

Findings

IN THE MATTER OF
EVIS MANUFACTURING COMPANY, ET AL.

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

Docket 6168. Complaint, Feb. 5, 1954—Decision, Mar. 23, 1959

Order requiring sellers in San Francisco of the "Evis Water Conditioner" to cease representing falsely that the product had any beneficial effect on water, changed its physical behavior, solved hard water problems, removed unpleasant flavors and improved the taste of beverages and food, saved soap, removed grease and scale, along with a variety of other similar claims.

Before *Mr. Abner E. Lipscomb*, hearing examiner.

Mr. Edward F. Downs for the Commission.

Pillsbury, Madison & Sutro, of Washington, D.C. and San Francisco, Calif., and *Mr. Noble McCartney*, of Washington, D.C., for respondents.

FINDINGS AS TO THE FACTS, CONCLUSION AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on February 5, 1954, issued and subsequently served upon respondents, Evis Manufacturing Company, a corporation and Joseph T. Voorheis and Arthur N. Wells, individually and as officers of said corporation, its complaint, charging said respondents with unfair methods of competition and unfair and deceptive acts and practices in commerce in the sale of a device for the conditioning of water, in violation of the provisions of the Federal Trade Commission Act.

Thereafter, on April 12, 1954, respondents submitted their answer to the complaint, denying the principal charges thereof and challenging certain of the interpretations of their advertisements contained therein.

Hearings were held in due course. Evidence was received in support of and in opposition to the allegations of the complaint. The hearing examiner filed his first initial decision on April 27, 1956, in which he ordered the complaint dismissed on the ground that the allegations thereof were not supported by reliable, probative and substantial evidence. The Commission, having heard the appeal of counsel in support of the complaint, including oral argument, vacated the aforesaid initial decision and remanded

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the proceeding to the hearing examiner for the reception of evidence of further scientific tests of the Evis Water Conditioner. The examiner, after taking such evidence, filed a second initial decision on June 30, 1958, again ordering the complaint dismissed.

Within the time permitted by the Commission's Rules of Practice, counsel in support of the complaint filed an appeal from the initial decision of June 30, 1958, and, the Commission, after considering said appeal, respondents' brief in opposition thereto, the oral argument on this appeal, and the entire record herein, rendered its decision granting the appeal and vacating and setting aside the initial decision.

Thereafter, this matter came on for final consideration by the Commission, and the Commission, being now fully advised in the premises, makes the following findings as to the facts, conclusions drawn therefrom, and order, which, together with the aforesaid decision on the appeal, shall be in lieu of the initial decision of the hearing examiner.

FINDINGS AS TO THE FACTS

1. The corporate respondent, Evis Manufacturing Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business at 40 Boardman Place, San Francisco, Calif.

The individual respondent, Joseph T. Voorheis, was president of the respondent corporation at the time of the issuance of the complaint but is now deceased. Individual respondent, Arthur N. Wells, is vice president of the respondent corporation, and has formulated, directed and controlled the policies and practices thereof.

2. The respondents for more than one year last past have been engaged in offering for sale, selling and distributing, directly to users and through retail distributors, a product designated by them as the "Evis Water Conditioner." Respondents at all times mentioned herein have maintained a substantial course of trade therein in commerce among and between the various states of the United States and in the District of Columbia.

In the course and conduct of such business, respondents have been in substantial competition in commerce with other corporations and with partnerships and individuals engaged in the sale

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and distribution of the various types of products intended for similar purposes.

3. In the course and conduct of their business, and for the purpose of inducing the purchase of their product, respondents have disseminated and caused to be disseminated advertisements in newspapers, magazines, leaflets, circulars and other advertising media circulated among prospective purchasers of their product in the various states of the United States and in the District of Columbia. Among and typical, but not all inclusive, of the statements and representations made in such advertisements and so published and circulated are the following:

The Special Processed Cast Metal of the Evis Conditioner imparts a continuous catalytic effect on water, water solids and entrained gases. This catalytic correction changes the physical behavior of water in many beneficial ways.

At long last! The real answer to your costly HARD WATER PROBLEM.

New home water conditioner makes any ordinary water behave "softer."

The amazing NEW EVIS WATER CONDITIONER * * * that makes hard water feel, taste, and act softer—without chemicals—without destroying natural minerals * * * that removes unpleasant odors and flavors * * * removes old scale and prevents new scale * * * saves fuel * * * that gives silky-smooth quality to water for hair, bath, dishes, laundry, car wash * * * that improves coffee and other food flavors.

Makes Even the Hardest Water Behave "Tame"!

Makes Better Tasting Water . . . by reducing or often Entirely Eliminating Unpleasant Odors and Flavors (even of chlorinated water).

Pays for itself Surprisingly Quick from Soap and Fuel Savings Alone!

Saves loads of soap.

Treat yourself to the joys of a catalytically corrected Home Water Supply! Harshness to hands is noticeably reduced. Easily Rinses away Troublesome Soap Scums. Dishes and Glassware Dry Free From Water Stains. Evis-ized Water Gets "More Work" out of soap in most cases. Scale Vanishes from Water Heaters, Pipes and Shower Nozzles. Sanitary Drains Are Freed From Grease Coatings.

Keeps drains and sumps free from scum.

* * * elimination of rust stain and scum.

* * * to eliminate scale and corrosion problems.

Retards pitting of the metal.

Aids operation of base-exchange softeners.

Leach out alkali and salts with EVIS treated water and Mother Nature will do the rest.

Finer Lawns—Fairer Flowers—Fatter Vegetables—Bumper Crops.

Better Growth has been reported for * * * Alfalfa—Cotton—Melons—Berries—Grass—Flowers and many other types of agricultural and orchard products.

The remarkable growth of plants using EVIS-ized water, as against raw water, particularly tomatoes and other potassium hungry plants, would

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indicate that the EVIS mineral salt stripping action on clay, provides potassium more abundantly to the plant.

EVIS Water Conditioners are being used with amazing results on cotton farms, alfalfa, orchards and in nurseries, greenhouses, and truck farms.

Dense clay structures become fine textured, hard clods and lumps tend to weaken and the soil becomes useful agriculturally.

Improves texture of soil in lawns and gardens.

... one gallon of EVIS-ized water will do the job of at least two gallons of raw water; the evaporation rate is materially reduced.

4. Through the use of the foregoing statements and representations, and others of similar import not specifically set out herein, respondents have represented directly and by implication that their product, the "Evis Water Conditioner:"

(a) Is made of a specially processed cast metal and has a catalytic effect on water passing through it which changes the physical behavior of such water in many beneficial ways;

(b) Will solve hard water problems causing "hard" water to become soft and will make hard water feel, taste and act softer, giving it a silky-smooth quality for hair, bath, dishes, laundry and car wash without the use of chemicals;

(c) Will remove and reduce unpleasant odors and flavors in water, making it taste better, and improve the taste of coffee and other foods;

(d) Will require the use of less soap and will reduce the cost of heating water;

(e) Will eliminate or reduce the harshness of water to the hands and will cause dishes and glassware to dry without leaving water stains;

(f) Will remove grease from drains and will prevent and remove scale from boilers, water heaters, pipes, shower nozzles and other parts of a water system;

(g) Will prevent, reduce and eliminate scum, rust stains and corrosion and retard the pitting of metal;

(h) Will improve the action of chemicals used for water softening purposes;

(i) Will leach out alkali and salts in soil, will improve the growth and production of various agricultural and orchard products and plants, and will improve the texture and structure of soil; and

(j) Will reduce the amount of water required for agricultural irrigation.

5. The record herein contains reliable, probative and substantial evidence, including the opinions of scientific and engineering

experts, that the Evis Water Conditioner will not change the physical behavior of water or beneficially affect water passing through it. Accordingly, the foregoing statements and representations are false, misleading and deceptive with the exception of the representation that the Evis Water Conditioner is made of a specially processed metal, as to which representation the allegation in the complaint has not been proved. Otherwise and in truth and in fact respondents' product, the "Evis Water Conditioner:"

(a) Does not change the physical behavior of water passing through it by catalytic effect or otherwise;

(b) Will not solve hard water problems or cause hard water to become soft or make hard water feel, taste or act softer or give it a silky-smooth quality for hair, bath, dishes, laundry or car wash;

(c) Will not remove or reduce unpleasant odors or flavors in water or make water taste better, nor will it improve the taste of coffee or other foods;

(d) Will not reduce the amount of soap used or effect a saving of soap expenses, nor will it effect a saving of fuel expenses for heating water;

(e) Will not eliminate or reduce the harshness of water to hands or cause dishes or glassware to dry without leaving water stains;

(f) Will not remove grease from drains or prevent or remove scale in boilers, water heaters, pipes, shower nozzles or other parts of a water system;

(g) Will not prevent, reduce or eliminate scum, rust stains or corrosion, nor will it retard the pitting of metal;

(h) Will not improve the action of chemicals used for water softening purposes;

(i) Will not leach out alkali and salts in soil, improve the growth or production of agricultural or orchard products or plants, nor will it improve the texture or structure of soil;

(j) Will not reduce the amount of water required for agricultural irrigation;

(k) Will not have any beneficial effect on water.

6. The use by respondents of the foregoing false, misleading and deceptive statements and representations, and others similar thereto, has had the tendency and capacity to mislead a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements and representations were

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true, and to induce a substantial portion of the purchasing public, because of such erroneous and mistaken belief, to purchase respondents' product. As a result thereof substantial trade in commerce has been diverted to respondents from their competitors and injury has been done to competition in commerce among and between the various States of the United States and in the District of Columbia.

CONCLUSION

The acts and practices of respondents, as herein found, have been to the prejudice and injury of the public and of the competitors of respondents, and have constituted unfair methods of competition and unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered, That respondent Evis Manufacturing Company, a corporation, and its officers, and respondent Arthur N. Wells, individually and as an officer of said corporation, and said 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 product, known as the "Evis Water Conditioner," or any other product of substantially similar design or construction, whether sold under the same name or under any other name, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication:

That their said product:

- (a) Has a catalytic effect on water;
- (b) Changes the physical behavior of water;
- (c) Will solve hard water problems;
- (d) Will make hard water soft;
- (e) Will cause hard water to feel, taste or act softer, or have any of the attributes or characteristics of soft water;
- (f) Will remove or reduce unpleasant odors or flavors from water;
- (g) Will make water taste better;
- (h) Will improve the taste of beverages or foods;
- (i) Will require the use of less soap;
- (j) Will reduce the cost of heating water;

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(k) Will eliminate or reduce the harshness of water to the hands;

(l) Will cause dishes or glassware to dry without leaving water stains;

(m) Will remove grease;

(n) Will prevent or remove scale;

(o) Will prevent, reduce or eliminate scum;

(p) Will prevent, reduce or eliminate rust stains;

(q) Will prevent, reduce or eliminate corrosion or retard pitting of metal;

(r) Will improve the action of chemicals used for water softening purposes;

(s) Will leach out alkali and salts in soil;

(t) Will improve the growth or production of agricultural or orchard products or plants;

(u) Will improve the texture or structure of soil;

(v) Will reduce the amount of water required for agricultural irrigation;

(w) Has any beneficial effect upon water.

It is further ordered, That the complaint be, and it hereby is, dismissed as to individual respondent Joseph T. Voorheis.

It is further ordered, That respondent, Evis Manufacturing Company, a corporation, and respondent, Arthur N. Wells, individually and as an officer of said corporation, 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.

Commissioner Kern not participating.

OPINION OF THE COMMISSION

By ANDERSON, Commissioner:

In this proceeding, which has been brought under Section 5 of the Federal Trade Commission Act, the complaint charges that the "Evis Water Conditioner," a device sold by the respondents, will not have any beneficial effect on water as represented by the respondents in their advertising.

The hearing examiner filed an initial decision in this matter on April 27, 1956, in which he ordered the complaint dismissed. The Commission, having heard the appeal of counsel in support of the complaint from this initial decision, including oral argument, remanded the case to the examiner for the reception of

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evidence concerning further scientific tests of the Evis Water Conditioner. The examiner, after taking such evidence, filed a second initial decision on June 30, 1958, again ordering the complaint dismissed. He based his holding on the ground that the disposition of the proceeding must be controlled by the legal principle that when conflicting evidence is in such a state of balance that substantial doubt exists as to the conclusions to be drawn therefrom, the burden of proof has not been sustained, and he who bears that burden must fail. Counsel in support of the complaint has appealed from the initial decision of June 30, 1958, dismissing the complaint.

The general issue to be decided here is whether considering all the evidence of record counsel supporting the complaint has established the allegations of the complaint with substantial, reliable and probative evidence.

The Evis Water Conditioner is a simple appearing device. It is a product of metal construction having the appearance of an oversized pipe coupling with an interior cross post integrally cast in place. It is made of cast iron or bronze or similar metals and coated inside and out with zinc galvanizing. The device is intended to be fitted into water systems for the purpose of beneficially treating and conditioning water.

The following are some of the claims that respondents have made for the Evis Water Conditioner in their advertisements:

The Special Processed Cast Metal of the Evis Conditioner imparts a continuous catalytic effect on water, water solids and entrained gases. This catalytic correction changes the physical behavior of water in many beneficial ways.

The amazing new Evis Water Conditioner . . . that makes hard water feel, taste and act softer—without chemicals—without destroying natural minerals . . . that removes unpleasant odors and flavors . . . removes old scale and prevents new scale . . . saves fuel . . . that gives silky-smooth quality to water for hair, bath, dishes, laundry, car wash . . . that improves coffee and other food flavors.

Makes Even The Hardest Water Behave "Tame!"

The complaint alleges that the representations contained in these and other advertisements for the Evis Water Conditioner are false, misleading and deceptive because the device will not give the claimed beneficial results.

The usual tests show Evis treated water to be no different from untreated water from the same source. The device allegedly changes something physical in the water, but the record shows that it does not change the usual physical factors like specific

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gravity, boiling point, viscosity or surface tension. The Evis Water Conditioner is not magnetized or radioactive and it does not contain electrical particles. It makes no chemical change in the water. Arthur N. Wells, the inventor, during his testimony, described the effect of the device in the following words:

After the water has passed through the conditioner, there is a change that has taken place and the way that change appears to be exhibited is in the manner in which the water behaves with fine particles and at surfaces, you might say, that what is changed in the water is its behavior in the interface, which applies generally to the contact between a fluid and any other substance.

The effect allegedly produced by the use of the Evis Water Conditioner, according to witness Wells, is the result of the crystalline structure of the device rather than its chemistry. He testified, in effect, that the elements contained in the unit are the same as those found in ordinary cast iron (or ordinary bronze in the case of the bronze unit), but that special processing somehow adds elements. On the advice of counsel, the witness would disclose neither the process nor the identity of the elements added, contending that this information involves trade secrets. It is not clear from his testimony whether the elements said to be added by the special processing can be detected by spectro analysis.

While the usual laboratory tests will not disclose any effect of the Evis Water Conditioner upon water (or apparently distinguish the metal in the device from other similar metal), the claimed difference in the water can be detected, Mr. Wells testified, along the lines of the phenomenon. This apparently means the observing of the results in a field test under usual operating conditions. A test recommended in respondents' literature is to try the feel of two specimens of dirt or mud, one of which has been mixed with Evis treated water and the other mixed with untreated water. The specimen made with Evis treated water is supposed to feel "smooth, slippery and disintegrated" compared to the other specimen.

Evidence Received in Support of the Complaint

The evidence received in support of the complaint includes a showing that 3,000 installations of the Evis Water Conditioner were failures (by virtue of an admission of counsel), but, more important, a considerable showing in the form of testimony and other evidence covering studies, experiments and tests of the device. With a few exceptions the witnesses testifying for the

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complaint were men with extensive engineering or scientific backgrounds; they qualify as experts in their respective fields. A wide variety of scientific tests and studies of the Evis Water Conditioner have been made. These include analyses made of the composition or structure of the device itself as well as tests and experiments on Evis treated water.

Council in support of the complaint introduced twenty-one witnesses, other than the individual respondents and an Evis distributor, all of whom gave opinion testimony based upon their education and experience, or general experience, together with experiments and laboratory tests performed with the Evis Water Conditioner.

The witnesses included those who had performed tests of the Evis Water Conditioner for the Department of Water and Power in the city of Los Angeles, the City of Los Angeles Harbor Department, and the Southern California Gas Company. The results of the various experiments and tests so made were all negative, including tests as to whether the device changes the hardness of water, aids in the operation of base exchange softeners, improves the taste or odor of water, removes scale, and otherwise beneficially affects water.

Tests were conducted at the U.S. Department of Agriculture by Dr. Lowell E. Allison, a soil scientist, to determine any effect of Evis treated water on soil properties and plant growth. Dr. Allison's testimony was that he could detect no significant differences between the Evis treated water used and the control water in laboratory experiments and that Evis treated water made no difference on plant life. This highly trained and experienced scientist testified that he saw no value in the Evis treatment; so much so that he would not further pursue the investigation.

Hugo de Bussieres, a chemical engineer of long experience, made a number of experiments with Evis treated water. He testified that he was primarily interested in the "dielectric constant," a measure of the internal molecular structure of a substance, and tested for characteristics of the water which might change if the dielectric constant changed. He carried out various chemical, spectrographic and other tests. His testimony was that there is nothing about the Evis Water Conditioner that would cause fundamental changes in the character of the water.

Dr. George D. Wagner, Jr., Junior Spectroscopist, Washington

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State College, ran a series of infrared spectro-analyses of Evis treated and nontreated water. Such tests are designed to determine if samples of a compound are identical so far as molecular structures are concerned. Dr. Wagner testified that the tests showed the molecular structures of Evis or non-Evis treated water to be the same.

Various tests and experiments conducted at Washington State College, Division of Industrial Research, some of which were in the laboratory and others on field or practical installations, failed to show that the Evis Water Conditioner was of any value in the treatment of water. Dr. Albroom, director of Industrial Research, Washington State College, and Dr. Mark F. Adams, a research chemist of the same institution, in effect so testified. The tests made at Washington State were designed to show, among other things, whether the Evis Water Conditioner would change the hardness of water, whether it would affect the formation of scale in coffee makers and whether it would affect the amount of soap used in dishwashers.

Dr. Robert Weast, an associate professor of chemistry, Case Institute of Technology, conducted tests to determine if the Evis Water Conditioner would remove scale from water pipes. He testified that, in his opinion, the unit does not remove scale from previously scaled pipes.

Dr. James Irvin Hoffman, Chief of the Surface Chemistry Section and Assistant Chief of the Chemistry Division of the National Bureau of Standards, performed tests with the Evis Water Conditioner. He testified that based upon his scientific knowledge and the experience he had had with the Evis Water Conditioner, it would have no effect upon water.

Since the remand of this case, extensive testing of the Evis Water Conditioner was undertaken by the Engineering Experiment Station of the University of Virginia. Dr. Lewis B. Johnson, Jr., and Dr. Robert Gildea, who worked on and were responsible for these experiments, both testified, in substance, that the Evis unit will not alter the characteristics of water and that it will not produce the beneficial effects claimed for it. The evidence so adduced clearly confirms the scientific showing made prior to the remand.

The hearing examiner has given little weight to the evidence received in support of the complaint. In many instances of tests or studies being made, he questions the results because of the doubt raised on cross-examination about whether the Evis unit

was properly installed. Apparently, not all of the experimentors followed instructions for installation in every particular. This may have a bearing on the fairness of the tests in some cases, but we do not think that a substantial part of the scientific evidence should be largely discounted for such a reason. Manufacturers' instructions should be followed, of course, to achieve the results claimed for a product, but in this case the "instructions" have varied from time to time and apparently are not all contained in any one document. A step indicated as essential in one instruction sheet, for example, may not even be mentioned in another. Under such circumstances, the failure to follow the omitted instruction should not necessarily put doubt on the experiment. Moreover, respondents' witnesses who testified as to claimed beneficial results, admitted in many instances that no particular instructions were followed. Also, respondents in their literature suggest that Evis treated water can be procured simply by running tap water through the Evis Water Conditioner, the implication being that an elaborate hookup is not essential. In addition, certain of the expert witnesses who had experimented with the Evis Water Conditioner testified that failure to follow detailed instructions would have made no difference in the results. This testimony and the admission of Mr. Wells, in substance, that he had no scientific principle to explain the claimed effect of the Evis device, places on the respondents some burden of showing the necessity for the detailed instructions, and no such showing was made. In view of all these considerations, failure to follow installation instructions in some particulars should not substantially detract, at least in most instances, from the weight of the showing based on the tests and studies.

The scientific evidence and testimony such as that above referred to supports the allegations of the complaint, and it is substantial. This evidence is strong, clear and persuasive. Taken altogether, it would be of compelling significance under any circumstances. Here we have the opinions of men of broad training and experience, which opinions were based on studies in the laboratory and field as well as upon general experience. Their qualifications generally are beyond challenge. The hearing examiner discounts the impact of this body of testimony for various reasons (including the installation question mentioned above), but in most of the cases his reasons do not stand close analysis.

He dismisses Dr. Allison's (U.S. Department of Agriculture) testimony, for example, because the tests on soil were not per-

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formed under conditions comparable to those obtaining in practical use, as he found, and because of admitted slight differences in favor of the Evis Water Conditioner. There is no basis for a conclusion from Dr. Allison's testimony that the differences had any scientific significance. Moreover, there is every indication that Dr. Allison, who tested the Evis Water Conditioner at the request of an Evis representative, knew what he was testing for, in making these experiments and that he did, in fact, give the device a completely fair test. The real substance of his entire testimony is that the Evis Water Conditioner has no value. The examiner erred, we think, in holding that such does not constitute probative evidence on the issues in this proceeding.

Another example of the examiner's rejection of highly significant evidence concerns the experiments conducted by Dr. George D. Wagner, Jr., of Washington State College. These experiments were of the greatest importance. Dr. Wagner's analysis by infrared spectrogram disclosed that the molecular configuration of Evis treated and non-Evis treated water were identical. It is apparently this characteristic of the water, if any, that is or should be changed if there is any effect to be obtained in the Evis treatment, yet the tests showed no difference. The hearing examiner, however, found that the cross-examination vitiates the basis on which Dr. Wagner's conclusions rest, nullifying the persuasive force of such conclusions. This evaluation of the testimony, we think, is entirely erroneous. The hearing examiner refers to the cross-examination of Dr. Wagner in which the witness admitted that his spectrogram would reveal "very little difference" between a compound in suspension in water, the same compound in solution in water and the same compound in the colloidal state in water. This is true, if important, but Dr. Wagner also said that he doubted you would ever find the compound in solution one time and in suspension another. He testified: "I have never heard of such a thing." Moreover, the respondents' claims for Evis treated water apparently are not based on any contention that the state of the compounds in such water differs in these respects from the state of the compounds in non-Evis treated water; thus, the fact that the spectrogram may not reveal such differences does not appear to be important. For about the same reason, there is no apparent significance to the fact that the infrared examination will not reveal certain types of compounds. The examiner also makes the observation that the tests

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were made on water in the static state rather than the dynamic. Here again, this would not seem to be of any significance. Evis treated water, for example, is represented as being effective in the washing of clothes and in such a case the water is static in the sense that it is not moving through a pipe. In our opinion, the testimony of Dr. Wagner is probative and reliable evidence and entitled to substantial weight.

Dr. James Hoffman of the National Bureau of Standards testified that based upon his scientific knowledge and the experience he had had with the Evis Water Conditioner, it could have no effect upon water. The examiner found, however, that the probative value of Dr. Hoffman's testimony on direct is lessened because he did not preclude the possibility, at some future date, of a change being effected in the physical behavior of water, in a water system, by contact at the interface with a specially processed metal, by means of the energy inherent in such a system. He held that the change which respondents claim to have effected in the behavior of water by passage through their device has not been proven *impossible*. This, we think, is much too high a standard of proof. Dr. Hoffman has clearly testified that the Evis Water Conditioner will not beneficially affect water. To the extent that he may have admitted the possibility of any claimed effect, it was under the qualification that it would be beyond his comprehension if it could be done. He testified on the basis of present day knowledge and his experience with the Evis device. In our view, his testimony should not suffer merely because, as a man of science, he admits the possibility of an occurrence, however remote.

The complaint contains the general allegation that, contrary to respondents' representations, the Evis Water Conditioner is not made of a specially processed metal and it does not change the physical behavior of water passing through it by catalytic effect or otherwise. In our opinion, counsel supporting the complaint has failed to prove that the Evis device is not made of a specially processed metal. A number of witnesses testified to the effect that analyses showed that the cast iron Evis Water Conditioner was substantially the same as ordinary cast iron. From the record it is not clear, however, whether it follows from this that special processing was not used. But this is of small moment. The essence of the general allegation is that the Evis Water Conditioner, special processing or not, will not change the

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physical behavior of water passing through it. Expert witnesses testified in substance that hard water, or water loaded with minerals, and the objectionable effect of such water, could not be changed except by chemical means. As the examiner even has observed, if such opinion be correct, the Evis device, which admittedly causes no chemical change in the water passing through it, would be worthless. As heretofore indicated, we give much more weight to the opinions expressed by the experts than has the examiner. We believe that there is substantial evidence to support the general allegation above referred to except as to special processing of the metal. This evidence in turn likewise supports the specific allegations of the complaint. In addition there is substantial evidence otherwise to support most if not all of the specific allegations.

It is obvious that counsel supporting the complaint has made a showing with reliable, substantial and probative evidence that the Evis Water Conditioner will not perform as claimed. We do not think that counsel has shown it is impossible for the Evis unit to produce beneficial results, nor do we think such proof, if it could ever be made in a case of this nature, is necessary. Not all of the evidence in support of the complaint is strong; not all of it is free from defects. Taken in its entirety, however, it covers the views of many scientific and engineering experts in the various related fields and it is almost wholly adverse to the Evis Water Conditioner. The views expressed were not simply opinions based on general experience alone. In almost every case, experiments or tests were performed. Some were in the laboratory and some involved practical installations. In these circumstances, it is evident that the showing of counsel in support of the complaint must be given substantial weight.

Finally, we hold that under the circumstances of this case, the respondents were not privileged to stand upon their refusal to disclose the composition of the metal in the Evis Water Conditioner and the claimed special processing thereof as trade secrets; and their failure to introduce the evidence thus within their immediate knowledge and control, if existing anywhere, relative to such factors which might explain the claimed effects of the device on water, is strong confirmation of the charges in the complaint. *Charles of the Ritz Dist. Corp. v. Federal Trade Commission*, 143 F.2d 676, 679 (1944).

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Respondents' Evidence

Respondents' evidence is almost entirely connected with the testimony of users of the Evis Water Conditioner. Some evidence was introduced by the respondents which was of a scientific nature, but it appears to be of little, if any, significance. Mainly this was testimony taken concerning a series of tests run at Peninsula Laboratories, Mountain View, Calif. The tests, which included a washing machine experiment, were supervised by Howard Franz, a research chemist and a partner in Peninsula Laboratories, and conducted by Chemists Gloria Sirine and Walter Hasbrook, Jr. The testimony relating to these tests was clearly inconclusive as a scientific matter. Mr. Franz, for example, would not testify that any of the results observed were caused by the Evis unit, nor would the witnesses Sirine and Hasbrook, Jr., do so.

In any event, respondents do not press their cause on the basis of any scientific evidence. They apparently concede that the effect resulting in the benefits to be derived from the use of their device, if any, is a scientific mystery. Respondents' evidence is largely that of the user testimony and the related exhibits.

An examination of this evidence shows that a number of users, including operating engineers and others, believed that they obtained beneficial results from the use of the Evis Water Conditioner. While a number of the witnesses testified about observing results in parallel practical experiments, it nevertheless appears that the observations were not of tests under scientifically controlled conditions. Any one of a number of factors not connected with the Evis Water Conditioner could have caused any differences which may have been noted. This evidence, while relevant, must be considered and weighed in the light of all the surrounding circumstances. In some cases, such testimony may be more important than in others, particularly where there is scientific evidence of considerable weight on both sides of the question. Cf. In the matter of *Pioneers, Inc.*, Docket No. 6190 (decided May 16, 1956). That is not the situation in this proceeding. The scientific evidence in the record almost entirely supports the allegations of the complaint. The user evidence, in these circumstances, is of relatively little value.

In conclusion, we hold that the record contains reliable, probative and substantial evidence supporting the allegations of the

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complaint with the exception heretofore noted and that it was error for the hearing examiner to dismiss the complaint.

The appeal of counsel in support of the complaint is granted. Accordingly, the initial decision is vacated and set aside, and our findings as to the facts, made on the whole record including the initial decision, and conclusion and order to cease and desist, are issuing in lieu thereof.

Commissioner Kern did not participate in the decision of this matter.

IN THE MATTER OF
COLUMBUS COATED FABRICS CORPORATION, ET AL.

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

Docket 6677. Complaint, Nov. 8, 1956—Decision, Mar. 23, 1959

Order requiring a manufacturer in Columbus, Ohio, and two of its distributors in the New York City area, to cease conspiring to prevent a New Jersey concern, which had been cutting prices on its "Wall-Tex" washable fabric wall covering, from obtaining supplies, and to threaten to boycott suppliers of the price cutter.

Mr. Brockman Horne and Mr. Jerome Garfinkel for the Commission.

Geary & Rankin, of Chester, Pa., and Mr. Richard V. Willcox, of Columbus, Ohio, for Columbus Coated Fabrics Corporation.

Howrey & Simon, of Washington, D.C., for Philan, Inc.

Mr. Milton Handler, of New York, N.Y., and Wilentz, Goldman, Spitzer & Sills, of Perth Amboy, N.J., for Zins Wallpaper Company.

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

Statement of the Case

Complaint in this proceeding, issued November 8, 1956, charged the three named corporate respondents with entering into and carrying out a planned common course of action and conspiracy among themselves and with and through other distributors and dealers in Wall-Tex, a wall covering, to hinder and restrain competition in commerce in the sale and resale thereof by establishing and maintaining uniform fixed resale prices, exclusive sales territories, boycotting and threatening boycott of dealers who ignored either or both, or dealers who supplied the latter, and enforcing such boycotts by hiring detectives for surveillance of those boycotted and bribing their employees, and finally delaying deliveries to such boycotters.

Answers filed in due course by all three respondents generally admitted corporate existence, commercial activity and relationships as alleged in the complaint, competition and commerce, except that Philan, Inc. denied it was engaged therein. All other allegations were, of course, denied. Motions to dismiss at the