

IN THE MATTER OF
RODALE PRESS, INC., ET AL.

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

*Docket 8619. Complaint, April 3, 1964—Decision, June 20, 1967**

Order requiring an Emmaus, Pa., book publisher to discontinue making claims in its advertising that readers of two of its health and diet publications would gain various therapeutic benefits.

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 Rodale Press, Inc., a corporation, and Rodale Books, Inc., a corporation, and Jerome I. Rodale and Robert Rodale, individually and as officers of said corporations, 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. Respondents Rodale Press, Inc., and Rodale Books, Inc., are corporations organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania with their offices and principal places of business located at 33 East Minor Street, Emmaus, Pennsylvania.

* Order of Dec. 4, 1968, dismissed the complaint in this matter after a remand dated Oct. 18, 1968, 407 F. 2d 1252 (1968), from the Court of Appeals.

Jerome I. Rodale and Robert Rodale are officers of said corporations. They formulate, direct and control the acts and practices of the corporate respondents. Their address is the same as that of the corporate respondents.

PAR. 2. Respondents are now, and have been for some time last past, engaged in the publication, advertising, sale and distribution of various books, pamphlets and magazines pertaining to diet, diseases and the health of mankind. Among, but not all inclusive of the books published by respondent Rodale Press, Inc., is "The Health Finder." Respondent Rodale Press, Inc., also publishes various pamphlets and paperback books. Rodale Books, Inc., participates in the publishing, advertising and distribution of the books published by Rodale Press, Inc., and has also published various pamphlets and paperback books, including but not limited to, "How To Eat for a Healthy Heart" and "This Pace is Not Killing Us."

Respondents cause and have caused said books and pamphlets when sold, to be transported from their place of business in the State of Pennsylvania to purchasers thereof located in various other States of the United States, and in the District of Columbia. Respondents at all times mentioned herein have maintained a course of trade in said books, pamphlets and magazines in commerce, as "commerce" is defined in the Federal Trade Commission Act. Respondents' volume of business in the sale of said books and pamphlets in commerce is and has been substantial.

PAR. 3. In the conduct of their business at all times mentioned herein respondents have been in substantial competition, in commerce, with other corporations, firms and individuals in the sale and distribution of books and pamphlets.

PAR. 4. In the course and conduct of their business and for the purpose of inducing the purchase in commerce of said books and pamphlets respondents have made certain statements and representations with respect thereto in advertisements and promotional material including letters, circulars and brochures, sent through the United States mails into various States of the United States and into the District of Columbia.

PAR. 5. Among and typical, but not all inclusive, of the statements and representations made and appearing in said advertisements are the following:

Better Health can mean a lot to you personally. Have you ever stopped to think that all the good things in life depend upon good health? * * * Wouldn't you like to enjoy one or more of these rewards of good health? * * * Good health and abundant energy that goes with it * * * Are you "just too tired"

to take a full part in the life of your community? * * * Do you enjoy your leisure moments as you should? Or are you so tired you spend most of your leisure time in resting and sleeping? * * * Are you bored and discontented because you don't feel well? * * * Turn page for important message * * *.

Health Finder, an encyclopedia of Health Information from the preventive point of view. ANSWERS HEALTH PROBLEMS.

Which of the health ideas in this amazing book will * * * (1) Add years to your life? (2) Give you more energy? (3) Cut down on your doctor and dentist bills? (4) Make you feel better than you ever felt before? (5) Help your family to achieve health and happiness? * * * Recommendations for a winter free from common colds (pages 260-1) * * * What is the most successful preventative and cure for constipation (pages 278-9) * * * Cancer and nutrition (pages 165, 6, 7) * * * Diet for children during polio season (pages 623, 4, 5) * * * Prevention of ulcers (page 854) * * * Heart Disease and the use of Vitamin E (pages 415, 6-7-8-9) * * * Use of garlic in the treatment of hypertension (high blood pressure) (page 388) * * * Laboratory experiments indicating that brewers yeast and dried liver prevent cancer (page 141) * * * Experiments showing the effectiveness of the B complex vitamins in preventing the growth of cancer (pages 176-7) * * * The garlic treatment for tuberculosis (page 386) * * * Goiter-what it is, where it occurs, what should be done to prevent it (pages 392, 393-4-5-6-7-8) * * * Reasons for a salt-free diet if you suffer from high blood pressure (pages 424-5) * * * Exciting discovery concerning the use of desiccated liver as a means of preventing fatigue (pages 450-1-2) * * * Experiments which indicate that liver in the diet helps prevent cancer (page 452) * * * Infantile paralysis and vitamin deficiency (pages 625-6-7-8-9) * * * Food and polio (pages 596-7-8-9) Polio its cause and prevention by Dr. Virgil A. David, New York City (pages 599-603).

Certain of the advertisements referred to in Paragraph Four included testimonials from alleged readers of said publication under headings CANCER, HEART DISEASE, MENTAL HEALTH, POLIO, ULCERS, and ARTHRITIS.

PAR. 6. Through the use of said statements and others not specifically set out herein, respondents have represented, and are now representing, directly or by implication, in their advertising:

(1) That readers of the book, "The Health Finder" who follow the ideas and suggestions set forth therein will:

- (a) Add years to their lives.
- (b) Gain more energy.
- (c) Effectuate savings on medical and dental expenditures.
- (d) Feel better than ever before.
- (e) Gain and maintain health.

(2) That readers of the book, "The Health Finder" will find therein the answer to any health problem including but not limited to:

- (a) How to free oneself of common colds.
- (b) How to prevent and cure all types of constipation.

- (c) How to prevent ulcers.
- (d) How to prevent fatigue.
- (e) How to prevent goiter.
- (f) How to prevent high blood pressure.

(3) That the ideas and suggestions contained in "The Health Finder" are effective in the prevention, relief and treatment of cancer, tuberculosis, infantile paralysis, heart disease, arthritis and mental illness.

PAR. 7. In truth and in fact:

1. The ideas and suggestions contained in "The Health Finder" will not assure readers:

- (a) An increased life span.
- (b) More energy.
- (c) Savings on medical and dental expenditures.
- (d) That they will feel better than ever before.
- (e) That they will gain and maintain health.

2. "The Health Finder" does not contain the answer to all health problems and will not enable the reader to:

- (a) Free himself of common colds.
- (b) Prevent or cure all types of constipation.
- (c) Prevent ulcers.
- (d) Prevent fatigue.
- (e) Prevent goiter.
- (f) Prevent high blood pressure.

3. The ideas and suggestions contained in "The Health Finder" are not effective in the prevention, relief or treatment of cancer, tuberculosis, infantile paralysis, heart disease, arthritis, or mental illness. Moreover, reliance on the advertising statements and representations resulting in purchase of the aforesaid book and the attendant delay in receiving adequate treatment promptly, may result in relentless progression of these serious diseases, irreparable injury to health, crippling, and loss of life.

Therefore, the statements and representations as set forth and referred to in Paragraphs Five and Six were and are false, misleading and deceptive.

PAR. 8. Included in the advertising of "The Health Finder" as set forth and referred to in Paragraph Four, respondents have advertised, as a gift to purchasers of said book, their publications "How to Eat For a Healthy Heart" and "This Pace is *Not* Killing Us," combined in a single volume.

PAR. 9. Among and typical of the statements and representations made and appearing in said advertisements concerning the

publications "How to Eat For a Healthy Heart" and "This Pace is *Not* Killing Us," but not limited thereto, are the following:

Did you know that in the United States alone 773,980 people died of heart disease last year? HOW TO EAT FOR A HEALTHY HEART attacks this terrifying problem from a new angle. THIS PAGE IS NOT KILLING US is also concerned with the heart disease problem. It contains an equally vital health message for you.

* * * * *

Here's why you should read both of these books at once: American men are dying from heart disease five times faster than Italian men—ten times faster than Japanese men! Why is this so? Is there any hope for Americans?

Yes Mr. Rodale says, there is all the hope in the world, if the enigma of heart disease is approached as a problem in nutrition * * *. Mr. Rodale brings to light many facts about heart disease—facts you must consider if you want to live a long, useful, vital life * * *.

If you have heart symptoms you won't want to miss this amazing book * * *.

PAR. 10. Through the use of said statements and others not specifically set out therein respondents have represented and are now representing, directly or by implication, in their advertising, that the books "How to Eat For a Healthy Heart" and "This Pace is *Not* Killing Us" contain information which will be of benefit in the prevention, treatment and cure of heart disease. Contrary to said representations said books do not contain information which will be of benefit in the prevention, treatment or cure of heart disease. Moreover, reliance on the advertising statements and representations resulting in purchase of the aforesaid books and the attendant delay in adequately treating heart disease promptly, may result in irreparable injury to health and loss of life.

Therefore the statements and representations as set forth and referred to in Paragraphs Nine and Ten were, and are, false, misleading and deceptive.

PAR. 11. The use by the respondents of the foregoing, false, misleading and deceptive statements in advertising has had and now has the tendency and capacity to mislead and deceive members of the purchasing public into the erroneous and mistaken belief that such statements were, and are, true and into the purchase of substantial quantities of respondents' books, magazines and pamphlets by reason thereof.

PAR. 12. The aforesaid acts and practices of the 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 un-

fair methods of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act.

Mr. Garland S. Ferguson and Mr. Richard W. Whitlock supporting the complaint.

Arnold, Fortas & Porter, by *Mr. Thurman Arnold and Mr. Stuart J. Land*, of Washington, D.C., and *Mr. Morton J. Simon*, of Philadelphia, Pa., for respondents.

INITIAL DECISION BY JOHN LEWIS, HEARING EXAMINER

APRIL 16, 1965

STATEMENT OF PROCEEDINGS

The Federal Trade Commission issued its complaint against the above-named respondents on April 3, 1964, charging them with engaging in unfair and deceptive acts and practices and unfair methods of competition, in commerce, in violation of the Federal Trade Commission Act, by the use of false, misleading and deceptive statements in advertising certain books and pamphlets published and distributed by them. After being served with said complaint respondents appeared by counsel and thereafter filed their answer denying, in substance, having engaged in the illegal practices charged.

Pursuant to notice duly given, prehearing conferences were convened in Washington, D.C., before the undersigned hearing examiner, theretofore duly designated to act as hearing examiner in this proceeding, on July 22, 1964, and October 5, 1964. Prehearing orders embodying the stipulations, admissions and agreements made at said conferences were thereafter issued by the undersigned. In accordance with the understandings reached at the prehearing conferences respondents moved the examiner to dismiss the complaint herein or, in the alternative, to certify the questions presented in said motion to the Commission. Said motion was denied by order of the undersigned issued November 19, 1964. Respondents' request for permission to file an interlocutory appeal from said order was denied by Commission order issued December 3, 1964, and a motion for reconsideration of said ruling was denied by the Commission on January 5, 1965.

Hearings on the charges were held in Washington, D.C., from November 30, 1964, to December 11, 1964, and, pursuant to order of the Commission granting leave to hold noncontinuous hearings, said hearings were recessed until January 19, 1965, and concluded on said date. At said hearings, testimony and other evi-

dence were received in support of and in opposition to the allegations of the complaint, said evidence being duly recorded and filed in the office of the Commission. All parties were represented by counsel, participated in the hearings and were afforded full opportunity to be heard and to examine and cross-examine witnesses. At the close of all the evidence, and pursuant to leave granted by the undersigned, proposed findings of fact, conclusions of law and order, together with supporting briefs, were filed by the parties on March 5, 1965, and a reply to complaint counsel's proposed findings was filed by respondents on March 16, 1965, the former electing not to file any reply to respondents' proposed findings.

After having carefully reviewed the evidence in this proceeding, and the proposed findings and conclusions submitted, the undersigned finds that this proceeding is in the interest of the public and, based on the entire record and from his observation of the witnesses, makes the following: ¹

FINDINGS OF FACT

Identity of Respondents

1. Respondents Rodale Press, Inc., and Rodale Books, Inc., are corporations organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with their office and principal place of business located at 33 East Minor Street, Emmaus, Pennsylvania. Jerome I. Rodale and Robert Rodale are officers of said corporations. They formulate, direct and control the acts and practices of the corporate respondents. Their business address is the same as that of the corporate respondents.²

Business of Respondents

2. Respondents are now, and have been for some time last past, engaged in the publication, advertising, sale and distribution of various books, pamphlets and magazines pertaining to diet, dis-

¹ Proposed findings not herein adopted, either in the form proposed or in substance, are rejected as not supported by the evidence or as involving immaterial matters. References to the proposed findings are hereinafter made with the abbreviations: "CPF" (for the findings of complaint counsel), "RPF" (for the findings of respondents) and "RR" (for respondents' reply). References to the transcript are made with the abbreviated symbol "Tr." References to exhibits are made with the abbreviated symbols: "CX" (for exhibits of complaint counsel) and "RX" (for exhibits of respondents). All such citations of the record are intended to refer to the principal portions relied upon by the undersigned, in connection with particular findings, but do not purport to be an exhaustive compendium of the portions of the record reviewed and relied upon by him.

² The above findings are based on the admitted allegations of the complaint. Although said allegations were partially denied in respondents' answer, said denial was withdrawn during the prehearing conferences (Prehearing Order No. 2, par. 3).

eases and the health of mankind. Among, but not all inclusive of the books published by respondent Rodale Press, Inc., is "The Health Finder." Respondent Rodale Press, Inc., also publishes various pamphlets and paperback books. Respondent Rodale Books, Inc., participates in the publishing, advertising and distribution of the books published by respondent Rodale Press, Inc., and has also published various pamphlets and paperback books including, but not limited to, "How to Eat For a Healthy Heart" and "This Pace Is *Not* Killing Us."³

Sales in Commerce

3. Respondents cause and have caused said books and pamphlets, when sold, to be transported from their place of business in the State of Pennsylvania to purchasers thereof located in various other States of the United States, and in the District of Columbia. Respondents at all times mentioned herein have maintained a course of trade in said books, pamphlets and magazines in commerce, as "commerce" is defined in the Federal Trade Commission Act. Respondents' volume of business in the sale of said books and pamphlets in commerce is and has been substantial.⁴

Competition in Commerce

4. In the conduct of their business at all times mentioned herein respondents have been in substantial competition, in commerce, with other corporations, firms and individuals in the sale and distribution of books and pamphlets.⁵

Advertising in Commerce

5. In the course and conduct of their business, and for the purpose of inducing the purchase in commerce of said books and pamphlets, respondents have made certain statements and representations with respect thereto in advertisements and promotional material, including letters, circulars and brochures sent through the United States mails into various States of the United States and into the District of Columbia.⁶

The Challenged Advertising

6. The allegations of the complaint that respondents have used false, misleading and deceptive advertising in connection with the

³ Same as n. 2, *supra*.

⁴ Same as n. 2, *supra*.

⁵ Same as n. 2, *supra*.

⁶ Same as n. 2, *supra*.

sale of certain of their books and pamphlets are based principally on mailer advertisements sent to potential purchasers of their book, "The Health Finder." The advertisements cited in the complaint as "typical" of those used by respondents were circulated from 1956 to April 5, 1960, and consist of a 4-page yellow-colored brochure and a 4-page compendium of testimonial extracts (CX 8 A-D, CX 9 A-D; Tr. 22, 25, 130, 571, 573; Prehearing Order No. 1, par. A 5). The statements appearing in the yellow-colored brochure which are quoted in the complaint may, for convenience, be classified under four headings:

- A. General statement regarding the importance of good health.
- B. General description of the book, "The Health Finder."
- C. Statement concerning the value of the ideas contained in the book.
- D. Statement concerning specific diseases or subjects discussed in the book, with reference to pages in the book where such subjects are discussed.

These statements, arranged in accordance with the foregoing subject headings, are as follows:

A

Better Health can mean a lot to you personally. Have you ever stopped to think that all the good things in life depend upon good health? * * * Wouldn't you like to enjoy one or more of these rewards of good health? * * * Good health and the abundant energy that goes with it * * * Are you "just too tired" to take a full part in the life of your community? * * * Do you enjoy your leisure moments as you should? Or are you so tired you spend most of your leisure time in resting and sleeping? * * * Are you bored and discontented because you don't feel well? * * * Turn page for important message * * *.

B

Health Finder, an encyclopedia of Health Information from the preventive point of view. ANSWERS HEALTH PROBLEMS.

C

Which of the health ideas in this amazing book will * * * (1) Add years to your life? (2) Give you more energy? (3) Cut down on your doctor and dentist bills? (4) Make you feel better than you ever felt before? (5) Help your family to achieve health and happiness?

D

* * * Recommendations for a winter free from common colds (pages 260-1)
* * * What is the most successful preventative and cure for constipation (pages 278-9) * * * Cancer and nutrition (pages 165, 6, 7) * * * Diet for children during polio season (pages 623, 4, 5) * * * Prevention of ulcers (page 854) * * * Heart Disease and the use of Vitamin E (pages 415, 6-7-8-9) * * * Use of garlic in the treatment of hypertension (high blood pressure) (page 388) * * * Laboratory experiments indicating that brewers yeast and dried liver prevent cancer (page 141) * * * Experiments showing

the effectiveness of the B complex vitamins in preventing the growth of cancer (pages 176-7) * * * The garlic treatment for tuberculosis (page 386) * * * Goiter-what it is, where it occurs, what should be done to prevent it (pages 392, 393-4-5-6-7-8) * * * Reasons for a salt-free diet if you suffer from high blood pressure (pages 424-5) * * * Exciting discovery concerning the use of desiccated liver as a means of preventing fatigue (pages 450-1-2) * * * Experiments which indicate that liver in the diet helps prevent cancer (page 452) * * * Infantile paralysis and vitamin deficiency (pages 625-6-7-8-9) * * * Food and polio (pages 596-7-8-9) Polio its cause and prevention by Dr. Virgil A. David, New York City (pages 599-603).

7. The extracts from testimonials purporting to have been received from readers are arranged according to certain specific diseases or subjects discussed in "The Health Finder." The first and second pages of the series of testimonial extracts are headed, respectively: "The Health Finder article that helped me most was—" and "I'm glad I bought the Health Finder because—." The complaint alleges that the testimonial extracts contain various misrepresentations with respect to the following diseases or subjects discussed in the book: Cancer, heart disease, mental health, polio, ulcers and arthritis (CX 9 A-D). The contents of the challenged portions of the testimonials will be hereafter more fully described.

8. Shortly prior to their discontinuance of the circulation of the above-mentioned yellow-colored brochure and the testimonial extracts on April 5, 1960, respondents, in February 1960, began to distribute a green-colored mailer advertisement for "The Health Finder," and a modified compendium of testimonial extracts. Respondents continued to distribute such mailer advertisement and testimonial extracts until at least August 1963 (CX 10 A-D, CX 22 A-H, CX 24 A-D, CX 25 A-B; Tr. 572, 586).⁷ The revised brochure omits all of the material quoted under the headings "A" and "C" above. It also contains some modifications in the statements dealing with specific diseases and subjects, as set forth in "D" above. The nature of such changes will be hereinafter more fully discussed. Complaint counsel contend that despite the changes, the green-colored brochure contains many of the misleading statements found in its yellow-colored predecessor (Brief, p. 32). Respondents, while not conceding that the yellow-colored brochure and accompanying testimonial extracts contained any misleading material, contend that any material

⁷ According to respondent Robert Rodale, respondents ceased distributing the green-colored brochure in April 1963 (Tr. 572). However, in August 1963, following the receipt by respondents of a proposed complaint in this proceeding, respondents submitted to the Commission a copy of the green-colored brochure as reflecting their "current" advertisement for "The Health Finder" (CX 22 E).

which could possibly be objectionable was eliminated in the later green-colored brochure and accompanying testimonial extracts (CX 22 D-E).

9. Respondents are not currently engaged in advertising "The Health Finder," although the title of the publication does appear in their catalog of current publications. As of the time of the hearings herein, there were approximately 240 copies of the publication in stock, out of a total of approximately 137,000 copies which had been sold between 1955 and 1964 (Tr. 572-573, 588). Respondents are currently publishing and distributing another book entitled "The Complete Book of Food and Nutrition," some portions of which are identical to those appearing in "The Health Finder" (CX 29; Tr. 598, 613-615). Respondents are now utilizing a red-colored brochure as a mailer ad which they send to prospective purchasers of this publication (Tr. 608; CX 30 A-D). To the extent the statements in the current mailer ad are material, they will be hereinafter referred to in greater detail. Respondents also publish other books and pamphlets dealing with food, nutrition and health (CX 4 A-B, CX 27, CX 28). However, except for one which will be hereinafter discussed, the record contains no evidence of the advertising used in the sale of these publications.

The Alleged Misrepresentation

10. The charge of false advertising with respect to the publication "The Health Finder" is based on the allegation that by the use of certain of the statements above quoted or referred to, respondents have represented, directly or by implication, that readers of "The Health Finder" who follow the ideas and suggestions set forth in the book will obtain certain health benefits, whereas in truth and in fact the ideas and suggestions in the book will be of no value in the respects indicated (Complaint, par. 6-7). It is the position of respondents that the complaint is based on an erroneous interpretation of their advertising and that the advertising, as properly interpreted, is truthful in every respect (Answer, par. 6-7). In addition, respondents rely on several affirmative defenses, the principal ones being, (a) that the complaint contravenes the First Amendment of the Federal Constitution since, in essence, it challenges the opinions and ideas set forth in the book, and (b) that there is no public interest in this proceeding since the advertising challenged by the complaint was discontinued four years prior to the issuance of the complaint (Answer, pp. 8-9). The merits of these affirmative defenses will be reserved

for consideration, following the disposition of the factual issues raised with respect to the alleged misleading character of respondents' advertising.

11. In support of their position concerning the nature of the representations made by respondents in their advertising, complaint counsel rely solely on the advertisements themselves, portions of which have been set forth above (Prehearing Order No. 1, par. A 6). No so-called "public" or consumer witnesses were called to testify as to the impression received by them from the advertisements. To establish the fact that the ideas and suggestions in the book will not afford the health benefits suggested by respondents' advertising, complaint counsel called a number of physicians to testify as to the alleged lack of efficacy of the ideas and suggestions in the book for the prevention, cure or treatment of the various medical conditions covered by the complaint. Respondents likewise called no public or consumer witnesses to support their interpretation of the advertising. Like complaint counsel they called a number of medical witnesses, who testified as to the alleged value of the ideas and suggestions contained in the book with respect to various indicated conditions, in accordance with respondents' theory as to the proper interpretation of the advertisements.

12. In order to resolve the issue of whether respondents' advertising with respect to "The Health Finder" is false, misleading and deceptive, it is necessary to first determine what it is that respondents have represented in their advertising concerning the efficacy of the ideas and suggestions contained in the book. Since no opinion testimony was offered as to the impression which the advertisements would make on the public, a determination as to the meaning of respondents' advertising must rest entirely on the advertisements themselves.⁸ The advertising principally relied upon by complaint counsel, as being deceptive, is quoted in paragraph 6, *supra*. As there indicated, the statements-made in the yellow-colored brochure used between 1956 and April 1960 fall into four broad categories. No contention is specifically made that the statements in category "A" are deceptive, such statements being apparently set forth in the complaint as background for the other statements which complaint counsel contend are deceptive. The statements set forth under headings "C" and "D"

⁸ While opinion testimony of consumers is sometimes offered in Commission proceedings, it is now well established that the Commission may make a determination of the "natural and probable" impression which advertising expressions will have upon members of the public, without calling public or consumer witnesses. *Drew v. F.T.C.*, 235 F. 2d 735, 741 (2 Cir. 1956), *cert. den.* 352 U.S. 969; *Zenith Radio Corp. v. F.T.C.*, 143 F. 2d 29, 31 (7 Cir. 1944).

are both claimed to be deceptive, the statements under "C" allegedly containing misrepresentations with respect to the benefits to be afforded by the book generally, and those under "D" allegedly containing misrepresentations with respect to specific subjects and portions of the book.

Alleged Misrepresentations As To Benefits Generally

13. It is contended by complaint counsel that by the statements appearing under "C" respondents have represented and are now representing, directly and by implication, that readers of the book, "The Health Finder," who follow the ideas and suggestions set forth in the book will, (a) "add years to their lives," (b) "gain more energy," (c) "effectuate savings on medical and dental expenditures," (d) "feel better than ever before," and (e) "gain and maintain health" (Complaint, par. 6, CPF, pp. 6, 8, 13, 17). Complaint counsel contend that these representations are false, misleading and deceptive since, in truth and in fact, the ideas and suggestions in the book will not *assure* readers (a) "an increased life span," (b) "more energy," (c) "savings on medical and dental expenditures," (d) "that they will feel better than ever before," and (e) "that they will gain and maintain health" (Complaint, par. 7, CPF, p. 17). The expert witnesses called by complaint counsel testified, in substance, that persons following the ideas and suggestions in the book would not be "assured" of (a) an increased life span, (b) more energy, (c) savings on medical and dental expenditures, (d) feeling better than ever before, or (e) gaining or maintaining health (Tr. 226-227, 341-343, 409-410, 470).

14. Respondents make no contention that the ideas and suggestions contained in "The Health Finder" will "assure" one of an increased life span and the other broad benefits referred to above. In fact, they concede that no one, not even a doctor, could "assure" anyone, in the sense of giving him a "guarantee," that by following certain medical advice he will be able to live longer, etc. (Tr. 475, 479). However, it is their position that the advertisements for the book do not purport to "assure" readers of these benefits. Respondents called a number of medical witnesses who testified that the book does contain valuable ideas and suggestions which, if followed, could result in better health and the avoidance of some types of diseases, thereby helping to prolong life (Tr. 542, 642, 730, 806). It is clear, therefore, that what is involved in this issue is not a question of the truth or falsity of the alleged representations in respondents' advertis-

ing, but whether respondents do, in fact, represent that readers who follow the ideas in the book will be "assured" of an increased life span, more energy, etc., in the sense that they are guaranteed to receive these benefits.

15. Although the complaint is somewhat ambiguous in this regard, it is apparently the position of complaint counsel that the statements in respondents' advertising quoted under "C" of paragraph 6 above amount to a representation that readers following the ideas and suggestions in the book will be assured, *i.e.*, guaranteed, an increased life span and the other indicated health benefits.⁹ It is the opinion and finding of the examiner that respondents' advertising does not purport to give the readers any assurance, in the sense of a guarantee, that they will live longer, maintain their health, etc., by following the ideas in the book. The reference to these benefits in the advertising is not in terms of any assurance or guarantee of what will inevitably be achieved by readers, but is expressed in the context of the question, *viz.*, "Which of the health ideas in this amazing book will * * * (1) add years to your life?", etc. Immediately below the question appears an explanation, which includes statements such as the following:

This knowledge can help the average person remain *comparatively free of many terrible diseases*. * * * Mr. Rodale believes that by observing certain health rules, we can develop bodies, minds, nerves, muscles and tissues that are more resistant to disease than they otherwise would be.

It is the opinion and finding of the examiner that the most that can be claimed to have been represented by the challenged statements, in the context of their use, is that the reader will find ideas in the book which, if followed, will be of value to the average person in maintaining his health and avoiding disease, and in this way help him to live longer, feel better, etc.

16. Since the evidence fails to establish that respondents have represented in their advertising for the "The Health Finder" that the ideas and suggestions in the book will "assure" readers of an increased life span, more energy, savings on medical and dental expenditures, or that they will gain and maintain health, it follows that the medical testimony relied upon by complaint counsel, to the effect that the ideas and suggestions in the book

⁹ It may be noted that Paragraph Six of the complaint, which sets forth the nature of the representations, does not use the word "assure," but merely alleges that the statements made in the advertising constitute a representation that readers who follow the ideas in the book "will" add years to their lives, etc. However, Paragraph Seven, in which the charge of misrepresentation is made, alleges that the representations are false since the ideas and suggestions contained in the book "will not assure readers" of an increased life span, etc.

will not "assure" these benefits, does not establish a case of misrepresentation in this respect. However, since it may be urged that the portions of respondents' advertising here under discussion are false, even on the basis of an interpretation thereof that respondents have represented merely that the book contains ideas and suggestions which would be helpful for (but not necessarily insure) a longer life, more energy, etc., it should be noted that the evidence likewise fails to establish any misrepresentation in this regard. A number of the medical witnesses called in support of the complaint who had testified that the ideas in the book would not "assure" these benefits, conceded that the book contained information which, if followed, would probably result in the reader's living longer, feeling better or achieving certain health benefits (Tr. 270-271, 346-348, 417-418, 421, 452). The testimony of the medical witnesses called by respondents likewise establishes that the book contains information which would be helpful in gaining better health and avoiding various diseases. (Tr. 542, 558, 644-661, 730, 806).¹⁰ The record fails to establish that the ideas and suggestions in the book are wholly without value in this regard.

17. Assuming, arguendo, that respondents' advertising for "The Health Finder" can be interpreted as representing that the book will "assure" readers a longer life, more energy, etc., it should be noted that the statements to this effect cited in the complaint appeared only in the yellow-colored brochure, which respondents ceased to use after April 1960, over three years prior to the issuance of the complaint herein. In the green-colored brochure, which was in use from 1960 to about the time the complaint issued herein, there is no reference to any of the ideas in the book assuring or being of value for longer life, more energy or similar benefits (CX 10 A-D).

Misrepresentation as to Prevention of Certain Diseases

18. Based on the statements made in the yellow-colored brochure set forth under the heading "D" of paragraph 6 above, it is charged that respondents have falsely represented that readers of "The Health Finder" will find therein information which

¹⁰ One of the witnesses called by respondents, an Associate Professor of Medicine and Pharmacology at the Johns Hopkins University Medical School, had testified as a witness for the Commission in other proceedings and had been consulted by the Commission in other matters (Tr. 540). He testified that the book made a number of admirable recommendations in the field of diet and nutrition and in suggesting the avoidance of excessive reliance on drugs, although he was of the opinion that some portions of the book did contain an exaggerated emphasis on the benefits of dietary manipulation (Tr. 542, 557).

will enable them to prevent certain specific diseases. It is also charged, in this connection, that respondents have falsely represented that readers of the book will find therein the answer "to all health problems" (Complaint par. 6-7). Respondents deny having represented that the book contains the answer to "all" health problems (Answer, p. 6). Their position as to the charge of misrepresentation with respect to specific diseases is not entirely clear. While claiming that the complaint is based on too broad an interpretation of their advertising (Answer, p. 5), they apparently concede that the book contains some erroneous ideas and suggestions but claim these are harmless (Tr. 475, 482).

19. The examiner turns first to a consideration of the issue of whether respondents have represented that their publication "The Health Finder" contains the answers to "all" health problems. It is not entirely clear from the proposed findings what portion of the advertising complaint counsel rely upon in support of this contention. The only portion of the advertisement cited in the complaint which may possibly be susceptible of such an interpretation is the statement appearing under the heading "B" in paragraph 6 hereof, that the book is an "Encyclopedia of Health Information from the Preventive point of view" and that it: "ANSWERS HEALTH PROBLEMS." It is the opinion and finding of the examiner that this portion of respondents' advertising cannot be fairly interpreted as representing that the reader will find in the book the answer to "all" his health problems. The advertisement in another portion, referred to in paragraph 15 above, states that the book contains information which "can help the average person remain comparatively free of many terrible diseases" and refers to a number of specific diseases which are discussed in the book. However, there is nothing in the advertisement to suggest that the readers will find the answer to *all* health problems in the book. Since the only evidence relied upon by complaint counsel to establish the falsity of this representation is the testimony of several doctors that the book does not contain the answer to "all" health problems (Tr. 227, 470), and since it has been found that respondents have made no such representation, it is concluded that complaint counsel have failed to establish that respondents' advertising is false, misleading and deceptive in this respect.

20. As stated above, the alleged misrepresentation with respect to certain specific diseases, *viz*, the common cold, ulcers, fatigue, goiter and high blood pressure, is based on the portion of the yellow-colored brochure cited under heading "D" of paragraph

6 hereof. The quoted portions appear in the advertisement under the dual headings: "Check The Topic You Would Like to Know More About" and "Check The Health Problems You And Your Family May Have." Below these headings appear a list of topics purporting to be discussed in the book, with an indication of the page or pages where each of the topics is discussed. The topics listed are, for the most part, either diseases or foods, vitamins and drugs purporting to have a useful or deleterious effect on health. The charge of misrepresentation is made with respect to only some of the diseases or topics referred to in the brochure. Certain of these diseases or topics are also referred to in the testimonial extracts (CX 9 A-D). The examiner now turns to a consideration of each of the specific diseases or topics with respect to which misrepresentation is charged to determine, (a) whether a representation of prevention or cure has been made and (b), if so, whether the representation is true or false.

The Common Cold

21. The yellow-colored brochure contains the following statements concerning the common cold: "Recommendations for a winter free from common colds (pages 260-1)," and "What we can do to prevent the common cold (pages 255-6-7)" (CX 8 B, D). The compendium of extracts from testimonial letters, accompanying the brochure, also contains a number of references to the value of the book's recommendations in preventing colds, such as: "Since practicing the non-use of soap and the use of vitamin supplements as recommended in your HEALTH FINDER, I have not had a cold since" (CX 9 A, D). It is the opinion and finding of the examiner that there would be members of the public who would interpret the statements made in respondents' advertisements concerning the common cold as meaning that by following the recommendations in the book, "The Health Finder," they will be able to avoid getting a cold.

22. It is the thesis of the author of the book, in the portions referred to in respondents' advertising, that by supplementing one's diet with foods containing certain vitamins, particularly vitamin A, one will be able to avoid getting a cold. This thesis is based on certain experiments purporting to show that individuals with respiratory infections were deficient in vitamin A. Accordingly, it is suggested in the book that by adding foods with vitamin A to one's diet the common cold can be avoided. This result is said to be achieved, "not directly by killing the disease germs," but "indirectly by providing for the health of the mucous mem-

branes" in the nose and throat (CX 1 A, p. 260). According to the greater weight of the credible medical evidence in the record, persons following the recommendations in the book will not be able to avoid getting a cold. The common cold is caused by various viral agents and there is no known way of preventing it, by dietary measures or otherwise. While it may be that a deficiency of vitamin A may predispose one to infection, it does not follow that the taking of vitamin A will prevent colds. In fact, the normal diet of the average individual contains sufficient vitamin A for the body's needs, and the supplementation of the diet with additional amounts of vitamin A may be harmful (Tr. 209-210, 366-372, 439-441).¹¹

23. In the green-colored brochure which respondents circulated from February 1960 to sometime in 1963, the statement in the yellow-colored brochure reading, "Recommendations for a winter free from common colds," was eliminated. The other statement on colds reading, "What we can do to prevent the common cold," was changed to read, "What we can do for the common cold" (CX 10 C). It is the opinion and finding of the examiner that, despite this modification, there would be members of the public who would interpret respondents' advertising to mean that the book will tell them how to avoid or deal with the common cold.

Constipation

24. The yellow-colored brochure contains the following statement concerning constipation: "What is the most successful preventative and cure for constipation? (pages 278-9)" (CX 8 B). The accompanying brochure of testimonial extracts contains a reference to constipation as follows: "I thought I was branded with this ailment for my entire life. I can hardly believe I am not constipated any more. * * * I believe brewer's yeast played the major role" (CX 9 A). It is the opinion and finding of the examiner that there would be members of the public who would interpret the statements in respondents' advertisements concerning

¹¹ The above findings are based principally on the testimony of three physicians called in support of the complaint, who were highly qualified specialists in internal medicine. Of the three witnesses called by respondents to testify on this subject, only one, an osteopathic physician, claimed that diet would prevent colds (Tr. 702). Respondents' witness most qualified in the field of internal medicine would say merely that there was a "possibility" dietary deficiency would affect the incidence of colds, but made no claim that adding vitamin A to the diet would prevent colds (Tr. 554). The third witness, an allergy specialist, testified merely that a nonwheat diet might enable one to avoid the allergic-type cold reaction caused by eating cereal grains (Tr. 652).

constipation as meaning that they can prevent and cure constipation by following the advice on this subject given in the book, "The Health Finder."

25. It is the thesis of the author of the book, in the portions referred to in respondents' advertising, that a "correct diet," including fresh fruits and vegetables and certain vitamins and minerals, and the avoidance of certain undesirable foods, is "the most successful preventive and cure for constipation" (CX 1 A, p. 278). According to the greater weight of the credible evidence in the record, there are a number of types of constipation which will not be prevented or cured by dietary manipulation. Reliance on dietary measures in these instances may result in serious danger to one's life. Even in those cases where dietary measures may be helpful, they are not the principal factor in preventing or curing constipation, and some of the foods and vitamins recommended have no value in the prevention or cure of the condition (Tr. 210-211, 373-376, 443-445).¹²

26. In the green-colored brochure, which respondents circulated from 1960 to 1963, they modified somewhat the statement concerning constipation which appeared in the yellow-colored brochure. Instead of referring to "the" most successful preventive and cure for constipation, they used the expression, "a successful preventative," and dropped the reference to "cure." The statement, as modified, reads: "What is a successful preventative for constipation? (pages 278-9)" (CX 10 B). No reference to constipation appears in the revised compendium of testimonial extracts (CX 25 A-B). It is the opinion and finding of the examiner that the statement in the green-colored brochure would still be interpreted by members of the public as meaning that by following the advice in the book they will be able to prevent constipation. As found above, there are a significant number of cases and types of constipation which will not be aided by dietary measures, and where delay in obtaining necessary medical advice and treatment could be dangerous.

¹² The above findings are based principally on the testimony of the three physicians called in support of the complaint who are referred to in n. 11, *supra*. The physician best qualified to testify on the subject among respondents' witnesses merely agreed with the book's "attack on the over-use of purgatives," but expressed no opinion as to the book's recommendation on how to prevent or cure constipation (Tr. 555). Respondents' osteopathic witness made no claim that dietary measures would prevent or cure constipation, but merely that a person eating a proper diet would be "less apt" to get constipation (Tr. 730). Their allergy specialist expressed agreement with the book, but gave no specific testimony that following its recommendations would prevent or cure all types of constipation (Tr. 653). This physician, while qualified in the field of allergy diseases, admittedly had limited experience in the field of internal medicine generally (Tr. 641).

Ulcers

27. With respect to ulcers, the yellow-colored brochure contains the following statement: "Prevention of ulcers (page 854)" (CX 8 B). The compendium of testimonial extracts also refers to ulcers, as follows: "Got rid of a peptic ulcer" (CX 9 B). It is the opinion and finding of the examiner that there would be members of the public who would interpret these advertisements to mean that the book will enable them to prevent ulcers. The thesis of the author of the book is, essentially, that the way to prevent ulcers is to avoid certain "forbidden foods" and to eat a diet consisting of certain desirable foods (CX 1 A, p. 854). The author reasons that since "dietary adjustment" is used in the *treatment* of ulcers, the same method can be used to *prevent* ulcers from occurring. The author rules out emotional factors as a cause of ulcers. According to the greater weight of the credible medical evidence in the record, while diet may be of value in the treatment of some types of (but not all) ulcers, it will not prevent ulcers from occurring and, while the cause of ulcers is not entirely understood, emotional factors are considered to play a significant role. Furthermore, in certain types of ulcers reliance on dietary measures and the failure to secure appropriate medical or surgical treatment may be dangerous to life (Tr. 212-214, 377-380).¹³

28. The above-quoted statement appearing in the yellow-colored brochure was modified in the green-colored brochure, which respondents began to circulate in 1960. In lieu of the statement, "Prevention of ulcers," which appears in the yellow-colored brochure, the 1960 brochure states merely: "Ulcers (page 854)" (CX 10 B). All reference to the subject of ulcers was omitted for the compendium of testimonials which accompanied the green-colored brochure (CX 25 A-B). It is the opinion and finding of the examiner that the modified statement cannot be construed as a representation that the book contains a prescription which will enable the reader to prevent ulcers. The most that can be inferred from the statement is that the book contains helpful ideas on the subject of ulcers. While the medical evidence in the record establishes that dietary measures, such as those referred to in the book

¹³ The above findings are based principally on the testimony of two of the internists referred to in n. 11, *supra*. The one internist called by respondents made no reference to the subject of ulcers. The allergy specialist made no claim as to the correctness of the book's recommendations on ulcers, stating that the "cause of peptic ulcers is still obscure and concepts of treatment are largely based on speculative interpretations" (Tr. 661). The osteopathic physician testified to having used dietary measures in the *treatment* of ulcers, but made no claim that they would *prevent* ulcers (Tr. 721).

will not prevent ulcers, it does not establish that they are wholly without value in the treatment of some types of ulcers.

Fatigue

29. With respect to fatigue, the yellow-colored brochure contains the following statement: "Exciting discovery concerning the use of desiccated liver as a means of preventing fatigue (pages 450-1-2)" (CX 8 B). It is the opinion and finding of the examiner that there would be members of the public who would interpret this statement in respondents' advertising to mean that the use of desiccated liver, as described in the book, will help them to prevent fatigue. In the book the author suggests that dietary management, particularly the addition of desiccated liver to the diet, will prevent or significantly reduce fatigue (CX 1 A, pp. 450-452). According to the greater weight of the credible medical evidence in the record, fatigue is a complex phenomenon which is the result of many causes, physical and psychological, and dietary management will not prevent fatigue, except in that limited class of cases where dietary deficiency is responsible for the fatigue (Tr. 215-216, 380-381, 448).¹⁴

30. The above-quoted statement made in the yellow-colored brochure concerning the use of desiccated liver in the prevention of fatigue was continued by respondents in the green-colored brochure which they circulated between 1960 and 1963 (CX 10 C). Respondents' current publication, "Complete Book of Food and Nutrition," contains a chapter entitled: "Desiccated Liver the Wonder Food" (CX 29, p. 973). The contents of this chapter are substantially the same as the section in "The Health Finder" dealing with this subject. Respondents refer to this subject in their current advertising for the book "Complete Book of Food and Nutrition," as follows: "Dessicated Liver the Wonder Food. * * * Experiments on Liver and Fatigue" (CX 30 A).

Goiter

31. With respect to goiter, the yellow-colored brochure advertising "The Health Finder" contains the following statement: "Goiter—what it is, where it occurs, what should be done to prevent it (pages 392-3-4-5-6-7-8)" (CX 8 B). It is the opinion and

¹⁴ The above findings are based principally on the testimony of the three specialists in internal medicine called in support of the complaint. The evidence offered by respondents involves principally cases of fatigue due to hypoglycemia, a condition in which there is an excess of sugar in the blood and in which reduction of the intake of sugar is recommended (Tr. 529). Even with respect to this condition, one of the doctors called by respondents indicated that this is but one of the causes of fatigue, and that a "more extensive presentation of fatigue could have been made [in the book] on the basis of evidence available at the time" (Tr. 655).

finding of the examiner that there would be members of the public who would interpret this statement to mean that they will be able to prevent goiter by following the recommendations in the book. The essential recommendation in the book as to how to prevent goiter is by the supplementation of the diet with foods containing iodine and by the avoidance of drinking water polluted by cyanide (CX 1 A, p. 397). According to the greater weight of the credible medical evidence in the record, iodine deficiency is only one cause of goiters and occurs only in limited areas of the country where the soil is low in iodine. There are various types of goiter for which the recommendations in the book will be of no value in the prevention thereof (Tr. 381-383).¹⁵

32. The above-quoted statement made in the yellow-colored brochure concerning the prevention of goiter was continued by respondents in the green-colored brochure which they circulated between 1960 and 1963 (CX 10 B). Respondents' current publication, "Complete Book of Food and Nutrition," contains some limited discussion on the subject of goiters, but not in terms of it being due to iodine deficiency (CX 29, pp. 150, 479). No reference to the prevention of goiters is made in respondents' current advertising brochure for this publication.

High Blood Pressure

33. The yellow-colored brochure contains the following statements with respect to high blood pressure: "Use of garlic in the treatment of hypertension (high blood pressure) (page 388). * * * Reason for a salt-free diet if you suffer from high blood pressure (pages 424-5)" (CX 8 B). The compendium of testimonials accompanying the brochure also contains reference to high blood pressure, including the following: "I was glad to discover the garlic treatment for high blood pressure. I am feeling much better and my blood pressure is down to normal thanks to the HEALTH FINDER. * * * We found garlic most helpful in relieving flatulence and hypertension" (CX 9 A-B). It is the opinion and finding of the examiner that there would be members of the public who would interpret the statements in respondents' advertising regarding high blood pressure as meaning that the use of garlic

¹⁵ The above findings are based on the testimony of a specialist in internal medicine called in support of the complaint. The only countervailing evidence offered by respondents was the testimony of its osteopathic medical witness that he had treated cases of goiter by dietary manipulation, the nature of such diet not being specified. However, in a number of cases treated by him, it was necessary to remove the goiter surgically. No claim was made that all types of goiters are preventable by iodine dietary supplementation (Tr. 722).

and the elimination of salt from the diet will aid in the relief or treatment of high blood pressure.

34. It is the thesis of the author of the book, "The Health Finder," with respect to garlic that it is "Most Valuable in Treatment of High Blood Pressure" since it "reduces high blood pressure" (CX 1 A, p. 388). Concerning the use of salt, the author states that "high blood pressure can be brought on by increased salt intake and that in many cases it can be cured by a salt-free diet" (*id.* at 424). According to the uncontradicted medical evidence in the record, garlic has no effect whatever in the treatment of high blood pressure (Tr. 452).¹⁰ With respect to salt, the medical evidence in the record establishes that the elimination of salt from the diet is recommended in many cases of high blood pressure, particularly in the type denominated "essential hypertension" (Tr. 155, 295, 363, 452-453, 557, 656, 846). Complaint counsel contend that the statements made by respondents regarding salt and high blood pressure are deceptive because the medical evidence establishes that, (a) there are types of high blood pressure in which a salt-free diet is not a part of the treatment, and (b) even in those cases where the elimination of salt is recommended, it is only part of an overall regimen of treatment prescribed by a physician (Tr. 154, 216, 303, 452-453). While the greater weight of the medical evidence is in accordance with counsel's position, this does not establish the falsity of respondents' advertising regarding salt and high blood pressure, since the examiner does not construe the statements made in their book and advertising to mean that the elimination of salt will cure all cases of high blood pressure and that no other measures are required in the treatment thereof.

35. The above-quoted statements made in the yellow-colored brochure concerning garlic and a salt-free diet in the treatment of high blood pressure were continued, in haec verba, in the green-colored brochure which respondents circulated between 1960 and 1963 (CX 10 B-C). Respondents' current publication, "Complete Book of Food and Nutrition," contains a discussion of garlic and a salt-free diet in the treatment of high blood pressure, in terms substantially similar to the discussion in "The Health Finder." (CX 29, pp. 495, 281, 287.) The advertising brochure for the book makes reference to the discussion on garlic as follows: "Controversy over garlic and blood pressure. Dr. Piotrowski's garlic

¹⁰ The only one of respondents' witnesses who testified regarding the use of garlic stated: "I have not had clinical experience with garlic therapy and cannot comment on the point raised" (Tr. 656).

treatment for hypertension" (CX 30 B). The examiner does not interpret this statement in respondents' advertising as constituting an affirmative representation that garlic is of value in the treatment of high blood pressure. The brochure also contains the following statement concerning salt and high blood pressure: "MEDICAL FACTS ON SALT-EATING AND HIGH BLOOD PRESSURE. High blood pressure and salt. Low-salt diet for reducing blood pressure" (CX 30 B). The examiner does not interpret this statement as constituting an affirmative representation that a salt-free diet will prevent or cure all types of high blood pressure.

Cancer

36. The charge of misrepresentation with respect to the specific diseases hereinbefore discussed involves principally diseases referred to in the yellow-colored brochure, although several of the conditions are also referred to in the compendium of testimonial extracts which accompanied it (CX 9 A-D). The charge of misrepresentation with respect to cancer and the other diseases hereinafter discussed involves diseases which, with one exception, are referred to in both the testimonial extracts and the brochure. Complaint counsel contend that the impact of both of these advertisements, which were sent out together in the mails, must be considered in determining the nature of the representations made by respondents (CPF, p. 16).

37. With respect to cancer, references appear in both the yellow-colored brochure and the compendium of testimonial extracts. The brochure contains the following references to cancer: "Cancer and Nutrition (pages 165-6-7). * * * Laboratory experiments indicating that brewers' yeast and dried liver prevent cancer (page 141). * * * Experiments showing the effectiveness of the B complex of vitamins in preventing the growth of cancer (pages 176-7). * * * Experiments which indicate that liver in the diet helps prevent cancer (page 452)" (CX 8 B). The testimonial extracts purport to quote from several letters received from readers, under the heading "Cancer," one of which states that if a relative of the reader had seen the article in the book on cancer "and followed its recommendations, she probably would not now be dying of cancer of the bones and nerves" (CX 9 A). It is the opinion and finding of the examiner that, despite the use of such words as "experiments" and "laboratory experiments," there would be members of the public who would infer from the advertisements, as a whole, that the book contains information which will enable them to avoid getting cancer. The testimonial extracts

suggest that readers of the book had interpreted it as giving them definitive advice on how to prevent cancer. There is no reason to believe that there would not be other members of the public who, upon reading the statements in the brochure and the testimonial statements, would infer that they are being offered definitive methods for preventing cancer, albeit methods which were developed in certain experiments.

38. The theme of the portions of the book referred to in the advertisements above quoted is that the prevention of cancer is, essentially, a matter of diet, *i.e.*, the eating of certain foods and vitamins. Although the experiments discussed in the book involved animals (rats) and limited types of cancer (cancer of the liver), the author makes broad claims for the application of these experiments to human beings and to the prevention of cancer generally. Thus, with respect to the experiments involving brewers' yeast, the author makes the positive statement that "a diet fortified by ample amounts of brewers' yeast is for the present the only *proven preventive* of cancer" (emphasis supplied) (CX 1 A, p. 142). In discussing experiments involving brewers' yeast and liver, the author states: "It seems *certain*, therefore, that both yeast and dried beef liver contain substances which, when included in the diet in sufficient quantity, *prevent cancer*" (emphasis supplied) (*id.*, at 141 and 452). The overwhelming weight of the credible medical evidence in the record establishes, (a) that there is no known method of preventing cancer by dietary means, (b) the fact that a person is nutritionally healthy and eats certain foods and vitamins, including those recommended by respondents in the book, will not prevent cancer, and (c) experiments carried on with animals do not have any necessary application to human beings and to all types of cancer (Tr. 218, 392-395, 455-457).¹⁷

¹⁷ The above findings are based principally on the testimony of the three specialists in internal medicine called in support of the complaint. Two of these were doing concentrated work in the field of cancer research at the National Cancer Institute of the National Institutes of Health, and the third was chief of medicine at a large medical school and hospital in Washington, D. C. (Tr. 201, 358, 432; CX 14, CX 15 A-C, CX 19 A-D, CX 20 A-B, CX 21 A-D). Of the two doctors called by respondents who commented on the book's discussion of cancer, one (an allergy specialist) stated that "inasmuch as the etiology of cancer is still obscure, any discussion as to how the subject may be prevented must be speculative" (Tr. 650). The other witness (an osteopathic physician) made no claim that the recommendations in the book would prevent cancer, but merely that where a person and his mother had eaten correctly he would be less apt to get certain diseases, including cancer (Tr. 729-730). The best qualified of respondents' witnesses to testify on the subject of cancer, an Associate Professor of Medicine at Johns Hopkins Medical School, referred only to the discussion in the book on tobacco and lung cancer (Tr. 553). However, concerning the book's emphasis on diet as a preventive generally, the witness stated (Tr. 542):

"I should point out that there are parts of the book that I think represent what seem to me to be exaggerated emphasis on the benefits of diet and vitamins and organic materials * * *."

39. In the green-colored brochure which respondents began to circulate in February 1960, they made some modifications in the statements above quoted from the yellow-colored brochure. Thus, the statement, "Laboratory experiments indicating that brewers' yeast and dried liver prevent cancer," was changed to read: "Laboratory experiments concerning brewers' yeast and dried liver and the prevention of cancer (page 141)" (CX 10 B). The statement, "Experiments showing the effectiveness of the B complex of vitamins in preventing growth of cancer," was changed to read: "Experiments concerning the B complex of vitamins and cancer." The statement, "Experiments which indicate that liver in the diet helps prevent cancer," was eliminated in the green-colored brochure, although reference to the subject of liver appears in the portion of the green-colored brochure quoted above. No changes were made in the book itself with respect to brewers' yeast and liver as preventives of cancer. It is the opinion and finding of the examiner that, despite the changes in respondents' advertising above discussed, the advertising still creates the impression that there is a relationship between certain foods and vitamins, and the prevention of cancer. Reference to the subject of brewers' yeast and liver, as preventives of cancer, also appears in respondents' current publication, "The Complete Book of Food and Nutrition," under the heading: "Cancer Prevented by Brewer's Yeast and Dried Liver" (CX 29, p. 980). The current advertisement for that book contains the statement: "Brewer's yeast and dessicated liver prevent cancer in experimental rats. What is the protective factor in brewer's yeast?" (CX 30-A).

Tuberculosis

40. The yellow-colored brochure contains the following statement concerning tuberculosis: "The garlic treatment for tuberculosis (page 386)." It is the opinion and finding of the examiner that while the above-quoted statement cannot be construed as a representation that garlic will enable one to prevent tuberculosis, as alleged in the complaint, there would be members of the public who would infer therefrom that garlic is of some value in the treatment or cure of the disease. The thesis of the author, based on various experiments discussed by him, is that garlic is effective in the treatment of tuberculosis and is believed to be "a specific for the tubercle bacillus" (CX 1 A, p. 387). Most of the testimony on which complaint counsel rely to establish the falsity of the representation made with reference to tuberculosis relates to the book's recommendation of certain vitamins in dealing with this

condition (Tr. 219, 397, 459). However, there is no reference to the efficacy of such vitamins in respondents' advertising. The only reference to tuberculosis in the advertising is in connection with the garlic treatment. While one of the doctors called in support of the complaint did testify that he knew of no medical opinion that garlic was of value in the treatment of tuberculosis (Tr. 220), the examiner does not regard such testimony as sufficient to establish that garlic has no value in the treatment of this condition. It should be noted that the green-colored brochure, which respondents began to circulate in February 1960 in lieu of the yellow-colored brochure, contains no reference to the subject of tuberculosis.

Infantile Paralysis (Polio)

41. The yellow-colored brochure makes the following references to infantile paralysis or polio: "Diet for children during polio season (pages 623-4-5). * * * Polio, and the diet Dr. Sandler recommended during a North Carolina epidemic * * * (pages 574-5-6-7-8-9-80). * * * Food and polio (pages 596-7-8). * * * Infantile paralysis and vitamin B deficiency (pages 625-6-7-8-9). * * * Polio, its cause and prevention, by Dr. Virgil A. Davis, New York City (pages 599-603)" (CX 8 B-C). The subject is also referred to in the testimonial extracts under the heading: "Polio" (CX 9 B). One of the testimonials states that, "Every mother should buy the HEALTH FINDER and follow the excellent sensible advice on polio." Another states that the reader was "afraid of germs and diseases" before reading the book and, "now, my fears are gone. I just don't worry about them anymore." It is the opinion and finding of the examiner that there would be members of the public who would interpret the statements made in respondents' advertising regarding polio as meaning that the ideas and suggestions in the book concerning infantile paralysis or polio will enable them to prevent, or at least minimize the chances of getting, this condition.

42. The thesis of the author of the book is that poliomyelitis, or polio as it is commonly called, is primarily caused by improper diet, *i.e.*, a deficiency of certain desirable foods and vitamins and the ingestion of certain undesirable foods and vitamins. Although purporting to discuss various studies and experiments made by others in the field, the author takes a positive position that polio is a dietary disease and recommends the eating of certain foods and the avoidance of certain others (CX 1 A, pp. 624-625, 629, 578-580, 599). While referring at one point to the possibility that

polio may be of viral origin, the author states that "germs (bacteria) or virus are probably always a *secondary* (never a *primary*) cause of disease," and makes the further statement that: "If no one ate too much or used a diet deficient in any of the essential food elements or drank insufficient fluids, there probably never would be an infectious disease" (*id.*, at p. 599). According to the greater weight of the credible medical evidence in the record, (a) polio is a viral disease and cannot be prevented or minimized by dietary manipulation and (b) the book's emphasis on polio as a dietary disease would tend to cause people to avoid polio vaccination and to rely on dietary measures, thereby increasing the danger that they will get the disease (Tr. 221-223, 237, 398-401).¹⁸ The examiner is mindful of the fact that when the book was originally written polio vaccination, as a preventive measure, had not been fully perfected. However, respondents continued to advertise dietary measures as a preventive long after polio vaccination had come into active use.

43. In the green-colored brochure, which respondents circulated from February 1960 to some time in 1963, respondents continued to make the same statements concerning polio, including the reference to dietary measures, as those appearing in the yellow-colored brochure (CX 10 B). In respondents' current publication, "The Complete Book of Food and Nutrition," there is continued emphasis on dietary manipulation as the way to prevent polio (CX 29, pp. 504-505, 397). Respondents have continued to refer to dietary measures as a preventive for polio in the brochure which they are currently using to promote the sale of this publication. The brochure contains the statement: "Prevent polio all year round" (CX 30 B).

Heart Disease

44. The yellow-colored brochure contains the following statement with regard to heart disease (CX 8 B): "Heart disease

¹⁸ Of the two physicians called by respondents who testified on the subject one, a physician and dentist specializing in diseases of the mouth, referred to one of the studies discussed in the book as "exciting," but expressed doubt that it contained "the entire story." He noted particularly the absence of any discussion of polio vaccination (Tr. 533-534). The other witness, an osteopathic physician, in line with his general nonmedicinal approach to disease, agreed with the emphasis on diet as a preventive and claimed that vaccination "does not answer the question of disease entirely" (Tr. 724-725). The associate professor of medicine, the witness whom the examiner regards as the most highly qualified to testify on the subject among the witnesses called by respondents, made no specific reference in his testimony to the book's discussion of polio although, as previously noted, he did indicate that there were parts of the book that "seem to me to be exaggerated emphasis on the benefits of diet and vitamins and organic materials" (Tr. 542).

and the use of vitamin E (pages 415-6-7-8-9). * * * Heart disease and low salt diet (page 415)." In addition, the brochure contains several references to high blood pressure which have been previously discussed. The subject of "heart disease" is also alluded to in several of the testimonial extracts. One of the testimonial letters contains the statement (CX 9 A): "I am sure heart disease will never strike me suddenly, as it has three of my friends * * *, after having read your article on Heart Disease." Another letter contains the following statement (CX 9 B): "As one who has suffered from coronary trouble, this article [on heart disease] appeals to me, and much more so *when I can do things which the doctor said would be disastrous to undertake in my state of health*" (emphasis supplied). It is the opinion and finding of the examiner that there would be members of the public who would interpret these statements in respondents' advertising to mean that the book contains ideas and suggestions, particularly with reference to the use of vitamin A and a low salt diet, which will be helpful in the prevention, treatment or cure of heart disease.

45. It is the thesis of the author that a diet low in salt and one containing vitamin E are desirable in the treatment of heart disease. In the case of salt, the emphasis is on a low salt diet in the treatment of heart disease. With respect to vitamin E, it is the position of the author that the use of vitamin E is of value "to treat and prevent heart disease of all types, whether coronary or rheumatic" (CX 1 A, p. 417). The author suggests that vitamin E "bids fair to be the most important discovery made in medicine in the last 100 years! Not excepting penicillin" (*id.*, at p. 416). According to the greater weight of the credible medical evidence in the record there are a significant number of types and cases of heart disease in which dietary measures are of no value in the prevention, cure or treatment of the condition, and even in those cases where dietary measures are of value they play only a minor role in an overall regimen of treatment (Tr. 142-150, 175, 294-297, 301, 303). By suggesting that dietary measures are the principal method for the prevention or cure of heart disease generally, the book tends to cause individuals with actual or potential heart disease to engage in self-diagnosis and avoid necessary medical advice (Tr. 151, 169-171, 175, 187-188, 300, 309). Even if the recommendations in the book could be understood as being limited to those types of heart disease where dietary measures are of value, their use by a layman could be dangerous since there are similarities in the symptoms of various heart diseases which make it difficult even for a physician, let alone a layman, to make a

proper diagnosis and prescribe the proper treatment (Tr. 315-316).¹⁹

46. The above-quoted statements made in the yellow-colored brochure concerning heart disease were continued, in haec verba, in the green-colored brochure which respondents circulated between 1960 and 1963 (CX 10 B). Respondents' current publication "Complete Book of Food and Nutrition" contains reference to salt and vitamin E in the prevention or treatment of heart disease (CX 29, pp. 281, 370, 942). The advertising brochure for the book also makes reference to these topics (CX 30).

Arthritis

47. The yellow-colored brochure contains the following references to arthritis: "How one Massachusetts doctor treats arthritis successfully (pages 58-9). * * * What part does emotional stress play in arthritis? (page 58)" (CX 8 B, D). The compendium of testimonial extracts contains the following statement concerning arthritis: "This article is worth many times the price paid for the book. I always thought food caused it all, but now I realize what the real cause was" (CX 9 A). It is the opinion and finding of the examiner that there would be members of the public who would infer from the above statements in respondents' advertising that the book contains ideas and suggestions which will be helpful in the prevention or cure of arthritis.

48. It is the thesis of the author, in the portion of the book referred to in the advertisement, that one type of arthritis, *viz*, rheumatoid arthritis, is "partly traceable" to emotional factors. The author recommends rest, exercise, avoidance of emotional disturbance and of exposure to dampness, as well as a proper diet, in the treatment of this condition. Complaint counsel contend that the representation made by respondents is misleading because, according to some of the medical testimony, the causes of arthritis are not fully known and, following the suggestions in the book

¹⁹ The above findings are based on the testimony of two highly qualified heart specialists who testified in support of the complaint. The heart specialist called by respondents did not substantially contradict the testimony of these witnesses with regard to the various types of heart conditions that would not be helped by dietary measures and the limited role played by diet in the treatment of other heart conditions. His principal thesis was that dietary measures, plus exercise and the elimination of smoking, would be of value in *preventing* or delaying the onset of some types of heart disease (Tr. 806). However, even he agreed that dietary measures, such as vitamin E, were no "cure-all," and acknowledged that the use of such measures, even by a physician, was dangerous since they might actually raise the blood pressure (Tr. 822). While this physician expressed the opinion that the book would not make readers "refrain from consulting doctors when sick" (Tr. 807), respondents' own advertising literature illustrates graphically that readers will not merely avoid getting necessary medical advice when sick, but will "do things which the doctor said would be disastrous to undertake in my state of health" (CX 9 B).

will not assure the prevention or cure of rheumatoid arthritis in all cases (Tr. 223, 402). The examiner does not, however, interpret either the statement in respondents' advertising or the recommendations in the book as containing any assurance of a prevention or cure in all cases. While it is true that the causes of this condition are not fully understood, the medical testimony of complaint counsel's own witnesses establishes that emotional factors do play a role in precipitating the condition in persons predisposed toward it, and that the avoidance of exposure to cold and other physical phenomena are recommended in the treatment of the condition, as well as a properly balanced diet (Tr. 461, 463, 251, 403).²⁰ It is concluded and found that complaint counsel have failed to establish that the statements made by respondents in their advertising literature concerning arthritis are false, misleading and deceptive.²¹

Mental Health

49. The yellow-colored brochure contains the following statement on the subject of mental health: "Nutrition and mental health (pages 474-5)" (CX 8 B). The compendium of testimonial extracts circulated with the brochure also contain several references to "Mental Health." One letter states that the article on mental health "would act as a preventative for many so-called neuroses." Another, purporting to be written by a teacher, states that "I know some of my pupils would benefit greatly with the addition of Vitamin B Complex to their diet" (CX 9 B). It is the opinion and finding of the examiner that there would be members of the public who would interpret the foregoing statements in respondents' advertising literature to mean that the book contains ideas and suggestions which would be valuable in the prevention or treatment of mental illness.

50. It is the thesis of the author, in the portion of the book referred to in the yellow-colored brochure, that improper nutrition is a factor in the onset of mental illness. The author cites, particularly, a shortage of vitamin B¹ in the diet as having caused mental abnormalities in some instances. The recommendation is made to eat a proper diet, with necessary vitamins and minerals,

²⁰ Complaint counsel rely, in part, on the testimony of one of their medical witnesses to the effect that vitamin E has no value in the treatment of arthritis (Tr. 464, 465). However, this testimony is based on a portion of the book which was not referred to in respondents' advertising.

²¹ To the extent it may be material, it may be noted that in the green-colored brochure which respondents circulated between 1960 and 1963, they continued to use one of the above-quoted statements appearing in the yellow-colored brochure, viz, "What part does emotional stress play in arthritis? (page 58)" (CX 9 C).

including vitamin B. It is the position of complaint counsel that this is misleading since, according to the testimony of one of their medical witnesses, one cannot be "sure" of preventing mental illness by following this advice (Tr. 465). The examiner does not, however, interpret the advertising or the book as containing any positive assurance that mental illness will be avoided in this way. The medical evidence relied upon by complaint counsel establishes that there is a relationship between certain types of mental illness and dietary deficiency, albeit one cannot be assured of preventing mental illness by a proper diet (Tr. 466, 467). It is concluded and found that complaint counsel have failed to establish that respondents' advertising is false, misleading and deceptive in this respect.

Alleged Deception in Other Publications

51. Included in the advertising for "The Health Finder," as found in Paragraph 5 hereof, respondents have advertised, as a gift to purchasers of said book, their publications "How to Eat For a Healthy Heart" and "This Pace is Not Killing Us," combined in a single volume. Among and typical of the statements and representations made and appearing in said advertisements concerning the latter two publications are the following:

Did you know that in the United States alone 773,980 people died of heart disease last year? HOW TO EAT FOR A HEALTHY HEART attacks this terrifying problem from a new angle. THIS PACE IS NOT KILLING US is also concerned with the heart disease problem. It contains an equally vital health message for you. * * *

Here's why you should read *both* of these books at once: American men are dying from heart disease five times faster than Italian men—*ten times faster than Japanese men!* Why is this so? Is there any hope for Americans?

Yes, Mr. Rodale says, there is all the hope in the world, *if the enigma of heart disease is approached as a problem in nutrition* * * *. Mr. Rodale brings to light many facts about heart disease—facts you must consider *if you want to live a long, useful, vital life* * * *.

Mr. Rodale has had a heart condition for 16 years! * * * Mr. Rodale has enjoyed buoyant health for 16 years by following the same advice he now gives *you* in HOW TO EAT FOR A HEALTHY HEART. If you have heart symptoms, you won't want to miss this amazing book. But please remember that the emphasis in Mr. Rodale's teachings is always on the *prevention of disease*—so even if you have a healthy heart now, *this book may help you keep it that way!*²²

52. It is the opinion and finding of the examiner that there would be members of the public who would interpret the above statements, made in connection with the sale of respondents' pub-

²² The above findings are based on the admitted allegations of the complaint. See CX 11 A-B for full text of advertisement.

lication "The Health Finder," to mean that the two publications "How to Eat for a Healthy Heart" and "This Pace is *Not* Killing Us," contain information which will be of benefit in the prevention, treatment and cure of heart disease. It is the thesis of the author, in the publication "How to Eat for a Healthy Heart," that heart disease is basically nutritional in origin and that by avoiding certain foods and eating other foods containing certain chemical substances, minerals and vitamins, one may prevent or cure heart disease.²³ His basic thesis in the publication "This Pace is *Not* Killing Us" is that "not only are we *not* living at a faster tempo but that we are actually suffering from a fatal inaction caused by this all-too-common reduction in our physical movement." (CX 2, p. 3; see also p. 83.) An increase in exercise and physical activity is recommended to help improve the "chemistry of the blood" (CX 2, p. 13).

53. As heretofore found in connection with the discussion of the subject "Heart Disease," in respondents' publication "The Health Finder," there are a significant number of types and cases of heart disease in which dietary measures are of no value in the prevention, treatment or cure. Likewise, there are types and cases of heart disease in which exercise may be harmful and, possibly, fatal. Even in those cases where dietary measures or exercise are part of a regimen of treatment, they play only a limited role. By suggesting that dietary measures, supplemented by physical exercise, may help in the prevention, treatment or cure of heart disease generally, the books tend to cause individuals with actual or potential heart disease to engage in self-diagnosis and to avoid necessary medical or surgical treatment.²⁴

54. While respondents have substantially ceased to distribute copies of the two above-mentioned pamphlets in connection with the sale of their book "The Health Finder," they are still distrib-

²³ In the introduction to the pamphlet the author states: "If you read the rest of my little book, I am sure you will be convinced that the approach to the heart disease enigma is through nutrition * * *" (CX 2, p. 4).

²⁴ The above findings are based principally on the testimony of the two heart specialists called in support of the complaint, who are referred to in n. 19, *supra*. The heart specialist called by respondents conceded that he did not "necessarily agree with all the conclusions" in the booklet, but expressed the opinion that the recommendations might help prevent "some types of disease" (Tr. 806-807). He took issue with the testimony of the witnesses called in support of the complaint that the book might cause readers to refrain from obtaining necessary medical advice. It may be noted, in this connection, that in the advertisement for the pamphlets the author makes claim to treating his own heart condition "by following the same advice he now gives *you*" (CX 11 B). While it is true that he makes passing reference in the *appendix* to one of the pamphlets to the fact that the "physician must be the judge" whether the recommendations regarding exercise should be followed (CX 2, p. 90), the overall impression created is that all heart disease is in a single category and is treatable or preventable by the methods outlined in the pamphlets.

uting such pamphlets, either for sale directly, or in connection with the distribution of other books and pamphlets sold by them (CX 4, 7). Thus, in their advertising for a magazine currently published and sold by them, entitled "Prevention," they have offered to furnish "Free" to subscribers of such magazine, a copy of the publication "How to Eat for a Healthy Heart" and, in connection therewith, have made statements regarding such pamphlet which are substantially identical with those set forth above (CX 7 A-B).

Concluding Finding

55. As heretofore found, respondents have made statements and representations in the advertising for their publications "The Health Finder," "How to Eat for a Healthy Heart," and "This Pace is *Not* Killing Us," which are false, misleading and deceptive in a number of material respects. It is concluded and found that the use by respondents of such false, misleading and deceptive statements in advertising has had and now has the tendency and capacity to mislead and deceive members of the purchasing public into the erroneous and mistaken belief that such statements were, and are, true and into the purchase of substantial quantities of respondents' books, magazines and pamphlets by reason thereof.

CONCLUSIONS

1. The record establishes that respondents have represented, directly or by implication, in their advertising that by following the ideas, suggestions and recommendations in their publications, "The Health Finder," "How to Eat for a Healthy Heart" and "This Pace is *Not* Killing Us," readers will be able to avoid, prevent, treat, cure or obtain relief for a number of diseases or ailments. The record also establishes that a number of such representations are false, misleading and deceptive in whole or in part since readers will not, by following the ideas, suggestions or recommendations in respondents' publications, be able to prevent, treat, cure or obtain relief for a number of such diseases or ailments, including the common cold, constipation, ulcers, fatigue, goiter, high blood pressure, cancer, infantile paralysis and heart disease. The record also establishes that reliance on the ideas and suggestions in the books may, in a number of instances, cause readers to delay in obtaining necessary medical treatment and may result in irreparable injury to health or even loss of life.

2. Respondents, while conceding that there are some inaccuracies in their publications, contend, (a) that the books are sound for the most part and will not cause readers to avoid necessary

medical treatment, (b) that the complaint represents an improper intrusion by the Commission into the contents of the books, in violation of the First Amendment, and (c) that there is no substantial public interest in this proceeding because of the discontinuance of the questioned advertisements and the publication of the books involved. Each of these contentions is hereinafter discussed.

3. Contrary to respondents' position, the record does not establish that "the two books involved were among the best health books published" (Resp. Br., p. 3). Nor does the record establish that the books are "a carefully compiled review of medical literature from respected sources, and that the readers who follow [their] advice will receive substantial medical benefits" (*id.*, at p. 10). The record does establish that the books contain a number of errors of commission and omission, and that the author, who has had no medical training (Tr. 850), frequently seizes upon experimental and tentative theories in the medical literature to make positive recommendations in accordance with his own preconceived theories. However, all of this is immaterial to the real issue in this case, which is not whether the books contain many valuable ideas, but whether respondents have made false and misleading statements concerning the books in their advertising. If, as has been found, respondents have created the impression in their advertising that purchasers of the books will find therein the answer to certain specific health problems and if the books do not perform as represented in these areas, then the law is violated.²⁵ The fact that a product is generally good or that it will perform as represented in certain other respects, does not exculpate the perpetrator of material misrepresentations.

4. With respect to the constitutional question, respondents apparently recognize that the protection afforded by the First

²⁵ Respondents cite the testimony of a psychiatrist called by them that there would be no danger of misunderstanding as to the book's recommendations, or of avoidance of medical treatment by readers, except for "some people at the extreme fringes" (RR, pp. 7-8). However, the testimony of a number of the Commission's witnesses, based on their personal experience with patients, establishes that there are a not insignificant number of people who are misled by such books and rely upon them instead of seeking medical treatment. The likelihood of readers relying on the books and not seeking necessary medical advice is increased here by the fact that, in some instances, the books or the advertising encourage readers not to seek or to disregard medical advice (See, *e.g.*, par. 44 and n. 24, *supra*). In any event, it matters not that persons of "average intelligence" would not be misled by the statements made in respondents' advertising concerning their books (*Prima Products, Inc. v. F.T.C.*, 209 F. 2d 405, 409, 2d Cir. 1954), since the Federal Trade Commission Act was enacted not merely to protect the person of "average intelligence," but "to protect the public—that vast multitude which includes the ignorant, the unthinking and the credulous" (*Positive Products Co. v. F.T.C.*, 132 F. 2d 165, 167, 7 Cir. 1942). If there are some members of the public who would be misled by the advertising, the law is violated (*Prima Products, Inc. v. F.T.C.*, *supra*; *Rhodes Pharmacal Co.*, 49 F.T.C. 263, 283, *aff'd* 208 F. 2d 382, 7 Cir. 1953).

Amendment is not absolute. It is now well settled that the right of freedom of speech and of the press does not confer any immunity on speech or writing which constitutes "libel, slander, misrepresentation, obscenity, perjury, false advertising," or the use of the mails to promote circulation by fraud or deception of the public. *Konigsberg v. State Bar*, 366 U.S. 36, 49 n. 10 (1961); *Donaldson v. Read*, 333 U.S. 178, 190 (1948); *American Medicinal Products, Inc. v. F.T.C.*, 136 F. 2d 426 (9 Cir. 1943); *Drew & Co. v. F.T.C.*, 253 F. 2d 735 (2d Cir. 1956), *cert. denied*, 352 U.S. 969. In *Witkower Press, Inc.*, 57 F.T.C. 145, 218, the Commission specifically held that its authority to prohibit deceptive advertising extends to "false promises of therapeutic benefits in the advertising for a book when such advertising statements derive from or reflect like views or information contained in the publication itself." Respondents seek to analogize the holding in the *Witkower* case to that in the obscenity cases, and argue that the decision is limited in its application to a situation where the book, "as a whole," is characterized by "intentional fraud or deception."²⁶ Respondents also rely on the holdings in the cases of *Koch v. F.T.C.*, 206 F. 2d 311 (6 Cir. 1953) and *Scientific Manufacturing Co., Inc. v. F.T.C.*, 124 F. 2d 640 (3 Cir. 1941), for the proposition that the Commission cannot attack the mere expression of opinion in a book or pamphlet.

5. In the opinion of the examiner, respondents' effort to distinguish the *Witkower* case is wholly without merit. The attack in the obscenity cases is directed against the publication itself, which would ordinarily be protected by the First Amendment. In order to place the publication beyond the pale of such protection by reason of its obscenity, it is necessary in such cases to establish that the publication as a whole is not a literary work, but appeals primarily to prurient interests. However, unlike the obscenity or other cases directed at a publication, the attack here is against the advertising for the publication. As the Commission pointed out in the *Witkower* case, the order sought "does not purport to forbid printing or sale of the book but looks instead to prohibiting false therapeutic claims used in advertising." Respondents are free to advance any theory they wish in their publication, no matter how ill-conceived and misguided. However, if they wish to advance the sale of their publication, as a commercial product, and to induce the public to purchase it, then they have no right to falsely advertise the therapeutic benefits which purchasers of their product

²⁶ See Brief for Respondents, pp. 6-7, and Motions to Dismiss or Certify, p. 12.

will receive, merely because that product is a book. Contrary to the position urged by respondents in their brief (pp. 1-2), what is being attacked here is not "the author's opinion *about* the book," but affirmative representations, in commercial advertising, as to the therapeutic benefits which purchasers of the book will achieve.

6. Neither the *Koch* nor the *Scientific Manufacturing Co.* cases cited by respondents are in anywise contrary to the holding in *Witkower*. The exclusion from the order in the *Koch* case involved, not misrepresentation in commercial advertising, but a book which the court found was "not an advertisement" within the meaning of the statute (206 F. 2d at 317). Similarly, the *Scientific Manufacturing Co.* case involved, not advertising, but a publication of respondents' "opinions and no more," regarding aluminum cooking utensils in the sale of which respondents were "not engaged or financially interested." It should be noted, however, that the court specifically excluded from its ruling, with respect to the privileged character of the publication, the circulation of an opinion "if, wanting in proof or basis in fact, it [the opinion] is utilized in the trade to mislead or deceive the public or to harm a competitor" (124 F. 2d at 644-645). It is, accordingly, concluded that the statements in respondents' commercial advertising concerning the therapeutic benefits which purchasers of their publications will receive are not within the protection of the First Amendment.

7. Finally, respondents urge that there is no longer any public interest in this proceeding and that no order should issue because of the discontinuance of the questioned advertising and of the publication of the principal book involved (Brief, p. 21). However, the mere discontinuance of practices found to be illegal does not automatically render a controversy moot. *Cannon Mills, Inc.*, 55 F.T.C. 1448. In cases of asserted abandonment of a practice, it must appear that the practice has been "surely stopped" and that it is not likely to be renewed. *Arnold Constable*, 58 F.T.C. 49, 64. In resolving this issue, it is customary to "look to the timing and circumstances surrounding the alleged discontinuance." *Art National Manufacturers Distributing Co., Inc.*, 58 F.T.C. 719, 724. In the instant case it appears that the alleged discontinuance of the first of the challenged advertisements took place only after a Commission investigator had advised respondents that their advertising was questionable (Tr. 575). While this advertisement was replaced by one which was less flamboyant in its claims of therapeutic benefits, it contained a number of the same misrepresentations. Respondents continued to circulate the second ad-

vertisement until at or about the time they were served with a copy of the proposed complaint herein. While it may be that respondents are no longer publishing or advertising a book with the title "The Health Finder," they are still publishing and advertising other health books, portions of which are identical with or substantially similar in content to that book, and are still making claims in advertising similar to or suggestive of some of those challenged in the complaint. Considering the nature of respondents' publications in the health field, strong incentive exists to make advertising claims of therapeutic benefits in order to encourage the purchase of these books. The examiner cannot say, in the light of what has already occurred, that the challenged practices have been "surely stopped" and that they will not be fully resumed once the pressure of a possible Commission order has been removed. It may also be noted that there is no claim of discontinuance with respect to the other two publications involved in the complaint.

8. It is concluded that the acts and practices of respondents consisting of the use of false, misleading and deceptive statements in advertising, as hereinabove found, 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.

ORDER

It is ordered, That Rodale Press, Inc., a corporation, and its officers, and Rodale Books, Inc., a corporation, and its officers, and Jerome I. Rodale and Robert Rodale, individually and as officers of said corporations, and respondents' representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of the books entitled "The Health Finder," "How to Eat For a Healthy Heart," "This Pace is *Not* Killing Us," or any other book or books of the same or approximately the same content, material and principles, whether sold under the same name or names or any other name or names, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing in advertising, directly or by implication, that:

1. Readers of the book "The Health Finder" who follow the ideas, suggestions or recommendations therein will be able to:

- (a) Avoid getting the common cold.
- (b) Prevent or cure all types of constipation.
- (c) Prevent ulcers.
- (d) Prevent fatigue.
- (e) Prevent all types of goiter.
- (f) Relieve or cure all types of high blood pressure.
- (g) Prevent cancer.
- (h) Prevent, or minimize the possibility of getting, infantile paralysis (polio).
- (i) Prevent, treat or cure all types of heart disease.

2. The books "How to Eat For a Healthy Heart" and "This Pace is *Not* Killing Us" contain information which will be of benefit in the prevention, treatment or cure of all types of heart disease.

It is further ordered, That those portions of Paragraphs Six and Seven of the complaint which allege that respondents have made illegal statements in advertising, other than those herein found to be false, misleading and deceptive, be, and the same hereby are, dismissed.

OPINION OF THE COMMISSION

JUNE 20, 1967

BY JONES, *Commissioner*:

This matter is before the Commission on cross appeals of counsel supporting the complaint and counsel for respondents. Complaint herein, issued on April 3, 1964, charges respondents with violation of Section 5 of the Federal Trade Commission Act (15 U.S.C., Sec. 45(a)), by having made certain false and misleading representations, in their advertising of a book entitled *The Health Finder* (sometimes herein called book) and a pamphlet entitled *How To Eat For a Healthy Heart and This Pace Is Not Killing Us* (sometimes herein called pamphlet).¹ In general, the complaint charges that respondents falsely advertised that persons who purchased the publications and followed the regimens discussed in the book and pamphlet would be able to prevent, cure or treat successfully various diseases and disorders and would receive other enumerated therapeutic benefits.

Respondents in their answers admitted responsibility for the cited advertising but otherwise denied the allegations of the complaint and contended that the complaint was in violation of the

¹ This pamphlet is actually two separate publications, *How To Eat For A Healthy Heart* and *This Pace Is Not Killing Us*, combined into a single volume.

First Amendment of the Constitution and otherwise not in the public interest.

The examiner, in his initial decision issued April 16, 1965, rejected respondents' constitutional and public interest arguments, sustained some of the charges in the complaint, dismissed others on a failure of proof and issued a proposed order to cease and desist.

Respondents on this appeal ask that the examiner's decision be set aside and the complaint dismissed.² Complaint counsel ask that the initial decision be sustained in part, set aside in part and the proposed order modified.

The sole issues before us on this appeal are whether respondents' advertising of their book and pamphlet contained promises that purchasers of these publications would receive therapeutic benefits, whether such representations, if made, were true; whether the Federal Trade Commission's challenge of respondents' advertisements contravenes the First Amendment or is otherwise not in the public interest since purportedly the publications in question are out of print and the challenged advertising discontinued, and finally what the proper scope of the order should be in the light of the findings and conclusions.

The Commission has considered the appeals and the entire record and has determined for the reasons set forth herein that the appeal of respondents should be denied, the appeal by complaint counsel should be granted in part and denied in part and that the initial decision of the hearing examiner should be vacated and set aside. The Commission has made its own findings as to facts, conclusions drawn therefrom and order, which accompany this opinion.³

I

RESPONDENTS AND THEIR ADVERTISING

A. THE RESPONDENTS

The corporate respondents, Rodale Press, Inc., and Rodale Books, Inc., were established in 1931 and 1954, respectively, by Jerome I. Rodale for the purpose of publishing and selling hardback and softback books. Each of the individual respondents, Jerome I. Rodale and his son, Robert C. Rodale, is chairman of

² The American Civil Liberties Union requested and was granted leave to file an *amicus curiae* brief and to present oral argument on the appeal to the Commission limited to the First Amendment issue.

³ Opinion citations "F" are to our Findings of Fact. Opinion citations "Tr." are to the transcript of the hearing before the examiner.

the board and president, respectively, of both corporate respondents. The respondents are engaged in the advertising, publication and offering for sale of a variety of publications. Their combined gross annual sales at the time of the hearing were approximately two and one-half million dollars. Their primary method of advertising and distributing their books and publications is via mail to the general public. Only limited sales are made through retail stores.⁴

B. DESCRIPTION OF RESPONDENTS' ADVERTISING CHALLENGED IN THE COMPLAINT

Respondents' advertising under challenge in this complaint and considered at the proceeding before the examiner consists of an eight-page advertising brochure used to promote the sale of *The Health Finder* from 1956 through 1960,⁵ a slightly revised and somewhat condensed edition of this brochure used from 1960 until 1963⁶ and various other pieces of mail advertising material used to promote respondents' pamphlet.⁷

Respondents' original advertising brochure for *The Health Finder* highlights on its first page a series of provocative questions about the desire for and the importance of good health as follows:

What do you want from life?

Better Health can mean a lot to you, personally. Have you ever stopped to think that all of the good things in life depend upon *good health*? * * *. Wouldn't you like to enjoy one or more of these rewards of good health?

Good Health, and the abundant energy that goes with it * * *. Are you "just too tired" to take a full part in the life of your community? * * *. Do you enjoy your leisure moments as much as you should? Or are you so tired you spend most of your leisure time in resting and sleeping? * * *. Are you bored and discontented because you "don't feel well"? * * *. *Turn page for important message.*

On the two inside pages of respondents' brochure appears in bold face type:

WHICH OF THE HEALTH IDEAS IN THIS AMAZING BOOK WILL
* * * (1) ADD YEARS TO YOUR LIFE? (2) GIVE YOU MORE
ENERGY? (3) CUT DOWN ON YOUR DOCTOR AND DENTIST BILLS?
(4) MAKE YOU FEEL BETTER THAN YOU EVER FELT BEFORE?
(5) HELP YOUR FAMILY TO ACHIEVE HEALTH AND HAPPINESS?

⁴ FF 1-4.

⁵ This advertising brochure (reproduced in its entirety as Appendix A to the Findings of Fact) was in two parts. The first part is a general description of the book. The second section contains what purports to be testimonials from readers of the book and pamphlet. (F. 7.)

⁶ The revised brochure consisting of four pages instead of eight, contains most of the same representations as the original brochure. It was introduced at the hearing and constitutes part of complaint counsel's proof of the representations. (F. 7.)

⁷ F. 10.

In the text below these bold-faced questions appear the following:

Here at last is a new kind of health book! During his years of research, Mr. Rodale has discovered a great store of medical knowledge, mostly hidden away in medical journals and medical archives. This knowledge can help the average person remain *comparatively free of many terrible diseases*. Isn't such a book worth a trial?

Tells You How To Stay Healthy

Mr. Rodale was not a healthy man when he first asked himself why it wasn't possible *to learn how to be healthy*—so healthy that we would rarely need to visit a doctor or take medicine—so healthy that we would feel wonderfully alive and happy instead of draggy and half-dead.

His [Mr. Rodale's] own life gives abundant proof of the success of his quest for health. Furthermore, the radiant health and wonderful energy of thousands of men and women who follow his teachings proves that *he knows how to pass his knowledge along to others*.

The *Health Finder* is an entirely new kind of health book because its subject is the prevention of disease. It can give you *a wonderful new conception of health*.

Worth Hundreds of Dollars

We sincerely believe that the *Health Finder* can be worth hundreds of dollars to you! We believe it will show you how to go through life confident and happy in the knowledge that you can do a great deal to keep yourself and your family radiantly healthy and full of energy. And the *Health Finder* can be valuable to you in another way. It can give you *peace of mind*—a rare feeling these days, when headlines tell us every day of the heavy toll being taken in all walks of life by all kinds of dreadful diseases. The *Health Finder* gives you peace of mind by showing you *how perfectly natural it is for you to enjoy that most precious of all possessions—GOOD HEALTH!*

Unconditional Money-Back Guarantee

You don't have to take our word for the value of the *Health Finder*. It is sold under an absolute money-back guarantee. If, when you receive the book, you are not convinced that *it will be worth many times its cost to you*, just return it, within fifteen days after you receive it, *for a full refund*. For the sake of your own health, and the health of your family, we urge you to get your copy of the *HEALTH FINDER* today. You have nothing to lose—and you may have *a wonderful new world of health and happiness to gain!* (Emphasis throughout as in original.)

This advertising brochure then sets forth a "check list" of health problems and topics which are discussed in *The Health Finder* encompassing a listing of approximately 100 different topics with page references, some described in the form of affirmative statements, others in the style of a question. Typical of the captions in this check list are the following:

Recommendations for a winter free from common colds (pages 260-1).

What is the most successful preventive and cure for constipation? (pages 278-9).

Cancer and nutrition (pages 165-6-7).
Diet for children during polio season (pages 623-4-5).
Prevention of ulcers (page 854).
Heart disease and the use of vitamin E (pages 415-6-7-8-9).
How one Massachusetts doctor treats arthritis successfully (pages 58-9).
Laboratory experiments indicating that brewers' yeast and dried liver prevent cancer (page 141).
Goiter—what it is, where it occurs, what should be done to prevent it (pages 392-3-4-5-6-7-8).
Polio, its cause and prevention, by Dr. Virgil A. David, New York City (pages 599-603).

The advertising brochure also lists excerpts of "Comments" presumably from readers of the book which are followed by four pages of testimonial excerpts about the great value and improved health, generally and with reference to specific ailments, which the readers attributed to their reading of respondents' book. These comments and testimonial excerpts include such comments as:

CANCER—"read this chapter aloud to his wife twice"

"This chapter I have read aloud to my wife twice because it contains so much pertinent information. If one of our relatives could have seen this article ten years ago and followed its recommendations, she probably would not now be dying of cancer of the bones and nerves."

She feels like moving mountains every day

"Through following your organic ideas of compositing to enrich the soil, and eating as nearly all organically grown food as possible I am able to state that never in my life, even as a child or teenager, have I felt more like moving mountains every day—and the days are never long enough for me. I am 43 years old and play tennis with my 22-year old daughter—and never feel my 43 years for a minute."

HEART DISEASE—"article appeals to coronary sufferer"

"As one who has suffered from coronary trouble, this article very definitely appeals to me, and much more so when I can do things which the doctor said would be disastrous to undertake in my state of health."

POLIO—"her fears are gone, doesn't worry any more"

"Before your ideas began to come my way, I was afraid of germs and diseases. Now my fears are gone. I just don't worry about them anymore."

ULCERS

"Got rid of a peptic ulcer."

VITAMIN E—"information worth many times cost"

"My husband has heart trouble and I believe that vitamin E and brewer's yeast has helped him more than anything he has ever used. His heart used to pound so hard while sleeping, but it doesn't any more and he doesn't tire so easily. That alone is worth many, many times the price of the book."

The 1960 revision of this brochure features on the first page, a reproduction of the outside cover of *The Health Finder* with the statement, "An Encyclopedia of Health Information from the

PREVENTIVE Point-of-View.”⁸ The top of the second and third pages of this brochure reads:

OVER 150,000 FAMILIES HAVE BOUGHT THE HEALTH FINDER—YOU AND YOUR FAMILY MIGHT FIND IT WORTHWHILE, TOO!

To find out, get out your pencil and check the topic you would like to know more about [] * * *. Check the health problems you and your family may have [] * * *.

Below the above is the “check list” similar to that contained in the original advertising brochure, with certain deletions. The revised brochure also contains a discussion of the book itself wherein it is stated:

Mr. Rodale was not a healthy man when he first asked himself why it wasn't possible to *learn how to be more healthy*—healthy enough so that he wouldn't need to visit a doctor or take medicine except on rare occasions—healthy enough so he would feel wonderfully alive instead of draggy and half-dead * * *. His own life gives abundant proof of the success of his personal quest for health.

Mr. Rodale believes that by observing certain health rules, we can develop bodies, minds, nerves, muscles and tissues that are more resistant to disease than they otherwise would be. In the *Health Finder*, Mr. Rodale shows why we should be careful of the food we eat—why a healthy diet is important.

The testimonial extract used with the revised brochure was also condensed to some extent and the testimonials quoted in the revised version have generally been limited to comments with respect to the overall preventive benefit of *The Health Finder* rather than to specific ailments.⁹

The principal piece of advertising for the pamphlet challenged in this proceeding is a two-page “letter” from the manager of Rodale Books, Inc.¹⁰ This letter discusses the heart problem in general and Mr. Rodale's experience with the ailment. In part, this letter reads:

Did you know that in the United States alone, 773,980 people died of heart disease last year? HOW TO EAT FOR A HEALTHY HEART attacks this terrible problem from a new angle. THIS PACE IS NOT KILLING US is also concerned with the heart disease problem. It contains an equally vital health message for you * * *.

Here's why you should read *both* of these books at once: American men are dying from heart disease five times faster than Italian men—*ten times faster than Japanese men!* Why is this so? Is there any hope for Americans?

Yes, Mr. Rodale says, there is all the hope in the world.

Mr. Rodale has had a heart condition for 16 years * * * [He] has enjoyed buoyant health for 16 years by following the same advice he now gives you

⁸ F. 7.

⁹ F. 7.

¹⁰ F. 10.

in HOW TO EAT FOR A HEALTHY HEART. If you have heart symptoms you won't want to miss this amazing book. But please remember that the emphasis in Mr. Rodale's health teachings is always on *the prevention of disease*—so even if you have a healthy heart now, *this book may help you keep it that way!*

Similar statements were also made in other advertising pieces.

So far as this record shows respondents did not disseminate any advertisement for *The Health Finder* after 1963. However, the publication itself continued to be available for sale both by direct mail from respondents and through certain book stores at the time complaint issued. Further, the book was included in the list of publications available from respondents and referred to in the text of *Prevention* magazine.¹¹

Active promotion of the pamphlet was discontinued in 1960 although it also continued to be included in the list of publications available for purchase from respondents at the time of the hearing.¹²

C. DESCRIPTION OF RESPONDENTS' PUBLICATIONS WHICH ARE THE SUBJECT OF THE CHALLENGED ADVERTISING

Respondents' book, *The Health Finder*, which is the principal subject of the challenged advertising claims, is a 944-page compendium of health information from "the preventive point of view."

Respondents' book is divided into approximately 260 major subjects and 1700 subtopics. Each of the major subjects is a particular medical problem, food type or substance, while the subtopics relate to various aspects of the major subject.

The usual format of the book is to start each chapter or section with an overall discussion of the subject. This is followed by references either in the form of entire articles or excerpts from articles relating to experiments, studies or other reports about the subject under discussion. Most of these materials had been previously published in medical and professional journals, books and newspapers and typically reflect some connection between the medical problem and nutrition. Intermingled with these materials are the personal health experiences of respondent Jerome I. Rodale. For certain of the major subjects the editor and/or his staff draw conclusions and make recommendations based on the previous discussion. The recommendations usually include the avoidance

¹¹ F. 6.

¹² F. 10.

of a particular food because of its harmful effect and the inclusion of other foods because of their particular beneficial effects.

The format of respondents' pamphlet, *How To Eat For A Healthy Heart and This Pace Is Not Killing Us*, is essentially the same as *The Health Finder*, with the text divided into various subjects and consisting of excerpts from articles in medical journals interspersed with the author's discussion of these articles and of his own personal experience or opinions respecting the subject matter under discussion.

II

JURISDICTION OF THE FEDERAL TRADE COMMISSION OVER ADVERTISING OF BOOKS

Before examining the specific charges in the complaint, it is necessary to discuss first the argument urged by the respondents and by the American Civil Liberties Union that the Commission's challenge of the accuracy of respondents' advertising necessarily constitutes a judgment on the accuracy and efficacy of the opinions and ideas contained in the publications, and that such action is censorship prohibited by the First Amendment of the Constitution and beyond the authority of the Federal Trade Commission Act.

A. THE GENERAL REACH OF THE FIRST AMENDMENT

The First Amendment to the Constitution provides in part as follows:

Congress shall make no law * * * abridging the freedom of speech, or of the press.

The rights of free speech and of the press have been characterized by the Supreme Court as "fundamental personal rights and liberties," reflecting the conviction of the framers of the Constitution that their exercise "lies at the foundation of free government by free men." *Schneider v. Irvington*, 308 U.S. 147, 161 (1939). According to the Court, these rights are designed to "assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people" and they are cited again and again by the Court for their essentiality "to the development and well-being of our free society" and as "indispensable to its continued growth." *Roth v. United States*, 354 U.S. 476, 484, 488 (1957). *Marsh v. Alabama*, 326 U.S. 501, 509 (1946).

Neither truth, nor orthodoxy, nor public value are essential ingredients of speech in order to qualify it for constitutional protec-

tion. *Roth v. United States*, *supra*, 354 U.S. at p. 484; *Winters v. New York*, 333 U.S. 507, 510 (1948); see also *Bond v. Floyd*, 385 U.S. 116, 136 (1966). Nor is the constitutional protection of the exercise of free speech limited to the bare freedom to utter words in the silence of one's own room or to a small select group of willing listeners. Rather, it embraces the broad spectrum of activities involved in the *communication* of ideas to the public, including the right to speak in public places, to picket, to solicit, to publish and disseminate and to be free of unreasonable deterrents, either financial or psychological, in such expressions or communication. *Lamont v. Postmaster General*, 381 U.S. 301, 307 (1965); *Freedman v. Maryland*, 380 U.S. 51, 57 (1965); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66-67 (1963); *Smith v. California*, 361 U.S. 147, 153 (1959); *Murdock v. Pennsylvania*, 319 U.S. 105, 117 (1943); *Martin v. Struthers*, 319 U.S. 141, 143 (1943); *Lovell v. Griffin*, 303 U.S. 444, 452 (1938); *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936).

While enjoying a "preferred position" in our constitutional system, these rights have never been regarded as absolute. The Supreme Court has consistently held that in a proper case these rights may of necessity undergo some restriction where their exercise comes into conflict with other essential public interests of the community. *Adderley v. Florida*, 385 U.S. 39, 47 (1966); *Sheppard v. Maxwell*, 384 U.S. 333, 362-63 (1966); *United States v. Harriss*, 347 U.S. 612, 625 (1954); *Breard v. Alexandria*, 341 U.S. 622, 644 (1951); *Communications Assn. v. Douds*, 339 U.S. 382, 398-99 (1950); *Teamsters Union v. Hanke*, 339 U.S. 470, 480 (1950); *Kovacs v. Cooper*, 336 U.S. 77, 88-89 (1949); *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944); *Labor Board v. Virginia Power Co.*, 314 U.S. 469, 477 (1941); *Schenck v. United States*, 249 U.S. 47, 52 (1919). In making these determinations, the Supreme Court has been primarily concerned with the degree of burden on the exercise of the protected right,¹³ whether the statute giving rise to the restraint was reasonable and nondiscriminatory in its objectives¹⁴ and whether the standards for its application

¹³ *Cox v. Louisiana*, 379 U.S. 559, 564 (1965) (narrowly drawn specific statute prohibiting picketing in or near courthouse sustained as reasonably related to evil sought to be curtailed and hence as not imposing undue burden); *Kovacs v. Cooper*, 336 U.S. 77, 87 (1949) (ordinance prohibiting objectionally amplified sound sustained); *Cox v. New Hampshire*, 312 U.S. 569, 576 (1941) (reasonably and fairly administered law requiring a license to parade sustained); See also to same effect *Whitney v. California*, 274 U.S. 357, 371-72 (1927).

¹⁴ *Cox v. Louisiana*, 379 U.S. 536, 545 (1965) (discriminatory application of local breach of peace statute held unconstitutional infringement of rights of civil rights demonstrators. This case was based on the same incident and facts as *Cox v. Louisiana*, 379 U.S. 559 (1965) where a conviction under a different statute was upheld because the statute was narrow and reasonably related to the evil it sought to curtail. See n. 13, *supra*); *Edwards v. South*

were sufficiently defined.¹⁵ Thus the constitutionality of regulatory statutes has been sustained against attack even where their impact resulted in some restraint of the exercise of constitutional freedoms.¹⁶

The constitutionality of the Federal Trade Commission Act has been expressly sustained on the ground that regulation of false advertising does not as such constitute unconstitutional restraints on the expression of opinions by sellers as to the market worth of their products and that whatever slight impairment of speech may be involved is far outweighed in importance by the need to protect the public from deception. *Regina Corp. v. Federal Trade Commission*, 322 F. 2d 765, 770 (3rd Cir. 1963); *E. F. Drew and Co. v. Federal Trade Commission*, 235 F. 2d 735, 740-41 (2nd Cir. 1956), cert. denied, 352 U.S. 969 (1957).¹⁷ As the Second Circuit observed in *Drew*:

Carolina, 372 U.S. 299, 226 (1963) (discriminatory application of local breach of peace statute held unconstitutional infringement of rights of civil right demonstrators); *Grosjean v. American Press*, 297 U.S. 233, 250 (1936); (tax only applicable to certain newspapers found discriminatory and unconstitutional) Cf. *Adderley v. Florida* 385 U.S. 39, 47 (1966) (even handed enforcement of trespass statute sustained).

¹⁵ *Kevishian v. Board of Regents*, 385 U.S. 589, 604 (1967) (loyalty oath statute held unconstitutional because of vague and indefinite standards.); *Burstyn v. Wilson*, 343 U.S. 495, 504-05, (1952) (N.Y. statute banning "sacrilegious" movies held unconstitutional because of vagueness of term); *Niemotko v. Maryland*, 340 U.S. 268, 273 (1951) (conviction under local disorderly conduct ordinance of Jehovah's Witnesses for speaking in a public park without a permit reversed on ground that local ordinance contained no standards under which permit was to be issued and hence because of its vagueness was an unconstitutional invasion of defendant's right of free speech); See also *Terminiello v. Chicago*, 337 U.S. 1, 5 (1949); *Cantwell v. Connecticut*, 310 U.S. 296, 307 (1940).

¹⁶ *Associated Press v. United States*, 326 U.S. 1, 20 (1945) (applicability of Sherman Anti-trust Act (29 Stat. 209) to press association by laws constituting boycott held not to contravene freedom of press protection of First Amendment); *Associated Press v. Labor Board*, 301 U.S. 103, 132-33 (1937) (applicability of National Labor Relations Act to press association held not to contravene freedom of press protection of First Amendment). See also, *United States v. Times-Picayune Publishing Co.*, 345 U.S. 594 (1953) (Sherman Anti-trust Act proceeding alleging illegal tie-in based on newspaper offer of special rate for advertisement placed in both morning and evening newspapers); *Lorain Journal Co. v. United States*, 342 U.S. 143, 155-56 (1951) (Sherman Anti-trust Act (29 Stat. 209) proceeding challenging press refusal to accept advertising from customers who also utilized radio for "promotions"); *Indiana Farmer's Guide Publishing Co. v. Prairie Farmer Publishing Co.*, 293 U.S. 268, 276 (1934) (private treble damage suit under Section 7 of the Sherman Anti-trust Act (29 Stat. 210) alleging damages from a conspiracy between competitors agreeing to a special combined advertising rate). In these cases the court found that the antitrust statutes applied to newspapers without discussing the constitutional issue.

See also *Chamber of Commerce v. Federal Trade Commission*, 13 F. 2d 673 (8th Cir. 1926) wherein the court rejected the argument that the Commission's proceeding against the use of newspapers to restrain trade in the grain market was in contravention of the freedom of press protection of the First Amendment. The court observed:

"The liberty of the press is not an unrestricted license and the abuse of that right is subject to criminal prosecution and to civil liability. * * * Also, publications might be restrained where they were instruments in carrying out a boycott or a conspiracy" (13 F. 2d 686).

¹⁷ Similar arguments addressed to the constitutionality of Federal Trade Commission Act proceedings involving advertising have been consistently and summarily rejected by the Courts in *Murray Space Shoe Corp. v. Federal Trade Commission*, 304 F. 2d 270, 272 (2nd Cir. 1962) (involving alleged false advertising of shoes) and in *American Medicinal Products, Inc. v.*

We think it sufficient to state that Congress can prohibit or control misleading advertising under the postal fraud statutes * * * or under its commerce power * * * without deprivation of First Amendment rights. There is no constitutional right to disseminate false or misleading advertisements (235 F. 2d 740).

The Court in discussing the constitutionality of the statutory provision that representing oleomargarine as a dairy product was deceptive, further elaborates its rationale by observing:

Nor is the slight and incidental limitation of speech necessary to avoid the danger of public deception an infringement of the First Amendment. Petitioner remains free to advertise its product. It is prohibited only from representing or suggesting that its product is a dairy product. "It is not difficult to choose statements, designs and devices which will not deceive." (*Ibid.*)

It is against the background of these general principles respecting the purpose and reach of the First Amendment that respondents' claims of unconstitutionality must be examined.

B. THE CONSTITUTIONALITY OF REGULATING THE ADVERTISING OF PUBLICATIONS

We find nothing in the law which even remotely supports respondents' argument to us that the protection of the First Amendment reaches automatically both to the speech itself and to the advertisements of the speech. Nor have we been directed to any reason of policy or of logic which compels the conclusion that any challenge to the truth or falsity of the advertisement of a book must inevitably constitute censorship of the book and therefore run afoul of the First Amendment protection.

The courts have taken the position that an advertisement whether it appears in the format of a book or pamphlet or as a paid notice in a newspaper is subject to regulation for its truth-

Federal Trade Commission, 136 F. 2d 426, 427 (9th Cir. 1943) (involving alleged false advertising of a reducing drug). The Supreme Court, by implication, has also affirmed the right of the Federal Trade Commission to regulate deceptive representations in connection with the sale of books by upholding proceedings involving such deceptive practices in *Federal Trade Commission v. Standard Education Society*, 302 U.S. 112 (1937) (involving alleged false advertising and representations used in the sale of encyclopedias). In this case, the Court affirmed the Commission's action without any discussion of possible infringement on freedom of press under the First Amendment.

See also *Donaldson v. Read Magazine Inc.*, 333 U.S. 178 (1948) in which the Supreme Court sustained the right of the Postmaster General to regulate advertising by restricting the receipt and dissemination of fraudulent mail by a magazine publisher noting that:

"A contention cannot be seriously considered which assumes that freedom of the press includes a right to raise money to promote circulation by deception of the public" (333 U.S. 192).

fulness.¹⁸ It is significant that in none of these cases was the issue respecting the constitutional protection of free speech even raised. In determining what constitutes advertising the courts do not apply any mechanistic formula but look to the substance of the message to determine whether it is designed to promote a product or to express ideas of the author. Even where the courts have disagreed with the Commission in its treatment of statements made in publications as advertising promotions and hence subject to the Commission's jurisdiction, they have been careful to underscore the right of the Commission to proceed against advertising, whether of a book or of some other product.¹⁹

These cases are important insofar as they demonstrate the Courts' clear recognition that the constitutional protection afforded free speech does not in the ordinary situation extend to advertising as that term is customarily used and indeed, that if the advertising is cast in the format of a book this will not serve to cloak it with the constitutional protection. The only issue, therefore, in determining whether advertising is properly within the jurisdiction of the Act is to determine whether the material challenged is or is not advertising.

Respondent argues, however, that the protection of the First Amendment must be regarded as embracing not only the publication containing the constitutionally protected speech but also all advertisements of the publications, because any limitation of respondents' right to advertise operates as a limitation of their constitutionally protected right to disseminate their writings. We do not agree.

We of course recognize the important role which advertising plays in the distribution and sale of the product being advertised. This is no less the case with publications than it is with other

¹⁸ *United States v. Urbuteit*, 335 U.S. 355 (1948) (libel action against a therapeutic device and a descriptive booklet "The Road to Health" sustained under the Food and Drug Act without discussion of First Amendment); *United States v. Twenty-four Bottles of Vinegar*, 338 F. 2d 157, 160 (2nd Cir. 1964) (dismissal of proceeding against Dr. D. C. Jarvis' "Folk Medicine, A Vermont Doctor's Guide to Good Health" and "Arthritis and Folk Medicine" because of failure to show the connection between the books and the vinegar and honey which the books advocated as a panacea to all health problems); *United States v. Eight Cartons, etc.*, 103 F. Supp. 626 (W.D.N.Y. 1951) (a seizure of Gayelord Hauser's book "Look Younger, Live Longer" and certain cases of molasses offered for various therapeutic purposes upheld without discussion of First Amendment); *Cf. same case*, 97 F. Supp. 313 (W.D. N.Y. 1951) (action dismissed for failure to show connection between the seized book and the product offered for sale).

¹⁹ In *Koch v. Federal Trade Commission*, 206 F. 2d 311, 317 (6th Cir. 1953) and *Scientific Manufacturing Co. v. Federal Trade Commission*, 124 F. 2d 640, 644-45 (3rd Cir. 1941), the Courts found that certain materials (books and pamphlets) challenged in the complaint were not used by respondents as "advertising" and were therefore not within the reach of the Commission. The Courts made it clear that if these materials had been used by respondents as "advertising" they would be within Commission jurisdiction.

products. As Justices Black and Douglas observed in their dissent in *Breard v. Alexandria*, *supra*,

The constitutional sanctuary for the press must necessarily include *liberty to publish and circulate*. In view of our economic system, it must also include *freedom to solicit paying subscribers* (341 U.S. 650, emphasis added).

There is little doubt that the ability to advertise is as important to the exercise of the right of free speech as it is to the correlative right of freedom of the press. But this does not compel the conclusion that no regulation of advertising of publications can take place without infringing the constitutional protection. It is obvious that no abridgment of respondents' right of free speech could possibly follow from the mere fact of filing a complaint challenging the advertisement of a publication or from the entry of an order prohibiting deceptive representations. A requirement that the advertiser make truthful claims about the book or pamphlet being advertised has consistently been held not to impose a restraint on the advertising itself and hence could hardly be said to restrain the distribution or circulation of the publications.²⁰ As the Supreme Court has stated, "It is not difficult to choose statements, designs and devices which will not deceive." *United States v. Ninety-Five Barrels of Vinegar*, 265 U.S. 438, 443 (1924). Thus we are in no way concerned here with the possibility that regulating the advertising could operate in any way as an impediment to the circulation and distribution of the publications themselves. An obligation to advertise truthfully bears no resemblance to a tax on the exercise of free speech.²¹ Neither does it operate to discourage an author from writing a book or pamphlet in the first place,²² nor force a retailer or publisher to handle the publications only at the risk of some unknown prosecution or other penalty.²³

It is clear that nothing in the Constitution or in the decisions interpreting its protection suggests that an advertisement of a book or other publication is to be regarded *per se* an extension of the writing and hence as within the protection of the First Amendment. On the contrary, the law is clear that the public policy reflected in the Federal Trade Commission Act in favor of ensuring the truthfulness of all advertisements is just as applicable to books as to any other product which may be the subject of an advertisement.

²⁰ *Regina Corp. v. Federal Trade Commission*, *supra*; *Murray Space Shoe Corp. v. Federal Trade Commission*, *supra*; *E. F. Drew and Co. v. Federal Trade Commission*, *supra*; *American Medicinal Products, Inc. v. Federal Trade Commission*, *supra*.

²¹ *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936).

²² *Near v. Minnesota*, 283 U.S. 697, 711-12, 717 (1931).

²³ *Smith v. California*, 361 U.S. 147, 153 (1959).

We bow to no one in our concern and responsibility to protect the public from any invasion of its Constitutional rights, particularly those associated with the rights of freedom of speech and expression. In today's increasingly computerized society with the ever-increasing involvement of Government in the lives of its citizens, we would be derelict in our duties as public officials and citizens if we were not especially zealous to protect the individual from any encroachment by Government on his fundamental freedoms. But we are also equally mindful of the importance of protecting the individual citizen from any misleading and deceptive representations contained in the barrage of advertising to which he is daily subject in the promotion of the myriad of products offered for sale in the market-place.

We conclude that the promotion of books as an item of commerce is no less subject to our statutory prohibitions on false and misleading advertisement and the citizen is no less entitled to protection against falsehood in this area of marketing than in any other. Accordingly, we hold that the Federal Trade Commission Act applies with full force to the advertising of publications and that the prohibition of false and misleading statements in the advertising of publications in no way operates as an impairment of the constitutionally protected rights of freedom of speech and of expression.

III

THE COMPLAINT AGAINST RESPONDENTS' ADVERTISING

A. CONSTITUTIONALITY OF THE COMPLAINT

The threshold questions which must be determined before the specific issues of the complaint are considered are (1) whether respondents' advertising claims challenged in this complaint are in fact advertising or whether they should be regarded as speech, and (2) whether the complaint is in fact challenging the truth or falsity of ideas expressed in the publications rather than in the advertising.

In our judgment respondents' advertising is clearly sales material designed to sell respondents' publications not the ideas or views of their author. This advertising was not designed as a vehicle for the expression by respondent Jerome I. Rodale of any of his personal views or opinions on health or on any other subject. It is not cast in the form of disclosing any of respondents' discoveries, theories or suggestions respecting health problems for their own sake. On the contrary, the entire format and advertising

message is focused on urging the public to purchase respondents' book and pamphlet in order to find out for themselves the author's answers to the health problems which the advertising tells the reader are discussed in these publications.²⁴ Thus in no sense are we confronted here with the type of "editorial advertisement" placed in a newspaper as a means of disseminating the substantive views of the advertiser which was held to be speech and hence constitutionally protected in *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964). Accordingly, we conclude that respondents' advertising challenged in this complaint constitutes advertising and not speech and is subject to the jurisdiction of the Federal Trade Commission Act.

Respondents claim that the instant proceeding is unconstitutional because in reality the complaint is directed to a determination of the truth or falsity of the contents of respondents' publications, *The Health Finder* and *How To Eat For A Healthy Heart and This Pace Is Not Killing Us*. We do not agree. An examination of the complaint makes it clear that it is not challenging the truth or falsity of any statements made in either of the advertised publications. On the contrary, the deceptions charged are exclusively based on specific representations contained in respondents' advertising. It is these representations which are challenged in the complaint and it is in this context that the Commission's right to examine into their truth or falsity must be determined. We conclude, therefore, that the Commission is constitutionally entitled to determine the truth or falsity of the respondents' advertising of their publications, *The Health Finder* and *How To Eat For A Healthy Heart and This Pace Is Not Killing Us*, and that if found to be deceptive, these respondents can properly be subjected to an order prohibiting them from making such false representations in the future.

B. ACCURACY OF RESPONDENTS' ADVERTISING

The complaint charges that respondents falsely advertised that readers of *The Health Finder* would add years to their lives, gain more energy, effectuate savings on medical and dental expenditures, feel better than ever, gain and maintain health, find the answers to all health problems, prevent the common cold, ulcers, fatigue, goiter and high blood pressure, prevent and cure all types of constipation, and prevent, treat, and relieve cancer, tubercu-

²⁴ FF 6-8, 10, 12-16, 25-26, 30-34, 38-40, 45-46, 50-52, 58-60, 64-66, 71-76, 80-81, 85-87, 92-95, 99-102, 106-109, 113-114.

losis, infantile paralysis, all types of heart disease, arthritis and mental illness and that readers of *How To Eat For A Healthy Heart and This Pace Is Not Killing Us* would be able to prevent, treat and relieve all types of heart disease.

Respondents deny that their advertising in fact makes any claims of therapeutic benefit as alleged in the complaint and that such claims as are made are not in fact absolute promises of benefits as alleged but merely representations of possible benefits. Finally, respondents argue that whatever claims are made in the advertising simply reiterate what is contained in the publications and are truthful in every respect (Resps. App. Br., p. 9; Resps. Answering Brief, pp. 1-3).

In order to evaluate the charges that respondents' advertising is false and misleading, it is essential that the challenged claims be looked at in the context of respondents' entire advertising message.²⁵

It is well established that the test to be used in interpreting advertising is the net impression that it is likely to make on the general populace. *National Bakers Services, Inc. v. Federal Trade Commission*, 329 F. 2d 365, 367 (7th Cir. 1964); *U.S. Retail Credit Assn. v. Federal Trade Commission*, 300 F. 2d 212, 219 (4th Cir. 1962); *Ward Laboratories, Inc. v. Federal Trade Commission*, 276 F. 2d 952, 954 (2nd Cir. 1960), *cert. denied*, 364 U.S. 827 (1960). It is immaterial that a given phrase considered technically may be construed so as not to constitute a misrepresentation or that a deception is accomplished by innuendo rather than by affirmative misstatement. *Country Tweeds, Inc. v. Federal Trade Commission*, 326 F. 2d 144, 147-48 (2nd Cir. 1964); *Regina Corp. v. Federal Trade Commission*, 322 F. 2d 765, 768 (3rd Cir. 1963); *Kalwajtys v. Federal Trade Commission*, 237 F. 2d 654, 656 (7th Cir. 1956), *cert. denied*, 352 U.S. 1025 (1957). Where an advertisement is subject to two interpretations, one of which is false, the Commission is not bound to assume that the truthful interpretation is the only one which will be left impressed on the mind of every reader. *Continental Wax Corp. v. Federal Trade Commission*, 330 F. 2d 475, 477 (2nd Cir. 1964); *Rhodes Pharmacal Co. v. Federal Trade Commission*, 208 F. 2d 382, 387 (7th Cir. 1953), *rev'd in part*, 348 U.S. 940 (1955). In sum, the Commission's mandate from the courts is to protect the "ignorant, the unthinking, and the credulous." *Charles of the Ritz Dist. Co. v. Federal Trade Commis-*

²⁵ We will not repeat in this opinion the individual analysis of each of the complaint allegations which we have made in our findings. See FF 12 through 117 for our findings and conclusion on each of the paragraphs Five through Eleven of the complaint.

sion, 143 F. 2d 676, 679 (2nd Cir. 1944) ; *Exposition Press, Inc. v. Federal Trade Commission*, 295 F. 2d 869, 872 (2nd Cir. 1961).

Looking at respondents' advertising as a whole, we find that the basic message being conveyed in respondents' advertising is that respondents' book is essentially a sort of "how-to-prevent-illness" book and that readers of the book will in fact be able to prevent most of the diseases and disorders which affect the good health of human beings. Thus, respondents' advertising features their book as a "new kind of health book," and the author, J. I. Rodale, as the repository of a great store of medical knowledge which "can help the average person remain comparatively free of many terrible diseases."²⁶ The book was featured in respondents' original advertising as "this amazing book" containing vital new "health ideas." In bold face type across the top of the second and third pages of the brochure was respondents' question: "Which of the Health ideas in this amazing book will 'add years to your life,' 'give you more energy,' 'reduce medical and dental bills,' 'make you feel better and help your family achieve health.'"²⁷ The very language of this advertising makes the representation of an affirmative promise of therapeutic benefits. It is directed to demonstrate how Rodale's discoveries *will be of value to the reader*. The advertising asks, "Wouldn't *you* like to enjoy one or more of these rewards of good health?" (CX 8A, emphasis added). In other parts of the advertising, it is stated, "*he knows how to pass his [Rodale's] knowledge along to others.*" "*The Health Finder gives you peace of mind by showing you how perfectly natural it is for you to enjoy that most precious of all possessions—GOOD HEALTH.*"

While it is true that in a few sentences respondents' advertising text uses such words as "may" or "might" in describing some of the benefits to be derived from the publication, we nevertheless are of the view and so hold that the purport of the entire message is to make specific claims and promises that reading the book will in fact enable the reader to prevent cancer, constipation, goiter and the other diseases and disorders featured in the advertising. Thus respondents' advertising states that the book "teaches you to stay healthy," that the radiant health of thousands of readers demonstrates that the author "knows how to pass his knowledge along to others," that the author discovered it was possible "to learn how to be healthy" and, in the case of the pamphlet advertisement that the author himself has had a heart condition for 16

²⁶ FF 7-8.

²⁷ FF 7-8.

years and "has enjoyed buoyant health for 16 years by following the same advice he gives you in *How To Eat For a Healthy Heart*." ²⁸ This interpretation of respondents' advertising is further supported by respondents' "absolute money-back guarantee" which is offered to readers who "are not convinced that [the book] will be worth many times its cost."

Similarly, the emphasis in the advertising is clearly not designed to portray the publications as compilations of experiments, articles and studies on various common illnesses.²⁹ On the contrary, respondents have through an artful combination of a so-called check list of health problems together with liberal quotations of extracts from readers' testimonials, clearly and affirmatively represented to the reader that both publications contain regimens for the illnesses discussed. The emphasis, and we hold the clear meaning of the advertising is to portray the book and pamphlet as containing a series of efficacious regimens which will guarantee a variety of health benefits to the reader.³⁰ Thus the reader is led to believe that the information gathered by the author offers the means to prevent the enumerated diseases³¹ and in certain instances also to obtain treatment or relief.³²

Moreover, we also conclude that, contrary to respondents' contentions, the benefits promised here are made in unqualified terms so that readers of respondents' advertising would believe that if they suffer from any form of the "disorder in question," the relief promised will apply to them.³³ As we pointed out in our recent opinion in *American Home Products Corp.*, Dkt. 8641, December 16, 1966 [70 F.T.C. 1524, 1605], where advertisers choose to make their claims in unequivocal terms, particularly claims relating to health remedies, we shall interpret them in their literal form and will not assume that members of the public will read any limiting qualifications into them. If a limited claim is in fact intended then the claims must be exactly delineated by express qualifying language. We will not imply such qualifying language in our interpretation of such claims, nor indeed do we think the ordinary casual reader would do so.

In sharp contrast to the flamboyant claims in respondents' advertising of the therapeutic benefits which readers will gain from

²⁸ F. 10.

²⁹ FF 8, 10.

³⁰ FF 12-16, 25-26.

³¹ FF 30-34, 45-46, 50-52, 58-60, 64-66, 71-76, 85-87, 106-109.

³² FF 38-40, 80-81, 92-95, 99-102, 113-114.

³³ FF 25, 39, 52, 94-95, 114.

reading the book and pamphlet,³⁴ the publications themselves make no such claims. Respondents' book and pamphlet are carefully written to disclose the limitations of the regimens discussed, as well as their asserted strengths and potentialities. In most instances, the regimens described in these publications are documented as to their source, the known experience, if any, with respect to their efficacy and various other relevant factors which are pertinent to the evaluation of the regimens by the readers.³⁵

The style of respondents' book is generally not to reach absolute conclusions on either the cause or possible preventive, cure or treatment of a medical ailment.³⁶ To the contrary, the language of the book is couched in terms of describing the possible relationship between a particular disease and an item in the diet as demonstrated by the reported experiment or study.³⁷ The recommendation that a food should be avoided or consumed is with the idea that there *may* be a relationship between that food and the medical problem.³⁸ In other instances, the book concludes that a particular experiment has demonstrated a definite relationship between one type or aspect of a disease or ailment and food, and diet manipulation is recommended for *possible* value in that restricted sense.³⁹

In no way does *The Health Finder* purport to be an all inclusive panacea or a replacement for professional medical attention. The author-editor is very candid in discussing the various ailments, observing in certain instances that the cause or cure is unknown and in others that substantial additional research is needed before any reliable conclusion can be drawn. The recommended diet manipulation or other effort is with the view that absent any other known preventive, treatment or cure, it is preferable to total indifference.⁴⁰

Again in respondents' pamphlet, the author makes it clear that the information which is provided is not all inclusive or absolute. Instead the author sets forth general ideas and suggestions which his personal experience and studies have indicated will be beneficial if followed. The pamphlet is very clear in its discussion that certain types of heart ailments, with which it is

³⁴ FF 12-16, 25-26, 30-34, 38-40, 45-46, 50-52, 58-60, 64-66, 71-76, 80-81, 85-87, 92-95, 99-102, 106-109, 113-114.

³⁵ FF 18, 27, 35, 41, 47, 54, 61, 67, 77, 82, 88, 96, 103, 110, 115.

³⁶ F. 9 and generally, findings cited in n. 35, *supra*.

³⁷ *E.g.*, FF 47, 54, 67, 82, 103, 110.

³⁸ *E.g.*, FF 41, 47, 61, 96.

³⁹ *E.g.*, FF 47, 54, 67, 77, 89.

⁴⁰ *E.g.*, FF 18, 27, 35, 54, 77, 89.

exclusively concerned, require professional care and that the suggestions contained in the pamphlet should not be followed in all cases without prior approval of a physician.⁴¹

It states the obvious to observe that the function of advertising is to promote and persuade. A certain amount of puffery and hyperbole is not unknown either to the writer of the advertisements or to their readers. Nevertheless, the same degree of hyperbole and puffery in the promotions of every day consumer products may become deceptive and misleading when used in the advertisement of alleged treatments and preventive measures for illness and disease. In this respect it is quite irrelevant whether the treatment being advertised is in the form of a pill encased in a box or in the form of a particular regimen described in a book or other writing. Literalness and exactitude—and perhaps understatement—must be the earmarks of promotions connected with health remedies. Advertisers must be scrupulously careful not only as respects the literal truthfulness of the message but as respects all of the implications, inuendos and suggestions which are conveyed in the advertising message.

As we detailed in our findings and conclusions, the record in this case demonstrates that neither of respondents' publications which are the subject of the challenged advertisements, makes any of the exaggerated claims contained in respondents' advertising respecting the efficacy of the various regimens discussed either as a cure, preventive, or method of treatment of the diseases and disorders covered. While we might reach a different conclusion as to the claims challenged here if each of them had stood alone, it is unrealistic to assume that readers of respondents' advertising would read them in such splendid isolation. Rather each claim must be read as it appears, as part of the overall context of respondents' advertising message. As so read, we have concluded that respondents falsely advertised that readers of *The Health Finder* would add years to their lives, gain more energy, effectuate savings on medical and dental expenditures, feel better than ever, gain and maintain health, find the answers to all health problems, prevent the common cold, ulcers, fatigue, goiter, high blood pressure, cancer, infantile paralysis, and mental illness, prevent and cure all types of constipation, and prevent, treat and relieve tuberculosis, heart disease, and arthritis, and that readers of *How To Eat For A Healthy Heart and This Pace Is Not*

⁴¹ FF 11, 115.

Killing Us would be able to prevent, treat and relieve all types of heart disease.

We have concluded that the allegations in the complaint charging that respondents falsely advertised that readers of *The Health Finder* would be able to treat and relieve cancer, infantile paralysis and mental illness have not been proven and these charges are dismissed.

IV

RESPONDENTS' CONTENTIONS AS TO PREJUDICE FLOWING FROM COMPLAINT AND ABSENCE OF PUBLIC INTEREST

Respondents have urged several reasons, beyond their constitutional arguments and defenses on the merits, as to why this complaint should be dismissed. We shall consider these contentions seriatim.

Respondents argue that the inclusion of the charges in Paragraphs Seven (3) and Ten of the complaint, that reliance on respondents' advertising may cause irreparable injury to the public by delaying their recourse to professional advice, was solely for the purpose of damaging respondents' reputation and that it represents an attempt by the American Medical Association to use the Commission to discourage self-medication.⁴²

While complaint counsel undertook to offer proof in support of this allegation,⁴³ its exact function in the complaint is not clear since the order attached to the complaint does not contain any provisions with respect to this allegation, nor has complaint counsel sought such provision on this appeal.

We do not understand the materiality of this allegation in view of the failure of the complaint to seek any relief against it in the order. We do not believe that its presence in the complaint has damaged respondents' reputation nor do we give any countenance, nor see any relevancy to respondents' argument that it was designed to discourage self-medication. We note in passing that despite its contention now that this allegation was prejudicial, respondents' counsel did not move to strike it as surplusage and indeed offered evidence to rebut the evidence offered in

⁴² Subparagraph (3) of Paragraph Seven charges:

"Reliance on the advertising statements and representations resulting in purchase of the aforesaid book and the attendant delay in receiving adequate treatment promptly may result in relentless progression of these serious diseases, irreparable injury to health, crippling and loss of life."

Paragraph Ten included a similar allegation with regard to the pamphlet.

⁴³ Tr. 143, 170, 210, 218, 308-10, 375, 446.

support by complaint counsel.⁴⁴ Nevertheless, in view of complaint counsel's failure to seek a provision in the order with respect thereto, on our own motion we shall dismiss this provision of the complaint as abandoned and surplusage. Accordingly, we do not find it necessary to make any determination as to the validity of the examiner's conclusion with respect thereto.⁴⁵

Respondents also contend that this complaint should be dismissed as lacking in public interest because the challenged advertising has been discontinued and the publications to which it relates are out of print and are no longer actively being promoted. Respondents raised this point before the Commission in their Pretrial Motion To Dismiss the Complaint, filed November 9, 1964. The motion was denied. Respondents urged the same argument in substance before hearing examiner who rejected it (H. Ex. Concl. 7, I.D., p. 1220). Respondents are again raising substantially the same issue on appeal (Resps. Brief on Appeal, p. 26).

The facts with regard to respondents' advertising are not controverted. The promotional activities under challenge here continued from 1956 through 1963 (FF 6-8, 10). Thus, what is involved here is not a single advertisement used a single time or on limited occasions, but a seven-year course of action involving use of substantially identical advertising representations.⁴⁶

Respondents contend that active promotion of *The Health Finder* was discontinued in 1963 because the book was out of date (Tr. 82, 572). However, the record establishes that subsequent thereto although active promotion had allegedly ceased, respondents continued to offer copies of the book for sale, listed the book in their "List of Available Books," and referred thereto in its current issues of their *Prevention* magazine. Moreover, the book was available for sale at certain retail book stores at the time of the hearing during 1964 (F. 6). The pamphlet advertising was purportedly discontinued in 1960; however, the pamphlet itself continued to be offered for sale and was also included in the list of publications offered for sale by respondents (F. 10).

It is inconceivable to us that respondents would consign to the junk heap a 944-page purported encyclopedia dealing with health problems. It is more likely that respondents intend to bring it

⁴⁴ Tr. 665-67, 753-90.

⁴⁵ The hearing examiner found that the allegation was proven (H. Ex. Concl. 1, I.D. p. 1217).

⁴⁶ In certain instances references to specific diseases were deleted from the revised advertising brochure or the descriptions condensed (FF 46, 82). Since the overall format of the advertising was continued, we do not consider these minor changes as significant on the question of whether respondents discontinued their advertising practices.

out in the future in some new edition. Thus the advertising of these publications in our judgment could not in any sense be said to be moot.

While respondents argue that no order should issue because the challenged advertising has been discontinued, they nevertheless continue to insist on their position that their advertising does not violate the law and indeed that they have a constitutional right to continue this precise advertising. Thus respondents are not in the position of being repentant advertisers arguing that an order is unnecessary because whatever the facts are with respect to the falsity of their advertising, it has been abandoned and will not be repeated in the future. To the contrary, respondents throughout the proceeding and before the Commission in addition to the constitutional challenge have argued that their advertising for the two publications is accurate and honest in every respect (Resps. Motion to Dismiss filed November 10, 1964, pp. 9-11).

Voluntary discontinuance of unfair trade practices is not necessarily a bar to issuance of a cease and desist order. *Coro, Inc. v. Federal Trade Commission*, 338 F. 2d 149, 153 (1st Cir. 1964), cert. denied, 380 U.S. 954 (1965); *Carter Products, Inc. v. Federal Trade Commission*, 323 F. 2d 523, 531 (5th Cir. 1963); *Clinton Watch Co. v. Federal Trade Commission*, 291 F. 2d 838, 841 (7th Cir. 1961), cert. denied, 368 U.S. 952 (1962). The test of whether an order to cease and desist is necessary is whether there is an adequate assurance to guarantee against resumption of the practices. In the instant matter, respondents' assurance is limited to the statement that they have no plans to promote or advertise *The Health Finder* or the pamphlet in the future (Tr. 572-74). However, respondents continue to insist that their advertising was not false and in any event is not subject to the jurisdiction of the Commission. In the face of these arguments, it is obviously impossible to assume that mere abandonment because the advertised product was out of date is a guarantee that if the publications were updated the precise advertising would not be resumed. Moreover, the record discloses that respondents' principal business is the publication, advertising and offering for sale of a variety of books including many quite similar to those in issue in this proceeding. No assurance has been rendered that these publications have been or will be advertised honestly and accurately.

Accordingly, it is our conclusion that it is necessary to issue an order to cease and desist to insure that respondents' practice

of falsely advertising the contents of their publications which is the practice found illegal herein, is not resumed in the future.

V

SCOPE OF THE ORDER

The order proposed by the hearing examiner in this case was stated in its preamble to apply to the advertising of respondents' *The Health Finder*, *How To Eat For A Healthy Heart—This Pace Is Not Killing Us*, as well as to "any other book or books of the same or approximately the same content, materials and principles, whether sold under the same name or names or any other name or names." However, the examiner's order applied the prohibitions on specific representations solely to the advertising of the two named publications. Accordingly, notwithstanding the broad language in the preamble, the order would not apparently in fact restrict the advertising of "other books."

On appeal, counsel supporting the complaint seeks to expand the substantive provisions of the order and also to make them expressly applicable both to the two named publications and also to other books of the same content, materials and principles (Complaint Counsel's Appeal Brief, p. 27).

Respondents, on the other hand, are opposed to any order being entered here because, they contend, the order as proposed by the hearing examiner is meaningless and, if expanded as urged by complaint counsel, would be unworkable and probably unconstitutional. Respondents argue that the order as proposed by the hearing examiner, confined as it is to advertising of respondents' two publications, involves what respondents characterize as "pica-yune and nit-picking prohibitions" which "would have little effect on respondents' advertising." Respondents argue that if the order is expanded as proposed by complaint counsel, it would be impossible to enforce because of the ambiguity of the standard of application of the prohibition to other books of the same "content, material and principle." Moreover, it would also be defective because it would prevent respondents from including references in their advertising "to the valuable information contained in respondents' publications" and thus will injure the public "by hindering the dissemination of valuable information." Thus respondents are apparently contending that an order limited in its application to the two named publications which were the subject of the challenged advertising would be fruitless and any order applicable to respondents' future advertising of any health books would inevitably constitute a suppression of the dis-

semination of valuable information. We do not believe that the Commission is confronted with such an apparently insoluble dilemma.

We have no doubts respecting the power and indeed the duty of the Commission to fashion orders which in its judgment will ensure against any future repetition by the respondents of violation of the law.⁴⁷ At the same time we are mindful of the special problems which must be considered in this case in view of the first amendment protection to which the product which is the subject of the advertising is entitled.

In the instant case, respondents have been found to have violated Section 5 because of false and misleading statements in their advertising of their publications. We are convinced that an order is necessary in this case but that it will sufficiently protect the public interest to confine the prohibitions of the order to the advertising of these two specific publications and to any subsequent editions or revised editions of them which respondents may distribute or offer for sale in the future.

Although we have no doubts as to our power and ability to fashion a broader order in this case, we do not believe that it is necessary to do so here. We are confident that our decision in the instant case has removed any possible doubts which respondents may have entertained as to the applicability of the Federal Trade Commission Act to their advertising of these two publications. We are equally confident that respondents are now fully aware that their advertising of any publications must meet the highest standards of literalness and accuracy both as to the contents of the publications being advertised and as to the various efficacy claims made in the advertising for the book. Accordingly, we conclude that an order to cease and desist is necessary and appropriate in this matter and that under the circumstances of this case it will sufficiently protect the public interest if it is confined to respondents' advertising in the future of these two publications.

CONCLUSION

To the extent indicated herein, the appeal of complaint counsel

⁴⁷ *Federal Trade Commission v. National Lead Co.*, 352 U. S. 419, 429 (1957); *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470, 473 (1952); *Coro Inc. v. Federal Trade Commission*, 338 F. 2d 149, 153 (1st Cir. 1964) *cert. denied* 380 U.S. 954 (1965); *Carter Products, Inc. v. Federal Trade Commission*, 323 F. 2d 528, 533 (5th Cir. 1963); *Niresk Industries, Inc. v. Federal Trade Commission*, 278 F. 2d 337, 343 (7th Cir. 1960), *cert. denied* 364 U.S. 883 (1960); *P. Lorillard Co. v. Federal Trade Commission*, 267 F. 2d 439, 445 (3rd Cir. 1959) *cert. denied* 361 U.S. 923 (1959).

is granted and the appeal of respondents is denied. The initial decision of the hearing examiner is vacated. We are entering our own Findings of Fact, Conclusions and Order which shall constitute the Findings of Fact, Conclusions and Order of the Commission.

Commissioner Elman dissented and has filed a dissenting opinion.

Commissioner MacIntyre concurred in the result only and has filed a separate statement.

DISSENTING OPINION

JUNE 20, 1967

BY ELMAN, *Commissioner*:

In its discussion of the First Amendment, the majority opinion demolishes a straw man. No one has suggested that the First Amendment confers a license to tell lies in advertisements for books. The Commission unquestionably may proceed against an advertisement which misrepresents a book's content or otherwise makes a material misstatement of fact concerning the book or the author. For example, if the advertisement for a health book states that it deals with obesity, when in fact it does not; or if the advertisement asserts that the author is an M.D., when in fact he is not; or if the advertisement represents that the book is endorsed by the American Medical Association, when in fact it is not; or if the advertisement asserts that the book has 944 pages, when in fact it has far less—all such misrepresentations of fact about the book or the author would clearly come within the Commission's jurisdiction and raise no serious constitutional or public policy questions.

Such questions do arise, however, when—as was done by the Commission's complaint in this case—an advertisement is attacked on the ground, not that it misrepresents the content of the book or the qualifications of the author, but rather that it repeats "ideas and suggestions" contained in the book which are "false and misleading." To me it is axiomatic that (1) the constitutional right to write, publish, and disseminate a book includes the right to advertise it to the public; and (2) the right to express ideas and opinions—whether they be orthodox or heretical, "true" or "false"—in a book also includes the right to reiterate these views in the advertisements for the book.

This fundamental premise was rejected by the Commission, however, in 1960 in a case which did not receive judicial review. *Witkower Press, Inc.*, 57 F.T.C. 145. The Commission there held

that "the freedom of expression protected by the [First] Amendment" does not extend to "false promises of therapeutic benefits in the advertising for a book when such advertising statements derive from or reflect like views or information contained in the publication itself. * * * The argument that the Federal Trade Commission Act confers no valid power to regulate false representations in advertising when integral to theories or views expressed in particular publications being advertised and sold misconceives the objectives and essential nature of the Act." (Pp. 218, 220.)

The reasoning of the Commission in *Witkower* may be summarized as follows:

(1) The Federal Trade Commission Act prohibits deceptive advertising of all products, including books.

(2) Even though an advertisement is truthful in describing a book's content, and merely repeats "promises of therapeutic benefits" contained in the book, such advertising is deceptive if these "promises" are "false."

(3) Since only the advertising and not the book is challenged, the proceeding does not involve "censorship" of the book.

It will be observed that, under *Witkower*, it is essential to the logic of the Commission's position that the "false promises of therapeutic benefits" in the book be repeated in the advertising. This is the bridge that enables the Commission, while insisting that it is attacking only the advertising and not the book, to prove its case by demonstrating the "falsity" of the "promises" contained in the book. Thus, for purposes of drafting and substantiating a complaint based on the *Witkower* theory, it is necessary to allege and prove that the advertisements reiterate, and "derive from or reflect," the views or theories expressed in the book. The linchpin of *Witkower* is the substantial identity of the claims contained in the book and those made in the advertising for it.

It seems obvious to me that the *Witkower* theory is merely a play on words. To be sure, only the advertising is challenged, not the book. But, under a *Witkower*-type complaint, the advertising is attacked only because the ideas and opinions in the book are alleged to be "false." If an advertisement for a book is found to be deceptive, not because it misleads the public as to the book's content, but only because it repeats "ideas and suggestions" in the book which the Commission has examined and found to be "false and misleading," I do not see how the First Amendment question is avoided. Although purporting to be directed only at the advertising, the proceeding necessarily involves an inquiry

into the truth or falsity of the book. In substance if not in form, such an inquest constitutes indirect "censorship" of the ideas and opinions expressed in the book. It abridges the freedom to express views or theories, no matter how unorthodox, whether they be communicated in a book, an advertisement, or any other form of publication. Cf. *New York Times Co. v. Sullivan*, 376 U.S. 254, 265-66 (1964); *Scientific Mfg. Co. v. Federal Trade Commission*, 124 F. 2d 640, 642-44 (3d Cir. 1941); *Koch v. Federal Trade Commission*, 206 F. 2d 311, 317 (6th Cir. 1953).

The American public is constantly besieged by advertisements for books offering panaceas and "the truth" on every conceivable subject. Do you want to make millions playing the stock market? Lose weight? Stay young and beautiful forever? Avoid probate? For every hope, dream and fear, a book has been written showing the way to salvation. Undoubtedly, many are pure rubbish. But one thing is clear, to me at least: It is not the function of the Federal Trade Commission or any other agency of government to sit as a board of review examining into the validity or worth of ideas, opinions, beliefs, and theories expressed in books and other publications offered for sale to the public. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion * * *." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

It is the glory of a free society that a man can write a book contending that the earth is flat, or that the moon is made of green cheese, or that God is dead, without having to "substantiate" or "prove" his claims to the satisfaction of some public official or agency. Such an inquisition, abridging the free expression of ideas, is intolerable. It is no less so because the inquisition is justified as an attempt to forbid deceptive advertising.

Whatever an author's opinions and beliefs, and regardless of their "truth" or "falsity," he has the right to express them not only in his book but in the advertising for it. Indeed, it serves the interest of truth-in-advertising if readers are informed, in advance of buying the book, what they will be getting for their money. It is better that they know what the book is about, and what "ideas and suggestions" it contains, before they buy the book rather than after. So long as an advertisement is truthful in describing a book's content, and merely repeats "ideas and suggestions" contained in the book, its author or publisher should not be compelled to run the gauntlet of an administrative proceed-

ing challenging the advertisement on the ground that these "ideas and suggestions" are "false and misleading." Freedom to publish and advertise a book for sale to the public is not reserved exclusively to those expressing "ideas and suggestions" which some bureaucrat examines and stamps as "correct."

As I stated at an earlier stage in this case, "Congress did not create this Commission to act as a censor of unorthodox ideas and theories in books, whether they deal with politics or health. We should not forget that, in both fields, today's heresy may become tomorrow's dogma." When Congress enacted the Federal Trade Commission Act of 1914, it surely did not contemplate that the members of the Commission and its staff would comb through books, searching for "false" doctrines and beliefs. At the very least, it would require an express grant of legislative authority to justify a federal agency in assuming so far out a jurisdiction. This is an area which government officials should seek to enter only if they have the most explicit legislative mandate. This Commission has not been given anything of the sort.

It is argued, however, that an exception should be made for health books containing "false" and "dangerous" ideas. First Amendment rights, it is said, should not be pushed to the point where they endanger the public's health. We should remember, however, that in regard to health, the "false and dangerous ideas" of yesterday are standard medical practice today, and vice versa. One recalls the derision with which the experts and authorities of their day greeted the unorthodox theories of Pasteur and Semmelweis. It was not too long ago that patients were bled for conditions which today are treated with blood transfusions. If the suggestion had been made, in the not too distant past, that a cardiac patient should take up bicycle riding, the medical experts would have regarded it as homicidal. Or if it had been suggested that a patient should get out of bed the same day he has undergone major surgery. How can we know which medical "ideas and suggestions" that are universally accepted today will not be discarded tomorrow. It is arrogance to presume that in any field of knowledge, whether dealing with health or otherwise, all the answers are now in. How can we be sure that the "nut" of today will not be hailed as a genius tomorrow? And vice versa?

If an advertisement does not misrepresent what a book is about, this Commission should not challenge it on the ground that it repeats ideas and suggestions contained in the book which are "false" and "misleading." Yet that is exactly what the Commis-

sion did when it issued the complaint in this case on April 3, 1964.

The complaint followed the precise model of *Witkower*. The charging paragraph reads as follows:

PARAGRAPH SEVEN: In truth and in fact:

1. The ideas and suggestions contained in "The Health Finder" will not assure readers:

- (a) An increased life span.
- (b) More energy.
- (c) Savings on medical and dental expenditures.
- (d) That they will feel better than ever before.
- (e) That they will gain and maintain health.

2. "The Health Finder" does not contain the answer to all health problems and will not enable the reader to:

- (a) Free himself of common colds.
- (b) Prevent or cure all types of constipation.
- (c) Prevent ulcers.
- (d) Prevent fatigue.
- (e) Prevent goiter.
- (f) Prevent high blood pressure.

3. The ideas and suggestions contained in "The Health Finder" are not effective in the prevention, relief or treatment of cancer, tuberculosis, infantile paralysis, heart disease, arthritis, or mental illness. Moreover, reliance on the advertising statements and representations resulting in purchase of the aforesaid book and the attendant delay in receiving adequate treatment promptly, may result in relentless progression of these serious diseases, irreparable injury to health, crippling, and loss of life.

Therefore, the statements and representations as set forth and referred to in Paragraphs Five and Six were and are false, misleading and deceptive.

It will be noted that, as in *Witkower*, the complaint is directed only at the "statements and representations" in the advertising, not those in the book. But they are alleged to be "false, misleading and deceptive" because "in truth and in fact" the "ideas and suggestions" contained in respondents' book, *The Health Finder*, are "not effective." As in *Witkower*, the theory of the complaint was that "the freedom of expression protected by the [First] Amendment" does not extend to "false promises of therapeutic benefits in the advertising for a book when such advertising statements derive from or reflect like views or information contained in the publication itself." (57 F.T.C. at 218.)

Following the *Witkower* model, the hearing of this case was an open and unabashed inquest into the validity or "efficacy" of the "ideas and suggestions" contained in respondents' book. A parade of respected medical witnesses was presented on both sides. The book was examined, page by page and sentence by sentence. The question to which the witnesses addressed themselves was wheth-

er readers of the book would, by following the ideas and suggestions contained in it, receive the promised therapeutic benefits. The examiner, relying on *Witkower* (I.D. 1219), held that no censorship of the book was involved because the "false and misleading" ideas and suggestions in the book were repeated in respondents' advertisements. In short, the hearing examiner sought to get around the First Amendment problems by emphasizing the substantial identity of the claims in respondents' advertisements and those in the book.

On this appeal to the Commission from the hearing examiner's initial decision (which was argued before us on September 28, 1965), respondents contended that the complaint, and the entire proceeding which followed, impaired their constitutional rights under the First Amendment. They were strongly supported by the American Civil Liberties Union, which filed a brief and presented oral argument as *amicus curiae*, urging the Commission to overrule *Witkower*.

The majority opinion, however, makes no mention of *Witkower*. Even though the Commission's Findings of Fact (*e.g.*, 19, 28, 36, 42, 48, 55, 62, 68, 78, 83, 90, 97, 104, 111, 116) indicate that the Commission, like the examiner, relies on the testimony of complaint counsel's medical witnesses to show the "falsity" of the "ideas and suggestions" contained in the book, the majority opinion does not discuss the *Witkower* question. It merely asserts that "An examination of the complaint makes it clear that it is not challenging the truth or falsity of any statements made in either of the advertised publications. On the contrary, the deceptions charged are exclusively based on specific representations contained in respondents' advertising." (P. 1236.) This is, of course, the premise of the *Witkower* theory.

The failure of the majority opinion to discuss, or even to cite, *Witkower* leads Commissioner MacIntyre to conclude that the Commission has retreated from the position taken in that case. I do not agree. It may seem strange that an opinion containing an elaborate discussion of "Jurisdiction of the Federal Trade Commission over Advertising of Books" should omit any reference whatsoever to the one Commission case which is an all-fours precedent. But the explanation for the Commission's silence in this regard is not hard to find. It derives from the fact, which Commissioner MacIntyre also notes, that the majority opinion has introduced into the case a brand-new theory of violation which not only is not charged in the complaint but is precisely the opposite of the *Witkower* theory.

Until today, there was no charge in this case that respondents' advertising misrepresented the content of the book, or misled the public as to what the book was about. The only charge was, as in *Witkower*, that the readers would be misled by the ads as to the health benefits they would receive by following the "false and misleading" ideas and suggestions contained in the book.

Now all this is turned upside down. According to the majority opinion, respondents' advertisements were deceptive because they made claims which did *not* repeat but exceeded those to be found in the book. This marks a 180-degree reversal of the theory of the case, as alleged in the complaint, tried before the hearing examiner, and argued on appeal to the Commission. Up until now, the one thing in this case upon which everyone agreed was that the Commission's theory of illegality rested upon the substantial identity of the "ideas and suggestions" contained in the book and those in the ads. Indeed, in upholding the Commission's right to examine into the truth or falsity of the "ideas and suggestions" in the book, the hearing examiner and Commission counsel have argued throughout that these "ideas and suggestions" were repeated in the advertisements, and that therefore it was the advertising not the book which was being "censored." (See Appendix, *infra*.)

What the Commission now does is to lay the advertisements and the book side by side, and to find that the two do not jibe. The majority opinion asserts that the advertisements contained "flamboyant" and "exaggerated" claims of promised therapeutic benefits which the author did not make in the book itself. The book, on the other hand, is "carefully written" and the author's statements in it are "candid" and "qualified" (pp. 1239-40). Indeed, although the majority opinion does not come right out and say so, the Commission seems to agree with some of the distinguished medical witnesses called by respondents, like Dr. Louis Lasagna of the Johns Hopkins University School of Medicine, who testified that the ideas and suggestions in the book were generally accurate and would be of substantial value to readers who followed them (Finding 21).

In thus trying to skirt the First Amendment question raised by the complaint drawn on the *Witkower* theory, the Commission injects into the case a Fifth Amendment question, no less serious. In effect, what the Commission has done here—two years after the oral argument of the appeal from the hearing examiner's initial decision—is simultaneously (a) to amend the complaint to add a new and different charge which is the opposite of the one in

the complaint, and (b) to convict respondents both on the new charge, without notice or hearing, and on the old charge, without supporting reasons.

APPENDIX

Excerpts From the Transcript of Oral Argument
Before the Commission (Tr. 38-41, 62-65)

CHAIRMAN DIXON: This complaint did not challenge what was said in the book, did it?

MR. FERGUSON [Commission Counsel]: It challenged the advertising statements as being false. They represented certain benefits.

CHAIRMAN DIXON: Advertising about the book is challenged.

MR. FERGUSON: That is correct.

COMMISSIONER JONES: But did you go into the question of whether what they said in their advertising about the book merely tracked and described what the book was about and what it said?

MR. FERGUSON: No, we didn't.

COMMISSIONER JONES: You didn't draw that kind of a distinction in trying this case?

MR. FERGUSON: No, we didn't.

Continuing then—

COMMISSIONER ELMAN: In other words, the advertising was false because the ideas in the book were worthless?

MR. FERGUSON: The advertising I believe was false, Commissioner Elman, because it represented to the purchasers and the prospective purchasers that they could achieve certain health benefits through purchasing and following the ideas in the book which they could not, being false representations.

* * * * *

COMMISSIONER JONES: * * * What are we concerned with here, what the book has said or what the advertiser said the book said?

MR. FERGUSON: Well, I think that the advertising certainly does not parrot word for word what the book has said.

COMMISSIONER JONES: But you don't really draw a distinction in that in the way you presented the case.

MR. FERGUSON: I presented the case, Commissioner Jones, on the theory that the advertising was false because the people

who followed the suggestions and ideas contained therein would not achieve the therapeutic benefits described. This was the theory of the Witkower and Farra, Straus [cases].

* * * * *

CHAIRMAN DIXON: There is no difference in this complaint and in the complaint in the Witkower case.

MR. FERGUSON: No sir. The complaint is on all fours and the problems of whether the Commission has the authority—

COMMISSIONER ELMAN: Mr. Ferguson, if I could just straighten this thing out, both in this case and in the Witkower case the charge was that the advertising was false and deceptive because the ideas in the book were also false and deceptive.

Isn't that right?

MR. FERGUSON: If one followed the ideas, he would not achieve the benefits represented.

COMMISSIONER ELMAN: The Witkower case didn't charge the advertising was false because it departed from what was in the book—because it followed what was in the book. That is also true here, isn't it?

MR. FERGUSON: I believe the two complaints are similar. But I do wish to emphasize that there is no matter here of first impression.

CHAIRMAN DIXON: It is your point that the Commission, maybe not this panel of the Commission, but the Commission as a Commission has ruled on this point before.

MR. FERGUSON: Many, many times, Your Honor.

* * * * *

CHAIRMAN DIXON: You would say to us that this Commission has nothing it can do about the writing of a book but if the writer chooses to advertise that book or sell it to someone that does advertise that book, that the Commission then has an obligation to proceed against the deception that is created by the advertising and tested by the book.

MR. FERGUSON: Yes, sir, I do.

* * * * *

COMMISSIONER ELMAN: Mr. Ferguson, about 20 or so years ago I read a book by Oswald Jacoby, "How to Win At Poker," and I have faithfully followed all the ideas and suggestions contained in that book and I can testify as a witness that I have not won at poker. Does that justify our issuing a cease and desist order against the advertising of that book?

MR. FERGUSON: The test I believe would have to be more than one person winning or losing.

COMMISSIONER ELMAN: I think I can qualify as an expert. Certainly on losing.

STATEMENT

JUNE 20, 1967

BY MACINTYRE, *Commissioner*:

In the attempt to skirt the First Amendment issue, the Commission has, in effect, retreated from the rule enunciated in *Witkower Press, Inc.*, 57 F.T.C. 145, 220 (1960). It does so by emphasizing discrepancies between the content of the book and the challenged advertising. The complaint did not make that distinction. It simply alleged the advertised claims for the books were false since the ideas and suggestions contained in these publications are not effective and will not be of benefit in the prevention or cure of the ailments with which they purport to deal. Further, the dichotomy between the challenged advertisements and respondents' publications, on which the majority's opinion apparently turns, did not figure in the trial of this case.

The opinion, therefore, creates the net impression that the crucial factor to finding a violation here was not whether the advertising made false claims for the publications but, rather, whether, *in addition*, inconsistencies could be found between the text of the publication and the challenged advertising. This conveniently avoids Rodale's claim that the advertisements are within the privilege of the First Amendment since they merely repeat the substance of respondents' publications. I would have met that issue squarely. By failing to do so, the majority has left its opinion open to the construction that, in another case, where equally false claims are made in the advertising, such promotion would be insulated from Commission action as long as it coincides neatly with the advertised book. In effect, therefore, the Commission has retreated from the rule of *Witkower Press*, which held that:

The argument that the Federal Trade Commission Act confers no valid power to regulate false representations in advertising when integral to theories or views expressed in particular publications being advertised and sold misconceives the objective and essential nature of the Act. * * *

The Commission does not make it clear why this standard should not be adhered to in the future or in this case. Clearly, if *Rodale* abandons this rule, then effective action against similar deception is unlikely in the future.

There is, of course, no necessity for avoiding the real issues

posed by respondents' appeal from the initial decision. On the basis of *Witkower*, I would take the position that "notwithstanding that an advertisement merely restates what the book is about * * * still the FTC has the power to restrict the publication of the advertisement should it have a tendency to mislead."¹ Where deception is clear, this Agency should act. This is the area of competence of the Federal Trade Commission. On the other hand, problems of Constitutional construction are best left to the courts, where these questions properly reside.

Under the circumstances, I have decided to concur in the result only.

FINDINGS OF FACT, CONCLUSIONS AND ORDER

The Federal Trade Commission issued its complaint in this matter on April 3, 1964, charging respondents with violation of Section 5 of the Federal Trade Commission Act (15 U.S.C., Sec. 45 (a)). In an initial decision filed April 16, 1965, the examiner sustained in part and dismissed in part the charges in the complaint and proposed an order to cease and desist. Counsel for both sides appealed. The Commission has considered the appeals and the entire record and has determined for the reasons set forth in the accompanying opinion, that the initial decision should be vacated and now makes this its findings as to the facts, conclusions drawn therefrom and order, the same to be in lieu of those contained in the initial decision.

FINDINGS AS TO THE FACTS

The Respondents

1. Respondents Rodale Press, Inc., and Rodale Books, Inc., are corporations organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with their office and principal place of business located at 33 East Minor Street, Emmaus, Pennsylvania. They are engaged in the preparation, advertising, publishing, and offering for sale of a variety of publications including *The Health Finder*, (CX 1, sometimes herein called book), a pamphlet *How To Eat For A Healthy Heart and This Pace Is Not Killing Us* (CX 2, sometimes herein called pamphlet), a monthly magazine entitled *Prevention* and various other books on the subjects of preventive health, gardening and language. Each of the individual respondents, Jerome I. Rodale, and Robert Rodale,

¹ "False Advertising—Restrictions on Freedom of Speech and Freedom of Circulation," VI Boston College L. Rev. 932.

is chairman of the board and president, respectively, of both corporate respondents and is responsible for the acts and practices of the corporate respondents including those challenged in the complaint (Stip. of the Parties, Pre-Hearing Order, Aug. 7, 1964; Tr. 11).

2. Rodale Press, Inc., was originally organized in 1931 by Jerome I. Rodale as a partnership to publish and sell hardback books. From 1947 through 1953, Jerome I. Rodale operated the business as a sole proprietorship. In 1953 Rodale Press, Inc., was incorporated and in 1954 Rodale Books, Inc., was established, also by Jerome I. Rodale, for the purpose of publishing and selling softback books (Stip. of Parties, Pre-Hearing Order, Aug. 7, 1964; Tr. 11, 571). The two corporations confine their publication efforts to books and magazines authored or edited by the individual respondents or by the corporations' staff (Resps'. Motion to Dismiss, Nov. 9, 1964, p. 20; CX 4B).

3. The two corporate respondents' combined gross annual sales at the time of the hearing were approximately two and one-half million dollars (Stip. of Parties, Pre-Hearing Order, Aug. 7, 1964). They employ a total staff of 140 people. The record does not indicate which of these individuals are editorial, clerical, or actually engaged in the publishing of the books (Tr. 571).

Transactions in Commerce

4. Respondents' primary method of advertising and distributing their books and publications is via mail to the general public. Only limited sales are made through retail stores (Tr. 571, 587, 595-96). Respondents cause and have caused said books and publications, when sold, to be transported from their place of business in the State of Pennsylvania to purchasers thereof located in various other States of the United States, and in the District of Columbia. Respondents at all times mentioned herein have maintained a substantial course of trade in said books, pamphlets and magazines in commerce, as "commerce" is defined in the Federal Trade Commission Act (Stip. of Parties, Pre-Hearing Order, Aug. 7, 1964). In the conduct of their business at all times mentioned herein, respondents have been in substantial competition, in commerce, with other corporations, firms and individuals in the sale and distribution of books and publications (*ibid.*).

5. In the course and conduct of their business, and for the purpose of inducing the purchase in commerce of said publications and pamphlets, respondents have made certain statements and representations with respect thereto in advertisements and pro-

motional material, including letters, circulars and brochures sent through the United States mails into various states of the United States and into the District of Columbia (*ibid.*).

The Advertising

6. Respondents' principal advertising under challenge in this complaint and considered at the proceeding before the examiner consisted of advertising brochures used to promote the sale of *The Health Finder* (CX 8, 9, 10). These brochures were disseminated during the seven-year period of 1956 through 1963. Two different versions were used. The first version was disseminated from 1956 through 1960 at which time a slightly modified and condensed edition was adopted and used through 1963. In 1963, active promotion of the book was discontinued. Subsequent thereto, respondents continued to offer copies of *The Health Finder* for sale either directly by mail or through retail outlets and it was available for sale at the time of the hearing in 1964. (Tr. 82, 572, 597.) The book continued to be included in respondents' list of books offered for sale and was referred to in current issues of respondents' *Prevention* magazine. (CX 4, 5, 27 at p. 58, Tr. 572, 582, 590-91.)

7. The first version of the advertising brochure is reproduced and attached as Appendix A* to these findings and is made a part hereof. It consists of eight pages (marked CX 8 A-D and CX 9 A-D), and is broken into two parts, one part (CX 9) contains excerpts to testimonials from prior readers, the second part (CX 8) contains descriptive text material relating respondent J. I. Rodale's health experiences, a partial listing of subjects discussed in *The Health Finder*, and a general discussion of health problems and how information contained in the book will be of value to the reader. The revised brochure contained substantially identical statements in a slightly condensed form (CX 10). Both versions were introduced into evidence before the hearing examiner and constitute evidence of the challenged representations. (Tr. 571-72.)

8. The thrust of respondents' advertising for *The Health Finder* is that it offers information "from the preventive point of view" (CX 8, 9, 10). The theme of the advertising is that, contained in the book is a regimen which if followed, would provide the reader with the means of *preventing*, and in some instances *treating* or *relieving*, the enumerated medical problems and ailments.

* Omitted in printing.

9. *The Health Finder*, a 944-page hardback book, is a compendium of health information (CX 1). This book was first offered for sale in 1955 and at the time of the hearing over 137,000 copies had been sold. (Tr. 573.) The basic theme of the book is that most of man's health problems are related to diet and in some instances environment; and by avoiding certain foods and including others in the diet, man may be able to reduce the incidence of disease and health problems. The information in the book was purportedly gathered by respondent Jerome I. Rodale as a part of his personal quest for good health. Its source was almost entirely articles and materials previously published in medical and professional journals, books and newspapers.¹ These materials generally report the results of a particular study, experiment, or observed phenomenon related to health. These articles are usually referred to by name and identified by publication, date and the individuals who were responsible. Sometimes, the entire article is reproduced. In others, excerpts are used, and in others only the subject or the alleged findings alluded to. Intermingled with some of these articles are the personal health experiences of respondent Jerome I. Rodale.

The book is divided into approximately 260 major subjects and 1700 subtopics. Each of the major subjects is a particular medical problem, food type or substance. The subtopics are various aspects of the major subject.

The usual format of the book is to commence with an overall discussion of the subject. This is followed by reference to numerous experiments, studies or other reports which relate to the subject and generally reflect a connection between the medical problem and nutrition. For certain of the major subjects the editor and/or his staff draw conclusions and make recommendations based on the previous discussion. The recommendations usually include the avoidance of a particular food because of its harmful effect and the inclusion of other foods because of their particular beneficial effects.

The style of the book is generally not to reach absolute conclusions on either the cause of possible preventive, cure or treatment of a medical ailment. To the contrary, the language of the book is couched in terms of describing the *possible* relationship between a particular disease and an item in the diet. (CX 1.)

10. Respondents' advertising used to promote the pamphlet *How To Eat For A Healthy Heart* and *This Pace Is Not Killing Us*, was

¹ The introduction to *The Health Finder* states that all of the material appearing in the book was previously published in respondent Rodale Press, Inc.'s magazine *Prevention* (CX 1, p. 6). Most of respondents' health publications consist of condensations of reports, articles or papers previously published in medical, professional or other journals. (CX 1, 2, 8 B-C and 27.)

also challenged in the complaint and considered at the proceeding below. It consisted of various mailing pieces which were usually sent with the advertising brochure for the *Health Finder*, described in Findings 6 and 7, *supra* and in conjunction with materials soliciting subscriptions to respondents' *Prevention Magazine*, since the pamphlet was frequently offered as a "bonus" with the purchase of the book or magazine subscription. (CX 3A, 6, 11.) The pamphlet was actively promoted from 1956-1960. (Tr. 573.) Subsequent thereto the pamphlet was included in the list of publications available for sale from respondents. (CX 4.)

One piece of advertising is a two page letter from the Manager of Rodale Books, Inc. (CX 11.) This letter discusses the "heart disease problem" and "Mr. Rodale's" personal experience and research on the ailment. Typical of the statement are the following:

Did you know that in the United States alone 773,980 people died of heart disease last year? HOW TO EAT FOR A HEALTHY HEART attacks this terrifying problem from a new angle. THIS PACE IS NOT KILLING US is also concerned with the heart disease problem. It contains an equally vital health message for you.

Here's why you should read *both* of these books at once: American men are dying from heart disease five times faster than Italian men—*ten times faster than Japanese men!* Why is this so? Is there any hope for Americans?

Yes, Mr. Rodale says, there is all the hope in the world, *if the enigma of heart disease is approached as a problem in nutrition.* Mr. Rodale brings to light many facts about heart disease—facts you must consider if *you want to live a long, useful, vital life.*

*Mr. Rodale has had a heart condition for 16 years! * * * Mr. Rodale has enjoyed buoyant health for 16 years by following the same advice he now gives you in HOW TO EAT FOR A HEALTHY HEART. If you have heart symptoms, you won't want to miss this amazing book. But please remember that the emphasis in Mr. Rodale's teachings is always on the prevention of disease—so even if you have a healthy heart now, this book may help you keep it that way!* (CX 11.)

Almost identical statements were made in other advertising materials. (CX 3, 6, and 7.) Further, the extract of testimonials which accompanied the advertising brochure for *The Health Finder*, also made reference to the pamphlet thereto as follows:

HOW TO EAT FOR A HEALTHY HEART is valuable, too

"Money could not buy what I have learned through HEALTH FINDER and HOW TO EAT FOR A HEALTHY HEART. Certainly every parent who is interested in the physical and mental welfare of their children should purchase these books and read them until they understand them thoroughly, and then follow the advice given therein."

HEALTHY HEART was worth price he paid for HEALTH FINDER

"Seldom a day goes by that I fail to read and absorb some good informa-

tion from my HEALTH FINDER. I would not sell it for any price if it could not be replaced. I also feel like the free book I received with it, HOW TO EAT FOR A HEALTHY HEART, was well worth the price I paid for my HEALTH FINDER." (CX 9C.)

11. The pamphlet is actually two separate publications, *How To Eat For A Healthy Heart* and *This Pace Is Not Killing Us*, combined into a single booklet. It is written and organized essentially in the same format as *The Health Finder*. The text of *How To Eat For A Healthy Heart* discusses findings of various studies and experiments on the relationship between foods, vitamins and minerals and heart disease. It is divided into various subjects and consists of excerpts from articles in medical journals interspersed with the author's discussion of these articles and of his own personal experience or opinions respecting the subject matter under discussion. *This Pace Is Not Killing Us* discusses the importance of a reasonable amount of exercise to the proper functioning of the body and specifically its relationship to heart disease. Interspersed with the revelation of the studies and research in this area, is J. I. Rodale's personal experiences with the ailment. (CX 2.)

Misrepresentations in the Advertising of the Health Finder of General Benefits (Comp. Pars. Six (1) and Seven (1))

12. Respondents' advertising represented, directly or by implication that readers of *The Health Finder*, who followed the ideas and suggestions set forth therein would add years to their lives, gain more energy, effectuate savings on medical and dental expenditures, feel better than ever and gain and maintain health. (CX 8, 9, 10.)

We conclude that the finding of the hearing examiner dismissing this charge in subparagraph Six (1) on the ground that respondents had not made the alleged representations is in error (H. Ex. F. 15, ID p. 1197) and we find that the representations alleged in subparagraph Six (1) were in fact contained in respondents' advertising and that these representations were false as alleged in subparagraph Seven (1).

13. Respondents' advertising text is replete with statements that readers of *The Health Finder* will add years to their lives, eliminate tiredness, increase their energy and gain good health, thereby implying that recourse to medical advice from doctors will be reduced. The text of respondents' advertising asks the specific questions:

Which of the health ideas in this amazing book will * * *

- (1) Add years to your life?
- (2) Give you more energy?
- (3) Cut down on your medical and dentist bills?
- (4) Make you feel better than you ever felt before?
- (5) Help your family achieve health and happiness? (CX 8 B, C)

The advertising claims thousands of persons who follow Rodale's teachings contained in his book, display "radiant health and abundant energy;" readers will learn how to keep themselves and their families "radiantly healthy and full of energy" (CX 8).

14. "Comments" of prior readers of the book are quoted in the advertising as follows:

By following your suggestion my health improved.

* * * I am sure, by your writings, that you have prolonged the lives of a vast number of people.

Our family hasn't had a day's illness since we started this plan.

My life is now what I'd always hoped it would be but it would never have happened except for the reading of your special article on bread. (CX 8D.)

15. Comments made in the testimonial section of the advertising brochure state:

Is almost 78, but friends marvel at her activity.

HEALTH FINDER has saved her friends' doctor bills.

She feels like moving mountains every day.

HEALTH FINDER is a money saver in family of seven.

HEALTH FINDER has paid for itself many times over.

This chapter I have read aloud to my wife twice because it contains so much pertinent information. If one of our relatives could have seen this article ten years ago and followed its recommendations, she probably would not now be dying of cancer of the bones and nerves.

Before your ideas began to come my way, I was afraid of germs and diseases. Now my fears are gone. I just don't worry about them anymore.

I wish I had known about the HEALTH FINDER 10 years ago. I will recommend it to every one who will write to me.

There isn't one word or one bit of information in the HEALTH FINDER that I would want to miss. It is the most enlightening book I've read on this most important subject. (CX 9.)

16. We conclude that respondents' rhetorical questions interlaced with these various testimonials respecting the enhanced energy, long livedness, money saving, free of disease benefits which readers claim have resulted from the book in the context of respondents' entire advertising message clearly convey the impression that the reader has but to read the book and follow its suggestions in order to achieve longer life, gain more energy, improve his health, and reduce the need to consult doctors and dentists.

17. We conclude that the same representations are contained in respondents' 1960 revision of the brochure even though the specific rhetorical questions were deleted in this edition (CX 10).

18. We find that these represented benefits are not contained in respondents' book. The author of the book recommends the importance of diet therapy in the enjoyment of good health and expresses the belief that many of the recommendations contained in the book will for many persons prolong their life-span and increase their enjoyment of good health. The book nowhere states that by reading it and following its prescriptions the readers will thereby reduce medical and dental bills, achieve good health, add years to their lives, etc. This notion is expressly repudiated in many sections of the book where the author clearly states that the cause or means of prevention of the disease under discussion is not known or that the treatment recommended will not be effective for all manifestations of the disease (CX 1, pp. 140, 142, 256, 392 and 454).

19. Witnesses called by complaint counsel² testified that the regimen contained in *The Health Finder* could not assure to all readers of the book the enumerated benefits promised in the advertising claims alleged in this subparagraph since each person's health problems must be individually considered, diagnosed and treated; whether a person can be provided the enumerated benefits will be determined by his own condition and that no single regimen could provide the enumerated benefits in all circumstances (Waldman, Tr. 226-27; Tschudy, Tr. 409; Brown, Tr. 470).

20. Respondents' counsel conceded during the hearing that medical knowledge being what it is, nothing and no one can assure a person of a longer life, more energy, savings on medical and dental expenses, feeling better than ever, or of a means of gaining and maintaining health (Tr. 408, 475, 479).

21. Witnesses called by respondents³ confined their testimony

² Medical witnesses called by complaint counsel included Dr. Modestino G. Criscitiello, a full-time staff member of Georgetown University Medical Center and a faculty member of the Georgetown University School of Medicine (Tr. 132-95); Dr. Thomas A. Waldman, a Senior Investigator at the National Cancer Institute, National Institute of Health, Bethesda, Maryland (Tr. 201-82); Dr. Frank A. Finnerty, Jr., a practicing physician, and also Chief of the Cardiovascular Research Department at Georgetown University Medical Division of the District of Columbia General Hospital (Tr. 284-325); Dr. Walter C. Hess, a member of the faculty of the Schools of Medicine and Dentistry at Georgetown University (Tr. 326-50); Dr. Donald P. Tschudy, a practicing physician specializing in cancer and internal medicine (Tr. 355-426); and Dr. Thomas M. Brown, a practicing physician, specializing in internal medicine (Tr. 429-73).

³ Dr. Emanuel Cheraskin, a professor and chairman of the Department of Oral Medicine at the University of Alabama (Tr. 496-536); Dr. Louis Lasagna, associate professor of medicine at Johns Hopkins University School of Medicine. Dr. Lasagna had been retained by the Federal Trade Commission on several occasions as a witness or on research (Tr. 539-68). Dr. Theron G. Randolph is a practicing physician in Chicago (Tr. 637-66). Dr. David Green is associate director of the Burge Tuberculosis Clinic in Philadelphia (Tr. 678-743); Dr. Blaine P. McLaughlin is a psychiatrist and chairman of the Department of Psychiatry at the University of North Dakota (Tr. 745-95). Dr. Joseph Wolfe is medical professor of the Valley Forge Heart Hospital and is a specialist in cardiovascular diseases (Tr. 795-830).

to the general statement that the ideas and suggestions in respondent's book were generally accurate and would be of substantial value to the reader who followed them (*e.g.*, Cheraskin, Tr. 532; Lasagna, Tr. 541; Randolph, Tr. 644; Green, Tr. 678; Wolffe, Tr. 804-05). We do not read this testimony as supporting the challenged claims in respondents' advertising that all readers of respondents' book will in all cases secure the enumerated benefits.

22. We conclude that *The Health Finder* will not enable readers to add years to their lives, gain more energy, effectuate savings on medical and dental expenditures, feel better than ever before and gain and maintain health, and that the representations in this respect made in respondents' advertising are false, misleading and deceptive.

Charge That Respondents Falsely Represented That the Health Finder Contained the Answer to Any and All Health Problems (Comp. Pars. Six (2) and Seven (2))

23. Respondents' advertising represented, directly or by implication that *The Health Finder* contained answers to any and all health problems. We conclude that the finding of the hearing examiner, dismissing this charge in subparagraph Six (2) on the ground that respondents' advertising had not made the challenged representation, is in error (H. Ex. F. 19, ID p. 1199), and we find that the representation alleged in Six (2) was in fact contained in respondents' advertising and the representation was false as alleged in subparagraph Seven (2).

24. Respondents' advertising contains the bold-faced heading to one of its paragraphs "ANSWERS HEALTH PROBLEMS— TELLS YOU HOW TO STAY HEALTHY." The dust cover of respondents' book, a picture of which is reproduced in respondents' advertising brochure, describes the book as "An encyclopedia of Health Information" and at the bottom of the dust jacket, the statement is made "ANSWERS HEALTH PROBLEMS" (CX 8C). In addition, respondents' advertising brochure contains a check-list of some 100 topics which are stated to be covered in the book. Over 100 testimonials, classified by disease are also included in respondents' advertising brochure (CX 8, 9).

Respondents' description of the book as an "encyclopedia," their flat assertion that the book "Answers Health Problems," and their reproduction in the advertising of the check-list enumerating ailments alphabetically, together with the over 100 testimonials reproduced in the advertising brochure would certainly be in-

terpreted by the reader as a representation that the book in fact furnishes answers to any and to all health problems.

25. We find that the absence of the word "all" or "each" from respondents' advertising message, does not avoid the representation to the public that all health problems are answered. It would ignore reality to hold that the omission of these words must of necessity imply something less than "all" or "each" to the reader.

26. Substantially identical statements were continued in the revised advertising brochure. Although the check-list is reduced in the number of items it contains, an abstract from the index is added which lists approximately 300 subjects (CX-10). We conclude that respondents continued to make the representation that the book contained the answer to "any" and "all" health problems in the revised advertising brochure.

27. The record demonstrates conclusively that respondents' book does not contain the answers to all health problems. The author of respondents' book makes no such claims in his discussion in the book of the various health problems covered there. The author is careful to state expressly in various sections of the book that no preventive or cure is known for certain diseases or that the treatment or regimen discussed is only for certain manifestations of a particular disease. (See F 18, *supra*.)

28. Complaint counsel's witnesses made it clear that neither *The Health Finder* nor any other source could provide such all inclusive answers to health problems (Waldman, Tr. 2270; Brown, Tr. 470). Respondents' counsel conceded this fact (Tr. 408, 475, 479).

29. We conclude that *The Health Finder* does not contain the answer to all health problems and that the representation in this respect made in respondents' advertising, is false, misleading and deceptive.

The Common Cold Charge (Comp. Pars. Six (2) (a) and Seven (2) (a))

30. We conclude, as found by the hearing examiner, (H. Ex. F. 21, ID p. 1200) that respondents' advertising claims challenged in subparagraph Six (2) (a) represent that respondents' book will tell the reader how to prevent the common cold and that this representation is false as alleged in subparagraph Seven (2) (a) of Paragraph Seven.

31. Respondents' original advertising brochure lists as topics covered by *The Health Finder*:

Recommendations for a winter free from common colds (pages 260-1) (CX 8B),

What can we do to prevent the common cold? (pages 256-7-8) (CX 8D).

32. Respondents' advertising brochure included the following testimonials relating to the common cold:

VITAMINS—"11-year old girl hasn't had cold all winter."

"My 11-year old girl generally has bad colds off and on all winter, since I read the article on Vitamins I started giving her cod liver oil, Vitamins A and D and she hasn't had a cold all winter" (CX 9C).

COLDS BECOMING RARE

"Colds are becoming rare in our house, in fact, none of us have had one this year—my family will be ever grateful to you for showing us way to health."

HAS NOT HAD A COLD

"I have read your article on how to prevent colds by dieting, and have followed your rules very carefully so far this winter. I have not had a cold, compared to previous winters when I have had two or three colds during the winter season."

NO COLDS IN YEARS

"Have not had a cold in years." (CX 9D.)

33. When read within the context of respondents' entire advertising message that *The Health Finder* will ensure readers good health and will save them medical expenditures and the inclusion of the series of testimonials not only with respect to colds but on a variety of diseases, as to the efficacy of *The Health Finder* in treating, preventing and curing various illnesses, respondents' advertising clearly constitutes a representation to the public that there is a successful preventive for the common cold and that readers of the book will find out how to prevent the common cold. (FF 6-8, 12-17, *supra*.)

34. Substantially identical statements with regard to the common cold were contained in the revised advertising brochure, and we conclude, as did the examiner (H. Ex. F. 23, ID p. 1201), that respondents continued to make the representation that the book contained the means to prevent the common cold.

35. Respondents' book itself is careful to point out that there is no cure or preventive for the common cold. *The Health Finder* states:

No one knows what causes it [cold] or how it can be cured or prevented.

* * * In our large file of material on the common cold many of the articles impress us with their extreme lack of helpfulness, for they do not suggest any possible remedy or even faint hope that some day we may conquer the common cold. (Emphasis added, CX 1, p. 256.)

Moreover, in its discussion of cold remedies, including the use of Vitamin A and the effects on colds of hot and cold shower

therapy, emotions and excessive wheat in diets, the book is careful to discuss the limitations of these treatments and avoids making any affirmative representations that colds can be either prevented or cured by any known remedies (CX 1, pp. 260-61).

36. Witnesses called by complaint counsel and by respondents were in substantial agreement that proper diet is important as a means of building resistance in the human body to the viral infection, but that this would by no means provide the reader with a means of preventing the ailment, since a cold is caused by a viral agent. (Waldman, Tr. 208-09; Tschudy, Tr. 365; Brown, Tr. 438.) Respondents' witnesses testified generally that the ideas in the book would not be harmful and might be beneficial in reducing the chances of contracting a cold, but we hold this testimony is irrelevant to the allegations of the complaint that respondents' advertising represented that readers of respondents' book will find a means of preventing colds. (Lasagna, Tr. 554; Green, Tr. 702.)

37. We conclude that *The Health Finder* does not contain the means to prevent the common cold and that the representation in this respect made in respondents' advertising is false, misleading and deceptive.

The Constipation Charge (Comp. Pars. Six 2(b) and Seven 2(b))

38. We conclude, as found by the hearing examiner (H. Ex. F. 24, ID p. 1201), that respondents' advertising claims challenged in subparagraph Six (2) (b) represent that respondents' book will tell the reader how to prevent and cure constipation and that this representation is false as alleged in subparagraph Seven (2) (b).

39. Respondents' advertising brochure includes the question, "What is the most successful preventative and cure for constipation?" as one of the health problems discussed in the book. (CX 8B.) Further the advertising includes a testimonial which reads as follows:

CONSTIPATION—"Brewer's yeast played major role"

"I thought I was branded with this ailment for my entire life. I can hardly believe I am not constipated any more. I can kiss my chronic headaches goodbye for life. I believe brewer's yeast played the major role. (CX 9A.)

When viewed against the overall context of respondents' advertising message that respondents' book contains the answer to health problems and that readers will be free of all diseases and enjoy good health, reduce doctor bills, enjoy long life and increased energy, we conclude that respondents' advertising represents that there is a successful preventive and cure for consti-

pation which the book will describe and that readers of respondents' book will find a preventive and cure of all types of constipation. We find that the absence of the word "all" or "each" in respondents' claims with respect to constipation is not determinative of whether the advertising claim represents to the public that a successful preventive and cure exists for all types of constipation. We believe that respondents' generalized and unlimited claims with respect to the prevention of "constipation" will be interpreted by the readers in their broadest and most generalized sense and will not be assumed to be limited in their application unless expressly so limited in the advertising. (FF 6-8, 12-22, *supra*.)

40. Substantially identical statements with regard to constipation were contained in the revised advertising brochure and we conclude, as did the examiner (H. Ex. F. 26 ID p. 1202) that respondents continued to make the representation that the book contained the means to prevent and cure constipation.

41. The discussion of constipation in *The Health Finder* is not expressed in language even suggesting that there is a preventive or cure for constipation. To the contrary, the thrust of the discussion in the book is that most people who use purgatives only imagine that they are constipated when in fact they are normal and the use of laxatives, or other medications may, in fact, result in injury or harm. *The Health Finder* concludes that "correct diet appears to be the most successful preventive and cure for constipation" (CX 1, p. 278, emphasis added). This certainly is not, as the advertising clearly represents, a cure or preventive for all types of the ailment.

42. Witnesses called by complaint counsel testified that diet manipulation was an important part of the usual therapy in certain types of constipation and that the consumption of the wrong types of foods could in fact cause the condition in some instances. (Waldman Tr. 240-41; Tschudy Tr. 373; Brown Tr. 442.) Each of the witnesses, however, stated that there are types of constipation which are the result of disease or organic difficulties and require drugs and/or surgery. (Waldman Tr. 211; Tschudy Tr. 373-77, 416.) For these conditions, diet manipulation would not be effective either as a preventive or cure.

43. Respondents' witnesses also testified that diet manipulation is an important factor in constipation and that the recommendation in the book to avoid laxatives was sound medical advice. (Lasagna, Tr. 555; Green Tr. 730.) These witnesses did not testify that this regimen was the only preventive or cure for constipation

nor that it would in fact prevent or cure all types of constipation in all cases.

44. Accordingly, we conclude that *The Health Finder* does not contain the means to prevent or cure all types of constipation and that the representation in respondents' advertising in this respect is false, misleading and deceptive.

The Ulcer Charge, (Comp. Pars. Six (2) (c) and Seven (2) (c))

45. We conclude, as found by the hearing examiner (H. Ex. F. 27, ID p. 1203), that respondents' advertising claims alleged in subparagraphs Six (2) (c) represent that respondents' book will tell the reader how to prevent ulcers and that this representation is false as alleged in subparagraph Seven (2) (c).

46. In respondents' advertising brochure, the topic "ULCERS" is featured as a major subject. Below this reference, is the listing "Prevention of Ulcers," as one of the health problems dealt with in respondents' book (CX 8B). Coupled with this representation is a testimonial which reads as follows:

ULCERS

Got rid of a peptic ulcer (CH 9B).

When viewed against the overall context of respondents' advertising message respecting the thrust and scope of respondents' book, we conclude that respondents' statements in their advertising respecting ulcers will be construed by the reader as holding out that by reading the book the reader will be able to prevent ulcers. (FF 6-8, 12-22, *supra*.)

We do not agree with the examiner's conclusion (H. Ex. F. 28 ID pp. 1203-04) that these alleged claims were not contained in respondents' 1960 revision of the advertising brochure (CX 10B). In their 1960 revision, respondents changed the topic listing respecting ulcers from "The Prevention of Ulcers" to simply "Ulcers." At the same time, respondents also revised the first page of the new brochure to herald *The Health Finder* prominently as an "Encyclopedia of Health Information from the *Preventive* Point of View" (CX 10A; emphasis added). In our opinion the shifting of the word "preventive" to describe the overall purport of the book and its deletion as a modifier of the subject "ulcer" does not change the advertising claim in any significant respect considered in the context of the overall format of the advertising brochure. Accordingly, we find that respondents' original advertising brochure in use from 1956 through 1960 and the revised version represent that *The Health Finder* contains the means of preventing ulcers. (FF 6-8, 12-22, *supra*.)

47. The discussion in the book on ulcers does not make the absolute claims respecting the prevention of ulcers made in the advertising. The book consists primarily of an analysis of several reported studies and experiments on ulcers. The book notes:

The literature we found did not indicate clearly whether people who are conscientious, worrisome and high strung get ulcers because this is their temperament or whether some combination of causes produces both the ulcers and temperament (CX 1, p. 853).

A further study is cited which suggests that since the principal means of preventing reoccurrence of ulcers is diet manipulation, that a maladjustment in the diet *may* have been the original cause. (CX 1, p. 855.) It is suggested that exercising care in the diet will improve your "health and outlook on life," thereby reducing the possibility of developing an ulcer personality. This discussion is a far cry from the advertising claims that reading the book and observing the regimen will prevent ulcers. At most the book could be described as a discussion of theories respecting various causative factors in the occurrence of ulcers and some suggestions for reducing the possibility of developing ulcer personality. In no sense does the book purport to be a preventive for ulcers as the advertising represents.

48. Witnesses called by complaint counsel testified that the actual cause of ulcers is still largely unknown, the diet manipulation recommended by the book would not provide a means of preventing the ailment in all cases and while diet adjustment was almost always recommended in the treatment of ulcers, it does not necessarily follow that improper diet was the cause of the ulcer, or that diet manipulation in the first instance would have prevented the condition from occurring (Waldman Tr. 212-14; Tschudy, Tr. 377-80). Respondents' witnesses testified that diet therapy is important in the treatment of ulcers but did not contend that diet manipulation could prevent ulcers (Randolph, Tr. 661; Green, Tr. 721).

49. Accordingly, we conclude that *The Health Finder* does not contain the means to prevent ulcers and that the representation in this respect made in respondents' advertising is false, misleading and deceptive.

The Fatigue Charge (Comp. Pars. Six (2) (d) and Seven (2) (d))

50. We conclude that the hearing examiner erred in his interpretation of respondents' advertising (H. Ex. F. 29, ID p. 1204) challenged in subparagraph Six (2) (d) and find that respondents' advertising challenged in this subparagraph repre-

sented not simply that use of desiccated liver will prevent fatigue, but that the book will tell the reader generally how to prevent fatigue. We also conclude as did the examiner that this representation was false as charged in subparagraph Seven (2) (d).

51. One of the topics which the advertising lists as being covered in the book reads:

Exciting discovery concerning the use of desiccated liver as a means of preventing fatigue (pages 450-1-2) (CX 8B).

Respondents' overall advertising message highlights *The Health Finder* as containing new ideas which will give its readers "more energy," enable them to have "abundant energy" and "zest" and to eliminate tiredness and the need for sleeping and resting, to enjoy general good health which is represented as the "magic" to overcome feelings of boredom, discontent and "make you feel better than you ever felt before" (CX 8A, C).

52. Viewed in the context of respondents' overall advertising message, we conclude that the advertising represents that *The Health Finder* will enable readers to prevent fatigue. In our opinion, respondents' claim is an absolute all encompassing one and is not restricted to a representation that "desiccated liver" will prevent fatigue. We hold that respondents' advertising makes an unqualified representation that *all* types of *fatigue* will be prevented by reading *The Health Finder*. (FF 6-8, 12-16, 23-26, *supra*.)

53. Substantially identical statements with regard to fatigue were contained in the revised advertising brochure and we conclude, as did the examiner (H. Ex. F. 30 ID p. 1204) that respondents continued to make the representation that the book contained the means to prevent fatigue.

54. There is nothing in *The Health Finder* itself which supports the claim in respondents' advertising that readers will be enabled to prevent fatigue. Fatigue is the subject of several sections of the book in addition to the discussion of the use of desiccated liver cited in the advertising. Yet nowhere in the text of *The Health Finder* is there any representation that all types of fatigue can be prevented. Indeed the author-editor states in his discussion of diet and its effect on fatigue that:

Though fatigue and nervousness can, of course, be effects of other ailments too, if you are prone to gagged out jittery feelings, watch your diet (CX 1, p. 343).

Moreover, the specific representation that use of desiccated liver will prevent fatigue is a highly misleading description of the

contents of the book. *The Health Finder* simply describes certain experiments with animals which indicated that those that had received desiccated liver resisted fatigue substantially longer than others. Although recommending the taking of desiccated liver, the author-editor does not state that it will prevent fatigue. He states: "The taking of liver *may* be a factor in contributing to the prevention of fatigue * * * I say 'may' because not enough work has been done on each of these subjects to clinch it scientifically" (CX 1, p. 464; See also FF 18, 27, *supra*).

55. Witnesses called by complaint counsel testified that diet deficiency discussed in the book is only one and a relatively unimportant cause of fatigue. In these instances diet manipulation would be of some value but would not necessarily assure the reader of a preventive. For fatigue caused by other factors such as organic diseases, diet would have no preventive value (Waldman, Tr. 214-16; Tschudy Tr. 380-81; Brown, Tr. 446).

56. Respondents' witnesses testified that nutrition and good health are important in overall good health and would necessarily be of value in preventing fatigue due to malnutrition (Cheraskin, Tr. 529; Randolph, Tr. 655). Respondents' witnesses did not support the claims in respondents' advertising that the book contained a preventive for all types of fatigue.

57. Accordingly, we conclude that *The Health Finder* does not contain the means to prevent fatigue and that the representation in this respect made in respondents' advertising is false, misleading and deceptive.

The Goiter Charge (Comp. Pars. Six (2) (e) and Seven (2) (e))

58. We conclude, as found by the hearing examiner (H. Ex. FF. 31-32 ID, p. 1204-05) that respondents' advertising claims challenged in subparagraph Six (2) (e) represent that respondents' book will tell the reader how to prevent goiter and that this representation is false, as alleged in subparagraph Seven (2) (e).

59. Respondents' advertising makes reference to goiter as one of the various topics treated in the book as follows:

Goiter—what it is, where it occurs, what should be done to prevent it (pages 392-3-4-5-6-7-8) (CX 8B).

When viewed against the overall context of respondents' total advertising message respecting the thrust and scope of respondents' book, we conclude that respondents' advertising claims represent to readers, both those suffering from goiter and those fearful of developing goiter, that by reading the book they will learn how to prevent goiter. (See FF 6-8, 12-16, *supra*.)

60. Substantially identical statements with regard to goiter were contained in the revised advertising brochure and we conclude, as did the examiner (H. Ex. F. 32 ID p. 1205) that respondents continued to make the representation that the book contained the means to prevent goiter.

61. Respondents' book does not contain the representation attributed to it by the advertising. Nowhere does *The Health Finder* make any specific claim that goiters can be prevented. The book contains a section entitled "Goiter" in which the causes of goiters are described, one a deficiency of iodine in the diet, second a disorder of the body, and third the drinking of polluted water (CX 1, p. 292). The book makes it clear that the cause of certain types of goiter is unknown. The discussion relates primarily to goiters caused by an iodine deficiency in the diet which can in some instances be prevented by insuring an adequate supply of iodine and to the possible causal relationship between goiter and polluted water. The author expresses the opinion based on the material excerpted and discussed in the section that "the two best guarantees against goiter" are an adequate diet with all necessary elements and avoidance of unpure drinking water (CX 1, p. 394). This discussion does not purport to suggest that this would prevent all types of goiter.

62. One of the witnesses called by complaint counsel testified that supplementation of the diet with iodine is the recommended therapy for certain types of goiter caused by iodine deficiency, that many types of goiter are not caused by this deficiency, that in other types of goiter, surgery and/or drugs are necessary for treatment and that the use of iodine supplement in those instances would not in any way have prevented their occurrence (Tschudy, Tr. 381-90, 422). Respondents' own witness on this issue agreed that all types of goiter are not amenable to treatment by adding iodine rich foods to the diet (Green, Tr. 722).

63. Accordingly, we conclude that *The Health Finder* does not contain the means to prevent goiter and that the representation in this respect made in respondents' advertising is false, misleading and deceptive.

The High Blood Pressure Charge (Comp. Pars. Six (2) (f) and Seven (2) (f))

64. We conclude that the respondents' advertising claims challenged in subparagraph Six (2) (f) represent that respondents' book will tell the reader how to prevent high blood pressure and

that this representation is false, as alleged in subparagraph Seven (2) (f).⁴

65. Respondents' advertising brochure contains the following in its "check list" of subjects discussed in *The Health Finder*.

Use of garlic in treatment of hypertension (high blood pressure) (page 388).

Reasons for a salt-free diet if you suffer from high blood pressure (page 424-5) (CX 8B).

The brochure also includes two testimonials on high blood pressure:

"I was glad to discover the garlic treatment for high blood pressure. I am feeling much better and my blood pressure is down to normal thanks to THE HEALTH FINDER" (CX 9A).

GARLIC—"helpful in relieving flatulence and hypertension"

"We found garlic most helpful in relieving flatulence and hypertension." (CX 9B.)

We believe this listing of hypertension and high blood pressure as topics covered by the book, coupled with the testimonials to the effect that use of garlic as recommended by *The Health Finder* resulted in the elimination of the testifiers' high blood pressure condition, when viewed in the overall context of respondents' advertising message as to the thrust and scope of respondents' book constitutes a representation to the reader that *The Health Finder* contains a means of preventing high blood pressure. (FF 12-16, *supra*.)

66. Substantially identical statements with regard to high blood pressure were contained in the revised brochure (H. Ex. F. 35, ID. pp. 1206-07), and we conclude that respondents continued to make the representation that the book contained the means to prevent high blood pressure.

67. *The Health Finder*, principally, in chapters entitled "Heart Disease," "Garlic," and "Salt," discusses various theories about the relationship between high salt intake and incidence of high blood pressure, the effects of garlic on high blood pressure, and the findings of research that by increasing the intake of garlic,

⁴ The hearing examiner's finding with respect to the claims alleged in subparagraph Six (2) (f) is ambiguous. He found that respondents had not represented that readers of *The Health Finder* will be enabled to "prevent" high blood pressure, but concluded:

* * * "[T]hat there would be members of the public who would interpret the statements in respondents' advertising regarding high blood pressure as meaning that the use of garlic and the elimination of salt from the diet will aid in the relief or treatment of high blood pressure" (Finding 33, ID. p. 1205).

However, the complaint did not charge that respondents represented that readers of *The Health Finder* would be able to relieve or cure high blood pressure, only that they would be enabled to prevent it.

patients' blood pressure was reduced and the symptoms of high blood pressure eliminated (CX 1, pp. 389-91, 424-5, 658). The entire discussion in the book is limited to an analysis of these theories and of the source material relied on. The conclusions offered with respect to the effect of diet on high blood pressure are limited to these theories and findings. The author nowhere makes any dramatic claims about the prevention of high blood pressure and does not make any representation that all kinds of blood pressure will be prevented by the regimens discussed in the book. He concludes in part:

* * * [I]f you are suffering from heart trouble or high blood pressure, you can be *certain* that your diet will *improve* the condition. If you're healthy, you can be reasonably certain your heart and blood vessels will continue to function without any signs of disorder for years to come (CX 1, p. 421, emphasis added).

This is in sharp contrast to respondents' advertising which is clearly designed to make just such dramatic claims which the book refuses to make.

68. Complaint counsel's witnesses testified in general agreement that the cause of many types of high blood pressure is not known. Certain types are, however, known to be the result of disease or congenital defects, which can be treated only by surgery, and could not be prevented by any means, much less diet. Further, there appears to be an inherited susceptibility to high blood pressure (Criscitiello, Tr. 166-67; Finnerty, Tr. 305). The regimen of diet manipulation would not be of value to the reader in preventing all instances of high blood pressure (Criscitiello, Tr. 145, 152, 153; Waldman, Tr. 209, 216; Finnerty, Tr. 304-13; Brown, Tr. 452). These witnesses also testified on cross-examination that *The Health Finder's* regimen of low-salt intake is a part of the therapy recommended in practically every case of high blood pressure and in others, is the sole therapy (Criscitiello, Tr. 155; Finnerty, Tr. 314). However, the fact that diet manipulation is a part of the therapy does not support respondents' advertising claim that the book provides a means of preventing high blood pressure.

69. Respondents cited certain publications by the American Heart Association and the Department of Health, Education and Welfare that stressed diet, particularly low-salt, as a means of lowering the incidence of the ailment (Tr. 175, 176, 181). We believe that this evidence respecting the efficacy of the regimens discussed in the book is irrelevant to the issue of the truthfulness of respondents' advertising claims. It is clear that readers of *The*

Health Finder would not find therein the means of preventing all types of high blood pressure.

70. Accordingly, we conclude that *The Health Finder* does not contain the means to prevent high blood pressure and that the representation in this respect made in respondents' advertising is false, misleading and deceptive.

The Cancer Charge (Comp. Pars. Six (3) and Seven (3))

71. We conclude, as found by the hearing examiner (H. Ex. F. 37, ID, pp. 1207-08) that respondents' advertising claims challenged in subparagraph Six (3) represent that respondents' book will tell the reader how to prevent cancer and that this representation is false, as alleged in subparagraph Seven (3). We further find that respondents have not advertised as charged in the complaint that respondents book will tell the reader how to treat and relieve cancer.⁵

72. Respondents' advertising brochure list the following statements on cancer:

Cancer and nutrition (pages 165-6-7).

Laboratory experiments indicating that brewers' yeast and dried liver prevent cancer (page 141).

Experiments showing the effectiveness of the B complex of vitamins in preventing the growth of cancer (pages 176-7).

Experiments which indicate that liver in the diet helps prevent cancer (page 452) (CX 8B & C).

73. The testimonial section of the advertising brochure contains several different statements relating to the validity of the regimen contained in the book as a means of preventing cancer. These testimonials are the following:

CANCER—"dread of this disease is relieved"

"The dread of this disease is relieved by your articles."

CANCER—"believes it is a disease of civilization"

"I certainly shall try to live up to the recommendations in this article as I believe cancer is a disease of civilization and everyone should become aware of what they are heading for these days."

CANCER—"read this chapter aloud to his wife twice"

"This chapter I have read aloud to my wife twice because it contains so much pertinent information. If one of our relatives could have seen this article ten years ago and followed its recommendations, she probably would not now be dying of cancer of the bones and nerves."

CANCER—"hopes she can prevent it reappearing in her family"

"Before my Mother died of Cancer, I knew absolutely nothing at all of this disease. We always thought of it as some vague, terrifying disease that

⁵ The examiner made no finding with regard to the challenged representation that the advertising represented that the book provided a means of treating and relieving cancer.

you heard of others dying from, but we never realized it could strike in our family also. But since my Mother's death I read every article I can obtain on the subject and hope I can prevent it from ever reappearing in our family again." (CX 9 A,B.)

74. The statements in respondents' advertising that experiments have indicated that certain foods and vitamins will prevent or are effective in preventing the growth of cancer, when read in conjunction with the testimonials of readers, clearly constitute a representation to the public that there is a successful preventive for cancer, which will be found in the book. (FF 12-16, 23-26 *supra*.)

75. Substantially identical statements with regard to cancer were contained in the revised advertising brochure and we conclude, as did the examiner (H. Ex. F. 39, ID p. 1209) that respondents continued to make the representation that the book contained the means to prevent cancer.

76. We find nothing in the advertising with regard to cancer which would suggest to the reader that it contains a means of treating or relieving cancer as charged in the complaint. Accordingly, we conclude that the charge in the complaint that respondents have advertised that the book contains a means of relieving or treating cancer has not been established.

77. The book does not contain a means of preventing cancer. Various experiments and theories are discussed indicating a possible relationship between diet and cancer. However, unlike respondents' advertising, the book itself makes clear the limitations of these theories, ideas and experiments. Suggestions that a particular factor may seem to affect or have a relationship to cancer are offered in light of the results of a particular experiment and not as a panacea for the ailment. The book simply contains a discussion of various theories, experiments and studies reflecting factors believed to influence the development of cancer in individuals and contains recommendations within the framework of these theories as a way to prevent the disease. (CX 1, p. 130, 138-42, 148-53, 158, 159, 165-69, 179, 182, 425, 550-51, 171, 178, 667.) The book explicitly rejects any suggestion that there is a known preventive for cancer. The book states as follows:

* * * [A] great deal more experimentation must be done before we know all the answers concerning cancer and nutrition. (CX 1, pp. 177-78.)

78. Medical testimony established that the exact cause of cancer is not fully known and the only recognized treatment at this time is surgery or radiology (Waldman, Tr. 217; Tschudy, Tr. 391-92;

Brown, Tr. 456). Medical witnesses called by counsel for the respondents did not seriously dispute the testimony presented by complaint counsel's witnesses, and did not support the advertising representations that the book contained the means of preventing cancer. (Randolph, Tr. 650; Green, 729-30.)

79. Accordingly, we conclude that *The Health Finder* does not contain the means to prevent cancer and that the representation in this respect made in respondents' advertising is false, misleading and deceptive.

The Tuberculosis Charge (Comp. Pars. Six (3) and Seven (3))

80. We conclude that respondents' advertising claims challenged in subparagraph Six (3) represent that respondents' book will tell the reader how to prevent, relieve and treat tuberculosis, and that this representation is false, as alleged in subparagraph Seven (3). We further find that the examiner was in error where he found that the challenged representation had not been made in respondents' advertising. (H. Ex. F. 40, ID. pp. 1209-10.)

81. Respondents' advertising brochure, in the "checklist" of subjects discussed includes the statement "the garlic treatment of tuberculosis." (CX 8B.) When viewed in the overall context of respondents' advertising that the book is an "Encyclopedia of Health Information from The Preventative Point of View," the inclusion of reference to tuberculosis in the advertising would be interpreted by readers as offering a means of preventing the disease. (See FF 6-8, *supra*.) Further, in view of the specific language of the advertising describing a "treatment" for the ailment instead of only a preventive, we conclude that respondents' have also represented, that readers who already are suffering from the disease would find a means of treating and relieving the ailment.⁶

82. *The Health Finder* does not contain a means of preventing, treating or relieving tuberculosis. It discusses the findings of an English physician at the turn of the century with regard to how tuberculosis patients in the most hopeless situations were substantially helped by taking garlic. A further study concerning similar success in a New York hospital, was reported in *The North American Journal of Homeopathy* of May, 1914. The exact reason for this alleged beneficial effect of garlic is not clear but appears to be by killing harmful bacteria. *The Health Finder* recommends that the reader add garlic to his diet, but does not suggest it will prevent, treat or relieve tuberculosis. (CX 1, pp. 386-87; 391.)

⁶ Respondents' revised advertising brochure omitted reference to tuberculosis.

Other sections of *The Health Finder*, although not cited in the advertising also refer to tuberculosis and treatment. A new drug allegedly used in New York hospitals for the treatment of tuberculosis which is noted to be a niacin derivative is discussed. According to the author-editor, this indicates the validity of the nutritional approach to the cure of tuberculosis. Since niacin is one of the vitamin B complex, the author-editor suggests the taking of liver and brewers' yeast which are both rich in sources of niacin. In making this recommendation, it is noted:

We cannot at this point tell you that taking liver will cure tuberculosis; but on the basis of this recent medical discovery, it looks as if liver would be a good food to take to insure all around health. (CX 1, p. 453.)

In certain cases, it is noted that sunlight has beneficial effects on tuberculosis patients. (CX 1, p. 810.) These discussions do not purport to offer what respondents' advertising promises, a means of preventing, treating or relieving tuberculosis.

83. Medical witnesses established that tuberculosis is an infectious disease and the only way to be assured of prevention is total isolation from exposure to the virus. (Waldman, Tr. 219; Brown Tr. 457.) Accordingly, nothing in *The Health Finder* would assure the reader of preventing contraction of the disease.

These witnesses agreed that improper diet could increase the body's susceptibility to the disease and to the extent the book's regimen of diet control would aid eliminating diet deficiencies, it would be of value. Dr. Brown also indicated that diet control is a part of the treatment of tuberculosis. This testimony does not establish that good diet alone can prevent, treat and relieve the disease or that *The Health Finder* contains the advertised benefits. (Tr. 220-21.) Respondents' medical witnesses agreed that tuberculosis is spread by a virus (tubercle bacillus). (Cheraskin Tr. 534; Green 729-30.) Neither of respondents' witnesses commented on the garlic treatment for tuberculosis.

84. Accordingly, we conclude that *The Health Finder* does not contain the means to prevent, relieve or treat tuberculosis and that the representations in this respect made in respondents' advertising are false, misleading and deceptive.

The Infantile Paralysis Charge (Comp. Pars. Six (3) and Seven (3))

85. We conclude, as found by the hearing examiner, (H. Ex. F. 41, ID, p. 1210) that respondents' advertising claims challenged in subparagraph Six (3) represent that respondents' book will tell the reader how to prevent infantile paralysis and that this repre-

sensation is false, as alleged in subparagraph Seven (3). We further find that respondents have not advertised as charged in the complaint, that respondents' book will tell the reader how to treat and relieve infantile paralysis.

86. Respondents' advertising brochure made the following references to infantile paralysis:

Diet for children during polio season (pages 623-4-5).

Polio and the diet Dr. Sandler recommended during a North Carolina epidemic. A most interesting article for anyone with children (pages 574-5-6-7-8-9-80).

Food and polio (pages 596-7-8-9).

Infantile paralysis and vitamin B deficiency (pages 625-6-7-8-9).

Polio, its cause and prevention by Dr. Virgil A. David, New York City (pages 599-603 (CX 8B-C)).

The following testimonials were included on infantile paralysis:

POLIO—"every mother should know these astonishing facts"

"The facts about polio and diet are astounding and every mother should know these facts and then judge for herself."

POLIO—"mothers should follow sensible advice"

"Every mother should buy the HEALTH FINDER and follow the excellent sensible advice on polio. This article alone is worth the price of the book."

POLIO—"her fears are gone, doesn't worry any more"

"Before your ideas began to come my way, I was afraid of germs and diseases. Now my fears are gone. I just don't worry about them anymore." (CX 9.)

87. The numerous references to infantile paralysis among the subjects discussed in the book coupled with the testimonials from prior readers, when considered in the overall thrust of the advertising message of offering a means of "prevention," clearly represent that readers of the book will find a means of preventing this disease. (FF 6-8, 12-16 *supra*.) Further, the advertising goes on to state that one doctor has found a means of prevention where it states, "Polio, its cause and prevention by Dr. Virgil A. David." (CX 8-C.) Although we find a representation in respondents' advertising that the book offers a means of prevention, absent specific statements offering "treatment or relief," we conclude that readers would not expect to find in the book other than how to prevent the disease.

88. Substantially identical statements with regard to infantile paralysis were contained in the revised advertising brochure and we conclude, as did the examiner (H. Ex. F. 43 ID p. 1211), that respondents continued to make the representation that the book contained the means to prevent infantile paralysis.

89. The author of the book refused to reach the conclusion of the advertising, that there is a means of preventing poliomyelitis. Extensive discussion is included of various experiments, studies and investigations as to possible causes of the disease. (*E.g.* CX 1, pp. 94-95, 127, 305, 314, 343, 555, 574-651.) In discussing these materials, the book notes the possible relationship between diet and the body's ability to resist the disease. The author further discusses other factors, *i.e.* activity, fatigue and avoidance of certain foods grown with chemical fertilizers. (CX 1, pp. 94-95, 121, 574-84.) The author makes it clear that very little is known about the disease and extensive research is presently in progress. (CX 1, p. 646.) Certain "suggestions" are "offered by the author in the hope of protecting children from poliomyelitis." (CX 1, p. 629.) These include avoidance of certain foods and activity and the inclusion of specified vitamins in the diet. These "suggestions" which are "offered" in the "hope" of helping are a far cry from the advertising representation that the disease can be prevented and the book contains the means of reaching this result.

90. Medical testimony made it clear that the only known and recognized preventive for poliomyelitis is the Salk vaccine which was developed subsequent to the publication of *The Health Finder*. Prior to that time, there was no means of preventing the disease. (Waldman, Tr. 221-23; Tschudy, Tr. 399-400.) Respondents' medical witnesses did not disagree that the Salk vaccine was the only recognized means of preventing the disease. (Cheraskin, Tr. 533-34; Green Tr. 724-25.)

91. Accordingly, we conclude that *The Health Finder* does not contain the means to prevent infantile paralysis and that the representation in this respect made in respondents' advertising is false, misleading and deceptive.

The Heart Disease Charge (Comp. Pars. Six (3) and Seven (3))

92. We conclude as found by the hearing examiner (H. Ex. F. 44, I.D., pp. 1211-12) that respondents' advertising claims challenged in subparagraph Six (3) represent that respondents' book will tell the reader how to prevent, treat or relieve all types of heart disease and that this representation is false as alleged in subparagraph Seven (3).

93. Respondents' advertising brochure contains the following statements with regard to heart disease:

Heart disease and the use of vitamin E. (pages 415-6-7-8-9).

Heart disease and low salt diet (page 415) (CX 8B).

The advertising brochure also contains the following testi-

monials relating to the prevention, treatment and relief of heart disease:

HEART DISEASE—"has struck three of his friends"

"I am sure heart disease will never strike me suddenly, as it has three of my friends in the past few weeks, after having read your article on Heart Disease." (CX 9A.)

HEART DISEASE—"article appeals to coronary sufferer"

"As one who has suffered from coronary trouble, this article very definitely appeals to me, and much more so when I can do things which the doctor said would be disastrous to undertake in my state of health." (CX 9B.)

VITAMIN E—"advice proved to be correct"

"Your advice on Vitamin E for treatment of heart disease and of menopause were eye-openers and proved to be correct after I advised some people to take it."

VITAMIN E—"information worth many times cost"

"My husband has heart trouble and I believe that vitamin E and brewer's yeast has helped him more than anything he has ever used. His heart used to pound so hard while sleeping, but it doesn't any more and he doesn't tire so easily. That alone is worth many, many times the price of the book." (CX 9C.)

94. The advertising does more than offer only a means of prevention. In testimonials, although reference is made to the preventive benefits, further statements are included which represent that the book will treat or relieve the condition. One testimonial reads, "as one who *has suffered* from coronary trouble, this article very definitely appeals to me." (Emphasis added.) Another reads, "my husband *has heart* trouble and I believe that Vitamin E and brewer's yeast *has helped him* more than anything he has ever used. His heart used to pound so hard while sleeping but it doesn't any more and he doesn't tire so easily" (CX 9, emphasis added). These statements clearly constitute a representation that the information contained in the book would not only provide a means of prevention, but also provide a means of treating and relieving the disease to those who are already suffering from it.--(FF 6-8, 12-16, *supra*.)

95. Substantially identical statements with regard to heart disease were contained in the revised advertising brochure and we conclude, as did the examiner (H. Ex. F. 46 ID p. 1213), that respondents continued to make the representation that the book contained the means to prevent, relieve and treat all kinds of heart disease.

96. *The Health Finder* does not offer a means of preventing, treating or relieving heart disease. Instead, it discusses various factors such as diet, obesity, exposure to certain substances in the atmosphere, lack of exercise, cholesterol, and vitamin deficiencies

which experiments and study have indicated have a relationship to heart disease (CX 1, pp. 25, 194, 330, 415-21, 551, 896, 900). Based on these various studies and experiments the author concludes and recommends that great care should be exercised in the diet, certain types of activity should be curtailed, and certain exposures avoided. For example, the author discusses experiments with vitamin E. He concludes that these experiments "may" be the key to the control of hardening of the arteries. (CX 1, p. 418.) In conclusion, the author recommends certain foods or diet supplements which he suggests will "improve your condition" or if you are now healthy, you can be "reasonably certain your heart and blood vessels will continue to function without any signs of disorder for years to come." (CX 1, p. 421.) This does not purport to provide what the advertising clearly represents, a means of preventing, treating or relieving the disease.

97. Complaint counsel's witness testified that the regimen of good diet recommended by *The Health Finder* is essentially part of that which is prescribed as part of the treatment of most heart ailments. However, there are certain heart difficulties which are not amenable to diet therapy, those caused by congenital heart defects and certain diseases. In those instances, the only effective relief or treatment is surgery and/or drugs. (Criscitiello Tr. 152; Waldman Tr. 216-17; Finnerty; Tr. 300.)

Diet manipulation is prescribed as a part of the therapy for most heart patients, but is accompanied by other medication, primarily drugs. The discrepancy between what is represented in the advertising and what *The Health Finder* provides is that the therapy in the book is incomplete, does not apply to *all* types of ailments and only prescribes part of the necessary treatment. (Criscitiello Tr. 155; 175; Finnerty Tr. 294.)

Respondents' witness did not disagree with the evidence presented by complaint counsel, merely reiterating that the ideas suggested by the book would be of value to the reader. (Wolffe Tr. 806-08.) We do not consider this testimony as establishing that the book would provide the means of preventing, treating or relieving all types of heart diseases as represented by the advertising.

98. Accordingly, we conclude that *The Health Finder* does not contain the means to prevent, treat or relieve all types of heart disease and that the representation in this respect made in respondents' advertising is false, misleading and deceptive.

The Arthritis Charge (Comp. Pars. Six (3) and Seven (3))

99. We conclude that respondents' advertising claims challenged

in subparagraph Six (3) represent that respondents' book will tell the reader how to prevent, treat and relieve arthritis and that this representation is false as alleged in subparagraph Seven (3). Further, we find that the examiner was in error where he found that respondents advertising contained no assurance of a preventive or cure of the ailment. (H. Ex. F. 48, ID pp. 1213-14.)

100. Respondents utilized the following specific statements relating to arthritis:

How one Massachusetts doctor treats arthritis successfully (pages 58-9) (CX 8B).

What part does emotional stress play in arthritis? (page 58) (CX 8D).

Further, the advertising brochure set forth the following testimonial:

ARTHRITIS—"article worth many times what book costs"

"This article is worth many times the price paid for the book. I always thought food caused it all, but now I realize what the real cause was." (CX 9A.)

101. Respondents' advertising when viewed in the context of the overall advertising message is susceptible to the interpretation that it represents that *The Health Finder* states the real cause of arthritis and that at least one doctor has treated arthritis successfully. We believe that a representation respecting the real cause of a disease is tantamount in the reader's mind to a representation that the disease can be prevented. Moreover, reference to successful treatment clearly implies that by reading the book the reader will learn of a successful relief and treatment of arthritis. Thus, we conclude that respondents' advertising does represent as the complaint alleges that readers of *The Health Finder* will be enabled to prevent, treat and relieve arthritis. (See FF 6-8, 12-16, *supra*.)

102. Substantially identical statements with regard to arthritis were contained in the revised advertising brochure and we conclude, as did the examiner (H. Ex. n. 21 ID p. 1214) that respondents continued to make the representation that the book contained the means to prevent, treat and relieve arthritis.

103. We also conclude that this representation is false and misleading since an examination of the contents of *The Health Finder* makes it quite clear that arthritis is not susceptible to any single cure or treatment. *The Health Finder* section entitled "Arthritis" consists of an excerpt from a reported study of Dr. Loring Swain of Boston, in 1945, in which he noted the relationship between arthritis sufferers and inadequate diet and emotional disturbances.

His treatment of arthritis was by rest, diet supplement to provide for vitamin deficiencies in iron, and efforts to improve the mental attitude of the patient through pleasant surroundings, activity and appetizing meals. Dr. Swain stresses the emotional element as one of the most important to the treatment and/or prevention of arthritis and recommends that patients avoid conflicts and stress in their daily life (CX 1, pp. 58-61). In other sections of *The Health Finder* there are discussions of the benefits to arthritis of cortisone treatment (CX 1, p. 286), the benefits of folic acid, a Vitamin B complex (CX 1, pp. 366-7) and the benefits of eating sunflower seeds as a source of needed vitamins. *The Health Finder* also cites a study indicating that the consumption of cherries eliminates the uric acid in the bloodstream which is thought to cause gout and which is stated by the book to be related to arthritis. This report was based on a study of twelve patients and the doctor conducting the tests "apologized for the unsatisfactory clinical data and laboratory data and control." (CX 1, p. 61.)

A reading of *The Health Finder* on the subject of arthritis does not support the truth of respondents' advertisting claims that the book deals with any overall preventive or single cure or treatment for arthritis. The book in no way constitutes a representation that all types of arthritis can be successfully prevented, relieved or treated or that the real cause of arthritis is clearly or completely understood by the medical profession. On the contrary, the book contains no such sweeping representation but confines its discussion on arthritis to different treatments which have been used and studies by various persons. The very diversity of the book's discussion makes clear that there is no blanket representation that followers of the book's suggestions will in fact prevent, find relief for or learn about effective treatment for arthritis.

104. Complaint counsel's witnesses all testified that there is no known preventive or permanent treatment for arthritis and in their opinion, there is no known significant connection between mental hygiene and arthritis although the overall mental condition of a patient is always a factor in every disease or ailment as is good nutrition. (Waldman Tr. 223; Tschudy, Tr. 401; Brown Tr. 462.)

Respondents' own witness while agreeing that the mental status of the patient is important in every instance, did not agree with the author as to even the evidence of any relationship between emotional factors and arthritis. (Randolph Tr. 648.)

105. Accordingly, we conclude that *The Health Finder* does not contain the means to prevent, treat or relieve arthritis and that

the representation in this respect made in respondents' advertising is false, misleading and deceptive.

The Mental Illness Charge (Comp. Pars. Six (3) and Seven (3))

106. We conclude that respondents' advertising claims challenged in subparagraph Six (3) represent that respondents' book will tell the reader how to prevent mental illness and that this representation is false as alleged in subparagraph Seven (3). We find that the examiner was in error where he found that respondents' advertising contained no assurance of a preventive for mental illness. (H. Ex. F. 50, ID, pp. 1214-15.) We further find that respondents have not advertised as charged in the complaint that respondents' book will tell the reader how to treat and relieve mental illness.

107. Respondents' advertising brochure contains the statement under the check list of subjects discussed "Nutrition and Mental Health" (CX 8B). The following testimonials were also set forth:

MENTAL HEALTH—"this article is a must for everyone"

"This article is a must for everyone. I believe that this article would act as a preventative for many so-called neuroses."

MENTAL HEALTH—"teacher says her pupils would benefit"

"Being a teacher I know some of my pupils would benefit greatly with the addition of Vitamin B Complex to their diet." (CX 9.)

Generalized statements were also made in the text of the advertising brochure which relate to mental health. These statements are as follows:

Mr. Rodale believes that by observing certain health rules *we can develop* bodies, *minds, nerves*, muscles and tissues that are more resistant to disease than they otherwise would be. (Italic supplied, CX 8 B-C.)

And the HEALTH FINDER can be valuable to you in another way. It can give you *peace of mind*—a rare feeling these days, when headlines tell us every day of the heavy toll being taken in all walks of life by all kinds of dreadful diseases.

The HEALTH FINDER gives you peace of mind by showing you how perfectly natural it is for you to enjoy that most precious of all possessions—GOOD HEALTH! (CX 8C.)

108. The reference to "Nutrition and Mental Health," as one of the subjects discussed, is coupled with the testimonial asserting that the article referred to "would act as a preventive for many so called neuroses," and when read in the overall context of respondents' advertising, that the book offers information from the "preventive point of view," would clearly imply to the reader that he would find in the book a means of preventing mental illness. (See FF 6-8, 12-22, *supra*.) We do not interpret respondents' adver-

tising as offering, as alleged in the complaint, a means of treating or relieving mental illness.

109. Substantially identical statements with regard to mental illness were contained in the revised advertising brochure, and we conclude that respondents continued to make the representation that the book contained the means to prevent mental illness. (CX 10.)

110. The discussion on mental illness in *The Health Finder* is very limited. In general, it recommends a basic healthful diet to insure necessary vitamins and minerals from natural sources, and shunning foods which are poisonous. The book discusses the effect of a vitamin B deficiency on the body, and experiments are reported where monkeys suffered brain deterioration from a diet with vitamin B deficiency. *The Health Finder* also asserts that one of the most significant problems in the field of mental illness today is that of devitalized diets (CX 1, p. 473). The book makes no suggestion that diet deficiency is the only cause, but concludes that we are "eating ourselves into incompetency." (*Ibid.*) Based on these experiments and studies, a diet rich in vitamin B is recommended. (CX 1, p. 475.)

Unlike the advertising the discussion on mental illness in the book does not suggest that professional care is unnecessary. To the contrary, it cites psychiatric theories that mental illness is a problem at all levels of society, in all stages of our life and more important at all ages and should be considered a problem in childhood as well as thereafter. (CX 1, pp. 471-75.) We do not find in the book's discussion of mental illness a means of prevention as represented in the advertising.

111. Medical evidence presented by complaint counsel established that *The Health Finder* overemphasized the importance of nutrition in mental health and that following a good diet would not assure the reader of preventing mental illness (Brown, Tr. 465-66). Although diet deficiency is sometimes a factor in mental illness and Vitamin B deficiency in particular is a factor in certain types, this does not mean mental illness can be prevented by including such vitamins in the diet. (Brown, Tr. 466.)

112. Accordingly, we conclude that *The Health Finder* does not contain the means to prevent mental illness and that the representation in respondents' advertising in this respect is false, misleading and deceptive.

Pamphlet Advertising Charge (Comp. Pars. Eight, Nine and Ten)

113. We conclude, as found by the hearing examiner (H. Ex. FF.

51-53, ID, pp. 1215-16) that respondents' advertising claims challenged in Paragraphs Eight and Nine represent that respondents' pamphlet *How To Eat For A Healthy Heart and This Pace Is Not Killing Us* will tell the reader how to prevent, treat and relieve all types of heart disease and that this representation is false as alleged in Paragraph Ten.

114. Respondents' advertising for the pamphlet, set forth in detail in Finding 10, *supra*, advises the reader that "Mr. Rodale has had a heart condition for 16 years * * * [he] has enjoyed buoyant health * * * by following the same advice he now gives you in" the pamphlet. (CX 11.) "If you have heart symptoms, you won't want to miss this amazing book. But please remember that the emphasis in Mr. Rodale's teachings is always on the prevention of disease—so even if you have a healthy heart now, this book may help you keep it that way." (*Ibid.*)

When viewed in the overall context of the advertising materials in which respondents' pamphlet was promoted (See FF. 6-8, 10, *supra*), the clear import of the advertising relating to the pamphlet, is that information contained therein would provide the reader with a means of preventing, treating and relieving all types of heart disease. The failure of respondents to specifically use the word "all" in its advertising does not preclude our finding that such representation was in fact made. Absent a disclosure or disclaimer in the advertising that certain types of heart ailments are not amenable to prevention or to treatment or relief by the information contained in the pamphlet, the reader would expect that respondents' publication was all inclusive. (See F. 25, *supra*.)

115. The pamphlet discussion of heart disease is substantially a reiteration of the section of *The Health Finder* on this disease (Tr. 153). The section of the pamphlet entitled *How To Eat For A Healthy Heart* discusses various studies which indicate there is a relationship between heart disease and what you eat.—(CX 2.) Although stressing the apparent importance of various foods and vitamins, the discussion is in the format of setting forth findings and not drawing absolute conclusions indicating that consumption of the enumerated substances will prevent, treat or cure heart disease. The discussion makes affirmative recommendations with regard to diet but in the vein the suggested regimen *may* be of value, not in the absolute language of the advertising.

The second section of the pamphlet, *This Pace Is Not Killing Us* discusses the relationship to physical exertion and the incidence of heart disease observing that the sedentary life can be as dangerous as one of stress and pressure. In conclusion, the publica-

tion stresses the benefit that innures from an active body coupled with adequate diet. Again the discussion is not phrased as suggesting that therapy will prevent, treat or cure all types of heart disease. The publication does precisely the opposite. In discussing the activities and regimen he followed after a heart attack, he observes:

Not every heart case will be permitted to do what I have done. The physician must be the judge. Mine may be the ideal form of heart disease for this method of treatment. But there are more serious cases, and I would urge extreme caution. There are leaking hearts and oversized hearts. There are hearts damaged in various ways, and some that have had thrombosis or blood clots. These people must depend on their physicians' guidance. (CX 2, p. 90.)

It is clear that respondents' pamphlet does not purport to provide an all inclusive means of preventing, treating or curing all types of heart disease.

116. Medical witnesses discussing the prevention, relief and treatment of heart disease (Discussed in detail at F 97, *supra*), although agreeing that diet and exercise are of value in prevention and to some degree in treatment, were of the opinion that there are certain types of heart disease where the cause was congenital or organic. For these types, diet alone was insufficient and exercise would not offer any significant preventive value. (Finnerty, Tr. 294-95; Waldman, Tr. 300-315.) Respondents' evidence did not contradict this and consisted primarily of showing that diet is a very important part of the therapy of all heart disease cases, and that numerous governmental agencies, private foundations and similar organizations in materials they disseminate urge diet manipulation as a means reducing the incidence of the disease. (Wolffe Tr. 806-08.) This does not establish that the pamphlet has been advertised truthfully. To the contrary, this evidence does no more than establish that many ideas in the pamphlet are of value in certain instances and in a few types of heart ailments.

117. Accordingly, we conclude that the pamphlet, *How To Eat For A Healthy Heart and This Pace Is Not Killing Us* does not contain the means to prevent, treat or relieve all types of heart disease and that the representations in this respect made in respondents' advertising are false, misleading and deceptive.

Injury to Competition Charge

118. The use by respondents of the foregoing false, misleading and deceptive statements and representations has had, and now has, the tendency and capacity to mislead and deceive members

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of the purchasing public into the erroneous and mistaken belief that such statements were and are true, and to enter into contracts for respondents' products because of such erroneous and mistaken belief. As a result thereof, substantial trade in commerce has been, and is now being, unfairly diverted to respondents from their competitors and substantial injury has been, and is being, done to competition in commerce among and between the various States of the United States and in the District of Columbia. (See F. 4, *supra*.)

GENERAL CONCLUSIONS

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents.
2. The proceeding is in the public interest.
3. The aforesaid acts and practices of respondents, as herein found, were and are all to the prejudice of and injurious to the public and 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.

ORDER

It is ordered, That Rodale Press, Inc., and its officers, and Rodale Books, Inc., and its officers, and Jerome I. Rodale and Robert Rodale, individually and as officers of said corporations, and respondents' representatives, agents and employees, directly or through any corporate or other device in connection with the offering for sale, sale or distribution of books or other publications, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

- (1) Representing in advertising, directly or by implication that:

A. Readers of the book *The Health Finder* and any subsequent editions thereof whether sold under that name or any other name will:

- (a) Add years to their lives;
- (b) Gain more energy;
- (c) Effectuate savings on medical and dental expenditures;
- (d) Feel better than ever before;
- (e) Prevent the common cold;

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- (g) Prevent or cure all types of constipation;
- (h) Prevent ulcers;
- (i) Prevent fatigue;
- (j) Prevent goiter;
- (k) Prevent high blood pressure;
- (l) Prevent cancer;
- (m) Prevent, treat or relieve tuberculosis;
- (n) Prevent infantile paralysis;
- (o) Prevent, relieve or treat all types of heart disease;
- (p) Prevent, relieve or treat arthritis;
- (q) Prevent mental illness;

B. *The Health Finder* and any subsequent editions thereof whether sold under that name or any other name contains the answer to all health problems;

C. The publication, *How To Eat For A Healthy Heart* and *This Pace Is Not Killing Us*, and any subsequent editions whether offered for sale under this name or any other name, will be of benefit in the prevention, treatment or cure of heart disease, unless the specific benefit contained in the book is disclosed in the advertising together with any qualifications and reservations stated in the publication;

D. *The Health Finder*, *How To Eat For A Healthy Heart*, *This Pace Is Not Killing Us*, or any subsequent editions thereof, whether sold under said names or any other name or names, will enable the reader to prevent, treat or relieve any stated disease or health problem, without clearly and conspicuously disclosing in the advertising any limitations and/or qualifications of the regimen which is contained in the book.

It is further ordered, That respondents shall file within 60 days after service upon it of this order, 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 set forth herein.

Commissioner Elman dissented and has filed a dissenting opinion. Commissioner MacIntyre concurred in the result only and has filed a separate statement.

Complaint

IN THE MATTER OF

STANDARD TOYKRAFT, INC., DOCKET NO. C-1217*

CONSENT ORDERS, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT*Complaints, June 22, 1967—Decisions, June 22, 1967*

Consent orders requiring ten different toy manufacturers to cease using deceptive over-sized containers to package specific toy products.

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 each of the respondents named in the caption hereof, and hereinafter more particularly designated and described, has 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 Standard Toykraft, Inc., Docket No. C-1217, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 95 Lorimer Street, Brooklyn, New York.

Respondent Pressman Toy Corporation, Docket No. C-1218, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 1107 Broadway, New York, New York.

Respondent Remco Industries, Inc., Docket No. C-1219, 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 Cape May Street, Harrison, New Jersey.

Respondent Avalon Manufacturing Corporation, Docket No. C-1220, is a corporation organized, existing and doing business

* And the following cases: Pressman Toy Corporation, Docket No. C-1218; Remco Industries, Inc., Docket No. C-1219; Avalon Manufacturing Corporation, Docket No. C-1220; H. Davis Toy Corp., Docket No. C-1221; Lisbeth Whiting Co., Inc., Docket No. C-1222; Hassenfeld Bros., Inc., Docket No. C-1223; E. S. Lowe Company, Inc., Docket No. C-1224; Ideal Toy Corporation, Docket No. C-1225; Kohner Bros., Inc., Docket No. C-1226.

Similar complaints and orders were consolidated by the compiler.

under and by virtue of the laws of the State of New York, with its principal office and place of business located at 128 Middleton Street, Brooklyn, New York.

Respondent H. Davis Toy Corp., Docket No. C-1221, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 461 Frelinghuysen Avenue, Newark, New Jersey.

Respondent Lisbeth Whiting Co., Inc., Docket No. C-1222, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 179-30 93rd Avenue, Jamaica, New York.

Respondent Hassenfeld Bros., Inc., Docket No. C-1223, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Rhode Island, with its principal office and place of business located at 1027 Newport Avenue, Pawtucket, Rhode Island.

Respondent E. S. Lowe Company, Inc., Docket No. C-1224, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 27 West 20th Street, New York, New York.

Respondent Ideal Toy Corporation, Docket No. C-1225, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 184-10 Jamaica Avenue, Hollis, New York.

Respondent Kohner Bros., Inc., Docket No. C-1226, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 1 Paul Kohner Place, P. O. Box 294, East Paterson, New Jersey.

PAR. 2. Each of the respondents is now, and for some time last past has been, engaged in the advertising, offering for sale, sale and distribution of toy products to jobbers and retailers for resale to the public.

PAR. 3. In the course and conduct of its business, each of the respondents now cause, and for some time last past has caused, its said products, when sold, to be shipped from the corporate place of business to purchasers thereof located in various other States of the United States, and maintains, and at all times mentioned herein has maintained, a substantial course of trade in said

products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Among the products which are offered for sale and sold by respondent, Standard Toykraft, Inc., Docket No. C-1217, is one which is identified by the name "Petal Craft." Two photographs illustrating the manner in which this product is packaged and labeled are annexed hereto, marked "Fig. 1" and "Fig. 2," and are incorporated herein by reference.*

Among the products which are offered for sale and sold by respondent, Pressman Toy Corporation, Docket No. C-1218, is one which is identified by the name "Loomatic." Three photographs illustrating the manner in which this product is packaged and labeled are annexed hereto, marked "Fig. 1," "Fig. 2" and "Fig. 3," and are incorporated herein by reference.*

Among the products which are offered for sale and sold by the respondent, Remco Industries, Inc., Docket No. C-1219, is one which is identified by the name "Chemistry Science Kit." A photograph illustrating the manner in which this product is packaged and labeled is annexed hereto, marked "Fig. 1," and is incorporated herein by reference.*

Among the products which are offered for sale and sold by respondent, Avalon Manufacturing Corporation, Docket No. C-1220, is one which is identified by the name "Paint on Color Velvet." Two photographs illustrating the manner in which this product is packaged and labeled are annexed hereto, marked "Fig. 1" and "Fig. 2," and are incorporated herein by reference.*

Among the products which are offered for sale and sold by respondent, H. Davis Toy Corp., Docket No. C-1221, is one which is identified by the name "Barrettes." Three photographs illustrating the manner in which this product is packaged and labeled are annexed hereto, marked "Fig. 1," "Fig. 2" and "Fig. 3," and are incorporated herein by reference.*

Among the products which are offered for sale and sold by the respondent, Lisbeth Whiting Co., Inc., Docket No. C-1222, is one which is identified by the name "Bingle Bangle Hat." Two photographs illustrating the manner in which this product is packaged and labeled are annexed hereto, marked "Fig. 1" and "Fig. 2," and are incorporated herein by reference.*

Among the products which are offered for sale and sold by respondent, Hassenfeld Bros., Inc., Docket No. C-1223, is one which is identified by the name "Mary Poppins." Three photo-

* Pictorial illustrations were omitted in printing.

graphs illustrating the manner in which this product is packaged and labeled are annexed hereto, marked "Fig. 1," "Fig. 2" and "Fig. 3," and are incorporated herein by reference.*

Among the products which are offered for sale and sold by respondent, E. S. Lowe Company, Inc., Docket No. C-1224, is one which is identified by the name "Hoodwink." Two photographs illustrating the manner in which this product is packaged and labeled are annexed hereto, marked "Fig. 1" and "Fig. 2," and are incorporated herein by reference.*

Among the products which are offered for sale and sold by respondent, Ideal Toy Corporation, Docket No. C-1225, is one which is identified by the name "Snoop." Three photographs illustrating the manner in which this product is packaged and labeled are annexed hereto, marked "Fig. 1," "Fig. 2" and "Fig. 3" and are incorporated herein by reference.*

Among the products which are offered for sale and sold by respondent, Kohner Bros., Inc., Docket No. C-1226, is one which is identified by the name "Doll Craft." Two photographs illustrating the manner in which this product is packaged and labeled are annexed hereto, marked "Fig. 1" and "Fig. 2," and are incorporated herein by reference.*

PAR. 5. By and through the use of the aforescribed method of packaging, each of the respondents represents, and places in the hands of others the means and instrumentalities by and through which they may represent, directly or by implication, that the volume of the net contents is commensurate with the capacity of the external container.

PAR. 6. In truth and in fact, the volume of the net contents is not commensurate with the capacity of the external containers. On the contrary, the capacity of the external containers is substantially in excess of the actual volume of the net contents, thereby creating the mistaken impression that the purchasers of said products are in fact receiving more than is actually the case.

Therefore, the method of packaging referred to in Paragraphs Four and Five hereof was and is false, misleading and deceptive.

PAR. 7. In the conduct of its business, at all times mentioned herein, each of the respondents has been in substantial competition, in commerce, with corporations, firms and individuals in the sale of toy products of the same general kind and nature.

PAR. 8. The use by each of the respondents of the aforesaid

* Pictorial illustrations were omitted in printing.

false, misleading and deceptive method of packaging has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that the quantum or amount of the products being sold was and is greater than the true such quantum or amount, and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

PAR. 9. The aforesaid acts and practices of each of the 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 and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of each of the respondents named in the caption hereof, and each of the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Deceptive Practices proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge each of the respondents with violation of the Federal Trade Commission Act; and

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

The Commission, having reason to believe that each of the respondents has violated the Federal Trade Commission Act, and having determined that complaint should issue stating its charges in that respect, hereby issues its complaints, accepts said agreements, makes the following jurisdictional findings, and enters the following orders:

1. Respondent Standard Toykraft, Inc., Docket No. C-1217, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 95 Lorimer Street, Brooklyn, New York.

- Respondent Pressman Toy Corporation, Docket No. C-1218, is

a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 1107 Broadway, New York, New York.

Respondent Remco Industries, Inc., Docket No. C-1219, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at Cape May Street, Harrison, New Jersey.

Respondent Avalon Manufacturing Corporation, Docket No. C-1220, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 128 Middleton Street, Brooklyn, New York.

Respondent H. Davis Toy Corp., Docket No. C-1221, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 461 Frelinghuysen Avenue, Newark, New Jersey.

Respondent Lisbeth Whiting Co., Inc., Docket No. C-1222, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 179-30 93rd Avenue, Jamaica, New York.

Respondent Hassenfeld Bros., Inc., Docket No. C-1223, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Rhode Island, with its office and principal place of business located at 1027 Newport Avenue, Pawtucket, Rhode Island.

Respondent E. S. Lowe Company, Inc., Docket No. C-1224, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 27 West 20th Street, New York, New York.

Respondent Ideal Toy Corporation, Docket No. C-1225, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 184-10 Jamaica Avenue, Hollis, New York.

Respondent Kohner Bros., Inc., Docket No. C-1226, is a corporation organized, existing and doing business under and by

virtue of the laws of the State of New York, with its office and principal place of business located at 1 Paul Kohner Place, P.O. Box 294, East Paterson, New Jersey.

2. The Federal Trade Commission has jurisdiction of the subject matter of these proceedings and of the respondents, and the proceedings are in the public interest.

ORDER

It is ordered, That each of the respondents named in the caption hereof, and its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of the toy product identified by name in Appendix A, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Packaging said product in a retail container of a size or capacity in excess of that required solely by the physical dimensions of the merchandise itself: *Provided, however*, That it shall be a defense in any enforcement proceeding instituted hereunder for the respondent to establish either:

(a) That retail purchasers, at the time of sale, are as fully aware of the disparity which exists between the size or capacity of the container and the physical dimensions of the merchandise as they would be if the container and the merchandise were displayed side-by-side; or

(b) That the container being employed is not larger in size or capacity than is necessary for the efficient packaging of the merchandise contained therein, and respondent has made all reasonable efforts to prevent any misleading appearance or impression from being created by such container.

2. Providing wholesalers, retailers or other distributors of said product with the means and instrumentalities by and through which they may mislead the purchasing public in the manner described in Paragraph (1) above.

It is further ordered, That each of the respondents herein shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this order.

1300

FEDERAL TRADE COMMISSION DECISIONS

Complaint

71 F.T.C.

APPENDIX A

- (C-1217) Standard Toykraft, Inc., "Petal Craft."
 - (C-1218) Pressman Toy Corp., "Loomatic."
 - (C-1219) Remco Industries, Inc., "Chemistry Science Kit."
 - (C-1220) Avalon Manufacturing Corp., "Paint on Color Velvet."
 - (C-1221) H. Davis Toy Corp., "Barrettes."
 - (C-1222) Lisbeth Whiting Co., Inc., "Bingle Bangle Hat."
 - (C-1223) Hassenfeld Bros., Inc., "Mary Poppins."
 - (C-1224) E. S. Lowe Co., Inc., "Hoodwink."
 - (C-1225) Ideal Toy Corp., "Snoop."
 - (C-1226) Kohner Bros., Inc., "Doll Craft."
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