

Complaint

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this order, file with the Commission a report in writing, signed by such respondents, setting forth in detail the manner and form of their compliance with the order to cease and desist.

By the Commission, Commissioner MacIntyre dissenting.

IN THE MATTER OF

HEINZ W. KIRCHNER TRADING AS
UNIVERSE COMPANYORDER, OPINIONS, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT

Docket 8538. Complaint, Oct. 16, 1962—Decision, Nov. 7, 1963

Order requiring the Pasadena, Calif., manufacturer of an inflatable swimming-aid device designated "Swim-Ezy" to cease representing falsely through statements and depictions in advertising in magazines of national circulation that the device would prevent any user from sinking, enable a non-swimmer to swim, protect him from the dangers associated with swimming, and enable him to perform like a skilled or champion swimmer; and that it was 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 Heinz W. Kirchner, an individual trading as Universe Company, hereinafter referred to as the respondent, has 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. Respondent Heinz W. Kirchner is an individual trading as Universe Company, with his office and place of business located at 959 North Lake, Pasadena, California.

PAR. 2. Respondent is now, and for some time last past has been, engaged in manufacturing, and in the advertising, offering for sale, sale and distribution of a swimming-aid device designated "Swim-Ezy" to the purchasing public.

PAR. 3. In the course and conduct of his business, respondent now causes, and for some time last past has caused, his said products, when sold, to be shipped from his place of business in the State of California to purchasers thereof located in various other States of the United States and maintains, and at all times mentioned herein

has 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 his business and for the purpose of inducing the sale of said devices, respondent has made certain statements with respect thereto in magazines of national circulation, of which the following are typical:

SWIM EZY

(Depiction of a young lady in a bathing suit)

INVISIBLE SWIM AID

NON-SWIMMERS SWIM INSTANTLY

Yes, now you too can swim like a fish the easy, safe way * * * new, unique 4-oz. device, $\frac{1}{25}$ " thin, worn INVISIBLE under bathing suit or swim trunks, floats you at ease, without effort * * * it makes anyone unsinkable. Poor swimmers look like champions * * * money back guarantee * * *.

PAR. 5. By and through the use of the aforesaid statements and depictions, and others of similar import not specifically set out herein, the respondent represented that when said device is used as directed while swimming or bathing:

- (a) It will, of itself, prevent any user from sinking;
- (b) Its use will instantly enable non-swimmers to swim;
- (c) Other persons will not know, or will not be able to notice, that a swimming aid is being worn;
- (d) The use of the device by poor or unskilled swimmers will enable them to perform or look like champion swimmers.

PAR. 6. In truth and in fact, when respondent's said device is inflated and used as directed while swimming or bathing:

- (a) It will not, of itself, prevent all users from sinking. To the contrary, the extent to which said device may help a person from sinking depends to a considerable extent upon the inherent buoyancy of the user, which varies considerably from person to person. Many prospective users of respondent's device, as a consequence, would need to exert considerable effort to keep from sinking;
- (b) Its use is limited to aiding flotation and it will not instantly enable the user to swim;
- (c) It will bring about a visible alteration in the bodily configuration of the user which in many instances and contrary to respondent's representations, would be known to, or noticed by other persons;
- (d) The use of the device will not make unskilled or poor swimmers perform or look like champions or skilled swimmers.

Therefore, the statements and representations as set forth in Paragraphs 4 and 5 hereof were and are false, misleading and deceptive.

Initial Decision

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PAR. 7. In his various advertisements as aforesaid, respondent has used such statements as "money back guarantee".

PAR. 8. In truth and in fact the advertised guarantee for such devices is limited by respondent to a specified period following the purchase of said device, which limitation was not disclosed in respondent's advertisements. Therefore, the quoted statement in Paragraph 7 hereof is false, misleading and deceptive.

PAR. 9. In the conduct of his business at all times mentioned herein, respondent has been in substantial competition, in commerce, with corporations, firms, and individuals in the sale of swimming aids and other products of the same general kind and nature as those sold by respondent.

PAR. 10. The use by respondent 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 respondent's product by reason of said erroneous and mistaken belief.

PAR. 11. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

Mr. John J. McNally supporting the complaint.

Christie, Parker & Hale, Pasadena, Calif., by *Mr. Robert R. Thornton*, for the respondent.

INITIAL DECISION BY EDWARD CREEL, HEARING EXAMINER

MAY 8, 1963

The Federal Trade Commission issued its complaint against the respondent on October 16, 1962, charging him with falsely advertising the merits of a swimming-aid device designated as "Swim-Ezy" and advertising this product as being guaranteed, without disclosing that the guarantee is limited to a specified period of time. Respondent's answer denied that his advertising was false, misleading, or deceptive and denied that he had violated the statute as alleged in the complaint.

This proceeding is before the hearing examiner for final consideration upon the complaint, answer, testimony and other evidence, and

proposed findings of fact and conclusions filed by counsel for respondent and by counsel supporting the complaint. Testimony of two swimming coaches and of the respondent and fourteen exhibits were received in evidence. Consideration has been given to the proposed findings of fact and conclusions submitted by both parties, and all proposed findings of fact and conclusions not hereinafter specifically found or concluded are rejected, and the hearing examiner, having considered the entire record herein, makes the following findings of fact, conclusions drawn therefrom, and issues the following order:

FINDINGS OF FACT

Respondent Heinz W. Kirchner is an individual trading as Universe Company, with his office and place of business located at 959 North Lake, Pasadena, California.

Respondent is now, and for some time last past has been, engaged in manufacturing a swimming-aid device designated as "Swim-Ezy". He advertises this product in magazines and sells it to the public primarily by means of orders received by mail.

In the conduct of his business, and at all times found herein, respondent has been in substantial competition, in commerce, with corporations, firms, and individuals in the sale of swimming aids and other products of the same general kind and nature as those sold by respondent.

Respondent now causes and for some time last past has caused his said products, when sold, to be shipped from his place of business in the State of California to purchasers thereof located in various other States of the United States, and maintains and at all times mentioned herein has maintained a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act. The facts found hereinabove were admitted by respondent's answer.

For the purpose of inducing the sale of said device, respondent has made certain statements with respect thereto in magazines of national circulation (Tr. 93-97) of which the following are typical:

SWIM EZY

(Depiction of a young lady in bathing suit)

INVISIBLE SWIM AID

NON-SWIMMERS SWIM INSTANTLY

Yes, now you too can swim like a fish the easy, safe way * * * New, unique 4-oz. device, $\frac{1}{25}$ " thin, worn INVISIBLE under bathing suit or swim trunks, floats you at ease, without effort, * * * it makes anyone unsinkable. Poor swimmers look like champions, * * * Money back guarantee * * *. (CXs 3-4)

Findings

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By and through the use of the aforesaid statements and others of similar import not specifically set out herein, the respondent represented that when said device is used as directed while swimming or bathing:

- (a) It will prevent all users from sinking;
- (b) It will instantly enable non-swimmers to swim;
- (c) Other persons will not know, or will not be able to notice, that a swimming aid is being worn;
- (d) The use of the device by poor swimmers will enable them to perform or look like champion swimmers.

Respondent's device is not a life-saving device and will not prevent users from sinking under all circumstances. It will add to the buoyancy of an individual and assist him in staying afloat; although, it will not literally prevent all users from sinking. It is not advertised as a life preserver, but in view of this representation it might be so used or relied upon and there is some danger attached to the use of this representation. Respondent contends that the swimmer referred to in the testimony (Tr. 31) was necessarily floating before he exhaled the air from his lungs, but it is not clear whether he was being kept afloat by the device or whether he was aided by his own movements.

Respondent represents that the device will instantly enable non-swimmers to swim, and it appears from the evidence that with the added buoyancy of the device a non-swimmer can devote his attention to propelling himself by arm and leg movements and begin to learn to swim. It would seem that although the representation "Instantly enables non-swimmers to swim" is exaggerated, the device is of some value as an aid in learning to swim, and this representation may be considered to be harmless puffing and should not be prohibited.

Respondent's representations that the device permits the users to perform and look like champion swimmers are such exaggerations that they are false and misleading. Even a competent swimmer does not have the form and speed of a winner of swimming contests, and a novice would not perform or appear to perform as a champion swimmer while wearing respondent's swimming aid.

Respondent also represents that the device is invisible when worn. It is designed to be worn under a bathing suit and normally the color would not be seen, but when inflated sufficiently to be valuable for the purpose of aiding the wearer to remain afloat to learn to swim, it would be obvious to others that something was being worn under the bathing suit. If the portion of the body about which the device is worn is submerged it would not be noticeable, but when the body is

afloat, as it would be when the device is properly used and when it is effective, its outline is apparent to observers. To the extent that noticeability is important, buyers who rely on the representation that the device is invisible would be deceived.

Respondent has included in his advertising a statement that his product carries a money-back guarantee, but the directions enclosed with the product when delivered disclose to the purchaser that the product must be returned in seven days, which time was recently extended to ten days. In practice, respondent has returned the purchaser's purchase price after much longer periods of time when the product was returned in merchantable condition, but the purchaser is not advised that this is the practice. Respondent has acted in a reasonable and generous manner in returning purchase money to dissatisfied customers, but the advertising fails to reveal any limitation on the money-back guarantee and the purchaser is advised of this limitation only after the product is delivered. It is concluded that seven or ten days is too short a period of time to benefit many purchasers who may rely on an unlimited guarantee at the time of purchase. The buyer would, as respondent contends, expect to be required to return the product within a reasonable time, but not within a week or ten days which might expire before opportunity for use of the product. Since respondent has advertised his product as having a money-back guarantee, and has imposed or has purported to impose a limitation of this guarantee at the time of delivery, it is found that there is a degree of deception inherent in the practice, although there is no testimony that deception has occurred.

The use by respondent 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 respondent's product by reason of said erroneous and mistaken belief.

CONCLUSION

The aforesaid acts and practices of respondent, as herein found, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted and now constitute unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

Opinion

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ORDER

It is ordered, That respondent, Heinz W. Kirchner, an individual trading as Universe Company, or under any other name or names, and respondent's agents, representatives and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution, in commerce, as "commerce" is defined in the Federal Trade Commission Act, of swimming aids designated "Swim-Ezy", or any other device of substantially similar design, properties, or construction, do forthwith cease and desist from representing, directly or by implication, that:

1. Said device will prevent the users thereof from sinking;
2. Persons other than the users thereof will not know or could not notice that a swimming aid is being used;
3. That the use of the device will enable poor or unskilled swimmers to perform or look like champions or skilled swimmers;
4. Said device is guaranteed, unless the nature and extent of the guarantee are clearly and conspicuously disclosed in conjunction with such representations.

OPINION OF THE COMMISSION

NOVEMBER 7, 1963

By *ELMAN Commissioner*:

The complaint in this matter charged respondent, who is engaged in the manufacture and sale of a swimming-aid device known as "Swim-Ezy", with having falsely and deceptively advertised this device, in violation of Section 5 of the Federal Trade Commission Act. Hearings were held and the hearing examiner filed an initial decision. In it, he dismissed the complaint insofar as it challenged the representation that "Swim-Ezy" instantly enables non-swimmers to swim, on the ground that such representation was merely harmless "puffing". Complaint counsel has not appealed from this ruling. At the same time, respondent has not appealed from that part of the initial decision in which the examiner held deceptive and unlawful the representation that the purchaser of "Swim-Ezy" receives there-with a money-back guarantee. However, respondent does appeal from the part of the initial decision in which the following representations were found to be deceptive and unlawful: that the use of "Swim-Ezy" will render a person unsinkable; that the device is invisible; and that use of the device will enable a poor or unskilled swimmer to perform or look like a champion or skilled swimmer.

"Swim-Ezy" consists, essentially, of a flat, inflatable rubber bladder connected to a plastic tube. The device is designed to be wrapped around the lower part of the trunk of the body, in the area of the hips and lower abdomen, in such a way as to be concealed by a bathing suit or swim trunks. After the wearer has entered the water (or before, if he wishes), he blows into the plastic tube and thereby inflates the bladder; he then plugs the tube and folds it beneath the bathing suit or trunks for concealment. When the wearer leaves the water, he releases the plug and the bladder deflates. The purpose of "Swim-Ezy", as stated by respondent, is to assist the wearer to achieve buoyancy (i.e., to float), thereby enabling him to devote his attention and energies to propulsion (i.e., swimming)—without anyone else being aware that he is using a swimming aid.

There is no question that respondent in fact made the representations alleged in the complaint. A typical advertisement for "Swim-Ezy", of record in the instant case, reads in part:

New, unique 4 oz. device, $\frac{1}{25}$ " thin, worn INVISIBLE under bathing suit or swim trunks, floats you at ease, without effort, is comfortable all day. No more fear of deep water, it makes anyone unsinkable. Poor swimmers look like champions, new swimmers use less strain.

Another advertisement of record reads in part:

"SWIM-EZY" turns non-swimmers into swimmers quickly and easily * * * makes poor and timid swimmers fun-loving water champs * * * guarantees swimmers and non-swimmers alike more *safe* fun in the water. All this * * * and it's invisible!

* * * * *

"SWIM-EZY" changes your bathing suit into a fully safe, floating swim suit that easily supports your whole body—lets you swim as long as you want—swim as far as you please—become a better swimmer. Use "SWIM-EZY" for any water sport—boating, fishing, water games. Play Safe—Be Safe * * * with "SWIM-EZY"!

* * * * *

Many people are afraid of the water. But now "SWIM-EZY" ends all your worries and fears * * * makes a non-swimmer as light and safe in the water as a fish. And, there's no danger of sudden cramps, or any disabling pain while in the water. Because "SWIM-EZY" *floats you right to safety.*

Respondent's principal contention on this appeal is that complaint counsel failed to prove such representations as the foregoing to be false and deceptive. In part, we accept this contention; we agree that, insofar as the representation that "Swim-Ezy" is "invisible" is concerned, there has been a failure of proof.

To be sure, "Swim-Ezy" is not invisible or impalpable or dimensionless, and to anyone who so understood the representation, it would be false. It is not likely, however, that many prospective pur-

chasers would take the representation thus in its literal sense. True, as has been reiterated many times, the Commission's responsibility is to prevent deception of the gullible and credulous, as well as the cautious and knowledgeable (see e.g., *Charles of the Ritz Dist. Corp. v. F.T.C.*, 143 F. 2d 676 (2d Cir. 1944)). This principle loses its validity, however, if it is applied uncritically or pushed to an absurd extreme. An advertiser cannot be charged with liability in respect of every conceivable misconception, however outlandish, to which his representations might be subject among the foolish or feeble-minded. Some people, because of ignorance or incomprehension, may be misled by even a scrupulously honest claim. Perhaps a few misguided souls believe, for example, that all "Danish pastry" is made in Denmark. Is it, therefore, an actionable deception to advertise "Danish pastry" when it is made in this country? Of course not. A representation does not become "false and deceptive" merely because it will be unreasonably misunderstood by an insignificant and unrepresentative segment of the class of persons to whom the representation is addressed. If, however, advertising is aimed at a specially susceptible group of people (e.g., children), its truthfulness must be measured by the impact it will make on them, not others to whom it is not primarily directed.

The essence of the representation of "invisibility" is, simply, that "Swim-Ezy" may be worn without other swimmers or bystanders realizing that the wearer is using a swimming aid. In advertising an "invisible" swimming aid, respondent is obviously catering to the feeling of embarrassment which many people feel in publicly revealing that they cannot swim. All the representation was intended to convey, and all that it would be understood by most prospective purchasers to mean, is that "Swim-Ezy" may be worn inconspicuously. The possibility that some persons might believe that "Swim-Ezy" is, not merely inconspicuous, but wholly invisible or bodiless, seems to us too far-fetched to warrant this Commission's intervention in the public interest. And, there is a dearth of substantial, probative evidence to demonstrate the falsity of the claim that "Swim-Ezy" can be worn in an inconspicuous manner. We attach little weight to the evidence on conspicuousness offered by complaint counsel's expert witness, who directed two of his swimming students to put on and, when they entered the water, inflate "Swim-Ezy" devices. He testified that students appeared to him to be bulgy and distended. However, this "test" of the device's "invisibility" was not conducted in such a way as to impress one with its reliability. The expert's testimony was not sufficiently concrete and detailed to permit an inference that the test conditions fairly reflected normal swimming

experience or demonstrated the performance of the product under ordinary conditions of use. We have also concluded that the other evidence introduced in support of the complaint on this issue was inconclusive. Accordingly, this part of the complaint must be dismissed.

The other two representations with which respondent's appeal is concerned, namely, that "Swim-Ezy" renders the wearer unsinkable and that it enables him to perform like a champion swimmer, have this common, and in the circumstances, potentially dangerous element: they assure the wearer that even if he cannot swim and strays into deep water, he is safe from sinking, drowning or otherwise getting into trouble either because of his lack of proficiency in, or the natural dangers associated with, swimming or other aquatic activities. The wearer is assured that he need not even take the ordinary precautions against trouble in the water—that with "Swim-Ezy", there is no danger from sudden cramps or other disabling pain—and that he will be endowed with the skill, not of the non-swimmer or novice swimmer, but of the champion. These representations are calculated to lull the wearer into a sense of security. If they are untrue, if the sense of security induced by the "Swim-Ezy" advertisements is false, the deception is most serious, affecting, as it may, not merely the pocketbook of the consumer, but, at least if he is a non-swimmer or poor swimmer, his personal safety as well. It might be added, too, that the instructions enclosed with each "Swim-Ezy" device do not attempt to qualify the sweeping claims made in the advertisements.

Two college swimming instructors were called by complaint counsel as expert witnesses. Respondent vigorously contests the probative value of evidence offered by these witnesses on the basis of tests conducted by them with "Swim-Ezy". While we find no material points of resemblance between the problems of testing involved in this case and those involved in *Evis Mfg. Co. v. F.T.C.*, 287 F. 2d 831 (9th Cir. 1961), upon which respondent principally relies, we are inclined to agree that the evidence furnished by the tests regarding the properties of "Swim-Ezy", like the test evidence on "invisibility", is inconclusive.

However, we think that the falsity of respondent's representations is amply established by the expert witnesses' general testimony regarding the nature of buoyancy and the techniques of swimming, testimony based not on the tests they conducted with "Swim-Ezy" but on their general experience in, and knowledge of, the field. Respondent does not, and could not reasonably, contend that these two witnesses were not eminently qualified to give such testimony.

The expert testimony establishes the following facts. Buoyancy—ability to float—varies greatly from individual to individual. At one extreme are people who are “floaters”; they can remain afloat with little effort. At the other extreme are the “sinkers”; even with their lungs full of air, they will sink immediately if they cannot swim. Buoyancy is a function not only of innate body structure, but also, and perhaps more importantly, of the psychological state of the individual—his relaxation and self-confidence in the water. The non-swimmer or person who fears the water may often be a “sinker” until he gains some skill and confidence.

What happens when a person of negative buoyancy, a sinker, enters the water wearing an inflated device, like “Swim-Ezy”, around his midsection? The device may render him sufficiently buoyant to keep the middle part of his body afloat, though no evidence was adduced to show just how buoyant, in fact, “Swim-Ezy” will render a person; but, at the same time, the upper part of the body, including the head, will be depressed. The position of a skilled swimmer in the water is a sloping one: the center of gravity is in the area of the lungs; the head is above this area; the hips and legs, below it. In contrast, a device such as “Swim-Ezy” causes elevation of the hip region and depression of the other areas of the body. Consider the case of a non-swimmer who relies upon the assurance of safety and unsinkability in respondent’s advertisements and steps into water over his head: he may find that while his hips are floating, his face is being forced under water. The danger to the individual if this happens is obvious. Similarly, a person attacked suddenly by disabling cramps or other pain while wearing “Swim-Ezy” in the water may find that his head is submerged under water, though his hips may continue to float. “Swim-Ezy”, in short, is not an effective life preserver. It does not assure the wearer safety from the dangers of swimming or from the wearer’s ineptness in swimming.

Swimming, it should be noted, is not floating. Swimming is a purposeful self-propulsion through the water. A device such as “Swim-Ezy” may help the novice swimmer to overcome a certain initial fear or hesitancy in attempting to swim, and so may indirectly assist in the teaching of swimming or in the acquisition of the skills of a proficient swimmer. In no sense, however, can a device such as “Swim-Ezy” impart to the novice or poor swimmer the security in deep water that comes to the expert or champion swimmer through long training in breathing, muscular coordination, and other attributes of the good swimmer.

Thus, we agree with the examiner that respondent’s representations of unsinkability and of champion performance are false and

deceptive. Nor do we accept respondent's contention that the representation that "Swim-Ezy" will enable the wearer to perform like, or become, a champion or skilled swimmer, even if it is false, should be disregarded as mere harmless "puffing". See, e.g., *Kidder Oil Co. v. F.T.C.*, 117 F. 2d 892 (7th Cir. 1941). This hyperbolic representation contains at least a kernel of dangerously misleading matter. Even if most people would discount the claim that, wearing "Swim-Ezy", they will forthwith become expert swimmers, they will not necessarily discount the implied representations that "Swim-Ezy" will enable them to take the kind of risks that only proficient swimmers should take. The ordinary person may well understand, from the advertisements for "Swim-Ezy", that, wearing this device, he can with complete impunity swim in as deep water, for as long a period of time, and as far out from shore, as an expert swimmer. Included in the representation that "Swim-Ezy" enables the wearer to perform as an expert or champion swimmer is, we find, a representation that extraordinary safety and security are to be obtained by wearing "Swim-Ezy"—the safety and security ordinarily enjoyed only by the champion or expert swimmer. The representations of unsinkability and of expert performance in respondent's advertisements are, thus, intertwined, and constitute, contrary to fact, a claim that "Swim-Ezy" will protect the non-swimmer or inexperienced swimmer from all danger in any and all aquatic circumstances.

We are, however, disposed to eliminate the prohibition in the cease and desist order of the representation that "Swim-Ezy" enables the wearer to "look like" a champion swimmer. That representation seems to us, standing alone, harmless puffing.

In addition to its substantive attack on the examiner's findings, respondent on this appeal challenges the examiner's refusal to allow a continuance, or, alternatively, to permit the record to remain open after completion of the hearings, in order that respondent might have more time to obtain the services of a testing company to substantiate the truth of the challenged representations.

Under our Rules of Practice, responsibility for the orderly and expeditious conduct of adjudicative hearings is committed very largely to the sound discretion of the hearing examiners. Rule 3.15(c). The reason for so allocating responsibility in matters such as continuances is plain. Whether to grant a continuance depends on an on-the-spot assessment of a wide variety of factors: the good faith of the moving and opposing parties, the relative hardship to the parties should the motion be granted or denied, the balance of convenience in terms of witnesses and evidence, the examiner's own commitments, and so on. The Commission is ordinarily

ill-equipped to make an evaluation of such factors sufficiently responsive to the particular circumstances of the individual case. Our review of the examiner's ruling on such questions should properly be limited to determining whether there has been an abuse of discretion.

Although we find no indication of bad faith or dilatoriness on the part of respondent's counsel in requesting the continuance or, in the alternative, opportunity to offer evidence after the closing of the record, neither do we find that the examiner abused his discretion in denying such relief. It was open to the examiner to find that respondent was unjustified in so delaying the initiation of correspondence with the testing company that, in the event the testing company was not prepared to act promptly, it would in all likelihood be impossible for respondent to meet the hearing schedule—as, indeed, happened. In this connection, we regard as significant the fact that, although respondent was apprised of the Commission's investigation into his representations regarding "Swim-Ezy" long before the issuance of the formal complaint in this matter, he made no move to obtain the services of a testing company until more than a month after he filed an answer to the complaint. In the circumstances, there is a hollow ring to the claim that the hearings were held so promptly as to deny respondent a fair opportunity to prepare his defense.

In any event, for the Commission to overrule the examiner on this point would ill accord with the spirit of Section 6(a) of the Administrative Procedure Act, which requires agencies subject to the Act, such as the Commission, to proceed in all matters before it "with reasonable dispatch", and of our Rule 3.15(c), which imposes on hearing examiners the duty "to take all necessary action to avoid delay in the disposition of proceedings". Effectuation of these two provisions requires broad delegation to the examiners of the power to rule on motions for continuances and similar relief.

While we are not deciding the instant case on such a ground, we are inclined to think that an advertiser is under a duty, *before* he makes any representation which, if false, could cause injury to the health or personal safety of the user of the advertised product, to make reasonable inquiry into the truth or falsity of the representation. He should have in his possession such information as would satisfy a reasonable and prudent businessman, acting in good faith, that such representation was true. To make a representation of this sort, without such minimum substantiation, is to demonstrate a reckless disregard for human health and safety, and is clearly an unfair and deceptive practice.

That this is so is evident from basic principles governing the law of false and misleading representations. One who affirmatively advertises a product to be safe, in a context in which the prospective user's health or safety may be adversely affected if the claim is false, implicitly represents that he has a reasonable and substantial foundation in fact for making the claim. Consider the case of an advertisement for a sunburn oil which states that the product will absolutely prevent painful sunburn, no matter how prolonged the user's exposure to the sun. The purchaser of this product would certainly be surprised and dismayed to find that the advertiser had made such a claim without having solid reason to believe it to be true. Purchasers believe that where such a claim is made, it has been substantiated in advance; the belief is reasonable and, we think, widespread. It is entitled to the Commission's protection.

Respondent's testimony in this case makes abundantly clear that he predicated his belief in the absolute safety and unsinkability obtainable by wearing "Swim-Ezy" on utterly unreliable, subjective impressions derived from the use of the device by himself and members of his immediate family. Thus, he put on the market a potentially dangerous device—dangerous not in itself, but in that it might lure a non-swimmer or unskilled swimmer into, literally, deep water, lulled by respondent's representations of absolute safety and unsinkability—without first attempting to ascertain, with reasonable care and diligence, that the device actually possessed the qualities he was claiming for it.

Against this background, respondent's contention that the hearing examiner acted inequitably in refusing to delay the hearings in order to give respondent still more time to attempt to substantiate his claims for "Swim-Ezy" is indeed unpersuasive. Respondent had been engaged in the manufacture and sale of "Swim-Ezy" for several years prior to the issuance of the formal complaint in this matter. He thus had ample time to test the truthfulness of his claims for the device without requiring that the proceeding herein be delayed. In fact, his failure promptly to ascertain the truthfulness *vel non* of those claims was itself, as has been noted, in disregard of the health and safety of the consuming public.

To the extent consistent with this opinion, the findings of fact and conclusions of law contained in the initial decision are adopted by the Commission. We have modified the order to cease and desist contained therein in accordance with our decision on this appeal. In addition, certain changes have been made in the language of the order in order to make it clearer and more effective.

Commissioner Anderson dissented in part.

Final Order

63 F.T.C.

OPINION, DISSENTING IN PART

NOVEMBER 7, 1963

By ANDERSON, *Commissioner*:

I concur in all views expressed by the majority, with the exception of the holding that respondent should be permitted to represent that his device enables the user to "look like" a champion swimmer. Since a champion swimmer looks like any other swimmer, or even a non-swimmer, when he is not actually swimming, such a claim certainly conveys the impression that the user will be able to perform like a champion swimmer. And it is obvious that a device which "causes elevation of the hip region and depression of the other areas of the body" will not enable the user to "look like" a champion. Aside from the fact that the purchaser may be deceived as to the safety of the device by the claim in question, he is also entitled to protection from deceptive advertising even though he is motivated solely by vanity in making his purchase. *Federal Trade Commission v. Algoma Lumber Company*, 291 U.S. 67; *Ward Laboratories, Inc., et al. v. Federal Trade Commission*, 276 F. 2d 952.

FINAL ORDER

NOVEMBER 7, 1963

This matter has been heard by the Commission on respondent's appeal from the initial decision of the hearing examiner. Upon consideration of the record and briefs submitted by the parties—oral argument having been cancelled by the Commission, in accordance with Section 3.22(f) of the Rules of Practice, at the request of both parties—the Commission has rendered its decision, granting the appeal in part but denying it in all other respects. The Commission has determined, for the reasons stated in the accompanying opinion, that the order to cease and desist contained in the initial decision should be modified and, as modified, adopted and issued as the Commission's final order. Therefore,

It is ordered, That respondent, Heinz W. Kirchner, an individual trading as Universe Company, and respondent's agents, representatives and employees, directly or under any name or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution, in commerce, of the device known as "Swim-Ezy", or any other swimming aid or device of similar design, construction, or intended use, do forthwith cease and desist

from representing, stating or implying, by words or pictorially or otherwise, that such device:

(1) can or will prevent the user thereof from sinking, or render him unsinkable;

(2) can or will assist the user thereof to float, or increase his buoyancy, unless respondent shall state, clearly and conspicuously and in immediate conjunction with any such representation, that such device is not a life preserver, and will not render the user thereof unsinkable, and should not be used in deep water by persons who cannot swim;

(3) can or will protect the user thereof from the dangers associated with swimming or bathing, such as (but not limited to) the danger of sudden cramps or other disabling pain;

(4) can or will enable the user thereof to become or perform like a skilled, expert or champion swimmer; or

(5) is guaranteed, unless all the terms and conditions of the guarantee are fully, accurately, clearly and conspicuously disclosed in immediate conjunction with any such representation.

It is further ordered, That respondent shall file with the Commission, within sixty (60) days after service of the order herein upon him, a report in writing setting forth in detail the manner and form of respondent's compliance with the order.

By the Commission, Commissioner Anderson dissenting in part.

IN THE MATTER OF

LUDWIG C. GRAF TRADING AS GRAF'S FURS ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION AND THE FUR PRODUCTS LABELING ACTS

Docket C-619. Complaint, Nov. 8, 1963—Decision, Nov. 8, 1963

Consent order requiring a San Diego, Calif., retail furrier to cease violating the Fur Products Labeling Act by representing falsely, on labels and in newspaper advertising, that sale prices were reduced from stated "regular" prices which were, in fact, fictitious; failing in invoicing and advertising, to show the true animal name of fur used in a fur product; failing, on invoices, to show the country of origin of imported furs, and invoicing falsely with respect to the country of origin—for example, showing Canada as the source of Russian furs; invoicing furs deceptively as "Broadtail" and artificially colored furs as natural, and failing in other respects to comply with invoicing requirements; and failing to maintain adequate records as a basis for pricing claims.

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COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act and by virtue of the authority vested in it by said Acts, the Federal Trade Commission having reason to believe that Ludwig C. Graf, also known as Ludi Carl Graf, an individual trading as Graf's Furs, and Ludi H. Graf, and Fred J. Graf, individually and as employees who cooperate with the said Ludwig C. Graf in the management and operation of said Graf's Furs, hereinafter referred to as respondents have violated the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling 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 Ludwig C. Graf, also known as Ludi Carl Graf, is an individual trading as Graf's Furs.

Respondents Ludi H. Graf and Fred J. Graf are individuals who cooperate in the management and operation of said Graf's Furs.

Respondents are retailers of fur products with their office and principal place of business located at 1200 Fifth Avenue, in the City of San Diego, State of California.

PAR. 2. Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, respondents have been and are now engaged in the introduction into commerce, and in the sale, advertising, and offering for sale in commerce, and in transportation and distribution in commerce, of fur products; and have sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of furs which have been shipped and received in commerce, as the terms "commerce", "fur" and "fur product" are defined in the Fur Products Labeling Act.

PAR. 3. Certain of said fur products were misbranded in that labels affixed thereto represented prices of fur products as having been reduced from regular or usual prices when the so-called regular or usual prices were in fact fictitious in that they were not the prices at which said merchandise was usually sold by respondents in the recent regular course of business, in violation of Section 4(1) of the Fur Products Labeling Act.

PAR. 4. Certain of said fur products were falsely and deceptively invoiced by the respondents in that they were not invoiced as required by Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated under such Act.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were fur products covered by invoices which failed:

1. To show the true animal name of the fur used in the fur product.
2. To show the country of origin of imported furs used in fur products.

PAR. 5. Certain of said fur products were falsely and deceptively invoiced in that respondents set forth on invoices pertaining to fur products the name of an animal other than the name of the animal that produced the fur from which the said fur products had been manufactured, in violation of Section 5(b)(2) of the Fur Products Labeling Act.

PAR. 6. Certain of said fur products were falsely and deceptively invoiced with respect to the name or designation of the animal or animals that produced the fur from which the said fur products had been manufactured, in violation of Section 5(b)(2) of the Fur Products Labeling Act.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were fur products which were invoiced as "Broadtail" thereby implying that the furs contained therein were entitled to the designation "Broadtail Lamb" when in truth and in fact they were not entitled to such designations.

PAR. 7. Certain of said fur products were falsely and deceptively invoiced in that said fur products were invoiced to show that the fur contained therein was natural, when in fact such fur was pointed, bleached, dyed, tip-dyed, or otherwise artificially colored, in violation of Section 5(b)(2) of the Fur Products Labeling Act.

PAR. 8. Certain of said fur products were falsely and deceptively invoiced with respect to the name of the country of origin of imported furs used in such fur products, in violation of Section 5(b)(2) of the Fur Products Labeling Act.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were fur products invoiced to show the name of the country of origin of furs contained in such fur products as Canada when the country of origin of such furs was, in fact, Russia.

PAR. 9. Certain of said fur products were falsely and deceptively invoiced in violation of the Fur Products Labeling Act in that they were not invoiced in accordance with the Rules and Regulations promulgated thereunder in the following respects:

- (a) Information required under Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated

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thereunder was set forth on invoices in abbreviated form, in violation of Rule 4 of said Rules and Regulations.

(b) The term "Dyed Broadtail-processed Lamb" was not set forth on invoices in the manner required by law, in violation of Rule 10 of said Rules and Regulations.

(c) Required item numbers were not set forth on invoices, in violation of Rule 40 of said Rules and Regulations.

PAR. 10. Certain of said fur products were falsely and deceptively advertised in violation of the Fur Products Labeling Act in that certain advertisements intended to aid, promote and assist, directly or indirectly, in the sale and offering for sale of such fur products were not in accordance with the provisions of Section 5(a) of the said Act.

Among and included in the aforesaid advertisements, but not limited thereto, were advertisements of respondents which appeared in issues of the San Diego Union, a newspaper published in the City of San Diego, State of California.

Among such false and deceptive advertisements, but not limited thereto, were advertisements which failed to show the true animal name of the fur used in the fur product.

PAR. 11. By means of the aforesaid advertisements and other advertisements of similar import and meaning not specifically referred to herein, respondents falsely and deceptively advertised fur products in that said advertisements represented that the prices of fur products were reduced from regular or usual retail prices and that the amount of such price reductions afforded savings to the purchasers of respondents' products, when the so-called regular or usual retail prices were in fact fictitious in that they were not the prices at which said merchandise was usually sold by respondents in the recent regular course of business and the said fur products were not reduced in price as represented and the represented savings were not thereby afforded to the purchasers, in violation of Section 5(a)(5) of the Fur Products Labeling Act and Rule 44(a) of the Rules and Regulations promulgated under the said Act.

PAR. 12. Respondents falsely and deceptively advertised fur products by affixing labels thereto which represented either directly or by implication that prices of such fur products had been reduced from regular or usual prices of such products and that the amount of such reductions constituted savings to purchasers when the so-called regular or usual prices were in fact fictitious in that they were not the prices at which said merchandise was usually sold by respondents in the recent regular course of business and the said fur products were not reduced in price as represented and the rep-

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resented savings were not thereby afforded to purchasers, in violation of Section 5(a)(5) of the Fur Products Labeling Act and Rule 44(a) of the Rules and Regulations.

PAR. 13. In advertising fur products for sale, as aforesaid, respondents made pricing claims and representations of the types covered by subsections (a), (b), (c), and (d) of Rule 44 of the Regulations under the Fur Products Labeling Act. Respondents in making such claims and representations failed to maintain full and adequate records disclosing the facts upon which such pricing claims and representations were based, in violation of Rule 44(e) of the said Rules and Regulations.

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The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act and the Fur Products Labeling Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Ludwig C. Graf, also known as Ludi Carl Graf, is an individual trading under his own name and as Graf's Furs with his office and principal place of business located at 1200 Fifth Avenue, in the City of San Diego, State of California.

Respondents Ludi H. Graf and Fred J. Graf are individuals and employees of Graf's Furs, and their address is the same as that of Ludwig C. Graf.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

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ORDER

It is ordered, That respondents Ludwig C. Graf, also known as Ludi Carl Graf, an individual trading as Graf's Furs, or under any other trade name and Ludi H. Graf and Fred J. Graf, individually and as employees who cooperate with the said Ludwig C. Graf in the management and operation of said Graf's Furs and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product; or in connection with the sale, advertising, offering for sale, transportation or distribution, of any fur product which is made in whole or in part of fur which has been shipped and received in commerce, as "commerce", "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Misbranding fur products by:

1. Falsely or deceptively labeling or otherwise identifying such products by any representation that any price, when accompanied or unaccompanied by any descriptive language, was the price at which the merchandise so represented was usually and customarily sold at retail by the respondents unless such merchandise was in fact usually and customarily sold at retail at such price by the respondents in the recent past.
2. Misrepresenting in any manner on labels or other means of identification the savings available to purchasers of respondents' products.
3. Falsely or deceptively representing in any manner, directly or by implication, on labels or other means of identification that prices of respondents' fur products are reduced.

B. Falsely or deceptively invoicing fur products by:

1. Failing to furnish invoices to purchasers of fur products showing in words and figures plainly legible all the information required to be disclosed in each of the subsections of Section 5(b)(1) of the Fur Products Labeling Act.
2. Setting forth on invoices pertaining to fur products any false and deceptive information with respect to the name or designation of the animal or animals that produced the fur contained in such fur product.

3. Setting forth on the invoices pertaining to fur products the name or names of any animal or animals other than the name of the animal producing the fur contained in the fur product as specified in the Fur Products Name Guide, and as prescribed by the Rules and Regulations.

4. Representing directly or by implication on invoices that the fur contained in fur products is natural when such fur is pointed, bleached, dyed, tip-dyed, or otherwise artificially colored.

5. Misrepresenting in any manner, directly or by implication, the country of origin of the fur contained in fur products.

6. Setting forth information required under Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder in abbreviated form.

7. Failing to set forth the term "Dyed Broadtail-processed Lamb" in the manner required where an election is made to use that term instead of the words "Dyed Lamb".

8. Failing to set forth on invoices the item number or mark assigned to fur products.

C. Falsely or deceptively advertising fur products through the use of any advertisement, representation, public announcement or notice which is intended to aid, promote or assist, directly or indirectly, in the sale, or offering for sale of any fur products, and which:

1. Fails to set forth in words and figures plainly legible all the information required to be disclosed by each of the subsections of Section 5(a) of the Fur Products Labeling Act.

2. Represents, directly or by implication, that any price, when accompanied or unaccompanied by any descriptive language, was the price at which the merchandise advertised was usually and customarily sold at retail by the respondents unless such advertised merchandise was in fact usually and customarily sold at retail at such price by respondents in the recent past.

3. Misrepresents in any manner the savings available to purchasers of respondents' fur products.

4. Falsely or deceptively represents in any manner that prices of respondents' fur products are reduced.

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D. Making claims and representations of the types covered by subsections (a), (b), (c), and (d) of Rule 44 of the Rules and Regulations promulgated under the Fur Products Labeling Act unless there are maintained by respondents full and adequate records disclosing the facts upon which such claims and representations are based.