

IN THE MATTER OF
LIGGETT & MYERS TOBACCO COMPANY

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

Docket 6077. Complaint, Jan. 15, 1953—Decision, Sept. 17, 1958

Order requiring a manufacturer of tobacco products to cease representing falsely in advertisements in newspapers and periodicals and by radio and television that its Chesterfield cigarettes or the smoke therefrom would have no adverse effect on the nose, throat or accessory organs, were milder or less irritating than other brands, and would soothe and relax the nerves.

Mr. Frederick McManus for the Commission.

Simpson, Thacher & Bartlett, of New York, N.Y., by *Mr. Whitney North Seymour* and *Mr. Armand F. Macmanus*, for respondent.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

1. The complaint in this case charges the respondent with the making of certain misrepresentations in advertising its "Chesterfield" cigarettes. A substantial volume of evidence has been received both in support of and in opposition to the complaint. Upon the conclusion of the case in chief in support of the complaint, respondent moved for dismissal of all of the charges in the complaint except one, respondent's position being that a prima facie case in support of those charges had not been established. On July 8, 1954, the hearing examiner issued an initial decision granting the motion and dismissing the charges in question. Upon appeal to the Commission by counsel supporting the complaint such decision was, on March 28, 1955, reversed by the Commission, except as to one issue, and vacated, the case being remanded to the hearing examiner for further proceedings. Since that time reception of respondent's evidence has been concluded, and proposed findings and conclusions have been submitted by both parties. The case is now before the hearing examiner for final consideration. To the extent that the findings and conclusions proposed by the parties appear herein, such proposals have been adopted; otherwise, they have been rejected.

2. Respondent Liggett & Myers Tobacco Company is a corporation organized and doing business under the laws of the State of New Jersey. It maintains an executive office at 630

Fifth Avenue, New York, N.Y., and has other offices and places of business at various other locations in the United States. The company is engaged in the manufacture and sale of tobacco products, including Chesterfield cigarettes. In the sale of its products respondent is engaged in interstate commerce, such products being sold and shipped by it from its various places of business to purchasers located in other states throughout the United States. Respondent is in competition in interstate commerce with numerous other sellers of tobacco products.

3. Respondent advertises its Chesterfield cigarettes throughout the United States, the advertisements being disseminated by means of newspapers and magazines and radio and television broadcasts. The complaint (paragraph 6) charges that in certain of its advertising respondent has represented, contrary to fact, (1) "that the smoke from Chesterfield cigarettes will have no adverse effect upon the nose and throat and accessory organs, including the eustachian tubes, sinuses, larynx and trachea"; (2) "that the smoke from Chesterfield cigarettes is milder and cooler and consequently less irritating to the user than all other cigarettes"; (3) "that the smoke from Chesterfield cigarettes will soothe and relax the nerves of smokers, irrespective of the physical condition or the smoking habits of smokers"; and (4) "that the smoke from Chesterfield cigarettes does not leave an unpleasant after-taste in the mouth."

The "No Adverse Effect" Issue

4. The advertisement which forms the basis for the first of these charges (that respondent has represented that Chesterfield cigarettes have no adverse effect upon the nose, throat and accessory organs) reads as follows (omitting certain material not involved in the present issue):

N O S E , T H R O A T ,
AND ACCESSORY ORGANS NOT ADVERSELY
AFFECTED BY SMOKING CHESTERFIELDS
FIRST SUCH REPORT EVER PUBLISHED
ABOUT ANY CIGARETTE

A responsible consulting organization has reported the results of a continuing study by a competent medical specialist and his staff on the effects of smoking Chesterfield cigarettes.

A group of people from various walks of life was organized to smoke only Chesterfields. For six months this group of men and women smoked their normal amount of Chesterfields—10 to 40 a day. 45% of the group have smoked Chesterfields continually from one to 30 years for an average of 10 years each.

the six-months period each smoker was
 including X-ray pictures, by the medical
 examination covered the sinuses as well as

ough examination of every member of the
 at the ears, nose, throat, and accessory
 examined by me were not adversely
 smoking the cigarettes provided." (Ex-
 mplaint)

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 matter of *Unitone Corporation*,
 1954), the Commission, speaking
 said:

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 more than to accurately restate medical
 a reputable otolaryngologist, it cannot

misleading statements, it is no defense
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7) charges that the representa-
 cause " * * * the smoke from
 itant and will have an adverse

effect upon the nose, throat, and accessory organs such as the eustachian tubes, sinuses, larynx, and trachea of many smokers in that it will cause the nose, throat, and such accessory organs to become irritated."

Testifying in support of this statement were five witnesses: an expert in the field of physiology and pharmacology, two practicing otolaryngologists, a physician who specializes in allergies, and an anesthesiologist. All agreed that cigarette smoke is an irritant and that it affects the mucous membrane of the nose, throat, and accessory organs, its effect being to cause irritation in such organs. In the case of four of the witnesses, their testimony was based not only upon general knowledge but upon wide clinical experience.

7. Respondent's principal defense on this issue revolves around the work of the consulting organization mentioned above. In December 1951, at the instance of respondent, Arthur D. Little, Inc., of Cambridge, Mass., an engineering, research and consulting organization, undertook an experiment for the purpose of determining the effect of Chesterfield cigarettes upon the nose, throat, and accessory organs. Arthur D. Little, Inc., is a large and well-known organization with a staff of some 850 persons, half of whom are professional scientists. More than 150 of the scientists have Doctor or Master degrees. For the test a panel or group of thirty of its own employees were chosen—twenty men and ten women, this being the approximate sex ratio of smokers in the United States. The panel appears to have represented a fair cross-section of the company's personnel, including secretaries, writers, administrative personnel, engineers, a librarian, a machine tool operator and maintenance personnel. All were cigarette smokers who smoked from ten to forty cigarettes per day, which was regarded as the range of the average smoker. Some 40 to 45 percent of the group were already users of Chesterfields.

8. As a part of the experiment, Arthur D. Little, Inc., engaged the services of an otolaryngologist of Cambridge—Dr. Walter J. E. Carroll. In January 1952, at the beginning of the test period, each member of the group was examined by Dr. Carroll, particularly as to the condition of the nose, throat, and accessory organs. Thereafter, each member was examined by him every two months until three examinations had been made in addition to the initial examination. During this period of approximately six months, the members of the group were supplied with Chester-

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field cigarettes without charge by Arthur D. Little, Inc., and it was understood that they were to smoke Chesterfields exclusively. At the end of the six months' period, Dr. Carroll addressed to Arthur D. Little, Inc., a letter reading as follows:

I have examined for the fourth time since January 1952, the ears, nose, and throat of a group of subjects selected by Dr. M. G. Gray of your staff, who were participating in a program in which they smoked cigarettes provided by you. The interval between each examination was approximately two months; the most recent examination in August, 1952, was made after six months' of smoking the cigarettes provided. Bacterial culture of the nasopharynx was done at the time of each examination and X-ray examinations of the chest and sinuses were made at the time of the first examination and at three and five months thereafter.

In these persons, no significant structural or functional changes in the organs and tissues which were examined were observed which could be directly attributed to smoking the cigarettes provided during the six months' period of the program which had elapsed. Those seen, notably acute upper respiratory infections, were consistent with the season of the year when examinations were made, and have no relation to the nature of the cigarettes smoked.

The X-ray examinations did not show any pathological changes which could be ascribed to participation in the panel.

It is my opinion that the ears, nose, throat and accessory organs of all participating subjects examined by me were not adversely affected in the six months' period by smoking the cigarettes provided. (Respondent Exhibit 9)

Upon receipt of this information from Arthur D. Little, Inc., respondent proceeded to prepare and publish the "no adverse effect" advertisement quoted above, after first submitting the advertising copy to Arthur D. Little, Inc., to make sure that there was nothing in the copy which in the opinion of that organization was inconsistent with the results of the experiment.

9. While there is no reason to question the good faith of respondent or the Arthur D. Little, Inc., organization or Dr. Carroll, it is questionable whether this experiment can properly be accepted as a scientific test in the real sense. This is so primarily because of the absence of any definite information as to the smoking habits of the thirty individuals during the period in question. As noted above, Chesterfield cigarettes were supplied to them free and they were expected to use them exclusive of any other cigarette, but there is no substantial evidence that they did so. Nor is there evidence as to the number of cigarettes per day smoked by the individuals. All that is known is that the individuals were selected because it was understood that the usual number of cigarettes smoked by them ranged from ten to forty

per day. Moreover, the individuals were examined only at intervals of two months and there is an absence of any real information as to their condition between the examinations.

10. Actually, the study did not end with the close of the six months' period; it was extended some eighteen months thereafter, making a total period of approximately two years. Dr. Carroll testified that examinations of the individuals during the period subsequent to the first six months disclosed nothing inconsistent with the conclusions expressed in his letter. Records on all of the members of the panel were maintained by Dr. Carroll, and in the case of four individuals there are references to smoking, all of the references occurring subsequent to the original six months' period. These entries in the records are as follows (each entry refers to a different individual):

An entry on April 8, 1954, reads:

Patient has been well since last examination, but complains of considerable p.n. discharge and cough. The cough appears to be made worse by the amount of p.n. discharge. Patient is unable to tell whether smoking makes it any worse, but feels that it does have some effect on it. He notices the coughing most at night on going to bed. (Commission Exhibit 6E)

An entry on June 16, 1953, reads:

Patient states that he has spasms of coughing at times while smoking. It lasts but a few seconds and is not regular in occurrence. (Commission Exhibit 7F)

An entry on January 28, 1954, reads:

Patient complains of considerable coughing which seems to be aggravated by smoking. (Commission Exhibit 8E)

An entry on August 6, 1953, reads:

Patient has some cough at times after smoking a great deal. (Commission Exhibit 9E)

With respect to these instances, Dr. Carroll testified in substance that in his opinion they were without significance, that the conditions referred to were transitory and were, in fact, not due to smoking. He did not think the instances were inconsistent with the opinion expressed in his letter.

11. There is also testimony on behalf of respondent from two physicians who are in charge of the health and physical fitness programs of two large industrial organizations—Sperry Gyroscope Company of Great Neck, N.Y., which is a subsidiary of the Sperry Rand Corporation, and Sylvania Electric Products Corporation of New York, each of which has many thousands of

persons in its employ in various plants and offices. The companies maintain extensive health departments comprising numerous physicians, technicians, nurses, etc. All applicants for employment are examined and there are also periodic examinations of all employees. The health facilities of the companies are always available to employees for treatment and consultation, and during the last several years each of the two witnesses has personally examined thousands of individuals and supervised the examination of many others. The testimony of the witnesses in substance is that of the thousands of employees who have come under their observation only a small percentage, probably 3 to 5 percent, had irritation of the ear, nose or throat, and that in the great majority of instances the irritation was due to infection rather than smoking. Rarely have they found cases of irritation which in their opinion could properly be attributed to smoking.

The testimony of another witness, who is also a physician connected with the Sperry Gyroscope Company, is to the same effect.

12. The evidence on the present issue appears clearly to preponderate in favor of the Government. In this connection it is highly significant that, without exception, all of the physicians and scientists testifying in the proceeding, whether for the Government or for respondent, appear to recognize that cigarette smoke is an irritant and is capable of affecting adversely the nose, throat and accessory organs. Apparently none of the witnesses entertains the view that cigarette smoke is harmless—that an individual may smoke with impunity. The witnesses differ as to the extent and gravity of the danger, but all recognize that at least some danger is present.

13. The fault with the advertisement in question lies in its absoluteness—in its representation that the smoking of Chesterfields will have *no* adverse effect on the nose, throat and accessory organs. Clearly this goes too far. Whatever may be the exact extent of the danger, the record establishes beyond question that the smoking of Chesterfields or any other cigarette will have, or certainly is likely to have, some adverse effect on the organs in question. It is therefore concluded that the advertisement is erroneous and misleading; that this charge in the complaint has been sustained.

“Milder” and “Cooler.”

14. The complaint (paragraph 6) charges that through the use of such expressions as “Buy Chesterfield - Much Milder,”

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"Always Milder," and "Cooler Smoking," respondent represents "that the smoke from Chesterfield cigarettes is milder and cooler and consequently less irritating to the user than all other cigarettes." And in paragraph 7 of the complaint it is charged that these representations are false and misleading because "the smoke from Chesterfield cigarettes is not milder, cooler or less irritating than that of other leading brands of cigarettes." In his decision of July 8, 1954, the hearing examiner held that there was no substantial evidence on the issue as to coolness, and the dismissal of that charge was affirmed by the Commission. That issue may therefore be disregarded, leaving only the issue as to mildness.

15. Respondent objects to the use of the word "all" in the interpretation of its advertising. As noted above, the complaint charges that respondent's advertising constitutes a representation that Chesterfield cigarettes are milder "than *all* other cigarettes" (emphasis supplied). Respondent points out that the word used by it is "milder," not "mildest," and insists that the representation is true if Chesterfield cigarettes are milder than some cigarettes, or, in fact, any one cigarette. A reasonable interpretation of the advertising would seem to lie between the two extremes. The advertising cannot, in the hearing examiner's opinion, reasonably be construed as representing that Chesterfield cigarettes are milder than *all* other cigarettes; it does, however, appear to represent that Chesterfield cigarettes are milder than cigarettes generally, or, than most other cigarettes. ✓

16. If this is the correct interpretation of respondent's claim, it may be questionable whether the complaint actually tenders an issue on the point. For, as seen above, the complaint, in challenging the representation as to mildness, alleges only that Chesterfield cigarettes are not milder than "Other leading brands of cigarettes." In view, however, of the conclusions reached on other aspects of the matter, the examiner finds it unnecessary to decide this question.

17. Next presented is the important question of the sense in which the word "milder" is used in respondent's advertising. It is contended by respondent that as here used the word relates only to sensory feelings or sensations, as taste, smell, etc.; that the word was not intended to relate, and cannot reasonably be construed as relating, to any actual physiological or pathological effect or condition, as inflammation or irritation in the nose,

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throat, or accessory organs; that here the word is used simply as denoting a quality product, a well blended, pleasant-tasting cigarette. Counsel supporting the complaint, on the other hand, would link the issue of mildness with the major issue raised by the complaint, that of the irritating and consequently adverse effect of Chesterfield cigarettes upon the nose, throat and accessory organs. Counsel's position is that since the record, as he contends, establishes that there is no significant difference between the irritating effect of Chesterfield cigarettes and other leading brands of cigarettes upon the organs in question, it necessarily follows that Chesterfield cigarettes cannot be milder than such other brands.

18. The word "mild" is defined in Webster's New International Dictionary of the English Language, 2d Edition, Unabridged, 1951, as "2. Moderate in action or sensuous effect; clement, temperate; soft; bland; as mild weather, a mild cigar, a mild drug, mild as milk; also of disease, not acute."

19. For more than 20 years the term "mild" in its various forms (mild, mildness, milder, mildest) has been in wide use by cigarette manufacturers in advertising their respective products. It is highly significant that despite such long usage in the industry generally, and despite the fact that the Commission has instituted a number of proceedings against cigarette manufacturers, the present case appears to be the first in which the use of the word has been challenged. This would indicate that through the years the Commission has regarded the term as harmless or innocuous, as merely a laudatory or "puffing" term denoting high quality or pleasant sensory reaction, not as a term relating to the amount or degree of irritation produced in the nose, throat or accessory organs.

20. It is immaterial that one of the Commission's expert witnesses testified that to him as an expert the word milder meant less irritation to these organs. The word is not a scientific term but an ordinary lay expression in common use, and it is by that standard that its meaning here must be determined. It seems clear that here the word was not used in any scientific or technical sense but merely to indicate a high quality, pleasant-tasting cigarette.

21. Assuming, however, that the term should be interpreted as representing less irritation, the record still falls short of sustaining the complaint. The principal evidence relied on by the Government is a report of certain smoking tests made by Dr.

Clarence D. Wright, a chemist of the Federal Security Agency (Com. Ex. 1A-C). Dr. Wright subjected samples of Chesterfields and four other leading brands of cigarettes (Camel, Lucky Strike, Old Gold, Philip Morris) to tests by means of a mechanical smoking device, the object of the tests being to determine the relative amounts of nicotine and "tarry materials" present in the smoke of the various brands. The smoke drawn in by the machine was channeled through funnels containing sulphuric acid and chloroform, this for the purpose of catching or "trapping" the nicotine content of the smoke in the sulphuric acid and the tarry material content in the chloroform.

22. A number of alleged discrepancies in the tests are pointed out by respondent. Assuming, however, that the test may properly be accepted at full face value, they show nothing more than that the amounts of nicotine and tarry materials present in the smoke from the various cigarettes are substantially the same. The tests fail to settle the question of the relative irritating effects of the cigarettes. This is so because admittedly cigarette smoke contains other irritating substances besides nicotine and tars, and the experiments conducted by Dr. Wright did not purport to trap or measure such other substances.

23. Not only is this clear from the evidence introduced on behalf of the Commission, but there is now in the record testimony to the same effect from two pharmacologists introduced by respondent. Both were qualified not only in the fields of pharmacology and physiology generally, but also as experts in the more restricted field of the nature and effect of tobacco smoke. Among the irritants other than nicotine and tars present in tobacco smoke are volatile bases, such as ammonia; volatile acids, such as formic and acetic acids; and aldehydes. Both of these witnesses testified unequivocally that the Wright report forms no adequate basis for a conclusion that there is no significant difference in the irritating properties of the brands of cigarettes in question.

24. Most cigarettes are composed of various blends of different types of tobacco. Among the types in common use are bright or flue-cured tobacco and Burley tobacco. Bright or flue-cured tobacco is recognized as being less irritating to the nose, throat and accessory organs than Burley tobacco. The record further indicates that the blend of tobaccos used in Chesterfield cigarettes contains appreciably more bright or flue-cured tobacco and less Burley tobacco than do many other cigarettes.

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25. One of the Commission's witnesses, Dr. Errett C. Albritton, basing his testimony upon the Wright report, expressed the opinion that there was no significant difference between the irritating effects of the five brands of cigarettes tested. But this testimony, being based upon the Wright report, obviously can have no greater probative value than the report itself. Dr. Albritton, while undoubtedly qualified in his own field, that of general physiology and pharmacology, claimed no special knowledge whatever in the field of tobacco and tobacco chemistry.

26. There is also testimony from practicing physicians (nose and throat specialists) that during the ordinary course of their practice their patients have at times told them which brand of cigarette they (the patients) smoked, and that no significant difference in the degree of irritation was observed by the physicians regardless of the brand named by the patient. It is very questionable whether such testimony, resting upon hearsay and upon more or less casual or routine observation of patients by physicians from day to day, constitutes reliable and substantial evidence upon so precise and difficult a question as the relative irritating effects of different brands of cigarettes.

27. It is concluded that this charge in the complaint has not been sustained. First, because as used in respondent's advertising the word "milder" merely denotes a quality product, pleasant to the senses; and, second, because if the term should be construed as representing that Chesterfield cigarettes are less irritating to the nose, throat and accessory organs than cigarettes generally, the record fails to establish the contrary.

"Soothing and Relaxing"

28. In certain of its advertising, respondent has used the statement "Chesterfield uses only the ingredients proved by scientific tests to produce a soothing and relaxing smoke" (Exhibit C to respondent's answer to complaint). The complaint charges that through the use of this statement respondent represents "that the smoke from Chesterfield cigarettes will soothe and relax the nerves of smokers, *irrespective of the physical condition or the smoking habits of smokers*" (emphasis supplied). The complaint then charges that the statement is false and misleading because the smoke from such cigarettes "will not soothe or relax the nerves in the case of all smokers."

29. It is obvious that here the complaint attributes to respondent words which it has not used. Respondent's statement con-

tains no representation that its cigarettes will produce a soothing and relaxing smoke irrespective of the physical condition or the smoking habits of smokers. It is recognized that advertisers are responsible not only for the words actually used but for the natural and reasonable inferences to be drawn therefrom. But this principle has no application here. Here the advertisement would seem to mean nothing more than that usually or generally or in most cases the smoking of Chesterfields will have a soothing and relaxing effect. If this is the correct interpretation of the advertisement, it seems clear that the complaint fails to tender any issue or state any cause of action, because it alleges only that the cigarettes will not soothe or relax the nerves in the case of *all* smokers.

30. There is no substantial evidence that respondent's statement, reasonably interpreted, is untrue. On the other hand, it is common knowledge that many persons find relaxation, a soothing effect, in smoking. Moreover, the record now contains testimony from an experienced physician that in his opinion the smoking of cigarettes is soothing and relaxing to many persons. (Tr. 984-986.) Clearly this charge in the complaint has not been sustained.

"Unpleasant Aftertaste"

31. The complaint challenges as false and misleading respondent's statement that its cigarettes leave no unpleasant aftertaste (Exhibit B to respondent's answer to complaint), the complaint alleging that the cigarettes do leave an aftertaste which is unpleasant to many persons. In support of this charge there was offered the testimony of five members of the public, all residents of Washington, D.C., who had at one time or another smoked Chesterfield cigarettes. All testified in substance that the cigarettes sometimes left an unpleasant aftertaste, although here was no agreement as to its nature. One of the witnesses referred to the taste as "distinctly a tobacco taste," another as a "dry pungent taste, like after eating cheese," another as a "foul taste or burning taste," another as a "sweetish taste," another as a "burning taste."

32. This appears to be the only testimony on the point except that of two physicians who in naming some of the subjective symptoms of the effects of smoking, especially excessive smoking, referred to a bad taste as one of them.

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33. The matter of taste is so largely one of personal opinion and preference among different individuals that it would seem to be difficult, if not impossible, to adjudicate the question. Evidently, to many persons the taste or aftertaste of cigarettes is not unpleasant, while to others it is. In any event, the testimony here presented does not constitute substantial evidence warranting a conclusion that this charge in the complaint has been sustained.

"Puffing" and Public Interest

34. In his decision of July 8, 1954, the hearing examiner expressed the view that the words or expressions "milder," "soothing and relaxing," and "no unpleasant aftertaste" were harmless and constituted mere "puffing" and, further, that there was no substantial public interest "in an attempt to settle by litigation such questions as whether a particular cigarette has an unpleasant aftertaste, whether it is * * * milder, or whether it is soothing and relaxing." The examiner further said "the answer to each of these questions would seem necessarily to vary from person to person, depending upon the preference, taste and reaction of the individual smoker." For these reasons the examiner concluded that "insofar as the issues now under consideration are concerned, the proceeding appears to be without substantial public interest."

35. While in its decision of March 28, 1955, the Commission expressed disagreement with these views, the examiner does not understand that the Commission's expressions of opinion were intended as final and conclusive adjudications of the issues in question. The examiner therefore reaffirms the views expressed in his former decision that, insofar as these issues are concerned, the proceeding is without substantial public interest.

CONCLUSIONS

Respondent's representation that the smoking of Chesterfield cigarettes will have no adverse effect upon the nose, throat and accessory organs has the tendency and capacity to mislead and deceive a substantial portion of the public with respect to the properties and effect of such cigarettes, and the tendency and capacity to cause such members of the public to purchase such cigarettes as a result of the erroneous and mistaken belief so engendered. The present proceeding, insofar as this representation is concerned, is therefore in the public interest. Respondent's practice is to the prejudice of the public and of respondent's competitors, and constitutes an unfair and deceptive act

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and practice and an unfair method of competition in commerce in violation of the Federal Trade Commission Act.

ORDER

It is ordered, That respondent, Liggett & Myers Tobacco Company, 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 in commerce, as "commerce" is defined in the Federal Trade Commission Act, of Chesterfield cigarettes, or any other cigarettes of substantially similar composition, do forthwith cease and desist from representing, directly or by implication:

(1) That such cigarettes or the smoke therefrom will have no adverse effect upon the nose, throat or accessory organs.

(2) That such cigarettes or the smoke therefrom is milder when used to connote that the smoke therefrom is less irritating than the cigarettes or the smoke of any other brands of cigarettes.

(3) That such cigarettes or the smoke therefrom will soothe or relax the nerves.

It is further ordered, That the complaint be, and it hereby is, dismissed as to all charges not covered by the foregoing order.

OPINION OF THE COMMISSION

By SECREST, Commissioner:

This matter is before the Commission on cross-appeals from the hearing examiner's initial decision of September 20, 1957. Respondent appeals from that part of the initial decision holding that it has engaged in false and misleading advertising through the use of representations that the smoking of Chesterfield cigarettes will have "no adverse effect upon the nose, throat or accessory organs." Counsel supporting the complaint appeals from that part of the initial decision dismissing those charges in the complaint which alleged that respondent falsely represents that Chesterfield cigarettes are "milder," "soothing and relaxing" and leave "no unpleasant aftertaste." He also specifically excepts to the hearing examiner's finding that there is no substantial public interest in attempting to settle by litigation the question of whether a particular cigarette has an unpleasant aftertaste, whether it is milder, or whether it is soothing and relaxing and to the further finding that such claims constituted mere puffing.

In an earlier initial decision dated July 8, 1954, the hearing examiner had held that such statements are mere "puffing"

terms in the consideration of which there was no substantial public interest, and that counsel supporting the complaint had failed to make out a *prima facie* case on that phase of the complaint. On interlocutory appeal, in an opinion dated March 28, 1955, the Commission reversed the hearing examiner and held that the expressions in question were not mere laudatory, harmless or "puffing" terms, and that the questioned representations went to qualities which Chesterfield cigarettes might or might not possess. As a further ground for reversal it was stated that the public interest warranted adjudication of the issues presented.

From the foregoing, it is clear that the Commission already has determined the question of public interest. And we find in the record now before us no persuasive reason to change our opinion. In our view the advertising statements in which are used the words "milder," "soothing and relaxing" and "no unpleasant aftertaste" are clear and positive affirmations of the quality of Chesterfield cigarettes, made to induce their purchase. They are not mere "puffing."

Respondent in its appeal excepts to the examiner's findings that it has represented that the smoking of Chesterfield cigarettes will have "no adverse effect upon the nose, throat and accessory organs" and that this representation was false. Exception is taken also to the related conclusions and to the order to cease and desist insofar as it inhibits the use of that representation.

Respondent's position is that its advertising merely reported an investigation conducted for it by a reputable consulting organization and that it was within its rights in stating the facts in connection with that matter. It is apparent, however, as the hearing examiner held, that the advertising was intended to induce the public to purchase Chesterfield cigarettes and that its obvious purpose was to convey to the public the impression that Chesterfield cigarettes have no adverse effect upon the nose, throat and accessory organs. The only remaining issue is whether the representation was true.

In resolving this issue there is for consideration the testimony of five experts in the fields of physiology, pharmacology, otolaryngology, allergy, and anesthesiology who were called in support of the complaint. The testimony of four of these was based not only upon general knowledge, but upon wide clinical experience. All agreed that cigarette smoke, as an irritant, affects the mucuous membranes of the nose, throat and accessory organs.

Then we have the evidence as to the panel study conducted

under stated conditions over a period of time which was the basis for the "no adverse effect" advertising copy. While the hearing examiner did not doubt the good faith of the respondent, or of the organization conducting the experiment, or of the expert evaluating its results, he did question whether the experiment had probative value as a scientific test in the real sense. There is, he stated, an absence of any definite information as to the smoking habits of the participants on the testing panel and a lack of any substantial evidence that they smoked Chesterfields exclusively during the period involved. Furthermore, he noted the lack of direct evidence as to the number of cigarettes smoked per day by the panel members and, finally, he questioned the adequacy of the experiment as to the frequency of examinations conducted in that there was an absence of any real information as to the condition of participating panel members between examinations.

There is also the testimony of three occupational medical specialists employed by large industrial organizations and that of the otolaryngologist retained to test the participating panel members, all called as witnesses by respondent.

From our view of the whole record, we have concluded that respondent's evidence in defense of the "no adverse effect" charge is inadequate to overcome the evidence in support of that charge. We agree with the hearing examiner that the evidence on this issue preponderates in favor of the pertinent allegations of the complaint. We are persuaded to this conclusion particularly since the record discloses that, without exception, all of the physicians and scientists called as witnesses, whether in support of or in opposition to the complaint, recognized cigarette smoke as an irritant capable of affecting adversely to some extent the nose, throat and accessory organs. Respondent's appeal on this aspect of the case is denied.

We turn now to the appeal of counsel supporting the complaint with regard to the use, by respondent in its advertising of Chesterfield cigarettes, of the terms "milder," "soothing and relaxing" and "no unpleasant aftertaste."

The complaint alleges that through the use of the term "milder," respondent represents "that the smoke from Chesterfield cigarettes is milder * * * and consequently less irritating to the user than all other cigarettes." Respondent vigorously objected before the hearing examiner to the use of the word "all" in the interpretation of its advertising. On this point the hearing ex-

aminer concluded, and we think correctly, that the term "milder" constitutes a comparative representation that Chesterfield cigarettes are milder than cigarettes generally, or than most other cigarettes. He concluded, however, that this charge in the complaint had not been sustained * * * "First, because as used in respondent's advertising the word 'milder' merely denotes a quality product, pleasant to the senses; and second, because if the term should be construed as representing that Chesterfield cigarettes are less irritating to the nose, throat and accessory organs than cigarettes generally, the record fails to establish to the contrary."

This conclusion in effect is an acceptance of respondent's contentions that the word "milder" relates only to sensory feelings such as taste, smell, etc.: that it did not purport to relate to physiological or pathological effects or conditions such as inflammation or irritation in the nose, throat, or accessory organs; and that the term merely connotes a quality product, "a well-blended, pleasant tasting cigarette." This conclusion also, and necessarily, constitutes a rejection of the pertinent arguments advanced by counsel supporting the complaint seeking to conjoin the issue of mildness with the paramount question of whether the smoke from Chesterfield cigarettes has any irritating consequence, and therefore adverse effect, upon the nose, throat and accessory organs. We agree that the dictionary attributes to the word "milder" more than one meaning, one of which is "moderate sensuous effect." However, this particular definition of the word cannot be applied to the advertising in question.

Respondent has disseminated the following, among other advertisements, wherein the representation "Buy Chesterfields—*Mich Milder*" appears in eye-arresting type at the bottom thereof:

In determining whether advertising is false or misleading, regard must be had not to fine-spun distinctions and arguments that may be made in excuse, but to the effect which, in its over-all context, it might reasonably be expected to have upon the general public, *P. Lorillard Co. v. Federal Trade Commission*, 186 F.2d 52 (C.A. 4, 1950). Or, as succinctly stated by the United States Court of Appeals, Seventh Circuit, in *Aronberg v. Federal Trade Commission*, 132 F.2d 165, 167 (1942):

But the buying public does not ordinarily study or weigh each word in an advertisement. The ultimate impression upon the mind of the reader arises from the sum total of not only what is said but also of all that is reasonably

NOSE, THROAT,

**and Accessory Organs not Adversely
Affected by Smoking Chesterfields**

**FIRST SUCH REPORT EVER PUBLISHED
ABOUT ANY CIGARETTE**

A responsible consulting organization has reported the results of a continuing study by a competent medical specialist and his staff on the effects of smoking Chesterfield cigarettes.

A group of people from various walks of life was organized to smoke only Chesterfields. For six months this group of men and women smoked their normal amount of Chesterfields—10 to 40 a day. 45% of the group have smoked Chesterfields continually from one to thirty years for an average of 10 years each.

At the beginning and at the end of the six-months period each smoker was given a thorough

examination, including X-ray pictures, by the medical specialist and his assistants. The examination covered the sinuses as well as the nose, ears and throat.

The medical specialist, after a thorough examination of every member of the group, stated: "It is my opinion that the ears, nose, throat and accessory organs of all participating subjects examined by me were not adversely affected in the six-months period by smoking the cigarettes provided."



ASK YOUR DEALER
FOR CHESTERFIELD—
EITHER WAY YOU
LIKE 'EM

★
CONTAINS TOBACCOS
OF BETTER QUALITY &
HIGHER PRICE THAN ANY
OTHER KING-SIZE
CIGARETTE

Buy CHESTERFIELD... *Much Milder*

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implied. * * * Advertisements must be construed in their entirety, and as they would be read by those to whom they appeal. * * * Advertisements are intended not "to be carefully dissected with a dictionary at hand, but rather to produce an impression upon" prospective purchasers.

In the advertisement, heretofore reproduced taste or flavor is not mentioned, nor are sensory effects referred to at all. Looking at the whole context of the advertisement and to the use of the term "milder" therein, the Commission is of the opinion that the term inferentially relates to a physiological condition, or effect, and that it was intended to be, and does constitute, an announcement that Chesterfield cigarettes are "less irritating" generally than other cigarettes. The advertisement deals with nothing but purported scientific discovery of physiological effects. And, as we have previously seen, all of the experts testifying without exception recognized that cigarette smoke to some degree is an irritant and is capable of adversely affecting the nose, throat and accessory organs. We conclude, therefore, that the hearing examiner was in error in ruling that the term "milder" relates only to sensory feelings such as taste, smell, etc., as contradistinguished from the physiological or pathological connotations of the word. This is particularly self-evident when the connotations of the term "milder" are viewed in the light of the whole context of the advertising in question.

There is next, then, for disposition the appeal from the hearing examiner's conclusion that the record fails to establish that Chesterfield cigarettes are not "*less irritating*" than other cigarettes generally.

Dr. Clarence D. Wright, of the Food and Drug Administration, conducted a series of tests to determine the comparative nicotine and tar content of five leading brands of cigarettes, including Chesterfields. Dr. Errett Albritton, duly qualified as an expert statistician and physiologist, received his M.D. from Johns Hopkins University and has taught biochemistry and pharmacology, which latter subject includes a knowledge or study of the effect of tobacco smoke on human beings. He testified that the Wright tests, as regards nicotine and chloroform extract content (tars), showed that Chesterfield smoke "is not significantly different from the smoke of the other brands." And, in answer to a question as to whether Chesterfields are milder than the other four cigarettes involved in the Wright tests (predicated upon his examination of the Wright report plus his expert knowledge in the allied fields of physiology and pharmacology), Dr. Albritton

replied, "I would say that there is no evidence in that exhibit that would indicate that Chesterfields are milder or less irritating to the throat than any other of those brands."

The hearing examiner rejected the Wright tests as having no probative value because "cigarette smoke contains other irritating substances besides nicotine and tars, and the experiments * * * did not purport to trap or measure such other substances." He also rejected the testimony of Dr. Albritton based on the Wright report as being without probative value. This was apparently on his evaluation of the evidentiary value he placed upon the report itself.

There is in the record no evidence as to the quantities of substances, other than nicotine and tars, present in cigarette tobacco or as to their qualities as irritants. In fact, the record contains nothing to show that the comparative irritating capacity of any of the cigarettes tested would be varied to any extent by their presence. The record does establish that nicotine and tars are the principal irritants present in cigarette smoke. The Commission is of the opinion that it was erroneous to reject the Wright report and Dr. Albritton's testimony. The Wright report accurately reflects the measurement of the nicotine and tar content of the smoke from cigarettes tested; and discloses no significant difference between Chesterfields and the other four leading brands in that respect.

The hearing examiner likewise questions as to reliability and substantiality—but does not clearly reject—the testimony of practicing physicians (nose and throat specialists) that in their practice they had noted no difference in the irritating capacity of various different brands of cigarettes, including Chesterfields. The record also contains testimony of other physicians, an allergist and an anesthesiologist, who likewise testified that in their clinical observations they found no appreciable difference in the irritating effect of smoke of any of the cigarettes smoked by their patients. The initial decision adverts in no way to this latter testimony.

The Commission is of the opinion that the testimony of the nose and throat specialists is entitled to greater weight than that accorded it by the hearing examiner. They arrived at the opinions expressed by accumulating from their patients information which in their professional judgment was necessary adequately to inform themselves of all clinical factors pertinent to

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the formulation of a diagnosis of, and treatment for, nose and throat ailments attributable at least in part to cigarette smoke. Dr. Moffett, a throat specialist, testified, for example, that for over 35 years he had observed the effect of various brands of cigarettes in general on the throat and nose, and that he had concluded all cigarettes were equally irritating and that he has not observed any difference among those patients who smoke Chesterfields, or any other cigarette.

Dr. Waldbott, an allergist, testified that in examining hundreds of patients he asked as to the brand of cigarette smoked, where the patient was a cigarette smoker, and that he had observed no significant difference between irritation caused by the smoke from Chesterfields and that from other brands of cigarettes. He reaffirmed this observation when under cross-examination.

Dr. Greene, an anesthesiologist, whose testimony also appears not to have been considered in the initial decision, testified at considerable length as to the basis for his clinical observation that there is no significant difference in the irritating qualities of any of the leading brands of cigarettes, including Chesterfields.

In the preparation of patients for administration of anesthesia prior to surgical operations, he queried over 1,500 patients as to their smoking habits, including reference to the "brand factor." His interest was prompted by the apparently high incidence of bronchitis in cigarette smokers, and this, of course, was important to him in relation to the administration of anesthetics. He found, and so testified, that there was no difference in irritation attributable to differences in brands of cigarettes smoked. On direct examination he stated he had never noticed any significant difference between the irritation caused by Chesterfields from that caused by other cigarettes. And, under cross-examination, Dr. Greene testified that a significant number of his patients were Chesterfield smokers and that after the first 1,500 patients had been asked what brand they smoked, he had stopped asking about brands because he found no difference in the irritation caused by smoke from any of the brands of cigarettes. The Commission is of the opinion that Dr. Greene's testimony is highly significant and that the examiner erred in failing to take it into consideration.

There is, of course, in the record contradictory evidence both as to the evaluation of the Wright report by respondent's wit-

nesses and on the question of whether Chesterfields, in fact, are milder than other leading brands of cigarettes. The Commission has concluded, however, after careful review of the whole record before it, that the preponderance of the evidence substantiates the charge that respondent, through employing the term "milder" in advertising Chesterfield cigarettes, represents that they are "less irritating" than other cigarettes and that this constitutes a misleading and deceptive statement or representation. We find, accordingly, that the record establishes that Chesterfield cigarettes or the smoke therefrom are not milder or less irritating than other cigarettes or the smoke produced from them. We find further that use of the term "milder" here has the capacity and tendency to lead members of the purchasing public into the erroneous and mistaken belief that such statement, or representation, is true, and into the purchase of substantial quantities of respondent's product because of such erroneous and mistaken belief. The appeal of counsel supporting the complaint on this aspect of the case is granted.

Considered next is the hearing examiner's finding that there is no substantial evidence to establish as untrue the representation that Chesterfield cigarettes "produce a soothing and relaxing smoke." The complaint alleges that dissemination of this claim constitutes a representation that "the smoke from Chesterfield cigarettes will soothe and relax the nerves of smokers irrespective of the physical condition or the smoking habits of smokers" and, further, that in truth and in fact the smoke from Chesterfield cigarettes "will not soothe or relax the nerves in the case of all smokers." The hearing examiner characterizes the representation as meaning nothing more than that usually the smoking of Chesterfields will have a soothing and relaxing effect, and he found that there is no substantial evidence that the statement is untrue.

The Commission, on the contrary, is of the opinion that the reasonable interpretation to be placed on the advertisement is that it constitutes a categorical claim that Chesterfield cigarettes will produce a soothing and relaxing effect without qualification as respects any particular individual reading it; and this without regard to whether the reader is an habitual smoker, an occasional smoker, a heavy smoker, a light smoker, or an individual who might be described as a new smoker. The advertisement is directed to all categories of smokers without limitation. It fails to give recognition to the fact that the effect upon an individual of a

given amount of cigarette smoke depends in a large measure upon the degrees of physical normalcy, sensitivity and tolerance of the individual, variances which exist in all persons to a greater or lesser extent.¹

The weight of the evidence in this proceeding clearly preponderates in establishing that while cigarette smoke may afford an habitual smoker, who may have experienced a sense of restlessness when deprived of cigarettes, some temporary palliation of tension, this relief will be afforded only to such habituated smokers, and even for them is a purely subjective reaction, temporary and transitory in nature. For example, Dr. Albritton, a physiologist and pharmacologist, testified in support of the complaint as follows:

Q. Doctor, in your opinion, will the smoking of Chesterfield cigarettes soothe and relax the smoker?

The Witness: Your question is directed toward the general effect on the individual, rather than the local effect, as I understand it, on his respiratory tract, and I would have to divide my answer into two sections here.

The chronic smoker who was habituated to the use of cigarettes and who developed a tension and restlessness when deprived of cigarettes would get a relief of that tension from taking his next cigarette regardless of the brand. I base this answer on the nicotine content of the smoke as shown in that exhibit.

The nonsmoker is also encompassed in your question, the person who is just starting to smoke. My answer would have to be different in the case of the nonsmoker who was just beginning to smoke. There I would see no soothing and relaxing effect; having gone through the experience personally of becoming habituated to tobacco, I know it had no such effect on me.

The Commission is of the opinion, therefore, and finds that respondent's Chesterfield cigarettes or the smoke therefrom will not, as a matter of fact, soothe or relax the nerves of cigarette smokers generally and that respondent's representations to the contrary are false and misleading. The appeal of counsel supporting the complaint on this point is granted.

Finally, counsel supporting the complaint has appealed from

¹ *Federal Trade Commission v. R. J. Reynolds Tobacco Co.*, 192 F.2d 535 (C.A. 7, 1951). The court sustained the Commission's findings and order to cease and desist, including a representation to the effect that the smoke from cigarettes is soothing and relaxing. The Commission had found in effect as a general proposition that in some cases, if a person is accustomed to smoking cigarettes and becomes tense and nervous, the smoking of a cigarette may have a psychological tendency to relieve the tension and produce a quieting effect, but the smoking of cigarettes will not under any condition be physiologically beneficial to any of the bodily systems (circulatory, respiratory, digestive, nervous, neuromuscular and special senses). And the Commission further found that the effect of smoking is not the same on every individual; that in the case of persons not accustomed to smoking the effect of even one cigarette will be the opposite to that produced on the habitual smoker to the extent that the former probably will become ill and quite upset as a result of his experience.

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the hearing examiner's finding that the record does not sustain the charge that Chesterfield cigarettes will leave an unpleasant aftertaste. The initial decision held that the matter of taste is largely one of personal opinion and preference among individuals and that it would seem difficult, if not impossible, to adjudicate the question.

The Commission is of the opinion that the question of whether or not any aftertaste is present in cigarette smoke is one of fact susceptible of proof. On the record in this proceeding we think it clearly established that cigarette smoke, including the smoke from Chesterfield cigarettes, does leave an aftertaste. The weight of the evidence, however, does not establish that that aftertaste in the case of Chesterfields is unpleasant as a matter of fact. We accept as correct, therefore, the examiner's finding that the testimony presented on this phase of the case does not constitute substantial competent evidence warranting a conclusion that the charge that Chesterfields leave no unpleasant aftertaste has been sustained. The contentions of counsel supporting the complaint to the contrary are rejected and his appeal from that finding is denied.

In accordance with the foregoing, and to the extent indicated hereinabove, respondent's appeal is denied and the appeal of counsel supporting the complaint is granted in part and denied in part. The findings and conclusions contained in the initial decision are hereby modified in accordance with this opinion, and the order to cease and desist will be modified to conform herewith. As so modified the initial decision will be adopted as the Decision of the Commission.

Commissioners Gwynne and Kern did not participate in the decision herein, Commissioner Gwynne for the reason he did not hear oral argument.

FINAL ORDER

Respondent and counsel supporting the complaint having filed cross-appeals from the initial decision of the hearing examiner in this proceeding; and the matter having been heard by the Commission on the whole record, including briefs and oral argument; and the Commission having rendered its decision denying respondent's appeal and granting in part and denying in part the appeal of counsel supporting the complaint and modifying the initial decision in conformity with the Commission's opinion:

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It is ordered, That the order contained in the initial decision be, and it hereby is, modified to read as follows:

"It is ordered, That respondent, Liggett & Myers Tobacco Company, 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 in commerce, as 'commerce' is defined in the Federal Trade Commission Act, of Chesterfield cigarettes, or any other cigarettes of substantially similar composition, do forthwith cease and desist from representing, directly or by implication:

"(1) That such cigarettes or the smoke therefrom will have no adverse effect upon the nose, throat or accessory organs.

"(2) That such cigarettes or the smoke therefrom is milder when used to connote that the smoke therefrom is less irritating than the cigarettes or the smoke of any other brands of cigarettes.

"(3) That such cigarettes or the smoke therefrom will soothe or relax the nerves."

It is further ordered, That the complaint be, and it hereby is, dismissed as to all charges not covered by the foregoing order.

It is further ordered, That the initial decision as so modified be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That respondent Liggett & Myers Tobacco Company, a corporation, shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist contained in the initial decision as modified.

Commissioner Gwynne not participating for the reason he did not hear oral argument, and Commissioner Kern not participating.

Decision

IN THE MATTER OF
UNITED INSURANCE COMPANYORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT*Docket 6253. Complaint, Oct. 14, 1954—Order, Sept. 17, 1958*

Order dismissing for lack of jurisdiction, following the Supreme Court's reversal of the Commission's desist orders in the *National Casualty Company* and *The American Hospital and Life Insurance Company* cases (357 U. S. 560), complaint charging a life insurance company in Chicago with misrepresenting the benefits and coverage of its health and accident policies.

Mr. Frederick J. McManus, for the Commission.

Thompson, Raymond, Mayer, Jenner & Bloomstein, by *Mr. Anan Raymond* and *Mr. William H. Madden, Jr.*, of Chicago, Ill., for respondent. *Mr. Almore H. Teschke*, General Council, Chicago, Ill., also for respondent.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

This proceeding is one brought under the Federal Trade Commission Act as affected and amended by the McCarran-Ferguson Act, 15 U.S.C., §§1011-1015 inclusive, the complaint charging the respondent corporation, in substance, with having transmitted in interstate commerce certain alleged false, misleading and deceptive advertising concerning its individual health-and-accident insurance policies. Group hospitalization or life insurance is not involved. The complaint is dismissed herein for lack of jurisdiction by the Commission over the subject-matter thereof, pursuant to the recent decision of the Supreme Court of the United States, relating to that subject.

The Supreme Court, in one *per curiam* opinion issued on June 30, 1958, decided two cases, entitled *Federal Trade Commission v. National Casualty Company* (No. 435) and *Federal Trade Commission v. The American Hospital and Life Insurance Company* (No. 436), 357 U.S. 560 (1958). The Supreme Court accepted jurisdiction of these cases on writs of certiorari from the Courts of Appeals for the Sixth and Fifth Circuits, respectively, to review their "interpretation of an important federal statute." It affirmed the judgment of each of such Circuits in setting aside the Commission's cease-and-desist orders against the said respondent in-