
IN THE MATTER OF
STAUFFER LABORATORIES, INC., ET AL.

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

Docket 7841. Complaint, Mar. 21, 1960—Decision, Feb. 7, 1964

Order requiring Los Angeles sellers of a device operated by electric current and designated as a "Posture Rest" and "Magic Couch", to cease representing falsely in advertisements in magazines and periodicals and in advertising matter and brochures distributed to dealers that the device was of value in reducing the body in particular areas such as hips, thighs, legs and stomach, as well as the over-all body weight, and that it would tone and firm sagging muscles.

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 Stauffer Labora-

* Reported as amended by order of hearing examiner dated Oct. 20, 1960.

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tories, Inc., a corporation, and Bernard H. Stauffer, 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 Stauffer Laboratories, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Mexico, with its principal office and place of business located at 1919 Vineburn Avenue, in the city of Los Angeles, California.

Respondent Bernard H. Stauffer is the president of the corporate respondent and formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His address 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, directly to the public and also to distributors and dealers, of a device as "device" is defined in the Federal Trade Commission Act used in connection with the "Stauffer Home Plan". Such device operates by electrical current and is and has been designated as a "Posture Rest" and "Magic Couch".

PAR. 3. Respondents cause the said device, when sold, to be transported from their place of business in the State of California to purchasers thereof located in various other states of the United States and in the District of Columbia both for rental and sale. Respondents maintain, and at all times mentioned herein have maintained, a course of trade in said device in commerce as "commerce" is defined in the Federal Trade Commission Act. The volume of business in such commerce has been and is substantial.

PAR. 4. In the course and conduct of their aforesaid business, respondents have disseminated, and have caused the dissemination of, certain advertisements concerning the said device by the United States mail and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including but not limited to magazines and periodicals of general circulation and in advertising matter and brochures supplied to dealers and distributors, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said device; and respondents have disseminated, and caused the dissemination of, advertisements

concerning said device by various means, including but not limited to the aforesaid media, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said device in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Among and typical of the statements and representations contained in said advertisements disseminated as hereinabove set forth are the following:

Greet summer with a lovelier figure.
How you'll look in a swimsuit depends on
how you reduce. No longer need
heavy hips, thighs, legs and waistline "rolls"
embarrass you. Beautify your posture,
reproportion your figure into more
youthful looking, lovelier lines by trimming
away unwanted inches with the famous
Stauffer home reducing plan
of effortless exercise and calorie reduction.

And the wonderful thing is that you
can do this in your own home.
Reduce—while you relax * * * with the
Stauffer home reducing plan.
This plan of effortless exercise and
calorie reduction lets you lose pounds—
and inches—while you relax on the
"Magic Couch", the famous Posture-Rest.

* * * The Magic Couch (Posture-Rest) is the heart of the
Stauffer plan of effortless exercise and calorie reduction.

* * * You lose unwanted pounds.

You lose inches where you need to—from hips, tummy, thighs.

You achieve a graceful lifted posture.

Your skin fits smoothly-sagging tissue is firmed and
toned. * * *

There is more to the Stauffer home
plan than just reducing. Rather, it
is a complete program of scientific figure control. It not only takes off
excess weight, but also removes hard-to-lose inches from ankles
thighs, hips and tummy. * * *

For a woman, it tones and firms
sagging muscles, beautifies posture
for a lovelier carriage, and gives her
a more youthful-looking figure.

PAR. 6. Through the use of the statements contained in the aforesaid advertisements, and others similar thereto not specifically set out herein, respondents have represented and are now representing, di-

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rectly and by implication, that said device used in connection with a "Plan" which provides for a low calorie diet:

1. Is of value in reducing the body in particular areas such as hips, thighs, legs, and the stomach, as well as the over-all body weight.*
2. Will tone and firm sagging muscles.

PAR. 7. The said representations were and are misleading in material respects and constituted, and now constitute, "false advertisements" as that term is defined in the Federal Trade Commission Act. In truth and in fact, the use of said devices:

1. Is of no value either in reducing the body in any particular area or the over-all body weight. Any reduction of weight that might result from the use of respondents' "Plan" will be brought about by the reduction in the caloric intake and not by use of the device.
2. Will neither tone nor firm sagging muscles.

PAR. 8. The dissemination by the respondents of the false advertisements, as aforesaid, constituted, and now constitutes, 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.

Rhyne & Rhyne, Washington, D.C., by *Mr. Charles S. Rhyne*, for respondents.

INITIAL DECISION BY EDWARD CREEL, HEARING EXAMINER

MARCH 21, 1963

The Federal Trade Commission issued its complaint against the respondents on March 21, 1960, charging them with disseminating advertisements which falsely represented the effects to be obtained from a device designated as Posture-Rest and as Magic Couch in connection with their Stauffer Home Reducing Plan. The complaint charged that these practices constituted unfair and deceptive acts and practices in violation of Section 5 of the Federal Trade Commission Act. Respondents' answer denied generally the allegations of the complaint, although some allegations were admitted. Following the trial of the case, the hearing examiner filed an initial decision on June 26, 1962. On February 21, 1963 [62 F.T.C. 1511], the Commission vacated and set aside this initial decision and remanded the matter to the hearing examiner for his further consideration and for the preparation and filing of a new initial decision.

* Reported as amended by order of hearing examiner dated Oct. 20, 1960.

This proceeding is again 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 respondents and by counsel supporting the complaint and oral argument thereon. 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 Stauffer Laboratories, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Mexico, with its principal office and place of business located at 1919 Vineburn Avenue, Los Angeles, California.

Respondent Bernard H. Stauffer is president of the corporate respondent and formulates, directs and controls the acts and practices of the corporate respondent. His address is the same as that of the corporate respondent.

Respondents for some time last past have been engaged in the advertising, offering for sale, sale and distribution, directly to the public and also to distributors and dealers, of a device, as "device" is defined in the Federal Trade Commission Act, used in connection with a body-reducing plan called the "Stauffer Home Plan." Such device operates by electrical current and is, and has been designated as a "Posture-Rest" and "Magic Couch".

Respondents cause the said device, when sold, to be transported from their place of business in the State of California to purchasers thereof located in various other States of the United States and in the District of Columbia both for rental and sale. Respondents maintain, and at all times mentioned herein have maintained, a course of trade in said device in commerce, as "commerce" is defined in the Federal Trade Commission Act. The volume of business in such commerce has been, and is, substantial.

In the course and conduct of their aforesaid business, respondents have disseminated, and have caused the dissemination of, certain advertisements concerning the said device by the United States mail and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including but not limited to magazines and periodicals of general circulation and in advertising matter

and brochures supplied to dealers and distributors, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said device; and respondents have disseminated, and caused the dissemination of, advertisements concerning said device by various means, including but not limited to the aforesaid media, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said device in commerce, as "commerce" is defined in the Federal Trade Commission Act.

Among and typical of the statements and representations contained in said advertisements disseminated as hereinabove found are the following:

Greet summer with a lovelier figure.
How you'll look in a swimsuit depends on
how you reduce. No longer need
heavy hips, thighs, legs and waistline "rolls"
embarrass you. Beautify your posture,
reproportion your figure into more
youthful looking, lovelier lines by trimming
away unwanted inches with the famous
Stauffer home reducing plan
of effortless exercise and calorie reduction.

And the wonderful thing is that you
Can do this in your own home.
Reduce—while you relax * * * with the
Stauffer home reducing plan.
This plan of effortless exercise and
calorie reduction lets you lose pounds—
and inches—while you relax on the
"Magic Couch", the famous Posture-Rest.

* * * You lose unwanted pounds.
You lose inches where you need to—from hips, tummy,
thighs. You achieve a graceful, lifted posture.
Your skin fits smoothly—sagging tissue is firmed
and toned. * * *

There is more to the Stauffer home
plan than just reducing. Rather, it
is a complete program of scientific
figure control. It not only takes off
excess weight, but also removes
hard-to-lose inches from ankles
thighs, hips and tummy. * * *
For a woman, it tones and firms
sagging muscles, beautifies posture
for a lovelier carriage, and gives her
a more youthful-looking figure.

* * * The Magic Couch (Posture-Rest) is the heart
of the Stauffer Plan of effortless exercise and
calorie reduction.

Through the use of the statements contained in the aforesaid advertisements respondents have represented, directly and by implication, that said device used in connection with a plan which provides for a low calorie diet:

1. Will reduce the body in particular areas such as hips, thighs, legs, and stomach, as well as the over-all body weight.
2. Will tone and firm sagging muscles.

The foregoing findings of fact are in substance those which were proposed by counsel supporting the complaint and were conceded by respondents to be accurate, except that respondents did not concede that the advertisements referred to above were typical of respondents' advertising or that the description of respondents' plan was complete. (Tr. 1461-62.)

The complaint alleges that respondents' device, which they designate as "Posture-Rest" and "Magic Couch", is of no value either in reducing the body in any particular area or the over-all body weight and will neither tone nor firm sagging muscles, and that as a result the dissemination of the above advertisements, and others of like import, were false and constituted unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

The basic device is composed of a motorized unit with a platform on top which has been described by respondents as an oscillating platform; a leg and foot rest; and an upper body and head rest. Thus, the basic device is composed of three parts. Respondents contend that they are selling not only this device, but a home reducing plan which includes a "Calorie Guide" and consultations with the counselor or salesman who makes the original sale to the user.

EVIDENCE SUPPORTING THE COMPLAINT

In support of the allegations that respondents' device is ineffective in reducing weight and toning and firming muscles, counsel supporting the complaint adduced testimony from several physicians, two of whom had conducted certain tests of respondents' device. The first of these, Dr. Charles S. Wise,¹ was professor of physical medicine and rehabilitation at George Washington University School of Medicine and director of the Department of Physical Medicine and Rehabilitation at George Washington University Hospital. His education, experience, and a list of his writings are set forth in detail in Commission Exhibits 18, 19 and 20.

¹ Testimony begins at Tr. 31.

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At the request of someone at the Federal Trade Commission, Dr. Wise conducted tests of the Magic Couch by having a number of obese employees of the George Washington University Hospital use it at the hospital for a period of ten weeks. He concluded—

* * * on my experience and knowledge of the effectiveness of massage, physiological effects, the physiological effects of mechanical massage, my knowledge and experience in the management of patients with obesity, my knowledge and experience dealing with muscle physiology, muscle tone, muscle weakness and strength, the sum of my clinical experience, plus, together with my observations of the use of this device, as well as other mechanical devices. (Tr. 48.)—that the Magic Couch had no effect on weight or dimensions, and would not tone or firm muscles. He further stated that the device would not accomplish these things either alone or in any plan of which he could conceive.

Dr. Frederick J. Kottke,² professor and head of the Department of Physical Medicine and Rehabilitation of University of Minnesota Medical School, whose education, experience, and publications are set forth in Commission Exhibits 21 and 22, testified to the same effect. He also made tests of respondents' device at respondents' behest in 1958, and the results of these tests, which recorded increases in oxygen consumption of individuals using the device, are shown by Commission Exhibits 23 and 24.

The machine which he used was called "Metabolaid", which was one of respondents' machines. This machine could be operated at one-half the speed of the Magic Couch and it is not clear which speed was used. Dr. Kottke's testimony, which was given several years after these tests were performed, was—

My opinion is that the machine of this type using vibration or oscillation in the manner recommended in the treatment brochure has no little effect on producing or requiring an increase in energy consumption of muscles or of the body as a whole that it is less than the normal energy consumption and consequently would not be effective in increasing either the rate of energy or the reduction of fat in the body. (Tr. 117.)

He further said:

The couch will be ineffective in influencing change in weight regardless of what other aspects are used in the treatment and
The couch would be ineffective in increasing strength or tone of muscle. (Tr. 119.)

Dr. Arthur S. Abramson,³ professor and chairman of the Department of Rehabilitation and Medicine at Albert Einstein College of

² Testimony begins at Tr. 80.

³ Testimony begins at Tr. 138.

Medicine of Yeshiva University, and director and visiting physician, physical medicine and rehabilitation, Bronx Municipal Hospital Center, whose training and experience, associations, and list of publications are shown by Commission Exhibit 26, testified that he had examined respondents' device briefly and respondents' instructions for its use; that it was his opinion that the Magic Couch was of no value in reducing the body, either over-all or in any particular area; and that it would not tone or firm muscles. He further testified in substance that in his opinion neither diet nor anything else in combination with the Magic Couch would make the Magic Couch more effective.

These three eminently qualified physicians, two of whom had made tests of respondents' device as hereinbefore described, all testified that the device was of no value in reducing weight or toning or firming muscles either alone or in conjunction with a diet or anything else.

RESPONDENTS' EVIDENCE

Dr. Irving Rehman,⁴ a Doctor of Philosophy but not a Doctor of Medicine, associate professor of Anatomy at the University of Southern California School of Medicine, testified that respondents' device caused an expenditure of energy, and that in 1955 or 1956, he participated in the taking of X-ray motion pictures, in the record as Respondents Exhibits 2 and 3, which were shown at the hearing. These pictures were taken of polio patients at the Sister Kenny Memorial Hospital, El Monte, California. He said that the X-ray motion pictures were made of areas not involved which presumably means the pictures were made of muscles which were not paralyzed by polio. Dr. Rehman stated that he was an expert in X-ray motion pictures but was not an expert in the interpretation of them. It is concluded that these motion pictures demonstrated that the unit caused a movement of the muscles shown in the pictures but that the amount or degree of such movement or the effect of this movement on weight reduction or muscle tone cannot be determined from this evidence.

Respondents adduced evidence of Dr. Horace Alfred Anderson,⁵ a practicing physician in private practice in Tacoma, Washington, who was a specialist in internal medicine. A substantial part of his practice consisted of treating over-weight people. He testified that about 125 of his patients had used respondents' device and that about

⁴ Testimony begins at Tr. 177.

⁵ Testimony begins at Tr. 660.

50 percent of them lost weight without changing their dietary habits. He also testified that in his opinion the device would tone and firm sagging muscles.

Dr. Anderson further testified in substance that the medical profession generally would be convinced that the device was not effective.

Although Dr. Anderson had at one time been financially interested in the sale of respondents' device in Canada, it is believed that Dr. Anderson believed that respondents' device was effective in reducing weight in certain cases even though he apparently had no explanation which was acceptable to him as to how the effect was accomplished.

Dr. George Gilbert Rowland Kunz,⁶ a general practitioner, in Tacoma, Washington, testified that he believed respondents' device would reduce certain areas of the body, would reduce total body weight, and would tone and firm musculature.

Respondents also adduced evidence of Dr. John E. Potts,⁷ a private practitioner in Walla Walla, Washington, who was connected with a test of eleven individuals for a five-week period in 1961. The results of these tests are in the record as Respondents Exhibits 54, 55, and 56. The records which show the weight loss of these individuals were kept by a "Stauffer technician" in the Stauffer office, and there is considerable doubt as to Dr. Potts' knowledge of the correctness of these results or the manner in which they were obtained.

Dr. Mervin H. Ellestad,⁸ a medical doctor who was Chief of Staff at the Harbor General Hospital, Torrance, California, testified regarding a study which he conducted in a hospital at Long Beach, California. The purpose of this test was to determine the increased consumption of oxygen through the use of respondents' device. This test showed an increase in oxygen consumption of the individuals tested, and a description of the results of the test is in the record as Respondents Exhibit 57. These tests included resistive positions of individuals on the device as well as passive positions.

Dr. Philip J. Charley,⁹ a Ph.D. in biochemistry and nutrition with B.S. and M.S. degrees in engineering, who was a vice president of Truesdail Laboratories of Los Angeles, testified regarding tests which he performed to determine oxygen consumption through the use of respondents' device which were similar to the tests performed by Dr. Ellestad. A description of these tests and the results, which show the amount of oxygen consumption increase, are shown in Respondents Exhibit 6.

⁶ Testimony begins at Tr. 812.

⁷ Testimony begins at Tr. 882.

⁸ Testimony begins at Tr. 966.

⁹ Testimony begins at Tr. 223.

Dr. Harry H. Wilson,¹⁰ a medical doctor of Los Angeles, who was employed by respondents as a full-time consultant since 1958, following his retirement from active practice of medicine, testified that when he first came with the organization he was very much of the opinion that any potential effect of respondents' device was largely psychological, but that he had since changed his opinion and that he gradually came to the conclusion that if the device did affect the body it would do so only because it initiated normal reflex actions that were inherent within the body and that it was sufficient to stimulate muscular lengthening and contraction or neuromuscular reflex actions. It was his further view that the device without caloric reduction could cause weight loss, providing various factors were completely favorable to that end result, and he said those factors were—

The nutritional intake would have to be so nearly equilibrium, as far as weight and gain of the user was concerned, that a small increase, a very slight increase in caloric consumption might tend toward the loss of weight. (Tr. 1076.)

In answer to an inquiry as to the principal effect of the device when used by an obese person, he stated:

I think—this is purely an opinion and it would vary according to the individual, because they all could not possibly have the same principal effect. My impression has been that its value to the plan, from a psychological standpoint, would be the sense of self-esteem that embarking upon an improvement program caused in the user, plus the addiction to this more or less pleasant feeling, at fixed times per day, would be more likely to cause them to stick to their overall [*sic*] program than if it were not a part of the plan. Physiologically I think that the postural improving factors such as the stretching of non-elastic tissues, which tend to immobilize joints, and probably the stretching of spastic muscles, which may be helping immobilize joints in a bad posture, gives, may give to the average person a sense of relaxation and freedom of movement, and increased sense of well-being, which encourages them to keep on the improvement program. (Tr. 1076-77.)

In explaining that he believed the unit produces definite muscular activity, he stated:

There are three or four neuromuscular mechanisms within the body that I referred to, that are inherent. The simplest would be the direct stretch of a muscle. From my own observation, that isn't operative too many times by the placement of the body on this moving platform. In other words, I am inclined to believe, for those individuals whom I tested, the stretch was insufficient to affect the direct stretch reflex too often. It may be my studies were too limited, and the subjects too limited. (Tr. 1077.)

Respondents produced evidence of electromyograph tests and pictures of such tests as proof that the device will contract muscles.

¹⁰ Testimony begins at Tr. 1057.

In their oral argument on the proposed findings they stated that they did not place any great reliance on this evidence, that no specific findings regarding the electromyograph evidence were requested (Tr. 1496), and that they requested that this evidence be considered only insofar as it would support the evidence that muscle movement was caused by the device. Since it is found that the X-ray motion pictures do show muscle movement, no finding is being made regarding the electromyograph evidence.

Respondents also called twelve users of the device who testified that while they were on respondents' reducing plan they lost varying amounts of weight and inches. One of these witnesses testified that although she lost a total of 130 pounds, her eating habits remained unchanged.

Respondents conducted a contest which closed in April 1959 called the "10 Happiest Women". This contest was initiated by an employee of respondents, who became employed by the advertising agency which completed the contest. The purpose of the contest was to obtain information to form the basis for a national advertising program which would feature the ten winners of the contest. Entry forms were sent to customers of respondents, presumably by way of the saleswomen or counselors, and the contestants were to show certain body measurements and body weight prior to using the Stauffer Home Reducing Plan and the same information after having used it. The contestants were also instructed to furnish before and after photographs and to write a statement of their reasons why they were happier after using the plan. Each of the ten winners received "a dream trip for two to Paris and London". (CX 6-N) Respondents did prepare and use national advertising based on these photographs and descriptions of weight loss of many of these contestants. The entry forms containing the information described for about 230 women are in the record as Respondents Exhibits 26 thru 35. While this evidence shows weight loss of these individuals over a period of time, it is not competent to prove the reasons for such weight loss or the effectiveness of respondents' device.

REBUTTAL EVIDENCE IN SUPPORT OF THE COMPLAINT

An additional reason for not making specific findings with respect to the electromyograph evidence is the fact that Dr. Joseph Goodgold,¹¹ associate clinical professor, New York University College of Medicine, Department of Physical Medicine and Rehabilitation, who had had considerable experience in the field of electromyography,

¹¹ Testimony begins at Tr. 1407.

testified that electromyography cannot be used to determine the amount of muscle movement. Also, Dr. Alberto A. Marinacci,¹² an associate professor in the Department of Neurology at the University of Southern California School of Medicine, who teaches the "electromyogram and brain waves", testified that —

* * * An electromyograph only is good for one thing and that is to record the activity generated by the nerve of the muscle to see whether there is—whether it is a normal or an abnormal state, that is it, not to the variation of their anomaly. How much work that can do, how much that can not do, that will not do that. (Tr. 862)

Dr. G. Donald Whedon,¹³ Chief, Metabolic Disease Branch, National Institute of Arthritis and Metabolic Diseases, National Institutes of Health, Bethesda, Maryland, whose education, experience, and publications are set forth in Commission Exhibit 80, studied the evidence given by Drs. Ellestad and Charley and the results of the tests they performed, and in commenting upon his interpretation of the results of Dr. Ellestad's work stated:

I intend to compare the energy expenditure in the lying-down position, lying on the unit, with the unit in operation, and with the unit not turned on, as the best controlled situation in which to determine the action of this unit to increase the expenditure of energy, which in my understanding is its intention.

Now comparing in this one position with the unit on and the unit off, there is only a four per cent difference, and by statistical analysis this is not statistically significant.

Now in addition to that, there was made the same comparison with the machine on and off—this is in Dr. Ellestad's data I am talking about—looking at his figures for the difference with the machine on and off in all three passive positions, the positions in which Dr. Ellestad at the bottom of page 3 of his report says that he obtained only 10.5 per cent difference. By statistical analysis this difference is not significance [*sic*], by my statistical analysis.

* * * * *

I started to say that I would like to comment in relation to this matter, if we were to accept the difference in energy expenditure between the machine on and off in all three passive positions, if we were to accept this difference of 17 ccs per meter square per minute as significant, then I would like to indicate what significance this really has in biological terms.

* * * * *

By that I mean, in order to accomplish the purpose for which the machine appears to be intended, the reduction of weight, the expenditure of energy, now 17 ccs of oxygen per meter square per minute calculates out to be 8.5 calories of energy per hour, if the machine is run for an entire hour.

* * * * *

Now the point that I think—the concept that I think is very important for everyone to understand, is this concept of basal metabolism. That is the energy

¹² Testimony begins at Tr. 839.

¹³ Testimony begins at Tr. 1330.

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expenditure in the resting situation which is used by Dr. Ellestad as the base line from which all of his comparisons of the machine were made. This is a situation in which the patient or subject is resting quietly in bed, not having consumed any food or drink for the preceding 10 to 14 hours.

Now the point is this: The moment that a subject shifts his position, sits up, dresses, or eats or even begins to talk, his energy expenditure becomes higher than the basal metabolic level. So that as I am sitting here talking, I am expending more energy by a significant amount than I would if I were in the basal situation, so that I think we need to have that concept in mind in examining the magnitude of the energy expenditure change which Dr. Ellestad obtained, if we were to concede that it was statistically significant.

This energy expenditure with a machine running for one hour amounts to not more than one half of one per cent of the total calories that an individual would consume and expend in a day. One hour of passive oscillation is 8.5 calories. This expenditure can be accomplished in about six to 8 minutes of just sitting and talking. It could be accomplished in four minutes of housework; it could be accomplished in two minutes of walking—

* * * * *

In terms of this expenditure of energy of 8.5 calories per hour with the machine running for one hour, as calculated from Dr. Ellestad's figures, in terms of tissue of the body this would be $\frac{1}{25}$ th of an ounce of body weight. If this action of the unit alone were to be relied upon for the loss in body weight, I calculated that it would take 400 days to lose one pound of weight; that is, it would take more than one year to lose one pound of weight. (Tr. 1348-52)

With regard to Dr. Charley's tests, which are also referred to as the "Truesdail Study", Dr. Whedon commented—

That the Truesdale [sic] study was set up in such a way that a comparison of the action of the unit could only be made with a subject in the back-lying position. In this situation the metabolic rate compared to basal, looking at Dr. Charley's report, was given as 107 in comparison with the basal metabolism rate of 100.

He states further, I believe, that this means that there was a seven per cent increase in energy expenditure caused by the unit in this position.

I would merely submit without stating, without having checked the statistical significance of this difference, that as far as biological significance, from the point of view of achieving a real degree of weight loss, that this is a lesser difference than was obtained by the Ellestad study. (Tr. 1354-55.)

He also said that there was nothing in the reports of the tests of Dr. Ellestad and Dr. Charley that indicated to him that the device was effective for causing weight loss.

DISCUSSION AND ADDITIONAL FINDINGS

It is believed that the questions to be decided here must be decided on the basis of the evidence of the best qualified witnesses in the absence of carefully controlled experimental evidence showing that the opinions of highly qualified experts are erroneous. It is believed

that the evidence offered in support of the charges of the complaint is not successfully overcome by respondents' evidence which consisted of observations and opinions of practicing physicians, oxygen consumption tests, muscle movement tests, and evidence of the effect of respondents' reducing plan on particular people.

Respondents contend that the issue is whether the device has any value whatsoever, and that they have shown that the device has some value, thereby resolving the issue raised by the pleadings in their favor. In absolute terms respondents are correct, in the sense that the use of the device increases the expenditure of energy above what would be expended in a resting state, but it is found that the device does not increase the expenditure of energy to a significant degree, and it is found that the device is not effective, or of value, as a device for reducing the weight or size of parts of the body or the entire body; and it is further found that the device is not effective in firming or toning muscles of the body.

It is true that any object can be used to exercise the body and even bodily movements without the use of any object can afford effective exercise, but the principle espoused by respondents is passive, effortless exercise and it is believed that the evidence shows such so-called exercise through the use of this device to be ineffective.

In 1958 and in 1960, respondents added certain attachments to their device which could be purchased separately or with the device, or could be earned by referring prospective customers to respondents' saleswomen. These attachments added a resistive principle to the effortless principle and were similar to those which respondents had previously used in their salons. To the extent that the resistance of hands and feet involves the use of energy, the effectiveness of the device with the attachments would be increased but the tests of the use of the device with the resistive attachments, although increasing energy expenditure considerably, still did not cause sufficient expenditure of energy to establish that the device was effective for its claimed purposes.

It is further found that the said representations were and are misleading in material respects and constituted "false advertisements" as that term is defined in the Federal Trade Commission Act. In truth and in fact, the use of said device:

1. Will not reduce the body in any particular area or the over-all body weight. Any reduction of weight that might result from the use of respondents' plan will be brought about by the reduction in the caloric intake and not by use of the device.
2. Will neither tone nor firm sagging muscles.

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CONCLUSION

The dissemination by the respondents of the false advertisements, as aforesaid, constituted unfair and deceptive acts and practices in commerce, within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered, That respondent Stauffer Laboratories, Inc., a corporation, and its offices, and respondent Bernard H. Stauffer, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, distribution or rental of the device designated "Magic Couch" and "Posture-Rest", or any other device of substantially the same construction, design or operation, do forthwith cease and desist from:

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

(a) That said device will cause a reduction in size or weight of the human body or any particular area thereof; or that the use of said device in conjunction with a diet will cause a reduction in size or weight of the human body or any particular area thereof, unless it is clearly stated that any such reduction would be solely by reason of a diet;

(b) That said device, used separately or as part of a plan requiring a restricted diet, or as part of any other plan, will tone or firm human tissue, including muscle.

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

OPINION OF THE COMMISSION

FEBRUARY 7, 1964

By ANDERSON, *Commissioner*:

This matter is before the Commission upon the exceptions of the respondents to the hearing examiner's initial decision filed March 21,

1963, the second initial decision filed herein.¹ The complaint charges respondents with the dissemination of false and misleading advertisements in connection with promoting the sale of a device designated as "Posture-Rest" and "Magic Couch" used with the "Stauffer Home Plan." It is alleged that contrary to advertising representations the device is of no value either in reducing the body in any particular area or the over-all body weight and that it will neither tone nor firm sagging muscles. The examiner, in the decision now before us, found that the allegations in the complaint were sustained by the evidence, and he entered an order to cease and desist against respondents.²

The general contention of the respondents is to the effect that the evidence is insufficient to sustain the findings and conclusions of illegality. Respondents specifically challenge a number of findings of the examiner, and they also object to the asserted failure of the examiner to make rulings as to the credibility of the witnesses and the probative value of expert testimony. Among the specific points raised are these: (1) that the examiner erred in allegedly placing the burden of proof on respondents, (2) that he erred in allegedly altering the complaint from a "no value" charge to a "does not increase the expenditure of energy to a significant degree" charge, and (3) that he erred in allegedly denying respondents a fair hearing because of the events respecting one of respondents' witnesses.

The respondents are Stauffer Laboratories, Inc., a New Mexico corporation with principal offices located at 1919 Vineburn Avenue, Los Angeles, California, and its president Bernard H. Stauffer. They sell a device referred to as the "Posture-Rest" and "Magic Couch" in conjunction with a "plan" for weight reduction and muscle firming and toning. The basic device, resembling a couch, is composed of a motorized unit with an oscillating platform and two removable couch extensions.³

¹ The examiner filed a first initial decision on June 27, 1962. Therein the respondents were held to be in violation of law as charged and ordered by the examiner to cease and desist the practices he found unlawful. Upon exceptions by the respondents to that decision, the Commission ordered it vacated and set aside because of insufficient findings and remanded the proceeding to the examiner for preparation of a new initial decision containing adequate findings.

² In granting the petition for review as to the second initial decision, the Commission advised the parties that in such review it would consider not only the briefs and argument as to such decision but also the prior briefs and argument.

³ Respondents also have a device called the "Metabol-aid," which admittedly is identical to the "Posture-Rest (Magic Couch)", except that it operates at two speeds: one identical to the Posture-Rest and the other, one-half that speed. The Metabol-aid was a device offered to the medical profession.

Respondents, in their advertisements, promise to benefit persons afflicted with obesity and "sagging muscles." The following are typical advertising statements:

Get slim—stay slim

insist on Stauffer

the only home plan backed

by 20 years of reducing success

The Stauffer principle has helped

more than 5 million women

remake their figures.

It's a complete figure-beautifying

plan of effortless exercise and calorie reduction.

Stauffer's "Magic Couch"—The Posture-Rest

unit—provides controlled rhythmic motion.

Helps take off excess weight,

remove unwanted inches.

No starvation diets. No strenuous exercise.

Exercise comes first with Stauffer. But it's effortless exercise—without work or strain—on Stauffer's Magic Couch. This exercise does away with inches * * * tones and firms hard-to-reach problem areas * * * improves posture * * * even reproportions. When you want to lose both inches and pounds, exercise on the Magic Couch is combined with sensible calorie reduction. This brings about results you just can't get from diet alone. And every woman who reduces with Stauffer does it with the help and encouragement of another woman * * * a trained Stauffer counselor.

Greet Summer with a lovelier figure.

How you'll look in a swimsuit depends on

how you reduce. No longer need

heavy hips, thighs, legs and waistline "rolls"

embarrass you. Beautify your posture,

reproportion your figure into more

youthful looking, lovelier lines by trimming

away unwanted inches with the famous

Stauffer home reducing plan

of effortless exercise and calorie reduction * * * .

* * * The Magic Couch (Posture Rest) is the heart of the Stauffer home reducing plan of effortless exercise and calorie reduction * * * .

You lose unwanted pounds.

You lose inches where you need to—from hips, tummy, thighs.

You achieve a graceful, lifted posture.

Your skin fits smoothly—sagging tissue is firmed and toned.

There is more to the Stauffer home plan than just

reducing. Rather, it is a complete program of scientific figure control. It not only takes off excess weight, but also removes hard-to-lose inches from ankles thighs, hips and tummy.

For a woman, it tones and firms sagging muscles, beautifies posture for a lovelier carriage, and gives her a more youthful-looking figure.

The complaint as amended alleges that through the use of statements such as those set out above respondents have represented, directly and by implication, that its device used in connection with a "plan" which provides for a low calorie diet:

1. Is of value in reducing the body in particular areas such as hips, thighs, legs, and the stomach, as well as the over-all body weight.
2. Will tone and firm sagging muscles.

One of respondents' contentions is that the elements of the "Stauffer Home Plan" were ignored.⁴ It is claimed that evidence was presented against the device alone, whereas respondents assertedly advertise and sell their couch for use only as an "inextricable integral component" of their plan. While it is true that respondents mention the "plan" in their advertising, the emphasis is mainly on the device. The advertisements state or imply that the device itself will provide or contribute to the claimed benefits. For instance, one representation reads: "This exercise does away with inches * * * tones and firms hard to reach problem areas * * *." The "This exercise" is the exercise which the user is supposed to get from the couch; hence, according to the representation, it is the couch itself which does the reducing and toning.

While the advertisements briefly refer to calorie reduction, the general impression is that the couch provides most or all of the benefits. Certain of the advertisements state that the couch adds something which the user can't get by the diet alone, thus clearly plugging the merits of the couch. An example is as follows: "When you want to lose both inches and pounds, exercise on the Magic Couch is combined with sensible calorie reduction. This brings about results you just *can't get from diet alone* * * *." (Emphasis supplied.) The significance of the device is stressed in other ways, such as by referring to it as the "heart of the famous Stauffer Home Reducing Plan" and by prominent illustrations. In addition, respondents' advertisements mention "effortless exercise," which plainly places the emphasis on the device, and they make claims for reductions in specific areas (*e.g.*, "hard to lose inches from ankles, thighs, hips and

⁴ Respondents claim the essential elements of their plan are exercise, diet and motivation.

tummy”), which suggest the exercising of these areas by the device. When all these factors are considered, there is no doubt that respondents, though selling a device in conjunction with a plan, are also making claims for the effectiveness of the device independent of the plan. See *Damar Products, Inc.*, Docket No. 7769, 59 F.T.C. 1263, December 6, 1961, *affirmed*, *Damar Products v. United States*, 309 F. 2d 323 (3d Cir. 1962).

The complaint is directed to the device alone, and so the evidence principally concerns the device. The complaint states that respondents represented that *the device* used in connection with a “plan” providing for a low calorie diet would have the claimed benefits, and that *the device* will not provide such benefits as represented either in conjunction with the “plan” or without. That it is the device alone which is challenged is unmistakably clear from the sentence “Any reduction of weight that might result from the use of the respondents’ ‘Plan’ will be brought about by the reduction in the calorie intake and not by use of the device.”

Some comment is in order as to the nature of respondents’ “plan” offered in its advertisements. The representations themselves state that it is a “plan of effortless exercise and calorie reduction,” suggesting two elements: exercise and diet. In respondents’ manual entitled “A Lifetime Program for a Lifetime Problem,” it is explained that the plan embodies four phases; proper posture, muscle relaxation, weight reduction, and increased circulation. In all phases respondents recommend use of the “Posture Rest” except for weight reduction, and as to that the literature states: “* * * It is *suggested* that calorie intake be reduced below your usual consumption.” (Emphasis supplied.) Certain other advertisements mention a “counselor” service. Respondents insist that the plan includes “motivation,” but motivation for what? To lose weight and tone muscles? An incentive to achieve these objectives would be of little help unless the means are effective. Here the complaint raises no question about the effectiveness of diet; it is the effectiveness of the device alone which is disputed. On the latter, motivation would be important only to the extent that the device will perform as claimed, and this is the issue we are to decide.

We fail to see merit in respondents’ urging that a “plan” is involved. As stated above, the device was represented as being effective of itself, and the challenge is made to that claim. Moreover, the “plan” is in reality nothing more than the device served with a little garnish of advice and handholding.

Respondents object to certain findings of the examiner on the ground that tests or studies presented by witnesses supporting the

complaint were made with the device without the attachments.⁵ They claim that not one shred of evidence was introduced by complaint counsel against the attachments and that since the complaint was directed against respondents' plan, which includes use of the attachments, it should have been dismissed for failure to establish a prima facie case. In all of the advertisements above referred to, the pictures of the Posture-Rest device in no instance show any attachments, nor are attachments otherwise mentioned. Respondents' manual entitled "A Lifetime Program for a Lifetime Problem" explains the use of the device, using elaborate pictures and illustrations, but likewise makes no mention of any attachments. Not only that, but the advertisements state that the exercise is "effortless." The representations plainly were made for the device as it was pictured and described in the advertising, not as to a device with attachments for "resistive" exercising. It is well settled that the law is violated if the first contact is secured by deception. *Exposition Press, Inc. v. Federal Trade Commission*, 295 F. 2d 869, 873 (2d Cir. 1961), and cases cited therein. Moreover, the study conducted by Dr. Ellestad for respondents (to be discussed in detail later) in which resistive positions (*e.g.*, pulling on stretch bar) were used fails to show the claimed effectiveness of the device even with attachments. We therefore reject respondents' contention for dismissal of the complaint on the ground here considered.

EVIDENCE SUPPORTING THE COMPLAINT

Counsel in support of the complaint in their case-in-chief placed in evidence the testimony of three medical witnesses, all experts in their field. These were Dr. Charles S. Wise, professor of physical medicine and rehabilitation at George Washington School of Medicine, and director of the Department of Physical Medicine and Rehabilitation at the George Washington University Hospital; Dr. Frederick J. Kottke, professor and head of Department of Physical Medicine and Rehabilitation of University of Minnesota Medical School; Dr. Arthur S. Abramson, professor and chairman of the Department of Rehabilitation and Medicine at Albert Einstein College of Medicine of Yeshiva University, and director and visiting physician, physical medicine and rehabilitation, Bronx Municipal Hospital Center, New York. All three are diplomates of and certified by the American Board of Physical Medicine and Rehabilitation and Drs. Kottke and Abramson are members of the board itself. The

⁵ The attachments referred to include the "stretch bar" and other extra parts which apparently will provide a certain amount of resistance, thereby increasing the physical effort of the user.

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board consists of eleven members. It is the examining and qualifying board for doctors of medicine who wish to specialize in physical medicine and rehabilitation.

The examiner summarized the testimony of these witnesses as follows:

These three eminently qualified physicians, two of whom had made tests of respondents' device as hereinbefore described, all testified that the device was of no value in reducing weight or toning or firming muscles either alone or in conjunction with a diet or anything else.

The opinions of these authorities were based not only upon their general knowledge and experience but upon their familiarity with the device through observation.

Dr. Wise testified that in his opinion the use of the Magic Couch would have no effect on the reduction of weight or change in dimensions of the individual, used alone or as part of any plan that he could conceive of, and that it would not have any effect on the toning or firming of normal muscles. He said that he based his conclusion on his experience and knowledge of the effectiveness of massage, the physiological effects of mechanical massage, his knowledge and experience in the management of patients with obesity, his knowledge and experience dealing with muscle physiology, muscle tone, muscle weakness and strength, the sum of his clinical experience, together with his observations of the use of the device in question, as well as other mechanical devices.

On cross-examination, Dr. Wise was asked about the circumstances under which he had observed the device in operation, and it was then that he described his study of the use of the device by a number of obese George Washington University Hospital employees over a ten-week period.

Respondents refer to these observations as a "test" of their devices and then proceed to challenge the opinion as based on such "test," which they assert was improperly conducted. Their premise is faulty, however, because Dr. Wise's observation did not constitute a test in the strict sense of the word but simply a means by which he could see the device in operation. He testified that he wanted to "* * * at least observe this specific couch in operation before I would commit myself definitely * * *." The fact that he did observe the device in actual use, if anything, strengthens his testimony concerning the lack of efficacy of the couch. Moreover, his opinion was based upon his whole knowledge and experience, not simply his observations of the device.

Dr. Abramson, a specialist in the field of physical medicine and rehabilitation, testified that the people seen by physicians in his field

have suffered "loss of energy reserves due to paralysis, loss of limb and so on," and that the weight carried by these people is of interest because it takes up the energy reserves. He testified in part: "* * * These are examples of the kind of concern we have with overweight as far as our patients are concerned, and the things I am mostly concerned with is to make my patients very lean, if I possibly can, even underweight." Accordingly, it is clear that Dr. Abramson is directly concerned with and treats obesity in his patients.

As to the Magic Couch, Dr. Abramson testified that it is wholly ineffective either to reduce weight or to firm or tone sagging muscles. He further testified that diet or exercise or anything else that he could think of would not add anything to the effectiveness of the couch.

The third expert witness complaint counsel put on the stand as part of their case-in-chief was Dr. Kottke. This witness, a specialist in physical medicine and rehabilitation, stated that in his field doctors are concerned with developing muscles which are weak and with maintaining optimal body metabolism and body size. The field, he testified, is definitely concerned with overweight persons. Dr. Kottke conducted a clinical study of the Metabol-aid, a device identical to the Posture-Rest except for an additional speed. He testified that in his opinion the device is ineffective in influencing change in weight regardless of what plan it is combined with and that it is ineffective in increasing strength or tone of muscle. The study which Dr. Kottke conducted involved the use of a metabolism machine to determine oxygen consumption. His opinion as to the ineffectiveness of respondents' device was based not only upon his study with this device but upon other studies he made in this same field.

Respondents challenge the qualifications of these three witnesses, referring to them somewhat slightly as "article-writing professors who teach rehabilitation of crippled people, not about overweight persons." In making their point, they describe their own witnesses as "experienced practicing physicians who treat ordinary overweight people." These complaint witnesses all have had extensive education, training and experience in the field of physical medicine, which includes the problems of overweight and muscular development. The suggestion that they are somehow less qualified because they may not treat the so-called ordinary overweight people is poorly made. They are ranking specialists in their field and highly qualified to speak authoritatively on medical questions here raised. Excessive body weight, it is clear, may be an even greater hazard and harder

to remove from a crippled person than from one of the so-called "ordinary overweight people."

Respondents challenge the competency of the testimony of Dr. Abramson on the ground that he only briefly viewed the device in operation. There is no merit in this contention. A medical witness is qualified to give an opinion as to the effectiveness of a product even though he has had no clinical experience with it. The objection, if valid, goes to the weight but not to the competence of the testimony. *Koch v. Federal Trade Commission*, 206 F. 2d 311, 315 (6th Cir. 1953), and cases cited therein. Moreover, it has been held that 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, 321 (7th Cir. 1959), *cert. denied*, 362 U.S. 940. Here Dr. Abramson's opinion testimony was based not only upon general knowledge but upon actual, although limited, experience in observing the use of the device.

Dr. Kottke is described by respondents as "acting on bitter vengeance" against respondents because they refused to pay him a \$12,000 fee he allegedly demanded for testing their device. This assertion is completely unsupported by evidence. Moreover, the record shows that Dr. Kottke was approached by Commission personnel on the matter of testifying in this proceeding, not the other way around. Thus, there is not the slightest suggestion that Dr. Kottke was acting out of spite in this matter. We reject as baseless this contention made against Dr. Kottke.

Respondents' Evidence

Respondents introduced the testimony of a number of medical witnesses and other witnesses in their defense. The most important of these were the following: Dr. Horace A. Anderson, practicing physician in private practice in Tacoma, Washington, and a specialist in internal medicine; Dr. George G. R. Kunz, general practitioner in Tacoma, Washington; Dr. John E. Potts, general practitioner in Walla Walla, Washington; Dr. Harry H. Wilson, a doctor of medicine and associated since retirement from private practice in 1958 with Stauffer Laboratories as a consultant; Dr. Marvin H. Ellestad, chief of staff of Harvard General Hospital in Torrance, California; Philip I. Charley, a Ph. D. in biochemistry and nutrition, and vice president of Truesdail Laboratories, Inc., a testing laboratory in Los Angeles, California; and Dr. Irving Rehman, a Ph. D. and associate professor of anatomy, University of Southern California School of Medicine.

Dr. Anderson testified that the Stauffer unit reduces both inches and total body weight and that it will improve the tone of sagging muscles. He appeared to be basing his opinion largely upon his stated success in reducing his own patients' weight with the device. He claimed that among his patients there were some whom he had tried to get to diet and they did not lose weight. Thereafter, he freed these patients from their diet and, according to his testimony, using the Stauffer unit they then lost weight. At one point he testified:

A. So then when I freed them from it [the diet], they began to lose weight, and they were using the unit. That is the conclusion—the only conclusion that you could draw from it. When you take a person off a thousand calorie diet, he starts using the machine as his adjunct to treatment and loses weight. He certainly isn't going to eat a thousand calories if he wasn't doing it before.

Here Dr. Anderson was talking about patients who had been previously put on a one thousand calorie diet, but who, he was convinced, did not follow such a diet. His testimony indicates that he was satisfied that after being put on the machine the patients did not diet, but this does not necessarily follow in the circumstances. After all, these patients had invested a great deal of capital in the unit, and with that in mind, it is possible that the user might very well follow a diet to justify the investment of approximately \$300. Dr. Anderson was only guessing when he testified that the unit alone was responsible for the reduction in weight, since he did not know for a fact that his patients were not dieting. A thorough reading of Dr. Anderson's testimony shows that he was most inexact about his record-keeping as to his study of the patients using the device. He made no real attempt at a clinical study. He admitted in his testimony that prior to such observations he had had little faith in the device. Thus, he must have become convinced of its claimed merits as a result of his observations which plainly were highly unscientific. In the circumstances, Dr. Anderson's opinion is not persuasive.

Dr. Kunz is a general practitioner respondents introduced to testify as to the merits of their device. He stated that the Stauffer Home Plan unit would be effective in reducing weight and in muscle toning and firming. He believed the unit to be a form of passive exercise which would reduce specific areas, as well as total body weight. His opinion was based on his experience, training, and upon his observations of patients using the device. The patients for whom Dr. Kunz prescribed the use of the machine were apparently also put on a diet; hence, it is not clear what grounds he had for his opinion that the device alone and separate from the diet would be effective. Dr. Kunz had made no clinical studies of any kind with respect to respondents' device. He had no special training in the field of physical medicine.

He had had no teaching appointments and had done no writing. Weighing his opinion in the light of the whole record, we conclude that it is of little probative value.

Dr. Potts, another general practitioner, testified as to a study he had made of the effectiveness of the Stauffer device in weight and inch loss. Eleven of his patients were studied over a five-week period and records were kept as to the effects of the unit's use. The patients, following a diet prescribed by Dr. Potts, were sent to the Stauffer office to use the device. The measurements as to weight and inches lost were made at the Stauffer office and the records were also kept there. In view of such showing, the hearing examiner concluded that there was doubt as to Dr. Potts's knowledge of the correctness of the results of his study, and we agree. Moreover, there is little if anything to indicate that the unit alone was responsible for the weight and inch losses claimed, since the patients were all following a diet.

Another witness presented by respondents was Dr. Irving Rehman. He had prepared X-ray pictures which the examiner concluded demonstrated a movement of muscle in connection with the use of respondents' device. It was not shown, however, whether this movement effected weight reduction or muscle tone.

Expert witnesses called by the respondents included Drs. Ellestad and Charley, who conducted oxygen consumption tests. Respondents place great store on the results of these tests, particularly that conducted by Dr. Ellestad. The latter, in testing the respondents' device and using six positions, both active and passive, arrived at an average of 11.9 percent increase in oxygen consumption over a basal condition.⁶ He testified that he considered such a percentage "just barely significant". He also testified that he considered the increase he found in caloric consumption to be significant, but he did not testify that any significant weight loss would result.

Dr. G. Donald Whedon, Chief, Metabolic Disease Branch, National Institute of Arthritis and Metabolic Diseases, National Institutes of Health, Bethesda, Maryland, was called as a rebuttal witness by counsel supporting the complaint to express his views as to the evidence given by Drs. Ellestad and Charley. Dr. Whedon, in response to a question as to whether figures given by respondents' witnesses would mean that the Stauffer unit causes a loss of weight, testified as follows:

If one were to accept these changes as statistically significant, which I do not, but if one were to accept them, the increase in energy expenditure would amount to such a small amount in the realm of—for example, requiring more than a year to lose one pound in weight—assuming the dietary intake was

⁶ Basal is a situation in which the subject is resting quietly in bed, not having consumed any food or drink for the preceding 10 to 14 hours.

kept constant, as to be of no real significance for the furtherance of weight loss in an obese person.

Another witness presented by respondents was Dr. Harry H. Wilson, a medical doctor and a full-time consultant for respondents since 1958. Dr. Wilson's testimony is so equivocal as to be of little use in attempting to evaluate the effectiveness of respondents' device. When asked about his opinion as to whether the Posture-Rest alone, without caloric reduction, would cause weight loss, he answered that it could, providing various factors are completely favorable to the end result. Asked to state the factors, he answered:

A. The nutritional intake would have to be so nearly equilibrium, as far as weight and gain of the user was concerned, that a small increase, a very slight increase in caloric consumption might *tend* toward the loss of weight. (Emphasis supplied.)

Dr. Wilson further testified as to the effect of the Posture-Rest unit when used by an obese person and he emphasized the psychological effect more than the physiological. In fact, his statement as to the physiological effect seemed to include the psychological. He stated at one point as follows:

* * * Physiologically I think that the postural improving factors such as the stretching of non-elastic tissues, which tend to immobilize joints, and probably the stretching of spastic muscles, which may be helping immobilize joints in a bad posture, gives, may give to the average person a sense of relaxation and freedom of movement, and increased sense of well being, which encourages them to keep on the improvement program.

Note here that Dr. Wilson has used terms such as "which tend to immobilize," "may be helping," "may give to the average person."

His over-all testimony appears to be that, while the device might result in some muscle stretching, the primary effect was in the motivation given to the user.

Respondents produced evidence of electromyograph tests for the purpose of proving that their device will contract muscles. The examiner, on the basis of other evidence (*i.e.*, X-ray pictures introduced through Dr. Rehman) found that respondents' device would contract muscles, and he concluded that it would be unnecessary in the circumstances for him to make a finding as to respondents' electromyograph evidence. The examiner also mentioned the testimony of complaint counsel's rebuttal witnesses, Dr. Joseph Goodgold and Dr. Alberta A. Marinacci, who testified to the effect that the electromyograph cannot be used to determine the amount or extent of muscle movement. We concur in the examiner's decision not to give any weight to the electromyograph evidence.

Finally, in presenting their case, respondents introduced user-type evidence, including the testimony of twelve satisfied users of the

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device. These witnesses claimed to have lost varying amounts in weight and inches. Satisfied-user testimony is of limited value because of the lack of scientific controls to determine the accuracy or truth of the claims. We do not believe the user evidence sufficiently persuasive to show that the device has any effectiveness especially in the face of the contrary testimony of qualified medical experts. Further user-type evidence introduced by respondents relates to a national contest which they conducted called the "10 Happiest Women." In this contest the women participating submitted to respondents data showing their body measurements and weights before and after using the Stauffer Home Reducing Plan as well as pictures and a statement on why they were happier using the plan. The winners, those showing the greatest losses, were awarded a trip to Paris and London. There is a showing that these contestants lost weight, but, as with other user evidence, this is no proof that the device was responsible for the results. We concur in the examiner's ruling that this evidence is not competent to prove the effectiveness of respondents' unit.

Conclusion as to Evidence

The examiner ultimately found that respondents' device does not increase the expenditure of energy to a significant degree, that it is not effective or of value for reducing the weight or size of parts of the body or the whole body, and that it is not effective in firming or toning useless muscles of the body. We concur fully in this finding.

While there is some disagreement among the expert witnesses called to testify in this proceeding as to the efficacy of respondents' device, this is not a case of stark conflict among equally well qualified experts. The examiner has decided the matter, as we understand it, essentially on the basis of the witnesses he determined to be the best qualified.⁷ Complaint counsel's witnesses are very highly qualified

⁷ It has been held that the trier of the fact may in cases of conflict of expert testimony rely on the greater experience of one expert over another. *Northern Feather Works, Inc. v. Federal Trade Commission*, 234 F. 2d 335 (3d Cir. 1956). Moreover, a conflict of medical opinion concerning the effectiveness of a product presents a question of fact to be decided by the Commission. *Erickson Hair and Scalp Specialists v. Federal Trade Commission*, 272 F. 2d 318, 321 (7th Cir. 1959); *Carter Products, Inc. v. Federal Trade Commission*, 268 F. 2d 461, 492 (9th Cir. 1959), cert. denied, 361 U.S. 884. In *Ward Laboratories, Inc. v. Federal Trade Commission*, 276 F. 2d 952, 954 (2d Cir. 1960), cert. denied, 364 U.S. 827, the court, in reference to an argument that the findings were arbitrary and capricious and based on a conglomeration of disputed theory and medical disagreement, remarked:

" * * * It is indeed a rare case where medical experts are called which does not involve disagreement. Here, however, the examiner is supported by clear and convincing testimony from well qualified witnesses. His decision and findings are the antithesis of 'arbitrary and capricious.' "

and each has expressed the opinion that respondents' device lacks the claimed efficacy. This is a strong showing, indeed, in support of the charges. Looking at the evidence adduced by respondents we note that it includes the testimony of physicians who expressed the opinion that respondents' device would give the benefits represented. This testimony, however, as we have indicated above, is lacking in persuasiveness since the witnesses generally had no sound basis for their views. Moreover, we do not believe that they are as well qualified by reason of training and experience in the field involved as are complaint counsel's witnesses. In considering the whole record, therefore, we are convinced and we hold that the charges in the complaint are supported by reliable, probative and substantial evidence.

Additional Contentions

The respondents claim that the examiner, in stating that the evidence offered in support of the charges of the complaint is not successfully overcome by respondents' evidence, improperly places on them the burden of proof in the proceeding, but that is not true. As we construe it, the examiner here means only that in evaluating all of the evidence, including that contrary to the allegations of the complaint, he believes the charges to be sustained. To put it another way, he concluded that the *prima facie* case had been made out and that it was not rebutted or explained away by the evidence introduced by respondents in their defense. This is not a shifting of the burden of proof. Complaint counsel had the full burden to prove the charges of the complaint and they sustained that burden. *Cf. Koch v. Federal Trade Commission*, 206 F. 2d 311, 319 (6th Cir. 1953); *Carter Products, Inc. v. Federal Trade Commission*, 268 F. 2d 461, 487 (9th Cir. 1959), *cert. denied*, 361 U.S. 884.

Respondents further assert that the examiner has made no findings as to the credibility or probative value of the testimony of the various witnesses. This likewise is not true. In spite of the fact that the examiner might have articulated his appraisal of the witnesses in more detail, we believe his findings are sufficient. When he uses the expression "best qualified witnesses," he means, it seems to us, that he made an evaluation which included a judgment of the credibility of the witnesses as well as other probative factors. This is shown by the fact that in mentioning the witnesses individually in the initial decision, the examiner points out those circumstances which bear on the probative value of their testimony. For example, he emphasizes that Dr. Rehman was an expert in X-ray pictures but not in the interpretation of them, and so he made his finding on that evidence

accordingly. To give another example, the examiner considered the circumstance that Dr. Anderson had had financial interest in respondents' device as a result of a distributorship connection in Canada, but concludes, as we understand it, that this factor did not influence his testimony. As a further instance, the examiner considered Dr. Potts' testimony in the light of the circumstances in which his tests were made, *i.e.*, the keeping of the records by the Stauffer people, and determined that this put doubt on the evidence.

Respondents charge that they were denied a fair hearing because complaint counsel and the examiner conducted what they term a "three-ring circus" in destroying a defense witness. Two of respondents' witnesses, Mr. Robert W. Kay and Mr. John W. Gregory, who testified as to the so-called electromyograph evidence, represented that they had educational degrees which they did not in fact have. This was developed on the record by complaint counsel subsequent to the testimony of such witnesses for the respondents. Respondents seem to be charging in part that complaint counsel introduced more evidence than was necessary to show that these witnesses, and in particular Mr. Gregory had lied. They further claim that the whole case is tainted by the attention given to that issue. Their brief states:

While it is conceded that Staff Counsel and the Hearing Examiner enjoyed this prodigious pillorying of a helpless and hopeless and mistaken man, it is submitted that this tactic so diverted the attention of the Hearing Examiner from the real issues in the case and so perverted the purpose of the hearing as to deny Respondent a fair hearing on the issues—the real issues—in this case.

We have reviewed the record to discover any possible levity of the type which respondents suggest but none is revealed by the written words. As to the amount of evidence put in on the subject, there is no showing that complaint counsel exceeded reasonable bounds. Respondents continued to rest their defense in part upon the electromyograph evidence, and complaint counsel could justifiably have decided that effective rebuttal required the effort they made.

There is nothing at all in the record which could possibly be construed as showing that the examiner was unduly influenced in his decision by the revelations bearing on the trustworthiness and reliability of witnesses Kay and Gregory. While he made no finding on the electromyograph evidence received through these witnesses, significantly, he gave as his reasons therefor factors other than the lack of reliability of the witnesses. The Commission, in any event, has the ultimate responsibility of making the findings of fact and the decision in this matter. *Cf. Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474 (1951). As stated above, we

hold that the charges of the complaint are sustained by reliable, probative and substantial evidence. Extensive hearings have been held and respondents have been given full opportunity to defend against the charges. Their apparent assertion of bias on the part of the hearing examiner changing the course of the hearing has no record substantiation. We conclude that respondents have not been denied a fair hearing.

A further contention of the respondents is that the examiner erred in allegedly altering the complaint from the "no value" charge to a charge that the device "does not increase the expenditure of energy to a significant degree." We do not agree that the examiner has changed the charge. The allegations of the complaint have to do with the effectiveness of respondents' device in reducing weight and in firming sagging muscles. A showing of the mere expenditure of energy is not crucial because energy can be expended, such as is the case in every physical activity, without necessarily reducing weight or firming sagging muscles. The charge of no value has to do with the question of weight reduction and of firming muscles and since the record shows that the device has no value in this connection, the allegations have been sustained in spite of the fact that there may be some expenditure of energy. Moreover, the examiner found, even as to the slight expenditure of energy, that it was not significant. Accordingly, we deny respondents' exception to this part of the initial decision.

Respondents' additional exception, the final one in our consideration, is the assertion that the hearing examiner did not apply the statutory standard which assertedly requires the measurement of results under customary conditions of ordinary recommended use. Reference is made to 15 U.S.C. § 55(a). This section provides that in determining whether an advertisement is misleading in a material respect, and therefore a false advertisement, there shall be taken into account, among other things, the extent to which the advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual. It is obvious that the reference to conditions as are customary or usual is a consideration in determining whether the advertisement is false for failing to reveal material facts. This does not provide a standard for evaluating advertising otherwise, and it has nothing to do with the instant case, which charges affirmative misrepresentation. Additionally, the Section cited does not provide a criterion for the evaluation of testimony, as respond-

ents seem to suggest. Aside from that, however, it is clear that the experts testifying for the complaint were familiar with respondents' instructions for use of the device and that their testimony was based upon results to be obtained under conditions of normal recommended use. This exception is therefore rejected.

Manifestly for respondents, this is no couch of roses. Their appeal is denied, and the initial decision will be adopted as the decision of the Commission. An appropriate order will be entered.

Commissioner Reilly did not participate for the reason that he did not hear oral argument.

FINAL ORDER

This matter having come on to be heard upon the exceptions of the respondents to the hearing examiner's initial decision filed March 21, 1963, and upon briefs and oral argument in support thereof and in opposition thereto; and

The Commission, for the reasons stated in the accompanying opinion, having denied respondents' exceptions and appeal and having directed that the said initial decision be adopted as the decision of the Commission:

It is ordered, That the hearing examiner's initial decision filed March 21, 1963, as supplemented and explained by the Commission's opinion, be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That the respondents shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist.

Commissioner Reilly not participating for the reason that he did not hear oral argument.

IN THE MATTER OF

STATE PAINT MANUFACTURING COMPANY ET AL.

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

Docket 8367. Complaint, Apr. 20, 1961—Decision, Feb. 7, 1964

Order requiring Tampa, Fla., paint manufacturers to cease representing falsely in newspaper advertising that a stated price was the usual retail or fac-

tory price for paint and that a purchaser would receive a "FREE GALLON WITH EVERY GALLON PURCHASE" when the advertised price was the regular selling price for two cans; and to cease printing the words "Factory Guarantee" on labels attached to their paint products when the guarantee was limited by undisclosed conditions.

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 State Paint Manufacturing Company, a corporation, and Nick G. Palermo, Nick O. Palermo, and Mario P. Charbonier, individually and as officers 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 as follows:

PARAGRAPH 1. Respondent State Paint Manufacturing Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its principal place of business located at 4610 West Buffalo Street, Tampa, Florida.

Individual respondents Nick G. Palermo, Nick O. Palermo and Mario Charbonier are officers of said corporation. They formulate, direct and control the policies of the corporate respondent including the acts and practices set forth hereinafter. Their address 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 business of manufacturing, selling and distributing paint and related products to the public, under the label or trade name of "State Paints," through various retail outlets and franchise dealers located in the various States of the United States.

PAR. 3. In the course and conduct of the business, respondents cause, and have caused, their paint products to be transported from their place of business in Florida to State Paint Stores and franchise dealers located in various other states of the United States, where said products are sold at retail. Said respondents, thereby maintain, and at all times mentioned herein have maintained, a substantial course of trade in said paint products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondents advertise, and have caused to be advertised, their paints in various newspapers of general circulation. Among

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and typical, but not all inclusive, of the statements contained in such advertisements are the following:

Whatever paint needs you may have, visit one of your nearby State Paint Stores, and be assured that you will be using the finest quality paint manufactured at the lowest price. Sold at direct factory prices.

Share in State Paint's million dollar bonus.
Every 2nd gallon free!

Gallon with every gallon purchased
Buy 1—Get 2 Buy 2—Get 4
Buy 5—Get 10 No limit—Any paint

Free! With every gallon purchased a gallon free

Black Label	Super Wall Latex
Outside White	\$6.98 gal. \$2.25 qt.
\$5.98	Every 2nd can free
Every 2nd can free	

Interior Latex	Alkyd Flat
\$5.98 gal. \$2.00 qt.	\$5.98 gal. \$2.00 qt.
Every 2nd can free	Every 2nd can free

The facts are there * * *
60 million Scotchmen can't be wrong!
50,000 gallons of fine paint free
Every 2nd can free
Save up to \$9.00 on every 2 gallons of fine quality paint.
Participate in the world's most famous paint offer.
Free gallon with every gallon purchase.
No limit. Any paint.

PAR. 5. Through the use of said advertisements, and others similar thereto not specifically set out herein, respondents have represented, and do represent, directly or by implication, that the usual and customary retail price of each can of State Paint is the price designated in the advertisements; that this advertised price is a factory price; that the purchase of one can of State Paint together with the gift of a "free" second can will result in savings of up to \$9 to the retail purchasers, and that if one can of State Paint is purchased at the advertised price, a second can will be given "free", that is, as a gift or gratuity without cost to the retail purchaser.

PAR. 6. The aforesaid advertisements referred to in Paragraph Four are false, misleading and deceptive. In truth and in fact, the usual and customary retail price of each can of State Paint was not, and is not now, the price designated in the advertisement but was, and is now, substantially less than such price. The advertised prices were not, and are not now, the prices charged by the factory for said

paint but were, and are now, substantially in excess thereof. Savings of up to \$9 will not result to purchasers of one can of State Paint together with a free can. The second can of paint was not, and is not now, given without cost to the retail purchaser, as the purchaser paid the advertised price which was and is now the regular selling price for two cans of State Paint.

PAR. 7. Respondents have caused to be printed upon labels attached to certain of their paint products the words "Factory Guarantee" thereby representing that said paint is fully and unconditionally guaranteed. In truth and in fact there are conditions connected with the said guarantee which are not set forth.

PAR. 8. In the conduct of their business, at all times mentioned herein, respondents have been, and are now, in substantial competition, in commerce, with corporations, individuals and firms engaged in the sale of paint and related products of the same general kind and nature as that sold by respondents.

PAR. 9. The use by 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 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. As a consequence thereof, substantial trade in commerce has been, and is being, unfairly diverted to respondents from their competitors, and substantial injury has thereby been, and is being, done to competition in commerce.

PAR. 10. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

Mr. Garland S. Ferguson supporting the complaint.

Mr. George W. Ericksen and *Mr. William Terrell Hodges*, of *MacFarlane, Ferguson, Allison & Kelly*, of Tampa, Fla., for respondents.

INITIAL DECISION BY JOHN B. POINDEXTER, HEARING EXAMINER

On April 20, 1961, the Federal Trade Commission issued a complaint in this proceeding charging State Paint Manufacturing Company, a corporation, and Nick G. Palermo, Nick O. Palermo and

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Mario P. Charbonier, individually and as officers of said corporation, hereinafter called respondents, with false advertising, in violation of Section 5 of the Federal Trade Commission Act. The complaint is directed largely to respondents' use of the word "free" in the advertising and sale of household paint and representing that the paint was sold at "factory" prices when, the complaint alleges, such is not the fact.

The respondents filed an answer to the complaint, admitting some and denying other allegations therein. A hearing has been held at which documentary and oral evidence was received in support of and in opposition to the allegations of the complaint. Proposed findings of fact, the conclusions of law, order, and briefs thereon have been filed by respective counsel. The proceeding is now before the hearing examiner for initial decision. All proposed findings and conclusions not specifically found or concluded herein are rejected. Upon consideration of the entire record, the hearing examiner makes the following findings of fact and conclusions of law, and issues the following order:

FINDINGS OF FACT

1. The respondent State Paint Manufacturing Company is a corporation organized and doing business under the laws of the State of Florida with its principal place of business located at 4610 West Buffalo Street, Tampa, Florida. The individual respondent Nick O. Palermo is president, the individual respondent Mario P. Charbonier is secretary-treasurer, and one Ralph Poe is vice president of the corporate respondent. The individual respondent Nick O. Palermo and Mario P. Charbonier formulate and direct the policies, acts and practices of the corporate respondent. The address of the above-named individual respondents is the same as that of the corporate respondent.

2. The individual respondent Nick G. Palermo is the father of Nick O. Palermo, president of the corporate respondent. Nick G. Palermo is a director and consultant to the corporate respondent as an honorarium. He has no voice in the management or formulation of the practices and policies of the corporate respondent.

3. The corporate respondent State Paint Manufacturing Company manufactures its paints at its factory located in Tampa. The corporate respondent does not sell paint direct from its factory to the general public. It sells the paints which it manufactures under the trade name "State Paints" through approximately 7 or 8 company owned and operated retail stores and approximately 130-135 fran-

chise retail dealers located in Florida, Georgia, Alabama, Texas, Louisiana and Tennessee. The individual respondent Nick O. Palermo, president of the corporate respondent, was formerly an employee of the Mary Carter Paint Company, Tampa, Florida. While so employed, he decided to form a similar paint company and go into business for himself. So, in 1955, in partnership with his brother-in-law, the individual respondent Mario P. Charbonier, and his father, the individual respondent, Nick G. Palermo, they began the manufacture and sale of household paint. Mr. Nick O. Palermo adopted the advertising and sales technique used successfully by his former employer Mary Carter Paint Company of "Buy One Can, Every Second Can Free." The business was incorporated in March 1956, under the name State Paint Manufacturing Company. Initially, paint sales were confined to the State of Florida. As sales of paint increased, the corporate respondent was financially enabled to enlarge and extend its sales area into the five additional States mentioned above.

4. In the conduct of its business, the corporate respondent ships and transports its paint products in its owned and operated trucks from its factory in Tampa, Florida, to its retail paint stores and franchise retail dealers located in Florida, Georgia, Alabama, Texas, Louisiana and Tennessee, where said paints are sold at retail. The corporate respondent maintains a substantial course of trade in said paints in commerce as "commerce" is defined in the Federal Trade Commission Act.

5. Since the company's inception in 1955, the general format of its advertising has been the use of the phrase or a similar one: "FREE CAN With Every Can Purchased, Quart or Gallon, any Paint, no Limit." For the purpose of inducing the purchase of its paints, respondent advertises and has advertised said paints in newspapers of general circulation, on radio, and television stations, and on labels attached to its cans or paint containers. Some of the statements and representations contained in said advertisements are the following:

Whatever paint needs you may have, visit
one of your nearby State Paint Stores, and be
assured that you will be using the finest
quality paint manufactured at the lowest price.
Sold at direct factory prices.
Share in State Paint's million dollar bonus.
Every 2nd gallon free!
Gallon with every gallon purchased
Buy 1—Get 2 Buy 2—Get 4
Buy 5—Get 10 No limit—Any paint

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FREE! WITH EVERY GALLON PURCHASED A GALLON FREE

Black Label	Super Wall Latex
Outside White	\$6.98 gal. \$2.25 qt.
\$5.98	Every 2nd can free
Every 2nd can free	
Interior Latex	Alkyd Flat
\$5.98 gal. \$2.00 qt.	\$5.98 gal. \$2.00 qt.
Every 2nd can free	Every 2nd can free

Save up to \$9.00 on every 2 gallons of fine quality paint.

Participate in the world's most famous paint offer.

Free gallon with every gallon purchase.

No limit. Any paint.

6. In sales of paint from the corporate respondent to its franchise retail dealers, it allows a 25% discount from the advertised price. CA-17 and CX-18 are examples of two invoices from the corporate respondent to franchise dealers representing sales of paint. For example, if a franchise dealer orders eight gallons of paint, State ships him sixteen gallons, but bills him for only eight gallons, less a discount of 25% from the advertised price. The extra eight gallons are shipped so that the dealer can pass on a "free" gallon to each purchaser of one gallon. Company owned and operated stores receive no discount and are shipped on the same basis as a franchise dealer. If State ships its store 100 gallons of paint, State bills the store for 50 gallons, allowing the store 50 gallons to pass on to the purchaser of each gallon. Insofar as the manufacturing cost to State is concerned, there is no difference in cost between the first gallon of paint being sold and the "free" gallon of paint given away. It is the same paint. The dollar gross sales of paint by State for the year 1958 were \$395,241.61 on a volume of 143,724 gallons; for 1959, \$704,649.46 on 256,236 gallons; for 1960, \$848,537.55 on 308,559 gallons; and for 1961, \$1,069,547.94 on a total of 388,926 gallons.

7. Corporate respondent's advertising clearly states that the second can of paint will be given away "free" on the condition that the customer buys the first can. It is also clear that, from the inception of State Manufacturing Company in 1955, as a partnership, its incorporation in 1956, and continuing to the present time, it has always used the sales and advertising technique of giving one can of paint "free" with the purchase of one can of paint. The advertising complained about is, for all practical purposes, identical with that involved in *Mary Carter Paint Co., et al*, Docket No. 8290, issued by the Commission on June 28, 1962 [60 F.T.C. 1827]. In that case the Commission held, among other things, that, since Mary Carter had always given away a "free" can of paint with the purchase of a first

can, no usual and regular retail price had been established for the first can. This hearing examiner must follow that decision. Accordingly, it is found that, through the use of said advertisements respondents have represented that: the usual and customary retail price of each can of State Paint is the price designated in the advertisements; the advertised price is a factory price, and the purchase of one can of State Paint together with the gift of a "free" second can will result in savings of up to \$9 to the retail purchaser, and, if one can of State Paint is purchased at the advertised price, a second can will be given "free," that is, as a gift or gratuity without cost to the retail purchaser.

8. Following the holding of the Commission in *Mary Carter Paint Co.*, *supra*, it is found that the corporate respondent's advertising is false, misleading and deceptive. The usual and customary retail price of each can of State Paint was not and is not the price designated in the advertisements but substantially less than such price. The second can of paint is not "free," that is, given without cost to the retail purchaser, since the purchaser pays the advertised price, which is the regular selling price for two cans of State Paint. Savings of \$9 will not result to purchasers of one can of State Paint together with the second can since the second can is not free of cost to the purchaser, and State Paint has never sold two cans of the advertised paint at \$9 more than the advertised price. The advertised paint prices are not the prices charged by the corporate respondent's factory for said paint but are the usual and customary prices at which the corporate respondent's company owned retail stores and franchise retail dealers sell said paint to retail customers. The advertised prices are substantially in excess of the prices charged by the corporate respondent's factory to its company owned retail stores and franchise dealers.

9. It is further found that labels attached to the containers of State Paint contained the words "factory guaranteed." This is a representation that said paint is fully and unconditionally guaranteed. As a matter of fact, the said guarantee is a limited one, and the terms, conditions and extent to which the guarantee applies and the manner in which the guarantor will perform thereunder are not disclosed on said labels. Under such circumstances, the Commission has held that failure to disclose the terms and conditions of the guarantee and manner of performance constitutes a violation of the Act.

10. In the conduct of its business, the corporate respondent is in substantial competition in commerce with corporations, individuals and firms engaged in the sale of paint and related products of the same general kind and nature as that sold by the corporate respondent.

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ent. The use by the corporate respondent of said false, misleading, and deceptive statements and representations has had and now has the capacity and tendency to mislead members of the purchasing public into the mistaken belief that said statements and representations were and are true, and into the purchase of substantial quantities of State Paint products by reason of said erroneous belief. As a consequence, substantial trade in commerce has been and is being unfairly diverted to the corporate respondent from its competitors, and substantial injury has thereby been, and is being done to competition in commerce.

CONCLUSIONS

The aforesaid acts and practices of the corporate respondent found herein are to the prejudice and injury of the public and respondent's competitors and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act. It having been found that the individual respondent Nick G. Palermo, the father of Nick O. Palermo, president of the corporate respondent, has no voice in the management or formulation of the practices and policies of the corporate respondent, the order to be issued herein will not be directed against the said Nick G. Palermo.

ORDER

It is ordered, That respondents, State Paint Manufacturing Company, a corporation, and its officers, and Nick O. Palermo, and Mario P. Charbonier, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution, in commerce, as "commerce" is defined in the Federal Trade Commission Act, of paint, or any other product, do forthwith cease and desist from representing, directly or by implication:

1. That any amount is respondents' customary and usual retail price of any merchandise when said amount is in excess of the price at which such merchandise is customarily and usually sold by respondents at retail in the recent and regular course of business.
2. That any article of merchandise is being given free or as a gift or without cost or charge, when such is not the fact.
3. That any merchandise is sold or offered for sale at factory prices, when such is not the fact.

4. Representing that any product sold by respondents is guaranteed unless the terms and conditions of such guarantee and the manner and form in which the guarantor will perform are clearly and conspicuously set forth.

5. Representing in any manner that, by purchasing any of its merchandise, customers are afforded savings amounting to the higher price used for comparison with that selling price, unless difference between respondents' stated selling price and any the higher price used represents the price at which the merchandise is usually and customarily sold at retail in the trade area involved, or is the price at which such merchandise has been usually and regularly sold by respondents at retail in the recent, regular course of its business in the trade area involved.

It is further ordered, That the complaint herein be, and the same hereby is, dismissed as to respondent Nick G. Palermo.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

This matter having been heard by the Commission upon exceptions to the initial decision filed by respondents, and upon briefs and oral argument in support thereof and in opposition thereto; and

The Commission having determined that the hearing examiner's findings and conclusions are fully substantiated on the record and that the order contained in the initial decision is appropriate in all respects to dispose of this matter:

It is ordered, That respondents' exceptions to the initial decision be, and they hereby are, denied.

It is further ordered, That the hearing examiner's initial decision filed October 15, 1962, be, and hereby is, adopted as the decision of the Commission.

It is further ordered, That respondents State Paint Manufacturing Company, Nick O. Palermo and Mario P. Charbonier shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist.

Commissioner Elman dissents for the reasons elaborated in his dissenting opinion in *Mary Carter Paint Company, Inc.*, Docket 8290, June 28, 1962 [60 F.T.C. 1827, 1853].

Commissioner MacIntyre did not participate in this decision.

Commissioner Reilly did not participate in this decision for the reason he did not hear oral argument.

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IN THE MATTER OF

CENTRAL ARKANSAS MILK PRODUCERS
ASSOCIATION, INCORPORATED, ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 2(a) OF THE CLAYTON ACT

Docket 8391. Complaint, May 5, 1961—Decision, Feb. 7, 1964

Consent order requiring an association of some 1,500 dairy farmers in Arkansas, Louisiana, Texas, Oklahoma and Missouri, engaged in the sale and distribution to processors of raw milk, produced by its members and also by non-members, to cease conspiring to fix or establish prices, terms or conditions of sale of raw milk; urging or inducing any milk processor to buy all his raw milk requirements from it by use of threats, coercion, etc.; charging or granting different premiums, surcharges, terms or conditions of sale in excess of the minimum requirements of a marketing agreement issued by the Secretary of Agriculture, to competing purchasers regulated by the agreement; and charging or granting different prices, terms or conditions of sale to competing purchasers not wholly regulated by said marketing agreement, with exceptions as set forth in the order below.

COMPLAINT

The Federal Trade Commission having reason to believe that the parties respondent named in the caption hereof, and more particularly designated and described hereinafter, have violated, and are now violating, the provisions of Section 5 of the Federal Trade Commission Act, and Section 2(a) of the Clayton Act (U.S.C., Title 15, Sec. 13) as amended by the Robinson-Patman 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 with respect thereto as follows:

COUNT I

(Alleging violation of Section 5 of the Federal Trade Commission Act.)

PARAGRAPH 1. Respondent Central Arkansas Milk Producers Association, Incorporated, hereinafter referred to as CAMPA, is a corporation existing and doing business under and by virtue of the laws of the State of Arkansas, with its office and principal place of business located at 1008 Ringo Street, Little Rock, Arkansas.

Respondent CAMPA is composed of approximately 1,500 members who are dairy farmers located in the States of Arkansas, Louisiana, Texas, Oklahoma and Missouri.