

Opinion

IN THE MATTER OF

COLGATE-PALMOLIVE COMPANY AND TED BATES &
COMPANY, INC.

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

Docket 7736. Complaint, Jan. 8, 1960—Decision, May 7, 1963

Final Order, following remand from the Court of Appeals, First Circuit, dated November 20, 1962, 310 F. 2d 89, 7 S.&D. 574, cease and desist order dated December 29, 1961, 59 F.T.C. 1452, requiring respondent and its advertising agency Ted Bates & Company, Inc., to cease using deceptive television demonstrations and misrepresenting the qualities of shaving cream.

OPINION OF THE COMMISSION ON REMAND

FEBRUARY 18, 1963

By ELMAN, *Commissioner*:

This case is again before the Commission, on remand from the Court of Appeals for the First Circuit.

On December 29, 1961, the Commission, finding that Colgate-Palmolive Company and its advertising agency, Ted Bates & Company, Inc., had violated Section 5 of the Federal Trade Commission Act, issued a cease and desist order against them. The Commission found that respondents, in numerous television commercials advertising the moisturizing qualities of Colgate's Rapid Shave cream, engaged in two distinct unfair and unlawful practices and methods of competition: (1) misrepresenting the qualities or merits of the product; and (2) using a sham demonstration purporting to prove a claim made for the product but which, because of the undisclosed substitution of a mock-up, did not in fact prove the claim. Our order was designed to prohibit respondents from continuing to engage in both of these illegal forms of advertising.

As to the first practice prohibited by the Commission's order, i.e., misrepresentation of the qualities of shaving cream products, the Court of Appeals in its opinion of November 20, 1962, sustained the Commission's decision, apparently in all respects. However, with respect to the second practice, i.e., the use of spurious television commercial demonstrations, the Court found the apparent reach of our order to be ambiguous. On the basis of an interpretation of the order it believed to be supported by our previous opinion and by certain statements made by Commission counsel during the oral argument of the appeal, the Court held that the order was permeated by "funda-

mental error" and went too far in prohibiting practices that do not violate Section 5. The case was accordingly remanded to permit the Commission to formulate a new order (310 F. 2d 89) [7 S.&D. 574, 582].

The appellate proceedings in this case demonstrate once again the imperative need for explicitness in administrative adjudication. An agency whose actions are subject to appellate review must always be mindful of its duty to the reviewing court to express clearly both the rationale and the bounds of its decision. As Mr. Justice Cardozo put it, the court "must know what a decision means before the duty becomes ours to say whether it is right or wrong." *United States v. Chicago M., St. P., & P.R.R.*, 294 U.S. 499, 511 (1935); and see *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943).

Reexamined in the light cast by the opinion of the Court of Appeals, the Commission's previous opinion and order in this case—to the extent that they dealt with respondents' practice of presenting spurious demonstrations in their television commercials—appear to have been wanting in the necessary clarity. Our opinion failed to spell out sufficiently the theory of law on which the order was based, and the prohibitions contained in the "demonstration" part of the order were not defined with sufficient precision. For that reason, it would clearly be inappropriate for the Commission to seek Supreme Court review of this case in its present posture. We believe it would be more orderly, less productive of delay, and in the public interest for the Commission now to remove the defects in its order found by the Court of Appeals, so that if there should be occasion for further judicial review, it will not be clouded by uncertainty as to the basis and breadth of our decision.

On this remand the Commission has undertaken to reconsider the entire case, and to formulate a new order in light of the various suggestions contained in the opinion of the Court. These suggestions have been carefully considered by the Commission and in substantial part have been accepted and incorporated in our order. In one respect (relating to the application to Bates of that part of the order prohibiting misrepresentation of the qualities or merits of shaving cream products), we have added a protective qualification beyond that suggested by the Court.

I

At the outset, we must emphasize what this case does and does not involve. The basic facts have never been in dispute. Respondents, in their television commercials for Rapid Shave, were not content merely to claim that its "super-moisturizing power" was so great that it could shave sandpaper. Had the commercials been limited

to that claim, the case would have raised only the narrow factual issue of its truthfulness. Respondents saw fit to go much further and to "prove" the claim by "demonstrating" this purported quality of the product to the viewing public. Respondents were evidently aware that many viewers might not be willing to take their word for it that Rapid Shave could shave sandpaper. For those skeptical viewers, additional proof of the truthfulness of the claim was apparently thought necessary in order to sell the product. Respondents sought to exploit the popular belief that "the camera doesn't lie." By means of the "sandpaper test" demonstration, respondents in effect stated to the viewing public: "Do you doubt that Rapid Shave really can shave sandpaper, and suspect that we may be exaggerating its merits? Well, see for yourselves, and your doubts will disappear. Here is a piece of tough, dry sandpaper. Look at how quickly and cleanly Rapid Shave shaves it. And Rapid Shave can do the same for you, even if your beard is as tough as sandpaper."

As stated in our previous opinion, "The heart of these commercials was the visual 'sandpaper test'—a test that was, in reality, not taking place. * * * [T]he pictorial test of Rapid Shave, proving to any doubting Thomas in the vast audience that 'By golly, it really *can* shave sandpaper!', was the clinching argument made by the commercials. * * * Without this visible proof of its qualities, some viewers might not have been persuaded to buy the product."

Respondents did not present a fictional dramatization, obvious to viewers as such, of the claim being made for the product. Had they done so, an entirely different case would have been before us. But when a seller offers what he represents to be "documentary proof", he can hardly claim the privilege of dramatic license. Respondents presented what appeared to viewers and was described as a "test" or visual proof, which each viewer could verify with his own eyes, of the truth of their claim that Rapid Shave's moisturizing qualities enabled it to shave tough, dry sandpaper cleanly and immediately upon lathering. In fact, however, the "sandpaper test" was a hoax; the "proof" was not proof at all; and the "demonstration" demonstrated only how far some marketers feel they can go in "hard sell" advertising. As respondents have freely conceded, the material they affirmatively represented in the "test" to be "tough, dry sandpaper" was not sandpaper but a mock-up of loose sand spread on Plexiglas.

Having put to one side the finding of fact that sandpaper cannot be shaved clean upon the application of Rapid Shave in the manner depicted and described in the demonstration, the Commission held

that even if Rapid Shave could shave sandpaper as represented, respondents' "sandpaper test" demonstration, being spurious, was an unfair and unlawful method of advertising. We held that when an advertiser purports to prove the existence of a quality claimed for his product by staging a sham test or demonstration that actually proves nothing, and the "demonstration" is material in affecting the judgment of buyers, the advertiser cannot defend the practice on the ground that the product in fact possesses the claimed quality.

In setting aside the Commission's order, the Court of Appeals held that it was susceptible of being interpreted to prohibit indiscriminately the use of mock-ups or substitute materials in all television commercials in every conceivable hypothetical situation. We agree that such an interpretation of our order would exceed its intended scope.

The Commission did not have before it any abstract question whether the use of mock-ups in television advertising is, in all circumstances, *per se* illegal; or whether, in a casual or incidental display of a product that cannot be faithfully reproduced on the television screen because of technical deficiencies in the photographic process, it is permissible to use substitute materials to overcome those deficiencies. Rather, a distinction was sought to be drawn between mock-ups that are used in demonstrations designed to prove visually a quality claimed for a product and are thus material to the selling power of the commercial, and those that are not. We entirely agree with the Court of Appeals, for example, that there is nothing objectionable in showing a person drinking what appears to be iced tea, but for technical photographic reasons is actually colored water, and saying "I love Lipsom's tea", assuming the appearance of the liquid is merely an incidental aspect of the commercial, is not presented as proof of the fine color or appearance of the tea, and thus in no practical sense would have a material effect in inducing sales of the product.¹

That the "sandpaper test" was calculated to affect the judgment of prospective buyers is beyond doubt. Respondents, who allocated so much of their television advertising to these bogus demonstrations, cannot dismiss them now on the ground that they were so ridiculous that nobody could have been influenced by them to choose Rapid Shave over a competitor's product. As the Court of Appeals pointed out, respondents' advertising "went far beyond generalities and eye-catching devices into asserting as a fact that the cream enables sand-

¹ We also agree with the Court of Appeals that where "products such as ice cream and the 'head' on beer melt under the hot camera lights and require the use of more stable substitutes", there could be no objection to the use of such substitutes in casual or incidental displays of the product, so long as the commercial does not seek thereby to prove visually the longevity or fine appearance of the product.

paper to be shaved forthwith, and that this fact 'proved' the cream's properties for shaving humans. They cannot now suggest that ability to shave sandpaper forthwith was an irrelevant fact and an irrelevant representation. We agree with the Commission that it is immaterial that the cream may in fact have adequate shaving qualities. *If a misrepresentation is calculated to affect a buyer's judgment it does not make it a fair business practice to say the judgment was capricious.*" (Emphasis added.)

III

With this ambiguity in our order resolved, we shall restate the factual and legal basis for our conclusion that it is unlawful for advertisers to stage television commercial demonstrations that purport to—but do not in fact, because of the undisclosed use of mock-ups or substitute materials—prove visually a quality or merit claimed for a product, regardless whether the product actually possesses such quality or merit.

The principle upon which the Commission decided this case is elemental in the law of unfair competition: A seller may not resort to material falsehoods in order to induce sales of his product;² and a misrepresentation may be material in affecting a buyer's choice even though it does not relate to the product's quality or merits.³

The product may in fact be all that the purchaser thinks it to be; but if he has been induced to buy it by the seller's fraud, injury is done both to the advertiser's competitors and to the public—which, through its representatives in Congress, has established the fundamental principle of law that sellers in interstate commerce may not indulge in material untruths in their advertising.⁴

² In Section 15 of the Federal Trade Commission Act, in defining false advertising for the purposes of Section 12 of the Act covering foods, drugs, devices and cosmetics, Congress specifically spelled out the basic proposition underlying the whole Act that a false advertisement is one that is "*misleading in any material respect * * **" (emphasis added). The validity of the complaint in this case, though expressly predicated on Section 5, may also be sustainable under Section 12, though the latter is not specifically cited therein. Cf. *Williams v. United States*, 161 U.S. 382 (1897). There can be no question that an advertisement that is "false" under Section 12 also violates the more general and comprehensive provisions of Section 5. See Note, *The Regulation of Advertising*, 56 Colum. L. Rev. 1018, 1025, 1031, n. 73 (1956).

³ Among the cases illustrating this principle are those involving false disparagement of a competitor's reputation, methods, or products, e.g., *Steelco Stainless Steel, Inc. v. FTC*, 187 F. 2d 693 (7th Cir. 1951) [5 S.&D. 265]; bait advertising, e.g., *Lifetime, Inc.*, Docket 7616, December 1, 1961 [59 F.T.C. 1231]; deceptive pricing, e.g., *Niresk Industries, Inc. v. FTC*, 278 F. 2d 337 (7th Cir. 1960) [6 S.&D. 727] cert. denied, 364 U.S. 883 (1960); dishonest testimonials, e.g., *FTC v. Standard Education Society*, 86 F. 2d 692 (2d Cir. 1936) [2 S.&D. 366], modified, 302 U.S. 112 (1937) [2 S.&D. 429]; and misrepresentation of the seller's trade status, e.g., *FTC v. Royal Milling Co.*, 288 U.S. 212 (1932) [2 S.&D. 217]. *Deer v. FTC*, 152 F. 2d 65 (2d Cir. 1945) [4 S.&D. 437].

⁴ See note 2, *supra*; see *National Trade Publications Serv. v. FTC*, 300 F. 2d 790, 792 (8th Cir. 1962) [7 S.&D. 455, 458].

The original concept of the Commission's jurisdiction over false advertising, it may be noted, was limited to cases in which the advertising was found to be an unfair method of competition. See *FTC v. Radam*, 283 U.S. 643 (1931) [2 S.&D. 116]; Handler, *The Jurisdiction of the Federal Trade Commission Over False Advertising*, 31 Colum. L. Rev. 527 (1931). While the Wheeler-Lea amendments to the Federal Trade Commission Act⁵ established injury to consumers as an independently sufficient ground for finding a violation of Section 5, the basic proposition that advertising which is unfair to competitors violates the law has never been challenged.⁶ If, relying on falsehoods told them by a seller, consumers have been persuaded to buy his product, they may perhaps not be deceived or hurt in a strict pecuniary sense if the falsehoods did not relate to the quality or merits of the product. But such "deception" of purchasers is by no means essential to a finding of unfair competition. Regardless whether consumers are "injured" when they are induced to buy through false advertising claims, honest competitors are injured—because some or many of such sales have been made at their expense. And the Federal Trade Commission Act has enacted into law the fundamental concept that businessmen may not, in competing with each other for the consumer's dollar, resort to "unfair methods of competition in commerce and unfair * * * acts or practices in commerce." Even apart from any moral or ethical considerations, Congress considered that such methods and practices must be outlawed in a competitive system where sellers should have fair and equal access to markets and where success should be the reward of the most efficient rather than the least scrupulous.

The Commission reiterates the basic principle that unscrupulous sellers and advertisers may not make misrepresentations that are material in inducing purchases. It is not enough for sellers to refrain from misrepresenting the merits of their wares; the law prohibits them from making any material misrepresentations designed to influence the public in choosing what, or what not, to buy.

What is essentially involved in this phase of the case is the question whether an advertiser may lie to prospective buyers to convince them that certain real qualities of a product actually exist. Consider, for

⁵ 52 Stat. 111 (1938), as amended, 15 U.S.C. 545(a) (1) (1958).

⁶ In the very first case arising under the Federal Trade Commission Act, *Sears, Roebuck & Co. v. FTC*, 258 Fed. 307, 311 (7th Cir. 1919) [1 S.&D. 36, 40] the court stated that the Commission is "not required to aver and prove that any competitor has been damaged or that any purchaser has been deceived. (The commissioners, representing the Government as *parens patriae*, are to exercise their common sense, as informed by their knowledge of the general idea of unfair trade at common law, and stop all those trade practices that have a capacity or a tendency to injure competitors directly or through deception of purchasers, quite irrespective of whether the specific practices in question have yet been denounced in common-law cases.)"

example, an advertisement for a product that falsely claims to have the "Good Housekeeping Seal of Approval". Surely it would not be a defense that the product in fact meets all the standards required for that seal. Cf. *Hearst Magazines, Inc.*, 32 F.T.C. 1440 (1941).

Other familiar examples of the same principle are faked "before" and "after" photographs and forged testimonials in advertisements for products that in fact possess the claimed quality or merits. A diet food may be effective as an aid in weight reduction, but that would not justify use of counterfeit photographic "proof" in advertising it. A brand of milk may be wholesome and nutritious, but parents may not be urged to buy it for their children on the false representation that the President's children drink it. A toothpaste may be beneficial in reducing the number of cavities, but if statistical proof is offered of its effectiveness in actual use by particular families or other groups, the proof must be genuine.

In short, if people are led by misrepresentations to buy an advertised product, in preference to an honest competitor's, it is not sufficient justification to say that the product actually possesses the claimed quality or merits. Allowance of such a defense would place a premium on false, and a penalty on honest, advertising. To say that selling is an art does not mean that artifice must be tolerated. If it is too difficult or even impossible in a particular medium to present a truthful demonstration proving a claim made for a product, the seller may be obliged to forego use of the demonstration form of advertising in that medium. There may indeed be some advertising claims that simply cannot be proved in a television pictorial demonstration. Nonetheless, as stated in our previous opinion, it would be a cynical subversion of the policy of the law to allow technical limitations of a particular medium to become lawful justification for resort to falsehoods and deception of the public.

The Commission recognizes that the task of convincing prospective customers of the various qualities of a product represents a challenge to every advertiser. An advertiser, promoting a product which he believes the public would benefit from buying, may feel—perhaps on the theory that the end justifies the means—that there is no harm in telling some "white lies" in order to induce consumers to buy it, so long as the product's merits are not misstated. But if a seller may indulge in falsehoods in order to do a more successful job of advocacy, then his competitors who are truthful in their advertising are put at a disadvantage. It would be ironical indeed if businessmen who do not resort to material deceptions in advertising their products were forced, as a result of a decision of the governmental agency responsible for enforcing truth in advertising, to do so or suffer competitively.

As the Court of Appeals for the First Circuit observed in a recent opinion, *Korber Hats, Inc. v. FTC*, decided December 31, 1962 [311 F. 2d 358; 7 S.&D. 611, 613], Congress "gave the Commission a broad mandate to prevent public deception in the give and take of the market place", and the "[c]ourts have consistently upheld the Commission's efforts to compel manufacturers and retailers to adhere to a high level of honesty in connection with their labelling and advertising habits". "The careless and the unscrupulous must rise to the standards of the scrupulous and diligent. The Commission was not organized to drag the standards down." *FTC v. Algoma Lumber Company*, 291 U.S. 67, 79 [2 S.&D. 247, 254 (1934)].

IV

We consider, finally, the questions of (1) the applicability of the "demonstration" part of the order to all products advertised by Colgate, and (2) the responsibility of Bates.

(1) The Commission here found two unfair competitive practices, not one. The record showed that respondents went beyond misrepresentation of the qualities or merits of a particular advertised product. They used an unfair and unlawful method of advertising: stating fraudulent visual demonstrations purporting to prove a quality claimed for a product, but which do not in fact constitute such proof because of the undisclosed substitution of a mock-up. The illegality and unfairness inhere in the "spurious demonstration" method of advertising, and do not depend on the particular products advertised.

The Court of Appeals recognized, without deciding, that if a certain type of advertising demonstration is unlawful, "it might be appropriate * * * to enter a broad order forbidding all such demonstrations en masse." We think that the entry here of such a broad order is not only appropriate but, in the circumstances presented, our duty to the public and honest competitors under the Federal Trade Commission Act. It would be less than adequate protection of consumers and competitors to enjoin the use of this unfair method of competition (i.e., sham "demonstrations" that actually demonstrate or prove nothing) only insofar as it could be used in advertising one product, but not others. Respondents having been found to have engaged in that unlawful practice, the Commission was obliged to order them to stop it once and for all. If the function and purpose of a cease and desist order here are to halt respondents' unfair method of advertising, it would make no sense for the order to forbid them to stage spurious television demonstrations in advertising shaving cream, but to allow them to continue the practice in advertising toothpaste or soap.

In respect to the prohibition against misrepresentation of the quality or merits of products, our previous order was narrowly limited to Rapid Shave and other shaving creams. In view of our findings as to respondents' misrepresentations in that regard, as well as the fact that respondents are already subject to a number of outstanding orders and stipulations containing similar prohibitions with respect to other products,⁷ the Commission would be amply justified in extending the prohibition against such misrepresentations to all products similarly advertised by respondents.⁸ However, since our earlier order, though perhaps overly generous to respondents, has in this regard been reviewed and sustained by the Court of Appeals, we will not disturb the limitation to Rapid Shave or other shaving creams.

(2) Whatever may be the rule in a hypothetical case where there is an absence of any knowledge or suspicion on an agent's part that an advertisement is false, it is clear that this is not that case. It was Bates that conceived the idea of television commercials making the claim, and "proving" it with a "sandpaper test" demonstration, that Rapid Shave could shave sandpaper.⁹ It was Bates that prepared, and placed for broadcast on national network television, the commercials in question.¹⁰ The record establishes that the responsible Bates

⁷ In Docket 7737, June 1, 1960 [56 F.T.C. 1491, 1493], Bates was ordered to cease and desist from using, in connection with the advertising of oleomargarine, "any pictorial presentation or demonstration purporting to prove, or representing in any manner, that moisture drops appearing on said oleomargarine cause such oleomargarine to taste more like butter, or to be more similar in flavor, than competitive oleomargarine."

In Docket 7688, February 24, 1960 [56 F.T.C. 956, 958], Bates was ordered to cease and desist from using, in connection with the sale of filter cigarettes, "any pictorial presentation or demonstration purporting to prove that the filter * * * absorbs or retains more of the tars or nicotine in cigarette smoke than the filter used in other cigarettes [when such is not the fact] * * *" and from representing that any filter cigarette has the approval of any agency of the United States Government or has been found by any such agency to be lower in tar or nicotine content than other filter cigarettes.

In Docket 7660, March 9, 1961 [58 F.T.C. 422, 430], Colgate was ordered to cease and desist from representing, in connection with the sale of any dentifrice, "that said dentifrice affords the users thereof with complete protection against tooth decay * * * [or] misrepresenting in any manner the degree or extent of protection against tooth decay * * * afforded users of any such dentifrice."

In Stipulation 8380, October 9, 1952 [49 F.T.C. 1601], Colgate agreed to cease and desist from representing that "FAB washes clothes as clean without rinsing as with rinsing * * * [or that] * * * FAB without rinsing washes clothes cleaner than or as clean as soap with rinsing."

In Stipulation 2867, June 26, 1940 [31 F.T.C. 1630], Colgate agreed to eliminate twelve representations concerning the qualities of Palmolive soap, two representations concerning the qualities of Cashmere Bouquet soap, five representations concerning the qualities of Super Suds, three representations concerning the qualities of shaving creams (including Rapid Shave), three representations concerning the qualities of dental cream, and one concerning the qualities of Kirkman Soap Flakes.

⁸ See *Niresk Industries v. FTC*, 278 F. 2d 337, 343 (7th Cir.) [6 S.&D. 727, 735], cert. denied, 364 U.S. 883 (1960); *America Tack Co. v. FTC*, 211 F. 2d 239 (2d Cir. 1954) [5 S.&D. 633]; *Hershey Chocolate Corp. v. FTC*, 121 F. 2d 968, 971-72 (3d Cir. 1941) [3 S.&D. 392, 396-97].

⁹ Proceedings before the hearing examiner, p. 85, testimony of Brantz M. Bryan, Jr., executive officer of respondent Bates. (Joint Consolidated Record Appendix, p. 65.)

¹⁰ Answer of respondent Bates, p. 2. (Joint Consolidated Record Appendix, pp. 9-10.)

officials knew that Rapid Shave could not shave sandpaper in the manner depicted and "proved" in the commercials. The record also establishes that it was this inability to shave sandpaper that led respondents to use a mock-up or artificial contrivance instead of real sandpaper in the visual "demonstration", wholly apart from any asserted technical photographic problems in reproducing sandpaper on the television screen.¹¹ While Colgate, as principal, is unquestionably responsible for the advertisements broadcast on its behalf, it would be strange indeed if Bates, as the moving party in originating, preparing, and publishing the commercials, and having full knowledge not only that the claim was false but that the "proof" offered to the public to support it was a sham, should be relieved from responsibility.

On the facts of record, therefore, this is *not* a case of holding an agency responsible for advertising a false claim originated by its principal, where the agency was wholly without knowledge, or "any suspicion", of the falsity of the claim. So far as our order forbids Bates to disseminate spurious television commercial "demonstrations", the agency will necessarily know of the use of mock-ups in commercials which it itself prepares. And, so far as our order prohibits Bates from misrepresenting the qualities of Rapid Shave or other shaving creams, we shall include a specific provision allowing a defense where respondent shows that it neither had knowledge of the falsity of such a representation nor had any reason to question its truthfulness.

Pursuant to Section 4.22(c) of the Commission's Rules of Practice, respondents will have twenty days to file exceptions to any provisions of the proposed new order, or to submit a proposed alternative form of order appropriate to carry out this decision.¹²

Commissioners Anderson and Higginbotham concur in the result.

¹¹ Proceedings before the hearing examiner, p. 85, testimony of Mr. Bryan. (Joint Consolidated Record Appendix, p. 65.)

¹² To avoid any possible misunderstanding of its position, the Commission emphasizes that its proposed order here would not prohibit *per se* the use of a mock-up in television commercials, e.g., where it precisely depicts a substance or material that cannot accurately be reproduced on the television screen. As we recognize in Point II, *supra*, the limitations of television photography might in some circumstances permit use of such a mock-up. But it is one thing to use a mock-up merely as a substitute for an article whose image becomes distorted when photographed; it is something entirely different to use the mock-up in a "test" or "demonstration" of the advertised product's claimed qualities, and to represent it as being the genuine article.

Thus, even if it be assumed in the instant case that Rapid Shave can in fact shave sandpaper, precisely as shown in the commercials, and that a mock-up was used only because real sandpaper cannot faithfully be reproduced on television, it misses the point to say that the commercials were therefore free from falsehood. Respondents did more than merely use a mock-up. They made an affirmative representation that was false, namely, that they were presenting an actual test and giving actual proof of Rapid Shave's ability to shave real sandpaper, and that in the test real sandpaper was being used. The misrepresentation would not have been greater or more material, but only more explicit, if the announcer had stated: "This test is being made on real sandpaper, and not an

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ORDER PROVIDING FOR THE FILING OF EXCEPTIONS TO PROPOSED FINAL ORDER

FEBRUARY 18, 1963

It is ordered, That respondents may, within twenty (20) days after service upon them of this order and the attached opinion of the Commission, file with the Commission their exceptions to any provisions of the Proposed Final Order, a statement of their reasons in support thereof, and a proposed alternative form of order appropriate to the Commission's decision; and that complaint counsel may, within ten (10) days after service of respondents' exceptions, file a statement in reply thereto.

It is further ordered, That if no exceptions to the Commission's Proposed Final Order are filed within twenty (20) days, the said Proposed Final Order shall then become the final order of the Commission.

PROPOSED FINAL ORDER

It is ordered, That respondent Colgate-Palmolive Company, a corporation, and its officers, agents, representatives, and employees, directly or through any corporate device, do forthwith cease and desist from using the following methods of competition or acts or practices in commerce, as "commerce" is defined in the Federal Trade Commission Act:

1. Advertising any product by presenting a visual test or demonstration represented to be actual proof of a claim made for the product, where the test or demonstration does not constitute actual proof because a mock-up or substitute material or article is used in the test or demonstration instead of the genuine material or article represented to be used therein.

2. Advertising Rapid Shave or any other shaving cream by claiming for it qualities or merits that the product does not in fact possess.

It is further ordered, That respondent Ted Bates & Company, Inc., a corporation, and its officers, agents, representatives, and employees, directly or through any corporate device, do forthwith cease and desist from engaging in the following methods of competition or acts or practices in commerce, as "commerce" is defined in the Federal Trade Commission Act:

artificial mock-up contrived to look like sandpaper." The point is, whatever the technical photographic reasons justifying use of a mock-up, there could be no justification for the false presentation to the public of "proof" that in fact was not proof.

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1. Advertising any product by presenting a visual test or demonstration represented to be actual proof of a claim made for the product, where the test or demonstration does not constitute actual proof because a mock-up or substitute material or article is used in the test or demonstration instead of the genuine material or article represented to be used therein.

2. Advertising Rapid Shave or any other shaving cream by claiming for it qualities or merits that the product does not in fact possess, unless respondent shows that it neither had knowledge of the falsity of such representation nor had any reason to question its truthfulness.

It is further ordered, That respondents shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist.

By the Commission, Commissioners Anderson and Higginbotham concurring in the result.

MEMORANDUM ACCOMPANYING FINAL ORDER

MAY 7, 1963

By the Commission:

On February 18, 1963, the Commission issued its opinion on remand and a proposed new cease and desist order. On April 15, 1963, each of the respondents filed exceptions to the proposed order, and an alternative form of order. Respondents would limit the order so that it would apply only to the advertising of Rapid Shave or other aerosol shaving creams; it would prohibit only misrepresentation of the "moisturizing qualities" of such shaving creams, and only where the misrepresentation is made in a "visual presentation of any experiment or test with the product, * * * when the product does not have the moisturizing qualities so represented." Respondent Bates proposes further that its order should apply only when it "knew or reasonably should have known that the product did not have the moisturizing qualities so represented."

The function of a cease and desist order is to give solid assurance to the public and honest competitors that the illegal and unfair practices found will not be resumed. Respondents' proposed order would do far too little in achieving that purpose. It would, at most, prevent respondents from repeating the precise misrepresentation of fact contained in the commercials which prompted the Commission to initiate this proceeding in January 1960. But the primary concern of Section 5 of the Federal Trade Commission Act, and cease and desist

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orders issued thereunder, is with "unfair *methods of competition*" and "unfair or deceptive * * * *practices* in commerce."

When, as in this case, the record shows not merely a misrepresentation of fact concerning a product offered for sale, but the pursuance of an unfair and illegal form of advertising, manifested by its repetition over a substantial period of time, an effective order must also be directed at the form of advertising (i.e., the "practice" or "method of competition") found illegal. Respondents did more than misrepresent the moisturizing properties of Rapid Shave; they adopted, and pursued, a method of advertising* which, because of the material falsehoods contained in such advertising, made it unfair to honest competitors and the public.

Respondents' proposed alternative form of order must, therefore, be rejected as ineffective and unrealistic. In the light of respondents' exceptions to the proposed final order, the Commission has modified it in minor respects to make it more clear and specific; and as thus modified, the final order will be issued.

A word must be said about respondents' vigorous assertion that the Commission, since it did not file a petition for certiorari in the Supreme Court to review the decision of the Court of Appeals, is therefore barred from entering a new order at this time. In vacating our original order and remanding the case to the Commission for further proceedings because "we think it best that an entirely new one be prepared", 310 F. 2d at 94, the Court of Appeals expressed doubt and uncertainty as to the reach and scope of the original order. It seemed to the Commission that, to a very considerable extent, these ambiguities were engendered by the extreme arguments made by counsel on both sides, in attacking as well as defending the order on appeal. In the circumstances, the most sensible, as well as the least dilatory, course for the Commission to follow was to proceed at once to remove those ambiguities, and to restate with clarity and precision the basis and breadth of our findings and order. This task, as the Supreme Court has frequently reminded the federal administrative agencies, is to be performed by the agency and not by its lawyers arguing on appeal. See, e.g., *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943). For only the agency can, and should, exercise the administrative judgment and discretion involved in the formulation of an order.

Respondents urge nonetheless that the Commission, as a condition precedent to the formulation of a new order, was obliged to invoke the appellate jurisdiction of the Supreme Court by the filing of a

*Presenting tests, demonstrations or experiments which are represented to the public to be actual proof of a material claim made for the product but which in fact are spurious and rigged, actually proving nothing.

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petition for certiorari. But one need not be an expert in such matters to know that, in the posture of the case after the Court of Appeals decision, the filing of a petition for certiorari would not only have been inappropriate but an unwarranted imposition on the Supreme Court, which has repeatedly admonished against the filing of improvident petitions for certiorari. In light of the ambiguities found in our original decision and order by the Court of Appeals, the case was in no posture for Supreme Court review. Had such a petition been filed, the Supreme Court undoubtedly would have considered that the Commission, not the Court, should undertake to remove those ambiguities—a task we have now performed without wasting the Court's and the public's time. Possibly the Commission has erred in its handling of this case, but it most assuredly has not failed in its duty of respect to the Supreme Court and the Court of Appeals. Commissioner Anderson concurs in the result.

FINAL ORDER

MAY 7, 1963

I

It is ordered, That respondent Colgate-Palmolive 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 of any product in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Unfairly or deceptively advertising any such product by presenting a test, experiment or demonstration that (1) is represented to the public as actual proof of a claim made for the product which is material to inducing its sale, and (2) is not in fact a genuine test, experiment or demonstration being conducted as represented and does not in fact constitute actual proof of the claim, because of the undisclosed use and substitution of a mock-up or prop instead of the product, article, or substance represented to be used therein.

II

It is further ordered, That respondent Colgate-Palmolive 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 of "Palmolive Rapid Shave"

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or any other shaving cream, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Falsely representing, in any respect material to inducing the sale of any such product, its moisturizing properties or other qualities or merits as an aid to shaving.

III

It is further ordered, That respondent Ted Bates & Company, Inc., a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of any product in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Unfairly or deceptively advertising any such product by presenting a test, experiment or demonstration that (1) is represented to the public as actual proof of a claim made for the product which is material to inducing its sale, and (2) is not in fact a genuine test, experiment or demonstration being conducted as represented and does not in fact constitute actual proof of the claim, because of the undisclosed use and substitution of a mock-up or prop instead of the product, article, or substance represented to be used therein: *Provided, however,* That it shall be a defense hereunder that respondent neither knew nor had reason to know that the product, article or substance used in the test, experiment or demonstration was a mock-up or prop.

IV

It is further ordered, That respondent Ted Bates & Company, Inc., a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of "Palmolive Rapid Shave" or any other shaving cream, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Falsely representing, in any respect material to inducing the sale of any such product, its moisturizing properties or other qualities or merits as an aid to shaving: *Provided, however,* That it shall be a defense hereunder that respondent neither knew nor had reason to know of the falsity of such representation.

Complaint

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v

It is further ordered, That each respondent 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