

Complaint

87 F.T.C.

IN THE MATTER OF

STEWART FROST, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT*Docket 9021. Complaint,* Mar. 1, 1976—Decision, Mar. 1, 1976*

Consent order requiring a New York City seller and distributor of a weight and body-reducing kit, among other things to cease misrepresenting that any product or services for the treatment of obesity which utilizes a body wrapping device will result in any loss of weight or permanent reduction in any part of the body or that such products may be used by all persons without danger of any resulting physical harm or injury. Further, respondents are required to place a cautionary statement regarding the use of such products in all advertising and promotional material and on all packaging.

Appearances

For the Commission: *David I. Paul* and *Harriet G. Mulhern*.

For the respondents: *Sheldon S. Lustingman, Bass & Ullman*, New York City.

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 Stewart Frost, Inc., a New York corporation, Stuart Frost, Inc., a New Jersey corporation, and Alvin Meyer and Elaine Nelson, individually and as officers of said corporations, and Trim-A-Way Figure Contouring, Ltd., a corporation and Sam Bernard, individually and as an officer of said corporation, hereinafter sometimes referred to as respondents, have violated Sections 5 and 12 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 Stewart Frost, Inc., a New York corporation, 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 551 Fifth Ave., New York, N.Y.

Respondent Stuart Frost, Inc., a New Jersey corporation, is a corporation organized, existing and doing business under and by virtue

* Reported as modified.

of the laws of the State of New Jersey, with its principal office and place of business located at 485-511 Main St., Fort Lee, New Jersey.

Respondents Alvin Meyer and Elaine Nelson are individuals and officers of the corporate respondents. They formulate, direct and control the policies, acts and practices of the corporate respondents, including the acts and practices hereinafter set forth. Their business address is c/o Merlite Industries, Inc., 114 Fifth Ave., New York, New York.

PAR. 2. Respondent Trim-A-Way Figure Contouring, Ltd. is a corporation organized and existing under and by virtue of the laws of the State of New York with its principal office and place of business located at 658 Central Ave., Scarsdale, New York.

Respondent Sam Bernard is an individual and an officer of Trim-A-Way Figure Contouring, Ltd. He formulates, directs and controls the policies, acts and practices of said corporate respondent, including the acts and practices hereinafter set forth. His address is the same as that of said corporation.

PAR. 3. Respondents Stewart Frost, Inc., a New York corporation, Stuart Frost, Inc., a New Jersey corporation, and Alvin Meyer and Elaine Nelson are now, and for some time last past have been engaged in the advertising, offering for sale, sale and distribution to the public of Slim-Quik, a weight and body reducing kit, consisting of gauze pads, a special solution and an elastic bandage, which purports to reduce body and weight measurements. Slim-Quik is a "device" as this term is defined in Section 12 of the Federal Trade Commission Act. Directions for using this device call for the pads to be soaked in the solution and placed on portions of the body by tightly wrapping them with the elastic bandage.

PAR. 4. Trim-A-Way Figure Contouring, Ltd. and Sam Bernard have granted to Stewart Frost, Inc., a New York corporation, Stuart Frost, Inc., a New Jersey corporation, and Alvin Meyer and Elaine Nelson a license to manufacture and market the solution and test results previously utilized by respondents Trim-A-Way Figure Contouring, Ltd. and Sam Bernard. Respondents Trim-A-Way Figure Contouring, Ltd. and Sam Bernard receive a royalty payment for each bottle of solution sold by said corporations and Alvin Meyer and Elaine Nelson and have made available to said respondents under such license all advertisements and test reports previously used by respondents Trim-A-Way Figure Contouring, Ltd. and Sam Bernard.

COUNT I

Alleging violation of Sections 5 and 12 of the Federal Trade

Commission Act, the allegations of Paragraphs One and Three are incorporated by reference in Count I as if fully set forth verbatim.

PAR. 5. In the course and conduct of their business, respondents have disseminated and caused to be disseminated certain advertisements and promotional material concerning the Slim-Quik device, including but not limited to those provided by respondents Trim-A-Way Figure Contouring, Ltd. and Sam Bernard by various means to individuals in various States of the United States, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act. These advertisements and promotional materials have been disseminated for the purpose of inducing, and with the likelihood of inducing, directly or indirectly, the purchase of Slim-Quik. At all times mentioned herein respondents maintain and have maintained a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 6. Typical and illustrative of the statements in said advertisements and promotional materials, but not all inclusive thereof, are the following:

* * *you can now lose inch after inch after inch from your stomach and waist, thighs, buttocks or arms* * *.

* * * * *

* * *with the sure knowledge that it's absolutely safe, that you can honestly expect astonishing results* * *"

* * * * *

And men, if you use this wrap on your stomach and waist, you can expect to temporarily take off up to 4 inches in all* * *.

* * * * *

* * *I temporarily lost 7 1/2 inches from my waist, hips and thighs all together* * *.

* * * * *

In addition, some of the above statements are accompanied by depictions and representations on television purporting to represent "before" and "after" illustrations of the beneficial reducing results which can be achieved by using the Slim-Quik device.

PAR. 7. By and through the use of said statements and others of similar import and meaning, but not expressly set out herein, respondents have represented, and are now representing, directly or by implication, that:

1. Slim-Quik will reduce the size of portions of the body without the necessity of dieting or exercise.

2. The changes in body configuration depicted in the "before" and "after" illustrations used in respondents' television presentation will be achieved by all persons using respondents' Slim-Quik device.

3. Respondents' Slim-Quik device is absolutely safe for use by all persons.

PAR. 8. In truth and in fact:

1. Slim-Quik will not reduce the size of portions of the body without the necessity of dieting or exercise.

2. The changes in body configuration depicted in the "before" and "after" illustrations used in respondents' television presentation will not be achieved by all persons using respondents' Slim-Quik device. To the contrary, in order to achieve any weight loss or change in body configuration of significant duration most persons must follow a program of diet and exercise. This is a material fact which, if disclosed to a prospective purchaser, would be likely to affect his or her decision whether or not to purchase such device.

3. Respondents' Slim-Quik device is not absolutely safe for all persons but, to the contrary, may cause injury to individuals with diabetes, varicose veins, phlebitis, or other circulatory problems. This is a material fact which, if disclosed to a prospective purchaser, would be likely to affect his or her decision whether or not to purchase such device.

PAR. 9. Respondents' advertisements and promotional materials have the tendency and capacity to mislead the public into believing obese people can use the Slim-Quik device and method and expect to rid themselves of dangerous and unsightly fat tissue.

In truth and in fact, in order to achieve any weight loss or change in body configuration most persons must follow a program of diet and exercise.

PAR. 10. Respondents' advertisements and promotional materials have the tendency and capacity to exploit people who are obese and who are vulnerable to the influence of advertisements and promotional materials which extend the hope of easily ridding themselves of fatty tissue without a regulated diet and a program of exercise.

As a consequence of respondents' false and misleading acts and practices, obese persons may be, and are induced to forego proper medical treatment, thereby worsening or exposing themselves to the problems which commonly accompany obesity including, but not limited to, diabetes, circulatory problems and heart disease.

PAR. 11. Therefore, the advertisements and other statements and respondents' failure to disclose material facts referred to in Paragraphs Five, Nine and Ten, and set forth in Paragraphs Six and Seven, were and are false, misleading and deceptive in material respects and

constituted, and now constitute, "false advertisements" as that term is defined in the Federal Trade Commission Act.

PAR. 12. The respondents' use of the aforesaid false, misleading and deceptive statements and representations and their failure to disclose material facts, as aforesaid has had, and now has, the tendency and capacity to mislead and deceive members of the public into the erroneous and mistaken belief that said statements were, and are, true and complete, and to induce members of the public to purchase substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

PAR. 13. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents have been, and are now in substantial competition in or affecting commerce with corporations, firms and individuals who sell products of the same kind and nature as those sold by respondents.

PAR. 14. The aforesaid alleged acts and practices of respondents Stewart Frost, Inc., a New York corporation and Stuart Frost, Inc., a New Jersey corporation, and Alvin Meyer and Elaine Nelson, 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 or affecting commerce in violation of Sections 5 and 12 of the Federal Trade Commission Act.

COUNT II

Alleging violation of Sections 5 and 12 of the Federal Trade Commission Act, the allegations of Paragraphs Two and Four hereof are incorporated by reference in Count II as if fully set forth verbatim.

PAR. 15. In the course and conduct of their business as aforesaid, respondents, as licensors, now cause and for some time last past have caused their weight and body reducing products and method, product test results, promotional and advertising materials, testimonials and efficacy claims to be made available for use pursuant to the license agreements with Stewart Frost, Inc., a New York corporation, Stuart Frost, Inc., a New Jersey corporation, Alvin Meyer and Elaine Nelson; and furthermore have retained the right to approve and disapprove any and all advertising claims used by the licensee.

PAR. 16. By granting a license to Stewart Frost, Inc., a New York corporation, Stuart Frost, Inc., a New Jersey corporation, Alvin Meyer and Elaine Nelson and by engaging in the acts and practices as described in the foregoing Paragraph Fifteen, respondents Trim-A-Way Figure Contouring, Ltd. and Sam Bernard have placed in the hands of the other corporate and individual respondents named herein,

the means and instrumentalities by which they may disseminate or cause to be disseminated certain advertisements and promotional materials for the purpose of inducing, and with the likelihood of inducing, directly or indirectly, the purchase of Slim-Quik, which may mislead members of the consuming public.

PAR. 17. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents Trim-A-Way Figure Contouring, Ltd. and Sam Bernard have been, and are now, in substantial competition in or affecting commerce with corporations, firms and individuals who sell weight and body reducing products and devices of the same general kind and nature as those sold by respondents.

PAR. 18. The aforesaid alleged acts and practices of respondents 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 Sections 5 and 12 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having issued its modified complaint on March 1, 1976 charging respondents named in the caption hereof with violation of the Federal Trade Commission Act, and respondents having been served with a copy of that complaint; and

The Commission having withdrawn the matter from adjudication for the purpose of negotiating a settlement by entry of a consent order; and

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

The Commission having considered the aforesaid agreement and having determined that it provides an adequate basis for appropriate disposition of this proceeding, and having thereupon placed such agreement on the public record for a period of sixty (60) days, in further conformity with the procedure prescribed in its Rules, the agreement is hereby accepted, the following jurisdictional findings are made, and the following order is entered;

1. Respondent Stewart Frost, Inc., a New York corporation, 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 551 Fifth Ave., New York, New York.

2. Respondent Stuart Frost, Inc., a New Jersey corporation, 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 485-511 Main St., Fort Lee, New Jersey.

3. Respondents Alvin Meyer and Elaine Nelson are officers of Stewart Frost, Inc., a New York corporation and Stuart Frost, Inc. a New Jersey corporation. They formulate, direct and control the policies, acts and practices of said corporations, and their address is c/o Merlite Industries, Inc., 114 Fifth Ave., New York, New York.

4. Respondent Trim-A-Way Figure Contouring, Ltd. is a corporation organized, existing and doing business under and by virtue of laws of the State of New York, with its office and principal place of business located at 658 Central Ave., Scarsdale, New York.

5. Respondent Sam Bernard is an officer of Trim-A-Way Figure Contouring, Ltd. He formulates, directs and controls the policies, acts and practices of said corporation, and his address is the same as that of said corporation.

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

ORDER

I

It is ordered, That Stewart Frost, Inc., a New York corporation, and Stuart Frost, Inc., a New Jersey corporation, their successors and assigns, and Alvin Meyer and Elaine Nelson, individually and as officers of said corporations, and said respondents' officers, agents, representatives and employees directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale and distribution of any products or services for the treatment of obesity which utilize a body wrapping device, procedure or method, in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, orally, visually or in writing, directly or indirectly, that:

a) Use of said products or services will result in any loss of weight or permanent reduction in size in any part of the body.

b) Use of said products or services in the treatment of obesity is safe

and may be used by all persons without danger of physical harm or injury therefrom.

2. Using visual illustrations, representations or depictions, such as "before" and "after" pictures, in television commercials and any other advertising or promotional materials, which misrepresent the efficacy of said body reducing products, services, devices, procedures or methods.

3. Advertising, offering for sale, selling or distributing any products or services for the treatment of obesity which utilize a body wrapping device, procedure or method unless the advertising and promotional material contain the following caution in a clear and conspicuous manner:

(a) "**CAUTION** If you suffer from circulation problems, varicose veins, phlebitis, or diabetes, consult your physician before using."

(b) In advertisements in newspapers or other periodicals, said "Caution" shall be printed in at least 11 point type.

(c) In advertisements placed on television broadcasts, the word "Caution" and the statement: "Caution: If you suffer from circulatory problems, varicose veins, phlebitis, or diabetes, consult your physician before using" shall be clearly and conspicuously placed on the television screen for a period of time not less than eight (8) seconds duration.

(d) Respondents shall include clearly and conspicuously on each bottle or container, with nothing to the contrary or in mitigation thereof, the "Caution" set forth in Paragraph 3(a) hereinabove. *Provided, however,* That the word "**CAUTION**" shall be printed in 18 point boldface type and the remaining language shall be printed in not less than 11 point type.

II

It is ordered, That Trim-A-Way Figure Contouring, Ltd., a corporation, its successors and assigns, and Sam Bernard, individually and as an officer of said corporation, and respondents' officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, or through its franchisees or licensees, in connection with the licensing, franchising, advertising, offering for sale, sale or distribution of any products or services for the treatment of obesity which utilize a body wrapping device, procedure or method, in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

4. Granting a license or franchise to any prospective licensee or franchisee for the manufacture, advertising, use, offering for sale, sale or distribution of any products or services for the treatment of obesity

which utilize a body wrapping device, procedure or method, without delivering to each such prospective licensee or franchisee a copy of the order herein and receiving from such prospective licensee or franchisee a signed acknowledgement of receipt and agreement to adhere to the requirements of Paragraphs 1, 2 and 3 of Part I of this order as a condition of the granting of the license or franchise.

5. Furnishing, disseminating or making available to any licensee or franchisee, any advertisements and promotional literature or materials which are or may be utilized by such licensee or franchisee in connection with the offering for sale, sale, distribution and promotion of any products or services for the treatment of obesity which utilize a body wrapping device, procedure or method, which violates Paragraphs 1, 2 or 3 of Part I of this order.

III

It is further ordered, That:

1. All respondents set forth under Part I and Part II of this order shall maintain for a five (5) year period complete and detailed records of the names and addresses of all purchasers, franchisees or licensees of any products or services for the treatment of obesity which utilize a body wrapping device, procedure or method and said respondents shall also keep copies of all franchising and licensing agreements. Such records shall be made available for examination and copying by a duly authorized representative of the Federal Trade Commission, upon reasonable notice, during normal business hours.

2. No provision of this order shall be construed in any way to annul, invalidate, repeal, terminate, modify or exempt respondents from complying with agreements, orders or directives of any kind obtained by any other agency or act as a defense to actions instituted by municipal or State regulatory agencies. No provision of this order shall be construed to imply that any past or future conduct of respondents complies with the rules and regulations of, or the statutes administered by the Federal Trade Commission.

3. Respondents shall deliver a copy of this order to cease and desist to all personnel or agents of respondents responsible for the preparation, creation, production or publication of the advertising of all products and services covered by this order.

4. Respondents shall deliver, by certified or registered mail, return receipt requested, a copy of this cease and desist order to all persons, franchisees or licensees now engaged, or who become engaged in the advertising, offering for sale, sale, use or distribution, of any of respondents' products or services for the treatment of obesity which utilize a body wrapping device, procedure or method.

5. Respondents shall deliver a copy of this order to all present and future employees engaged in the sale of respondents' products or services and shall secure from each such person a signed statement acknowledging receipt of a copy of this order.

6. Respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents such as dissolution, assignment or sale, resulting in the emergence of a successor corporation or corporations, the creation or dissolution of subsidiaries, a change in the corporate name or address or any other change in the corporations which may affect compliance obligations arising out of this order.

7. Each individual respondent named herein shall promptly notify the Commission of the discontinuance of his or her present business or employment and/or his or her affiliation with a new business or employment. Such notice shall include such respondents' current business address and a statement as to the nature of the business or employment in which he or she is engaged, as well as a description of his or her duties and responsibilities.

8. Respondents shall within sixty (60) days after service upon them of this order, file with the Federal Trade Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

Order

87 F.T.C.

IN THE MATTER OF
ENCYCLOPAEDIA BRITANNICA, INC., ET AL.

Docket 8908. Order, Mar. 2, 1976

Denial of respondents' motion to reopen the record and proceedings to afford them opportunity to conduct discovery upon and defend against non-record secret facts, information and/or evidence.

ORDER DENYING MOTION TO REOPEN RECORD AND
PROCEEDINGS

Respondents have moved that we reopen the record and proceedings in the above-styled matter to afford Britannica the opportunity "to conduct discovery upon and defend against the non-record secret facts, information and/or evidence that are being considered by this Commission in reaching its decision" in this appeal.

The motion arises out of a Freedom of Information Act request filed by respondents. In midst of the adjudicative proceedings, respondents filed with the Secretary of the Commission a Freedom of Information Act request for the Analytical Program Guide for the Direct Selling Industry and other related documents. The Secretary released part of the materials requested, and the respondents appealed to the Commission the Secretary's denial of further access to the documents. The Commission reviewed the matter, as it was required to do under the applicable provisions of the Commission's Rules of Practice¹ which were promulgated pursuant to the Freedom of Information Act.² The Commission also filed, pursuant to the order of the U.S. District Court (N.D. Ill.), a "Revised Index and Justification for Withholding Documents." The Revised Index characterizes some of the documents as "pre-decisional communications," a term utilized by the Supreme Court to describe non-evidentiary documents which were exempt because they were "deliberations comprising part of a process by which governmental decisions and policies are formulated." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 158 (1975). Citing the Commission's Freedom of Information Act review and its use of the descriptions "pre-decisional communications" in the Revised Index, the respondents contend that the Commission has utilized the documents in the decision-making process in this adjudicative matter.

This motion is plainly without merit. The Commission has based its determinations and order in this matter solely upon the record compiled in Dkt. No. 8908. Accordingly,

¹ Section 4.11(a)(2).

² 5 U.S.C. §552(c)(6)(A)(iii).