandruff, itchiness, dryness and oiliness are causes of excessive hair loss and that by correcting these conditions he can prevent baldness and cause hair to grow. He is, therefore, promising something more than temporary alleviation of dandruff, itching, dryness and oiliness; he is representing that he can cure or correct these disorders of the scalp and thereby restore hair and prevent baldness. His claims are made with respect to corrections of a permanent nature and not merely to a temporary benefit limited to the period during which the treatments are received or during which the preparations are used.

Respondent also contends that the hearing examiner erred in finding that respondent has represented that his services and treatments would stop excessive hair fall in the type of baldness known to dermatologists as male pattern baldness, that he could prevent or overcome male pattern baldness, or induce new hair to grow in male pattern baldness. The hearing examiner specifically found in this connection that respondent's advertisements imply that his treatments will prevent or overcome baldness in all cases,

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or at least the great majority of cases. The respondent's advertising includes the following statements and claims:

DANDRUFF, the commonest hair problem, is also the commonest cause of baldness!

Not dandruff as you *see* it, but imbedded dandruff . . . the kind that lodges down in your hair tubes to choke off hair growth . . . the kind that plays a "perfect host" to hair-killing bacteria.

You can't get rid of it with "tonics," shampoos, or other ordinary methods. But you can get rid of it with Voss treatment.

THINK TWICE before you adopt and follow the old "do nothing" method of preserving your hair.

Time was when nothing could be done to prevent baldness, and it didn't matter a bit if you believed that baldness was due to heredity, age, or what have you.

Not now. This is the mid-20th-century. Going bald now, in this city where the nation's most famous scalp specialist *guarantees* to stop excess hair loss, just doesn't make sense.

If you have hair now, you can keep it—with the help of Voss Hair Experts.

Even "fuzz" can be replaced with long and strong hairs—with the professional help of Voss Hair Experts.

In view of these claims, we hold that the finding by the hearing examiner on this point was correct.

There is undisputed evidence in the record that the type of baldness known as male pattern baldness comprises 95% of all cases of baldness. By representing that his treatments can prevent or overcome baldness in all cases, or in the great majority of cases, respondent has, of course, represented that he can effectively treat baldness of the male pattern type. The hearing examiner's conclusions as to the falsity of respondent's advertising representations have full support in the record.

Respondent points out that the order of the hearing examiner would prohibit him from disseminating certain advertising claims "in connection with the offering for sale, sale or distribution of the various cosmetics or other preparations set out in the findings herein, or of any other preparations for use in the treatment of hair and scalp conditions." He contends that the order is at variance with the complaint since the complaint does not charge the dissemination of false advertising of preparations other than those sold by respondent. He also argues that the order is not supported by the findings of the hearing examiner since the findings relate to respondent's treatments and do not include "any other preparations."

It is well settled that a Commission order need not be limited to enjoining specific acts which are charged and found to be

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unlawful. *Hershey Chocolate Corporation v. Federal Trade Commission*, 121 F.2d 968 (1941); *Consumer Sales Corporation v. Federal Trade Commission*, *supra*. The uncontradicted testimony of the two expert witnesses clearly establishes that there are no preparations or treatments which will permanently eliminate or cure dandruff, itching, dryness or oiliness of the scalp, cause fuzz to be replaced by long or strong hair, prevent or overcome male pattern baldness, or in cases of male pattern baldness cause hair to grow thicker, or longer or stronger, or cause new hair to grow, or cause lost hair to be replaced with new hair. We construe the findings set forth in paragraph 17 of the initial decision as in substance expressing these same conclusions. In view thereof, we are of the opinion that the order is not too broad and that the prohibitions thereof should extend to respondent's use of advertising in connection with the offering for sale, sale or distribution "of any other preparations for use in the treatment of hair and scalp conditions."

Respondent also argues that Section 12 of the Act applies to the advertising of products and not to the advertising of treatments. It is his contention, therefore, that the order is invalid since it does not contain a reservation to the effect that it will apply only to the dissemination of false advertisements which induce or are likely to induce the purchase of his products. The hearing examiner correctly found that although respondent's advertising does not mention preparations, the dissemination thereof in commerce comes within the scope of Section 12(a) (1) of the Act. As we stated in *Bishop Hair Experts, et al.*, Docket No. 6554 (Decided May 12, 1958) :

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.

The hearing examiner properly found that although respondent's advertising referred to his treatments, the dissemination thereof was for the purpose of inducing or likely to induce the purchase of the preparations. Inasmuch as the order is expressly limited in its application to practices promoting the sale of preparations, no further restriction thereof is necessary.

Respondent contends that the hearing examiner committed prejudicial error in denying respondent's motion to exclude from the hearing room an expert witness who had not as yet testified.

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He contends that the expert, having heard respondent testify, was "briefed" on what the nature of respondent's testimony was and that this tended to destroy his objectivity when he did testify.

It would appear from a review of the record that the only portion of respondent's testimony which had any bearing on the testimony given by the expert witness concerned respondent's method of treating hair and scalp conditions. There can be no objection to this information being imparted to the expert in some form so that he might express an opinion as to the effectiveness of respondent's treatments. We can think of no sound reason, and none has been suggested by respondent, why the expert's objectivity would be affected because the information came from respondent himself rather than from some other source. The purpose of the rule of exclusion or sequestration is merely to prevent one prospective witness from being taught by hearing another's testimony. (*Wigmore on Evidence*, 3d ed. (1940), Sec. 1838.) An order of exclusion is not demandable as a matter of right but is rather a matter within the discretion of the trial judge. (*Jones, The Law of Evidence in Civil Cases*, 3d ed. (1924), pp. 1257-1259; *Wigmore, supra*, Sec. 1839.) Although an expert witness may be placed under the rule if there is any reason to believe he may be influenced by the testimony of other witnesses, we are of the opinion that no such reason existed here and that there was no abuse of the hearing examiner's discretion in denying respondent's motion to exclude the witness.

Respondent also appeals from the hearing examiner's ruling denying a motion to strike, for lack of competence, the testimony of the two doctors who testified in behalf of the complaint. He argues that although neither of the doctors was qualified as an expert geneticist or an expert endocrinologist, they discussed the cause of male pattern baldness in terms of heredity, endocrine balance and aging to explain why they felt that the condition would be untreatable. The record discloses, however, that the opinion expressed by each of the doctors with respect to the futility of attempting to treat baldness of the male pattern type was based upon his experience as a dermatologist and not upon any knowledge he may have had with respect to the cause of the condition. The two doctors merely advanced theories as to the cause of male pattern baldness and the information elicited on cross-examination with respect thereto was not relevant to any of the issues in the case. The hearing examiner, therefore, prop-

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erly denied the motion to strike the testimony of the two witnesses.

No question has been raised on appeal with respect to the hearing examiner's ruling that sales of preparations were made by respondent only when those persons taking office treatments and those receiving home treatment kits were charged for refills of shampoo, solvent and Triseptol. The evidence shows that respondent's clients who receive home and office treatment are furnished a home treatment kit containing the same preparations which are applied during office treatments, the shampoo, solvent and Triseptol, a booklet of instructions and a hair brush. This kit contains enough of the formulas for 32 home treatments, a four-months' supply. During this period, the client is required to come in for office treatment once a month although he may get as many office treatments as he can take.

Despite the fact that the client must be examined and treated by respondent before receiving the kit and must come in at least once a month for an office treatment, it is believed that the transaction is something other than the sale of a series of treatments by respondent. As we stated in *Wybrant System Products Corporation, et al.*, Docket No. 6472, the important question to be determined with respect to such a transaction 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?" Insofar as the arrangement between respondent and the home and office client is concerned, the office treatments furnished by respondent appear to be merely incidental to the sale of the home treatment kit. Respondent himself has so indicated by testifying that in addition to the kit, the client receives as many office treatments as he can take "without any extra charge." Furthermore, the difference in the amount charged clients taking office treatments exclusively, \$170 for 40 treatments, and that charged clients receiving the home treatment kit, \$80 for 32 home treatments plus an indefinite number of office treatments, would indicate that the latter class of clients is purchasing the product rather than the service.

We are of the opinion, therefore, that in addition to the sales of refills of the various preparations, as found by the hearing examiner, the transactions involving the furnishing of home treatment kits to certain clients constitute sales by respondent of the preparations contained in such kits.

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Respondent's appeal is denied and the initial decision, modified to conform with this opinion, will be adopted as the decision of the Commission.

## 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 directing modification of the initial decision:

*It is ordered*, That paragraphs 30 and 31 of the initial decision be modified to read as follows:

30. The record fully supports conclusions that the furnishing of cosmetic and medicinal preparations in the form of a treatment kit to some clients for use at home constitutes sales of such preparations. The evidence further shows that both those taking office treatments solely and those receiving home treatment kits in addition to office treatments were charged for refills of the shampoo, solvent and Triseptol, in addition to the cost of the treatments and to the cost of the kits. These were also sales. It is not controlling that there is no showing as to the amount of home treatment kits or refills that were sold during any year or any other particular period of time. There evidently were sufficient sales of the latter item to justify respondent's sending out a printed card showing the price thereof. All purchases of the kits and refills were by those who had taken treatments and who presumably originally presented themselves for diagnosis and treatment as a result of the said advertisements. 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." Sales in "commerce" are not necessary for a violation of Section 12(a) (1).

31. Consideration has been given to the question as to whether there is sufficient public interest to justify an order to cease and desist. The dissemination of the said advertising, through the United States mails and in commerce was substantial. The fact that such advertising was substantial and was false and the circumstance that such advertising has served to induce the purchase of the aforementioned items supply the necessary public interest.

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*It is further ordered,* That the initial decision of the hearing examiner, as so modified, be, and it hereby is, adopted as the decision of the Commission.

*It is further ordered,* That respondent, George M. Voss, 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.

Complaint

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IN THE MATTER OF  
WARD BAKING COMPANY

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

*Docket 6833. Complaint, July 8, 1957—Decision, Feb. 10, 1959*

Consent order requiring a baking corporation in New York City, with net sales in 1956 exceeding \$100,000,000, to cease discriminating in price in violation of Section 2(d) of the Clayton Act by granting promotional allowances to some customers but not to their competitors and not on proportionally equal terms, such as payment of 5% of the wholesale price on purchases in excess of \$50 a week to retailers in the New Haven, Conn., and Philadelphia, Pa., trading areas.

COMPLAINT

The Federal Trade Commission, having reason to believe that Ward Baking Company, hereinafter designated as respondent, has violated and is now violating the provisions of subsection (d) of 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. Ward Baking Company is a corporation organized and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 475 Fifth Avenue, New York City, N.Y.

PAR. 2. Respondent is now and for several years last past has been engaged in the business of baking and selling bakery products including bread, cakes, rolls and pies. Said products are sold to customers with places of business located in the several States of the United States and in the District of Columbia, for resale to the purchasing public. Respondent is an interstate enterprise conducting its business from 23 baking facilities located throughout the United States. Its net sales in 1956 exceeded \$100,000,000.

PAR. 3. In the course and conduct of its business, respondent has engaged in commerce, as "commerce" is defined in the Clayton Act, as amended, having shipped its products from the place where such products are manufactured in various States of the United States to its customers having places of business located in other States of the United States and in the District of Colum-