

Decision

IN THE MATTER OF
WARD LABORATORIES, INC., ET AL.ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT

Docket 6346. Complaint, May 5, 1955—Decision, Mar. 4, 1959

Order requiring three associated New York City sellers to cease representing falsely in advertising that the common cause of baldness, or a significant one, is germ infection, and that use of their hair and scalp preparations would remedy such causes and remedy and prevent the common type of baldness, cause growth of new hair, and prevent excessive hair fall; and to cease representing falsely that they owned or operated a laboratory, through use of the word "Laboratories" in their corporate names or otherwise.

Morton Nesmith, Esq. for the Commission.

T. Stanley Block, Esq., of New York, N.Y., for respondents.

INITIAL DECISION BY JAMES A. PURCELL, HEARING EXAMINER

Preliminary Statement

The complaint in this matter, issued by the Federal Trade Commission on May 5, 1955, charges the respondents named in the caption hereof, are engaged in the business of selling and distributing cosmetic and medicinal preparations in interstate commerce for external use in the treatment of conditions of the hair and scalp. The complaint charges specifically that the respondents, through the use and dissemination of false and misleading advertisements concerning their said preparations, for the purpose of inducing and which were likely to induce the sale of said preparations to the public, falsely represented the efficacy of their said preparations as to their therapeutic effect for the prevention of baldness or partial baldness and that they will cause the growth of new hair and prevent excessive hair fall. It was further charged they represented that the common cause, or a significant cause, of baldness is due to germ infection and that use of their preparations will effectively remedy and obviate the common or significant cause of baldness thus resulting in new hair growth and the prevention of excessive hair fall.

Respondents Ward Laboratories, Inc., and Comate Laboratories, Inc., were further charged in said complaint with the false, misleading and deceptive use of the word "laboratories" in their

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respective corporate names for the reason that said respondents do not own or operate a laboratory in connection with their said business.

On March 7, 1956, upon motion, the complaint was amended so as to allege the most common cause of baldness is not due to germ infection, as represented by respondents, but on the contrary is due to heredity, age and endocrine balance, such condition being commonly referred to as "male pattern baldness," and that the use of respondents' preparations will not effect any of the claimed remedial actions preventing complete or partial baldness or excessive hair fall, nor will they cause the growth of new hair.

Respondents' advertisements were further charged as false and misleading in that they failed to reveal facts material in the light of the representations made therein, such facts being that most cases of baldness or loss of hair is of a type known as "male pattern baldness" and when baldness is of this type respondents' preparations are of no value in the treatment thereof.

To the complaint, as amended, respondents filed their answer in which they admitted that their said preparations:

Will not prevent baldness, will not cause the growing of new hair and will not prevent excessive hair fall, except where the aforesaid conditions are caused by seborrhea.

In their original answer to the complaint prior to the amendment thereof, and reasserted in their answer to the complaint as amended, respondents set up, as an affirmative defense, that seborrhea is a significant or common cause of hair loss which may be controlled through use of respondents' preparations which latter would destroy the bacteria causing seborrhea and thus effect the elimination of hair loss.

Upon the issues thus joined the matter proceeded to trial during the course of which testimony was received in support of, and in opposition to, the charges of the complaint, all of which testimony has been reduced to writing, and, together with the evidence in the form of exhibits, has been duly filed in the office of the Commission in Washington, D.C., as required by law.

Proposed findings of fact and conclusions of law were submitted by all parties, oral argument thereon not having been requested. Rulings on such findings and conclusions appear elsewhere of record, as required by law.

This matter being now before the hearing examiner for final determination based upon the record as an entirety, he having

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presided at all hearings, observed all witnesses, considered and ruled upon all testimony and exhibits of record, finds that this proceeding is in the interest of the public and makes his findings as to the facts, conclusions of law based thereon, and order.

During the course of the proceeding counsel representing all parties, being desirous of narrowing the issues and agreeing upon certain facts, thus obviating the necessity of receiving testimony thereon, executed a stipulation reciting such agreed facts. The stipulation appears of record herein¹ as well also certain minor agreements entered into between counsel, which latter appear in the transcript of testimony. The advertising matter of respondents, forming the basis of this action and adverted to in the stipulation aforesaid, are likewise matters of record herein.²

The facts agreed upon, and those arrived at as a result of testimony and other evidence, are incorporated in the following:

Findings as to the Facts

1. Respondent Ward Laboratories, Inc., is a corporation organized, existing 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 19 West 44th Street, New York, N.Y. Respondents Emile E. Kling and Joseph J. Seldin are individuals and president and secretary-treasurer, respectively, of Ward Laboratories, Inc., with the same address as the said corporate respondent.

Respondent Comate Laboratories, Inc., and respondent Sebacin, Inc., are corporations, organized, existing and doing business under and by virtue of the laws of the State of New York, with their offices and principal place of business located at 20 West 45th Street, New York, N.Y.

The individual respondents Emile E. Kling and Joseph J. Seldin formulate and control the policies, acts and practices of the said three corporate respondents, including the acts and practices hereinafter set forth.

2. The said respondents are now, and for more than two years last past have been, engaged in the business of selling and distributing cosmetic and medicinal preparations for external use in the treatment of conditions of the hair and scalp. Included among said preparations are (a) those sold by respondent Ward Laboratories, Inc., under the following names: "Ward's Formula

¹ Com. Exh. No. 1.

² Com. Exh. Nos. 3, 4, 5, 6, 7, and 8.

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Medicine for the Scalp and Hair," "Ward's Formula Medicinal Lubricant for Dry Scalp and Hair," "Ward's Formula Medicinal Compound for Oily Scalp" and "Ward's Formula Shampoo"; (b) those sold by respondent Comate Laboratories, Inc., under the following names: "Comate Medicinal Scalp Formula," "Comate Medicinal Emulsion," "Comate Scalp Conditioner," "Comate Dry Scalp Shampoo" and "Comate Oily Scalp Shampoo"; and (c) those sold by respondent Sebacin, Inc., under the following names: "Sebacin Basic Formula," "Sebacin Antiseptic Lubricant" and "Sebacin Shampoo." Said respondents cause said preparations, when sold, to be transported from their places of business in the State of New York to purchasers thereof located in the State of New York and various other States of the United States and in the District of Columbia. Said respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in said preparations between and among the various States of the United States and the District of Columbia.

The preparations sold under the names of "Ward's Formula Medicine for the Scalp and Hair," "Comate Medicinal Scalp and Hair Formula" and "Sebacin Basic Formula" are substantially the same product. The active ingredients for said products are: Beta Naphthol (or B-Hydroxynaphtholene), Cinnamic Acid, Sodium Sulfocarbolate (or Phenolsulfonate), Alcohol 37½% by volume.

The preparations sold under the name of "Ward Formula Medicinal Lubricant for Dry Scalp and Hair," "Comate Medicinal Emulsion" and "Sebacin Antiseptic Lubricant" are substantially the same product. The active ingredients for said product are: Chloral Hydrate .27%, Sodium Phenolsulfonate (or Sulfocarbolate), Resorcinol Monoacetate, Sulfonated Castor Oil.

The preparations sold under the names of "Ward's Formula Medicinal Compound for Oily Scalp" and "Comate Scalp Conditioner" are substantially the same product. The active ingredients for said products are: Oxyquinoline Sulfate, Salicylic Acid, Menthol, Glycerine, Alcohol 84% by volume.

The preparations sold under the names of "Ward's Formula Shampoo," "Comate Dry Scalp Shampoo," "Comate Oily Scalp Shampoo" and "Sebacin Shampoo" are substantially the same product consisting of liquid soap.

"Ward's Formula Medicine for the Scalp and Hair," "Comate Medicinal Scalp and Hair Formula" and "Sebacin Basic Formula" contain the same or similar active ingredients, the "Ward Formula" bottle containing 5 oz., the "Comate Formula" bottle con-

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taining 12 oz., and the "Sebacin Formula" bottle containing 16 oz. as part of a Sebacin package deal consisting of the formula, shampoo and antiseptic lubricant.

That "Ward's Formula Medicinal Lubricant," "Comate Medicinal Emulsion" and "Sebacin Antiseptic Lubricant" contain the same or similar active ingredients. "Sebacin Antiseptic Lubricant" and "Comate Medicinal Emulsion" contain more expensive perfume.

That "Ward's Formula Shampoo," "Comate Dry Scalp Shampoo," "Comate Oily Scalp Shampoo" and "Sebacin Shampoo" contain different ingredients, all being classified in the general category of liquid soap.

3. In the course and conduct of their aforesaid business, the respondents have disseminated and have caused the dissemination of advertisements concerning said preparations by the United States mails and by various other means in commerce, as "commerce" is defined in the Federal Trade Commission Act, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of said preparations; and respondents have also disseminated and have caused the dissemination of advertisements concerning said preparations, by various means, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of said preparations in commerce, as "commerce" is defined in the Federal Trade Commission Act.

Among and typical of the statements and representations contained in said advertisements, in periodicals, leaflets, circulars, pamphlets and other advertising literature, disseminated and caused to be disseminated as hereinabove set forth are the following:

(a) Ward's Formula advertising:

SAVE YOUR HAIR

* * *

Millions of trouble-breeding bacteria, living on your sick scalp (see above) are killed on contact. Ward's Formula kills not one, but all four types of these destructive scalp germs now recognized by many medical authorities as a significant cause of baldness. Kill these germs—don't risk letting them kill your hair growth.

Once you're bald, that's it, friends! There's nothing you can do. Your hair is gone forever. So are your chances of getting it back. But Ward's Formula, used as directed, keeps your sick scalp free of itchy dandruff, seborrhea, and stops the hair loss they cause. Almost at once your hair looks thicker, more attractive and alive.

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(b) Comate Formula advertising:

NOW!

The Amazing Facts about BALDNESS

... AND WHAT YOU CAN DO ABOUT IT

WARNING: The following facts are brought to the attention of the public because of a widespread belief that nothing can be done about hair loss. This belief has no basis in medical fact. Worse, it has condemned many men and women to needless baldness by their neglect to treat certain accepted causes of hair loss.

There are six principal types of hair loss, or alopecia, as it is known in medical terms:

1. Alopecia from diseases of the scalp
2. Alopecia from other diseases or from an improper functioning of the body
3. Alopecia of the aged (senile baldness)
4. Alopecia areata (loss of hair in patches)
5. Alopecia of the young (premature baldness)
6. Alopecia at birth (congenital baldness)

Senile, premature and congenital alopecia cannot be helped by anything now known to modern science. Alopecia from improper functioning of the body requires the advice and treatment of your family physician.

BUT MANY MEDICAL AUTHORITIES NOW BELIEVE A SPECIFIC SCALP DISEASE IS THE MOST COMMON CAUSE OF HAIR LOSS.

(c) Sebacin Formula advertising:

NEW MEDICAL EVIDENCE SHOWS HAIR CAN BE SAVED!

MEDICAL AUTHORITIES

BLAME GERM INFECTIONS

FOR COMMON BALDNESS

Washington, D. C.—New hope was offered to men and women suffering from the age-old problem of baldness, in recent testimony here by leading dermatologists.

* * * * *

* * * This impressive testimony by competent medical doctors now made public for the first time offers renewed hope for the treatment of sick scalps and the prevention of baldness.

4. It was further stipulated³ between counsel:

In the course and conduct of their business, respondents Ward Laboratories, Inc., and Comate Laboratories, Inc., used the word "laboratories" in their corporation names in soliciting the sale of and selling their said preparations. In truth and in fact respondents do not own or operate a laboratory in connection with their said business.

The stipulated facts appearing in numbered paragraphs one to four, next preceding, are hereby found as facts for the purposes of this decision. The remaining facts necessary to be found under the issues framed, being predicated of scientific or medical testi-

³ Tr. 15-16.

mony, are arrived at as a result of the evaluation of testimony produced by the parties in support of their respective positions.

5. It is found, as a fact, that from a reading of the various advertisements published and circulated by respondents of and concerning their various products, all as hereinabove set forth, respondents have represented, directly and by implication, that the common cause, or a significant cause, of baldness is due to germ infection and that the use of their preparations will (a) remedy the common cause, or a significant cause, of baldness; (b) remedy the common type of baldness; (c) prevent baldness or partial baldness; (d) cause the growth of new hair, and (e) prevent excessive hair fall; that this finding is made upon analysis, evaluation and reasonable construction of the overall tenor and effect of said representations and the construction which would be placed thereon by the average reader, meaning thereby those members of the consuming public who would, or might, be misled thereby, and while there is no testimony as to public acceptance or interpretation of the said advertisements none such is necessary, it being the especial province of this Commission to avail of its expertise herein *sua sponte*, without the necessity of supporting testimony, and this has been consistently held to be an attribute of quasi-judicial and expert bodies such as this Commission.

6. It is further found as a fact that said advertisements are misleading in material respects and constitute false advertisements in that, contrary to fact, they represent that the common cause, or a significant cause, of baldness is due to germ infection. In truth and in fact the most common cause of baldness is due to heredity, age and endocrine balance, commonly referred to as male pattern baldness; that this type of baldness constitutes 95% of all cases of baldness and regardless of the exact formula or the combination of the ingredients or preparations, or the methods of application of respondents' preparations, such will not remedy or cure the common cause, or a significant cause, of baldness; will not remedy or cure the common type of baldness; will not prevent baldness or partial baldness; will not cause the growth of new hair; and will not prevent excessive hair fall.

This examiner lays no claim to any special competence in the scientific fields of dermatology, trichology, endocrinology, bacteriology, pharmacology, cosmetology, physiology, chemistry and anatomy, all of which are touched upon in this proceeding, and

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has had to be content with the testimony and conclusions set forth by the experts. There is no lay testimony. In other words, the examiner has acted as the finder of the facts portrayed and has carefully adhered to his special province in marshaling the evidence and making his findings and conclusions based thereon. In order that the findings may be shown to be based upon demonstrable facts, reasonably arrived at, and to negate any thought that there has been an arbitrary selection of one segment of scientific thought over another, the ability so to do by this examiner being subject to challenge because of lack of scientific competence, and further in order to support the specific finding of fact, which is now here made, that there is no controlling divergency of expert opinion in the instant matter, a review of the salient testimony and evidence forming the predicate of these findings is in order.

In arriving at a final determination the examiner has not only been persuaded by his personal observation of the respective witnesses while testifying, as well also the testimony itself as it appears in the printed transcript, but also has taken into consideration as determinative and persuasive factors, the professional backgrounds, education and experience of the respective witnesses. This being so it is felt that the last mentioned qualifications of the individual witnesses should be stated and accordingly such are succinctly set forth and incorporated herein as "Marginal Note No. 1," immediately following these findings of fact, such note embracing pages 23 to 27 hereof. In dealing with testimony the names of witnesses have been used in order that the testimony may be related to the particular witness and, by reference to the Marginal Note, his competency to express his opinions may be evaluated.

The Testimony

Dr. Howard T. Behrman, a witness called by the Commission, testified to his qualifications as an expert, such qualifications appearing in detail in Marginal Note No. 1, hereinbefore referred to. After qualification the witness was examined on the *voir dire* upon the conclusion of which counsel for respondents expressed himself satisfied with the competency of the witness.

The witness testified that his specialty in the practice of medicine is confined to dermatology which concerns itself primarily with the diagnosis and treatment of the skin, both in health and in disease, and this includes the hair and scalp; that the matter

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of diminished hair growth, excessive hair loss, baldness, dandruff, itching and irritation of the scalp are all within the same field of witness' specialty and he is familiar with all of these conditions, having devoted himself since 1939 to the practice of dermatology to the exclusion of the other branches of medicine; that he has averaged between 50 and 100 patients a day for some years past in his private practice, exclusive of hospital work and clinics, and that between 25 and 50 percent of that number were cases involving hair and scalp disorders.

The subject of baldness, known to the profession as alopecia, may be divided into two main groups, the first thereof to include all cases of congenital baldness, being baldness at birth or associated with congenital disturbances of some type. The second category would be acquired baldness or the type that occurs subsequent to birth. This latter may in turn be separated into two main groups, that is, the group associated with scarring as well as baldness, and the other group being unassociated with scarring. Both of these major sub-groups may be further subdivided into the local and the systemic forms of baldness. Under the local form may be found baldness due to various physical agents, such as heat, X-ray, atomic radiation, and chemical action or substances of that type, as well also virus and fungi of different types. The remaining subdivision in this category forms the major and most important type of baldness which may be described as "just plain ordinary baldness of the garden variety type" which is referred to as the male pattern baldness. The baldness caused by systemic reasons, such as syphilis, high fevers, endocrine disturbances and things of that nature are not here considered because we are not concerned therewith under the issues at trial in this matter. Witness testified that: "When we speak of baldness, the disease, what we primarily talk about is ordinary male pattern baldness, common baldness"; that this particular type of baldness constitutes at least 95 percent or more of all cases of baldness and that all of the other types of baldness above described, come within the remaining 5 percent; that germ infection is not the cause of common baldness, otherwise known as the "male pattern type," nor is the matter of germ infection a significant cause of baldness.

Witness thereupon undertook to describe the causes leading up to baldness of the male pattern type and said that it is his opinion, and there is "more or less" universal agreement among

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dermatologists, endocrinologists, anatomists and the like on the subject that such is due to three things: 1. *Heredity*. In other words, certain racial groups, strains and families have a tendency toward this type of baldness; 2. *Hormonal balance*. In other words, the relationship between the circulating hormones, primarily the male and female sex hormones; that it is known where an imbalance or preponderance of male, in contradistinction to female, hormones is encountered, we generally find baldness, which is the reason the disease is so named, it being primarily prevalent among men rather than women; 3. *Age*. In other words, with age there is a certain amount of hair loss which is gradual and occurs as time passes on.

The witness is familiar with the use, application and action of all of the ingredients used by respondents in the manufacture of their various preparations and, in fact, has used most of them in his practice; that he is of opinion there is no foundation for respondents' assertions concerning the efficacy of any of these ingredients, either singly or in combination, for the treatment and condition or cure of baldness of the common or male pattern type, nor would use of respondents' preparations remedy the common cause of baldness; that the said preparations will not cure or remedy a significant cause of baldness, nor remedy the common type of baldness, nor will said preparations, in this vast majority of cases, prevent baldness or partial baldness, and likewise, such preparations will not cause nor facilitate the growth of new hair.

From the foregoing it will be seen that this witness attributes 95 percent of all cases of baldness to the common or "male pattern" type. As to the remaining 5 percent witness said these cases could be attributed to several hundred causative factors but was of the firm opinion that adequate treatment thereof could only be devised and administered after full clinical examination and laboratory study of individual cases; that it is possible in certain instances in this percentage category some of respondents' preparations might be of value, while in other instances they might, and possibly could, aggravate and worsen the condition. On this line considerable testimony was had which is not here dealt with for the reason we are primarily concerned, under the issues herein, with that great body of cases of baldness comprising 95 percent plus and as to this percentage category respondents' preparations will have no effect in promoting hair restoration, hair growth, prevent falling hair or in any other

wise fulfilling the representations of respondents as disclosed in their advertisements.

Dr. Herbert Rattner, a witness called at the instance of the Commission, whose professional qualifications are set forth in the Marginal Note No. 1 hereinbefore referred to, testified that he is engaged exclusively in the practice of dermatology which is that branch of medicine having to do with the care of the skin and its appendages, the latter being the nails, hair, and the adjacent mucous membrane; that from the time he began to specialize in dermatology, in the year 1927, he has treated many cases of diminished hair growth, excessive hair loss, baldness, dandruff, itching and irritation of the scalp, all of such being within his particular field; that the witness sees and attends individuals with the foregoing ailments practically every working day.

Witness testified that ordinarily, when the term "baldness" is used, it is taken to mean the "common garden variety" or "male pattern type" of baldness; that there are different types and causes of baldness other than the male pattern type which are roughly subdivided into "patchy" and "diffuse baldness," and the one with which we are principally here concerned is in the latter category; the patchy type of baldness can be due to several causes, some related to disease—alopecia areata, syphilis, pupus erythematous, folliculitis decalvans, (which latter is probably due to a germ), ringworm in children and instances of this type. Then there is diffuse baldness, the male pattern type, the cause of which is not known but according to the witness it is "pretty evident" that such is due to endocrine imbalance which is inherited. Also in the diffuse baldness category this type appears at times following high fever, or the taking of certain drugs, or after the skin of the scalp has been inflamed by chemicals, but in these last mentioned instances the bald condition is temporary in nature and the hair recurs but this is not true of the male pattern baldness. Witness gave as his opinion that the proportion of bald-headed people, or semi-bald people, which would come under the heading of the male pattern type in men is very close to 100 percent, and was very positive in his statement reiterating that at least 99½ percent or "very close to 100 percent" belong in the male pattern type and that all other patterns or varieties of baldness, other than the male pattern type, would be encompassed within one percent. When speaking of these percentages

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the witness was not influenced by the fact that baldness occurs sometimes with women, but only very infrequently and would not change his opinion as above expressed; that some women who are under treatment for certain types of cancer receive the male sex hormones as part of the treatment as a result of which they may become bald as long as they are taking the medicine, that is to say, the male sex hormone, and this is but another evidence of the reason why this widely prevalent condition of baldness is denominated "the male pattern type."

Referring to seborrhea as a causative factor of the male pattern type of baldness, as represented in respondents' advertisements, the witness denies that such is a causative agent; that he has seen many patients with seborrhea who are not bald and, referring to himself as an example, testified: "I have a lot of seborrhea where I have hair. Where I have a few hairs I still have seborrhea dermatitis; I do not [have seborrhea] where I am bald"; that seborrhea and baldness are frequently associated, but not causatively, that is to say, many men who are bald also have seborrhea and many who are bald do not have seborrhea, and also many people who have seborrhea are not bald. The witness has never in his experience seen any instances in which scalp germ infections were the causative agent in the loss of hair in the common male pattern type of baldness; that germs may be the causative agent in certain types of patchy baldness but never in the common male pattern type; that these instances of patchy type of baldness would fall within the one percent previously alluded to by the witness.

Having had read to him a list of all of the ingredients comprised in the makeup of the several preparations of respondents here involved, the witness said that he is familiar with many of them and in fact had used the same or similar ingredients in his practice and those which he had not so used he had "looked up" and was prepared to testify to the effects which could be expected from their usage; that substantially all of the ingredients are mild antiseptics, except menthol which is used for its cooling effect, which are much like an after-shave lotion, and alcohol which has the effect of drying the hair; that glycerin and castor oil are simply vehicles and the various combinations of respondents are designed to be mild antiseptics, to dissolve dandruff and "furnish a little hair dressing."

The witness was positive in his statement that none of the ingredients as listed, whether singly or in combination, would

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have any synergistic or additive effect the result of which in his opinion would cure baldness or stop falling hair, and in fact would have no effect whatsoever on common baldness of the male pattern type. He further testified that the use of respondents' preparations will not cause the growth of new hair; will not prevent excessive hair fall and will not remedy any significant cause of common baldness.

Upon having read to him various of the respondents' advertisements such as:

Millions of trouble-breeding bacteria, living on your sick scalp are killed on contact. Ward's Formula kills not one, but all four types of these destructive scalp germs now recognized by many medical authorities as a significant cause of baldness * * *

The witness gave as his expert opinion that said statement was false and misleading and not substantiated by his own experience or by any competent authorities within his field who are known to the witness. The witness was equally positive in testifying concerning several of the other advertisements of the respondents and his criticism was based upon the same reasoning; that senile and premature and congenital baldness cannot be helped by anything known to medical science and that the loss of hair or baldness due to scalp germs and infection are exceedingly rare and further that the male pattern type of baldness has no relation whatsoever to destructive scalp germs or infection.

Dr. Albert M. Kligman, a rebuttal witness called by the Commission and whose qualifications appear herein in Marginal Note No. 1. Upon conclusion of his qualification as an expert, respondents' counsel volunteered the statement:

May I state that I concede the qualifications of the doctor?

The witness thereupon testified that his medical specialty is dermatology which is the study of the skin and its principal appendages, the hair and the nails; originally the witness was interested with mycological investigation of fungus infection, but in the past four or five years has paid particular attention to the study of the hair, particularly those studies relating to its anatomy and the physiology of hair growth. The witness has read the testimony of respondents' witnesses in this case. Referring to the testimony of respondents' witness Traub, he did not agree with the latter's finding as to the percentages of all causes of baldness and that, contrary to such testimony, said that considerably less than one-tenth of one percent of all of

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the causes of baldness, in the opinion of the witness, is caused by infection; that there are many causes of baldness ranging over a great number of diseases in general, from constitutional and hereditary defects; mechanical causes such as the pulling of the hair; physical causes such as radiation and burns; chemical causes such as toxins, external or internal; allergy causes such as a drug reaction; psychosomatic causes involving emotional problems of the individual; infectious causes due to virus, bacteria, fungi and the like, so that the cause of baldness is as wide as the subject of dermatology itself; that in his opinion the most common type of baldness is the "male pattern" baldness, which type he estimates to constitute 99 percent of all cases of baldness, and in fact is "very close to, and could be, 100 percent."

According to the witness the male pattern type of baldness is an hereditary disorder, one which has to be born with the genes that predispose toward its development, and when it emerges as a clinical symptom it is accompanied by the presence of other factors, such as age; coupled with the foregoing is the consideration of the endocrine and hormonal status of the individual; that this type of baldness does not appear until an individual has gone through his adolescence because baldness of this type requires the presence of male hormone; that those who are castrate and genetically immature do not develop baldness; in addition there is a third condition which has to do with sex because this disease appears principally in males, but not exclusively; the male pattern type of baldness may occasionally appear in females who inherit a double dose of these genes from both sides of the family, but this is rare.

Upon being asked if infection is a cause of the male pattern type baldness the witness answered: "Emphatically no"; that seborrhea is not a cause of the male pattern baldness, nor is the condition known as seborrhea dermatitis a causative agent; that in unusual cases certain types of bacterial diseases and some types of fungus diseases may contribute to the loss of hair but this loss is in no way analogous to that which ensues in the male pattern type. The process of balding in the male pattern category takes place wholly independently of any infection of the hair roots and is not a consequence of inflammation due to skin irritation or infection; that the two conditions are markedly different because in instances of bacterial infection such would not be localized to a particular area and would show no definite pattern and have no characteristic way of developing but, in the areas

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where it did make itself evident, would be characterized by exudation, by swelling, and usually crusting, pain and tenderness and an upheaval in the tissue, as a consequence of which the hair would be thrown off; that such described localized conditions are not prevalent in the male pattern baldness and have no physiological or other connection therewith.

When respondents' witness Lewis was on the stand, there was introduced through him Respondents' Exhibit No. 5, being a brochure titled "Dandruff and Seborrhea" by McKee and Lewis, published April 1938. The record shows that author McKee is deceased and coauthor Lewis is the same Dr. George M. Lewis who testified for the respondents. Under the accepted rule that the writings of an expert may not, ordinarily, be used to support his testimony as an expert witness, no weight is accorded this exhibit by the examiner who has preferred to consider only the oral testimony of the witness as given on the stand. However, the respondents, obviously laying store in the comments and summary contained in said brochure, this witness was asked to comment on said exhibit from a technical standpoint in which comments the witness said that he is familiar with the contents of the paper and that its general purport is to support the major finding of the authors to the effect that certain types of organisms tended to be associated with baldness which the witness declared to be an obsolete idea; that the experiments described in the paper were not carried out completely from a scientific standpoint in that it does not involve quantitative techniques, nor does it estimate the number of organisms which were isolated from the scalp during the experiments; that it is a rather "crude work" and not modern [1938]; that the organisms recovered were not specifically designated by their scientific terminologies and as an instance the witness pointed out that the authors found "increased infections of scurf staphylococcus on the surface of the scalp," which statement has no scientific basis for existence and that is not the manner in which experts designate organisms; that the work is wholly insufficient to afford any basis in fact or significant information bearing upon the subject that any specific type of bacteria is associated with male type of baldness; that, so far as witness knows, no one has clearly demonstrated that the microflora, (the bacteria flora), of the scalp of people with baldness is in any manner different than that of normal people; that the witness himself is well versed in the bac-

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teriological field and teaches a course in bacteriology of the skin; specifically referring to the various categories of the staphylococcus, germs or substances as found on the scalps of the experimentees, referred to on page 136 of the aforesaid Respondents' Exhibit No. 5, the witness said that all of these are normal organisms which can be found upon sampling any population of men and that such are not indicative of, nor can they be related to, the male pattern baldness.

Further examination of the witness went into extensive technical discussions and explanations for the opinions and conclusions he has expressed—such as microscopical examination of biopsies of the skin and hair;⁴ microscopical examinations of scalp scale culture, fungus, bacteria and micro-organisms; the effect, (in producing baldness), of the male chromosomes and genes in the hereditary apparatus, and other testimony not necessary to be here reviewed but a reading of which serves to convince and render comprehensible to the lay mind the scientific bases for the reasonableness and truth of the testimony of this witness.

Also extensive examination, both on direct and cross, was had of this witness which explored the subject of seborrhea dermatitis and its noneffect in producing the male pattern type of baldness. No attempt is here made to relate or review any therapeutic effect of respondents' medicaments in this insignificant percentage of cases, such constituting less than one-half of one percent, as opposed to the overwhelming percentage of cases of the male pattern type.

Dr. Peter Flesch, a witness called by the Commission in rebuttal, and whose qualifications are listed in Marginal Note No. 1 aforesaid, testified that he is a research physician in the fields of chemistry and the physiology of the skin, specializing in certain aspects thereof such as the pigmentation of the skin, keratinization, hair growth and the development of new methods of research. After qualification of the witness by Commission counsel as an expert and examination on the *voir dire* by respondents' counsel, the latter announced: "I have no objections to the qualifications of the witness."

This witness is the same person who conducted certain experiments and propounded certain theories upon which respondents' witness, Dr. Traub, placed much reliance in his testimony and the general purport of the testimony of this witness, Flesch, is to

⁴ See testimony affecting Commission's Exhibit No. 14 which is a schematic drawing, made under the supervision of the witness, of a normal hair and its surrounding tissue.

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the effect that Traub had misinterpreted the results of the tests and experiments which Flesch had conducted and, based thereon, he had postulated certain theories, which were *only* theories, and which the witness Traub had construed to be definitive results which could be accepted as explanatory of the causative reason for baldness in human beings. The gist of this witness' testimony is as follows: Witness had read and is familiar with the testimony heretofore given in this case by all of respondents' witnesses and particularly with that of the witness Traub; that Traub was in error in making the following statements:

I think the chemical evidence we now have from Flesch on this squalene and other fatty acids that are produced in excessive oily conditions of the scalp may be the thing that is important, is the important one in bringing about hair loss.

and further:

The only person who has done any extensive work [on this subject] has been Flesch, and his work has been that of animals, but he definitively proved that rubbing of this material in the skin of the animal, experimental animal, produced a hair loss and alopecia, and if that is the case, that may be the explanation of all of this type of common baldness.

Witness said that his experiments could not be correctly interpreted to the effect that baldness, either in human or lower animals, is commonly caused by infection or that it is commonly caused by sebum or seborrhea; that his studies and experiments have failed to develop that there is anything commonly present on the hair or the scalp, such as seborrhea, squalene and fatty acids, or any infection which explains the existence or the causation of the common type of baldness or which explains "why one person gets bald and the other fellow doesn't"; that he knows of no substance or factor of the human scalp or hair which may be removed and thus change in any way, either by retardation, postponement or the overcoming of the common type of baldness and that anyone who so interprets his experiments as so indicative is in error.

The respondents offered testimony to the following effect:

Dr. Eugene F. Traub, whose qualifications are set forth in Marginal Note No. 1 above referred to, a witness on behalf of the respondents, has specialized in the practice of dermatology for 36 years; that he has read and is familiar with the testimony of the witnesses on behalf of the charges of the complaint and fixes at approximately 90 to 95 percent the incidence of the infectious or so-called premature-senile-hereditary types of bald-

ness, although he did not undertake to separate or break down the percentages in the various subtypes; he discounts the hereditary factors, upon which Commission's witnesses laid great stress, by observing that he does not believe, "[a]nybody at the present time knows what 'hereditary factors' mean"; he discounts the endocrine factor or theory, advocated by Commission witnesses, as causative of, or influencing, baldness because: "[j]ust how much stress one can put on the different types of hormones that comprise the endocrine chain is hard to say," but in evaluating the causes of many types of baldness, and contrary to the expressed opinions of Commission's witnesses, he places stress upon dandruff, seborroid dermatitis, pityriasis capitis and germicidal infections as significant causative factors; it is his testimony that loss of hair is attributable to large measure to germ infections which are present on the scalp and, especially so, in the presence of dandruff of the two types mentioned.

A portion of this witness' direct testimony partook of having read to him certain responses to questions and opinions expressed by Commission's witnesses, the net result of his answers tending to show that he was not in agreement with many of the opinions of Commission's witnesses, viz: That in his opinion, seborrhea, particularly of the fatty type, is a causative factor of the male pattern baldness, although he was frank to say that there is no complete agreement among dermatologists that his opinion in this behalf reflects the consensus on this subject; that he is of the opinion that germ infection is a significant cause of baldness, which opinion he bases upon his clinical and medical practice as well also upon the work of those who are engaged in the field of scientific research on hair, as also the textbooks and pamphlets on the subject, but did not cite any authoritative work in support thereof. The witness further testified that in determining proper treatment for a bald condition it is essential to appraise the individual case in order to properly diagnose and prescribe and that this is desirable, not only at the outset, but that continued supervision is important in order to determine what, if any, remedial progress is being effected; that in his practice he has made use of a "host" of local remedies, mostly of the mild anti-septic type which, coupled with their germicidal effects plus the attendant massaging of the scalp in their physical application, the latter having a tendency to reduce skin tightness and tenseness thus improving circulation, contributing to a beneficent

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result in avoiding excessive hair failure. Specifically advertising to respondents' preparations, with which he testified he was familiar, both as to their composition and effect in use, witness classified all of them as "mild antiseptics" which, if used, would have a tendency to destroy the infection and as a result "improve the scalp situation." The witness was very frank in saying that, as to baldness of the hereditary factor type:

There isn't anything to do about the endocrine factor so we are left with the local management where we hope to achieve some result and, by the local treatment, of course, we use various preparations on the scalp.

Upon being asked:

Q. Does that mean, doctor, that you are relegated to the infectious type, exclusively, for any remedial action?

A. That's what it boils itself down to, sir.

Q. Is that the way you wish to express it?

A. I think that's about it.

Dr. George M. Lewis, a witness for respondent, testified that he is a practicing physician specializing in dermatology and has devoted extensive study to the hair and scalp. His *curriculum vitae* is delineated in Marginal Note No. 1 aforementioned. Testifying concerning the various groups into which baldness may be categorized, witness gave the most common and largest to be that of alopecia prematura or the "ordinary type of baldness," referred to in this proceeding as the "male pattern type," saying that such group comprises from 90 to 95 percent of the bulk of all loss of hair, thus agreeing in this connection with the testimony of the witnesses on behalf of the complaint. Witness places all other categories of baldness in the remaining 5 to 10 percent. However, from this point forward, in differing with the expressions of opinions by Commission's witnesses, this witness said that in the 95 percent group aforesaid the condition of pityriasis capitis and seborrhea dermatitis "are very important components of this disease syndrome," [otherwise baldness], and then goes on to give a description of the several types of dandruff referred to and his theories of their causative importance in hair loss, basing his opinion on clinical experience and his contacts with his professional colleagues and men with whom he has worked on this subject. Much of the testimony of the witness was given over to his methods of treatment of pityriasis capitis and seborrhea dermatitis which testimony is not here reviewed because, contrary to the views expressed by this witness on their causative importance, these views are considered to be at irre-

concilable variance with the views on the identical subject expressed by Commission's witnesses, to wit, that these morbid conditions of the scalp are not significant causes of hair loss in the male pattern type with which we are here primarily concerned.

The witness is familiar with the component ingredients and recommended usage of the products of respondents, as hereinbefore described, has used the same or similar products in his own practice and summarizes their effects under two different actions, (1) antiseptics and (2), stimulation, i.e. the agitation or manipulation of the scalp in the form of massage upon application of the product thereto. Of the two he believes the former is the more important in its action on the flora of the scalp and that the effect would be to diminish or eliminate the scaling or dandruff and in time to decrease the loss of hair. Witness gave as his opinion that in the insipient stages of the male pattern type of baldness he has "convinced himself" that local treatment is effective in preventing further loss of hair, but that once the hair falls out it is a complete loss. In the matter of self-diagnosis and self-treatment for hair loss by a sufferer, the witness is of opinion that particularized treatment is much more to be desired than the use of a generalized remedy which is claimed to be applicable to any and all conditions of hair loss and is of opinion that it would be better to consult a doctor than to attempt self-treatment with a universal formula.

Without in anywise intending to impugn the honesty and rectitude, or to disparage the professional opinions of the preceding two witnesses as above epitomized, it is found, as a fact, that the views expressed are so at variance with the testimony of the Commission's witnesses, (to which latter the examiner ascribes the greater weight), that he finds it impossible to attempt to reconcile the same and to accept the verity thereof in preference to the opinions expressed to the contrary.

Dr. Louis C. Barail, a witness called by the respondents, is a consulting biochemist and toxicologist. Through this witness the respondent unsuccessfully attempted to show the germicidal efficacy of the respondents' product, known as "Ward's Formula," in certain tests which were conducted by the witness some six or seven years prior to the time of testifying, the witness being then an employee of the United States Testing Company. The obvious intent was an attempt to show that the product named, as well also other products of the respondents here in issue, were efficacious in the control of the various forms of dandruff and

scalp flora, thus tending to substantiate respondent's representations concerning their products, provided the defense theory prevailed, that dandruff and germs are significant causes of hair loss, especially in the male pattern type of baldness. At the time of the making of the tests attempted to be proved, the witness had no personal knowledge of the correct chemical formulae of the products, either quantitatively or qualitatively; was unable to produce his laboratory notes concerning the experiments, the results of which he attempted to give, and his report, based upon those experiments, upon being tendered in evidence, was refused. No further attempt was made by respondents to avail themselves of the testimony of this witness wherefore his testimony is disregarded as having no weight whatever in aid of a determination of the issues here involved.

Marginal Note No. 1 (Referred to on Pages 12 to 22)

In support of the allegations of the complaint the Commission called four witnesses, three of whom are practicing physicians in New York City, Chicago and Philadelphia, and the fourth a licensed physician in Hungary engaging in research specializing in dermatology. All of these witnesses are actively engaged in the field of dermatology and their respective qualifications are given as follows:

Dr. Howard T. Behrman, whose curriculum vitae appears of record as Commission's Exhibit No. 2, is a practicing physician specializing in dermatology in the city of New York; an A.B. from the University of Pennsylvania, M.D. New York University College of Medicine; Research Fellow, University of Pennsylvania; internship, Beth Israel Hospital, New York City; graduate study three-year special postgraduate course in dermatology at Bellevue Hospital in New York University College of Medicine; special training in the physics of dermatologic radio therapy and also in mycology, New York Skin and Cancer Hospital and Mount Sinai Hospital, New York; Fellow of the American Academy of Dermatology; American Medical Association; American Academy of Compensation Medicine and American Academy of Science; Fellow in Dermatology, New York Academy of Medicine; Diplomate, American Board of Dermatologists; member of the Committee on Cosmetics, American Medical Association; New York County Medical Society; Eastern Medical Society; Metropolitan Medical Society; New York Physicians Medical Society; author of approximately 100 scientific articles on skin diseases;

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coauthor of four books, one dealing with hair, one with skin, one on "Cutaneous Manifestations of Internal Disease" and a text on "The Scalp in Health and Disease"; author of the chapters on skin and hair in "The Home Medical Advisor," by Dr. Morris Fishbein, and in Davis' Series on Medicine. This witness has been actively engaged in the field of dermatology since completing his internship in 1939 and is now so engaged.

Dr. Herbert Rattner, a practicing physician in the city of Chicago, Ill., specializing in dermatology and whose curriculum vitae is of record herein as Commission's Exhibit No. 9 (A-B), as well also his bibliography consisting of some 54 articles and 7 books, all on the subject of dermatology or closely allied therewith. Witness received his M.D. in 1926 from Northwestern Medical School. At the time of testifying he was chairman of the Section of Dermatology of the American Medical Association, (1956-1957); since the year 1927, and currently, is exclusively engaged in the practice of dermatology; a diplomate of the American Board of Dermatology and Syphilology; historian of the American Dermatological Association; member of the American Academy of Dermatology and Syphilology; Society of Investigative Dermatology; Institute of Medicine of Chicago; Chicago Medical Society; Society of Railroad Surgeons; dermatologist at Passavant Memorial and Cook County Hospitals and a consultant in dermatology at St. Vincent's Hospital, all of the State of Illinois; consultant to the Veterans Administration Research Hospital; chairman of the Nomenclature Committee for Dermatology of the American Medical Association; editor of the Archives of Dermatology; chairman of the Editorial Committee of the Academy of Dermatology and Syphilology and author of the section on Dermatology of the Encyclopedia Britannica Year Book and has been so engaged in the latter for the past four years; former president of the Chicago Dermatological Society.

Dr. Albert M. Kligman, a practicing physician in the city of Philadelphia, specializing in dermatology, whose curriculum vitae appears herein as Commission's Exhibit No. 12 (A and D) and whose publications are listed in Commission's Exhibit No. 13 (A, B, C and D). Academic degrees: B.S., Penn State, 1939; Ph.D., University of Pennsylvania, 1942; M.D., University of Pennsylvania, 1947; diplomate, American Board of Dermatology and Syphilology, 1951; currently associate professor of dermatology

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in the Graduate School of Medicine of the University of Pennsylvania; member of the American Association for the Advancement of Science; American Medical Association; Society for Investigative Dermatology and American Academy of Dermatology. In the last four or five years witness has given special attention to the study of the hair, particularly relating to its anatomy and the physiology of hair growth.

Dr. Peter Flesch, whose profession is that of a research physician and whose curriculum vitae appears herein as Commission's Exhibit No. 15. There also appears, as Commission's Exhibit No. 16 (A, B and C), a list of publications of this witness, many of said publications dealing with hair growth and the physiology and chemistry of the skin, the majority dealing with the subject of dermatology in one form or another. Witness is at present engaged at the University of Pennsylvania, Department of Dermatology, in research involving the chemistry and physiology of the skin, including pigmentation of the skin, keratinization, hair growth and the development of new methods in research; lectures on these subjects to the graduate students of the University of Pennsylvania. While the witness is not a licensed medical practitioner in the State of Pennsylvania, he does treat patients in his field but under the supervision of a licensed physician such latter being Dr. Albert M. Kligman, a witness whose qualifications have been set forth in the next preceding paragraph. Witness holds an M.D. degree from the Medical School of the University of Budapest, 1939; M.S. from the University of Chicago, 1943; research associate, Department of Pharmacology, University of Chicago, Cancer Society Fellow; Ph.D. in Pharmacology, University of Chicago; assistant professor of dermatology, University of Pennsylvania; author of a number of publications dealing with research in dermatology.

The respondents called the following witnesses whose qualifications are reviewed:

Dr. Howard T. Behrman. The qualifications of this witness have been hereinbefore reviewed, he having been originally called by the Commission. For the purpose of further exploring the witness' testimony in chief, the results of which are reported in the findings of fact, respondents called this witness as their own.

Dr. George M. Lewis, a practicing physician in the State of New York, specializing in dermatology and whose curriculum vitae appears herein as respondents' Exhibit No. 4. Said exhibit likewise contains a list of the witness' publications in the form

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of books, chapters in books and articles in journals dealing with the subject of dermatology. Degrees and qualifications: M.D., University of Alberta, Canada, 1925; L.M.C.C., 1925, Medical College of Canada; F.A.C.P., 1937, American College of Physicians; diplomate, American Board of Dermatology and Syphilology; licensed to practice in New York State since September 1926. House physician, New York Skin and Cancer Hospital, November 1, 1925 to November 1, 1926; fellowship, New York Post-Graduate Medical School and Hospital; attended University of Pennsylvania Graduate School with special course in mycology and pathology, 1927; assistant attending dermatologist and syphilologist, Skin and Cancer Unit, New York Post-Graduate Hospital, 1928-1933; attending dermatologist and syphilologist, Skin and Cancer Unit of the same hospital, 1933-1939; assistant in radiology, New York Hospital, 1931-1932; assistant physician to out-patients, 1932-1940; attending dermatologist, St. Clare's Hospital; visiting dermatologist, Welfare Hospital, New York City; attending physician, New York Hospital, consulting dermatologist to Memorial Hospital, James Ewing Hospital, both of New York; and Vassar Brothers Hospital, Poughkeepsie, N.Y.; consulting dermatologist, Polyclinic Hospital, New York City; instructor in clinical medicine, (dermatology) Cornell University Medical College; instructor, New York Post-Graduate Medical School, Columbia University; and professor of clinical medicine (dermatology) Cornell University Medical College, 1949.

Witness is a member of the New York County Medical Society; New York State Medical Society; American Medical Association; New York Academy of Medicine; Manhattan Dermatological Society (president, 1944-1945) (1947-1948) (1956-1957); American College of Physicians; American Academy of Dermatology and Syphilology, (president, 1956); American Dermatological Association, Incorporated; Society for Investigative Dermatology, Incorporated; Mycological Society of America; American Board of Dermatology and Syphilology, Incorporated (president, 1954-1955), and a member of the editorial boards of "Archives of Dermatology," "New York State Journal of Medicine" and "Journal of Investigative Dermatology."

Dr. Lewis C. Barail, of the State of New York, formerly a practitioner of medicine in France and Switzerland, now a consulting biochemist and toxicologist whose curriculum vitae, denoted by him as: "Principal activities of Dr. Lewis C. Barail, Consulting Biochemist and Toxicologist," appear herein as re-

spondents' Exhibit No. 6. A reading of this exhibit discloses that the witness asserts to an M.S. degree in chemistry and an M.D. with 30 years' experience in biological research. He also asserts to be a former professor and lecturer at several universities and colleges including Columbia, New York, Fordham and Temple Universities but no specific details thereof are furnished in the exhibit, nor does the testimony given by the witness enlarge upon his professional qualifications in this connection. His "activities" according to this exhibit, and the professional societies of which he is a member are apparently more or less commercial in nature, involving sanitation, toxicology and operations research in the fields of biologicals, cosmetics, disinfectants, food products, packaging materials, pesticides, pharmaceuticals and plastics.

Dr. Eugene F. Traub, a practitioner of dermatology for 36 years, presently residing in Cambridge, Md., whose curriculum vitae appears herein as respondents' Exhibit No. 1. This witness is also a practicing physician in the field of dermatology with offices in New York City; B.S., University of Michigan, 1916 and M.D., University of Michigan, 1918; internship, resident physician, University Hospital, Ann Arbor, Mich., 1919-1920; internship and residency, New York Skin and Cancer Hospital, and Skin and Cancer Unit, from 1921 to July 1, 1947; has served as attending dermatologist in New York and Cornell Universities; clinical professor of dermatology and syphilology, Post-Graduate Hospital, Columbia University; professor of dermatology, University of Vermont, 1928-1949; medical director, Skin and Cancer Hospital of Philadelphia, 1954-1956; is at present professor of dermatology, New York Medical College; consulting dermatologist in the following hospitals—Central Islip Hospital, Meadowbrook Hospital, Nassau Hospital, Beth David Hospital, Wyckoff Heights Hospital, Prospect Heights Hospital and Cambridge Hospital, of Cambridge, Md.; director of the Department of Dermatology in the following hospitals—Flower and Fifth Avenues Hospitals, Morrisania Hospital, Metropolitan Hospital, Bird S. Coler Memorial Hospital and Home, Queens General Hospital, and Otisville Hospital. At present is clinical professor of dermatology at Temple University, Philadelphia. A member of the American Dermatological Association; New York Dermatological Society; Fellow, New York Academy of Medicine; Fellow, American Academy of Dermatology; Fellow, American Medical Association; American Dermatologists and Syphilologists of Greater New

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York; a member of the Board of Directors of the Association of Dermatosyphilologists of Greater New York, and a diplomate of dermatology and syphilology, Compensation and Industrial Dermatoses. The said exhibit also includes a list of the various publications of this witness.

7. It is further found, as a fact, that respondents' advertisements are also misleading in a material respect and constitute "false advertisements," as that term is defined in the Federal Trade Commission Act, by reason of the respondents' failure to reveal facts material in the light of the representations made therein. In advertising their cosmetic and medicinal preparations as a cure or remedy for destructive scalp germs or infections, which respondents represent are a significant or the most common cause of hair loss or baldness, they suggest that there is a reasonable probability that baldness is due to the presence of destructive scalp germs or infections and that their preparations will be of benefit and constitute an effective treatment therefor. In truth and in fact, the instances in which loss of hair or baldness is due to scalp germs or infection are rare. In the great majority of cases, loss of hair or baldness is a male pattern type, having no relation to destructive scalp germs or infection, and when baldness is of this type respondents' preparations will be of no value whatever in the treatment thereof. Thus, there is no reasonable probability that any particular case of baldness is caused by a condition for which the respondents' preparations may be beneficial, and respondents' advertising is misleading because of failure to reveal the fact that in the great majority of cases, loss of hair or baldness is of the type known as male pattern baldness and that when baldness is of that type, respondents' preparations are of no value in the treatment thereof.

8. Respondents Ward Laboratories, Inc., and Comate Laboratories, Inc., use the word "Laboratories" in their corporate names in soliciting the sale of and selling their said preparations. Through the use of the word "Laboratories" as aforesaid, the said respondents represent that they own and operate laboratories in connection with their said business. Such representations are false, misleading and deceptive in that said respondents do not own or operate a laboratory in connection with their said business.

9. The use by the respondents of the foregoing false and misleading statements and representations, disseminated as aforesaid, has had and now has the capacity and tendency to mislead

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and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements and representations are true and into the purchase of said preparations because of such erroneous and mistaken belief.

CONCLUSIONS

1. The aforesaid acts and practices of respondents, as hereinabove 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.

2. Respondents urge dismissal of the complaint on the asserted ground that "the Commission does not have the power to support the scientific opinion which happened to favor its complaint and to thus arbitrarily disregard the opposing equally valid medical opinion," citing in support thereof *F.T.C. v. Lambert Pharmacal Co.* 38 F.T.C. Dec. 726 (Docket No. 4232). A reading of the lengthy memorandum opinions of the several commissioners, which are largely reviews of the voluminous expert testimony in the case, does not bear out the construction which respondents place thereon as grounds for dismissal, and nowhere does it appear that the case was dismissed solely because of conflicting scientific or medical opinions, (albeit such existed), but rather dismissal was occasioned by failure of the Commission to sustain the burden of proof. That this is true is apparently borne out by one of the commissioners of the majority who, in his concurring memorandum, said:

It is the duty of the Commission to decide issues of fact, whether or not medical or scientific questions are involved, by the greater weight of the evidence—the burden of proof being on the Commission. In my opinion * * * the allegations of the complaint have not been sustained by the greater weight of the evidence.

This quotation is a fair statement of the duty of the Commission to arrive at appropriate findings after due appraisal of all relevant evidence and irrespective of conflict of opinions of witnesses, which conflicts are prone to occur in all cases involving the inexact sciences, as here, which is exactly the reason why they are called the "inexact sciences." Were it otherwise any complaint would have to be dismissed where the respondent could muster sufficient experts to raise the cry of "conflict." However, administrative proceedings, unlike criminal cases, do not have to be proved beyond a reasonable doubt but merely "as supported

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by and in accordance with the reliable, probative, and substantial evidence" of record.

This view of the law of evidence as here applicable gave rise to the statements of the examiner contained in the first and second paragraphs on page nine of this decision.

3. As a corollary of the foregoing reasoning, and consonant with the opinion in *Universal Camera Corporation v. N.L.R.B.* 340 U.S. 474 et seq., directing that the "substantial evidence" rule, (above referred to), to support an order must be based upon the "entire record" which, perforce, includes evidence *contra* that introduced in support of the charges of the complaint, it was considered apropos to set forth in fair detail all pertinent evidence in order to disclose that all defense matter has received the due consideration which it merits.

4. It will be observed that the order hereto appended, (par. 1(b)) requires affirmative disclosure that respondents' products, under certain conditions therein set forth, will have no value in preventing baldness or excessive hair loss. As authority therefor see:

Sec. 15(a) (1) F.T.C. Act; *Paul v. F.T.C.* 169 F. 2d 294, 295; *Dorfman v. F.T.C.* 144 F. 2d 737, 739; *Haskelite Mfg. Co. v. F.T.C.* 127 F. 2d 765, 766; *The Elmo Company, Inc.*, D. 5959 (48 F.T.C. 1379); *Amer. Library of World Literature* D. 5811 (49 F.T.C. 220); *The Thorikon Company*, D. 6004 (49 F.T.C. 613); *Aberty v F.T.C.* 182 F. 2d 36, 39.

In the *Aberty* case the Court decided that a condition precedent to requiring an affirmative disclosure is a specific finding that failure to make such disclosure is misleading because of the things claimed in the advertisement. Such a definitive finding will be found herein under "Findings of Facts," paragraph No. 7, page 28.

ORDER

It is ordered, That the respondents, Ward Laboratories, Inc., a corporation, and its officers, and respondents Emile E. Kling and Joseph J. Seldin, individually and as officers of Ward Laboratories, Inc., and Comate Laboratories, Inc., a corporation, and its officers, and Sebacin, Inc., a corporation, and its officers, 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 cosmetic and medicinal preparations designated as Ward's Formula Medicine for the

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Scalp and Hair, Ward's Formula Medicinal Lubricant for Dry Scalp and Hair, Ward's Formula Medicinal Compound for Oily Scalp, Ward's Formula Shampoo, Comate Medicinal Scalp Formula, Comate Medicinal Emulsion, Comate Scalp Conditioner, Comate Dry Scalp Shampoo, Comate Oily Scalp Shampoo, Sebacin Basic Formula, Sebacin Antiseptic Lubricant, and Sebacin Shampoo, or any other preparation or preparations of substantially similar composition or possessing substantially similar properties, under whatever name or names sold, do forthwith cease and desist from, directly or indirectly:

1. Disseminating or causing to be disseminated by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which represents, directly or by implication, that the use of said preparations alone or in conjunction with any method of treatment will:

(a) Prevent or overcome baldness or excessive hair loss, unless any such representation be expressly limited to cases other than those known as 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 said male pattern baldness and that in such cases respondents' preparations will be of no value in preventing or overcoming baldness or excessive hair loss;

(b) Induce new hair to grow, cause the hair to become thicker or otherwise grow hair, 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 said male pattern baldness and that in such cases respondents' preparations will not induce the growth of hair or thicker hair.

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

3. Using the word "Laboratories," or any other word of simi-

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lar import or meaning, as a part of or in connection with the respondents' corporate or trade names, or otherwise representing, directly or by implication, that respondents own or operate a laboratory unless and until such a laboratory is actually so owned and operated.

OPINION OF THE COMMISSION

By GWYNNE, Chairman :

The complaint charges respondents with the use and dissemination of false and misleading advertising in the selling and distributing of cosmetics and medical preparations in interstate commerce for use in the treatment of conditions of the hair and scalp.

After a hearing, the examiner found against respondents and entered an order accordingly. Respondents' appeal therefrom has been presented both in written brief and oral argument.

No new legal propositions have been raised in this appeal. The hearing examiner made detailed findings of fact which are supported by the record.

The appeal of respondents is denied. The initial decision is adopted as the decision of the Commission.

FINAL ORDER

This matter having been heard on the respondents' appeal from the hearing examiner's initial decision, and the Commission having filed its opinion denying the appeal and adopting the initial decision as the decision of the Commission :

It is ordered, That the respondents, Ward Laboratories, Inc., a corporation, Emile E. Kling and Joseph J. Seldin, individually and as officers of Ward Laboratories, Inc., and Comate Laboratories, Inc., and Sebacin, Inc., corporations, shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist contained in the aforesaid initial decision.

Findings

IN THE MATTER OF
THE FAIR

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

Docket 6822. Complaint, June 17, 1957—Decision, Mar. 4, 1959

Order requiring a Chicago department store to cease violating the Fur Products Labeling Act by failing to comply with the labeling and invoicing requirements; by advertising in newspapers which failed to disclose the names of animals producing certain furs, represented prices as reduced from purported regular prices which were in fact fictitious, and used comparative prices and percentage savings claims not based on current market values or a designated time; and by failing to keep adequate records as a basis for such pricing claims.

FINDINGS AS TO THE FACTS, CONCLUSIONS AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, the Federal Trade Commission on June 17, 1957, issued and subsequently served its complaint in this proceeding upon the respondent charging it with violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder, and, as specified under the provisions of the aforesaid Act, with engaging in unfair and deceptive acts and practices in commerce in violation of the Federal Trade Commission Act. After the filing of answer by respondent, hearings were held before a hearing examiner of the Commission and testimony and other evidence in support of, and in opposition to, the allegations of the complaint was received into the record. In an initial decision dated April 29, 1958, the hearing examiner held that certain of the complaint's charges were sustained and that others should be dismissed. The initial decision contained a provisional order to cease and desist.

The Commission having considered the cross appeals filed from the initial decision of the hearing examiner and the entire record in this proceeding and having determined that the appeal of counsel supporting the complaint should be granted and the appeal of respondent denied in part and granted in part and that the initial decision should be vacated and set aside, the Commission further finds that this proceeding is in the interest of the public and now makes this its findings as to the facts, conclu-