

IN THE MATTER OF

BRISTOL-MYERS CO. ET AL.

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 4861. Complaint, Oct. 28, 1942—Decision, Nov. 15, 1949*

The word "survey" as used in advertising representing that, according to a national survey conducted among thousands of dentists, twice as many personally used the advertiser-vendor's tooth paste as any other dentifrice, etc., fairly implied, if not the questioning of all dentists, at least the questioning of a representative, unbiased and fair samplings from the profession as a whole.

The preponderant weight of qualified dental opinion, based on clinical experience of many years with thousands of patients, is that soft, well-cooked non-fibrous foods are not conducive to gum trouble; that it is immaterial to gum health whether the diet of a person is soft or coarse; and that the modern American diet provides sufficient gum stimulation.

The word "massage" as used by dentists means a careful downward stroke or squeezing applied to only a quarter inch of the gum margin and teeth, and its proper use by laymen requires professional instruction over a considerable length of time. As used, however, in tooth-paste advertisements stating that massage with the product concerned will provide needed exercise for the gums and stimulation, make them firm and healthy, guard against "pink tooth brush" and prevent gum trouble generally, the word means to the great majority of the general public a horizontal, vertical, or rotary scrubbing of the teeth and all of the gums with the tooth brush, or a similar rubbing with the finger, and regardless of the need for and benefits to be expected from gum massage as employed by the dentist, it appears that such uninstructed "massage" as that contemplated by such advertisements, either with or without any dentifrice, does not and will not accomplish such results.

The preponderant weight of qualified dental opinion, as based on clinical experience, is that even massage, performed as instructed by the dentist is not necessary in an undiseased mouth; that a layman is unable to ascertain whether or not he is in need of massage; and that no dentifrice adds any benefit to gum massage, either through mechanical or chemical action of appreciable duration or significance, or therapeutically.

As respects the representation in the advertisements of a certain toothpaste that it would beautify the smile and brighten and whiten the teeth, the Commission was of the opinion that the reference to beautification of the smile was mere puffery, unlikely, because of its generality and wide variety of meaning, to deceive any one factually.

Where a corporation engaged in the interstate sale and distribution of "Ipana" toothpaste from its principal place of business in New York or from its plants or warehouses in other States; along with two advertising agencies employed by it to handle, respectively, newspaper and periodical advertising, and radio advertising for said product, who, after having been instructed by it

as to the general nature of the advertising desired and the media in which to be used, composed and submitted to it for review, approval or change advertisements or radio commercials which they then published or broadcast in the proper media on preagreed-upon schedules; in advertising said product through advertisements in newspapers and periodicals, and by radio commercials and various other means—

- (a) Represented that, according to a national survey conducted in 1940 among thousands of dentists, twice as many dentists personally used Ipana Tooth Paste as any other dentifrice, and that more dentists recommended it for their patients' daily use than the next two dentifrices combined; and thereby fairly implied that the questioning of all dentists, or at least a representative sampling from the profession as a whole with its some 66,000 practicing dentists, showed that of all the dentists in the country twice as many used said product as any other, and that said product was their exclusive choice; and obviously implied that the reason for the dentists personal choice of said product was its quality and overall effectiveness;

The facts being that the actual sampling conducted by them was from a restricted list, not representative of the profession as a whole; only 621 of the 1,983 dentists who answered listed said product as their preference for personal use; the replies indicated only the dentifrice used and recommended "most often" and not that used and recommended exclusively; and reasons for choice included taste or flavor, receipt of free samples, the product's soap content, and the fact that it foamed, that it was "harmless" or easy to use, or habit; and out of a total of 880 reasons given for preferring the product, 372 had no connection with its quality or over-all effectiveness as a dentifrice;

- (b) Falsely represented that the modern American diet consisted of such soft, well cooked, nonfibrous foods that the gums did not get needed exercise and stimulation; that massage with Ipana would provide such exercise and make the gums firm and healthy, guard against "Pink Tooth Brush," and prevent gum trouble generally;

The facts being that said product, according to the preponderant weight of qualified dental opinion, was a cleaning agent only, without therapeutic value, and with prophylactic value only insofar as it cleansed;

With capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the mistaken belief that such representations were true, and thereby into the purchase of substantial quantities of said product;

Held, That such acts and practices were all to the prejudice and injury of the public, and constituted unfair and deceptive acts and practices under the Federal Trade Commission Act.

As respects the charge in the complaint in said proceeding that respondents falsely and misleadingly advertised that in many schools children were drilled in rubbing their gums with Ipana and that use of said paste with or without massage would beautify the smile and brighten and whiten the teeth: it appeared that gum massage was included in the hygienic courses of a number of schools, and that no proof was offered that such drilling in massage was not with Ipana toothpaste as an adjunct.

The expression "brighten and whiten the teeth," as used in respondent's advertising above referred to, according to opinion evidence, meant simply cleaning the teeth, and it appeared that while the use of said product would not alter the shape, size, contour, permanent color, injuries, malposition, or original

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luster of the teeth, it would, through the removal of film, debris, food, dirt, and surface stains, assist in their cleaning, and the Commission accordingly found not sustained the allegation of the complaint that said representation was deceptive.

As respects the charge that respondents falsely represented that the use of Ipana toothpaste would prevent tooth decay, there was no evidence in the record showing that such representation was made.

While two advertising agencies, as noted, participated in the dissemination of the advertising found to be false or misleading in the instant matter, the Commission was of the opinion in the exercise of its sound discretion, and concluded, that the complaint should be dismissed as to them since they had at all times acted under the direction and control of respondent vendor-advertiser, their employer, with whom rested the final authority and responsibility for such advertising, and also for the reason that the practices found to be against the public interest would be stopped by the order to cease and desist issued against said employer.

Before *Mr. Frank Hier*, trial examiner.

Mr. William L. Pencke for the Commission.

Mr. Gilbert H. Weil, of New York City, for Bristol-Myers Co.

Mr. Isaac W. Digges, of New York City, for Pedlar & Ryan, Inc., and Young & Rubicam, Inc.

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 Bristol-Myers Co., a corporation, Pedlar & Ryan, Inc., a corporation, and Young & Rubicam, Inc., a corporation, 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 states its charges in that respect as follows:

PARAGRAPH 1. Respondent Bristol-Myers Co. is a corporation organized under the laws of the State of Delaware, and has an office and principal place of business in the International Building, Rockefeller Center, New York City. Respondents Pedlar & Ryan, Inc., and Young & Rubicam, Inc., are corporations organized under the laws of the State of Delaware, and have their respective offices and principal places of business at 250 Park Avenue, and 285 Madison Avenue, city and State of New York.

PAR. 2. Respondent Bristol-Myers Co. is now, and has been for several years last past, engaged in the sale of Ipana tooth paste, a cosmetic preparation as defined in the Federal Trade Commission Act.

Respondents Pedlar & Ryan, Inc., and Young & Rubicam, Inc., have been advertising agents for respondent Bristol-Myers Co. and have participated in the preparation and dissemination of the advertising matter to which reference is made herein.

Respondent, Bristol-Myers Co., causes its said product when sold, to be shipped and transported from its principal place of business in the State of New York, or from its plants or warehouses in other States, to the purchasers thereof who are located in States other than that of the points of origin of such shipments. Said respondent maintains, and at all times mentioned herein, has maintained, a course of trade in its said cosmetic preparation, in commerce, between and among the various States of the United States and in the District of Columbia.

PAR. 3. Respondents, in the course and conduct of their businesses, have disseminated and are now disseminating, and have caused and are now causing the dissemination of false advertisements concerning said Ipana tooth paste by the United States mails and by various other means in commerce, as "commerce" is defined in the Federal Trade Commission Act; and respondents have also disseminated and are now disseminating, and have caused and are now causing the dissemination of, false advertisements concerning said Ipana tooth paste, by various means, for the purpose of inducing, and which are likely to induce, directly or indirectly, the purchase of the said preparation in commerce, as "commerce" is defined in the Federal Trade Commission Act. Said false, misleading, and deceptive statements and representations were disseminated and caused to be disseminated by respondents, as hereinabove set forth, by the United States mails, by advertisements inserted in newspapers and periodicals, by radio continuities and other advertising literature, typical examples of which are hereinafter set forth.

PAR. 4. By and through the use of the statements and representations contained in the following advertisements, to wit,

Ipana for the Smile of Beauty.

Compliments and popularity—a solitaire for your finger—phone calls, dances and dates. Even without great beauty they're yours to win and possess. Just bring your smile to its sparkling best and eyes and hearts will open to you.

If you want the kind of smile you can really be proud of, decide today to switch to Ipana Tooth Paste and gum massage.

—keep your teeth clean and white by using Ipana—the yellowish tint on your teeth will disappear.

respondents have represented, and now represent, directly and by implication, with respect to Ipana tooth paste, that its use will result in

the user possessing a beautiful smile and increased popularity and the assurance of white teeth free from yellowish tint.

PAR. 5. The foregoing representations are false and misleading. In truth and in fact, the smile is a change in facial expression, the most notable components of which are a brightening of the eyes and an upward curving of the corners of the mouth. It does not necessarily involve a display of teeth or gums. A smile not otherwise pleasing will not be rendered so by the possession of good teeth. Beautiful teeth will not insure a beautiful smile or social popularity. The beauty of human teeth depends primarily upon their conformation, color, arrangement in the mouth and other natural physical features, and teeth which do not possess these natural qualities will not be rendered beautiful by the use of Ipana tooth paste either as a dentifrice, a rubbing medium, or both. Such use of Ipana will neither whiten teeth not naturally white nor remove the yellow tint natural to the teeth of many persons or which results from tobacco or other stains.

PAR. 6. By and through the use of the statements and representations contained in the following advertisements, to wit,

Guard against "Pink Tooth Brush" with the help of Ipana and Massage—It may not mean serious trouble, but find out. More than likely it is a warning of neglected gums, soft, flabby underworked. And like thousands of dentists your dentist may suggest "the healthful stimulation of Ipana massage."

That is why the daily use of Ipana and Massage—to help guard against "Pink Tooth Brush."

respondents have represented, and now represent, directly and by implication, with respect to Ipana tooth paste, that its use will avert "Pink Tooth Brush" and is of value in the treatment of the causes thereof.

PAR. 7. The foregoing representations are false and misleading. In truth and in fact, so-called "Pink Tooth Brush" refers to a variety of oral conditions of systemic or local origin, in which, after brushing the teeth, there is a sufficient flow of blood to color the brush pink. Ipana has no significant therapeutic properties of value in the prevention, treatment, or cure of such conditions, nor is it of any value in the treatment of "neglected gums—soft, flabby, underworked," or of any unfavorable condition of the gums. Any beneficial consequences to the gums, including "stimulation," which may result from rubbing them with Ipana, are attributable solely to the rubbing.

PAR. 8. By and through the use of the statements and representations contained in the following advertisements, to wit,

Do you know that the 1940 National survey recently conducted among thousands of dentists revealed the following remarkable fact—Twice as many

dentists personally use Ipana Tooth Paste as any other dentifrice preparation.

Dentists choose Ipana for Personal Use 2 to 1 over any other dentifrice.

—In a recent nationwide survey, more dentists say they recommended Ipana for their patients' daily use than the next two dentifrices combined. Which should help convince you—that for healthier gums, brighter teeth and a more attractive smile, you should begin now to massage with Ipana Tooth Paste.

That is why so many dentists recommend massage with Ipana.

So many dentists suggest the helpful stimulation of Ipana and massage.

respondents have represented, and now represent, directly and by implication, that by actual choice twice as many dentists personally use Ipana in preference to any other dentifrice preparation; that more dentists recommend Ipana for their patients' personal use than the next two dentifrices combined, and that such recommendation constitutes convincing proof that the use of Ipana is productive of healthier gums, brighter teeth, a more attractive smile and will result in helpful stimulation to the gums.

PAR. 9. The aforesaid representations are deceptive and misleading. The truth and in fact, the results of the so-called survey furnish no sufficient basis for the claims made by respondents. Furthermore, the respondent, Bristol-Myers Co., has for many years distributed Ipana lavishly and gratuitously among the members of the dental profession and in consequence its use by any number or proportion of dentists cannot be attributed to the superiority of Ipana to other dentifrices or to choice. There are several characteristics which are common to all satisfactory dentifrices, including a certain degree of cleansing properties, a not unpleasant taste and nonabrasive qualities. The personal use by dentists, or their recommendation, of Ipana does not furnish any adequate factual basis for respondent's claim that such use or recommendation constitutes a recommendation by such dentists that Ipana possesses properties that will contribute to or produce healthier gums, brighter teeth or a more winning smile, or is superior to other dentifrices. Neither does such recommendation or use furnish any sufficient ground for respondent's representation that many dentists recommend "massage with Ipana" or suggest "the helpful stimulation of Ipana and massage."

PAR. 10. By and through the use of the statements and representations contained in the following advertisements, to wit,

—foods we eat nowadays do not give our gums the work they need to keep them firm and healthy—so they often become soft and susceptible to trouble. That's why so many dentists suggest massage with Ipana Toothpaste.

That's why so many dentists say—Give your gums the healthful stimulation of Ipana Toothpaste—and massage. —it gives your gums the kind of stimulation they need to help guard against gum trouble.

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—but when used with massage Ipana helps to give our gums the exercise and stimulation they fail to get from the soft, creamy foods we eat—a stimulation they need to help guard against gum trouble.

Safeguard the health of your gums—

Twice each day brush your teeth and massage your gums with this famous tooth paste. Don't let neglect mark you down for serious gum trouble, but help yourself to healthier gums, brighter teeth and a winning smile with Ipana.

Because Ipana is especially designed not only to clean and brighten teeth, but, when used with massage, to help give gums the stimulation they do not get from the soft, well cooked foods we eat—the exercise they need to keep them from becoming susceptible to gum trouble.

For when you massage with Ipana you can actually feel its stimulating effect upon your gum tissues as lazy gums start to waken and circulation speeds up. And that helps bring greater health to your gums and consequently more radiance to your smile.

You'll notice an invigorating "tang"—exclusive with Ipana and massage. That tells you circulation is speeding up within the gums—helping gums to gain new firmness and new strength.

—a new firmness to your gums—a brighter luster to your teeth and naturally more charm and attractiveness to your smile.

Teeth are seldom bright and sparkling when our gums are soft and tender—help yourself to healthier gums, brighter teeth and a more attractive smile.

For Ipana not only cleans the teeth thoroughly, brilliantly—

—unless gums are firm and healthy teeth are seldom at their sparkling best. That's why so many dentists recommend the faithful use of Ipana Tooth Paste and gum massage.

Protect your teeth from decay by using Ipana.

Children are drilled in Gum Massage in many schools (Depiction of school-boys using tooth brushes).

Ipana, with massage—help your gums to a healthier more resistant firmness.

respondents have represented and now represent, directly and by implication, that the current American diet consists of "soft," "creamy," "well-cooked" foods; that this diet does not give the gums sufficient work, exercise, and stimulation, in consequence of which they tend to become soft, tender, and susceptible to gum trouble; that the use of Ipana will be beneficial to the gums by stimulating them and arousing circulation therein, and imparting strength, firmness and health thereto, and will render the user less susceptible to, and protect against, gum trouble; that this increased firmness, strength and health will result in brighter and more lustrous teeth and a more engaging smile; that the use of Ipana will prevent decay of the teeth, and that in many schools children are drilled in rubbing their gums with Ipana.

PAR. 11. The aforesaid advertisements are deceptive and misleading in material respects. Respondents' claim of benefit to the gums and teeth is predicated on the false assumption that the present

American diet consists of "soft," "creamy," "well-cooked" foods; that this diet does not "exercise" the gums and that in consequence they tend to develop unfavorable conditions. In truth and in fact, the human diet now consists and always has consisted, of animal and vegetable products. The methods of cookery used in this country today are essentially those which have been used for hundreds of years, and whether food should be thoroughly cooked or the contrary depends now, as always, upon the individual taste. Only in inconsequential respects, so far as teeth and gums are directly, or systematically, concerned, does the diet of today differ from that of centuries ago. No diet of any character serves to exercise the gums. The gums are those tissues which invest the necks of teeth and cover the alveolar parts of the jaws. They are nonmuscular, as immobile as the toenails and are wholly incapable of "exercise" in any unusual sense of the word. The gum tissues themselves are capable of a degree of expansion and contraction based on biologic changes induced by heat, cold, or friction, but the different amount or duration of expansion or contraction caused by the friction of various diets in the process of eating is inconsequential. The firmness and health of gums is primarily dependent upon the general condition of the system and supporting mechanism of teeth and will not be enhanced or improved or affected by the use of Ipana either as a dentifrice, as a rubbing medium, or both, nor will the use be protected against gum troubles or rendered less susceptible thereto. Any benefit that may result from rubbing Ipana on the gums is due solely to the rubbing and not to the Ipana. Respondents' claim that a stimulating effect on the gums can be felt when Ipana is rubbed on them, and that this shows that lazy gums are awakening and circulation is speeding up is untrue. The so-called "tang" is nothing more than a sensory reaction of the nerve ends in the mouth and gums due to a short exposure to the small quantity of volatile aromatic oils in Ipana. Said oils have no stimulating effect upon the circulation in the tissues because of their brief contact therewith, the smallness of the amounts and their further dilution with saliva. Ipana will not help to bring health to the gums nor radiance to the smile. There are many conditions of the gums to which massage is detrimental rather than beneficial. The "brilliance," "brightness," "luster," and "sparkle" of teeth is due to the natural qualities of the tooth enamel. The teeth of some people possess these qualities; those of others do not and will not acquire them or any of them through the use of Ipana, whether it is rubbed on the gums or used as a dentifrice or both. The user of

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Ipana will not be protected against tooth decay nor will his resistance to gum ailments be increased. The use of Ipana as a rubbing medium for the gums is not taught in schools. The only value of Ipana Tooth Paste is as a not unpleasant adjunct to the use of the toothpaste in cleansing the teeth.

PAR. 12. The aforesaid quoted statements and representations, made and disseminated by respondents, are not inclusive, but are set forth as typical examples. Many other statements and representations of similar import and meaning have been, and are, disseminated by respondents but are not specifically set out herein.

PAR. 13. The use by respondent of the foregoing false, deceptive, misleading and exaggerated statements, representations and depictions with respect to Ipana tooth paste has had, and now has, the capacity and tendency to, and does, mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that said statements and representations were true and into the purchase of substantial quantities of Ipana tooth paste because of said erroneous and mistaken belief.

PAR. 14. The aforesaid acts and practices of respondents, as herein alleged, are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on October 28, 1942, issued and subsequently served upon the respondents named in the caption hereof its complaint, charging said respondents with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of that act. After the respondents had filed their joint answer to the complaint, testimony, and other evidence in support of and in opposition to the allegations of said complaint were introduced before Frank Hier, a trial examiner of the Commission theretofore designated by it, and such testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, this proceeding regularly came on for final hearing before the Commission upon the complaint, the respondents' answer thereto, testimony and other evidence, the trial examiner's recommended decision, written briefs, and oral arguments of counsel; and the Commission, having duly considered the matter and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. The respondent, Bristol-Myers Co., is a corporation organized under the laws of the State of Delaware, with an office and its principal place of business located in the International Building, Rockefeller Center, New York, N. Y. The respondents, Pedlar & Ryan, Inc., and Young & Rubicam, Inc., are corporations organized under the laws of the State of New York, and these respondents have their respective offices and places of business at 250 Park Avenue and 285 Madison Avenue, in New York, N. Y.

PAR. 2. Respondent Bristol-Myers Co. is now, and for many years last past it has been, engaged in the sale of Ipana tooth paste, a cosmetic preparation as defined in the Federal Trade Commission Act. Said respondent causes this product, when sold, to be shipped and transported from its principal place of business in the State of New York, or from its plants or warehouses in other States of the United States, to purchasers thereof who are located in States other than those of the points of origin of such shipments and in the District of Columbia. Respondent, Bristol-Myers Co., maintains, and at all times mentioned herein it has maintained, a regular course of trade in its said cosmetic preparation in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 3. Respondents, Pedlar & Ryan, Inc., and Young & Rubicam, Inc., are both engaged in business as advertising agencies, acting as professional counsel in advertising matters, and in this capacity each of said companies has been employed by respondent Bristol-Myers Co., the former from 1925 to 1944, handling newspaper and periodical advertising in the promotion of Ipana tooth-paste, and the latter from 1937 to the date of the hearings in this proceeding, handling radio advertising for said product. Pursuant to such employment, the appropriate one of these agencies, after having been instructed by respondent Bristol-Myers Co. as to the general nature of the advertising desired and the media in which it was to be used, would compose the advertisements or radio commercials, submit them to respondent Bristol-Myers Co. for examination, review, approval, or change, and then have said advertisements published or broadcast in the proper media on a prearranged and preagreed upon schedule. Respondents Pedlar & Ryan, Inc., and Young & Rubicam, Inc., thus participated in the preparation and in the dissemination of the advertising material to which reference is hereinafter made, but in connection with which the primary and final authority rested with respondent Bristol-Myers Co.

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PAR. 4. In the course and conduct of their businesses, and for the purpose of inducing the purchase of Ipana tooth paste, the respondents have disseminated, and are now disseminating, and have caused and are now causing, the dissemination, by the United States mails, through advertisements inserted in newspapers and periodicals, by radio commercials, and by various other means in commerce, as "commerce" is defined in the Federal Trade Commission Act, of many advertising statements and representations concerning said product.

PAR. 5. In the manner and for the purpose aforesaid, the respondents have represented (1) that, according to a national survey conducted in 1940 among thousands of dentists, twice as many dentists personally use Ipana tooth paste as any other dentifrice, and (2) that more dentists recommend Ipana for their patients' daily use than the next two dentifrices combined.

PAR. 6. The survey referred to in said representations consisted of sending to each of 10,000 dentists, whose names were taken from the subscription lists of the two publications Oral Hygiene and Dental Survey, a questionnaire containing, among other queries, the questions, "What dentifrice do you personally use most often?" and "Is dentifrice named above also the one you recommend most often to patients?" 1,983 of these questionnaires were returned, containing 2,467 replies to the question "What dentifrice do you personally use most often?" and these replies indicated that 621 of the dentists answering this question chose Ipana tooth paste, with its 4 nearest competitors being chosen by 258, 189, 144, and 128 dentists, respectively; 706 other replies to this question were divided among 19 other named brands, 189 returns were classified without explanation as "Miscellaneous," 225 indicated that the answering dentists preferred no particular brand or type of dentifrice, and 9 of the dentists stated that they use the tooth brush only. The original returns had been destroyed and only the tabulation therefrom made up by the respondents was available. The excess of 484 replies over the 1,983 returns was not explained in the tabulation, and if this excess was due to multiple choices of dentifrices, the distribution of such multiple choices was neither explained nor accounted for. The same relative situation was revealed in answers to the question "Is dentifrice named above also the one you recommend most often to patients?", there being 1,405 returns, containing 1,674 answers to the effect that the answering dentists recommend to patients the same dentifrices which they personally use most often (413 of whom personally use Ipana), and 578 returns, containing 793 answers to the effect that the answering dentists do not recommend to their

patients the same dentifrice which they personally use (208 of these personally using Ipana). Other surveys conducted in 1941 and 1944 revealed substantially similar situations.

PAR. 7. (a) There are in the United States approximately 66,000 practicing dentists. The representations above referred to fairly imply, and a reader might reasonably infer therefrom, that the preference for personal use and the recommendation to patients to use Ipana was by the Nation's 66,000 dentists as a profession. The phrase "survey" used in the respondents' advertising fairly implies, if not the questioning of all dentists, at least a representative, unbiased and fair sampling from the profession as a whole. The representations reasonably imply that of all the dentists in the country twice as many use Ipana tooth paste as any other dentifrice and that more of them recommend Ipana for their patients' daily use than recommend the next two dentifrices combined. They also reasonably imply that the survey disclosed that Ipana tooth paste is the exclusive choice of such dentists.

(b) These implications are false and misleading in that the actual sampling conducted by the respondents was from a restricted list of dentists, not representative of the dental profession as a whole, comprising replies from less than 2,000 of the Nation's 66,000 dentists, and even then containing a sufficient number of apparent multiple choices unaccounted for to make the results wholly unreliable. They are misleading for the further reason that out of the 1,983 dentists answering the questionnaire only 621 listed Ipana tooth paste as their preference for personal use, the survey thus failing completely to justify the respondents' claim of overwhelming popularity of Ipana among the Nation's dentists; and the implications are clearly false in that the answering dentists indicated only the dentifrices they use and recommend "most often" and not the dentifrices which they use and recommend exclusively.

(c) The respondents' representations also carry the unmistakable inference and obviously convey the impression that the underlying reason for the personal choice of Ipana tooth paste by the Nation's dentists is the quality and over-all effectiveness of such product. The respondents' own tabulation of the replies received from the questionnaires shows on its face that this is not the case. Of the 621 dentists selecting Ipana as their choice for personal use providing 880 answers to the question "What is the most important single reason why you use the above dentifrice most often?" 158 gave as the reason the taste or flavor of the dentifrice, 83 said the choice was due to the

fact that they receive free samples, 26 liked Ipana best because of its soap content and the fact that it foams, 15 because it is "harmless," 12 because it is easy to use, 12 preferred it from habit, and 65 answers were classified as "Miscellaneous." Thus, the tabulation shows that out of a total of 880 reasons given for preferring Ipana tooth paste, 372 of them had no connection whatever with the quality or over-all effectiveness of the product as a dentifrice.

(d) The Commission is of the opinion, therefore, and finds, that the representations referred to in paragraph 5, and the reasonable implications thereof and ultimate impressions to be drawn therefrom, were and are false and deceptive in some respects and misleading as a whole, and that the advertisements in which said representations were made have been and are false advertisements.

PAR. 8. By means of newspaper and periodical advertising and radio continuities, the respondents have further represented to the public (1) that the modern American diet consists of such soft, well-cooked, nonfibrous foods that the gums do not get the exercise and stimulation they need, and (2) that massage with Ipana will provide such exercise and stimulation, will make the gums firm and healthy, guard against "Pink Tooth Brush," and prevent gum trouble generally.

PAR. 9. (a) The preponderant weight of qualified dental opinion, based on actual clinical experience of many years with thousands of patients, is that soft, well-cooked, nonfibrous foods are not conducive to gum trouble; that it is immaterial to gum health whether the diet of a person is soft or coarse; and that, contrary to the respondents' representations, the modern American diet provides sufficient gum stimulation.

(b) The term "massage," as used by dentists, means a careful, downward stroking or squeezing pressure applied to only a quarter inch of the gum margin and teeth, and its proper use by laymen requires professional instruction over a considerable length of time. The record in this proceeding contains a great deal of discussion pro and con on the question whether this properly instructed massage will or will not stimulate circulation in the gums, whether or not Ipana or any other dentifrice used in connection therewith is useful or beneficial as a cleansing or therapeutic agent, whether histamine is a hormone or something else, and the vascular effects of epinephrine, benzedrine, and ultraviolet rays. As used in the respondents' advertisements, however, the unqualified term "massage" means to the great majority of the general public a horizontal, vertical, or rotary

scrubbing of the teeth and all of the gums with the tooth brush, or a similar rubbing with the finger, and regardless of the need for and benefits to be expected from gum massage as employed by the dentist, the record is clear that such uninstructed "massage" as that contemplated by the respondents' representations, either with or without Ipana tooth paste or any other dentifrice, does not and will not stimulate circulation in the gums, impart firmness and health structure thereto, or prevent gum trouble in general, or "Pink Tooth Brush" in particular. Moreover, the preponderant weight of qualified dental opinion, based on clinical experience, is that even massage as carefully instructed by the dentist and properly performed is not necessary in an undiseased mouth, that a layman is unable to ascertain whether or not he is in need of massage, and that neither Ipana nor any other dentifrice adds any benefit to gum massage, either through mechanical or chemical action of appreciable duration or significance, or therapeutically. The preponderant weight of the same opinion is that Ipana tooth paste is a cleansing agent only, without therapeutic value, and with such prophylactic value only insofar as it cleanses.

(c) For the reasons stated, the representations referred to in paragraph 8 were and are false and deceptive, and the advertisements wherein said representations were made have been and are false advertisements.

PAR. 10. The respondents have also represented in their advertising (1) that in many schools children are drilled in rubbing their gums with Ipana, and (2) that the use of Ipana tooth paste, with or without massage, will beautify the smile and brighten and whiten the teeth; and the complaint charged that both of these representations were misleading and deceptive. As it relates to the representation that school children are drilled in rubbing their teeth with Ipana, the evidence is that gum massage is included in the hygienic courses of a number of schools, and no proof was offered that such drilling in massage was not with Ipana tooth paste as an adjunct. Accordingly, the record does not show and the Commission does not find that this representation was untrue. Concerning the representation that Ipana tooth paste will beautify the smile and brighten and whiten the teeth, the Commission is of the opinion that the reference to beautification of the smile was mere puffery, unlikely, because of its generality and widely variant meanings, to deceive anyone factually. As used in the advertising, the expression "brighten and whiten the teeth," according to the opinion evidence, means simply cleaning the teeth, and the record shows that while the use of Ipana will not alter the shape,

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size, contour, permanent coloration, injuries, malposition, or original luster of the teeth, it will, through the removal of film, debris, food, dirt, and surface stains, assist in the cleaning of them. The Commission therefore finds that the allegation of the complaint that this representation was deceptive has not been sustained.

The complaint further charged that the respondents have falsely represented that the use of Ipana tooth paste will prevent tooth decay. There is no evidence in the record showing that this representation was ever made.

PAR. 11. The use by the respondents of the false, deceptive and misleading representations, disseminated as aforesaid, with respect to the product, Ipana tooth paste, has the capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such representations are true and, because of such erroneous and mistaken belief, into the purchase of substantial quantities of said product.

CONCLUSION

The acts and practices of the respondents as herein found (excluding those referred to in par. 10) are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices within the intent and meaning of the Federal Trade Commission Act.

The Commission is of the opinion, however, and in the exercise of its sound discretion concludes, that the complaint in this proceeding should be dismissed as to the respondents Pedlar & Ryan, Inc., and Young & Rubicam, Inc. This is for the reason that, although these respondents participated in the dissemination of the advertising found to be false or misleading, they at all times acted under the direction and control of respondent Bristol-Myers Co., their employer, with whom rested the final authority and responsibility for such advertising, and for the further reason that the practices found to be against the public interest will be stopped by the order to cease and desist issued against Bristol-Myers Co.

Commissioner Carson not participating.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the respondent's answer thereto, testimony and other evidence taken before a trial examiner

of the Commission theretofore duly designated by it, the trial examiner's recommended decision, written briefs, and oral arguments of counsel; and the Commission, having made its findings as to the facts and its conclusions that the respondents have violated the provisions of the Federal Trade Commission Act:

It is ordered, That the respondent, Bristol-Myers Co., a corporation, 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 cosmetic preparation, Ipana tooth paste, or any other preparation of substantially similar composition or possessing substantially similar properties, whether sold under the same name or under any other name, do forthwith cease and desist from:

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

(a) That twice as many dentists in the United States personally use Ipana tooth paste as any other dentifrice, or that any greater proportion or number of dentists use said product than is the fact;

(b) That more dentists in the United States recommend Ipana tooth paste for use by their patients than any other two dentifrices combined, or that more dentists recommend said product than is the fact;

(c) That the use of Ipana tooth paste with massage will prevent "Pink Tooth Brush" or aid in the treatment of its causes;

(d) That Ipana tooth paste has any significant therapeutic value in the treatment of mouth, tooth, or gum diseases;

(e) That modern or current diets, or soft, well-cooked foods, do not give the gums the exercise and stimulation they need, or that such diets or foods make the gums susceptible to trouble;

(f) That massage with Ipana tooth paste stimulates circulation in the gums, imparts firmness or health to the gums, or prevents gum trouble.

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

It is further ordered, For the reasons set forth in the Commission's findings as to the facts in this proceeding, that the complaint herein

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be, and it hereby is, dismissed as to the respondents, Pedlar & Ryan, Inc., and Young & Rubicam, Inc.

It is further ordered, That the respondent, Bristol-Myers Co., shall, within 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.

Commissioner Carson not participating.

Syllabus

IN THE MATTER OF
EDWARD BAUM TRADING UNDER HIS OWN NAME AND
AS THE MEGA-EAR-PHONE

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 5408. Complaint, Nov. 30, 1945—Decision, Nov. 15, 1949

Where an individual engaged in the interstate sale and distribution of a device designated as the "Mega-Ear-Phone," which was recommended for the correction of deafness and other ear conditions, and which was composed of processed silk with a disk or drum at one end and side walls which extended from the disk in the form of four small flexible cones called "accumulators," intended, when inserted into and along the outer channel of the ear to bring the disk in contact with the ear drum, to expand with the ear and effectively convey sound impulses; in advertising his said product through the mails, newspapers and by booklets, letters and other advertising literature—

- (a) Represented that said device relieved deafness, eliminated head noises, and enabled a deaf person to hear irrespective of the cause and degree of deafness; and that use thereof would restore and improve hearing; and would restore the natural flow of wax in the ear and promote the ear's health in general; The facts being that the placing of said device in the auditory canal and against the ear drum would have no effect on the perceptive or nerve type of deafness, and no favorable influence in the conductive type of cases where there is impairment of the ossicles or bone mechanism of the middle ear; and it would not in other respects accomplish the results above claimed therefor;
- (b) Falsely represented that it would cause thickened membranes of the ear drum to become thinner and would restore elasticity and the proper degree of moisture to the ear drum; that a distended ear drum and dislocated ossicle of the middle ear would be corrected by the use of the device and thereafter held in proper position; and that said device served as a perfect substitute for punctured, perforated, ruptured, or destroyed ear drums;
- (c) Falsely represented that it would not injure the most sensitive and delicate ear and was the latest and most effective device for impaired hearing and deafness and fulfilled every requirement for relief thereof, and that it was beneficial in cases of nervous deafness; the facts being that injury to the ear might result through the manner in which said device was inserted or removed, and use thereof coincident with suppuration of the middle ear might interfere with ear drainage; and other claims therefor were likewise false;
- (d) Represented that the shape of the ear was necessarily as indicated in certain drawings set forth in his advertisements, and that the exact position and placement of his device in the user's ear was the same as that portrayed in the drawings; and that the result to be obtained by use of said device would be the same as indicated by the designated placements as drawn;

The facts being that the auditory canal and membrane varies among individuals in respect to shape and pattern and frequently depart from the contours