

IN THE MATTER OF
WALTER MARCYAN TRADING AS THE MARCY CO.

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

Docket 6706. Complaint, Jan. 9, 1957—Decision, Apr. 9, 1959

Ordering requiring a distributor in Los Angeles, Calif., to cease advertising falsely that use of his "DYN-A-PAK Food Supplements" containing vitamins and minerals would cause hair to grow faster and stronger and become thicker and glossier, and that the preparation would develop energy and endurance in persons lacking those qualities.

Mr. John J. McNally for the Commission.

Mr. G. G. Baumen, of Los Angeles, Calif., for respondent.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The complaint charges that respondent has violated the Federal Trade Commission Act by making false, misleading and deceptive statements about a food or drug preparation which he advertises as being beneficial for thinning or falling hair and baldness. Hearings were held at which evidence in support of and in opposition to the allegations of the complaint was received, and proposed findings were submitted by counsel. Upon the basis of the entire record the following findings are made, conclusions reached and order issued.

FINDINGS OF FACT

1. Respondent Walter Marcyan is an individual trading as The Marcy Co., with his office and principal place of business located at 1398 Sunset Boulevard, Los Angeles 26, Calif. Said respondent is now, and for one year and more last past has been, engaged in the sale and distribution of a food or drug preparation, as the terms "food" and "drug" are defined in the Federal Trade Commission Act.

2. Respondent causes the said preparation, when sold, to be transported from his place of business in the State of California to purchasers thereof located in various other States of the United States. Respondent maintains, and at all times mentioned herein has maintained, a course of trade in said preparation, in commerce, among and between various States of the United States. The volume of such trade has been and is substantial.

1622

Findings

3. The product is called "DYN-A-PAK Food Supplements," and is marketed in packages of four drawers or compartments each, 30 units per drawer or compartment. In the first drawer the units are in capsule form; in the other three drawers they are in tablet form. The composition of the units varies from drawer to drawer, and is as follows:

Drawer No. One.....	30 Capsules.
A (Fish Liver Oils).....	25,000 i.u.
D (Irradiated Ergosterol).....	1,000 i.u.
Thiamin (B1)	3,333 i.u.
Riboflavin (B2)	5,000 mcg.
Ascorbic Acid (C)	3,000 i.u.
Niacinamide	150 mg.
Drawer No. Two.....	30 tablets.
B12 (Fermentation Process).....	2 mcg.
Folic Acid	1 mg.
Liver (N.F.)	388 mg.
Iron (Ferrous Sulfate).....	5 mg.
Iodine (Kelp)	0.1 mg.
Cobalt (Sulfate)	0.1 mg.
Copper (Sulfate)	0.1 mg.
Magnesium (Kelp)	.39 mg.
Manganese (Sulfate)	1 mg.
Potassium (Kelp)	10 mg.
Nickel (Sulfate)	0.1 mg.
Chlorine (Kelp)	10 mg.
Sulphur (Kelp)	.63 mg.
Sodium (Kelp)	3.33 mg.
Drawer No. Three.....	30 tablets.
B1 (Thiamin)	1,000 i.u.
B2 (Riboflavin, Grain ext.).....	1,050 mcg.
B6 (Pyridoxin)	100 mcg.
Niacinamide	6.6 mg.
Calcium Pantothenate	600 mcg.
C (Ascorbic Acid).....	200 i.u.
E (Tocopherols)	200 mcg.
Inositol	333 mcg.
Biotin	.66 mcg.
Folic Acid	333 mcg.
Brewers Yeast	129 mg.
Drawer No. Four.....	30 tablets.
Calcium (Calcium)	200 mg.
Phosphorus (Pyrophosphate)	156 mg.
Iron (Ferrous Sulfate).....	3.3 mg.
Iodine (Kelp)	.033 mg.
Copper (Sulfate)	.010 mg.
Potassium (Kelp)	3.13 mg.
Manganese (Sulfate)	1.66 mg.

Findings	55 F.T.C.
Magnesium (Kelp)	0.2 mg.
Cobalt (Sulfate)	.033 mg.
Nickel (Sulfate)	.033 mg.
Sulphur (Kelp)	0.28 mg.
Sodium (Kelp)	1.12 mg.
Chlorophyllin	100 mg.

The labels state further that, as shown by spectographic analysis, the kelp, which is a component of the units in drawers two and four, contains the following trace elements:

Zinc,	Lithium,	Strontium,
Barium,	Silicon,	Titanium,
Chromium,	Silver,	Vanadium.

According to directions on the package, one tablet or capsule from each drawer is to be taken daily.

4. In advertising his product respondent has used newspapers, periodicals and other means, and has made statements of which the following is typical:

In every case these pupils said they noticed an improvement in energy and endurance within the first 5 days of use. As time went on I noticed that a large percentage of these testimonials mentioned that their finger nails were growing faster and stronger, that their hair was growing thicker and that it had stopped falling out. Previously when they washed their hair in the wash bowl the drain always showed large quantities of hair, but after using Dyn-A-Pak for a month or two there was just a minimum loss. Many women have told me that their hair was growing thicker and glossier.

* * * * *

It is possible that somewhere in combining the proportions of this great food supplement we have hit upon something that makes hair grow faster and stronger and keeps it from falling out.

5. By such advertising the respondent has represented, directly and by implication, that through the use of said preparation as directed, thinning or falling hair will be checked and baldness prevented; that hair will grow faster and stronger and become thicker and glossier; and that said preparation will develop energy and endurance in the cases of persons who are tired, weak and lack endurance.

6. Respondent's answer states that "the use of DYN-A-PAK as directed will develop energy and endurance in the cases of persons who are tired, weak and lack endurance when such conditions are the result of a deficiency of one or more of the vitamins or minerals supplied by said preparation." It is generally agreed that favorable results will follow the taking of a vitamin or mineral product *only* when there is a deficiency of one or

more of the vitamins or minerals supplied by the preparation. Such qualification should be clearly stated in respondent's advertising.

7. As to the claimed effectiveness of use of the product to check or alleviate or prevent thinning or falling hair or baldness or to cause the hair to grow faster or stronger or to become thicker and glossier, the testimony of two highly qualified expert medical witnesses is strongly to the effect that such salubrious results could not be anticipated and would not result. Such testimony was unqualified and uncontradicted, except by the testimony of respondent, who said he had been taking DYN-A-PAK for the past seven years; that in 1951 he was losing hair and his hairline was receding; that he now has more and thicker hair, it has "stopped falling out to the degree it had been," and his hair line has not receded since. Respondent also asserted that he had letters from other people which contained statements which would substantiate the claims made in his advertising.

8. As against statements made by respondent in his own behalf, based on his own experience but without corroboration or other supporting facts, and as against statements based only on the contents of commendatory letters of others, the testimony of the expert witnesses must be accepted and the conclusion reached that respondent's product, taken as directed, will not have any effect upon thinning or falling hair or baldness, nor will it cause hair to grow faster and stronger and become thicker and glossier.

CONCLUSIONS

(a) The representations made by respondent as to the beneficial results that will ensue from use of DYN-A-PAK as directed are false, misleading and deceptive.

(b) The statements and representations contained in the advertisements circulated by respondent have had, and now have, the capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that said statements and representations are true, and into the purchase of said preparation because of such erroneous and mistaken belief.

(c) The acts and practices of the respondent, as herein found, were and are all to the prejudice and injury of the public and constituted and now constitute unfair and deceptive acts and practices, in commerce, within the intent and meaning of the Federal Trade Commission Act.

Opinion

55 F.T.C.

ORDER

It is ordered, That respondent Walter Marcyan, an individual trading as The Marcy Co., or under any other trade name or names, and respondent's agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution of the product "DYN-A-PAK," or any product of substantially similar composition or possessing substantially similar properties, whether sold under the same name or any other name, do forthwith cease and desist from, directly or indirectly:

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

- (a) Check thinning or falling hair;
- (b) Prevent baldness;
- (c) Cause the hair to grow faster or stronger or become thicker or glossier;
- (d) Develop energy or endurance in the cases of persons who are tired, weak, or lack endurance, unless expressly limited to cases where such conditions are the result of a deficiency of one or more of the vitamins or minerals supplied by respondent's product;

(2) Disseminating or causing to be disseminated any advertisement by any means, for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase of said product in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement contains any of the representations prohibited in paragraph (1) hereof.

OPINION OF THE COMMISSION

By TAIT, Commissioner:

The complaint charges respondent with violating the Federal Trade Commission Act through the dissemination of false advertisements for inducing the sale of a food supplement preparation. The hearing examiner in his initial decision held that the allegations of the complaint were sustained by the evidence and ordered respondent to cease and desist the advertising found to be unlawful. Respondent has appealed from that decision.

The only question raised on appeal is whether certain find-

ings of fact in the initial decision are supported by the evidence. These findings are based in part on the testimony of two doctors who testified in behalf of the complaint. Respondent points out that neither of the doctors had ever used his preparation or had ever conducted clinical tests with it. He also contends that these doctors were not experts on the subject on which they gave testimony. He, therefore, argues that there was insufficient foundation for the testimony of these witnesses and that such testimony does not constitute substantial evidence to support the findings that his product will not check thinning or falling hair, prevent baldness, cause hair to grow faster or stronger or cause hair to become thicker or glossier.

The contention that the two doctors who testified were not qualified to express an opinion in this matter is refuted by the facts. Without listing their qualifications, it is sufficient to say that both witnesses were well equipped by formal training and experience to testify as experts in the field of their specializations. Each witness had included in his specialization the diagnosis and treatment of conditions affecting the hair and scalp. After years of clinical observation of those factors which influence hair growth and hair loss, they were qualified to speak authoritatively on that subject.

Respondent's argument that a proper foundation was not laid for the witnesses' opinions ignores the fact that both doctors testified after having examined the list of ingredients in respondent's product. Since they had sufficient factual information upon which to give an opinion, it was unnecessary that any other data be presented to them in the form of a hypothetical question, as contended by respondent. Both witnesses expressed the opinion that neither the product nor the ingredients contained therein would have the beneficial effect on hair growth claimed by respondent. The fact that they had not tested or used the product did not make their testimony incompetent or inadmissible. *Charles of the Ritz Dist. Corp. v. Federal Trade Commission*, 143 F. 2d 676; *Dr. W. B. Caldwell, Inc., v. Federal Trade Commission*, 111 F. 2d 889.

Respondent's contention that no weight should be given the testimony of the two doctors is likewise rejected. Both men testified on the basis of their clinical observations and experience that there was no evidence that any of the vitamins and minerals contained in respondent's product would have any influence on hair growth or hair loss. The law is well settled that the testi-

Order

55 F.T.C.

mony of an expert based on his general knowledge in a particular field may constitute substantial evidence to support the allegations of a complaint. *Charles of the Ritz Dist. Corp. v. Federal Trade Commission, supra*; *Dr. W. B. Caldwell, Inc. v. Federal Trade Commission, supra*; *Neff v. Federal Trade Commission*, 117 F. 2d 495; *Bristol-Meyers Co. v. Federal Trade Commission*, 185 F. 2d 58. The testimony of the expert witnesses, opposed only by the uncorroborated testimony of the respondent as a user of the preparation, fully sustains the findings as to the falsity of respondent's advertising representations.

Respondent's appeal is denied, and the initial decision will be adopted as the decision of the Commission.

FINAL ORDER

This matter having been heard by the Commission upon respondent's appeal from the hearing examiner's initial decision, and upon briefs in support thereof and in opposition thereto, no oral argument having been requested; and the Commission having rendered its decision denying the appeal and adopting the initial decision:

It is ordered, That the respondent, Walter Marcyan, shall, within sixty (60) days after service upon him of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which he has complied with the order to cease and desist.

Decision

IN THE MATTER OF
NASSAU FASHIONS, INC., ET AL.CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT*Docket 7171. Complaint, June 9, 1958—Decision, Apr. 9, 1959*

Consent order requiring manufacturers in Cleveland, Ohio, to cease selling their garments made from "Fiocco" rayon fabric simulating wool, without clearly disclosing the rayon content.

Mr. Charles W. O'Connell for the Commission.

Mr. William H. Rosenfeld, of *Rosenfeld, Palay & Fallon*, of Cleveland, Ohio, for respondents.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

The Federal Trade Commission (sometimes also hereinafter referred to as the Commission) issued its complaint herein, charging the above-named respondents with having violated the provisions of the Federal Trade Commission Act in certain particulars.

On February 5, 1959, there was submitted to the undersigned hearing examiner of the Commission for his consideration and approval an "Agreement Containing Consent Order to Cease and Desist," which had been entered into by and between respondents and the attorneys for both parties, under date of January 30, 1959, subject to the approval of the Bureau of Litigation of the Commission, which had subsequently duly approved the same.

On due consideration of such agreement, the hearing examiner finds that said agreement, both in form and in content, is in accord with §3.25 of the Commission's Rules of Practice for Adjudicative Proceedings, and that by said agreement the parties have specifically agreed to the following matters:

1. Respondent Nassau Fashions, Inc., is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business located at 1974 East 61st Street, in the city of Cleveland, State of Ohio.

Respondent Max Reiter is president and treasurer of said Nassau Fashions, Inc., and his office and place of business is the same as that of the corporate respondent.