

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.

IN THE MATTER OF
BAKERS FRANCHISE CORPORATION ET AL.
ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT

Docket 7472. Complaint, Apr. 13, 1959—Decision, July 19, 1961

Order requiring a New York City company, engaged in licensing bakers to bake and sell its "Lite Diet Bread", to cease representing falsely in advertisements in newspapers and by means of television and radio broadcasts, that the bread was a low-calorie food and that consumption of it as part of a diet would prevent the consumer from gaining weight; facts being "Lite Diet Bread" had as many calories as ordinary bread but was more thinly sliced and as a consequence each slice contained fewer calories than the conventional larger slice.

Before *Mr. John B. Poindexter*, hearing examiner.

Mr. Morton Nesmith and *Mr. Michael J. Vitale* for the Commission.

Mr. Gilbert H. Weil, *Mr. Francis J. Cunningham, Jr.*, and *Weisman, Allan, Spett & Sheinberg*, of New York City, and *Mr. William C. Walsh*, of Cumberland, Md., for respondents.

FINDINGS AS TO THE FACTS, CONCLUSIONS AND ORDER

This matter having been heard by the Commission on cross-appeals from the initial decision of the hearing examiner, and the Commission having rendered its decision denying the appeal of respondents and granting the appeal of counsel supporting the complaint, and having determined, for the reasons stated in the accompanying opinion, that the initial decision should be vacated and set aside, now makes in lieu thereof these its findings as to the facts, conclusions and order.

FINDINGS AS TO THE FACTS

1. Respondent, Bakers Franchise Corporation, is a New York corporation controlled, directed and dominated by its officers, respondents Irving G. Fox and Harry C. Freedman. The address of all respondents is 250 Park Avenue, New York, New York.

2. Respondents are engaged in the business of licensing bakers to produce and sell a bread made from respondents' secret recipe. Bakers so licensed are permitted to market the bread under respondents' trademark "Lite Diet". As of October, 1957, respondents had entered licensing agreements with 110 bakers located in 42 states and the Dominion of Canada. Bread is a food as "food" is defined in the Federal Trade Commission Act.

3. An important service rendered to its licensees by respondents is the supplying of advertising copy and materials. The licensees in turn utilize this copy and material by placing it in newspapers and broadcasting it over radio and television.

4. In conducting their business respondents have disseminated and caused the dissemination of advertisements concerning "Lite Diet" bread through the United States mails and by other means in commerce, as "commerce" is defined in the Federal Trade Commission Act, for the purpose of inducing the purchase of said bread in commerce.

5. Much of the advertising material disseminated by respondents is false in that it creates in the mind of the public the erroneous and false impression that "Lite Diet" bread is lower in calories than ordinary bread, is less fattening and is more effective in controlling body weight. In truth and in fact respondents' bread has approximately the same calorie content as other white breads.

6. Loaves of "Lite Diet" bread, as offered for sale to the public, are thinner sliced than some white bread. Therefore a slice of "Lite Diet" bread weighs 17 grams as compared to the 23 gram weight of the average slice of many white breads. Any difference in calories between a slice of "Lite Diet" bread and a slice of regular

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white bread is solely due to the smaller size of the "Lite Diet" slice.

7. The words light diet are interpreted by the public to mean a low calorie, reducing diet. Thus, the use by respondents of the trademark "Lite Diet" has the capacity to mislead and does in fact mislead the public into the belief that bread so advertised is lower in calories than regular white bread.

8. The words "Lite Diet" as a designation for respondents' product are false and deceptive and cannot be properly qualified to adequately protect the public from the erroneous and mistaken impression that respondents' product is a low calorie bread; qualification of the trade name will not remove the deception inhering in its continued use.

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents.

2. This proceeding is in the public interest.

3. The respondents disseminated or caused the dissemination of false advertising in commerce. Said activity constitutes unfair and deceptive acts or practices in violation of the Federal Trade Commission Act.

ORDER

Is is ordered, That respondents, Bakers Franchise Corporation, a corporation, and its officers, and Irving G. Fox and Harry C. Freedman, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of "Lite Diet" bread, or any other bread of substantially the same composition, 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:

(a) That said bread is lower in calories than other white bread;

(b) That said bread is less fattening, or is more effective in controlling body weight.

2. Disseminating or causing to be disseminated any advertisement, by means of the United States mails or by any means in commerce, as "commerce" as defined in the Federal Trade Commission Act, in which the words "Lite Diet" or words of similar import or meaning are used as the trade name or designation for respondents' bread.

3. 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 in commerce, as "commerce" is defined in the Federal Trade Commission Act, of respondents' product, which advertisement contains any of the representations prohibited in Paragraph 1 hereof or the trade name or designation prohibited in Paragraph 2 hereof.

It is further ordered, That respondents 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 dissenting and Commissioner Elman not participating.

OPINION OF THE COMMISSION

By SECRET, *Commissioner*:

This matter is before us for consideration of cross-appeals from the hearing examiner's initial decision dismissing the complaint. Respondents allege error only in the refusal of the hearing examiner to adopt one of their proposed findings. Counsel supporting the complaint alleges error in the conclusions of the hearing examiner including, of course, his holding that the evidence was insufficient to support the allegations of the complaint.

Respondents are engaged in the business of licensing bakers to produce and sell a bread made from respondents' secret recipe. The bakers in return, for a consideration, are licensed to market the bread under respondents' trademark, "Lite Diet". As of October, 1957, respondents had licensing agreements with 110 bakers located in 42 states and Canada.

In addition to supplying the recipe and permitting the use of their trademark, respondents supply their licensees with advertising materials and copy which the licensees place in newspapers and broadcast over radio and television facilities. During the period between October 31, 1955 and April 1, 1959 respondents have alleged that \$2,500,000 has been expended in advertising "Lite Diet" bread.

Typical of the statements contained in respondents' advertising are the following:

Who'd believe it could help you control your weight? So try it . . . Lite Diet . . . Lite Diet. * * *

Here's a bread that tastes great yet helps you control weight. It's Lite Diet, Lite Diet, Lite Diet.

* * * Will you listen to him? Says it helps you keep slim . . . Do try it . . . Lite Diet . . . Lite Diet.

Who'd ever think such delicious bread could help you keep slim!

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Fortified with B vitamins & minerals.

No added sugar or shortening.

Approx. 45 calories per 17 gram slice.

Lite Diet

WHITE SPECIAL FORMULA BREAD

The advertisements usually depict an attractively slender young woman and a loaf of bread bearing the label "Lite Diet".

The complaint charges that respondents in making such representations have falsely advertised a food in interstate commerce in violation of the Federal Trade Commission Act. It is also alleged that the trade name, "Lite Diet", is itself deceptive in that it implies that respondents' bread is a low calorie food.

The principal thrust of the complaint then deals with the issue of whether respondents are selling a low calorie bread. At two places in the record the hearing examiner, without protest or correction from either party, announced that he interpreted the complaint as follows:

Well, it seems to me, Mr. Well, that the key to this whole case is whether or not your bread, ["Lite Diet"], is a low calorie food and whether or not it has less calories than the average bread.

. . . it seems to me that the keystone or the touchstone of this complaint is that light diet ["Lite Diet"] bread is not a low calorie food in the sense that it has less calories than average bread.

In keeping with this interpretation of the complaint the hearing examiner overruled respondents' objections to the testimony of consumer witnesses which tended to compare respondents' product with other bread.

The initial decision comes to grips with this "keystone" issue and answers it in both the affirmative and the negative. The hearing examiner found, and respondents admit, that in a loaf to loaf comparison or on a weight basis respondents' bread had just as many calories as "regular bread". He also found that in a slice to slice comparison respondents' bread had less calories (45 as opposed to 62) than ordinary bread. The key to this apparent enigma lies in the width of the slices. The respondents' loaves are always more thinly sliced and as a consequence each of these smaller slices has fewer calories than the conventional larger slice of bread. A slice of the respondents' bread weighs approximately 17 grams while a conventional slice of bread weighs 23 grams.

Of course, this is much the same as saying a small pat of butter has less calories than a large pat or that a thin slice of pie has less calories than a thick one. But the hearing examiner at respondents' request discerns an apparent distinction. He found: ". . . the average consumer does not weigh bread to determine its calorie content.

He determines the calorie content of bread on a per slice basis” This finding is apparently based upon the testimony of an expert witness called by respondents, for testimony to this effect was not elicited from members of the public called as witnesses. Their testimony, for the most part, dealt with bread in general and not with any particular quantity or unit thereof. But the key finding of the hearing examiner is without question entirely based upon the testimony of the consumer witnesses. This finding reads:

In the eyes of the average consumer who testified in this proceeding, a slice of “Lite Diet” bread is a “low” calorie food as compared to a slice of regular bread.¹

We characterize this conclusion as the hearing examiner’s “key” finding because upon it he bases his ultimate decision that “. . . respondents’ trademark ‘Lite Diet’ and advertising have not, under the evidence, been shown to be false and deceptive”

With such great weight attached to the consumer testimony we are compelled to review it. A total of ten consumer witnesses testified and respondents stipulated that if an additional ten had been called their testimony would have been substantially similar. Nine of the witnesses were women and eight of the nine were housewives. The direct examination of the consumer witnesses followed a simple pattern. They were handed one of respondents’ advertisements and asked what the words “Lite Diet” as used therein meant to them, and in some instances, what the advertisement as a whole conveyed to them.

A certain amount of license is involved whenever an attempt is made to summarize testimony even though the summary is supported by quoted excerpts, but quite obviously no better course, short of an unwieldy copying of the entire transcript, is available. However, here the testimony to be summarized is short, covering less than 100 pages, and, in our opinion, is so uniform that the license is minimal. With this in mind let us summarize.

Most of the witnesses clearly testified that the advertisements impressed upon them the belief that “Lite Diet” was a low calorie food in the sense that it was lower in calories than ordinary bread. A fair sampling of their testimony would include the following statements:

. . . and it was probably lower in calories than ordinary bread.

. . . it would be the right bread to keep you slim if you are on a diet, since it says it is low in calories. . . .

¹ Actually the wording of this finding is not quite accurate since none of the witnesses testified to ever having seen a slice or loaf of respondents’ bread and their knowledge thereof was apparently limited to what they were able to learn from briefly examining respondents’ advertisements. Thus it should be understood that this finding refers to the witnesses’ interpretations of the representations made in respondents’ advertisements.

... it would be used as preferable to another bread.

It implies to me a low calorie bread.

... this implies to me that this is a low calorie bread for people who are trying to lose weight.

Well, in case you are on a diet, I imagine that would be used in preference to other kinds of bread. ...

Well, it is lower [in calories] than the regular breads, the one that aren't advertised as light diet. ...

As indicated the witnesses for the most part spoke of bread in general terms and not in terms of a particular quantity such as a loaf, slice or ounce. Therefore, we find no basis in this testimony for the hearing examiner's findings that the average consumer that testified thought that respondents' bread represented that "... a slice of 'Lite Diet' bread is a 'low' calorie food as compared to a slice of regular bread." (Emphasis added)

But even if the witnesses had testified in terms of slices we are not persuaded that such testimony would support the conclusion that the advertisements were not deceptive. The testimony of the consumer witnesses indicates that they were all completely misled by respondents' advertisements and trade name. Moreover, independent of the consumer testimony we find on our own authority that respondents advertisements are deceptive and misleading.² In making this judgment we are aware that for the most part the advertisements create deception by implication and innuendo rather than by overt falsehoods. But this is unimportant.³ The important consideration is that the advertisements, taken as a whole, undissected, and without the use of extrinsic, interpretative aids, create a false impression in the mind of the public.⁴

We deem it significant, but not controlling, that the advertisements do not disclose that "Little Diet" bread is thinner sliced. In our view this disclosure would not materially lessen the deceptive nature of the advertisements and consequently would not affect their illegal nature.⁵ The impression created by the use of such terms as "special formula", "no added sugar or shortening" and "help you keep slim" is that respondents' product is a lower calorie reducing food and the revelation that the loaf is also thinner sliced may well enhance rather than lessen the deception.

² *Zenith Radio Corp. v. Federal Trade Commission*, 143 F. 2d 29, 31 (7th Cir. 1944); *Charles of the Ritz Distributing Corp. v. Federal Trade Commission*, 143 F. 2d 676, 680 (2d Cir. 1944).

³ *Koch v. Federal Trade Commission*, 206 F. 2d 311, 317 (6th Cir. 1953); *Consolidated Book Publishers v. Federal Trade Commission*, 53 F. 2d 942, 944 (7th Cir. 1931).

⁴ *Rhodes Pharmacal Co., Inc. v. Federal Trade Commission*, 208 F. 2d 382, 387 (7th Cir. 1953), *aff'd*, 348 U.S. 940 (1955); *Earl Aronberg, et al. v. Federal Trade Commission*, 132 F. 2d 165, 167 (7th Cir. 1942).

⁵ *General Motors Corp., et al. v. Federal Trade Commission*, 114 F. 2d 33, 35-36 (2d Cir. 1940), *cert. denied*, 312 U.S. 682 (1941).

Respondents contend that their trademark, "Lite Diet", is a valuable asset and that substantial sums have been spent in its promotion. It is urged that this expenditure gives them a vested interest in the trade name vis-a-vis the public. They urge that the trademark is susceptible to truthful interpretation and that as a consequence we should not order its complete excision; in the words of their brief: "... where a trademark is concerned a deceptive meaning does not justify its excision if it also possesses a truthful meaning."

We, of course, adhere to the principle announced by the Supreme Court in *Federal Trade Commission v. Royal Milling Co.*⁶ and quoted with approval in *Jacob Siegel Co. v. Federal Trade Commission*⁷ to the effect that trademarks or trade names, as valuable assets, should not be excised ... if less drastic means will accomplish the same result. But as we see it, it is the "result" to be obtained and not the partial truth or falsity of the trade name which dictates the remedy. And, of course, the result sought here is the complete eradication of deception and confusion.

The desired result can only be obtained in this matter by complete excision of the trade name. The record indicates that the words, "Lite Diet", create in the public mind an impression that the product is a lower calorie bread. This false impression can be contradicted by qualifying words but such contradiction would be productive of more rather than less confusion. There is substantial evidence that to the average consumer a light diet is a reducing diet, low in calories. Thus the representations, "Lite Diet—Not A Low Calorie Bread" or "Lite Diet—Not Low in Calories" contain flat contradictions of terms. Nor do we believe that a revelation that respondents' bread is thinner sliced will cure the deception. Contradictory qualifying language completely at loggerheads with the words to be qualified compound rather than allay confusion. In this matter we feel that qualifying language will, at best, completely confuse the consumer and that the public interest requires the complete excision of the trade name, "Lite Diet". An order accomplishing this end will issue.

As we indicated at the outset, respondents have appealed the refusal of the hearing examiner to make one of the findings of fact which they requested. The requested finding would hold that the thinner slice of "Lite Diet" bread, because of additional enrichment, is equal in nutritional benefit to the conventional larger slice of bread. It is our conclusion that the evidence will not support such a finding. Respondents' own expert testified:

⁶ 288 U.S. 212, 217 (1932).

⁷ 327 U.S. 608, 612 (1946).

The point is that the smaller slice of the Lite Diet will carry with it almost as much as the larger slice of the standard white breads, in many of the ingredients. Not all of them, naturally.

But even if the record supported respondents' contention, we fail to see the necessity of a finding on this point. We are here concerned only with the calorie content of respondents' bread and the misleading representations made with respect thereto. We are aware that there are many so-called enriched foods on the market today and under respondents' theory each of these could be represented as a light diet or reducing food irrespective of calorie content. But as respondents' brief points out, "... there is no necessary relationship between the amount of calories contained in the foods and their richness in the protective nutritional factors." Thus as we view it, the nutritional benefit derived from eating respondents' bread is immaterial insofar as this matter is concerned. Consumers purchasing respondents' bread under the impression that it contains fewer calories are none the less deceived by reason of the fact that they may gain a nutritional bonus. "The consumer is prejudiced if upon giving an order for one thing, he is supplied with something else."⁸

The hearing examiner in his Initial Decision relied, in large measure, upon the testimony of respondents' expert witness, an outstanding medical practitioner, specializing in nutrition. This testimony, however, can make only a very small contribution to the resolution of the principal contested issue in this proceeding. For example, there is no question but that a person eating a 17 gram slice of bread will receive less calories than one eating a 23 gram slice. Also we have no quarrel with the expert's mathematical conclusions with respect to weight loss resulting from lower calorie intake produced by the smaller slice. What we fail to see is the evidentiary effect of these truths upon the deception created in the public mind by the representation that "Lite Diet", a "Special Formula" bread will "... help you keep slim." In truth and in fact respondents' bread, like any other bread, will help you keep slim only if you eat less of it and it should be unnecessary to point out that this can be said of any other food.

However, we are indebted to the expert testimony in this proceeding for making clear a point often overlooked by those who would be slim. One loses weight only by ingesting less calories than are required to maintain the body, thereby requiring the body to utilize its stored fat. There is no panacea or magic shrinking potion tasting like "... mixed flavor of cherry tart, custard, pineapple, roast

⁸ *Federal Trade Commission v. Algoma Lumber Co., et al.*, 291 U.S. 67, 78 (1934).

turkey, toffy and hot buttered toast" such as Alice found in the never never land of Lewis Carroll's imagination. To become thin or stay thin in this practical world, one must consume a true light diet. Respondents' bread is neither more nor less suited to be an ingredient of a light diet than any other equally enriched bread and respondents' representations to the contrary constitute "false advertising".

The Initial Decision of the hearing examiner is vacated and set aside and in lieu thereof we are issuing our own findings of fact, conclusions and order to cease and desist.

Commissioner Kern dissented to the decision herein and Commissioner Elman did not participate in the decision.

DISSENTING OPINION OF COMMISSIONER KERN

I find myself in reluctant but complete disagreement with my colleagues and, with one major exception later noted, in complete agreement with the hearing examiner as to the proper disposition of this proceeding.

In connection with their business of licensing bakers to produce and sell bread made from their formula and sold under their trade-mark "Lite Diet" (a trade-mark on which they have expended \$2,500,000 in advertising from October 31, 1953, to April 1, 1959, yet one to be excised by the order issued consistent with the majority opinion), respondents have made a number of advertising representations. Literally read, the complaint charges that respondents have falsely represented that "Lite Diet" bread is a low calorie food and that its consumption as part of a diet will prevent the consumer from gaining weight. During the proceeding counsel supporting the complaint unsuccessfully sought to amend the complaint so as to eliminate the "as part of a diet" qualification to the charge. Subsequently, however, respondents' counsel consented that the scope of the issues should not be restricted by the appearance of those words *in the complaint*. It seems to me that my colleagues have attempted to stretch that consent (or, rather, the hearing examiner's interpretation of it) out of all bounds. True, the allegation of the complaint may now be read to charge respondents with falsely representing that Lite Diet bread is a low calorie food and that its consumption [omitting "as part of a diet"] will prevent the consumer from gaining weight. But this does not alter by one iota our duty to view respondents' actual representations in contest—that is, "in their entirety, and as they would be read by those to whom they appeal."¹

¹ *Ford Motor Company v. Federal Trade Commission*, 120 F. 2d 175, 182 (6th Cir. 1941).

The record relied upon by counsel supporting the complaint to sustain their burden of proof consists of the testimony of ten consumer witnesses (with the stipulation that ten other available consumer witnesses would testify to the same effect) and two expert witnesses, together with exhibits of printed advertisements and radio and television scripts used by respondents.

Coming first to the consumer testimony, I am convinced that the hearing examiner correctly found that it did not sustain the allegations of the complaint. Each of the ten consumer witnesses was asked to examine Commission Exhibits 1 and 2² and to testify what those advertisements meant to him. The hearing examiner pointed out that "Even though a preponderance of the testimony of the consumer witnesses was to the effect that respondents' advertising conveyed the impression that 'Lite Diet' bread was low in calories, they explained that this was in the sense that 'Lite Diet' was suitable to be used in connection with a diet or weight control program. The great weight of their testimony was that 'Lite Diet' bread was advertised to be used in connection with a diet, and not in unlimited amounts, irrespective of the amount of consumption of other foods."

It is appropriate to a consideration of probable deception on the part of consumers that the basic and underlying advertising be considered and examined. An examination of Exhibits 1 and 2 reveals that the exact number of calories, namely, 45 calories per 17 gram slice was set out in these exhibits shown to Commission witnesses. Therefore, it seems clear that there could be no possible consumer confusion as to whether a slice of this bread was either a low calorie or a high calorie food. There is competent evidence in this record to sustain the examiner's finding that the consumer does not weigh bread to determine its calorie content, but determines the calorie content on the basis of "slice." Surely the respondents have fully satisfied the requirements of proper advertising if they set out the exact number of calories in each slice of their bread. They not only did so, but indicated the exact number of grams in each slice of bread. Furthermore Commission Exhibit 1 has a replica of respondents' bread indicating that it is a ready-sliced loaf, and Commission Exhibit 2 refers particularly to slices of bread not only in stating "approximately 45 calories per 17 gram slice" but also in stating "for one slice of this delicious white special formula bread contains only half the calories in a glass of skimmed milk."

² Since my colleagues rest their decision on the advertisements taken as a whole, since these two advertisements were shown to each consumer witness and formed the basis of the consumer testimony and thus may be taken as typical, and since they are the basis of my later analysis, Exhibits 1 and 2 are reproduced at the end of this opinion.

Thus, after careful study of the consumer testimony I agree with the hearing examiner's finding that these witnesses' impression of the advertising claims was that Lite Diet bread, "if used as part of a diet . . . would 'help you keep slim' or 'help you control your weight.'" As reducing diets are shown by the record to list bread in slice portions and as respondents' bread contains substantially fewer calories to the slice, the consumer testimony obviously does not support the complaint.

Since the consumer testimony was anything but helpful to their position, my colleagues have been forced into the position of deciding this matter independent of such testimony³ and on the basis of the advertising itself. This is understandable since counsel supporting the complaint, in argument before the Commission, jettisoned the consumer testimony by thus characterizing the initial decision dismissing the complaint: "In other words [the hearing examiner] adopts the erroneous impression of consumer witnesses to establish the point that the use of the name 'Lite Diet' is not deceptive" (Transcript of oral argument p. 51). When one relates this statement to the fundamental proposition that the burden of proof is on counsel supporting the complaint to establish the deceptive quality of respondents' advertising, and to the further fact that the great bulk of the testimony offered by counsel supporting the complaint was consumer testimony, it is difficult to understand how the majority reaches the conclusion that the burden of proof has been sustained by the greater weight of the evidence. Indeed the majority opinion admits that it was necessary to resort to finding "deception by implication and innuendo." But here they are on no sounder ground, for, taken as a whole, the advertisements are clear, explicit and contain no representations not fully borne out by the record.

Turning now to a consideration of the two expert witnesses supporting the allegations contained in the complaint, the key question put to each witness by Commission's counsel confuses the matter by improper comparison:

Q. Now, Dr. Kline, assuming that Lite Diet Bread contains approximately 45 calories per 17 gram *slice* as advertised there, is it different in calorie content from the ordinary *loaf* of white bread? (Emphasis supplied.)

A. No, it is not.

³ As authority for ignoring the consumer testimony, the Commission opinion cites *Zenith Radio Corp. v. Federal Trade Commission*, 143 F. 2d 29, 31 (7th Cir. 1944), and *Charles of the Ritz Distributing Corp. v. Federal Trade Commission*, 143 F. 2d 676, 680 (2d Cir. 1944). In those cases the Commission did not present any public opinion (consumer) testimony. The courts merely held that such evidence was not essential to a finding of deception. Those cases do not authorize ignoring consumer testimony that has been received in the record.

Yet the record is undisputed that on a slice-for-slice basis—and this is what respondents' advertising is concerned with (the record likewise indicates that this is what the usual reduction diet is concerned with—namely, a portion or a slice), respondents' slice of bread contains 45 calories as compared with the average slice (23 grams) of ordinary bread containing approximately 62 calories. Therefore, the testimony of these expert witnesses is no more helpful than the consumer testimony.

My colleagues appear to adopt the view that if it can be established that respondents' bread is not a "low" calorie food, then respondents' advertising is false and misleading. They conclude that the hearing examiner erred in his eighth finding that the expert opinion did not conclusively determine whether a particular food, respondents' included, is a high or low calorie food but that it is a relative matter and on cross examination the admission was made by the expert witnesses that bread is not a high calorie food. While I accept the hearing examiner's evaluation of this testimony, I find that it is unnecessary to do so because, in my judgment, since the advertising clearly sets forth the exact number of calories in each slice of respondents' bread as well as setting forth the number of grams in each slice, there could be no possibility of consumer confusion on this matter of calories. Indeed, through each cellophane wrapping in which respondents' bread is wrapped, the fact that it is sliced is readily discernible and on each such wrapper appears "approx. 45 calories per 17 gm. slice" (Comm. Ex. 12).

On this issue of whether respondents' bread is not in reality a low calorie food, the opinion expressed by the United States Government through the Department of Agriculture is illuminating:

Bread is not relatively high-calorie food. A slice of white bread one-half inch thick furnishes 63 calories; a slice of whole wheat bread, 55 calories. Some of the breads of high protein content which are low in fat may furnish as little as 46 or 48 calories (Resp. Ex. 12, p. 20).

This gives further compelling indication that the public custom is to compare breads by slices. It also certainly indicates that bread is not a high calorie food. Moreover bread is included in many weight-control diets (Resp. Ex. 7, pp. 54-57).⁴

In addition to relying upon implication and innuendo, the majority opinion states that the deceptive impression of respondents' adver-

⁴ Even the 800- and 1000-calorie diets, which are the lowest ones listed for Armed Forces hospital use, and so sparse as to be nutritionally inadequate, include the equivalent of one or two slices of bread daily (Resp. Ex. 7).

tising is heightened by such phrases as "special formula" and "no added sugar or shortening," yet the truth of both of these phrases is unchallenged in the record. In fact even my colleagues refer to respondents' products in their opinion as "a secret recipe;" moreover, the special formula is in the record (Resp. Ex. 4), although held in camera by order of the hearing examiner and with the acquiescence of counsel supporting the complaint. Indeed, the complaint in this proceeding states that respondents "sell a bread designated 'Lite Diet Bread' made in accordance with respondents' formula."

I agree with the consensus of consumer witnesses that a fair appraisal of respondents' advertising, taken as a whole, compels the conclusion that the benefits claimed are only in conjunction with a reducing diet regime or program. The words "could help you keep slim" are clearly so oriented (Comm. Exs. 1, 2, 8, 10 and 11); also the phrase "you will wonder how it can fit into your weight control program" (Comm. Exs. 3, 4, 6, 7 and 9); also the phrase "yet help you control weight" (Comm. Exs. 5 and 14). Therefore, regardless of efforts to remove this issue from the case by deletion from the complaint the phrase "as part of a diet," it cannot be accomplished because the advertising clearly indicates that its representations for its products are in connection with a diet regime. Surely one cannot blink at the phraseology contained in the advertisements themselves.

Respondents attempted to introduce evidence establishing that the nutritional value of its 17 gram slice of bread was as high as the average larger slice of bread by reason of its bread being fortified or enriched due to its special formula. Some of this evidence was initially rejected on the theory that it was not relevant to the issues in this proceeding and a requested finding of respondents was refused on the same ground. It is in this one major respect that I differ from the hearing examiner. Indeed it is my belief that this is one of the reasons my colleagues reached the cynical conclusion that all that was involved in this situation was merely the mechanical matter of slicing bread thinner than the customary slice. In my view respondents' advertising indicating that respondents' bread is helpful in the control of weight should be considered not only in connection with the reduced number of calories in each slice, but in connection with the fact that it contains as high a nutritional value, or almost as high, as an ordinary slice of bread. This surely is relevant in considering the issue as to whether or

not respondents' "Lite Diet" bread is suitable, appropriate and helpful for use on a low calorie diet. I would amend the hearing examiner's findings to include a finding on this proposition. I believe that its consideration not only is important in establishing the lack of deception in respondents' advertising, but likewise makes clearly inappropriate my colleagues' disposition of this proceeding and particularly the order excising respondents' trade-mark "Lite Diet."

To destroy respondents' business on the basis of the unconvincing record before us here, I regard as wholly without justification and this is what the order issued this day in conformity with the opinion of the majority will accomplish. Neither this record nor previous decisions of the Commission, nor principles of common fairness and equity support such action. I find myself unwilling to purchase regret at such a price. I dissent.

14-C Corpus Christi Times, Thurs., March 5, 1959

who'd ever think
such delicious bread
could help you keep slim!

Lite Diet.
WHITE SPECIAL FORMULA BREAD



• Fortified with B vitamins & minerals
• No added sugar or shortening
• Approx. 45 calories per 17 gram slice

BAKED FRESH DAILY BY
HOLSUM BAKING CO.

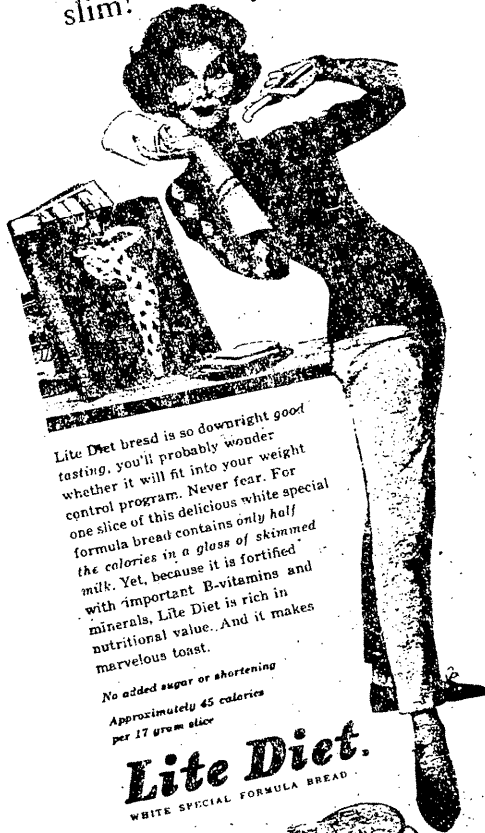
COMMISSION EXHIBIT 1

BAKERS FRANCHISE CORP. ET AL.

70

Opinion
who'd
ever
think
such
delicious bread
could help
you keep
slim!

Sunday
Henry
(NYC)
3-23-18



Lite Diet bread is so downright good tasting, you'll probably wonder whether it will fit into your weight control program. Never fear. For one slice of this delicious white special formula bread contains only half the calories in a glass of skimmed milk. Yet, because it is fortified with important B-vitamins and minerals, Lite Diet is rich in nutritional value. And it makes marvelous toast.

No added sugar or shortening
Approximately 45 calories
per 17 gram slice

Lite Diet.
WHITE SPECIAL FORMULA BREAD



ON A LOW FAT DIET
Lite Diet bread contains
only 1.7% of fat,
of which 89% is
essential fatty acids.

Baked by **Dugan's**
BAKERS FOR THE WORLD SINCE 1928

COMMISSION EXHIBIT 2

Complaint

59 F.T.C.

IN THE MATTER OF

J. A. MORGAN PRODUCE, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
SEC. 2(c) OF THE CLAYTON ACT*Docket 8128. Complaint, Sept. 26, 1960—Decision, July 19, 1961*

Consent order requiring a wholesale distributor of citrus fruit and other food products, and a brokerage company owned and controlled by the distributor's president, to cease violating Sec. 2(c) of the Clayton Act by receiving and accepting from suppliers, commissions on purchases for the distributor's own account made directly or through said associated brokerage company.

COMPLAINT

The Federal Trade Commission, having reason to believe that the parties respondent named in the caption hereof, and hereinafter more particularly described, have been and are now violating the provisions of subsection (c) of Section 2 of the Clayton Act, as amended (U.S.C. Title 15, Section 13), hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent J. A. Morgan Produce, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Georgia, with its office and principal place of business located at Georgia State Market, Forest Park, Georgia. Said respondent corporation was organized and incorporated on or about May 30, 1960, and is a successor to the business formerly located at the same address under the name of J. A. Morgan Produce Company, and operated as a sole proprietorship by Julian A. Morgan, Sr., and the other individual respondents named herein.

Respondent Julian A. Morgan, Sr., an individual, is president of respondent J. A. Morgan Produce, Inc.; respondent Julian A. Morgan, Jr., an individual, is vice-president of respondent J. A. Morgan Produce, Inc., and Gloria Ann Tynes, an individual, is secretary-treasurer of respondent J. A. Morgan Produce, Inc. The office and principal place of business of the individual respondents is the same as that of the corporate respondent. Said individual respondents own all, or substantially all, of the capital stock of said corporate respondent J. A. Morgan Produce, Inc., and direct and control the acts, practices and policies thereof, including the acts and practices hereinafter mentioned, and for a considerable period of time before said business was incorporated, the individual respondents directed and controlled the acts, practices and policies of its predecessors, the J. A. Morgan Produce Company.