
IN THE MATTER OF
SIBCO PRODUCTS COMPANY, INC., ET AL.

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

Docket 8628. Complaint, June 8, 1964—Decision, Nov. 22, 1965

Order requiring a New Jersey manufacturer of water filtrators to cease misrepresenting the effectiveness and capability of its water filtration units and deceptively guaranteeing the performance of such units.

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 Sibco Products

Company, Inc., a corporation, and Frank Sibert, 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 Sibco Products Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its principal office and place of business located at 8 Livingston Street in the city of Newark, State of New Jersey.

Respondent Frank Sibert is an officer of the corporate respondent. He 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 of water filtration units directly to the public and to dealers for resale to the public.

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

PAR. 4. In the course and conduct of their business, and for the purpose of inducing the purchase of their water filtration units, respondents have made statements and representations in brochures, leaflets and form letters and in advertisements inserted in newspapers and magazines, respecting the nature and extent of their guarantee for said products and the nature and duration of the performance of said filtration units.

Typical and illustrative of such statements and representations, but not all inclusive thereof, are the following:

PURE WATER

Amazing New Purifier guaranteed for
10 years! Removes RUST, IRON, SULPHUR,
CHLORINE, ODORS, etc. Purifies and
filters city or well water. * * *

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* * * it needs NO REGENERATION and NO REFILLING. * * * We use specially processed MINERALS which DO NOT WEAR OUT but are kept clean by back flushing once every 2 or 3 months, depending upon the condition of your water.

PAR. 5. By and through the use of the aforesaid statements, and others of similar import and meaning not specifically set out herein, respondents represent, directly or by implication, that:

1. Respondents' water filtration units are fully and unconditionally guaranteed by them in every respect for a period of ten years.
2. Respondents' water filtration units effectively remove water-borne microorganisms and viruses capable of causing diseases.
3. Respondents' water filtration units need no regeneration and no refilling; the filtering material in respondents' water filtration units will not wear out or become exhausted; and the filtering material in such units will remain effective if backflushed with water periodically.

PAR. 6. In truth and in fact:

1. Respondents' water filtration units are not fully and unconditionally guaranteed by them in every respect for a period of ten years. The guarantee is limited and the terms, conditions and extent to which such guarantee applies and the manner in which the guarantor will perform thereunder are not clearly and conspicuously disclosed. Moreover, a charge is made for service of respondents' products, which fact is not disclosed in respondents' advertisements.
2. Respondents' water filtration units do not effectively remove water-borne microorganisms or viruses capable of causing diseases.
3. Respondents' water filtration units need regeneration or refilling; the filtering material in respondents' water filtration units will wear out and become exhausted; and the filtering material in such units will not remain effective if backflushed with water periodically. In areas where the water to be filtered contains rust, ionic iron, odors and flavors, or is slightly acid, the capacity of the filtering material to perform effectively will diminish in time, and it will eventually become ineffective. When this occurs, backflushing the filtering material with water will not restore its effectiveness, and it must be replaced or reactivated.

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

PAR. 7. By and through the use of the aforesaid acts and practices respondents place in the hands of dealers and others the means

and instrumentalities by and through which they may mislead the public in the manner hereinabove alleged.

PAR. 8. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of water filtration units of the same kind and nature as those 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 erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' product by reason of said erroneous and mistaken belief.

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 methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

Mr. Sheldon Feldman for the Commission.

Mr. Frank Sibert, pro se, and for the corporate respondent, Sibco Products Company, Inc.

INITIAL DECISION BY LEON R. GROSS, HEARING EXAMINER

DECEMBER 18, 1964

The complaint in this proceeding, asserting a violation of Section 5 of the Federal Trade Commission Act,¹ alleges that respondents, in advertising for sale and selling water filtration units in interstate commerce, represent, contrary to the fact, that their water filtration units are (1) guaranteed unconditionally in every respect for a period of ten years; (2) will effectively remove water-borne microorganisms or viruses capable of causing disease, and (3) that the water filtration units, and particularly the minerals which are enclosed in the casings, will not wear out or be used up, but that such filtering material will remain effective indefinitely if back-flushed periodically with water.

Respondents' answer was filed on July 9, 1964, by George R. Handler, Esquire, as attorney for the respondents. The answer, in

¹ "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful." (15 U.S.C.A., Section 45).

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substance, denies that the statements which respondents have made in advertising and selling their water filtration units are false, misleading and deceptive as asserted in the complaint.

A prehearing conference was held on August 12, 1964. Respondents at the conference were represented by George R. Handler, Esquire, of the Newark, New Jersey, Bar. Also present at the prehearing conference was Frank Sibert, the individual respondent and the *de facto* owner of Sibco Products Company, Inc. At the August 12, 1964, prehearing conference, after an extended discussion between parties and colloquy with the hearing examiner in an effort to reduce the issues of the controversy to their simplest terms, it appeared that respondents might wish to request leave to withdraw their answer and petition the Commission for leave to reopen negotiations under Sections 2.1-2.4, inclusive, of the Commission's Rules of Practice.

Under date of September 8, 1964, George R. Handler wrote to counsel supporting the complaint as follows:

This is to advise you that I no longer represent the respondents in the above matter. I have been relieved of further connection with this case by Mr. Sibert who felt that he could not proceed in the manner that I recommended.

I want to thank you for your kindness extended to me during our negotiations.

Very truly yours,

/s/ George R. Handler
George R. Handler.

When the case was called for hearing on September 21, 1964, (a date which had previously been agreed upon by all of the parties), only Frank Sibert appeared on behalf of respondents. Mr. Sibert represented to the hearing examiner that the respondents were not represented by counsel because they did not have funds to pay counsel fees.² The hearing examiner offered to postpone the September 21, 1964, hearing in order to afford Frank Sibert an opportunity to arrange for new counsel, but Mr. Sibert declined the offer of postponement and elected to act as both counsel and witness for himself and for the corporate respondent which is, in fact, his alter ego.

Hearings went forward on September 21 and September 22, 1964, in Washington, D.C. Witnesses were called and examined by counsel

² It is to be noted that this representation is at variance with that in the letter of September 8, 1964, from the attorney to the effect that he was relieved of further representative connection by Mr. Sibert who "*felt that he could not proceed in the manner that I recommended.*" (Emphasis supplied.)

supporting the complaint and cross-examined by Frank Sibert. Mr. Sibert actively participated in all of the proceedings as though he were a lawyer and was accorded every administrative safeguard which it was possible to accord him under the circumstances. At the close of the proceeding, Mr. Sibert stated:

Water problems are getting worse every day, and need to be encouraged to develop new simple ways to meet this great need of good water. Do not tear me down with technicalities, my business being as small as it is, and I am struggling to help people to get good water and I ask that you dismiss the complaint against me and my firm and you may be assured that I will do everything possible to abide by the rules of the Federal Trade Commission, that I have learned and I sincerely want to thank you, Mr. Gross and Mr. Feldman, for treating me so nicely and being so helpful in guiding me. (Tr. 249)

The record was closed for the receipt of evidence effective September 24, 1964. Findings, conclusions and briefs have been filed by Frank S. Sibert and by complaint counsel. Proposed findings which are not incorporated in and made a part of this initial decision in the form or substantially the form in which they were proposed, are hereby rejected as being either unsupported by the evidence or irrelevant and immaterial to a decision of the issues. All motions, if any, which have heretofore been made, which have not previously been ruled upon hereby are overruled and denied. The hearing examiner heard and observed the witnesses in the hearing room and on the witness stand. He observed their demeanor and their manner of answering questions. He was able to, and did, form an opinion as to their reliability and creditability. He was also able to, and did, form a judgment as to the weight and probative value of the testimony of the witnesses. The hearing examiner has considered the reliability, creditability and probative value of the witnesses' testimony in making his findings of fact as well as the witnesses' respective interest in the outcome of this proceeding. Based upon the entire record, including testimony of the witnesses and the exhibits, the hearing examiner makes the following:

FINDINGS OF FACT

1. Sibco Products Company, Inc., a New Jersey corporation, whose principal place of business is 8 Livingston Street, Newark, New Jersey, manufactures and sells in interstate commerce, among other things, a Sibco water purifier. The individual respondent Frank Sibert is president and principal stockholder of the corporation. He formulates, directs and controls the acts and practices

hereinafter described. Frank Sibert's address is the same as that of Sibco Products Company, Inc., to wit: 8 Livingston Street, Newark, New Jersey.

2. In the course of manufacturing and selling their water filtration units to the public, and to dealers for resale to the public, respondents have caused their said products, when sold, to be shipped from their place of business in New Jersey to purchasers thereof located in various other States of the United States. (Tr. 9) Respondents maintain, and, at all times pertinent to this proceeding, have maintained a substantial course of trade in their products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

3. Respondent Frank Sibert, and his wife, own all of the issued and outstanding stock of the corporate respondent and are the sole officers of the corporation. (Tr. 32 and 33)

4. The Federal Trade Commission has jurisdiction over the parties to and the subject matter of this complaint. This proceeding is in the public interest.

5. In the course and conduct of manufacturing and selling their water filtration units in interstate commerce, respondents have been and now are in substantial competition with other corporations, firms and individuals in the sale of water filtration units of substantially the same kind and nature as those sold by respondents.

6. Respondent Frank Sibert has had no educational background or training which qualify him as an expert in the field of water filtration. (Tr. 45) He did not complete high school. (Tr. 60, 62) Mr. Sibert's sole technical qualifications for designing, manufacturing, and selling water filtration units is based upon information which he asserts was imparted to him by a foreign-born M.D., a Dr. Emil Hoffman, whom he knew. (Tr. 60 *et seq.*, 64) Dr. Hoffman died before 1955. (Tr. 63) Dr. Hoffman was not an expert in the manufacture of water filtration units. Mr. Sibert first began to manufacture water filtration units "about five years ago." (Tr. 68)

7. Sibert testified that he had been in the water purification business for the last seven years; that the first two years he did not manufacture and sell his water filtration units but was only "field testing" such units. Sibert stated, therefore, that he had only been manufacturing and selling his water filtration units for the last five years. When pressed to give the name of any purchaser who had used one of his water filtration units satisfactorily for seven years without replacing the minerals, Sibert was unable to give the name of any such purchaser or the location of any unit,

other than a unit which, he claims, has been on his premises at 8 Livingston Street, Newark, New Jersey.

8. Dr. Emil Hoffman died before Sibert went into the water purification business. Dr. Hoffman was not alive when Sibert entered the water filtration business and did not provide any scientific assistance, guidance, or knowledge for Sibert in constructing and selling his water filtration units. Sibert did not, and does not, have the assistance, guidance, and supervision of any scientifically qualified person in designing, constructing, and selling his water filtration units.

9. Specimens of respondents' water filtration units are in evidence as CX 25, CX 26 and CX 27 which constitute the metal containers; and CX 28, CX 29, CX 30, CX 31 and CX 32 which are the minerals or chemicals placed inside the metal containers. These minerals or chemicals are:

CX 28—"Birm material" (Tr. 28, *et seq.*)

CX 29—Zeolite resin—"a water softener" (Tr. 39)

CX 30—Calcite—to reduce the acidity in the water (Tr. 40)

CX 31 and 32—bone black or bone char—"to remove rust, iron, sulphur, chlorine, odors, et cetera." (Tr. 47)

10. In addition to conducting business under the name of Sibco Products Company, Inc., respondent Sibert also conducts business under the name of Sibert and Company. Sibco Products Company, Inc. and Sibert and Company are New Jersey corporations. Sometimes one corporation and sometimes the other corporation is used by Frank Sibert to contract for and fill orders for the water treatment units which respondents manufacture and sell.

11. Mr. Sibert asserts that he holds patents on and/or has manufactured or sold, in addition to the current water filtration units, an infrared massager (Tr. 65), an electric fly killer (Tr. 66), a cigarette roller for rolling cigarettes, a substance for removing tarnish for silver (Tr. 66, 67), a nail clipper (Tr. 66), a switch blade knife (Tr. 67), a cushion vibrator to condition the body (Tr. 67), a vibrating pillow and a slenderizing and exercising machine. (Tr. 68).

12. Mr. Sibert estimated the gross annual sales of his water filtration units to be between \$20,000 and \$30,000. When pressed to give more specific figures, Sibert refused to do so on the grounds that he did not have the precise information, even though he is the only person involved in his business enterprises which are, in fact, a one-man operation. Sibert testified further that, by comparison with other successful water purification manufacturers, he

does "[p]robably a million dollars they do to my one dollar or one hundreds dollars. My volume is very, very small." (Tr. 72)

13. In addition to Frank Sibert, witnesses in support of the complaint included:

ROBERT L. TILLSON (Tr. 86 *et seq.*), a general physical scientist for the Federal Trade Commission. Mr. Tillson is a graduate of Iowa State University with a bachelor's degree in chemical engineering. He was a research chemist with the Bureau of Chemistry and Soils, U.S. Department of Agriculture, and has been employed by the Food and Drug Administration of the U.S. Department of Agriculture in its enforcement of the food, drug and cosmetic laws.

DR. VICTOR R. DEITZ (Tr. 101 *et seq.*), of the Naval Research Laboratory, Washington, D.C., a Ph.D. degree in chemistry from the Johns Hopkins University, who had done postdoctoral study at the University of Illinois. Dr. Deitz had been research chemist with the General Electric Company, Schenectady, New York, for one year. Thereafter, he was with the National Bureau of Standards from 1939 to 1963. At the time of his testimony, Dr. Deitz was with Naval Research Laboratory doing research in chemistry. He is a member of the American Chemical Society, the Washington Academy of Science, the Farraday Society of London and the Sugar Industry Technicians. Dr. Deitz edited and published a two-volume bibliography of solid adsorbents—the commercial solvent adsorbents used in industrial chemistry. He is the author of between fifty and sixty papers on the various aspects of the adsorption of these materials and of laboratory prepared materials. He has been editor of the proceedings of the technical sessions on bone char published jointly by the National Bureau of Standards and the Sugar Refining Industry of the world. Dr. Deitz has been a Guggenheim Research Fellow, and the recipient of the annual award of the Sugar Industry Technicians. While a Guggenheim Fellow he studied at the Imperial College of Science and Technology in London, England.

DR. ROBERT B. DEAN (Tr. 140 *et seq.*) is presently director of Laboratory Research for the Advanced Waste Treatment Program of the U.S. Public Health Service. He was previously a chemist with the Borden Chemical Company in Bainbridge, New York, manufacturer of adhesives and chemicals. Dr. Dean has his bachelor's degree in chemistry from the University of California at Berkeley, California, and his Ph.D. degree in experimental zoology

from Cambridge University, Cambridge, England. He engaged in two years of teaching in medical schools in Rochester, New York and Minneapolis, Minnesota; was a research associate at Stanford University in California, doing research on water for the War Production Board; assistant professor of chemistry, University of Hawaii, a professor at the University of Oregon. Dr. Dean is a member of the American Chemical Society, the British Society for Chemical Industry, the New York Academy of Sciences, Phi Beta Kappa honorary scholastic fraternity and Sigma Xi, the honorary scientific fraternity. He is the author of the book, "Modern Colloids" published by D. van Nostrand, Princeton, New Jersey, and the author of between fifty and sixty scientific papers which have been published in various scientific journals.

JAMES JOLLY (Tr. 195 *et seq.*), a geologist with the U.S. Bureau of Mines, holds a bachelor's and master's degree in geology from the University of Oregon at Eugene, Oregon. Mr. Jolly was a mine geologist with the Hecia Mining Company of Wallace, Idaho, and is presently a mineralogist and petrologist doing x-ray spectographic work with the U.S. Bureau of Mines.

GRANT KUBBARD (Tr. 206 *et seq.*) is a chemist with the U.S. Bureau of Mines. Mr. Hubbard was formerly employed by the Los Alamos Scientific Laboratory of the University of California. He holds a bachelor's degree in chemistry from Arizona State College; has been employed by Crown Zellerbach Corporation as a research chemist; and has engaged in graduate studies in analytical chemistry. Mr. Hubbard is a member of Phi Sigma. He had his undergraduate college training in all fields of general chemistry and in mathematics. Mr. Hubbard has done graduate college work in analytical chemistry and instrumental methods. Mr. Hubbard was an analytical chemist when he was at the Los Alamos Scientific Laboratory.

14. In the course and conduct of their business, and for the purpose of inducing the purchase of their water filtration units, respondents have made statements and representations in brochures, leaflets, and form letters, and in advertisements inserted in newspapers and magazines, respecting the nature and extent of their guarantee for said products and the nature and duration of the performance of said water filtration units.

Typical and illustrative of such statements and representations, but not all inclusive thereof, are the following:

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PURE WATER
Amazing New Purifier
guaranteed for
10 years! Removes
RUST, IRON, SULPHUR,
CHLORINE, ODORS, etc. Purifies and
filters city or well water. * * * (CX 11)
* * * it needs NO REGENERATION and NO
REFILLING. * * * We use specially
processed MINERALS which DO NOT WEAR
OUT but are kept clean by back flushing
once every 2 or 3 months, depending upon
the condition of your water. (CX 1)

15. By and through the use of their advertising statements, respondents represent, directly or by implication, contrary to the fact, that their water filtration units are "UNCONDITIONALLY GUARANTEED for a period of 10 years from date of proper installation, if found defective for any reason, subject to the following conditions: * * *" (CX 3)

Respondents' newspaper advertisements, CX 7-13, describe the guarantee for their water filtration units as: "Amazing New Purifier guaranteed for 10 years!"

16. Respondents' water filtration units are not fully and unconditionally guaranteed by them in every respect for a period of ten years. The guarantee is limited and the terms, conditions, and extent to which such guarantee applies and the manner in which the guarantor will perform thereunder are not clearly and conspicuously disclosed. A charge is made for servicing respondents' products.

17. Compliance with the terms of respondents' guarantee by a dissatisfied purchaser would be a difficult task. In order to avail oneself of this guarantee the unit must be dismantled and returned to respondents. The unit weighs approximately 100 lbs. (Tr. 51) The minimum shipment fee, as far as respondent Sibert is aware, is \$3. (Tr. 52) From southern Florida, the truck rate for return of the unit to Newark, New Jersey, according to Mr. Sibert, would be \$5.85. (Tr. 52) This amount, coupled with the required \$30 service charge, involves a substantial outlay of money. In addition, a considerable amount of effort would be required to ship these units, which are heavy, large, and very difficult to handle. (See CX 25, 26, 27) Respondents' "service charge" is in reality a reimbursement fee which is sufficient to completely compensate respondents for the cost of a new unit. The filtration casing and accompanying valve assembly cost respondents between \$10 to \$15.

(Tr. 54, 55, and see CX14-19) Although Mr. Sibert has refused to disclose the source of the ingredients which he uses in his units, and it is not possible to determine their cost precisely, a fair estimate of the cost of the bone char would be approximately \$15.

18. In their advertising statements, respondents represent, directly or by implication, contrary to the fact, that their water filtration units effectively remove water-borne microorganisms and viruses capable of causing diseases. Such misrepresentations include the statements that respondents' water filtration units give: "Delicious Clear, Clean, Odor-free water"; that "Pure drinking and cooking water are vital to the *health* of your family so don't delay correcting your bad water with a SIBCO Water Purifier" (Emphasis added.) (CX 1); "giving you crystal clear, clean odor Free water that tastes good," (CX 4b); "Gives you clear, clean, odor free water that tastes good for drinking, cooking, laundering, etc." (CX 5b); "The function of this unit is to FILTER the impurities at the source of supply in your home" (CX 6a); "PURE WATER," "Purifies and filters city or well water." (CX 7-13)

19. Respondents' representations are intended to and do convey the impression to a prospective purchaser by employing the words "clean," "pure water," and "health" that the Sibco water filtration unit will remove bacteria from the user's water.

20. Respondents' water filtration units do not effectively remove water-borne micro organisms or viruses capable of causing diseases. Respondents' disclaimer in their advertisements (CX 1, CX 4a-b, CX 5, CX 6, CX 7-13) does not cure the deception implicit in the impression created in the initial representation to a prospective purchaser. (See *Giant Food, Inc. v. F.T.C.*, Docket 7773, Commission's decision and Court of Appeals decision, 322 F. 2d, 977 (1963).)

21. Respondents' advertising represents, contrary to the fact, that their water filtration units need no regeneration and no refilling; that the filtering material in respondents' water filtration units will not wear out or become exhausted; and that the filtering material in such units will remain effective indefinitely if backflushed with water periodically. (See Answer, CX 1, CX 3, CX 4a-b, CX 5a-b, CX6, CX 7-13)

22. Respondents' water filtration units do require regeneration or refilling, the chemicals (finding 9, *supra*, CX 28, CX 29, CX 30, CX 31, CX 32) will wear out and become exhausted and will not remain effective indefinitely if backflushed with water periodically. In areas where the water to be filtered contains rust, ionic iron, odors and flavors, or is slightly acid, the capacity of the filtering

material to perform effectively will diminish in time, and will eventually become ineffective. When this occurs, backflushing the filtering material with the same water which deposited the undesirable elements upon the chemicals will not restore the filtration unit's effectiveness. The chemicals must be replaced or reactivated. The chemicals used by respondents are in general usage as water filtration agents and their properties are generally known. Sibert's bald statement that he subjects the chemical to a "secret" process which basically alters their known characteristics is not supported by probative evidence and is contrary to accepted scientific opinion.

23. Dr. Victor R. Deitz and Dr. Robert B. Dean testified that respondents were, and are, misrepresenting when they claim their units will not wear out or become exhausted, need no regeneration and no refilling, and will remain effective if merely backflushed with water periodically. Dr. Deitz, an expert on bone char (Tr. 101-04), has edited seven volumes of the proceedings of the technical sessions of the chemical industry on bone char, published jointly by the National Bureau of Standards and the Sugar Refining Industry of the World. (Tr. 103) (See *supra* finding 13) In substance, Dr. Deitz testified: that bone char, an industrial adsorbent manufactured from animal bones, is granular and usually contains 9 to 11 percent of carbon. The remaining part is calcium phosphate, a constituent of the bone itself. Bone char removes impurities by adsorption. Internal voids and pores of the bone char are filled up with the filtered out impurities. Once these voids and pores are clogged with impurities, the bone char ceases to filter out further impurities. (Tr. 127-28) An "adsorbent" is typified by a mechanical retention of the material which is adsorbed. (Tr. 105) Heating an organic material in the absence of air, will cause it to carbonize. This is known in the trade as the "charring process." Dr. Deitz has done research on the history and usage of the charring process. (Tr. 107) Bone char is an old and well-known adsorbent, first proposed in 1828. In early literature it was known as "bone black." (Tr. 108) Bone char and bone black are two names for the same material. (Tr. 103 and 109) The principal use for bone char as a filtering agent is in the sugar refining business where the average life of the bone char is three to four years under favorable conditions. During this time bone char, which started out as a porous material, becomes hard and dense. Starting with a weight of 40 pounds per cubic foot, when clogged with impurities it may weight as much as 80 pounds per cubic foot. At this stage it is virtually worthless as a filtration agent.

When bone char is used in the sugar refining industry for the

purpose of removing calcium and decolorization, its average cycle of operation is about one week. After that

It requires—I said it did require regeneration for the reason that at a practical level its ability to remove color, and carbon falls off, so that it cannot produce the white sugar as it did before. Now, this regeneration is in two steps. First one washes away with water the sugar that is in the tank. This represents quite a bit of sugar solids, since I mentioned that the tank was ten feet in diameter and 20 feet high. Then a little bit—then as the water enters, having forced out the sugar, there is a sort of half a tankfull of sweet water. That is, a mixture of sugar and water which they recover. And finally they wash, sometimes for days, with water to remove some of the adsorbed impurities that will come out.

Then the contents are completely removed and sent to high temperature kilns where the water then is driven out of the wet bone char and the bone char actually heated up to about 550 centigrade which is about, oh, anywhere around 1050 to 1100 degrees Fahrenheit, and at these temperatures the adsorbed impurities are recomposed and the volatile products come out and as a result of this heat treatment, the alkalinity of the bone char is restored for it, too, had suffered a drop during its use. (Tr. 111)

When used for water filtration bone char must be regenerated chemically in order to continue to filter effectively. (Tr. 114) Backflushing bone char with water may have limited effectiveness, but the water used for the backflushing must be purer than the water which flowed through the filter originally. (Tr. 116) Certain substances added to bone char may assist it in its filtration function. In the sugar industry burnt magnesia and marble chips are added, but these materials are used up or dissolved in the filtration process. Marble is a calcium carbonate with properties similar to calcite, which is occasionally used in respondents' units. The calcite in respondents' unit will be used up when the water to be filtered is acid. (Tr. 118)

In areas where the water contains rust, ionic iron, odors, and flavors, and is slightly acid, a water filtration unit composed of bone char and calcite would not remain effective indefinitely. (Tr. 119) Such a unit might last a few weeks, or longer, depending upon the condition of the water to be filtered. (Tr. 119) After a period of time the calcite will be used up if the water is slightly acid and the bone char will be ineffective because it will be clogged with impurities. Periodic backflushing with water will not restore the effectiveness of these filtering materials, but will loosen up the bed of char. When respondents' filtering materials become ineffective they must be reactivated or regenerated. No substances known to men of science have an "unlimited life" in effectively removing impurities from water if such substances are merely backflushed

with the same water which flowed through them originally. (Tr. 120)

24. The following colloquy occurred between Dr. Deitz and Mr. Sibert:

Q. * * * Now, if you found friends of yours who had a water purifier for two, three, four, five years that had iron in their water, say one or two or three parts per million of iron, had a little odor in the water and probably some rust that came from the well, and these people used only water from their well to backwash that particular unit without any other type of regeneration—these are friends of yours, people you know and you have seen this in operation for two, three, four, five years—would you believe that that could be done without regeneration?

A. No. It is against all my chemical training.

Q. In other words, it is against all the laws of physics and the training that you have had, right?

A. I would say yes. All adsorbents gradually die out in their activity.

Q. But if something was done to that bone char that would make it do that, would you then believe it?

A. I have studied it for 25, 30 years, and we made a lot of—we doped the bone char up with many things. This is an old chestnut. And we have never been able to modify the surface in such a way that its adsorbing cycle was any better than it was originally. I can—

Q. You said you could never modify the surface?

* * * * *

Mr. Sibert: The adsorbing surface. (Tr. 130-31)

25. Dr. Robert B. Dean, director of laboratory research for the Advanced Waste Treatment Program of the United States Public Health Service, an expert on the treatment and purification of water, has dealt with water filtration since 1938 (Tr. 142), has a Ph.D. degree, and is a specialist and university professor in colloid chemistry, including absorption and adsorption. He has authored between fifty and sixty scientific papers, including a series of six papers on adsorption on liquid surfaces. (Tr. 144) Dr. Dean testified, as did Dr. Deitz, that bone char is made by heating bones in a furnace with a limited amount of air, leaving the mineral matter substantially intact. The organic matter of the bone is converted to carbon which is distributed over the surface of the mineral so that the end product is a black "friable" material which can be broken fairly easily, and is porous. Bone char is a natural product containing a number of substances which also occur as minerals. The carbon is in a form not too different from the carbon made by charring a stick in fire. (Tr. 146) Bone char is generally composed of approximately 10 percent carbon; "it might be 8 percent." (Tr. 147) There are a great many carbons. Specific carbons are usually tailor-made for a particular filtering job, *i.e.*, powdered carbon is used by waterworks to remove excessive odor and taste from water.

In such instances, alum is used as a coagulant. Granular carbon is used in the treatment of water also. It has a low ash content, looks very much like bone char, and has a much higher capacity for adsorbing certain odors, flavors, colors, and dissolved organic material. Granular carbon used for purifying water may be made by carbonizing coal, *i.e.*, coal treated with heat and steam, carbon dioxide, or other gases.

26. Regeneration, as applied to bone char, refers to the process by which there is restored to the filtering material its initial ability to adsorb impurities and other chemicals. (Tr. 151) The regeneration process is similar to the original process of making bone char, *i.e.*, the organic matter on the bone char is heated, and part of it is driven off and part is reconverted into carbon.

27. Bone char functions in a way analagous to a sponge. There are many tiny holes or pores leading in from the surface, with smaller holes branching off from these, and smaller holes branching off from each of those. Bone char has about 10 percent of the porosity area of a good activated carbon, which would have areas of as much as an acre of adsorbing surface per pound. (Tr. 152)

28. According to Dr. Dean's calculations, a tank containing 45 pounds of bone char could effectively filter out fluorides for from between 200 and 1,000 days. (Tr. 155) When the bone char becomes clogged with impurities its effectiveness cannot be restored by merely backflushing it with water. When it becomes ineffective the filtering material must be reactivated by regenerating it with heat in a kiln. Such regeneration could not be done in the home. (Tr. 158)

29. Odors and flavors will be adsorbed by bone char, but the deposits which they leave are not removed by backflushing with water. (Tr. 158) A common water treatment problem is the presence of the taste of chlorine. The longevity of a water filtration unit, installed to remove this type of odor, cannot be predicted exactly because water supplies differ too greatly. A water filtration unit will not last indefinitely. (Tr. 160)

30. Calcite is often used to remove excessive acidity from water and to contribute hardness to water. As it removes acidity in water, it dissolves into the water and disappears. (Tr. 160) Birm is used to remove iron from water, but it would have absolutely no effect on the removal of odors, taste, or detergents. It would not add any longevity to bone char. Zeolite minerals are used for the removal of hardness from water. They are not "zeolite resins," as Mr. Sibert named them. Many resins function in the same way as zeolite but are properly called "iron exchange resins." (Tr.

161-62) Neither zeolite, nor iron exchange resins would add any longevity to bone char, nor would they have any effect on bone char's ability to remove odors, taste, color, or detergent from water.

31. In the opinion of Dr. Dean and Dr. Deitz, the water filtering materials in respondents' units will not remain effective indefinitely. Dr. Dean, who has been intensely involved in the treatment of water for over 25 years, knows of no special treatment that will make bone char effective indefinitely for the removal of impurities. (Tr. 163) Based upon the information that respondents' water filtration units are composed of bone char and, on occasion, calcite and zeolite, Dr. Dean was of the opinion that respondents' description of their filtration unit: "it needs NO REGENERATION and NO REFILLING. No chemicals are used. We use specially processed MINERALS which DO NOT WEAR OUT but are kept clean by back flushing once every 2 or 3 months, depending upon the condition * * *" is false, misleading, and deceptive. (CX 1) Dr. Dean concluded "That water filter [respondents' unit] can certainly function as claimed to remove certain filterable impurities and it may remove other impurities for a limited time, but not indefinitely." In Dr. Dean's opinion, "clean water" would mean bacteria-free water. (Tr. 182-83)

32. The evidence in this record fails to show that any controlled tests of respondents' water filtration units were ever conducted by or on behalf of respondents. No substantial probative evidence has been offered by respondents to support their contentions that their units will not wear out and will remain effective if backflushed periodically. The thrust of the instant complaint does not concern itself with *which impurities* respondents' water filtration units are capable of removing.

33. JAMES JOLLY, a geologist employed by the United States Bureau of Mines, at the request of complaint counsel, analyzed the chemicals taken from one of respondents' water filtration units. His role in the presentation of the evidence was limited, and his cross-examination by Mr. Sibert did not elicit any evidence rebutting the charges of the complaint that respondents made false and misleading representations concerning (1) the guarantee attaching to their unit (2) the longevity of their units in use (3) the capability of their units to remove effectively water-borne microorganisms or viruses capable of causing diseases.

34. GRANT HUBBARD, a chemist employed by the United States Bureau of Mines, also at the request of complaint counsel, analyzed or supervised the analysis of the filtration chemicals taken from one of respondents' water filtration units and incorporated the re-

sults of such analysis in the Spectrographic Report. (CX 36a-b) Based on this analysis, it would appear that 8 percent or approximately 8 percent of respondents' filtration material, so tested, was bone char. The other 92 percent is "largely made up of calcium phosphorus and oxygen or calcium phosphorus, primarily, with perhaps other compounds of calcium. * * * the presence of a trace of iron, but * * * substantially calcium phosphate and carbon." (Tr. 215)

In support of the allegations of the complaint, this record contains the positive, categorical testimony of highly qualified, scientifically trained and knowledgeable scientists against the bald unsupported assertions of respondent Frank Sibert, the real party interest. The hearing examiner received the impression at the first prehearing conference that a failure of communication between complaint counsel and Mr. Sibert was the only reason that this matter ever reached the stage of formal complaint and hearings. However, the hearing examiner is now convinced and finds as a matter of fact and law that the public interest requires that Mr. Sibert, individually and through any corporate or other device, be publicly enjoined from the false, misleading, and deceptive representations and practices he has utilized in selling his water filtration units in interstate commerce. Irrespective of the depth and sincerity of his convictions about his "secret" process (which he refused to disclose at the hearing), Mr. Sibert must be permanently ordered to limit his representations to such facts as he can prove. In this record, Mr. Sibert has not *proven* any of his challenged advertising claims to be true. Complaint counsel has proven them to be false.

The facts of record support the following:

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction over the parties to and the subject matter of this proceeding. This proceeding is in the public interest.
2. Respondents manufacture and sell in interstate commerce a water purifier or water filtration unit which they marketed under the name, among others, of "Sibco Water Purifier" in competition with other manufacturers and sellers of similar water filtration units.
3. In selling their water filtration and water purifier units in interstate commerce, respondents make false, misleading, and deceptive representations which are more specifically found, *supra*, to be in violation of the Federal Trade Commission Act.

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4. Respondents' false, misleading, and deceptive representations have been and will continue to be unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce in violation of the Federal Trade Commission Act.

ORDER

It is ordered, That respondents Sibco Products Company, Inc., a corporation, its officers, agents, representatives and employees, and Frank Sibert, individually and as an officer of said corporation, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of water filtration units, or any other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that respondents' water filtration units or any other products are guaranteed, unless the precise nature, extent, and duration of the guarantee and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed;

2. Representing, directly or by implication, that respondents' water filtration units or any of respondents' other products, are unconditionally guaranteed when a service or other charge is imposed for repairing or replacing said products, unless the amounts of said repair or service charges are clearly and conspicuously disclosed in the text of the guarantee;

3. Representing, directly or by implication, that respondents' water filtration units effectively remove water-borne microorganisms or viruses capable of causing diseases;

4. Representing, directly or by implication, that:

(a) respondents' water filtration units need no regeneration or no refilling;

(b) the filtering material in respondents' water filtration units will not wear out or become exhausted; or

(c) the filtering material in respondents' water filtration units will remain effective indefinitely if backflushed with water periodically.

5. Misrepresenting in any manner, or placing in the hands of others the means and instrumentalities whereby they may mislead or deceive the purchasing public as to the nature or extent of respondents' guarantee, the effectiveness or duration of the effectiveness of their water filtration units, the manner or means for restoring or prolonging the effectiveness of said

units; or the capability of respondents' water filtration units to remove water-borne microorganisms or viruses capable of causing diseases.

OPINION OF COMMISSION.

NOVEMBER 22, 1965

BY JONES, *Commissioner*:

The complaint in this matter charges that Sibco Products Company, Inc., a corporation, and its principal stockholder, Frank Sibert, violated Section 5 of the Federal Trade Commission Act by making certain misrepresentations in connection with the sale and distribution of their water filtration unit. The hearing examiner sustained the allegations in the complaint and entered an order requiring respondents to cease and desist from making the representations he found to be false. Respondents have appealed.

I. *Respondents and Their Product*

Sibco Products Company, Inc., is a New Jersey corporation which manufactures and sells in interstate commerce, among other things, a water filtration unit. The individual respondent, Frank Sibert, is the president of the corporate respondent, and he and his wife are sole officers and stockholders of the corporation. He formulates, directs and controls the acts and practices of the corporation.

Sibert entered the water filtration business in 1957, some seven years prior to the hearing below. Previously according to his testimony, he had developed a total of 15 new products, including an infrared massager, an electric fly-killer, a nail clipper, a cigarette roller, an automatic silver tarnish remover, a quick-opening pocket knife, a cushion vibrator, a vibrating pillow, a slenderizing machine and a water desalter.

Sibert had no background which qualified him as an expert in the field of water filtration. He testified that he had been inspired to enter the water filtration business by a Dr. Emil Hoffman, a medical doctor, and that the sole basis for his technical competence in the design and manufacture of water-filtration units was information purportedly given to him by Dr. Hoffman, who did not himself claim any specialized training in this field. Dr. Hoffman died in or about 1956, and Sibert did not have any scientific assistance, guidance or supervision from any technically qualified people in the design or construction of water filtration units at the

time he decided, shortly after Dr. Hoffman's death, to go into this business.

During his first two years in the business, Sibert stated that he did not sell his units but only "field-tested" them. Thus, the period he actually sold the units was limited to five years preceding the hearing. Sibert stated that he sold about 1,000 units during this period. Although it is not clear precisely what the price of the unit was, a letter sent to prospective purchasers sets forth a "retail price" of \$345 each, or a "factory price" of \$295. Sibert testified that the price of the least expensive unit was \$125. He estimated that the amount of the gross annual sales of the units was between \$20,000 and \$30,000. When pressed to give more specific figures, Sibert refused to do so on the ground that he did not have the precise information, even though he was the only person involved in the business. He also refused to give the names of any customers who had in fact purchased the unit.

The water filtration unit sold by respondents consists of a metal tank, approximately four feet in height and eight inches in diameter. Although Sibert consistently refused to disclose the ingredients used in his unit despite a subpoena duces tecum ordering him to produce this data, experts at the hearing who tested respondents' unit testified that the minerals or chemicals inside respondents' filtration units include birm (for the removal of iron), zeolite resin (a water softener), calcite (to reduce acidity) and bone char (to remove rust, iron, sulphur, chlorine and odors).

II. *The Representations Challenged*

The challenged representations of respondents are contained in advertisements placed by respondents in the press and in literature and brochures sent by respondents to prospective customers. One of the newspaper advertisements of respondents' product, published in various New York City dailies and elsewhere, reads in part as follows:

PURE WATER. Amazing New Purifier guaranteed for 10 years! Removes RUST, IRON, SULPHUR, CHLORINE, ODORS, etc. Purifies and filters city or well water. Eliminates stained sinks, dishes, clothes. Gives you crystal clear, odor-free, better tasting water. * * * No refills, no motor, no regeneration, no chemicals. Write for FREE details. * * *

Prospective purchasers were sent a form letter containing, *inter alia*, the following language:

* * * [O]ur wonderful New Type Sibco Water Purifier * * * needs NO REGENERATION and NO REFILLING. No chemicals are used. We use

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pecially processed MINERALS which DO NOT WEAR OUT but are kept clean by back flushing once every 2 or 3 months, * * *.

Our Model S-1 will give you approximately [sic] 200 gal. per hour of Delicious Clear, Clean, Odor-free water to delight your family. * * *

This unit will be shipped with the specific understanding that if it fails to perform those functions which we guarantee, namely, the removal of RUST, IRON, SULPHUR, & CHLORINE ODORS, you may return it to us within 30 days after you receive it, for a full refund.

We know you and your entire family will be just delighted with the SIBCO Purified Water which is Sparkling Clear, Clean and Odor free. Pure drinking and cooking water are vital to the health of your family so don't delay correcting your bad water with a SIBCO Water Purifier.

A separate brochure sent to prospects stated, among other things, "no regeneration, no refills * * * Special Minerals last for years, need only a periodic back flushing to keep Minerals clean * * *."

The hearing examiner made the following findings with respect to respondents' challenged representations:

1. Respondents represented that their water filtration units are fully and unconditionally guaranteed by them in every respect for a period of ten years, whereas in fact the user in order to take advantage of the guaranty must dismantle the unit, ship it back to respondents at their own expense and in addition pay a \$30 service charge which in effect covers the cost of a new unit;

2. Respondents represented that their water filtration units effectively remove water-borne microorganisms and viruses capable of causing diseases, whereas in fact these units do not perform as claimed;

3. Respondents represented that their water filtration units need no regeneration and no refilling; the filtering material in their water filtration units will not wear out or become exhausted; and the filtering material in such units will remain effective if back-flushed with water periodically, whereas in fact these units do require regeneration or refilling and the chemical filtering agents contained in the unit will wear out and become ineffective even if back-flushed.

III. Discussion of the Issues

Respondents were not represented by counsel either during the hearing before the examiner or on their appeal to the Commission from the hearing examiner's initial decision. For this reason, it is important to detail the facts respecting respondents' conduct of their defense and appeal in this case before considering the issues on appeal.

Respondents were represented by counsel throughout the period of the investigation, which commenced in 1961, in the precomplaint consent order negotiations, in the preparation of their answer to the complaint herein, and during the pretrial conference held before the examiner about six weeks before the hearing commenced. Approximately one month after this conference, respondents' counsel wrote to counsel supporting the complaint as follows:

This is to advise you that I no longer represent the respondents in the above matter. I have been relieved of further connection with this case by Mr. Sibert, who felt that he could not proceed in the manner that I recommended.

On September 21, 1964, the first day of the hearing, respondent Sibert appeared and stated that respondents were not represented by counsel because they could not afford to pay counsel fees and that he intended to conduct respondents' defense. The hearing examiner then offered to adjourn the hearing, to give Sibert a chance to obtain counsel, but this offer was rejected by Sibert. At the conclusion of the two-day hearing, in which Sibert testified and cross-examined witnesses at length, he made a statement on the record thanking the examiner and complaint counsel "for treating me so nicely and being so helpful in guiding me."

On December 31, 1964, respondent Sibert wrote a letter to the Commission stating as follows:

At the pre-Hearing, the Hearing Examiner, Mr. L. R. Gross told me that if I or the Company could not afford a lawyer to help me defend myself and the Company, that the Federal Trade Commission would provide legal counsel for us.

This was not brought up at the Hearing, and I had to defend myself and the Company without the benefit of Counsel, because of lack of funds to bring in my own lawyer. (I was really nervous)

Can you enlighten me on this matter, and what legal help we may expect or can obtain when financially unable to pay for a lawyer to defend us.

On the same date, he also wrote another letter to the Commission stating that he could not afford a copy of the transcript and requesting that the Commission send him a copy.

On January 19, 1965, the Commission advised Sibert that a copy of the transcript of the hearing would be made available to him in New York and that the Commission would give Sibert the right to file a statement in lieu of a brief and extended the time for filing that statement. The Commission also advised Sibert that he could obtain legal assistance from a number of sources, including the New Jersey State Bar Association, the Legal Aid Society of

New York City, and the Legal Referral Service located in New York. Sibert, however, continued to represent himself and the corporate respondent and appeared on his own behalf at the oral argument.

Sibert claimed in his Appeal Brief that he had been very nervous and confused during the hearing and that he could not afford to purchase a copy of the transcript. However, in his Appeal Brief he made references to specific pages of the transcript of the hearing before the examiner, so that it is apparent that he did in fact use a copy of the transcript in preparing his Appeal Brief to this Commission even though he had not purchased a copy (*e.g.* pp. 6, 8, Resp. Appeal Brief).

In our consideration of the issues in this case, we have been mindful of the fact that respondents were not represented by counsel during the hearing before the examiner and before the Commission. Accordingly, we have examined the entire record in this case with great care and we are satisfied that respondents were accorded a full and complete opportunity by the hearing examiner to present every facet of their defense. Moreover, we ourselves heard respondent Sibert on oral argument and are quite confident that he was completely aware of all of the issues involved in this complaint, clearly understood the evidence offered in support of the complaint, availed himself fully of the opportunity to offer all of his evidence during the hearing in support of his defense, and took advantage of his time for oral argument to explain his position on appeal in great detail to the Commission. He was an able counsellor in his own behalf, and we have no doubts as to his abilities to conduct his own defense.

With this background in mind, we turn to our discussion of the issues in this case.

1. *The Unconditional Ten-Year Guaranty*

Respondents admitted in their answer prepared by their counsel that their ten-year guaranty was not unconditional and that users of respondents' unit seeking to return the unit for repair or replacement during this ten-year period had to pay the costs of shipment as well as a \$30 service charge. Their advertisements did not disclose any of those conditions.

Respondents' sole argument is that their customers received a copy of the formal guaranty setting forth the conditions under which it would be honored prior to purchasing the unit. The evidence for this claim was Mr. Sibert's testimony during the hearing before the examiner. While the documentary evidence in

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support of this claim is somewhat inconclusive, it is not necessary to resolve this point, and we will assume that Mr. Sibert's testimony is in accord with the facts.

The Commission has long held that a representation that a product is guaranteed must disclose the manner, if any, in which such guaranty is limited. See *Pati-Port, Inc.*, 60 F.T.C. 35 (1962), *aff'd*, 313 F.2d 103 (4th Cir. 1963) and *Luxury Industries, Inc.*, 59 F.T.C. 442 (1961). An advertisement which states that a product is guaranteed and fails to disclose that a service charge will be required before said guaranty will be honored is an unfair and deceptive practice. *Parker Pen Co. v. F.T.C.*, 159 F.2d 509 (7th Cir. 1946).

The failure to set forth the terms of the guaranty was particularly deceptive in this case, since the so-called guaranty was so severely limited that it hardly constituted a guaranty at all. To have his unit repaired or replaced a customer was required not only to go to the considerable trouble and expense of dismantling and shipping the 100-pound, four-foot unit, but also to pay a \$30 service charge—the approximate amount which respondents paid for the materials in their unit. So onerous were these conditions that they undoubtedly discouraged many customers from acting under the guaranty, and, if they had been disclosed in the advertisements, would probably have deterred many potential purchasers from buying the unit in the first place.

Nor is the deception in this case cured by the fact that respondent in other literature directed to prospective customers disclosed that the guaranty is in fact limited and conditional. As the Court stated in *Carter Products Co. v. F.T.C.*, 186 F.2d 821, 824 (7th Cir. 1951)

The law is violated if the first contract or interview is secured by deception (*Federal Trade Comm. v. Standard Education Society, et al.*, 302 U.S. 112, 115), even though the true facts are made known to the buyer before he enters into the contract of purchase (*Progress Tailoring Co., et al. v. Federal Trade Comm.*, 7 Cir., 153 F.2d 103, 104, 105). See also *Aronberg, et al. v. Federal Trade Comm.*, 7 Cir., 132 F.2d 165, 169.

Accordingly, we hold that respondents' advertisements were false and misleading in that they unqualifiedly represented that the product was guaranteed, whereas in fact, in order to take advantage of the guaranty, the customer had to return the unit to respondents at his own expense and had to pay an additional service charge of \$30.

2. *Implied Representations Respecting Micro-organisms and Viruses*

Complaint counsel charges that by the use of such words as "pure," "purify" and "clean" and the phrase "pure drinking and cooking water are vital to the health of your family * * *" in connection with the unit, respondents are implicitly representing that disease-carrying water will be made safe for drinking through the use of the Sibco "Purifier."

Respondents admit that the unit will not kill micro-organisms but maintain that the words quoted above do not constitute an implicit representation to this effect. Moreover, respondents alleged in their answer that the literature accompanying the unit contains a specific disclaimer that it does not kill bacteria.

We conclude from the evidence that respondents' water purifier does not in fact remove water-borne micro-organisms or viruses capable of causing diseases. Moreover, we hold that the statements in respondents' advertisements and form letters—that their unit will "purify and filter" water, will ensure "clean" water, will correct "bad" water, will give "pure drinking and cooking water" which is "vital to the health of your family" and will filter "impurities" found in the consumer's water supply—constitute representations that respondents' unit will remove bacteria and other disease-causing germs. We find that a potential purchaser who has or believes he has or may have contaminated water could easily be led by statements of the type quoted above to believe that respondents' unit will make his water potable. *Giant Foods, Inc. v. F.T.C.* 332 F. 2d 977 (1963).

With respect to the disclaimer used by respondents in one brochure, we have no way of knowing from the evidence whether all of respondents' prospective customers actually received this pamphlet. Furthermore, this disclaimer was not inserted until respondents' precomplaint negotiations with complaint counsel. Finally, the presence of this disclaimer in one of respondents' brochures does not negate the contrary implication in the affirmative representations contained in their advertisements and sales literature as to the purifying qualities of their unit.

3. *Representations Respecting Longevity of Materials in Unit.*

Complaint counsel charges that since the materials in respondents' unit cannot last indefinitely without regeneration, respondents' contrary representations are false. Respondents claim that while ordinary bone char (one of the major filtering ingredients in their

unit) will remove water impurities for only a limited time, their bone char has been subjected to a "secret" process which enables respondents' filtering unit to function without regeneration and remain effective for an indefinite period. During the hearing before the examiner, however, respondents consistently refused to disclose their alleged "secret" process with which they treated their bone char.

The testimony at the hearing by complaint counsel's expert witnesses was unanimous that the period for which bone char will function without regeneration as an effective filtering agent, is rather limited, and that calcite, one of the other filtering substances in respondents' unit, will disappear altogether within a few years.

A laboratory analysis of respondents' materials conducted prior to the hearing revealed that the bone char in respondents' unit is chemically and physically indistinguishable from other bone chars and has no unique characteristics.

The record discloses that while Dr. Victor R. Deitz, complaint counsel's first expert witness, was on the stand, complaint counsel suggested that Sibert testify *in camera* "to give Dr. Deitz an opportunity to be aware of what this process [is]" (Tr. 131). The term "*in camera*" was explained to respondent both by complaint counsel and by the hearing examiner (Tr. 132). The hearing examiner specifically explained to Mr. Sibert that he, the examiner, could segregate that portion of the record referring to the secret process so that it would not be made public. The hearing examiner's statement on this point was as follows:

* * * [I]f you wish to ask this witness whether treating the bone char in the way you treated it, divulge your secret, that the Hearing Examiner can by order direct that part of the examination to be made separate and apart from the rest of the record so it would not be available to the public (Tr. 132).

Despite this assurance, Mr. Sibert refused to take the stand and testify on the nature of the process used, claiming still that he was unwilling to disclose the secret nature of his process.

In the final minutes of the hearing, after all of the expert witnesses had departed, Sibert offered to divulge his secret process for treating bone char to the examiner and to complaint counsel. The examiner refused to permit this, setting forth his grounds as follows:

I do not know what you do with the bone char. Mr. Feldman does not know what you do with the bone char. So far as I know this is your "secret." We have no desire in view of your previously expressed determination, not to

reveal it even to create a situation where, inadvertently, because once it was made known to us I might have to use that in writing an initial decision, and then that initial decision would be a matter of public record.

Am I making myself clear to you? For once I know it I have no right, in writing an initial decision, particularly if I should hold in your favor, I could not possibly say, "In view of the testimony that a secret which I have in my pocket means that all of their witnesses are wrong," because I would have to say why (Tr. 224-225).

During the oral argument, respondents did describe their process to the Commission. Mr. Sibert told the Commission the following:

Bone char has millions of tiny little crevices in it. This bone char when it is checked shows certain minerals. Now, bone char is made from bones. Bones have fat and oils in them. Those fats and oils that remain in there when bone is charred are the culprits that keep the regular stuff, unless it is removed, from working.

Now, that is my secret. All we do is remove that oil and fat from that bone char that holds all these millions of tiny impurities that go in there. And you can't backflush it (Tr. 45-46).

Even though this special process was not revealed by Sibert to the expert witnesses, we are convinced that Mr. Sibert's cross-examination of them and their testimony in reply would not have been any different had the precise formula been known by them. Mr. Sibert carefully examined both of the expert witnesses offered by complaint counsel on whether it would be possible to treat bone char by a special process in order to prevent it from deteriorating and losing its filtering properties.

Dr. Seitz and Dr. Dean both affirmed that nothing could be done to bone char to prevent it, after usage, from clogging and to enable it to be reactivated by backflushing. Dr. Deitz, a leading expert on bone char, testified that respondents' claim as to the permanent effectiveness of their bone char was "against all [his] chemical training." His testimony on cross-examination continued as follows:

All adsorbents gradually die out in their activity.

Q. But if something was done to that bone char that would make it do that, would you then believe it?

A. I have studied it for 25, 30 years, and we made a lot of—we doped the bone char up with many things. This is an old chestnut. And we have never been able to modify the surface in such a way that its adsorbing cycle was any better than it was originally. * * * (Tr. 130).

Dr. Robert B. Dean, Director of Laboratory Research for Ad-

vanced Waste Treatment, of the U.S. Public Health Service, testified to the same effect:

I know of no special treatment or anything that you could do to bone char that would make it effective toward the removal of tastes, odors, colors or detergents indefinitely (Tr. 163).

Sibert argued on appeal that respondents had been deprived of a fair hearing because of the refusal of the hearing examiner to permit him to disclose his secret process to the examiner. We find no merit in this contention. It is clear that if respondents were in any way handicapped or prejudiced at the hearing because the experts could not be interrogated directly and expressly on their opinion of the efficacy of respondents' process, that handicap or prejudice was created by respondents' refusal to disclose this process to them as they had been urged to do by the hearing examiner. However, we find that in fact respondents were not in any way handicapped or prejudiced in their defense by the nondisclosure of the details of respondents' alleged secret process.

Considering all of the evidence offered in this record and weighing it in the light of all of the various contentions made with respect to it by respondents, we conclude that respondents' water filtration unit will not permanently remove water impurities without regeneration and that respondents' representations to the contrary are false and misleading and in violation of Section 5 of the Federal Trade Commission Act.

Respondents claim that the examiner refused to permit them to introduce into evidence the testimonials of their customers as to the efficacy of the unit and also that he terminated the hearing prematurely before respondents had completed offering their defense. We have carefully examined the record on these points and find no merit in either of these contentions. The record demonstrates that respondents were given every opportunity to introduce the alleged customer testimonials but refused to take advantage of it because of their unwillingness to disclose the names of their customers. The transcript on this point reads as follows:

HEARING EXAMINER GROSS: I have to advise you that your bare statement that you have these letters is not sufficient—I cannot consider it, because it would have, certainly, have been no expense to have brought them with you.

MR. SIBERT: I have the letters here.

HEARING EXAMINER GROSS: If you want to put them in evidence, all right. You show them to Mr. Feldman and he might be willing to have them brought into evidence.

MR. SIBERT: The reason that I do not want to put them in evidence is because it discloses the names. This particular one I did mention, but it discloses the names of the people, of the customers, let us say, of mine, and I understand that I do not have to disclose the names of them (Tr. 235-236).

During the oral argument on this appeal, the Commission offered to receive the proposed letters *in camera* (the meaning of which term was again explained to Sibert), but Sibert nevertheless once more failed to make them available.

We find a similar absence of factual basis for respondents' claim that their defense was arbitrarily cut off by the hearing examiner.

On page 11 of his brief, Sibert stated that he had had

* * * plenty of written proof with me at the hearing of satisfied customers who had been using our Water Purifier and expected to show it as evidence, but at the second day of the hearing it was after 4 pm and the hearing examiner said he wanted to close the hearing, before 5 pm that day. I could not come back the next day, due to lack of funds, so I was unable to provide this evidence, that now seems vital in this case. I was nervous and I felt like there was some sort of pressure on me, because I did not have the money to stay over another night in Washington, so I skipped a lot of the things I wanted to say and evidence I should have left there, to help convince the hearing examiner that we were right and were not trying to mislead anyone * * *.

The record in no sense bears out Sibert's contention that he had been cut off and deprived of an opportunity to offer evidence. The hearing examiner made sure that Sibert understood that no time limitation was imposed by him. At the end of the first day's hearing, the hearing examiner stated as follows:

Now, Mr. Sibert, as you sit there now, and this doesn't necessarily bind you, do you intend to offer any evidence other than such evidence as you may be able to get through examining the government's witnesses? And I don't mean by asking that question to imply that you are being limited as to time at all. You may within the bounds of relevancy put in all the evidence you want. Or you may take the stand again and testify further if you wish (Tr. 135).

Sibert answered, "I have no one that I can bring here because I don't have the money for it."

At the end of the second day, the hearing examiner announced that he would like to leave no later than 4:40 p.m.; but he further specified:

That does not mean, sir, that you do not have the rest of the week, if you want it * * *. Take all the time you want, because Mr. Feldman has shown no indication to shut you off and I hope I have not (Tr. 245).

There is no indication that Sibert had any serious intention of bringing in any witnesses. At one point, he referred to "the chemist of that company that we have been buying the material from" but said that he had "refused to come here and help me" (Tr. 43). The hearing examiner then explained at length how Sibert could obtain a subpoena from the hearing examiner who could require any "witness anywhere in the United States" to attend the hearing (Tr. 44). Sibert once again declined because of lack of funds. As noted above, to the extent this alleged evidence referred to his customers' testimonials, it was his decision not to offer them, a decision which he persisted in on this appeal as well.

Finally, we find that there is no merit to Sibert's claim that he was cut off by the Commission in his oral argument and prevented from making various arguments which he had intended to make. Sibert was not only accorded the opportunity to argue his case in full, but indeed presented his arguments before this Commission with great clarity and at considerable length. He also submitted an 18-page, closely spaced typewritten statement (in lieu of a brief), together with four attachments, to the Commission, in which he set forth each of the hearing examiner's findings and presented detailed comments as to why, in his opinion, these findings and conclusions were in error. We are convinced that Mr. Sibert has in fact fully presented all of his evidence and arguments, both during the hearing before the examiner and on the appeal, as to why the hearing examiner erred in his findings and conclusions and why an order is unnecessary in this case.

In conclusion, we find that respondents' contentions on the merits are without factual support in the record and contrary to the established case law. We also find that in no way have respondents been deprived of any of their rights or treated unfairly.

IV

The order entered by the hearing examiner, in our judgment, is both appropriate and necessary to ensure that respondents will cease and desist from making the representations which we have found to be deceptive. While respondents voluntarily revised some of their sales literature prior to and during the proceedings in this case, these revisions in some cases were not extensive enough and in other instances did not encompass all of respondents' sales literature. During the oral argument on the appeal from the initial decision the Commission directed the parties to attempt to negotiate a satisfactory disposition of this proceeding, so that it would be unnecessary for the Commission to issue a formal decision and

order. Subsequent to the argument complaint counsel advised the Commission that he had been unable to work out a satisfactory agreement with respondents. Accordingly, we have concluded that it is essential that a formal cease and desist order be issued by the Commission in this case.

The initial decision, as supplemented and modified to conform to the views expressed in this opinion, and the order issued by the examiner, will be adopted as the decision and order of the Commission.

Commissioner Elman concurs in the result.

FINAL ORDER

This matter having been heard by the Commission on an appeal by respondents from the initial decision of the hearing examiner, and upon briefs and argument in support thereof and in opposition thereto; and

The Commission having rendered its decision determining that the appeal should be denied, that the initial decision, as supplemented and modified to conform to the views expressed in the accompanying opinion, should be adopted as the decision of the Commission, and that the order issued by the hearing examiner should be adopted as the order of the Commission:

It is ordered, That the initial decision, as modified and supplemented by the accompanying opinion be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That the order issued by the hearing examiner be, and it hereby is, adopted as the order of the Commission.

It is further ordered, That the respondents herein 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 this order.

Commissioner Elman concurring in the result.
