
 In the Matter of the ARBITRATION Between
 THE SCREEN ACTORS GUILD, INC.,
 Claimant,
 - against -
 DANIEL & CHARLES ASSOCIATES, LTD.,
 Respondent.

Case No.:
 1330-0207-77

2/21/78

Appearances:-

For Claimant:

ALTER, LEPEVRE, RAPHAEL,
 LOWRY & GOULD, P.C., Esqs.
 530 Fifth Avenue
 New York, N.Y. 10036

by Dirk S. Gould, Esq.

For Respondent:

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 New York, N.Y. 10021

by Barry I. Fredericks, Esq.
 Edward Sussman, Esq.

ARBITRATION TRIBUNAL

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 485 Fifth Avenue
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I N T R O D U C T I O N

This Arbitration between the above-named parties has proceeded under the collective agreement entitled SCREEN ACTORS GUILD 1975 COMMERCIALS CONTRACT and under the rules and procedures of the American Arbitration Association. Accordingly, the undersigned have been selected in accordance with those procedures. All witnesses presented by the parties were sworn, and all exhibits have been duly marked.

I S S U E S

Whether or not the Respondent Daniel & Charles is obligated to the Claimant SCREEN ACTORS GUILD pursuant to Schedule II B F of the aforesaid Commercials Contract as a result of the production and presentation for television use of two commercials respectively entitled "Answer/Lakis" and "Answer/No" and, if yes, what shall be the remedy?

F A C T S

The dispute concerns the applicability of Paragraph II of Schedule B II A of the Commercials Contract, of which the parties are signatories to the said agreement (SAG Exhibit 1), which states that in hiring "...preference will be given to qualified professional actors..."

Automatically excluded from this preference (B II D of SAG Exhibit 1) are those persons "...who by words or actions participate in the giving of a testimonial or endorsement..."

At issue are two commercials of Respondent Daniel & Charles Associates, Ltd., for television use

Referred to as "Answer/Lakis" (D & C Exhibit 1) and "Answer/No" (D & C Exhibit 2), the former commercial utilizes three persons selected from the public (in addition to the announcer) whose names are Lakis, Ferris and Sandifor.

On the other hand, the latter commercial includes nine persons:

Hartman
Stewart
Itaya
Gordon
Rivas
Harrison
Gedeon
Brooks
Quintanilla

All agree that none of the above persons is a qualified professional actor as defined in the SCREEN ACTORS GUILD (SAG) Commercials Contract.

Of the twelve persons in D & C Exhibit 1 and D & C Exhibit 2, two (Ferris and Sandifor) are accepted by SAG as having participated in a "testimonial or endorsement" and thus Daniel & Charles is entitled to the exclusion referred to above. As far as the remaining ten are concerned (Lakis in D & C Exhibit 1 and all in D & C Exhibit 2), the subjects of the claim, non-members of SAG, they are the subjects of the claim for liquidated damages demanded by SAG which has charged violations of sections above referred to which set forth the preference for professionals. As we have stated, excluded from that preference clause are endorsements or testimonials. What appears in the remainder of "Answer/Lakis" and "Answer/No", according to Claimant SAG, are not testimonials or endorsements within the meaning of the Commercials Contract, rather, we are advised, they are advertising slogans, and not subject to the exclusion; further, SAG demands the liquidated damages as set forth more specifically in Schedule B II F of the aforesaid Commercials Contract. Without

regard to the merits of the issues herein, no dispute exists as to the computation of liquidated damages if any should be found owing.

For its part, Daniel & Charles describes in detail, how, in behalf of this product, Ban Basic, in defense of its right to the exclusion as a testimonial, it retained Drossler Research, an independent organization, to conduct interviews and locate actual users of Ban Basic at a shopping mall in California. After determining whether or not the interviewee was a genuine user of Ban Basic, thus narrowing the group of persons originally interviewed by a variety of means which need not be gone into here, on-camera interviews were conducted of the users based upon a previously prepared questionnaire.

Further reducing the number of interviewees and editing these interviews, using, in every instance only words actually spoken by the interviewees, D & C Exhibits 1 and 2 were completed and thereafter exhibited on television. Respondent urges that the above is part of the proper procedure to qualify the product for a testimonial or endorsement; that in every way D & C Exhibits 1 and 2 qualify.

In D & C Exhibit 1, Lakis appears in the commercial saying, "For today's world, Ban Basic is the answer."

In D & C Exhibit 2, the nine interviewees state respectively:

Hartman: "Yeah, Ban Basic is the answer for me."

Stewart: "Ban Basic's the answer."

Itaya: "Ban Basic is the answer."

Gordon: "The answer for me is Ban Basic."

Mivas: "Ban Basic is the answer."

Harrison: "Ban Basic's the answer for me."

Gedeon: "Ban Basic is the answer."

Quintanilla: "Ban Basic is the answer."

Brooks: "Ban Basic, that's the answer."

Having used the actual words of product users, with a clear intent to make a testimonial, the exclusion is applicable, says Respondent.

To SAG, however, the above are slogans and not testimonials; in support of its position, SAG asserts that no objection had been made by SAG in "Answer/Lakis" to (a.) Sandifor, quoted as saying, "Ban Basic really helps keep me dry," and to (b.) Ferris, stating, "So I switched to Ban Basic and it just sprays directly, it doesn't go all over the room." Claimant argues that these are entitled to the exclusion because they express experiences of the testifier needed to qualify for the exclusion. The others do not.

At the hearings held, SAG offered dictionary definitions of "testimonial" and "slogan" in support of its position. In addition, presenting as a witness, John T. McGuire, an executive of the New York Branch of Claimant, his definition had three facets to it:

1. The person testifying discusses the value of the product;
2. he speaks in terms of a personal experience; and
3. the viewer of the commercial should perceive the commercial as coming from the individual speaking and not coming from the advertiser.

Dictionary definitions were also offered (SAG Exhibits 6, 7, 8, 9) which tended to indicate a personal statement of support.

All agreed that no definition of "testimonial" is offered in the Commercials Contract. (SAG Exhibit 1)

Also an official of SAG, New York Branch, Mr. John Sucke, commented upon several exhibits offered by SAG which in the view of SAG were properly accepted as testimonials or endorsements (e.g., Pat Boone's mother and Lueller's spaghetti, SAG Exhibit 12; and TANG, SAG Exhibit 13; a former U. S.

official, Francine Neff speaking on behalf of American Express, SAG Exhibit 14), also was entitled to the exclusion.

In reference to the last-named, where the commercial expressed clearly a personal experience, Sucko agreed that use of the familiar words, or the "slogan" of the advertiser, could be included in the personal statement without violating the contractual right of the advertiser for the exclusion of testimonials or endorsements.

Although in "Answer/Lakis" SAG objected only to the exclusion for Lakis, and did not claim exclusion for Ferris and Sandifor, McGuire further testified that he knew of no reason why an actor and a person from the public, appropriately offering a testimonial, could not be included together in the same commercial.

As regards the term "slogan", SAG offered dictionary definitions tending to show that the origin indicated Gaelic war cries, but that the meaning had been transformed to include, amongst other things, the familiar arrangements of words of advertisers.

For its part, Respondent, Daniel & Charles, responded by stating it had complied with the requirements of the Federal Trade Commission; an independent agency, Drossler Research Group, had been retained to conduct the interviews; that the interviews were properly carried out; that the words used in "Answer/Lakis" and "Answer/No" were actually used by the interviewees, all of whom were, in fact, users of Ban Basic.

From this, Respondent, Daniel & Charles, urged that it had been their intention from the first to create a testimonial; that all the steps set forth above clearly indicate that; after the commercial is edited and completed following these proper steps, and ready for use, it cannot at that time be argued that Daniel & Charles should have used members of SAG.

Nor is it a question of money, says Daniel & Charles; to make a testimonial commercial, such as this, is as expensive as, if not more so, using SAG members.

Supporting its position, Daniel & Charles has placed in evidence D & C Exhibits 9 through 18, comprising the entire interviews, questions and answers of the persons interviewed for the commercials in D & C Exhibits 1 and 2. Examining these, one cannot fail to observe that the persons are members of the public, that they are users of the products, and have actually said what is set forth in "Answer/Lakis" and "Answer/No".

Daniel & Charles Accounts Supervisor, George Biava, called by Daniel & Charles, stated that in his view in its entirety "Answer/No" was properly a testimonial; furthermore, regarding "Answer/Lakis", to substitute an actor for Lakis in "Answer/Lakis" would not be acceptable to the networks.

What is a testimonial, in the opinion of Biava, resulted from the expression of someone who had experienced something in the use of a product; that the testimonials used here in D & C Exhibits 1 and 2 were properly classified as such.

In response, SAG says that it is the finished product which determines the right to the exclusion; that Respondent Daniel & Charles cannot claim the exemption fully when regardless of its original intention all that is shown is a slogan. Pointing to the case of "Brooks", one of the persons testifying in "Answer/No", who says there, "Ban Basic, that's the answer", in still another commercial involving the same product, Brooks says words to which SAG takes no exception under the Commercials Contract. It is the use of a part of the interview in the manner used that violates the Commercials Contract. Regardless of the original intent, the actual use illustrates the nature of the claim.

recalled as a witness, Sucke of SAG, and questioned about the use of slogans in some of the exhibits submitted by SAG (e.g., SAG Exhibits 12, 13, 14), agreed that in some of the commercials put into evidence by SAG, slogans were used for which no objection was filed; e.g., in the American Express commercial, but Sucke indicated SAG did not claim a violation of the Commercials Contract since the slogan was only part of a personal statement; the entire context must be evaluated. In the total context of the commercial, the American Express advertisement slogan does not violate the contract.

(SAG Exhibit 14)

Information was also offered as to the Television Code subscribed to by various television networks requiring in the use of testimonials that members of the general public be used, who must be bona fide users of the product.

Daniel & Charles therefore claims that the advertiser has complied with FTC "Guides" and the Television Code; under these circumstances, given the intent to create a commercial, no claim exists as urged by SAG.

On its part, whatever the original intent, the final product, after editing, is what must be judged, says SAG. Some of the commercials made for Ban Basic, since they contain the personal statement, are not in violation of the Commercials Contract; but the ones in the dispute are claimed in violation because they express only the slogan of the advertiser; for such a use, a professional should be used. Absent such use, the liquidated damage clause of the Commercials Contract must come into operation.

O P I N I O N

In the consideration of the issues before this Panel, we are particularly cognizant of the terms of the Agreement entered into between the parties, Claimant, Screen Actors Guild, and Respondent, Daniel & Charles Associates, Ltd. (SAG Exhibit 1, entitled SCREEN ACTORS GUILD 1975 COMMERCIALS CONTRACT) At the same time we are aware of pertinent laws, regulations, guidelines or codes to the extent such helps us find an answer to the question; but it is the Agreement which is our charge. Thus, the "Guides" of the Federal Trade Commission and the Code of the National Association of Broadcasters will be evaluated for any assistance in reaching a conclusion here. No suggestion has been made, however, that any one of these violates any of the others. While the relevance has been challenged in regard to the analysis to be made of some of these, relevance is an issue for the Panel to decide. What is significant in terms of this proceeding is the fact that at all pertinent times, rightly or in error, professional actors were not used. No dispute exists that members of the public were selected under the procedures arranged for by Daniel & Charles. It is in these accepted facts that the issues have been drawn.

Reading from SAG Exhibit 1, the following appears.

"D. There shall be automatically excluded from the provisions of this Section the following:

"1. Persons who portray themselves, who by words or actions participate in the giving of a testimonial or endorsement: "

Although the Commercials Contract (SAG Exhibit 1) uses the disjunctive "or" ("testimonial or endorsement"), no suggestion has been made that "endorsement" and "testimonial" have different meanings; in that sense we shall so accept both words as having the same meaning for the purposes

of this proceeding. Without belaboring the point, this view is supported by the Federal Trade Commission. [16 USCA S. 255(a)]

Nevertheless, no more than a casual examination of the contractual language is required to observe that the terms are not there defined so as to direct an answer. Whatever the reasons, no definition of these words appears, nor are we referred to any other document, regulation etc., that incorporates by reference, or even noted, for assistance.

Since there is this definitional absence, Daniel & Charles refers us to the FTC "Guides". Examining that, amongst other things, it suggests that any advertising message which consumers are likely to believe reflects the opinions, beliefs, findings, or experience of a party other than the sponsoring advertiser is part of this definition.

Referring to the experiences, findings, beliefs, etc., of one other than the advertiser, namely, the consumer, we are not brought into the clear, however, as how to determine what this consumer is likely to believe. (Both briefs, in slightly different language, set forth essentially the same reference; but leaving to some unknown third party a major role in evaluating particular rights and obligations, if any, is not geared for the best form of contractual applications.)

Although certain beliefs, experiences of a party other than the advertiser are required, namely the interviewee (a moderately objective standard) coupled with this is the further requirement that the testimonial is likely to be believed by consumers as a statement of some one other than the advertiser, or an actor hired by the advertiser. What is likely to be believed by consumers is a subjective standard. To join both subjective and objective terms in one definition is not entirely useful; minimally, however, let us try to extract the view that a testimonial must reflect one's own

experiences.

At the third session of these proceedings, Mr. George Biava, a Vice President of Daniel & Charles, in response to a question from Mr. Dirk S. Gould, stated that in his view a "testimonial" reflected the opinion of one who has experienced something in the use of a product. Distinguishing this from a so-called slice of life commercial, where similar words might be used as in a testimonial, in such non-testimonial case, the language did not necessarily reflect the opinions, experiences, Biava said, of the speaker. Example 2 in the FTC "Guides" following §255(d) would illustrate this; two women are discussing a detergent with one indicating satisfaction. This is recognized by all as a slice of life commercial but not acceptable as a testimonial.

In the second session of the hearings, the Executive Secretary of the New York Branch of the Screen Actors Guild, Mr. John McGuire, called as a witness by Complainant, defined testimonial in the following specific terms; such testimonial must

1. state the value of the product;
2. it is based upon the user's own experience;
furthermore
3. the viewer must perceive this statement as representing the personal experience of the declarer, and not that of the advertiser.

As with the FTC "Guides" a subjective element is urged by McGuire in his definition, not unlike that in the FTC "Guides" itself; how does the viewer perceive the statement. Added to this, McGuire would require a term, also not specifically included in the FTC definition, that the endorser discuss the value of the product. Since he lists them as two separate terms of his definition of "testimonial", presumably McGuire would have us consider a discussion of value of a product as something distinct from the endorser

In furtherance of its effort to assist the Panel and to help it understand the terms "testimonial" or "endorsement", SAG introduced into evidence (SAG Exhibits 6, 7, 8, 9) definitions of "testimonial". From these we glean that clearly "testimonial" is related to "testimony" which in turn derives from the Latin "testimonium". Originally defined in terms of giving sworn statements (attestation) as to a fact or character, this meaning has grown somewhat into its present sense to include an emphasis on a personal statement of a laudatory nature.

To use a term in a more specialized way or to define a term in a limited manner is without doubt the right of a regulation or guide, particularly in an industry such as the one we are concerned with here. Whether or not under the FTC "Guides" it was wise or useful to include this subjective element in the definition, or whether such introduces a confusing factor, is not for us to say. But concerned as we are with exclusions from certain contractual clauses in an executed agreement, therefore absent a specific definition, we are constrained to use a term in its most usual way, and, in so far as it can be determined, as understood generally. Whatever value the FTC guide has, and we here are not equipped to test with the public the personalized element raised by the FTC guide, the parties did not include it or, for that matter, any definition of the term in the contract. For these reasons, useful though it may conceivably be, McGuire's definition presents similar problems to that of the FTC. In any event, it is not part of the agreement reached.

Having reached this far, however, do we see a common element in all the efforts to assist us in the meaning of the term presented during these hearings? Seemingly yes; all have a common strain running through (omitting the subjective factors for these purposes); a personal statement

is the very minimum to be expected.

As a part of the industry concerned, Biava, on cross-examination, put it in the terms of his industry: recalling his definition from the non-stenographic notes made, he said a testimonial is the opinion of some one who has experienced something in the use of a product.

In all fairness to Biava, his answer, while useful for our purposes, should not necessarily be charged as the answer of the advertising field or even necessarily that of Respondent itself since he spoke personally in response to cross-examination. But as we said, it was helpful.

In D & C Exhibit 1, "Answer/Lakis", three persons appear (plus the announcer), two of whom, named Sandifor and Ferris, are not improperly covered by the exclusion, says the Guild. On the other hand, in the same exhibit (D & C Exhibit 1), it is stressed by the Guild, that Lakis (one of the three persons) does not give a testimonial; what Lakis says does not fit anyone's definition of testimonial, accordingly, SAG makes its claim for the liquidated damages set forth in the Commercials Contract for Lakis, but not for Ferris or Sandifor.

Liquidated damages are sought for the entire exhibit (D & C Exhibit 2), "Answer/No". Examination of the nine panels in that exhibit, reveals, with only insignificant variation, that each says either "Ban Basic is the answer" or "The answer is Ban Basic". Of these nine, three, Hartman, Harrison and Gordon add "for me" to the words expressed. (The same announcer appears in both "Answer/No" and "Answer/Lakis".)

In the eyes of SAG, all nine panels in "Answer/No" exemplify "slogans"; in no way are we observing "testimonials" by any definition. "Slogans", in its origin, has generally come to mean, SAG urges, in terms of the industry we are concerned with here, "an often repeated word or phrase used

in advertising or promotion." [SAG Exhibit 10(b) p. 657]
In no way, we are told, do these words communicate a personal experience with something even when "for me" is part of the phrase.

For its part, Daniel & Charles describes in detail how it retained an independent organization to conduct the interviews to locate members of the public who used Ban Basic; we have read through the exhibits offered, the questions put, and the answers received. In each case, the words in "Answer/Lakis" and "Answer/No" were actually used in response to questions put to the person involved; that in all cases general members of the public were used; that the words do register an experience with Ban Basic.

In sum then, Daniel & Charles urges that the intent of the advertiser was to create a testimonial. The method selected was beyond reproach, the statements presented were actually made by user-interviewees who had expressed their interest in the product, Ban Basic. Given this intent and these facts, what was used in D & C Exhibit 1 and D & C Exhibit 2 satisfies the right to the contractual exclusion as a proper use of a testimonial.

But, SAG states, all the words in "Answer/No" and the words of Lakis in "Answer/Lakis" were merely the advertiser's slogan, nothing more; in all ten, nine in "Answer/No" and one in "Answer/Lakis", they are the phrase the advertiser desires the "endorser" to say, and the public to hear; in support of this, brief of Claimant points to the interviews of Hivas, Quintanilla, and Harrison. In each, interviewer asked a question several times until the answer was forthcoming as stated in the commercial, even suggesting the precise wording, as in the Harrison interview coming out "Ban Basic's the answer for me."

Nevertheless, Claimant, through witness Sucke, is

prepared to accept the idea that a phrase, important to the advertiser, can be covered by the exclusion when that phrase is used in a broader context of language clearly covered by any agreed definition of testimonial; e.g., the language represents a personal experience with the product involved; thus, when the total content enters the personal experience, beyond the catch phrase, the use of the catch phrase does not destroy the right to the exclusion.

Considering first "Answer/Lakis", the SAG claim here is for denial of the exclusion as applied to Lakis himself; under Schedule B II D 1, SAG contends that the words "For today's world, Ban Basic is the answer" does not spell out a personal experience with a product. The words do not illustrate the opinion of someone who has experienced something in the use of a product.

Applying these considerations to "Answer/Lakis", i.e., the total context of the advertisement, that were applied in the American Express advertisement (see SAG Exhibit 3 - Francine Neff), we are constrained to agree that Respondent is entitled to the exclusion. Ms. Neff expounds in her own words a personal experience in SAG Exhibit 3 but ends with the catch phrase the advertiser desires all to remember, "The American Express card; don't leave home without it"; we do not see any vast difference between SAG Exhibit 14 and D & C Exhibit 1 in terms of the Commercials Contract.

"Answer/Lakis" (D & C Exhibit 1) should be considered in the context of the total commercial; both Ferris and Sandifor express personal statements, not objected to by SAG; they have experienced something with regard to the product involved.

Without considering how the Federal Trade Commission would regard such a mixture of part-acting commercial

and part-testimonial commercial, here the total commercial, although using the catch phrase in part, nevertheless does, in the major part fit the requirements for a testimonial. Were one person to say all the words in "Answer/Lakis" the commercial would doubtless be entitled to the exclusion. Saying the same words by three persons, one of whom used the catch phrase, does not in our view illustrate such a contractual difference as to require a loss of the exclusion.

Accordingly, the claim as related to "Answer/Lakis" is not granted.

Moving on to "Answer/No", we are constrained to the opposite conclusion; the claim of SAG should be sustained. Hardly more than the catch phrase is used. In some instances "for me" is part of the phrase; but this does not truly alter the context, nor does it really spell out, as Biava and others define testimonial, a personal experience with something: Ferris and Sandifor explain their reasons; they make a personal statement. They indicate an experience with Ban Basic. No one in "Answer/No" acts or speaks in such fashion.

While both may have come from the same extensive interview, the reduction of the interview to a catch phrase in a lengthy interview cannot be made acceptable because the interview was properly commenced, or another use from the same interview, did not constitute a contractual violation. While a certain risk exists that even though there has been lengthy effort to produce a testimonial, the actual use as shown in the commercial may be a violation. But that risk is small based upon the many commercials shown at the hearing, particularly is it relatively small when we review the substantial number of testimonials shown to us. The penalty is the liquidated damage clause, Schedule B II F.

Without having any reason to doubt the intent of Respondent at the commencement of the interview of the persons

others exhibited are truly not personal experiences; without charging any improper or illegal conduct "Answer/No" does not appear to conform to the expressed intent. The intent appears to have become lost. This is not to say that intent may not be important in analyzing the context of another commercial between the same parties, at another time in history, but "Answer/No" clearly is little more than a catch phrase. A reading of the full interview lends support to this. Important as this phrase may be to the advertiser, what we are concerned with here is whether the use constituted an alleged violation of the Commercials Contract.

Under the limited circumstances before us, we are constrained to find that "Answer/No" (D & C Exhibit 2) is in violation, and accordingly Claimant should be awarded the liquidated damages provided for in II F for the nine (9) frames involved. In no way is what we say here a judgment on any other "testimonial" or on testimonials in general.

A W A R D

1. The claim of Claimant that a contractual violation exists as to Daniel & Charles Exhibit 1 entitled "Answer/Lekis" is denied.

2. The claim of Claimant that a contractual violation exists as to Daniel & Charles Exhibit 2 entitled "Answer/No" is granted. The Claimant is awarded \$2,700.00 (two thousand seven hundred dollars and no cents) as damages as are provided for in the Commercials Contract of the Screen Actors Guild, 1975, Schedule B II F.

Paul Hochman

Elaine C. Stone — & dissent as to #2 of the award
 Award #1. I dissent
Award #2. I concur with the award.

ON THIS 16th day of February, 1978, I personally came and appeared Carl Rachlin, Esq., to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Harold Francis Washington
 HAROLD FRANCIS WASHINGTON
 Notary Public, State of New York
 No. 41-4607396
 Qualified in Queens County
 Commission Expires March 30, 1979

STATE OF New York }
 COUNTY OF New York } ss.:

On this 17th day of February, 1978, before me personally came and appeared Elheran C. Stone, Esq., to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Harold Francis Washington
 HAROLD FRANCIS WASHINGTON
 Notary Public, State of New York
 No. 41-4607396
 Qualified in Queens County
 Commission Expires March 30, 1979

STATE OF New York }
 COUNTY OF New York } ss.:

On this 21st day of February, 1978, before me personally came and appeared Harold M. Hoffman, Esq., to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

HAROLD FRANCIS WASHINGTON
 Notary Public, State of New York
 No. 41-4607396
 Qualified in Queens County
 Commission Expires March 30, 1979

Harold Francis Washington

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For Claimant:

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For Respondent:

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