

Syllabus

IN THE MATTER OF

GEORGE N. BOUTHILLETTE DOING BUSINESS UNDER
THE TRADE NAMES OF EVERETT FOOT CUSHION LAB-
ORATORIES AND EVERETT FOOT CUSHION COMPANY

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 5258. Complaint, Dec. 7, 1944—Decision, Aug. 11, 1948

Where an individual engaged in the manufacture and interstate sale of a device formerly advertised and marketed under the trade name "Arch-Aidant" but later known as "Re-Zil-Arch"—

(a) Falsely represented, in advertisements in newspapers, periodicals, circulars, letters and other advertising media, that his device stopped foot troubles and pains; conformed to the shape and needs of the arch and strengthened the foot structure; was scientifically constructed, massaged the foot and exercised every muscle; and relieved fallen arches, callouses, corns, cramped toes, tender heels, perspiration, leg pains, backache, poor circulation and metatarsal troubles;

(b) Falsely represented that one engaged in the sale of his device might reasonably expect to earn the sum of \$8.00 or more daily under normal conditions, through such statements in advertisements and form letters as "MEN, WOMEN, EARN \$8.00 DAILY, TAKE ORDERS for Famous Cushion Combination 'Arch-Aidant'. Relieves Foot Troubles. Steady Demand. HERE'S YOUR CHANCE TO POCKET QUICKLY \$8.00 DAILY AND MORE UNDER OUR PROVEN TAKING PLAN. It is not difficult to sell 50 pairs per week. EVERYBODY IS A PROSPECT!!!";

(c) Falsely represented through use of the word "Laboratories" in one of his trade names, that he owned, operated, or controlled a laboratory equipped for study and research in connection with foot disabilities and the use of his device therefor; and

(d) Falsely represented through use of the trade name "Arch-Aidant" for his device that it would be of aid to the arch of the foot, generally;
With tendency and capacity to mislead and deceive a substantial portion of the purchasing public, and thereby induce it to purchase his said product and to engage in the sale thereof:

Held, That such acts and practices, under the circumstances set forth, were all to the prejudice and injury of the public and constituted unfair and deceptive acts in commerce.

As respects the question in said proceeding as to whether or not respondent had misrepresented the earnings which his agents and distributors might reasonably expect daily under normal conditions and circumstances, said matter was one peculiarly within the knowledge of respondent, and respondent's counsel having stipulated upon the record, during the hearing in the matter, that it had no record showing that any of respondent's salesmen had in fact earned as much as eight dollars per day in selling the device, as

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represented by respondent, the Commission concluded and found that such representation was without foundation in fact and was erroneous and misleading.

Before *Mr. Clyde M. Hadley*, trial examiner.

Mr. Karl Stecher and *Mr. Morton Nesmith* for the Commission.

Thomson & Thomson, of Boston, Mass., for respondent.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said act, the Federal Trade Commission, having reason to believe that George N. Bouthillette, an individual doing business under the trade names of Everett Foot Cushion Laboratories and Everett Foot Cushion Co., hereinafter referred to as respondent, has violated the provisions of said act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, George N. Bouthillette, is an individual doing business under the trade names of Everett Foot Cushion Laboratories and Everett Foot Cushion Co., with his principal place of business located in the city of Everett, State of Massachusetts.

PAR. 2. Respondent is now, and for more than 1 year last past has been, engaged in manufacturing and offering for sale a device formerly advertised and marketed under the trade name "Arch-Aidant" but now known as "Re-Zil-Arch."

PAR. 3. Respondent causes and has caused his said product, when sold, to be transported from his place of business in the State of Massachusetts to purchasers thereof located in the various States of the United States other than the State of Massachusetts.

Respondent maintains, and at all times mentioned herein has maintained, a course of trade in said product in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 4. In the course and conduct of his aforesaid business respondent has disseminated and is now disseminating, and has caused and is now causing the dissemination of, false advertisements concerning his said product by United States mails and by various means in commerce, as commerce is defined in the Federal Trade Commission Act, and respondent has also disseminated and is now disseminating and has caused and is now causing the dissemination of false advertisements concerning said product by various means, for the purpose of

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inducing and which are likely to induce, directly or indirectly, the purchase of said product in commerce, as commerce is defined in the Federal Trade Commission Act.

Among and typical of the false, deceptive, and misleading statements and representations contained in said false advertisements disseminated and caused to be disseminated as hereinabove set forth by United States mails, by advertisements inserted in newspapers, magazines and periodicals and by means of circulars, pamphlets, letters, and other advertising media all of general circulation and distribution in commerce are the following:

STOP foot troubles!

Get Quick New Relief At Amazingly Low Cost!

Wear Arch-Aidant.

Get amazing foot comfort with NEW Cushion Combination inner Longitudinal and Metatarsal ARCH-AIDANT.

Relieves burning foot pains caused by fallen arches, callouses and various forms of foot ailments.

A wonderful Foot Rest for Those Who Are on Their Feet Long Hours.

Scientifically designed.

Gives flexible support to all arches by conforming to their shape and needs.

Exercises and massages foot with every step.

Helps strengthen foot structure.

ARCH-AIDANT helps foot sufferers to get quick and blessed relief from * * * metatarsal trouble and various forms of foot disabilities.

The *Famous* Cushion Combination Inner-Longitudinal and Metatarsal "ARCH-AIDANT" Cushions Every Step and Exercises Every Muscle.

The *Famous* "ARCH-AIDANTS" Relieves tired aching feet, fallen arches, callouses, corns, cramped toes, tender heels, perspiration, leg pains, backache, poor circulation, etc.

PAR. 5. Through the use of the statements, representations, and advertisements hereinbefore set forth and others of the same import and meaning, but not set out herein, respondent has represented, and does now represent, directly and by implication, that his device, "Arch-Aidant," stops foot troubles generally; that it conforms to the shape and needs of the arch and strengthens the foot structure; that its use relieves foot pains caused by fallen arches, callouses, and various other foot ailments; that it is scientifically constructed, massages the foot and exercises every muscle; that it relieves fallen arches, callouses, corns, cramped toes, tender heels, perspiration, leg pains, backache, poor circulation, and metatarsal troubles.

PAR. 6. The foregoing statements and representations are grossly exaggerated, false, misleading, and deceptive. In truth and in fact, respondent's device will not stop foot troubles. It does not conform to the shape and needs of the arch since there is no assurance that it

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will fit inside the shoe in the proper locality or that the bosses will fit accurately under the arches. Its use will not strengthen the foot structure. It cannot be depended upon to relieve the pains caused by fallen arches, callouses, or various other foot ailments. The device is not scientifically constructed for its intended purpose. It does not act as a massage to the foot, will not exercise the foot muscles and will not relieve fallen arches, callouses, corns, cramped toes, tender heels, perspiration, leg pains, backache, poor circulation, or metatarsal trouble.

PAR. 7. In the course and conduct of his business and in order to procure the services of agents or distributors of his said device, and to thus further the sale of his product in commerce, respondent has made false and misleading statements with respect to the prospective earnings to be derived by those who undertake to act as his agents or distributors. Among and typical of such false and misleading statements and representations inserted in newspapers and periodicals of general circulation are the following:

Here's your chance to pocket quickly \$8.00 daily and more under our proven order taking plan.

It is not difficult to sell 50 pairs per week.

PAR. 8. Through the use of the aforesaid statements and representations, respondent represents that one engaged in the sale of his said device may reasonably expect to earn the sum of \$8 or more daily and to sell 50 pairs weekly under normal conditions and circumstances.

In truth and in fact, there is not sufficient demand for respondent's product that it may be reasonably expected that such earnings or such sales or comparable earnings or sales can be made under normal conditions and circumstances.

PAR. 9. The use by the respondent of the word "Laboratories" as a part of one of the trade names under which he operates is misleading and deceptive in that it serves as a representation that he owns, operates, or controls a laboratory properly and adequately equipped for the purpose of study and research in connection with foot disabilities and the use of his device in connection therewith, which is contrary to the fact. Likewise, the use of the trade name "Arch-Aidant" for his device is misleading and deceptive in that it serves as a representation that the said device will be of aid to the arch of the foot, generally, which is contrary to the fact.

PAR. 10. The use by respondent of the foregoing false, deceptive, and misleading statements, representations, and advertisements disseminated as aforesaid, with respect to his device and that he con-

ducts a laboratory, has had and now has the tendency and capacity to and does mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements, representations, and advertisements are true and to induce a substantial portion of the purchasing public, because of such erroneous and mistaken belief, to purchase substantial quantities of respondent's product and to induce members of the public into agreeing and engaging in the solicitation and sale of said product, in commerce, as agents of respondent.

PAR. 11. The aforesaid acts and practices of respondent, as herein alleged, 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.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on December 7, 1944, issued and subsequently served its complaint in this proceeding upon the respondent, George N. Bouthillette, an individual doing business under the trade names Everett Foot Cushion Laboratories and Everett Foot Cushion Co., charging him with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of that act. After the filing by respondent of his answer to the complaint, testimony, and other evidence in support of the complaint were introduced before a trial examiner of the Commission theretofore duly designated by it (no evidence being offered on behalf of respondent), and such testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, the proceeding regularly came on for final consideration by the Commission upon the complaint, answer, testimony, and other evidence, recommended decision of the trial examiner, and brief in support of the complaint (no brief having been filed on behalf of respondent and oral argument not having been requested); and the Commission, having duly considered the matter and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. The respondent, George N. Bouthillette, is an individual who has heretofore done business under the trade names Everett Foot Cushion Laboratories and Everett Foot Cushion Co., with his

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place of business in the city of Everett, State of Massachusetts; and as such has been engaged in the manufacture and sale of a device formerly advertised and marketed by the trade name "Arch-Aidant" but now known as "Re-Zil-Arch." Respondent caused his product, when sold, to be transported from his place of business in the State of Massachusetts to purchasers thereof located in various other States of the United States and maintained, at the times mentioned herein, a course of trade in his product in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 2. In the course and conduct of his business, respondent has disseminated and caused the dissemination of printed advertisements concerning his product by 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 the product in such commerce. Among and typical of the statements and representations contained in the advertisements thus disseminated through newspapers, periodicals, circulars, letters, and other advertising media of general circulation and distribution in commerce are the following:

STOP FOOT TROUBLES

Get Quick New Relief at Amazingly Low Cost!

Wear Arch-Aidant!

Get amazing foot comfort with NEW Cushion Combination inner Longitudinal and Metatarsal ARCH-AIDANT. Relieves burning foot pains caused by fallen arches, callouses and various forms of foot ailments.

SCIENTIFIC CONSTRUCTION

Scientifically designed. Gives flexible support to all arches by conforming to their shape and needs. Exercises and massages foot with every step. Helps strengthen foot structure.

TORTURE NOT NECESSARY

ARCH-AIDANT helps foot sufferers to get quick and blessed relief from * * * metatarsal trouble and various forms of foot disabilities.

The Famous "ARCH-AIDANT" Cushions Every Step and Exercises Every Muscle. Gives Flexible Support to the arches by conforming to their Shape and Need. Relieves tired, aching feet, fallen arches, callouses, corns, cramped toes, tender heels, perspiration, leg pains, backache, poor circulation, etc.

PAR. 3. Through the use of such advertising claims and assertions, respondent has represented, directly and by implication, that his device stops foot troubles generally; that it conforms to the shape and needs of the arch and strengthens the foot structure; that its use relieves foot pains caused by fallen arches, callouses and various other foot ailments; that it is scientifically constructed, massages the foot and exercises every muscle; that it relieves fallen arches, callouses,

corns, cramped toes, tender heels, perspiration, leg pains, backache, poor circulation, and metatarsal troubles.

PAR. 4. These representations are grossly exaggerated, false, and misleading. In truth and in fact, respondent's device will not stop foot troubles. It does not conform to the shape and needs of the arch since there is no assurance that it will fit inside the shoe in the proper locality or that the bosses will fit accurately under the arches. Its use will not strengthen the foot structure. It will not relieve the pains caused by fallen arches, callouses, or other foot ailments. The device is not scientifically constructed for its intended purpose. It does not act as a massage to the foot, will not exercise the foot muscles and will not relieve fallen arches, callouses, corns, cramped toes, tender heels, perspiration, leg pains, backache, poor circulation, or metatarsal trouble.

PAR. 5. In the course and conduct of his business and in order to procure the services of agents or distributors of his device, and thus further the sale of his product in commerce, respondent has, by published advertisements and form letters, made the following statements with respect to the earnings which may be derived by those acting as his agents or distributors:

MEN, WOMEN. EARN \$8.00 DAILY, TAKE ORDERS for Famous Cushion Combination "Arch-Aidant." Relieves Foot Troubles. Steady Demand.

HERE'S YOUR CHANCE TO POCKET QUICKLY \$8.00 DAILY AND MORE UNDER OUR PROVEN TAKING PLAN

It is not difficult to sell 50 pairs per week.

EVERYBODY IS A PROSPECT!!!

PAR. 6. Through the use of such statements and assertions, respondent has represented that one engaged in the sale of his device may reasonably expect to earn the sum of \$8 or more daily under normal conditions and circumstances.

The earnings of respondent's sales agents is a matter which is peculiarly within the knowledge of respondent. During the hearing in this proceeding respondent's counsel stipulated upon the record that respondent had no records showing that any of his salesmen had in fact earned as much as \$8 per day in selling the device. The Commission therefore concludes and finds that the foregoing representation was without foundation in fact and was erroneous and misleading.

PAR. 7. Respondent's use of the word "Laboratories" in one of the trade names for his business was misleading and deceptive in that it served as a representation, contrary to fact, that he owned, operated,

or controlled a laboratory properly and adequately equipped for the purpose of study and research in connection with foot disabilities and the use of his device in connection therewith. Likewise, the use of the trade name "Arch-Aidant" for his device was misleading and deceptive in that it served as a representation that the device would be of aid to the arch of the foot, generally, which is not a fact.

PAR. 8. The use by respondent of the foregoing false, deceptive, and misleading statements, representations, and advertisements, disseminated as aforesaid, with respect to his device and his business, has had the tendency and capacity to mislead and deceive a substantial portion of the purchasing public, and to induce such portion of the public, because of such erroneous and mistaken belief, to purchase his product, and to engage in the sale of the product.

CONCLUSION

The acts and practices of the respondent as herein found 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 TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of respondent, testimony, and other evidence introduced before a trial examiner of the Commission theretofore duly designated by it, recommended decision of the trial examiner, and brief in support of the complaint (no brief having been filed on behalf of respondent and oral argument not having been requested) ; and the Commission having made its findings as to the facts and its conclusion that the respondent has violated the provisions of the Federal Trade Commission Act :

It is ordered, That the respondent, George N. Bouthillette, individually and trading under his own or any other name or designation, and his agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, and distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of respondent's device formerly designated "Arch-Aidant" and now designated "Re-Zil-Arch," or any device of substantially similar construction, do forthwith cease and desist from directly or indirectly :

1. Representing that respondent's device stops foot trouble ; relieves foot pains caused by fallen arches, callouses, or other foot ailments ; is

scientifically constructed or designed ; conforms to the shape or needs of the arch ; exercises or massages the foot ; strengthens the foot structure ; relieves fallen arches, callouses, corns, cramped toes, tender heels, perspiration, leg pains, backache, poor circulation, or metatarsal trouble.

2. Using the term "Arch-Aidant" or any other term of similar import to designate or describe said device, or otherwise representing that said device is of general aid to the arch of the foot.

3. Using the word "Laboratories" or any other word or term of similar import in respondent's trade name, or otherwise representing that he owns or operates a laboratory.

4. Representing as earnings or profits of respondent's sales agents any amount which is not a true representation of the average net earnings consistently made by such agents in the ordinary course of business under normal conditions and circumstances.

It is further ordered, That the respondent shall, within 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 this order.

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IN THE MATTER OF

JACQUES KREISLER MANUFACTURING CORPORATION
ET AL.

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SUBSEC. (A) OF SEC. 2 OF AN ACT OF CONGRESS APPROVED OCT. 15, 1914,
AS AMENDED BY AN ACT APPROVED JUNE 19, 1936

Docket 5446. Complaint, June 17, 1946—Decision, Aug. 11, 1948

Where a corporation and two officers thereof, engaged in the manufacture and competitive interstate sale and distribution of jewelry products under their "retro-active quantity discount plan," pursuant to which customers were allowed discounts based upon their total purchases during the calendar year, and which included a schedule of ten graduated discounts, beginning with 2½ percent for a \$500 volume of purchases and 5 percent for a \$750-volume, and ending with 22½ percent for a volume of \$11.250 and 25% for \$15,000 or over;

In soliciting orders through their salesmen who called on all customers, without distinction and regardless of whether a customer qualified for a discount or not, at their places of business, and received and transmitted orders for invoicing and shipment to such customers—

Discriminated in price through treating collectively customers who were members of and affiliated with so-called chain organizations or other group-buying organizations, even though they were separate, distinct and individual legal and business entities, and granting to each such customer the retro-active quantity discount applicable to a single buyer who purchased the amount equivalent to the collective purchases of all members of the particular chain or group-buying organization;

Effect of which discriminations in price of from 2½ to 25 percent among their competing customers, not shown as making only due allowance for differences in costs of manufacture, sale, and delivery resulting from differing methods or quantities in which their products were sold and delivered, might be substantially to lessen competition in the lines of commerce concerned:

Held, That such acts and practices in granting discriminations as above set forth constituted violations of sub-section (a) of section 2 of the Clayton Act as amended by the Robinson-Patman Act.

Mr. Daniel J. Murphy for the Commission.

Parker, Chapin & Flattau, of New York City, for respondents.

COMPLAINT

The Federal Trade Commission, having reason to believe that the parties respondent named in the caption hereof, and hereinafter more particularly designated and described, since June 19, 1936, have vio-