

sion Act, any advertisement which contains any of the representations prohibited in Paragraph 1 hereof.

It is further ordered, That the respondent herein 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 this order.

IN THE MATTER OF

AMERICAN HOME PRODUCTS CORPORATION D/B/A
WHITEHALL LABORATORIES

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

Docket 8478. Complaint, Apr. 16, 1962—Decision, Sept. 27, 1963

Order requiring New York City distributors of a liquid anesthetic designated "Outgro" to cease representing falsely through advertising in newspapers and magazines, and especially by television broadcasts, that their said preparation would instantly relieve and would cure ingrown toenails and the pain and infection therefrom; and to cease using the word "Outgro" without a conspicuous accompanying statement that the product would not affect the growth or position of the toenail.

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 American Home Products Corporation, doing business under the trade name Whitehall Laboratories, hereinafter referred to as respondent, has violated the provisions of said Act, and it appeared to the Commission that a proceeding by it in respect thereof would be in the public interest,

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hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent American Home Products Corporation 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 685 Third Avenue in the city of New York, State of New York.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the sale and distribution of a preparation which comes within the classification of drugs as the term "drug" is defined in the Federal Trade Commission Act.

The designation used by respondent for said preparation, the formula thereof and directions for use are as follows:

Designation: "Outgro".

Formula: Active Ingredients: 21.0 grains of Chlorobutanol (a chloroform derivative) to each fl. oz., Tannic Acid, and Isoproponol (anhydrous) 81.22%.

Directions: Outgro is a local anesthetic. Apply several drops in crevice where nail is growing into flesh. Work Outgro well under the nails. Let dry thoroughly. Don't rub off! Apply a few drops several times a day. Do not apply if toe is infected, but see your physician or foot specialist. Diabetics should not use Outgro. Do not use near fire or flame.

Keep all medication out of the reach of children.

PAR. 3. Respondent causes the said preparation, when sold, to be transported from its place of business in the State of New York to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondent maintains, and at all times mentioned herein has maintained, a course of trade in said preparation in commerce as "commerce" is defined in the Federal Trade Commission Act. The volume of business in such commerce has been and is substantial.

PAR. 4. In the course and conduct of its said business, respondent has disseminated, and caused the dissemination of, certain advertisements concerning the said preparation by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, advertisements inserted in newspapers, magazines, and other advertising media, and by means of television broadcasts over networks transmitted by stations located in various States of the United States and by means of other television continuities broadcast by stations having sufficient power to carry such broadcasts across state lines, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of said preparation; and has disseminated, and caused the dissemination of, advertisements concerning said preparation by various means, including but not limited to the afore-

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said media, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said preparation in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Among and typical, but not all inclusive, of the statements and representations contained in said advertisements disseminated as hereinabove set forth are the following:

VIDEO*

AUDIO

CU: OF TOES OF FOOT. REVEAL SWOLLEN AREA OF BIG TOENAIL AND PAIN LINES. TITLE ABOVE: "INGROWN TOENAIL."

ANNCR: (ECHO)
Ingrown toenail (ECHO OUT)
brings * * *

(A reproduction is attached hereto marked Exhibit "A" and made a part hereof)

CONTINUE PAIN LINES.

pain and

CONTINUE PAIN LINES.

danger of infection.

FLIP TO TOES, REVEALING NORMAL BIG TOE. TITLE ABOVE: "OUTGRO."

(ECHO) Outgro (ECHO OUT) brings relief and protection!

CUT TO MCU OF ANNCR. BEHIND DESK.

Don't suffer pain or risk infection unnecessarily.

ANNCR. HOLDS BOTTLE OF OUTGRO. BOTTLE ZOOMS UP. LOSE ANNCR.

Get Outgro for ingrown toenail.

CUT TO CU OF TOES. PAIN LINES FROM BIG TOE. REVEAL APPLICATOR DROPS.

With the Outgro way, a few drops

(A reproduction is attached hereto marked Exhibit "B" and made a part hereof)

PAIN FLASHES DISAPPEAR
TITLE: RELIEVES PAIN INSTANTLY.

relieves pain instantly,

(A reproduction is attached hereto marked Exhibit "C" and made a part hereof)

TITLE POPS OFF, POP ON TITLE: "GUARDS AGAINST INFECTION." MOVE IN TO ECU BIG TOENAIL

guards against infection,

(A reproduction is attached hereto marked Exhibit "D" and made a part hereof)

*Pictorial Exhibits A, B, C, D, E, F, and G are omitted in printing.

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VIDEO

AUDIO

LOSE TITLE AS NORMAL SIZED
NAIL GROWS IN.

toughens skin underneath so nail can
be cut

NAIL IS NORMAL, ADD TITLE
ABOVE: "NORMAL FOOT COM-
FORT."

to restore normal foot comfort!

(A reproduction is attached hereto
marked Exhibit "E" and made a part
hereof)

CUT TO SPLIT SCREEN TITLE
LEFT. "INGROWN TOENAIL"
ABOVE BIG TOE. TITLE RIGHT:
"OUTGRO" ABOVE NORMAL BIG
TOE.

So don't suffer pain and danger * * *

(A reproduction is attached hereto
marked Exhibit "F" and made a part
hereof)

"X" OUT SCREEN LEFT.

of ingrown toenail. Use Outgro!

(A reproduction is attached hereto
marked Exhibit "G" and made a part
hereof)

FLIP TO ECU OF OUTGRO BOTTLE
AND PACKAGE.

Outgro! For immediate relief and
protection!

PAR. 6. Through the use of said advertisements, and others similar thereto not specifically set out herein, respondent has represented, and is now representing, directly and by implication:

1. That Outgro relieves pain of ingrown toenails instantly.
2. That Outgro relieves infection from ingrown toenails.
3. That Outgro offers immediate relief from ingrown toenails.
4. That Outgro will cure ingrown toenails.

PAR. 7. The said advertisements were and are misleading in material respects and constituted, and now constitute, "false advertisements" as that term is defined in the Federal Trade Commission Act. The use of Outgro according to directions will have no significant effect upon pain or infection nor will it cure or offer relief from ingrown toenails.

PAR. 8. Respondents' use of the trade name "Outgro" is false and misleading in material respects in that it represents directly and by implication that the product will cure ingrown toenails. In truth and in fact "Outgro" will not cure ingrown toenails.

PAR. 9. The dissemination by the respondent of the false advertisements, as aforesaid, constituted, and now constitutes, unfair and

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deceptive acts and practices, in commerce, within the intent and meaning of the Federal Trade Commission Act.

Mr. Frederick J. McManus and Mr. Charles J. Connolly supporting the complaint.

Carretta and Counihan, Washington, D.C., by *Mr. Albert A. Carretta* for respondent.

INITIAL DECISION BY ANDREW C. GOODHOPE, HEARING EXAMINER

DECEMBER 28, 1962

The Federal Trade Commission issued its complaint against the respondent on April 16, 1962. The complaint charged respondent with false and deceptive advertising as to therapeutic merits of a drug product sold under the trade name "Outgro". The complaint also charged that the trade name "Outgro" itself was deceptive.

This proceeding is before the hearing examiner for final consideration upon the complaint, answer, testimony and other evidence, and proposed findings of fact and conclusions filed by counsel for respondent and by counsel supporting the complaint. Consideration has been given to the proposed findings of fact and conclusions submitted by both parties, and all proposed findings of fact and conclusions not hereinafter specifically found or concluded are rejected, and the hearing examiner, having considered the entire record herein, makes the following findings of fact, conclusions drawn therefrom, and issues the following order:

FINDINGS OF FACT

1. Respondent American Home products Corporation¹ 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 685 Third Avenue in the city of New York, State of New York.

2. Respondent is now and for some time in the past has been engaged in the sale and distribution of a product designated as "Outgro". The trade name "Outgro" is owned by the respondent and is registered with the U.S. Patent Office.

3. The active ingredients of the product "Outgro" are Chlorobutanol, Tannic Acid, Isopropyl Alcohol and Ethyl Cellulose.²

¹ The respondent was described in the complaint as "American Home Products Corporation d/b/a Whitehall Laboratories". The name was shortened, as appears herein, by order of the examiner with the agreement of counsel for both sides.

² The complete formulation of the ingredients appears on Commission Exhibit 5 A.

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4. Respondent manufactures its product "Outgro" in Elkhart, Indiana, and shipments thereof are made therefrom to various other States of the United States and to the District of Columbia. Respondent maintains a course of trade in its product "Outgro" in commerce, as "commerce" is defined in the Federal Trade Commission Act.

5. The product "Outgro" is a "drug" within the definition of the term "drug" contained in the Federal Trade Commission Act.

6. The respondent has caused advertisements of its product "Outgro" to be disseminated in commerce by various means, including advertisements in newspapers and magazines, but principally by means of television broadcasts on networks transmitting such broadcasts across state lines. The purpose of such advertisements was to induce the purchase in commerce of respondent's product "Outgro" by the public.

7. The theme of respondent's advertising under consideration in this proceeding was that the product "Outgro" was an effective remedy for the condition generally known as ingrown toenail. The advertisements made claims that the product when applied as directed³ was effective in relieving the pain and guarding against the infection of ingrown toenails. In addition, respondent's ads claim that "Outgro" offers immediate relief from, and will in effect cure, ingrown toenails.

8. An ingrown toenail is a condition resulting when the corner of the nail grows into the soft tissue at the outer end of the toe. It usually involves the great toe, but others may be involved. Another cause may be an excess of soft tissue at the outer end of the toe lapping over the nail.⁴ The cause of this condition is usually improper trimming of the nail or improperly fitting shoes. As the nail presses into the soft tissue, it causes pressure on the tissue and may even penetrate the skin covering.

The usual symptoms of ingrown toenails are pain, inflammation and swelling. If the skin is penetrated and bacteria are present, there is danger of infection. In the examiner's opinion, however, it is imma-

³ The directions for the application of "Outgro" are as follows:

Directions: Outgro is a local anesthetic. Apply several drops in crevice where nail is growing into flesh. Work Outgro well under the nails. Let dry thoroughly. Don't rub off! Apply a few drops several times a day. Do not apply if toe is infected, but see your physician or foot specialist. Diabetics should not use Outgro. Do not use near fire or flame.

Keep all medication out of the reach of children."

⁴ An ingrown toenail is defined in the American Illustrated Medical Dictionary by Dorland as "overlapping of the nail by the flesh," and the word "flesh" is defined as "the soft, muscular tissue of the animal body." Consequently, the technical definition of ingrown toenail is "overlapping of the nail by the soft, muscular tissue of the animal body."

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terial whether or not there has been an actual penetration of the skin by the nail with the resultant danger of infection before the condition becomes an ingrown toenail. The respondent's advertising makes no such distinction, and an examination of the advertising establishes that the claims involved herein are made for the product regardless of whether a penetration of the skin has occurred.

9. Examples of the respondent's advertising in recent years include the following:

Nov. 11, 1956—May 22, 1958

June 19, 1961—Present

Is an ingrown nail hurting you? Now get immediate relief with OUTGRO. Just a few drops of OUTGRO brings blessed relief from the tormenting pain of ingrown nail! OUTGRO toughens the skin underneath the nail, allows the nail to be cut and thus prevents further pain and discomfort. So to get immediate relief from the tormenting pain of ingrown nail, to protect against dangerous infection * * * get OUTGRO today! Now at all drug counters!

May 23, 1958—May 7, 1961

Ingrown toenail brings pain and danger of infection. OUTGRO brings relief and protection! Don't suffer pain or risk infection unnecessarily. Get OUTGRO for ingrown toenail. With the OUTGRO way, a few drops relieves pain instantly, guards against infection, toughens skin underneath so nail can be cut to restore normal foot comfort! So don't suffer pain and danger of ingrown toenail. Use OUTGRO! For immediate relief and protection!

March 8, 1961—July 2, 1961

Ingrown toenail brings pain and danger of infection. With OUTGRO just three drops bring relief and protection! Now watch how OUTGRO relieves pain instantly, guards against infection. Used as directed OUTGRO toughens skin underneath so nail can be cut to restore normal foot comfort. Don't suffer the pain and danger of ingrown toenail. With OUTGRO just three drops brings relief and protection. Get OUTGRO!

Each of the three statements set forth above constitute the audio portion of a television advertisement which is spoken in conjunction with a series of slides or frames which are broadcast and appear visually on the television screen. The audio portion set forth above should be heard in connection with the visual portion of the ads to ascertain their full import. The film strips containing both the audio and the video portions of the ads are in the record.

10. The first charge of deceptive advertising is that respondent falsely claims that its product "Outgro" will relieve the pain of ingrown toenail instantly. It is found that the clear import of the

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respondent's advertising is that the application of the product "Outgro" to the affected area will immediately relieve the pain caused by an ingrown toenail. The product "Outgro" contains a small amount of Chlorobutanol, which is a topical anesthetic. The credible testimony in the record is that the use of the small amount of Chlorobutanol present in "Outgro" will have no appreciable effect upon the pain of ingrown toenail and that, if it has any, it is very slight and of short duration. The examiner finds that respondent's advertising claims that the use of "Outgro" will relieve the pain of ingrown toenail instantly are false.

11. The second charge is that respondent falsely claims that "Outgro" relieves infection from ingrown toenail. Respondent urges that its advertising is only to the effect that "Outgro" will "guard against" infection resulting from ingrown toenail. If the skin is not broken as a result of the ingrown toenail, there will generally be no infection present to guard against. If the skin is broken, the use of respondent's product which contains a small amount of Isopropyl Alcohol will have no effective antiseptic results. Respondent's claim that the tannic acid forms a "coating" over the affected areas which will prevent any infection from entering is without foundation. Tannic acid has no antiseptic effect and, in fact, the coating over the affected area may result in infectious matter being contained rather than permitted to exude naturally. The examiner finds that respondent's claims that "Outgro" will guard against or relieve the infection from ingrown toenails are false.

12. The third charge is that respondent falsely claims that the product "Outgro" offers immediate relief from ingrown toenail. The credible evidence in the record is that the product "Outgro" does not provide any immediate or any other relief from ingrown toenails. The examiner finds that respondent's claims in this regard are false.

13. The fourth charge in the complaint is that respondent falsely claims that "Outgro" will "cure" ingrown toenails. Counsel for respondent has conceded that the product "Outgro" will not "cure" ingrown toenails, and urges that the respondent has never so advertised. Respondent's advertising does not use the word "cure" anywhere in their text. The examiner has viewed the television tapes used by respondent in advertising "Outgro" and the clear import of the respondent's advertising is that the use of the product "Outgro" will effect an almost immediate cure of ingrown toenail. This is based principally upon the comparison in such television commercials of a swollen and infected ingrown toe with a perfectly normal toe which the advertising claims will result from the use of

"Outgro". The examiner finds that respondent's claims that "Outgro" will cure ingrown toenails, and that such claims are false.

15. The examiner accepts as credible the testimony of the experts in this field who testified on behalf of counsel in support of the complaint. Their qualifications as experts in their fields and in the subject matter herein involved are unquestioned. Their testimony, based upon their training, clinical experience and knowledge of the ingredients of the product "Outgro" and the directions for its use, is that the use of "Outgro" will have no significant effect on pain or infection, nor will it cure or offer relief for ingrown toenails. In fact, some testified that its use may well have aggravated the condition in at least some instances which they had observed in their practices.

The testimony of respondent's experts as to the effectiveness of the respondent's product "Outgro" is rejected. The two principal expert witnesses called by the respondent identified and testified about a clinical study which they had conducted on behalf of the respondent. This clinical study made by Drs. Grinnell and Brodey was received in evidence. Commission counsel requested that the names of the subjects of their study be given him for the purpose of interviewing them. This was ordered by the examiner. Counsel for respondent insisted that rather than permit the subjects to be interviewed by Commission counsel that respondent's counsel would bring them all from New York to Washington to be interviewed on the record before the examiner. Commission counsel refused this offer. Thereafter, interviews with certain of the subjects were conducted in New York City. At the request of respondent's counsel, he was present together with a reporter who transcribed the interviews verbatim. Of the 44 patients involved in the study, Commission counsel interviewed 11. Permission to interview the remainder was refused by Dr. Grinnell since the questions being asked by counsel in support of the complaint might endanger his practice. Counsel for respondent "would not permit my witness [Grinnell] to be endangered in his profession by questions asked by Counsel in support of the complaint." Whereupon, the examiner struck the studies from the record and all of the testimony of Drs. Grinnell and Brodey in regard thereto. In view of the refusal by Dr. Grinnell and counsel for respondent to have more than a few of the subjects of the study interviewed by Commission counsel, and having observed the demeanor of Dr. Grinnell and Dr. Brodey on the witness stand, the examiner is of the opinion that no credence can be given either to their clinical study or testimony.

16. The last charge is that "respondent's use of the trade name 'OUTGRO' is false and misleading in material respects in that it

represents directly and by implication that the product will cure ingrown toenails." Counsel for respondent has conceded that "Outgro" will not cure ingrown toenails. In support of this charge, counsel in support of the complaint requested the examiner to take "official notice that the respondent's use of the trade name 'Outgro' represents directly and by implication that the product will cause ingrown toenails to grow out again, thereby curing the ingrown toenail." This request was denied by the examiner.

The word "outgrow" from which respondent has obviously dropped the "w" to obtain its trade name, is defined in Webster's New International Dictionary as: "1. To surpass in growing. 2. To grow out of or away from." It is therefore quite clear that the secondary meaning of "outgrow" is directly applicable to and descriptive of a method of treatment of ingrown toenails; namely, to get the nail to grow out of or away from the flesh against which it has grown.

The testimony of the experts in the record is that an ingrown toenail can only be effectively treated and cured by surgery to remove the causative factor. This involves the removal of the offending portion of the nail including a portion of the matrix cells at the base of the nail. These matrix cells create the growth of the nail and it is therefore necessary to remove a portion of the matrix to prevent the nail from again growing in such a fashion that it becomes ingrown again. If the ingrowing nail is treated at an early stage, it can be packed so that the nail may grow up over the tissue thus preventing the nail from becoming ingrown. The record establishes that the product "Outgro" has no effect upon either the matrix cells of the nail or in the way that the nail grows. The product does not cause the nail "to grow out of or away from" the skin or tissue of the toe. The examiner is convinced that many members of the public purchasing respondent's products have and will purchase "Outgrow" with the mistaken belief arising from its trade name that it will somehow affect the growth of the nail and eliminate the symptoms of the ingrown nail. The use of the trade name "Outgro" advertised as it is as a preparation for use on ingrown toenails clearly has the capacity to mislead members of the public, and the examiner feels that the public interest requires an order prohibiting its use on respondent's foot care product.

CONCLUSION

The dissemination by the respondent of the advertising found above to be false and the use by respondent of the trade name "Outgro" in connection with its foot preparation constituted and now

constitutes unfair and deceptive acts and practices, in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER TO CEASE AND DESIST

It is ordered, That respondent American Home Products Corporation, a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of its foot preparation sold under the trade name "Outgro", or of any other product of substantially similar composition, do forthwith cease and desist from:

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

(a) Represents, directly or by implication, that such product relieves the pain of ingrown toenails.

(b) Represents, directly or by implication, that such product relieves or guards against infection from ingrown toenails.

(c) Represents, directly or by implication, that such product cures or offers relief from ingrown toenails.

(d) Contains the word "Outgro" or any other brand name that represents, directly or by implication, that the product will cure ingrown toenails.

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

OPINION OF THE COMMISSION

SEPTEMBER 27, 1963

By ELMAN, *Commissioner*:

The complaint in this matter charges respondent with disseminating advertisements misleading in material respects and hence constituting false advertisements within the meaning of Section 12 of the Federal Trade Commission Act, in connection with a medicinal preparation (a "drug" within the meaning of Section 15(c) of the Act) which respondent manufactures and sells, under the regis-

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tered trade name "Outgro", for the treatment of ingrown toenails.

An ingrown toenail results when the corner of the nail, commonly the nail of the big toe, grows into the soft tissue of the outer end of the toe. In pressing into the tissue, the nail may penetrate the skin covering. The usual symptoms of an ingrown toenail are pain, inflammation and swelling; if the skin is penetrated and bacteria are present, there is danger of infection. There are two recognized, effective remedies for an ingrown toenail. The less drastic involves lifting up the corner of the nail over the soft flesh, usually by means of a wad of cotton, to permit the nail to grow out over the flesh. If the nail is too far ingrown for this remedy to be effective, then surgery—which involves cutting away the entire nail in the affected area, including the matrix (the skin immediately underneath the nail)—may be required.

"Outgro" is a local anesthetic in liquid form. Concededly, it cannot cure an ingrown toenail or an infection resulting therefrom. Indeed, if "Outgro" is used when infection has already set in, the tannic acid in the product may "seal" the infection in the toe, retarding treatment and possibly causing the infection to spread. Respondent does contend, however, that "Outgro" affords at least partial or temporary relief from the pain and discomfort resulting from ingrown toenail and, by toughening the soft flesh in the surrounding area, acts to some degree as a prophylactic against new infection resulting from ingrown toenail, and also facilitates the cutting of the nail should surgery prove necessary. Although the hearing examiner concluded that "Outgro" is without any therapeutic value, we find, on the basis of all the evidence, including a clinical study prepared by respondent which the examiner improperly excluded from evidence but which the Commission has fully considered on this appeal,* that complaint counsel has not sustained the burden of proving that "Outgro" does not have the limited properties argued for it by respondent.

In its advertising, however, respondent has made more sweeping claims for its product—claims which cannot be substantiated and are, in consequence, unlawful. The record in this case contains

*The basis of the examiner's ruling excluding the study in question (RX 9-11) was respondent's refusal to abide by an order of the examiner which gave complaint counsel permission to interview informally every one of the 44 patients who had participated in the study. Respondent, however, objected not to conventional cross-examination in respect of the study, but only to complaint counsel's interviewing the patients outside of the examiner's presence. Indeed, respondent freely provided complaint counsel with the names and addresses of each of the 44 patients and with all other information, notes and records which might have been helpful in impeaching the study on cross-examination. Since complaint counsel thus had ample opportunity for adequate cross-examination, the study should have been received in evidence, and we have considered it as part of the record upon which our findings are based.

many instances of excessive advertising claims. For example, in one television commercial for "Outgro" (CX 6a-6b) the viewer is shown first a toe with ingrown toenail, the corner of the nail buried under the soft flesh; then "Outgro" being applied to it; and immediately thereafter, the nail growing over the flesh to form a perfectly normal toenail. While this metamorphosis is occurring before the viewer's eyes, the announcer is remarking that "Outgro" "toughens skin underneath so nail can be cut to restore normal foot comfort". Even on the dubious assumption that the viewer would understand the reference to cutting to denote surgery by a doctor, and not mere trimming of the nail by the user of "Outgro" himself with scissors or nail clipper, the qualifying words are believed by the visual presentation, in which the ingrown nail, unaided by surgery or any other treatment besides "Outgro", is shown growing back to normal. Moreover, other statements accompanying the visual presentation are misleading because they omit essential qualifications: "Outgro brings relief and protection! Don't suffer pain or risk infection unnecessarily. Get Outgro for ingrown toenail"; "So don't suffer pain and danger of ingrown toenail. Use Outgro!"

The clear implication of the advertisement as a whole is that the use of "Outgro", without more, will restore an ingrown toenail to normal. No reference is made to surgery, packing of the nail, or other treatment that is ordinarily necessary. The average viewer of such an advertisement would probably believe that "Outgro" is a completely effective home remedy for ingrown toenail; he is not told, and would not be likely to understand, that "Outgro" is merely a local anesthetic and cannot give more than temporary, symptomatic relief, with some prophylaxis against infection.

In the case of a medicinal preparation having limited properties, such as "Outgro", the law requires in appropriate cases that the limitations also be clearly disclosed where the claim is made that the product has such properties. This duty not to mislead the public is not satisfied merely by refraining from making claims which in themselves are false. Section 15(a)(1) of the Federal Trade Commission Act expressly provides that, in determining whether an advertisement for a food, drug, device or cosmetic is misleading and hence false, "there shall be taken into account (among other things) not only representations made or suggested * * * but also the extent to which the advertisement fails to reveal facts material in the light of such representations * * *."

To a person seeking to be rid of an ingrown toenail, it is certainly material that "Outgro" does *not* cure the condition or infections resulting therefrom, does *not* effect a complete and permanent

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cessation of pain and discomfort, and *should not* be used if infection has already set in. These limitations, which are the corollaries of the claims that "Outgro" relieves pain and "protects" or "guards against" infection, must be clearly expressed, for without them the unqualified claims become deceptive half-truths. Such express disclaimers are all the more necessary if the misconceptions created by respondent's affirmative misrepresentations of the properties of "Outgro" are to be dispelled. *Cf. Waltham Precision Instrument Co.*, F.T.C. Docket 6914 (decided October 16, 1962), 61 F.T.C. 1027, 1048, 1049.

The examiner found the trade name "Outgro" false and misleading *per se* and ordered respondent to cease using it in its advertising. We agree that the name is likely to deceive the prospective purchaser, who may be led by it to believe that the product will cause an ingrown toenail to grow out or away from the flesh against which it is pressing. However, while the fact that "Outgro" is a registered trademark is not controlling in this proceeding, *Charles of the Ritz Dist. Corp. v. FTC*, 143 F. 2d 676 (2d Cir. 1944), an order prohibiting altogether the use of a valuable trade name—here, one that has been used by respondent for more than thirty years—is a drastic measure which we prefer not to invoke if a less severe remedy is readily available that will adequately protect the public interest. See *FTC v. Royal Milling Co.*, 288 U.S. 212. In the present circumstances, it will suffice to require an appropriate affirmative disclaimer in conjunction with the use of the name "Outgro" in advertising. There are, to be sure, cases in which the addition of an affirmative disclaimer to a misleading trade name would only confuse the consumer—and in such cases, excision of the name may be the only practical remedy. See, e.g., *Bakers Franchise Corp.*, F.T.C. Docket 7472 (decided July 19, 1961), 59 F.T.C. 70, 77. We are satisfied, however, that in the instant case an order requiring respondent to disclose, clearly and conspicuously, in immediate conjunction with the name "Outgro", that the product does not in any way affect nail growth, shape or position, will not confuse the consumer and will fully obviate any danger of consumer deception caused by the trade name.

Except as set forth in this opinion, the findings of fact and conclusions of law contained in the initial decision are adopted by the Commission. We have revised somewhat the terms and provisions of the order to cease and desist. As has been stated many times, the purpose of an order of the Commission is to guide and instruct in the requirements of law with a view to prevention of future violations, not to punish. This purpose is best fulfilled here, we think,

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by an order which distinguishes between what is permitted and what is forbidden to respondent in clear and precise terms. The order in this case does not prevent or inhibit respondent from making truthful claims on behalf of "Outgro"; it requires only that those claims be expressed in such terms, and with such qualifications where necessary, that prospective purchasers will not be misled.

FINAL ORDER

SEPTEMBER 27, 1963

This matter has been heard by the Commission on respondent's appeal from the initial decision of the hearing examiner. The Commission has rendered its decision, granting the appeal in part but denying it in all other respects. The Commission has determined, for the reasons stated in the accompanying opinion, that the order to cease and desist contained in the initial decision should be modified and, as modified, issued as the Commission's final order. Therefore,

It is ordered, That respondent, American Home Products Corporation, a corporation, and its officers, agents, representatives and employees, doing business under any name or through any corporate or other device, in connection with the sale, offering for sale or distribution of the product that respondent manufactures and sells under the name of "Outgro", or any other product of substantially similar composition and intended use, do forthwith cease and desist from disseminating or causing to be disseminated,

(1) by United States mails, or in commerce by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of said product, or

(2) by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in commerce of said product,

any advertisement which:

(A) states or implies, whether by words or pictures or a combination thereof, that said product can or will:

(1) cure, or provide an effective remedy for, the condition known as ingrown toenail;

(2) relieve pain or discomfort resulting from said condition, unless respondent clearly and conspicuously states, in immediate conjunction with any such representation, that such relief is partial and temporary only and is not complete or permanent;

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(3) relieve, improve or cure infection caused by or accompanying said condition; or

(4) protect, prevent or guard against such infection, unless respondent clearly and conspicuously states, in immediate conjunction with any such representation, that said product is preventive only and cannot relieve, improve or cure an already existing infection, and should not be used if infection has already set in; or

(B) contains the word "Outgro" or any similar-sounding or similar-appearing word suggestive of growth, unless respondent clearly and conspicuously states, in immediate conjunction with any such word, that said product does not affect in any way the growth, shape or position of the toenail.

It is further ordered. That respondent shall file with the Commission, within sixty (60) days after service of the order herein