

in which it has complied with this order.

IN THE MATTER OF
LEVER BROTHERS COMPANY ET AL.

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

Docket 7747. Complaint, Jan. 13, 1960—Decision, Oct. 15, 1962

Order dismissing, for failure of proof—with dissenting opinion by two Commissioners—complaint charging the manufacturers of “Pepsodent” toothpaste and its advertising agency with using a deceptive demonstration in television commercials for the product.

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 Lever Brothers Company, a corporation, and Foote, Cone and Belding, a corporation, and William H. Bambrick, individually and as an officer and Account Executive of Foote, Cone and Belding, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be

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in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Lever Brothers Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maine, with its principal place of business located at 390 Park Avenue, New York, N.Y.

PAR. 2. Respondent Foote, Cone and Belding is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 247 Park Avenue, New York, N.Y. This corporate respondent is the advertising agency of the respondent referred to in paragraph 1 above and prepares and places for publication advertising material including, but not limited to, that hereinafter set forth to promote the sale of toothpaste and related products.

Individual respondent William H. Bambrick is a vice president and account executive of said corporate respondent Foote, Cone and Belding, and insofar as the allegations of this complaint are concerned, was responsible for, or active in, the practices of said corporate respondent Foote, Cone and Belding.

PAR. 3. Respondent Lever Brothers Company is now and for more than one year last past has engaged in the business of manufacturing, selling, and distributing toothpaste sold under the brand name Pepsodent, and now causes said Pepsodent toothpaste, when sold, to be transported from its factories in various cities to wholesalers, distributors and retailers located in various states of the Union and in the District of Columbia, and maintains, and at all times mentioned herein has maintained, a substantial course of trade in said product in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondent Lever Brothers Company, in the course and conduct of its business, and at all times mentioned herein, has been in substantial competition in commerce with other corporations, firms and individuals in the sale of toothpaste and related products of the same general kind and nature as those sold by respondent.

PAR. 5. Respondents Foote, Cone and Belding and William H. Bambrick are now and have been in substantial competition in commerce with other corporations, firms and individuals engaged in the advertising business.

PAR. 6. In the course and conduct of its aforesaid business and for the purpose of inducing the sale of its Pepsodent toothpaste, respondent Lever Brothers Company has, with the aid and direct participation of respondents Foote, Cone and Belding and William H. Bambrick, made certain statements, representations and pictorial presentations

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with respect to said Pepsodent toothpaste by means of television broadcasts transmitted by television stations located in various states of the United States and in the District of Columbia having sufficient power to carry such broadcasts across state lines.

Among and typical of the statements and representations contained in said advertisements, but not all-inclusive, including the audio-video representations contained in said broadcasts as above set forth, are the following:

Audio

ANNCR (VO): Right! Pepsodent cleans away yellow smoke stains as well as stains caused by many foods.

LAB TECHNICIAN (LIP SYNC): I'd like to prove that to you right now.

LAB TECHNICIAN (VO): This is a cigarette smoking machine.

It deposits yellow smoke stain on enamel like the hard surface of your teeth.

(SOUND OF RAPPING ON ENAMEL)

With the Pepsodent, we brush across the stain

Then rinse with plain water.
(WATER EFFECT)

See? The smoke stain is gone

Where we used Pepsodent.

ANNCR. (VO): Yes, Pepsodent removes even yellow smoke stain, perhaps the hardest of all stains to remove. In fact, Pepsodent cleans your teeth more *effectively*.

Video

DIS CU 2-PRODUCT SHOT (PASTE IS GOING ONTO BRUSH) AND LEGEND: "CLEANS AWAY YELLOW SMOKE STAINS".

DIS TO LAB TECHNICIAN BEHIND DEMONSTRATION TABLE CONTAINING EQUIPMENT FOR TEST.

WORKS CIGARETTE MACHINE HOLDING LIGHTED CIGARETTE. NEARBY IS PEPSODENT BRUSH WITH PASTE ALREADY ON IT. ALSO PEPSODENT TUBE WITH CAP OFF IS IN PICTURE.

CONTINUES WORKING CIGARETTE MACHINE.

CU AS ANNCR. REMOVES SMOKING MACHINE FROM THE ENAMEL PLATE.

PICKS UP BRUSH WITH PASTE ON IT AND BRUSHES ACROSS STAIN.

USES SMALL HAND HOSE TO RINSE.

CU ENAMEL PLATE. HAND INDICATES CLEAR AREA.

LIVE PEPSODENT PKG APPEARS IN CLEAR AREA.

DIS TO BATHROOM SCENE. YOUNG MAN FROM OPENING IS IN BATHROBE. HOLDS TUBE IN ONE HAND AS HE SQUEEZES PASTE ONTO BRUSH.

YOUNG MAN STARTS TO BRUSH. DIS TO

TIGHTER SHOT ON YOUNG MAN'S FACE. WORD "CLEANS" COMES IN FROM UPPER LEFT; "MORE" FROM UPPER RIGHT. "EFFECTIVELY" FROM LOWER MIDDLE.

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Through the use of the aforesaid statements and representations and said video demonstrations and others of the same import not specifically set out herein, respondents have represented, directly or by implication, that said demonstration proves that Pepsodent toothpaste is effective in removing tobacco smoke stains from the teeth of all smokers.

PAR. 6. The aforesaid statements, representations and demonstrations are false, misleading and deceptive. In truth and in fact, said demonstration is not valid for the purpose of proving, and does not prove, that Pepsodent toothpaste is effective in removing tobacco smoke stains from the teeth of all smokers, and especially the accumulated stains from the teeth of habitual smokers.

PAR. 7. The use by respondents of the aforesaid false, misleading and deceptive statements and misrepresentations has had and now has the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true, and into the purchase of a substantial quantity of respondent Lever Brothers Company's product Pepsodent toothpaste because of such erroneous and mistaken belief. As a result thereof substantial trade has been and is being unfairly diverted to respondent Lever Brothers Company from its competitors, and substantial injury has been and is being done to competition in commerce.

PAR. 8. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors, and constituted and now constitute unfair and deceptive acts and practices and unfair methods of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act.

Mr. Frederick McManus for the Commission.

Mr. Abe Fortas and *Mr. G. Duane Vieth* of *Arnold, Fortas & Porter*, of Washington, D.C., for respondent Lever Brothers Company.

Mr. David M. Solinger, *Mr. Eugene H. Gordan* and *Mr. Jerome Gotkin* of *Solinger & Gordon*, of New York, N.Y., for respondents Foote, Cone & Belding, Inc., and William H. Bambrick.

INITIAL DECISION BY HARRY R. HINKES, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above-named respondents, charging violation of the Federal Trade Commission Act in connection with the sale and advertising of Pepsodent toothpaste. Answers generally denying the charges and asking for dismissal of the complaint were filed by all respondents, and

hearings were held pursuant to notices duly issued. Briefs and proposed findings have been filed by each of the parties.

FINDINGS OF FACT

1. Respondent Lever Brothers Company (hereinafter referred to as Lever) is a corporation engaged, existing and doing business under and by virtue of the laws of the State of Maine. Its principal place of business is located at 390 Park Avenue, New York, New York.

2. Respondent Foote, Cone & Belding, Inc. (proceeded against as Foote, Cone and Belding, and hereinafter referred to as FC&B), is a corporation engaged, existing and doing business under and by virtue of the laws of the State of Delaware. Its principal place of business is located at 247 Park Avenue, New York, New York. It is in substantial competition with other firms, individuals and corporations engaged in the advertising business.

3. Respondent Lever is engaged in the interstate sale and dissemination of advertisements designed to induce the sale of toothpaste which is sold under the brand name of "Pepsodent." Lever is engaged in substantial competition with other manufacturers of toothpaste.

Respondent FC&B is an advertising agency which was engaged by respondent Lever to prepare and place advertisements of Pepsodent toothpaste, including advertisements via television.

Respondent William H. Bambrick is a vice president of FC&B. At all times mentioned in the complaint, however, he was an account executive of FC&B assigned to the Pepsodent account. To most of FC&B's accounts, and especially to major ones such as the Pepsodent account, there are assigned a management representative, an account supervisor and an account executive. The account executive reports to the account supervisor and the account supervisor to the management representative. The management representative, who is in all cases one of the company's principal officers and in most cases also a director of the company, is primarily concerned with major questions of policy affecting the relationship of the agency to its client. To that end, he maintains liaison between the principal officers of the agency and the principal officers of the client. The account supervisor, who is usually a vice president of the company, is primarily responsible for developing long-range advertising plans for the client. The management representative and the account supervisor jointly decide when to recommend major changes in advertising to the client, what advertising plans should be presented and what media selections should be recommended. While the account executive participates in the intra-agency meetings in which recommendations relating to

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advertising plans and changes and media selections are decided upon, and is present when these recommendations are made to the client, his principal duties commence after the client has generally approved the advertising plans or changes and media selections recommended. The account executive then makes the necessary assignments within the agency (to the creative, copy, layout, art, production, media and other departments) and coordinates every phase of the work until the advertisements are completed and media cost estimates and schedules are prepared. At that time, the completed advertisements and media cost estimates and schedules are reviewed by the management representative and the account supervisor and, if approved, presented by them and the account executive to the client for its final approval. An account executive at FC&B also supervises the making of analyses of the client's sales and advertising problems, schedules meetings with the client, obtains written authorization from the client for advertising space and time orders and keeps the account supervisor and, through the account supervisor, the management representative posted on all important matters respecting the client. With respect to the Pepsodent account, Mr. Bambrick's duties as the account executive paralleled the duties of an account executive as set forth above.

4. Work started on the Pepsodent advertisement involved in this proceeding in or about February 1958 when there were intra-agency discussions at FC&B. In April 1958, at a meeting attended by Mr. Bambrick and the account supervisor, FC&B obtained authorization from Lever for further preparatory work and in June 1958 Mr. Bambrick and the management representative and other department heads at FC&B presented the commercial campaign to Lever and obtained their preliminary approval. In November 1958, at a meeting with Lever, the account supervisor and Mr. Bambrick recommended the campaign to be used and Lever gave its final approval.

5. Respondent Lever has established procedures under which all advertising copy and material proposed for its products, including scripts and storyboards of television commercials, are examined by the company's research and development division and legal division to insure the technical accuracy and legal acceptability of an advertisement. Pursuant to these procedures, no advertising may be disseminated unless the written approval of both of these divisions has first been obtained.

6. The advertisements in issue were all television commercials of 30 or 60-second duration. Except for slightly different introductions and conclusions they are practically identical. In the introductory phase of each of the commercials, models are depicted smoking; then

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follows the principal part of the commercials which is a tobacco smoke stain removal demonstration introduced by a laboratory technician; at the conclusion of the demonstration, except in the 30-second commercials, models are depicted brushing their teeth with Pepsodent toothpaste. The demonstration has the following sequence:

(a) A lighted cigarette is placed in a holder located in the top of a jar-like glass container with an open bottom (referred to in the commercials as a smoking machine). This container is placed on the top of a white pot opal glass plate.

(b) A laboratory technician squeezes a rubber bulb attached to the jar, and air is drawn through the lighted cigarette in the same manner as if it were being smoked by a person. The smoke drawn from the cigarette enters the chamber of the container and deposits a tobacco smoke stain on the bottom of the white plate.

(c) After a sufficient number of cigarettes have been smoked (four) to leave a visible stain on the plate, the cigarette smoking machine is lifted from the plate.

(d) A portion of the stained area is then subject to brushing with Pepsodent toothpaste, applied on a regular toothbrush. This brushing removes all of the visible stain, except for some loosened stain material mixed in with streaks of Pepsodent toothpaste left by the brushing. The brushed area of the plate is then rinsed with water which removes the remaining debris. After the operation, the brushed area appears as clean as the portion of the plate which was not exposed to the tobacco smoke, while the unbrushed area remains stained.

7. A typical script of the commercials in issue in which the demonstration appears is as follows:

Audio
1. ANNOUNCER (VO): Whether
you prefer a cigarette

2. . . . a pipe

3. . . . or a good cigar

4. You'll prefer

Video
1. FADE ON SHAPE CONTAIN-
ING CLOSE-UP OF WOMAN
SMOKER—UPPER RIGHT. SHE
IS DRAWING ON A CIGARETTE
OR CIG. IS IN PIX AS SHE
EXHALES.

2. ON SAME SCREEN, LIGHT
UP YOUNG MAN'S HEAD AS HE
LIGHTS UP A PIPE—UPPER LEFT.

3. ON SAME SCREEN, LIGHT
UP HEAD OF MUCH OLDER MAN
AS HE DRAWS ON A CIGAR—
LOWER MIDDLE.

4A. OPTICAL TRANSITION
FROM ABOVE 3-PERSON SHOT
TO—

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Audio

5. Pepsodent Toothpaste. Because Pepsodent is the toothpaste that cleans away yellow smoke stains, as well as stains caused by many foods.

6. LAB TECHNICIAN (LIP SYNC): I'd like to prove that to you right now.

7. LAB TECHNICIAN (VO): This is a cigarette smoking machine.

7A. It deposits yellow smoke stain

8. on enamel like the hard surface of your teeth.

(HAND RAPS ON ENAMEL)

9. With the Pepsodent we brush across the stain.

10. Then rinse with plain water (WATER EFFECT)

11. See? The smoke stain is gone—

12. Where we used Pepsodent

13. ANNOUNCER (VO):
Yes, Pepsodent removes even yellow smoke stain, perhaps

14. the hardest of all stains to remove. In fact,

15. Pepsodent cleans your teeth more *effectively*,

16. Polishes more protectively than any other leading toothpaste.

Video

5. 2-PRODUCT SHOT (PASTE IS GOING ONTO BRUSH) AND LEG-
END: "CLEANS AWAY YELLOW
SMOKE STAINS."

6. CUT TO LAB TECHNICIAN
BEHIND DEMONSTRATION
TABLE CONTAINING EQUIPMENT
FOR TEST.

7. WORKS CIGARETTE MA-
CHINE HOLDING LIGHTED CIGA-
RETTE. NEARBY IS PEPSODENT
BRUSH WITH PASTE ALREADY
ON IT. ALSO PEPSODENT TUBE
WITH CAP OFF IS IN PICTURE.

7A. CONTINUES WORKING
CIGARETTE MACHINE.

8. CU AS ANNOUNCER RE-
MOVES SMOKING MACHINE FROM
THE ENAMEL PLATE.

9. PICKS UP BRUSH WITH
PASTE ON IT AND BRUSHES
ACROSS STAIN.

10. USES SMALL HAND HOSE
TO RINSE.

11. CU ENAMEL PLATE. HAND
INDICATES CLEAR AREA.

12. LIVE PEPSODENT PKG.
APPEARS IN CLEAR AREA.

13. BOX WIPE REVEALS BATH-
ROOM SCENE. YOUNG MAN FROM
OPENING IS IN BATHROBE.
HOLDS TUBE IN ONE HAND AS
HE SQUEEZES PASTE ONTO
BRUSH. STARTS TO BRUSH.

14. YOUNG MAN STARTS TO
BRUSH. DISSOLVE TO—

15. TIGHTER SHOT ON YOUNG
MAN'S FACE. WORD "CLEANS"
COMES IN FROM UPPER LEFT;
"MORE" FROM UPPER RIGHT;
"EFFECTIVELY" FROM LOWER
MIDDLE

16. CONTINUE TO TIGHTEN ON
MOUTH AND TEETH. WORD
"POLISHES" POPS IN FROM UP-
PER LEFT; "MORE" FROM UP-
PER RIGHT; "PROTECTIVELY"
FROM LOWER MIDDLE.

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17. And Pepsodent makes every breath nicer for you

GIRL (VO) (EFFECT):

. . . and for everyone close to you, too

18. ELECTRONIC BEEP ON FIRST LINE OF JINGLE IN BG.

ANNOUNCER (VO):

Yes, you'll wonder where the yellow went

19. ELECTRONIC BEEP OF SECOND LINE IN JINGLE IN BG.

When you brush your teeth with Pepsodent

20. Whether you smoke or not, Pepsodent cleans more effectively than any other leading toothpaste.

21. SILENT

Video

17. And Pepsodent makes every YOUNG LADY.

18. YOUNG MAN AND YOUNG LADY LOOK AT EACH OTHER FONDLY.

19. GLAMOUR CU OF CARTON.

20. HAND SETS LIGHTED CIGARETTE ON CARTON.

21. SUPER LEGEND: "GUARANTEED BY LEVER BROTHERS".

8. The foregoing television commercials were prepared and placed by FC&B as agents of Lever and projected on three major television networks.

9. All sequences of the demonstration were accurately represented in the television commercials in issue. No optical illusions, deceptive devices or other tricks were employed in depicting the demonstration.

10. In the commercials, the surface of the white pot opal glass plate used in the demonstration was accurately referred to as "enamel like the hard surface of your teeth," since it had properties of glossiness and hardness similar to tooth enamel.

11. The demonstration in itself, and when viewed in the context of the commercials in which it appears, is represented as proof only of Pepsodent's ability to remove fresh or recent tobacco smoke stains deposited on the teeth. There are no references, either express or implied, in the demonstration or commercials to accumulated tobacco smoke stains. The tobacco smoke stain is repeatedly referred to in the commercials as "yellow smoke stain" which is the usual color of a fresh tobacco smoke stain, as distinguished from the brown or black stains of accumulated tobacco smoke. The teeth of the models depicted as smokers in the commercials appear white and not stained before and after smoking and before and after brushing.

12. There are many differences between the surface of a glass plate and the surface of a tooth in the mouth of a smoker. The plate is nonorganic; the tooth is a mixture of organic and inorganic matter. The plate is quite smooth, even microscopically; the surface of the

human tooth is marked by ridges and crevices and other irregularities. However, macroscopically (i.e., as seen with the unaided eye), both surfaces are hard and glossy smooth.

13. Stain of any kind on the tooth in vivo (in the mouth of a living person) is brought about by the presence on the teeth in vivo of a substance called plaque, a sticky mass of microorganisms, food debris and salivary substances in which the tobacco smoke becomes embedded as a stain.

14. The record does not show that the toothpaste brushing demonstration, depicted in the commercials as effectively cleaning a freshly deposited smoke stain from a hard glossy glass surface, is not valid for the purpose of proving, and does not prove, that Pepsodent toothpaste will similarly remove a like stain from teeth in vivo, despite the microscopic and chemical differences between the two surfaces, the absence of plaque on the glass surface, the absence of moisture on the glass surface, or other differences.

DISCUSSION

The complaint charges that the demonstration is not valid for the purpose of proving that Pepsodent toothpaste is effective in removing accumulated stains from the teeth of habitual smokers. At no point does the commercial refer to accumulated stain or to an habitual smoker. The stain is shown removed immediately after its deposit on the glass plate. There is no accumulation. The models used in the demonstration appeared to have clean teeth, not the stained teeth of the habitual smoker. The stains are referred to as yellow smoke stains, which is the usual color of a fresh tobacco stain, instead of the brown or black color usually associated with accumulated stains. It is well settled that the Commission may not inject novel meanings into advertising which expand the claims beyond their intended scope and then strike down the advertisement because the expanded claim cannot be supported (*International Parts Corporation v. Federal Trade Commission*, 133 F. 2d 883 [3 S. & D. 535] (7th Cir. 1943)). The meanings to be ascribed to the acts of the respondent are only the ordinary, common and accepted understandings and, in this case, cannot be extended to include accumulated smoke stains or habitual smokers. It thus becomes unnecessary to decide whether or not the demonstration was valid to prove that Pepsodent toothpaste could remove the accumulated stains from the teeth of habitual smokers—a question which the record does not clearly answer.

Nor is the issue whether Pepsodent toothpaste will remove smoke stains from teeth. At no place does the complaint charge any mis-

representation with respect to the performance of the toothpaste in question. Instead, the complaint limits itself to a charge that the *television demonstration* was deceptive because it was not valid for the purpose of proving, and did not prove, that the toothpaste could remove tobacco stain. Respondent argues that the demonstration of a product cannot be subjected to trial as a false advertisement unless the complaint alleges that the claim which it demonstrates is itself false or misleading. This argument was raised by a respondent in a recent case where the Commission ruled that the use of a plexiglass mock-up instead of actual sandpaper in a shaving cream commercial constituted an unfair and deceptive practice even if the product could in fact have shaved the actual sandpaper.

The point is that the "proof" offered was a material element of the advertising; without it, the advertising might not have succeeded in selling the product; and, in fact, the "proof" was not proof at all. . . . Without this visible proof of its qualities some viewers might not have been persuaded to buy the product. (*In the Matter of Colgate-Palmolive Company, et al.*, Docket No. 7736, December 29, 1961) [59 F.T.C. 1452].

We must, therefore, consider whether the demonstration was deceptive assuming Pepsodent toothpaste can do the stain removing job claimed of it. Unlike the *Colgate-Palmolive* case, *supra*, there was no distortion or concealment of the nature of the demonstration. Pepsodent toothpaste was used on a Pepsodent brush and applied to a glass surface on which a tobacco stain had just been deposited. Upon rinsing with water, the brushed portion of the plate was seen cleansed.

Counsel supporting the complaint emphasizes the audio portions of these commercials where the demonstrating technician referred to the glass plate as "enamel like the hard surface of your teeth." He argues that this is a misstatement of fact and cites the testimony of three expert witnesses called by him in support of the complaint. These experts concluded that the television demonstration was not valid to prove that Pepsodent toothpaste would remove tobacco smoke stains from teeth. All of them based their conclusions upon the structural, chemical and other differences between a glass plate as used in the demonstration and teeth in vivo. They emphasized the presence of ridges and imperfections in such teeth and an absence of such surface structures on a glass plate. They admitted, however, that these tooth structures which made cleaning of a tooth difficult were in the main microscopic. Macroscopically, both the glass plate and a tooth would be quite similar in glossy smoothness. Moreover, these experts doubted the ability of an ordinary dentifrice to remove smoke stains from teeth. In this respect, however, they were contradicted by others whom they

cited as experts. Thus, Commission witness Dr. Bhussry cited himself and four other experts as authority for the proposition that teeth could not be cleaned by a dentifrice. Two of these four were shown to disagree with him, and, in fact, the witness finally admitted that the macroscopic plaques, which, he said, were those of the initial smoke stain, could be removed by a dentifrice (Transcript pp. 68, 80, 104). Similarly, Commission witness Dr. Ferrigno testified that the television demonstration did not prove Pepsodent effective in removing stains from teeth. He, too, disagreed with other experts but admitted that an abrasive dentifrice would have some effect in removing tooth stains and that the stains could be removed macroscopically by polishing. The final Commission witness, Dr. Scott, described at length the physical and chemical differences between a glass plate and a tooth. He, too, however, stated that both might be smooth and glossy to the naked eye.

In a demonstration which purports to show the appearance of a tooth before and after brushing with a dentifrice, the obvious meaning and interpretation is the one that must be sought for and obtained and not necessarily the scientific or esoteric. One does not ordinarily go about observing others' teeth with a microscope, or even a jeweler's eye piece. It thus becomes immaterial that there are microscopic differences between the surfaces of a tooth and a glass plate. The critical test is the appearance of the subject matter when viewed grossly, which is the way teeth are ordinarily observed. In this respect, even the Commission witnesses made it clear that there was no material misrepresentation or deception when the television technician referred to the glass plate as "enamel like the hard surface of your teeth."

It appears that Commission counsel actually agrees, at least in part, with this conclusion. In his eighth proposed finding he states:

. . . Only if the toothpaste is applied immediately or soon after the tobacco smoke stain has been deposited will the tooth paste be effective, and then only upon the frontal surface of the teeth which can be reached by the brush will it be effective. Under the latter conditions, cleaning the teeth right after smoking, toothpaste is not needed; plain water is just as effective as toothpaste. . . .

If Commission counsel means that water alone is as effective as toothpaste applied with a brush, he is patently in error: in the television commercial, the part of the stain which was not touched by the brush remained on the plate despite the action of the rinse water applied to it. If Commission counsel means that brushing with water is as effective as brushing with toothpaste, the record fails to support him. One witness did state that water alone could remove *materia alba*, which adheres very loosely to a tooth, but which does not stain. The record

is silent as to what results could be obtained on a stain with a brush and water instead of a brush and toothpaste.

In summary, it must be concluded that the television commercials involved in this proceeding cannot be construed to represent that Pepsodent toothpaste will clean the accumulated smoke stains from the teeth of habitual smokers. At most, these are demonstrations of Pepsodent toothpaste's ability to clean recently deposited smoke stains from clean surfaces. The surface of the glass plate used in the commercial, although different in many respects from the surface of a living tooth, is sufficiently like a living tooth surface to render the demonstration valid in all material respects.

ORDER

It is ordered, That the complaint be, and it is hereby, dismissed.

COMMISSIONERS DIXON AND MACINTYRE, DISSENTING

The majority would dismiss this complaint for failure of proof. We disagree.

The complaint charges that a television demonstration used by respondents to promote the sale of Pepsodent toothpaste "is not valid for the purpose of proving, and does not prove, that Pepsodent toothpaste is effective in removing tobacco smoke stains from the teeth of all smokers, and especially the accumulated stains from the teeth of habitual smokers."

The fundamental mistake made by the hearing examiner is his conclusion that the commercial relates only to Pepsodent's ability to remove fresh or recent tobacco stains deposited on the teeth. To reach this conclusion, he relies on the reference in the commercial to "yellow smoke stain" and to the fact that the teeth of the model depicted in the demonstration appear white before and after smoking. He flatly states that "There are no references, either express or implied, in the demonstration or commercials to accumulated tobacco smoke stains."

To accept the conclusion of the hearing examiner requires a distinction which, in our view, is not usually made by the public. Specifically, we do not believe that the reference to smoke stains as "yellow" precludes an understanding by the public that such stains include those accumulated over a long period of time and that such an understanding results only from the description of such stains as "brown" or "black." More importantly, and a fact not commented on by the examiner, any interpretation of "yellow" as relating to fresh tobacco stains is completely negated by the announcer's statement that "Pepsodent removes even yellow smoke stain, perhaps the hardest of all

stains to remove." To construe that statement as meaning that the demonstration is for the purpose of showing that Pepsodent will remove the stain caused by the smoking of one cigarette, as shown in the commercial, is wholly unrealistic.

The hearing examiner is on sound ground in holding that the Commission may not inject novel meanings into advertising which expand the claims beyond their intended scope. There is no need to inject a novel meaning into this advertising. To us, the reasonable and intended meaning of this advertising is that if a person's teeth are stained from tobacco smoke, whether the stain be fresh or the accumulated stain of an habitual smoker, such stain can be removed with Pepsodent as demonstrated. In any event, the most charitable interpretation of this commercial is that it is ambiguous. If respondents intended that this demonstration should relate to only freshly deposited tobacco stain, they could have clearly so stated. To rely on the use of the word "yellow" and the whiteness of the model's teeth requires entirely too technical an interpretation of the advertising for the average viewer. It is well settled that representations susceptible of both a misleading and a truthful interpretation will be construed against the advertiser.¹

The record in this case clearly shows that tobacco stains, as well as other stains, become imbedded in a substance on the teeth that is so adherent that it is extremely difficult, if not impossible, to remove them with an ordinary dentifrice, including Pepsodent. In fact, these accumulated stains usually require the use of a sharp instrument and a highly abrasive compound, such as pumice material, for their removal. Anyone who has been through that experience in a dental chair recognizes the difficulty in removing this accumulated stain. The demonstration here in question shows the removal of a freshly deposited stain from one cigarette by using Pepsodent. Considering the difficulty in removing accumulated stains as opposed to a fresh stain, as shown by this record, it is obvious that this demonstration is not valid for the purpose of proving and does not prove, that Pepsodent will remove accumulated tobacco stains.

We have no doubt that persons may be induced to buy Pepsodent toothpaste as a result of this commercial in the mistaken belief that they have been shown that Pepsodent will remove stains from their teeth which have accumulated through the use of tobacco. As we said in the *Hutchinson* case,² the quality of the product is not directly in

¹ *Murray Space Shoe Corporation v. Federal Trade Commission*, 304 F. 2d 270 [7 S. & D. 480] (2nd Cir. 1962).

² In the Matter of *Hutchinson Chemical Corporation*, Federal Trade Commission Decisions 1942 [55 F.T.C. 1942] (1959).

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issue in a proceeding of this nature. However, the demonstration not being valid, the advertising is deceptive and should be enjoined. We would so order.

ORDER DISMISSING COMPLAINT

The Commission having considered this case on the appeal of counsel supporting the complaint from the initial decision and order of the hearing examiner dismissing the complaint, and having concluded that the complaint should be dismissed because of failure of proof: