

detail the manner and form in which they have complied therewith.

IN THE MATTER OF

MODERN METHODS, INC., ET AL.

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

Docket 7568. Complaint, Aug 25, 1959—Decision, Feb. 19, 1962

Order dismissing, for procedural irregularities, initial complaint charging New
York City sellers with advertising falsely that their correspondence courses
could be relied on by women to make normally heavy or thin legs shapely

719-603—64—21

Complaint

60 F.T.C.

and alluring, and with sending out collection letters under other names which represented falsely that they turned over delinquent accounts to an independent organization to enforce collection, among other things.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Modern Methods, Inc., a corporation, and Harold Brooks, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Modern Methods, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 296 Broadway, in the city of New York, State of New York.

Respondent Harold Brooks is president of the corporate respondent. Said individual respondent formulates, directs and controls the acts and practices of said corporate respondent, including the acts and practices hereinafter set forth. The address of the individual respondent is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of correspondence courses of instruction, including cosmetic lotions and massagers for use in connection therewith. These courses are entitled "12 WEEK Scientific Home Course to add alluring curves to SKINNY LEGS" and "12 WEEK Scientific Home Course to slenderize HEAVY LEGS", hereinafter referred to as the "Skinny Legs" course and "Heavy Legs" course, respectively. Said courses purport to accomplish for the purchasers thereof the desired effects described in the captions set forth.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said products, when sold, to be shipped from their place of business in the State of New York to purchasers thereof located in various other States of the United States, and maintain, and at all times mentioned herein have maintained a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, and for the

309

Complaint.

purpose of inducing the sale of their courses of instruction, respondents have made certain statements with respect to said courses in advertisements in magazines and periodicals of general circulation and in circulars, form letters and other literature sent to persons answering said magazine and periodical advertisements, of which the following are typical:

FAT LEGS

Try this new, amazing, scientific home method to Reduce, Ankles, Calves, Thighs, Knees, Hips for SLENDERIZED LEGS

FREE! "How To Slenderize Your Personal Heavy Leg Problems"

Book—also packed with actual before and after photos of women who obtained remarkable results! Beautifully firm, slenderized legs help the rest of your figure look slimmer, more appealing! Now at last, you too can try to help yourself to improve heavy legs due to normal causes, and reduce and reshape ANY PART of your legs you wish . . . or your legs all over . . . as many women have by following this new scientific method. Well-known authority on legs with years of experience offers you this tested and proven scientific course—only 15 minutes a day—in the privacy of your home!

Contains step-by-step illustrations of the easy scientific leg technique with simple instructions for slenderized, firmer, stronger legs; improving skin color and circulation of blood in legs, plus leg measurement chart.

Limited Time FREE OFFER

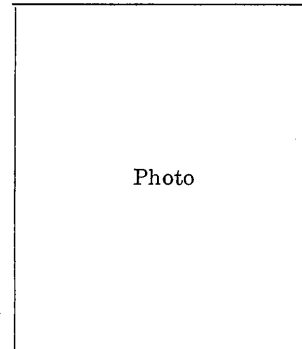
For your Free book on the Home Method of Slenderizing Heavy Legs mailed in plain wrapper, without obligation, just send name and address.

* * *

FREE "How to Slenderize Your Personal Heavy Leg Problems" Book—also packed with actual before and after photos of women who obtained remarkable results! Mailed in Plain wrapper without obligation.

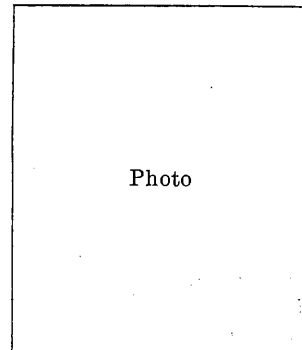
* * *

* * *



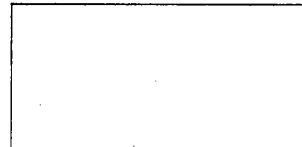
Photo

BEFORE



Photo

AFTER



(Picture of book)

Complaint

60 F.T.C.

* * * Now . . . The COMPLETE All-Inclusive 12 Week Course for FAT LEGS * * *

So right now I want to ask you—do you really want alluringly graceful, feminine legs? Are you willing to devote fifteen enjoyable minutes a day faithfully carrying out the instructions I send you? * * *

Included with the course is a complete 3-piece HOME MASSAGE KIT to be used with the Heavy Legs Course, and it's yours ABSOLUTELY FREE if you enroll within ten days. (See enclosed description.) * * *

* * *

* * * how
the *complete*,
all-inclusive,
12 WEEK
HOME COURSE
helps you
to slenderize
HEAVY LEGS * * *

I KNOW that the ankles, calves, knees, thighs, and the hips of the feminine legs, if normal, have responded to the tested, scientific leg exercise techniques I have perfected. Moreover, the heavier and flabbier your legs, the BETTER I LIKE IT and the more interested I am in helping you.

* * * WOULD YOU TRADE ABOUT
FIFTEEN MINUTES A DAY
OF YOUR SPARE TIME
FOR A LIFETIME OF
BEAUTIFUL SHAPELY LEGS? * * *

* * * This Valuable Deluxe 3-Piece
HOME MASSAGE KIT TO BE USED WITH THE HEAVY LEGS COURSE!
If you mail the enclosed personal enrollment form *within the next TEN DAYS!*
GET THESE THREE FREE GIFTS FOR PROMPT ACTION!
They are worth almost as much as the price of the "Complete Shapely Legs Home Course." Just see what you are to receive at no extra cost under this remarkable offer * * *

* * * * *

309

Complaint

THIN LEGS

Try this new amazing scientific home method to
ADD SHAPELY CURVES at ankles, calves,
 thighs, knees, hips!

FREE! "How to Add Alluring Curves To Cor-
 rect Your Personal Thin Leg Problems"

Book—also packed with actual before and after
 photos of women who obtained remarkable
 results!

Skinny legs rob the rest of your figure of attrac-
 tiveness! Now at last you too can try to help
 yourself improve underdeveloped legs, due to
 normal causes, and fill out any part of your legs
 you wish, or your legs all over as many women
 have by following this new scientific method.

Well known authority on legs with years of ex-
 perience offers you this tested and proven scien-
 tific course—only 15 minutes a day—in the
 privacy of your home! Contains step-by-step
 illustrations of the easy **SCIENTIFIC LEG**
 technique with simple instructions: gaining
 shapely, stronger legs, improving skin color and
 circulation of legs.

Limited Time FREE OFFER!

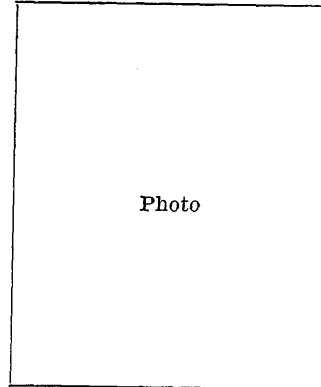
For your free book on the Home Method of
 Developing Skinny Legs mailed in plain wrapper,
 without obligation, just send name and address.

* * *

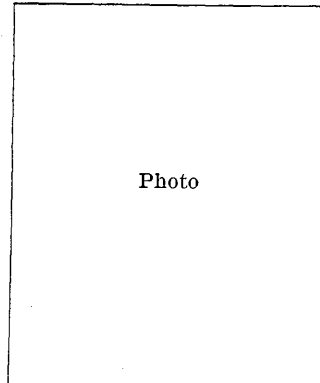
FREE "How to Add Alluring Curves To Correct
 Your Personal Thin Leg Problems"

"Book—also packed with actual before
 and after photos of women who obtained
 remarkable results! Mailed in plain wrap-
 per without obligation. * * *

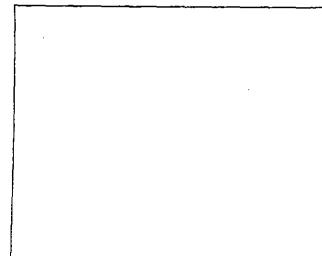
* * *



Photo

BEFORE

Photo

AFTER

(Picture of Book)

* * * Now . . . The **COMPLETE ALL-Inclusive 12 Week Course for Skinny
 LEGS** * * *

In the course of my experience I have treated every kind of leg problem: straight
 hips, skinny thigh, bony knees, stringbean calves, toothpick ankles. And I can
 help you too! * * *

Complaint

60 F.T.C.

Included with the course is a complete 3 Piece DeLuxe HOME MASSAGE KIT for Skinny Legs, and It's yours ABSOLUTELY FREE if you enroll within ten days. (See enclosed description.) * * *

* * *

* * * how
the *complete*
all-inclusive
12 WEEK
HOME COURSE
helps you
add
alluring curves
to
SKINNY LEGS

* * * Yes, buy a pair of exquisite legs to have for your very own, alluring, enticing legs you would be proud to show in shorts, or a bathing suit; legs men would admire and other women envy. * * *

* * *

* * * This Valuable Deluxe 3-Piece HOME MASSAGE KIT TO BE USED WITH THE HEAVY LEGS Course!

If you mail the enclosed personal enrollment form *within the next TEN DAYS!* GET THESE THREE FREE GIFTS FOR PROMPT ACTION!

They are worth almost as much as the price of the "Complete Shapely Legs Home Course." Just see what you are to receive at no extra cost under this remarkable offer * * *

PAR. 5. Through the use of certain of the statements set forth in Paragraph Four and others similar thereto, respondents have represented that their Heavy Legs course provides an effective and reliable means for women with fat or heavy legs, except those due to abnormal causes, to reduce and reshape all or any part of their legs and to make them shapely and alluring.

PAR. 6. The aforesaid statements and representations were and are false, misleading and deceptive. In truth and in fact, said Heavy Legs course does not provide an effective or reliable means for women with fat or heavy legs, whether due to normal or abnormal causes, to reduce or reshape all or any part of their legs or to make them shapely or alluring.

PAR. 7. Through the use of certain of the statements set forth in Paragraph Four and others similar thereto, respondents have represented that their Skinny Legs course provides an effective and reliable means for women with thin or skinny legs, except those due to abnormal causes, to fill out all or any part of their legs and to make them shapely and alluring.

PAR. 8. The aforesaid statements and representations were and are false, misleading and deceptive. In truth and in fact, said Skinny Legs course does not provide an effective or reliable means for women

with thin or skinny legs whether due to normal or abnormal causes, to fill out all or any part of their legs or to make them shapely or alluring.

PAR. 9. Through the use of certain of the statements set forth in paragraph 4 and others similar thereto, respondents have represented that a book on either how to slenderize fat legs or how to add shapely curves to thin legs containing specific information concerning the methods and techniques to be followed in achieving such results will be sent free to persons replying to respondents' magazine and periodical advertisements.

PAR. 10. The aforesaid statements and representations were and are false, misleading and deceptive. In truth and in fact, respondents do not send any free book containing specific information concerning the methods or techniques to be employed in either slenderizing fat legs or adding shapely curves to thin legs. The only "books" respondents send to persons responding to their magazine and periodical advertisements are two pamphlets, one relating to the Heavy Legs course and the other relating to the Skinny Legs course. Each pamphlet is approximately twelve pages in length and consists primarily of advertising claims in the nature of testimonials, along with a general description of the course to which each relates.

PAR. 11. Through the use of certain of the statements set forth in paragraph 4 and others similar thereto, respondents have represented that a 3-piece massage kit consisting of an electric "Stim-U-Leg" massager, a "Limber Up" lotion and "Tone Up" formula, worth almost the price of either courses, will be given free to women who return a completed enrollment form for either the Skinny Legs course or the Heavy Legs course within ten days after receipt of such form.

PAR. 12. The aforesaid statements and representations were and are false, misleading and deceptive. In truth and in fact, the 3-piece massage kit is not sent free to women returning in ten days either a completed enrollment form for the Skinny Legs course or for the Heavy Legs course. Nor is such kit worth almost the price of either course. The "Limber Up" lotion and the "Tone Up" formula are sent only after \$3.00 or more is submitted with a completed enrollment form; said lotion and formula, moreover, must be returned, along with the "Stim-U-Leg" massager and all other materials furnished by respondents in the event a purchaser elects to avail herself of her rights under the money back provision, which becomes operative only after one of the courses has been completed and paid for. The "Stim-U-Leg" massager is not sent until the purchaser is ready for the sixth lesson of one of respondents' courses and only then if payments are current with not less than \$15.00 having been paid.

Initial Decision

60 F.T.C.

PAR. 13. In collecting or attempting to collect delinquent accounts arising in connection with their business, respondents have sent out collection letters or notices under name or names other than their own, such as Legal Claims Department, which represent or imply that respondents have turned over such accounts to a separate and independent organization to enforce collection thereon. In truth and in fact said letters or notices are not sent out by a separate or independent organization but are sent out by respondents themselves for the purpose of collecting their own accounts.

PAR. 14. The use by the respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

PAR. 15. The aforesaid acts and practices of respondents, as herein alleged, 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.

Mr. Harold A. Kennedy supporting the complaint.

Mr. Horace Donnelly, Jr., of Washington, D.C., for respondents.

INITIAL DECISION BY LEON R. GROSS, HEARING EXAMINER

PRELIMINARY STATEMENT

Respondents advertise for sale and sell through the United States mails, from their office in New York City, in interstate commerce, correspondence courses designated

12 Week

Scientific Home Course

to slenderize

HEAVY LEGS

for bulging hips—flabby thighs—bulging knees—

heavy calves—heavy ankles—strengthening feet

and arches.

and

12 Week

Scientific Home Course

to add alluring curves to

SKINNY LEGS

for straight hips—scrawny thighs—bony knees—thin

calves—thin ankles—strengthening feet and arches.

On August 29, 1959, the Federal Trade Commission issued a complaint against the respondents charging them with violating the Federal Trade Commission Act by engaging in false, misleading and deceptive acts, practices and representations in advertising, offering for sale, selling and disseminating in interstate commerce the aforementioned "heavy legs" and "skinny legs" courses. The respondents answered the complaint, issue was joined, and full hearings have been completed. This initial decision is based upon the entire record including the testimony of witnesses and exhibits in evidence. Proposed findings and conclusions and suggested order have been filed by the parties and oral argument thereon was heard.

In 1952, a United States Post Office Department's Hearing Examiner, in a proceeding then pending there, recommended the revocation of mailing privileges of respondents pursuant to the provisions of 39 U.S. Code, § 259 and § 732 (Hearing Examiner's Docket 1-234).

On July 18, 1956, the Solicitor for the Post Office Department reversed the Hearing Examiner and dismissed the proceedings "without prejudice." Respondents' publications which are the subject matter of the Post Office proceedings are in evidence as CX 19 and CX 20. They sold for \$1.98 each and are different from the courses which are the subject matter of this proceeding (CX 1 and CX 2) and which sell for \$29.95 each.

Respondents pleaded the Post Office proceedings as *res judicata*, but such plea was denied by this hearing examiner. The Federal Trade Commission, on December 31, 1959, on interlocutory appeal affirmed the ruling of the hearing examiner.

On November 29, 1960, the examiner struck from the record respondents' exhibit 60 for reasons which are set forth in said ruling. Such reasons, *inter alia*, are the fact that respondents sought through such exhibit 60 to place in this record selected portions of the Post Office record without affording Commission's counsel an opportunity to cross-examine the witnesses whose testimony was reproduced in RX 60, and without tendering the Post Office record in its entirety.

Respondents also offered in evidence testimony of witnesses characterized as "satisfied customers." Over the strenuous objections of counsel supporting the complaint, the examiner permitted two such satisfied customers, Edith Amidore and Freda Garman, to testify. The examiner denied the motion of counsel supporting the complaint to strike the testimony of the witnesses Amidore and Garman, but in the same ruling also denied the request of respondents to intro-

Initial Decision

60 F.T.C.

duce any further testimony of "satisfied customers."¹ The examiner refused evidence proffered by counsel supporting the complaint for the purpose of establishing what is a "shapely and alluring" female leg. The first witness who testified on this issue stated in substance that what is a "shapely and alluring" female leg is an empirical judgment which could vary from person to person. It appeared to the examiner that further testimony of this character would not be of material assistance in deciding the principal issues framed by the pleadings.

Aside from the testimony of respondents' customers, Edith Amidore (Tr. 678) and Freda Garman (Tr. 719), of respondent Harold Brooks, and of Richard Stalvey, this record consists chiefly of the testimony of experts. These witnesses, who are either M.D.'s or physiotherapists, were called to give an expert professional opinion whether respondents' courses will, or will not, accomplish that which respondents represent they will accomplish.

All motions made by the parties which are not specifically ruled upon in this initial decision or have not previously been ruled upon hereby are overruled and denied.

On the basis of the entire record in this proceeding the examiner makes the findings of fact and conclusions hereinafter set forth. Findings requested by counsel which are not specifically adopted and incorporated in this initial decision are rejected. The fact that the examiner has not incorporated in this decision nor specifically rejected, nor stricken specifically, evidence which is in the record should not be construed as indicating that such evidence has not been fully considered by the examiner in preparing this decision. It indicates merely that the evidence which the examiner has specifically incorporated in his findings of fact is sufficiently preponderant, relevant, probative, and substantial for a proper adjudication of the issues involved in this proceeding.

On the basis of the entire record, including the testimony of all the witnesses and the exhibits, the examiner makes the following

FINDINGS OF FACT

Respondent Modern Methods, Inc., a New York corporation, organized in 1951, has its principal office and place of business at 296 Broadway, New York, N.Y. It is now, and for some time last past, has

¹ See *Erickson v. FTC*, 272 F. 2d 318; *Basic Books, Inc. v. FTC*, 276 F. 2d 718, 720; *Wybrant System Products Corp.*, 266 F. 2d 571, *Cert. den.* 361 U.S. 914; *Witkower Press, Inc.*, Docket 6588, *Aff'd* by Commission, July 19, 1960; *Evis Manufacturing Co.*, Docket 6168, Commission Decision of March 23, 1960, appeal pending; *United States v. Horsey*, 198 F. 2d 273 (C.A. 5 1952); and *Loesch Hair Experts*, 257 F. 2d 882. See Examiner's Ruling of October 17, 1960, which is hereby incorporated herein and by reference made a part hereof.

309

Initial Decision

been engaged in advertising, offering for sale, selling and distributing correspondence courses which are characterized as follows:

12 Week
Scientific Home Course
to slenderize
HEAVY LEGS
for bulging hips—flabby thighs—bulging knees—heavy
calves—heavy ankles—strengthening feet and arches.
and
12 Week
Scientific Home Course
to add alluring curves to
SKINNY LEGS
for straight hips—scrawny thighs—bony knees—thin
calves—thin ankles—strengthening feet and arches.

These courses are in evidence as CX 1 (Heavy Legs) and CX 2 (Skinny Legs). Respondents sell approximately 400 such courses per month, at a price of \$29.95. The courses, which consist of twelve consecutive weekly courses of exercises to be performed at home are sold chiefly through the United States mails to persons residing in many States of the Union, other than New York State. The corporate respondent's approximate annual business for 1960 was \$200,000 per annum, of which 90 percent was done outside New York State. A small hand vibrator and skin lotions, CX 21, 22 and 23, are sent to customers who have paid in all the money due after the sixth lesson, for use as part of the course.

Respondent Harold Brooks, president of the corporate respondent, and owner of half of its issued stock, formulates, directs, and controls the acts and practices of said corporate respondents. The business address of the individual respondent is the same as that of the corporate respondent.

In the course and conduct of their business, and for the purpose of inducing the purchase of their Skinny Legs and Heavy Legs courses, respondents advertise in magazines and periodicals of general interstate circulation in the United States. The advertisements also appear in circulars, form letters, and other literature disseminated by respondents to persons answering said advertisements. CX 3, 4, 10, 11, 17 and 18, in evidence in this record, are typical and representative of the advertisements used by respondents in selling their courses. Respondents intend such advertisements to convey the impression, and said advertisements do represent, that respondents' Heavy Legs course provides an effective and reliable means for reducing and reshaping all or any part of the heavy or fat legs of women, except

Initial Decision

60 F.T.C.

such heavy or fat legs as may be due to "abnormal" causes. Similarly, respondents intend that their advertisements for their Skinny Legs course should convey the impression, and the advertisements for that course do represent that such Skinny Legs course provides an effective and reliable means for filling out all or any part of thin or skinny legs of women, except those whose condition is due to "abnormal" causes.

The following representations by respondents in their advertisements are false, misleading and deceptive within the intent and meaning of the Federal Trade Commission Act: that the courses are by

"A well-known authority"; are "Tested and proven scientific course"; "Around the clock glamour legs help everything you do"; "Stronger shapely legs help you dance gracefully, work on feet with less fatigue; improve your favorite sport; swim, bowl, play tennis with more ease"; and "*In many cases, doctors advise use of this technique.*" (Emphasis supplied.)

"This Progressive Scientific Method for slenderizing Heavy Legs is based on the knowledge and experience of the medical profession, physiotherapists, and famous body contour experts throughout the world." (Emphasis supplied.) "All-around glamour legs help women in everything they do."

The above statements from respondents' advertisements are not true. Respondents have not proffered evidence to prove that they are true.

Respondents' advertisements are respondents' first contact with their prospective customers. Respondents use the name and facsimile signature of "Henry Milchstein, M.S., Ph.T." in a false, misleading and deceptive manner in the courses themselves. Although Milchstein compiled the courses for the respondents six or seven years ago, he was paid for his services in so doing and severed his business connection with the respondents thereafter. Since then Milchstein has had absolutely nothing to do with respondents in a business way, or with conducting respondents' courses. Milchstein has no business interest in respondents, nor association with them (Tr. 560, 561, 562). The last few years, when he was in the neighborhood, Mr. Brooks visited Mr. Milchstein's office. Approximately six times in the last six years Milchstein has suggested to the respondents how to reply to questions propounded to respondents by customers. Milchstein did not receive any payment for this advice.

Milchstein knew or should have known that the courses were being promulgated by respondents as though he, Milchstein, were still conducting them on a personal basis. Yet, Milchstein acquiesced in the misleading and deceptive use of his name and facsimile signature in the courses.

Respondent Brooks, who actually does conduct respondents' day-to-day operations is not licensed to practice physiotherapy in New York State, nor in any other State. Respondent Brooks does not have the professional education nor experience which qualifies him to advise women how to improve the appearance of Heavy or Skinny Legs through the methods described in the courses he sells. Respondents' representation to the purchasers of their courses that they are being personally conducted on a week-by-week basis, by a licensed physiotherapist is false, misleading and deceptive. The record does not show that there is any licensed physiotherapist on respondents' staff, in their employ, or, by contrast, available for consultation by respondents.

Respondents intend to create the impression and did create the impression in CX 1-D and CX 2-D that they are constantly making awards to the students enrolled in their courses who show the greatest improvement. However, respondent Brooks testified that such awards had been made on a basis of two per year since respondents commenced making such representations in their advertisements (Tr. 794). It is significant that one of the eight awards allegedly made by respondents to their pupils was a hundred dollar "award" which was paid to respondents' witness, Edith Amidore, just "a week or two" before she took the witness stand in their behalf (Tr. 702).

The methods used by the respondents to collect delinquent accounts is also false, misleading and deceptive. CX 24, entitled "Legal Claims Department", does not issue from any such legal claims department. Respondents have agreed in the record to cease and desist from their currently false, misleading and deceptive collection practices.

The greater part of the record consists of the opinion testimony of "experts" called by both parties. These experts gave their professional opinion as to whether the courses would or would not do that which respondents in their advertising, and in the courses themselves, represent they will do. The hearing examiner heard and observed the witnesses in the hearing room and on the witness stand. He observed their demeanor and their manner of answering questions. He was able to and did form an opinion as to their reliability, credibility and knowledge of respondents' courses, their background, education, and professional experience, and their qualifications to express an opinion about respondents' courses. The hearing examiner was able to and did form a judgment as to the bias or lack of bias of these witnesses and their personal interest or lack of interest in the outcome of this litigation. The examiner was further able and

did form a judgment as to the weight and probative value of the testimony of each of the experts. Based upon all of the above factors and any and all requisite factors, the hearing examiner finds that respondents' courses here under attack, and in evidence as CX 1 and CX 2, are falsely, misleadingly, and deceptively advertised and represented to the public. Respondents' courses will not do that which respondents represent they will do. They are false, misleading and deceptive within the intent and meaning of the Federal Trade Commission Act.

The witnesses who testified to this conclusion on behalf of the Federal Trade Commission are:

Dr. Charles S. Wise, Professor of Physical Medicine and Rehabilitation at George Washington University School of Medicine, Washington, D.C., and Director, Department of Physical Medicine and Rehabilitation, George Washington Hospital.

Peter V. Karpovich, Research Professor of Physiology at Springfield College, Springfield, Massachusetts.

Dr. Nadine Coyne, Associate Professor and Director of Education at the Institute of Physical Medicine and Rehabilitation, New York University—Bellevue Medical Center. Dr. Coyne graduated from a well-recognized college in a course of physical therapy and had been an instructor in physical therapy, prior to entering the practice of medicine.

Dr. Arthur S. Abramson, Professor and Chairman of the Department of Rehabilitation Medicine, Albert Einstein College of Medicine, Yshevia University—Medical Director Ithaca College.

Dr. Alfred Abel, Chief of Physical Medicine and Rehabilitation Service, Bronx Veterans Rehabilitation Hospital, and a member of the staff of Albert Einstein College of Medicine and Ithaca College.

The curricula vitae of these witnesses are in the record (CX 25A-E; 26; 27A-F; 30A-C; 31A-G; 38A-F). All of the Commission's expert witnesses were graduates of medical schools, although Mr. Karpovich, who received his medical education in Europe, had never been licensed to practice medicine generally in the United States. All of the Commission's expert witnesses are certified as full Diplomates by the American Board of Physical Medicine and Rehabilitation to practice the speciality of physical medicine. Dr. Abramson, in addition to being a Diplomate of the above Board, also acts as a member of the Certifying Committee of the Board (Tr. 1134).

All of these witnesses appeared to be professional people of the highest type, without any bias, prejudice, or personal interest in the outcome of this litigation. They are qualified by professional edu-

cation and experience to express an authoritative professional opinion about respondents' courses—and did so. They all demonstrated a thorough knowledge of, and acquaintance with, the course. Several of them had tested some of the exercises prescribed by the courses. The consensus of their opinion testimony is that the courses are “worthless” to accomplish that which respondents represent they will accomplish. Dr. Coyne pointed out actual anatomical inaccuracies in the courses. Implicit in the testimony of these witnesses also, but not articulated by any of them, is the potential capacity for harm in permitting persons who are not graduate M.D.'s to practice in a field which should be under the direct supervision and control of graduate M.D.'s. Respondents' small print admonition in their courses to “consult your physician about following these food suggestions” (CX 1-R and CX 2-R) does not substantially alleviate this danger.

Dr. Coyne's testimony was particularly impressive. In hours of grueling cross-examination by respondents' counsel, Dr. Coyne convinced this examiner that she knows these courses and that her opinion is to be given great weight. Moreover, Dr. Coyne had actually practiced physiotherapy before she became a practicing M.D.

Similarly, Doctors Wise, Abramson, and Abel were equally as impressive, objective, and knowledgeable in their answers and opinions about the courses.

Mr. Karpovich was characterized by respondents' witnesses as an outstanding authority in his field. One of the respondents' witnesses, Dr. Wassenberg, sought Mr. Karpovich's collaboration in a research project but Karpovich declined to become associated with him in the project.

Arrayed against the imposing panel of Commission expert witnesses were the following witnesses for the respondents:

Henry Milchstein, who compiled the courses which respondents sell, is a registered physiotherapist at 121 West 46th Street, New York, New York, and is assistant professor in Physical Podiatry at the M. J. Levi College of Podiatry in New York City; chief physiotherapist of the Home and Hospital of the Daughters of Jacob, 167th Street and Finley Avenue, the Bronx, New York City. Henry Milchstein, as the author of respondents' courses and who had been paid originally for writing them, would hardly be expected to disown his own brainchild. His bias and prejudice in favor of respondents was obvious and his interest in preventing his courses from being discredited is self-evident. Although Milchstein expressed mild surprise that his name and facsimile signature were being used in the manner respond-

ents presently use it—as though Milchstein was and is personally conducting each course with each of respondents' customers on a personal week by week basis—the examiner received the impression that Milchstein had no objection to the deception which use of his name and facsimile signature made possible.

Milchstein's personal interest in the outcome of this litigation makes his opinion of doubtful value. He certainly is not objective, and he is not as well qualified as any of the Commission witnesses to express an objective professional opinion about the courses.

Harry Boysen runs what he calls a "rehabilitation center" from his residence, 162 West 54th Street, New York, N.Y. He testified on direct examination that his educational background consists of the following: "A Bachelor of Science, a degree in physical therapy, a Master of Arts in Rehabilitation, a Master of Science in Basic Medical Science, a Doctor in Psychology, and a degree or rather a certification as a physical director." Counsel supporting the complaint was able to prove in this record that most of these claims by Boysen as to his "educational background" are subject to grave doubt and serious question.

Boysen has been completely discredited as a witness in this proceeding, and his testimony should be largely disregarded. Whether Boysen violated his oath "to tell the truth, the whole truth, and nothing but the truth" is in some province other than this opinion. Boysen's involvement in "diploma mills" in California, rehabilitation centers in New York City, and conspiracies to obtain false medical licenses in the State of Maryland are sufficiently spelled out in this record to cast serious doubt on any opinion he may have expressed concerning respondents' courses. His refusal to identify pictures (CX 33, CX 34) of a house in which he had previously testified he had lived in California (which house was also called "Fremont College" and "Sequoia College") speaks for itself. The court proceedings in the Circuit Court of Baltimore City, Maryland, in "*State of Maryland ex rel. vs. Simon Virkutis, M. D., et al.*," adjudicated one aspect of the Maryland false certification caper and are in evidence as CX 36. That court opinion names Boysen as one of several persons involved in false certification of persons to practice a form of medicine in Maryland. Boysen did not deny this fact on the witness stand. As a matter of fact, his rationalization of his participation in the conspiracy to obtain fraudulent medical licenses in the State of Maryland convinced the hearing examiner that Boysen's testimony should be completely disregarded. Boysen's testimony added nothing to respondent's case. His appearance on the witness stand added noth-

ing to the professional stature of respondents' panel of witnesses. In view of Boysen's involvement in false certification of applicants for medical licenses in the State of Maryland, his endorsement of respondents' courses detracts from such virtues, if any, ascribed by the other experts to the courses. The hearing examiner finds that Boysen's opinion had limited probative value in determining whether respondents' courses will, or will not, do what respondents represent they will do.

Marthann Doolittle (Tr. 956, *et seq.*) conducts a "Relaxation Guidance Center" from her home, 4 East 95th St., New York, N.Y.; has a B.A. Degree from Albertus Magnus College in New Haven, took a year of physical medicine at New Haven College of Physical Medicine, and "took a year of physical therapy training at Columbia Medical and Columbia Teachers College combined. It was a joint course given by the the two institutions." She obtained a doctorate of education from Teachers College, Columbia University. Miss Doolittle's Relaxation Guidance Center as described by Miss Doolittle (Tr. 989, *et seq.*) does not appear to be the place at which the witness would have had very much experience in testing the efficacy of respondents' Heavy Legs and Skinny Legs courses so that she could evaluate them professionally and definitively. She demonstrated limited knowledge of, and acquaintance with, respondents' courses. Her testimony was not unequivocally that respondents' courses *will* do what respondents represent they will do. The witness had "used the modalities course of physiotherapy. I have a sinusoidal, galvanic and Farradac machine . . . and I have an ultraviolet and an infra-red." (Tr. 991)

Dr. Doolittle, in response to a question what the Heavy Legs course and the Skinny Legs course purports to offer to the people who buy it, replied, "I think it offers a service through planned therapeutic exercises to help a person achieve better muscle tone." (Tr. 999) Respondents represent that the courses will do a great deal more than "Help a person achieve muscle tone." Such misconception by Dr. Doolittle of respondents' claims for their courses entitles the Doctor's testimony to very little weight in deciding the basic issues posed by the opposing panels of experts.

Dr. Isadore Turner (Tr. 869, *et seq.*) of Flushing, New York, was one of two M.D.'s who testified for respondents. He was not certified by the American Board of Physical Medicine. He could not remember the last time he had treated a woman to improve cosmetically her heavy legs or skinny legs nor the names of such patients (Tr. 896). Dr. Turner's testimony indicated that the few women he had treated

for heavy or skinny legs had other medical problems which were pathological rather than cosmetic. He did not testify that respondents' course would do absolutely what they represent it would do; but opined that diet and exercise combined *might*, under proper conditions, be used to reduce or build up the measurements of certain portions of the human body. Dr. Turner testified in substance that diet and exercise are the most effective method for reducing heavy legs (Tr. 920, 925, 926). His testimony was of limited value in proving that for which it was elicited. He did not testify that respondents' courses absolutely will do that which they represent they will do.

Dr. Eugene H. Weissenberg (Tr. 360, *et seq.*) is a physician specializing in physical medicine and rehabilitation. He lives at 1201 Rio Piedras, Puerto Rico. He demonstrated a sympathetic attitude toward the respondents which the examiner finds prevented him from giving an unbiased and objective appraisal of respondents' courses.

He obtained his medical education in Vienna, Austria, received his M.D. in 1918 from the University School of Medicine of Vienna, and is licensed to practice in New York and Puerto Rico. In 1944, he migrated to the United States and for the next six years thereafter was connected with Columbia University and then for five years with the Veterans Administration. In 1955 Dr. Weissenberg moved to Puerto Rico where he was Chief of Physical Medicine and Rehabilitation at the State Insurance Farm, a governmental agency of Puerto Rico (Tr. 361, *et seq.*). In 1959, Dr. Weissenberg left the service but maintained his affiliation with the University School of Medicine in Puerto Rico where he had the position of Clinical Professor of Physical Medicine and Rehabilitation. The testimony of Dr. Weissenberg, even as that of Dr. Turner, was not unequivocally to the effect that respondents' courses will do that which respondents represent they will do. It is not clear in this record whether Dr. Weissenberg came all the way from his practice in Puerto Rico to New York City for the sole purpose of testifying on behalf of respondents. However, Dr. Weissenberg acknowledged in his testimony the eminence of Peter Karpovich (one of the Commission's witnesses) in this field (Tr. 395). Dr. Weissenberg's attempt to collaborate with Dr. Karpovich on a research project, because of the high esteem in which Weissenberg held Karpovich's professional qualifications and scientific opinion, was refused by Karpovich (Tr. 391). Dr. Weissenberg's demeanor on the stand convinced the examiner that he was not giving an unbiased opinion nor was he being objective. He did not display the familiarity with respondents' courses that Commission experts had. His opinion was neither as impressive as, nor as knowledgeable as, the opinions

of any or all of the Commission's expert witnesses. Moreover, Dr. Weissenberg's opinion, even as that of Dr. Turner, was not unequivocally to the effect that respondents' courses will do that which respondents represent they will do. Dr. Weissenberg's testimony on cross-examination (Tr. 408), demonstrated his very limited knowledge of the courses. His opinion, if it were the only opinion in the record, would not prove respondents' contentions.

The examiner finds that the opinion testimony adduced on behalf of the Federal Trade Commission is more trustworthy, dependable, reliable and credible than the opinion testimony adduced on behalf of the respondents. Based upon the professional opinion testimony of the experts who testified on behalf of the Commission, the examiner finds as a fact that respondents' courses will not do that which respondents represent they will do, and that respondents' representations to prospective customers in advertisements and in the courses that the courses will make heavy legs and skinny legs more shapely and alluring were and are false, misleading, and deceptive within the intent and meaning of the Federal Trade Commission Act.

In their advertisements and in the courses themselves, respondents falsely and deceptively represent the terms and conditions under which their hand vibrator (CX 23), the Tone-up Lotion (CX 21), and Limber-up Lotion (CX 22) are dispensed. These are not furnished "free" to respondents' customers as represented by respondents; they are sent to customers who have paid in a designated minimum sum of money. Their monetary value is overstated by respondents in both the advertisements and in the courses themselves. The use of these devices will not reduce heavy legs nor build up skinny legs. However, by making these contrivances a part of their courses, respondents deceive their customers concerning the amount of beneficial results, if any, to be obtained from using them.

DISCUSSION

Respondents' position may be stated by quoting from the brief accompanying their proposed findings:

In the instant case there is no proof that there is a trade which has been affected by the acts or practices of respondents [Br. p. 19] . . . [Therefore,] the proceeding is not in the public interest [Br. p. 20] when evidence shows that no one was deceived, there is a lack of public interest . . . [Br. p. 21]. In other words, before there can be an act or practice, there must be someone who is capable of being taken in by the act or practice to their detriment."

Throughout this proceeding, respondents' counsel has erroneously urged the above common law concept of fraud and deceit as the yard-

Initial Decision

60 F.T.C.

stick for determining whether there has been a violation of Section 5 of the Federal Trade Commission Act. Respondents' counsel argues that in the absence of a showing that there has been a specific injury to a specific member or segment of the public, there can be no public injury, and therefore, no public interest in this proceeding.

Respondents' counsel further argues that, because a large part of the testimony in this record is the opinion testimony of experts, this case involves a constitutional issue of denial of freedom of speech, or of the press. This argument demonstrates such misconception of the constitutional guarantees as to require no lengthy discussion. The constitutional provisions cited by respondents were placed in the Constitution for protection of the individual's rights. They were not intended to nor do they vouchsafe into the respondents, or anyone else, the right to bilk the public by deceptive trade practices.² Respondents further state (Br. p. 20), "Public interest must be specific and substantial, citing *Henry Broch & Co. v. Federal Trade Commission*, 261 F. 2d 725 (reversed on other grounds 636 U.S. 166)."

The answer to respondents' "no injury to competition" argument is in adjudicated cases which were decided after the Wheeler-Lea Amendment of 1938 broadened the concept of deception which the Federal Trade Commission is responsible for policing. Certain sentences culled from those decisions state what the examiner understands the present state of the law to be. It is in the public interest to prevent the sales of commodities by the use of false and misleading statements and representations.³ Capacity to deceive and not actual deception is the criteria by which practices are tested under the Federal Trade Commission Act.⁴ To tell less than the whole truth is a well-known method of deception; and he who deceives by resorting to such method cannot excuse the deception by relying upon the truthfulness per se of the partial truth by which it has been accomplished.⁵ "A statement may be deceptive even if the words may be literally or technically construed so as to not constitute a misrepresentation . . . The buying public does not weigh each word in an advertisement or misrepresentation. It is important to ascertain the impression that is likely to be

² For discussions of the constitutionality of the Federal Trade Commission Act, see *Sears, Roebuck & Co. v. FTC*, 258 F. 307; *FTC v. F. A. Matocci*, 87 F. 561; *National Harness Mfrs. Assn. v. FTC*, 268 F. 705; *T. C. Hurst & Son v. FTC* 268 F. 874; *FTC v. A. McLean & Son*, 84 F. 2d 910. The Sears case has been cited with approval on the question of constitutionality in the following cases: *State of Oklahoma v. U.S.*, 153 F. 230 (C.C.A. 10th 1946); *Scientific Mfg. Co. v. FTC*, 124 F. 2d 640; *FTC v. Matocci, supra*; *FTC v. Balme*, 23 F. 2d 618; *Royal Baking Powder case*, 281 F. 745.

³ *Parke, Austin & Lipscomb v. FTC*, 142 F. 2d 437, citing *L. & E. Mayer Co. v. FTC*, 97 F. 2d 365, 367.

⁴ *Goodman v. FTC*, 244 F. 2d 584, 604 (C.A. 9th 1957).

⁵ *P. Lorillard Co. v. FTC*, 186 F. 2d 52, 58 (C.A. 4th 1950).

created upon the prospective purchaser.”⁶ Advertisements are not to be judged by their effect upon the scientific or legal mind, which will dissect and analyze each phrase, but rather by their effect upon the average member of the public who more likely will be influenced by the impression gleaned from a first glance.⁷

If respondents’ deceptive advertising were corrected so as to abide by the legal rules stated above, this would remove only *one* of the sources of respondents’ deception. There is an even more significant and deeply rooted deception in the courses themselves. The deception in the courses themselves cannot be cured unless the courses are completely rewritten to conform with reliable, accepted, medical, professional opinion, and so as not to overstate, as they now do, what they will accomplish. Respondents should cease forthwith to represent that “Henry Milchstein, M.S. Ph. T.” actually conducts the courses, as “your instructor,” because this is not true.

It is unnecessary to make a finding whether proper diet and proper exercise would substantially reduce and reshape women’s heavy legs and build up and make more shapely women’s skinny legs. Qualified professional expert witnesses have stated as their opinion that the specific courses (CX 1 and CX 2), presently being sold by respondents, will not do that which respondents represent they will do. In order, therefore, for respondents to cure the deception presently in the courses, respondents must either eliminate the deceptive claims presently in the courses, or rewrite the courses so that they will accomplish what respondents claim they will do.

Respondents’ great reliance upon *Evis Manufacturing Company, et al. v. FTC*, 287 F. 2d 831 (C.A. 9th 1961) is misplaced. The *Evis* issues do not coincide with the issues in this case. In *Evis* the court emphasized the facts that (a) the Commission’s expert witnesses *ignored the manufacturer’s instructions* when installing Evis water conditioners, and (b) Commission counsel apparently conceded that out of some 100,000 installations, possibly 3,000 or only 3 percent of the users would testify to unsatisfactory results. In view of the fact, therefore, that Commission counsel had indirectly conceded that the water conditioner did what it was represented as doing, in 97 percent of the cases, the Commission had erred in ignoring the expert testimony in the record to the effect that the conditioner would perform as represented. Respondents in this proceeding proffered the testimony of about forty hand-picked customers (which was refused—see footnote 1, *supra*) even though they had been selling approximately 5,000

⁶ *Kahwaity v. FTC*, 237 F. 2d 654, cert. den. 352 U.S. 1025.

⁷ *Ward Laboratories, Inc., et al. v. FTC*, 276 F. 2d 952, 954 (C.A. 2d 1960).

courses per year for about six years. As the court said in *Erickson* (footnote 1, *supra*):

Further, it is sound to say that the fact that petitioner had satisfied customers is not a defense to Commission action for deceptive practices. . . .

The opinion testimony in this record has been evaluated by application of accepted criteria for judging opinion testimony (i.e., interest in the outcome, bias, prejudice, demeanor on the stand, professional training and experience, and other elements stated *supra*, page 321, *et seq.*).

Rather than equating the issues in this case with *Evis* the issues in this case should be equated with: *Aggressive Medical Company*, 31 F.T.C. 1111 (a germicidal destroyer, contraceptive tablets for preventing venereal disease); *Raladam Co.*, 316 U.S. 149, 24 F.T.C. 475 (Marmola reducing tablets); *Hollywood Magic Garment Company*, 36 F.T.C. 110 (a rubberized garment to reduce weight by inducing excessive perspiration); *David V. Bush*, 14 F.T.C. 90 (a weight reducing diet). In *Associated Laboratories, Inc.*, 37 F.T.C. 263, order aff'd 150 F. 2d 629, respondents made claims for their Kelp-a-Malt tablets similar to the claims made by the respondents in this proceeding, i.e., that the tablets would produce "a well-proportioned body," "shapeliness of form or figure"; a "shapely" figure; restoring health, strength and vigor to those who are "tired" and "run down"; therapeutic value in cases of "acid stomach," "gas," or "indigestion"; *Charles of the Ritz Distributing Corporation v. FTC* (C.A. 2d 1944), 143 F. 2d 676 (involved foundation cream for makeup); *Feil v. FTC*, 285 F. 2d 879 (C.A. 9th 1960) (involved a device to prevent bed wetting); *Erickson v. FTC*, 272 F. 2d 318 (1959) (hair and scalp preparations); *Bristol-Myers Co. v. FTC*, 185 F. 2d 58 (1950) (the use of Ipana toothpaste to prevent "pink tooth brush"); *J. E. Todd, Inc. v. FTC*, 145 F. 2d 858 (1944) (a product which had value in the treatment of arthritis, neuritis, rheumatism and similar diseases); *Irwin v. FTC*, 143 F. 2d 316 (1944), involving the sale of "Gordon's Detoxifier" to cleanse the intestines.

The land-mark *Raladam* decisions involving the sale of a weight-reducing preparation "Marmola" were responsible for the Congress broadening the concept of deception prohibited by the Federal Trade Commission Act to "capacity to deceive and not actual deception is the criteria by which practices are tested under the Federal Trade Commission Act." *Goodman v. FTC*, *supra*.

Respondents' counsel has made much of the fact that evidence adduced in later hearings on behalf of counsel supporting the complaint was not proper rebuttal evidence. Respondents, for instance, objected to Commission counsel being afforded an opportunity to

elicit, as rebuttal, the true facts concerning the training, background, experience, and activity of Harry Boysen. This Commission evidence (Tr. 1304-1399) constituted proper rebuttal testimony. Until respondents had put Boysen on the stand as one of their experts, Commission counsel could not know what Boysen's testimony would be. Commission counsel should be highly commended for placing in this record the true facts concerning Boysen. This he could not have done except on rebuttal.

The Federal Trade Commission Act and the Commission's practices and procedures do not require Commission counsel to anticipate through clairvoyance respondents' evidence, and incorporate rebutting evidence in the Commission's case in chief.

Respondents' technical position about the burden of proof confuses the legal distinction between the burden of proof and the burden of going forward. The burden of going forward will always devolve upon Commission counsel, but the burden of proof is upon the party who asserts a particular proposition. In this case respondents sought to prove Boysen a qualified expert. They failed in their burden of proof.

Moreover, Federal Trade Commission proceedings are not contests of wits nor technical legal exercises. The public interest must be served and protected. To that end the truth must be ascertained and made a part of the hearing record.⁸ Due process of law is as much a right of those who represent the public interest as it is of the private litigant. Counsel supporting the complaint in this case had the initial obligation of going forward. Having once established the essential allegations of the complaint by reliable, probative and relevant evidence, the burden then shifted to these respondents.⁹ After the close of respondents' evidence, Commission counsel were and are entitled to rebut evidence adduced on behalf of respondents, even as respondents were and are privileged to contradict as much of the Commission's evidence as the facts will establish.

Respondents' heavy reliance upon *Scientific Manufacturing Company, supra*, in their brief (p. 18, *et seq.*) and upon *Evis Manufacturing Company, supra*, in their oral argument is misplaced. The examiner's analysis of the *Evis* decision in this portion of this opinion has differentiated *Evis* in many respects from the instant proceeding. The examiner's finding that the expert opinion testimony preponder-

⁸ The ideal toward which administrative practice is pointed is that its greater flexibility will make the ascertainment of the truth easier, surer, and speedier.

⁹ See Hearing Examiner's Ruling of March 23, 1960, denying respondent's motion to dismiss at close of case-in-chief. See also *Consolidated Foods Corp.*, Docket No. 7000, Dec. of March 4, 1960.

Initial Decision

60 F.T.C.

ates heavily in favor of the Commission's witnesses in this case would be sufficient, standing alone, to make *Evis* inapplicable.

Scientific Manufacturing Company sold pamphlets in interstate commerce which postulated the theory that foods prepared, cooked, or stored in aluminum utensils became toxic or poisonous. The nub of this decision is in the last paragraph reading:

. . . Surely Congress did not intend to authorize the Federal Trade Commission to foreclose expression of honest opinion in the course of one's *business of voicing opinion*. The same opinion, however, may become material to the jurisdiction of the Federal Trade Commission and enjoined by it if, wanting in proof or basis in fact, it is utilized in the trade to mislead or deceive the public or to harm a competitor. . . . (Emphasis supplied.)

The obvious distinction between *Scientific Manufacturing* and the instant case is the fact that respondents here are not in the "business of voicing opinion" but are selling home study courses at approximately \$30 per course. Were respondents' interpretation of the phrase "business of voicing opinion" adopted by any responsible authority, Congress would lose all of its control over trade regulation in the anti-deceptive field because it would be very simple for any respondent charged with deceptive practices to claim, as respondents claim here, that they are merely in the "business of voicing opinion." Nothing could be further from the facts in this case. Respondents are in the business of making money.

In the matter of *Pioneers, Inc., et al.*, 52 F.T.C. 1351, in which a difficult problem was presented involving the weight to be given to so-called expert testimony, the complaint was dismissed by the hearing examiner, and this was affirmed by the Commission:

. . . In view of the conflict in the scientific evidence, the hearing examiner deemed the user evidence attesting to product merit to be particularly significant, and he, accordingly, held the complaint's allegations to be unsustained by the greater weight of the evidence. Recognizing that the burden of proof is on the proponent of the complaint, we regard the hearing examiner's order of dismissal as sound and correct in the circumstances of this case. . . .

In the instant proceeding this hearing examiner has found that the "greater weight of the evidence" adduced as opinion testimony *does* sustain the allegations of the complaint.

Respondents' advertisements for the courses, as well as the courses themselves, are false, misleading and deceptive in many ways. The first contact that respondents have with their customers is by means of their deceptive advertisements. Where the first contact is secured by deception, it is not subsequently cured by making a full disclosure of the facts.¹⁰

¹⁰ *Carter Products, Inc. v. FTC*, 186 F. 2d 821, 824.

In this case, the deceptions in the advertisements are of a separate and distinct nature from those in the courses themselves. Without reference to the deceptions in the advertisements, the representations in the courses are deceptive, *inter alia*, in that they are *not* conducted on a personal week-by-week basis by "Henry Milchstein, M.S. Ph.T." as "your instructor"—nor by any other licensed physiotherapist. They will *not*, according to preponderant, creditable, probative, reliable, medical testimony, do what respondents claim they will do for

Heavy Legs
Bulging hips
Flabby thighs
bulging knees
heavy calves
heavy ankles
feet and arches

(See cover of CX 1). Nor will they do what respondents represent they will do for

Skinny legs
Straight hips
Scrawny thighs
bony knees
thin calves
and
thin ankles
feet and arches

(See cover of CX 2).

Respondents argue that Milchstein is the only expert witness, on either side, entitled to express a binding opinion about their courses because he had actually used them. The answer to this argument, in addition to the examiner's finding of Milchstein's bias, prejudice, interest in the outcome of the litigation, and acquiescence in the deceptive use of his name and facsimile signature, is in language from *Bristol-Myers Co. v. FTC*, 185 F. 2d 58, 62:

... Opinion evidence based on the general medical and pharmacological knowledge of qualified experts has often been held to constitute substantial evidence, even if the experts have had no personal experience with the product. *Goodwin v. U.S.*, 6 Cir., 2 F. 2d 200, 201; *Dr. W. B. Caldwell, Inc., v. F.T.C.*, 7 Cir., 111 F. 2d 889, 891; and this has been done even where witnesses who had personally observed the effects of the product testified to the contrary. (Citing cases)

Respondents argue, finally, (a) even if the courses won't do any good, at least they won't do any harm; and (b) if their customers are not satisfied, they can get their money back at the end of the courses. Such pleas in the nature of "confession and avoidance"

again completely misconceives the congressional intent and purpose of the Federal Trade Commission Act and the Wheeler-Lea Amendment thereto.

This record shows that when respondents were challenged by the Post Office Department in 1952 for the manner in which they were then advertising and selling their courses which are in evidence (CX 19 and CX 20), respondents changed their operations from that typified by CX 19 and CX 20 to that now typified by CX 1 and CX 2, CX 21, CX 22, and CX 23. The need, therefore, for a broad and all-inclusive cease and desist order is apparent from the record.

Based upon the findings of fact previously set forth and the law as applied to those facts, the hearing examiner makes the following:

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction over the parties and over the subject matter of this proceeding; and this proceeding is in the public interest. The complaint filed herein states a good cause of action against respondents, and counsel supporting the complaint has proven the essential and material allegations thereof by a preponderance of reliable, relevant, probative and substantial evidence in the record. Respondents are engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act.

2. In advertising, offering for sale, selling and disseminating in interstate commerce their 12 Week Scientific Home Course to "slenderize heavy legs" and their 12 Week Scientific Home Course to add alluring curves to skinny legs," respondents engage in false, misleading and deceptive acts, practices and representations which are in contravention of and constitute a violation of the Federal Trade Commission Act, as amended.

3. The aforementioned false, misleading and deceptive acts, practices and representations of respondents in selling their courses for Heavy Legs and Skinny Legs should, in the public interest, be forthwith prohibited as provided in and by the Federal Trade Commission Act, and the decisions thereunder. Therefore,

It is ordered, That Modern Methods, Inc., a corporation, and its officers, and Harold Brooks, individually and as an officer of said corporation, and their agents, representatives and employees, directly or through any corporate or other device:

I. In connection with the offering for sale, sale or distribution of the courses of instruction entitled "12 WEEK Scientific Home Course to slenderize HEAVY LEGS" and "12 WEEK Scientific Home Course to add alluring curves to SKINNY LEGS," or any other courses of

instruction or writings having to do with reducing, building up, reshaping or otherwise changing the contour of women's legs, which contain the same or substantially the same subject matter, or approach to the problem, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication that said courses and writings:

A. Provide an effective or reliable means to reduce, reshape, or fill out all or any part of the legs of women, or otherwise change the size, shape or contour of all or any part of women's legs;

B. Provide an effective or reliable means to make all or any part of the legs of women substantially more shapely or alluring than they are before the courses or writings are used;

C. Are by a well-known authority;

D. Are tested and proven scientific courses;

E. Will provide around the clock glamour legs which help everything a woman does;

F. Will improve the ability of the purchasers thereof to swim, dance, play tennis or bowl;

G. Are predicated on techniques which are recommended by doctors;

H. Are based upon the knowledge and experience of the medical profession;

I. Are based upon the knowledge and experience of physiotherapists and body contour experts throughout the world;

J. Are being conducted by a licensed physiotherapist.

II. In connection with the offering for sale, sale or distribution of any course of instruction or other article of merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing that any book containing any specific information will be furnished free or for any amount or consideration unless such book containing such information is in fact so furnished;

B. Representing that any specific article of merchandise will be furnished free or for any amount of consideration unless such specific article is in fact so furnished;

C. Using the word "free" or any other word or words of similar import or meaning, in advertising or in other offers to the public, to designate or describe any massager, lotion, formula, book or other article of merchandise when all of the conditions, obligations or other prerequisites to the receipt and retention of the "free" article of merchandise are not clearly and conspicuously explained or set forth in immediate conjunction with such representation;

Opinion

60 F.T.C.

D. Representing, directly or by implication, that the regular or usual price of any of their products is any amount in excess of the price at which the respondents have usually and customarily sold such products in the recent and regular course of their business;

E. Representing, through the use of a trade name or otherwise, that respondents, or either of them, are a separate or independent organization or person to whom accounts have been turned over by respondents, or either of them, for collection;

F. Representing that any courses or writings sold by respondents will accomplish results for the user of said courses or writings which in fact they will not accomplish.

OPINION OF THE COMMISSION

By KERN, *Commissioner*:

The complaint in this matter charges respondents with violation of the Federal Trade Commission Act. The hearing examiner in the initial decision held that the allegations of the complaint were supported by the record and ordered respondents to cease and desist from the practices found to be unlawful. Respondents and counsel supporting the complaint have appealed from the initial decision.

The main thrust of the complaint is that respondents have misrepresented their correspondence courses as providing an effective or reliable means for women with heavy legs and women with thin legs, except when due to abnormal causes, to reshape all or any part of their legs to make them more shapely and alluring. In addition, the complaint alleges that respondents have falsely represented that a free book is sent to persons responding to their advertisements and that a massage kit will be given free to women enrolling in the courses. Finally, the complaint attacks as deceptive the use of certain collection forms on the ground that such collection notices are not sent out by a separate or independent collection agency as the forms imply.

The argument which respondents advance on this appeal may be summarized as follows: namely, that there is no substantial evidence in the record to establish the allegations of the complaint, that the Commission lacks jurisdiction over the parties and subject matter and that respondents have been denied due process of law and the proceedings are not in accordance with the Administrative Procedure Act.

Respondents' contention that the Commission lacks jurisdiction over the parties and the subject matter of these proceedings obviously is without merit. Moreover, the subject matter here before us un-

doubtedly is clothed with substantial public interest. A commercial enterprise dedicated to remolding the contours of the female form, especially the lower appendages thereto, into shapely and alluring contours deserves governmental encouragement, not reprimand. But even in this worthy field of endeavor traditional rules of truth and veracity concerning the course of treatments offered by respondents must be maintained. Neither fat nor skinny customers should be hoodwinked into subscribing for respondents' courses on the basis of false representations; for failure of performance of respondents' courses as represented could only serve to increase the burden of the cross they bear.

Respondents, in effect, argue that there is no substantial evidence to support the order entered by the hearing examiner because the findings of the initial decision and order are based solely on the opinion evidence of the Commission experts, which is contradicted by the testimony of respondents' experts as well as that of two user witnesses.

Respondents' contention that expert medical opinion has no relevance to the issues presented by this case is without merit.¹ It suffices to say that there is ample support in the record for a holding that the efficacy of the exercises prescribed by respondents' courses involves medical and physiological questions and is not limited to a realm of corporal mechanics as respondents apparently argue. Obviously, the Commission, in order to resolve the issues before it in this case, must consider expert medical opinion as well as such other evidence which is relevant and probative.

Opinion evidence based on general medical and pharmacological knowledge constitutes substantial evidence. *Erickson Hair and Scalp Specialists v. Federal Trade Commission*, 272 F. 2d 318 (7th Cir. 1959), *cert. denied* 362 U.S. 940 (1960). Conflicts between the opinion evidence of Commission experts, respondents' experts and the testimony of customers are questions of fact to be resolved by the Commission. *Maurice J. Feil, et al. v. Federal Trade Commission*, 285 F. 2d 879 (9th Cir. 1960). However, in view of the disposition of this case on procedural grounds discussed below, we do not reach the question of whether, in fact, counsel supporting the complaint has sustained the burden of proof by reliable probative and substantial evidence.

¹ "Actually, the issue is not within the realm of medical expertise, but is one of the application of function and motion against resistive forces to the female extremities insofar as the special exercises are concerned." Respondents' Appeal Brief, p. 24.

We now turn to respondents' argument that they were denied due process of law and that the proceedings below were not in accordance with the Administrative Procedure Act.

The allegations on this point requiring the most serious consideration were to the effect that respondents were denied the opportunity to present a full and complete defense to the charges made against them. In support of such contention, *inter alia*, the respondents claim substantial error or abuse of discretion in the refusal of the hearing examiner to reopen the case to permit respondents to present surrebuttal evidence to the rebuttal evidence offered by counsel supporting the complaint. Specifically, respondents requested that Commission experts, Doctors Coyne and Karpovich, be recalled for the purpose of cross-examination on prior statements with respect to the effect of exercise on the contours of muscles, allegedly contradicting their testimony in this proceeding. In the case of Dr. Karpovich, the subject of the cross-examination was to be statements in a book previously written by the witness. Doctor Coyne, on the other hand, was to be cross-examined on her testimony in another proceeding, *Damar Products, Inc.* (D. 7769), if the hearing examiner declined to take official notice of certain passages of the witness' testimony in that proceeding. Finally, respondents requested permission to recall their witness, Henry Milchstein, to rebut criticism by Dr. Coyne of the courses of which he was author.

The hearing examiner did not err by refusing to reopen the case to permit the recall of Doctors Coyne or Karpovich. The determination of whether a witness should be recalled for impeachment rests within the realm of the hearing examiner's sound discretion, and there is no showing under the circumstances that the hearing examiner abused that discretion in refusing to permit respondents to recall Doctors Coyne and Karpovich.² By the same token, respondents' claim that there was an abuse of discretion in permitting counsel supporting the complaint to recall respondents' witness Royson for further cross-examination is without merit.

The hearing examiner, however, did commit error in refusing to permit respondents to recall Mr. Milchstein for the purpose of surrebutting Dr. Coyne's criticism of respondents' courses. This offer of testimony, not opposed by counsel supporting the complaint, was

² On a review of respondents' motion to reopen the record of March 7, 1961, it is apparent that the statements of Dr. Coyne in *Damar Products, Inc.* (D. 7769), did not, in fact, contradict the witness' testimony in this proceeding. With respect to Dr. Karpovich's book, although there is a conflict between the parties on this point, the hearing examiner could have reasonably concluded that this book was available to the respondents at the time the witness was on the stand.

related, in some degree, to the merits of the case and should have been permitted. The hearing examiner had properly given counsel supporting the complaint some latitude in presenting rebuttal evidence and, in all fairness, should have afforded respondents the same opportunity on surrebuttal. Questions relating to the precise limits of rebuttal testimony are matters resting largely within the discretion of the Commission, which has ultimate responsibility for conducting the proceeding and determining its merits, and the hearing examiner's rulings in this area should not be unduly restrictive. *Foster-Milburn Co., et al.*, 51 F.T.C. 369, 371 (1954).

Respondents also argue that the proceedings were unfair on the ground that the hearing examiner indicated prejudgment of the case against respondents and that the hearings were conducted in a manner prejudicial to respondents' rights.

In his ruling of October 21, 1960, the hearing examiner gratuitously castigated certain of respondents' exhibits, at a time when this issue was moot, since he had already rejected the evidence in a previous hearing. He also issued this ruling before respondents' memorandum of authorities was due. These circumstances, irrespective of his actual state of mind at the time, indicate that the examiner, in issuing the ruling, did not preserve that appearance of impartiality requisite to a fair hearing.³

Respondents, in addition, allege, in effect, that the hearing examiner by his interruptions of counsel as well as frequent interventions in the examination and cross-examination of witnesses, abandoned the role of trier-of-fact and aided counsel supporting the complaint in presenting his case. We do not find that the hearing examiner aided, or intended to aid, counsel supporting the complaint by his participation in the examination of witnesses or by his comments during the proceeding. In fact, the record evidences instances of objections on the part of both sides to the hearing examiner's questions directed to witnesses, and on one occasion, both respondents' counsel and counsel supporting the complaint objected to the same question. The interjection of the hearing examiner in this proceeding was probably helpful to neither side. Nevertheless, while the hearing examiner may examine and cross-examine witnesses to insure that the facts are developed fully and with clarity, he should not pursue this course to the point where either or both sides are impeded in the presentation of their case by needless interruption and interference.

³ The fact that respondents' attorney was subsequently permitted to file his memorandum and argue the matter does not cure the procedural defect when it is apparent that the hearing examiner had already finally determined the matter at the time he issued his written ruling.

Although we will ordinarily accept the hearing examiner's evaluation of the witnesses who have appeared before him, certain innuendoes and derogatory inferences in the initial decision reflecting on the credibility or bias of respondents' medical expert, Dr. Weissenberg, are not warranted by the record.

Further, the hearing examiner in the initial decision erroneously stated that all of the Commission experts were certified as full Diplomates of the American Board of Physical Medicine and Rehabilitation. He emphasized the significance he attached to this distinction with the comment that one of the Commission experts was also a member of the Certifying Committee of the Board. Subsequently, he takes pains to note that one of the two medical witnesses presented by respondents, a Dr. Turner, was not certified by the Board. In fact, the record does not show that Dr. Karpovich, one of the two Commission experts presented in the course of the case in chief, was so certified and counsel in support of the complaint expressly disclaims any such qualification of Dr. Karpovich in his proposed findings. Thus, the hearing examiner's insistence on the fact that all of the Commission experts were certified was not only at variance with the record but with the proposed findings of the attorney in support of the complaint. This gratuitous misstatement as to the qualification of one of the Commission expert witnesses on the part of the hearing examiner, unsupported by the record and disclaimed even by counsel supporting the complaint, raises a grave question as to the hearing examiner's impartiality.

The charitable inference is that this mistake in the initial decision may have resulted from a simple typographical error in incorporating the applicable proposed finding of counsel supporting the complaint on this point in the initial decision. Nevertheless, such carelessness involving a factor to which the hearing examiner evidently attached considerable importance in his evaluation of the witnesses lends support to the conclusion that the proceedings in this matter may not have been conducted with that degree of fairness and thoroughness which should be characteristic of all Federal Trade Commission proceedings.

On a review of the record as a whole we have determined that respondents were not afforded a fair hearing below. The hearing examiner erred in curtailing respondents' presentation of evidence and his indulgence in gratuitous and unguarded comment in the course of hearings and in the initial decision have reflected on his impartiality.

309

Order

As the Ninth Circuit aptly stated in an analogous situation:

If judicial perfection cannot be obtained, at least the observation of the forms of fairness often makes it easier to pull out of the quicksand of error. *James H. Sewell v. Federal Trade Commission*, 240 F. 2d 228, 233 (9th Cir. 1956), rev'd on other grounds 353 U.S. 969 (1957).

We conclude, therefore, that the complaint in this proceeding should be dismissed. The Commission unquestionably has the power to remand this matter to a hearing examiner for further evidence in order to provide an adequate basis for review. However, such a proceeding is costly, time consuming and, to some extent, harassing to respondents. The record is devoid of the testimony of dissatisfied customers claiming deception on the part of respondents. Even though proof of actual deception is not prerequisite to a finding of violation, taking into consideration all the circumstances disclosed by this record we are satisfied that the public interest will be adequately protected by continuing a close scrutiny of respondents' operations. Such disposition of the case makes it unnecessary to rule specifically on each of the points raised by respondents and counsel supporting the complaint in their appeal from the hearing examiner's initial decision.

ORDER DISMISSING COMPLAINT

This matter having been heard by the Commission upon the appeals of respondents and counsel supporting the complaint and upon briefs and oral argument in support thereof and in opposition to said appeals; and

The Commission having duly considered said appeals and the record herein and having determined, for the reasons stated in the accompanying opinion, that the complaint should be dismissed, such disposition of this case rendering it unnecessary to rule specifically on each of the points raised by respondents and counsel supporting the complaint in their appeals:

It is ordered, That the complaint herein be, and it hereby is, dismissed.

Complaint

60 F.T.C.

IN THE MATTER OF

PIERCE OIL & REFINING COMPANY ET AL.

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

Docket C-80. Complaint, Feb. 21, 1962—Decision, Feb. 21, 1962

Consent order requiring Springfield, Ill., concerns engaged in the sale to the public of reclaimed lubricating oil obtained from motor crankcase drainings, to cease selling their said product in the same kind of containers as those used for new and unused oil, with no markings to indicate its reprocessed nature, which furthered the deception by the words "crude" and "a perfected blend" printed thereon; and to cease similar deceptive use of the word "guaranteed".

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Pierce Oil & Refining Company, a corporation, Springfield RefinOil Company, a corporation, and Perry W. Pierce and Twylah M. Pierce, individually and as officers of said corporations, and Perry W. Pierce, individually and trading as Sorco Oil & Refining Company, as Springfield RefinOil Company, and as Perry W. Pierce, hereinafter referred to as respondents, have violated the provisions of the said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondents Pierce Oil & Refining Company and Springfield RefinOil Company are corporations organized, existing and doing business under and by virtue of the laws of the State of Illinois. Individual respondents Perry W. Pierce and Twylah M. Pierce are officers of said corporate respondents. They formulate, direct and control the acts and practices of the corporate respondents, including the acts and practices hereinafter set forth. Individual respondent Perry W. Pierce is also doing business as Sorco Oil & Refining Company, as Springfield RefinOil Company and as Perry W. Pierce. All respondents have a principal office and place of business at 1023 E. Washington Street in the city of Springfield, State of Illinois.

PAR. 2. Respondents are now, and for more than a year last past have been, engaged in the sale and distribution of reclaimed, or reprocessed, used lubricating oil to dealers for resale to the purchasing public. Among brand names under which their said products are sold is that of "Saf T lube". Respondents cause and have caused