

unless respondents in each instance furnish such assistance at the time of the delivery.

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

IN THE MATTER OF

SAV-COTE CHEMICAL LABORATORIES, INC., ET AL.

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

Docket C-716. Complaint, Feb. 10, 1964—Decision, Feb. 19, 1964

Consent order requiring an Alexandria, Va., mail-order seller of its "Sav-Cote" products and other paints or coatings, to cease making—in direct-mail and newspaper advertisements and otherwise—numerous false statements concerning its business organization, the durability and protective qualities of "Sav-Cote," the use of its products by the armed forces, tests and approval by the Navy, and the guarantee to purchasers, among other deceptive claims.

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 Sav-Cote Chemical Laboratories, Inc., a corporation, and William Moskowitz, individually and as an officer of said corporation, 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 in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Sav-Cote Chemical Laboratories, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Virginia, with its principal office and place of business located at 20 South Dove Street, Alexandria, Virginia.

Respondent William Moskowitz is the president of Sav-Cote Chemical Laboratories, Inc. He formulates, directs and controls the acts and practices of Sav-Cote Chemical Laboratories, Inc., including the acts and practices hereinafter set forth. His office and principal place of business is located at the above stated address.

PAR. 2. Respondents have been and are now engaged in the preparation, offering for sale, sale and distribution of "Sav-Cote" plasticlear and "Sav-Cote" colors, sometimes hereinafter referred to collectively as "Sav-Cote" products or simply as "Sav-Cote", and other paints or coatings. Such products have been and are now offered for sale, sold and distributed through the mail directly to the general public.

PAR. 3. In the course and conduct of their business, respondents have caused and now cause "Sav-Cote" products, when sold, to be shipped from their place of business in the State of Virginia to purchasers thereof located in various other States of the United States and in the District of Columbia, and maintain, and at all times mentioned herein have maintained a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, and for the purpose of inducing the sale of "Sav-Cote" products, respondents have made numerous statements and representations concerning the manner in which their business is organized, the merits and characteristics of "Sav-Cote", the use of such products by the armed forces, tests and approval by the Navy, the proof available to support their advertising representations, and the guarantee provided to purchasers.

A. Typical and illustrative of such statements and representations, but not all inclusive thereof, are the following which respondents caused to be printed and distributed in direct-mail advertisements sent to individuals and other members of the public through the United States mail and otherwise:

MARINE DIVISION. RESINS & PLASTIC DEPARTMENT.

It actually defies aging * * * lasts indefinitely.

PUTS AN END TO YOUR PAINT & SURFACE COATING PROBLEMS.

Waterproofs.

Stops rust & rot.

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Resists * * * flame.

Doesn't Peel, * * * or Crack.

Forms a * * * leakproof elastic skin as it's applied.

Sav-Cote has been used by the armed forces, tested by the Navy Laboratories, accelerated weather testing at the Bayonne, N. J. testing grounds, * * *

B. Typical and illustrative of such statements and representations, but not all inclusive thereof, are the following which respondents caused to be printed and published in newspapers having a general circulation:

Elastic

PROVEN: * * * actually never needs removal.

Proven to cut refinishing cost to 80%.

Goes over old paints.

GUARANTEED: * * * full money back if not satisfied, for any reason in the world, within 30 days.

PAR. 5. Through the use of the aforesaid statements and representations, and others similar thereto, but not specifically set forth, respondents have represented, directly or by implication, that:

(a) Sav-Cote Chemical Labs., Inc., maintains a marine division and a resins and plastic department.

(b) "Sav-Cote" finishes last for an indefinitely long period of time without aging.

(c) "Sav-Cote" puts an end to all paint and surface coating problems.

(d) "Sav-Cote" finishes are impenetrable by water or water vapor under all usual and ordinary conditions of use.

(e) "Sav-Cote" arrests all corrosion and decay.

(f) "Sav-Cote" is not flammable.

(g) "Sav-Cote" doesn't peel, * * * or crack under any conditions of use.

(h) A surface to which "Sav-Cote" has been applied will not leak under any conditions.

(i) "Sav-Cote" has been regularly used by the armed services: has been tested and approved by the Naval Research Laboratory, Washington, D.C.; and has been subjected to accelerated weather testing by naval testing facilities located at Bayonne, New Jersey.

(j) "Sav-Cote" plasticlear finishes are elastic.

(k) Respondents have scientific or empirical evidence which proves that "Sav-Cote" finishes never need removal.

(l) Respondents have scientific or empirical evidence which proves that the use of "Sav-Cote" will reduce the cost of refinishing surfaces up to 80%.

(m) "Sav-Cote" can be applied over old badly cracked or peeling painted surfaces.

(n) Respondents guarantee for 30 days from date of purchase to make a full refund for any reason given.

PAR. 6. In truth and in fact:

(a) Sav-Cote Chemical Labs., Inc., does not maintain a marine division or a resins and plastic department and is neither departmentalized or divided into divisions.

(b) "Sav-Cote" finishes do not last for an extended or indefinitely long period of time without aging.

(c) "Sav-Cote" does not put an end to all paint and surface coating problems.

(d) "Sav-Cote" finishes are not impenetrable by water or water vapor under all usual and ordinary conditions of use.

(e) "Sav-Cote" does not arrest all corrosion and decay. If applied over a surface which has started to corrode or decay "Sav-Cote" will not stop such corrosion or decay.

(f) "Sav-Cote" is flammable and will burn easily when in liquid form as during application.

(g) "Sav-Cote" does peel and crack under some conditions of use.

(h) A surface to which "Sav-Cote" has been applied will leak under some conditions.

(i) "Sav-Cote" has not been regularly used by the armed forces; such sales as respondents may have made have been isolated sales to individual commands. "Sav-Cote" has not been tested or approved by the Naval Research Laboratory, Washington, D.C.; and has not been subjected to accelerated weather testing or any other kind of testing by naval facilities at Bayonne, New Jersey.

(j) "Sav-Cote" plasticlear finishes are not elastic.

(k) Respondents do not have scientific or empirical evidence which proves that "Sav-Cote" finishes never need removal.

(l) Respondents do not have scientific or empirical evidence which proves that the use of "Sav-Cote" will reduce the cost of re-finishing surfaces up to 80% or any other amount.

(m) "Sav-Cote" cannot be efficiently or satisfactorily applied over old badly cracked or peeling painted surfaces.

(n) Respondents do not guarantee for 30 days from the date of purchase to make a full refund for any reason given. Respondents do not guarantee the results obtained in any manner.

Therefore said statements and representations were and are false, misleading and deceptive.

PAR. 7. In the course and conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals engaged in the sale of paints and coatings.

PAR. 8. The use by the respondents of the aforesaid false, misleading and deceptive statements, representations and practices, has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of "Sav-Cote" products by reason of said erroneous and mistaken belief.

PAR. 9. 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 methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Sav-Cote Chemical Laboratories, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Virginia, with its principal office and place of business located at 20 South Dove Street, in the city of Alexandria, State of Virginia.

Respondent William Moskowitz is the president of Sav-Cote Chemical Laboratories, Inc., and his address is the same as that of said corporation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I

It is ordered, That respondents Sav-Cote Chemical Laboratories, Inc., a corporation and its officers, and William Moskowitz, individually, and as an officer of said corporation, and their representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of Sav-Cote plasticlear or Sav-Cote colors, or any other paint or coating, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Falsely representing, directly or by implication, that respondents' business is divided into departments or divisions.

2. Representing, directly or by implication, that any of such products defy aging or last indefinitely without aging or put an end to paint and surface coating problems; or misrepresenting, in any manner, the durability of any of such products.

3. Using the unqualified representation "Waterproofs" or "Stops rust & rot" or "Resists * * * flame" or "Doesn't Peel, * * * or Crack" or "forms a * * * leakproof * * * skin" or "Goes over old paints" or any other word or words of similar unqualified import or meaning; or misrepresenting, in any manner, any merits or characteristic of any of such products.

4. Using the word "Elastic" to describe any finish which is not capable of being readily stretched or expanded without essential alteration.

5. Using the word "PROVEN", or any other word or words of similar import or meaning in connection with any representation, unless respondents have scientific or empirical evidence available which establishes the truth of such representation.

6. Representing, directly or by implication, that any of such products has been tested by any person, company, organization or group which has not tested such product; or misrepresenting, in any manner, the results of any test conducted on any of such products.

7. Representing, directly or by implication, that any of such products has been approved by any person, company organization or group which has not approved such products; or misrepresenting, in any manner, the approval given or granted to any of such products.

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8. Representing, directly or by implication, that any person, company, organization or group has used any of such products unless such person, company, organization or group has usually, normally and regularly used such products.

II

It is further ordered, That respondents Sav-Cote Chemical Laboratories, Inc., a corporation and its officers, and William Moskowitz, individually, and as an officer of said corporation, and their representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of Sav-Cote plasticlear or Sav-Cote colors, or any other product, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Representing, directly or by implication, that any product is guaranteed unless the nature and extent of the guarantee, the manner of performance and the identity of the guarantor are clearly and conspicuously disclosed.

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

IN THE MATTER OF

STERLING DRUG, INC., ET AL.

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

Docket 8554. Amended Complaint, Jan. 31, 1963—Decision, Feb. 20, 1964

Order dismissing—following the decision of the United States Court of Appeals for the Second Circuit, 317 F. 2d 669 (7 S.&D. 683), which held that the Commission had not demonstrated that it had "reason to believe" the challenged advertisements were false—complaint charging false advertising of aspirin.

AMENDED 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 Sterling Drug, Inc., a corporation, and Dancer-Fitzgerald-Sample, Inc., a corporation, and Thompson-Koch Company, a corporation, 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 in the public interest, hereby issues its amended complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Sterling Drug, Inc., 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 1450 Broadway in the city of New York, State of New York.

Respondent Dancer-Fitzgerald-Sample, Inc., 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 347 Madison Avenue in the city of New York, State of New York.

Respondent Thompson-Koch Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its principal office and place of business located at 1450 Broadway in the city of New York, State of New York.

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

The designation used by respondent Sterling Drug, Inc., for said product, and the formula thereof and directions for use are as follows:

Designation: "Bayer Aspirin"

Formula: Each tablet contains five (5) grains of aspirin.

Directions: Take one (1) or two (2) tablets with water three (3) or four (4) times daily as required.

PAR. 3. Respondent Sterling Drug, Inc., causes the said product, 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 product in commerce, as "commerce" is defined in the Federal Trade Commission Act. The volume of business in such commerce has been and is substantial.

Respondent Dancer-Fitzgerald-Sample, Inc., and Thompson-Koch Company are now, and for some time last past have been, the advertising agencies of Sterling Drug, Inc., and now prepare and place, and for some time last past have prepared and placed, for publication, advertising material, including the advertising herein-after referred to, to promote the sale of the said product. In the

conduct of their business, at all times mentioned herein, respondents Dancer-Fitzgerald-Sample, Inc., and Thompson-Koch Company have been in substantial competition, in commerce, with other corporations, firms and individuals in the advertising business.

PAR. 4. In the course and conduct of their business, respondents have disseminated, and caused the dissemination of, certain advertisements concerning the product referred to in Paragraph Two, above, 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 and other advertising media, and by means of television and radio continuities broadcast over networks through stations located in various States of the United States and in the District of Columbia, and by means of other radio and television continuities broadcast over 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 Bayer Aspirin; and have disseminated, and caused the dissemination of, advertisements concerning the said Bayer Aspirin by various means, including but not limited to the aforesaid media, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said product in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Among and typical, but not all-inclusive thereof, of the statements and representations contained in said advertisements, including audio-visual representations in television broadcasts, disseminated as hereinabove set forth, are the following:

Government-Supported Medical Team Compares Bayer Aspirin
and Four Other Popular Pain Relievers

Findings reported in the highly authoritative journal of the AMERICAN MEDICAL ASSOCIATION reveal that the higher priced combination-of-ingredients pain relievers upset the stomach with significantly greater frequency than any of the other products tested, while Bayer Aspirin brings relief that is as fast, as strong, and as gentle to the stomach as you can get.

This important new medical study, supported by a grant from the federal government, was undertaken to compare the stomach-upsetting effects, the speed of relief, and the amount of relief offered by five leading pain relievers, including Bayer Aspirin, aspirin with buffering, and combination-of-ingredients products. Here is a summary of the findings.

Upset Stomach

According to this report, the higher priced combination-of-ingredients products upset the stomach with significantly greater frequency than any of the other products tested, while Bayer Aspirin, taken as directed, is as gentle to the stomach as a plain sugar pill.

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Speed and Strength

The study shows that there is no significant difference among the products tested in rapidity of onset, strength, or duration of relief. Nonetheless, it is interesting to note that within just fifteen minutes, **Bayer Aspirin had a somewhat higher pain relief score than any of the other products.**

(A reproduction of a newspaper advertisement containing the foregoing representations is attached hereto marked Exhibit 1 and incorporated herein.)*

* * * * *

Video:

Audio:

Open on tight shot of AMA Journal (JAMA).

Annex (VO) * * * In the December 29 issue of the Journal of the American Medical Association, an important new medical report evaluates five widely advertised pain relievers including Bayer Aspirin, aspirin with buffering and leading combination-of-ingredients products.

(A reproduction of the report referred to in the above-quoted advertisements is attached hereto marked Exhibit 2 and incorporated herein.)*

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

1) That the findings of the medical team of clinical investigators referred to in said advertisements have been endorsed and approved by the United States Government.

2) That the publication of a report of said study, together with the findings of the clinical investigators, in The Journal of The American Medical Association, is evidence of endorsement and approval thereof by that association and by the medical profession.

3) That the clinical investigators found that Bayer Aspirin will not upset the stomach, is as gentle to the stomach as a sugar pill and is more gentle to the stomach than any analgesic product containing more than one ingredient, and that there is no analgesic product available to the consumer which is more gentle to the stomach than Bayer Aspirin.

4) That the clinical investigators concluded that Bayer Aspirin, after fifteen minutes following administration, affords a higher degree of pain relief than any other product tested.

PAR. 7. In truth and in fact:

1) The findings and conclusions reached by the clinical investigators conducting the study referred to in said advertising were and are their own, personally, and have not been endorsed or ap-

*Pictorial Exhibits 1 and 2 are omitted in printing.

proved by the United States Government, by The American Medical Association or by the Medical profession.

2) The clinical investigators did not state as a finding in their report that Bayer Aspirin will not upset the stomach, is as gentle to the stomach as a sugar pill, is more gentle to the stomach than any analgesic product containing more than one ingredient or that there is no analgesic product which is more gentle to the stomach than Bayer Aspirin.

3) The clinical investigators reported that there is no significant difference in the degree of pain relief afforded by the various products tested after a lapse of fifteen minutes following administration.

The aforesaid advertisements set forth and referred to in Paragraph Five above were, and are, misleading in material respects and constitute "false advertisements," as that term is defined in the Federal Trade Commission Act.

PAR. 8. The dissemination, by the respondents of the false advertisements, as aforesaid, constituted, and now constitutes, unfair and deceptive acts and practices, in commerce, in violation of Sections 5 and 12 of the Federal Trade Commission Act.

Mr. Berryman Davis and *Mr. Howard S. Epstein*, counsel supporting the complaint.

Mr. Mathias F. Correa, *Mr. Thomas C. Mason*, and *Mr. H. Richard Schumacher*, of *Cahill, Gordon, Reindel & Ohl*, New York, N. Y., counsel for respondents *Sterling Drug, Inc.*, and *Thompson-Koch Company*.

Mr. Frank A. F. Severance and *Mr. Gordon M. Lucey*, of *Dunnington, Bartholow & Miller*, New York, N. Y., counsel for respondent *Dancer-Fitzgerald-Sample, Inc.*

INITIAL DECISION BY ELDON P. SCHRUP, HEARING EXAMINER

STATEMENT OF PROCEEDINGS

The Federal Trade Commission on January 31, 1963, issued its amended complaint¹ charging *Sterling Drug, Inc.*, a corporation, *Dancer-Fitzgerald-Sample, Inc.*, a corporation, and *Thompson-Koch Company*, a corporation, with violation of Sections 5 and 12 of the Federal Trade Commission Act. Respondent *Sterling Drug, Inc.*, is alleged to be engaged in the interstate sale and distribution of the drug product Bayer Aspirin, and respondents *Dancer-Fitzgerald-Sample, Inc.*, and *Thompson-Koch Company* are alleged to act as advertising agencies for *Sterling Drug, Inc.*, in the preparation and

¹ The complaint, as originally issued on January 16, 1963, did not include *Thompson-Koch Company* as a party respondent.

placing of advertisements for the sale of Bayer Aspirin. Said advertisements are alleged to be disseminated by the United States mail and through various means in interstate commerce to induce the intrastate and interstate purchase of Bayer Aspirin.

Set forth in the complaint are reproduced portions of newspaper and video and audio advertisements of Bayer Aspirin allegedly typical of the content of numerous such advertisements referring to an article published and circulated in the Journal of the American Medical Association under date of December 29, 1962. Attached to the complaint and attached to and made part of this Initial Decision is Comm. Ex. No. 1,* a full reproduction of this newspaper advertisement.

Attached to the complaint and attached to and made part of this Initial Decision is Comm. Ex. No. 3,* the said article of December 29, 1962, appearing in the Journal of the American Medical Association and referred to in such advertisements. As hereinafter set forth and described in the Findings of Fact, it is the alleged misrepresentations stated to appear in such Bayer Aspirin advertising which are charged in the complaint to be in violation of Sections 5 and 12 of the Federal Trade Commission Act.

Answers to the amended complaint were filed by the respondents on March 15, 1963. Said answers admit in part and deny in part the various allegations of the amended complaint and ask that the complaint be dismissed. Following a prehearing conference on April 8, 1963, made part of the public record by agreement of all counsel, a hearing on the merits was held in Washington, D.C. on April 22 through April 25, 1963.

At the conclusion of the presentation of the case-in-chief, counsel for the respondents moved to strike the record testimony directed to certain phases of respondents' advertising as given by the witnesses called in support of the allegations of the complaint.² Upon the denial of this motion,³ respondents elected to present no defense witnesses⁴ and the case was closed on the record.⁵

The transcript of record in this proceeding consists of 441 pages. Twenty-one witnesses were called during the presentation of the case-in-chief and their testimony extends from page 122 through page 383. Marked for identification and received in evidence without objection under an oral stipulation between counsel is Comm. Ex. No. 1, a full-page Bayer Aspirin advertisement appearing at

*Pictorial Commission Exhibits Nos. 1 and 3 are omitted in printing.

² Tr. 19; 183-184.

³ Tr. 399-406.

⁴ Tr. 421.

⁵ Tr. 439.

page A-12 in the Washington, D. C. newspaper, The Evening Star, on January 10, 1963; Comm. Ex. No. 2, a printed volume of 217 pages entitled "United States Court of Appeals for the Second Circuit, Federal Trade Commission, appellant, v. Sterling Drug, Inc., Dancer-Fitzgerald-Sample, Inc., Thompson-Koch Company, appellees, Joint Appendix"; Comm. Ex. No. 2-A, a printed volume of nine pages under the foregoing caption entitled "Supplement to Joint Appendix"; Comm. Ex. No. 3, a printed article of four pages bearing the inscription and date JAMA December 29, 1962, and entitled "A Comparative Study of Five Proprietary Analgesic Compounds", Thomas J. DeKornfeld, MD, Louis Lasagna, MD, and Todd M. Frazier, ScM, Baltimore.

Marked for identification and rejected in the instant proceeding is Comm. Ex. No. 4, entitled "Affidavit of Louis Lasagna, MD", dated March 20, 1963. This exhibit, when offered, was both objected to and further stated by respondents' counsel not to be covered by the oral stipulation between counsel.⁶

Respondents' exhibits marked for identification numbers 1 through 11 were also rejected; ⁷ Respt. Ex. No. 12, a two-page affidavit dated February 14, 1963, by Mildred P. Clark, Head Librarian, Winthrop Laboratories, Division of Sterling Drug, Inc., and its attached University of Michigan Medical Bulletin of five printed pages were received in evidence without objection.

Written motions addressed both to the Hearing Examiner and to the Commission that the Commission be declared disqualified to make any adjudication on the issues presented by Paragraph Seven (1) of the complaint were denied by the Hearing Examiner⁸ and by the Commission on May 16, 1963, with a memorandum opinion accompanying its order.

Commission's rejected exhibit, marked for identification No. 4, and respondents' rejected exhibits, marked for identification numbers 1 through 11, are subject to Section 4.12 (f) of the Commission's Rules of Practice for Adjudicative Proceedings which provides that rejected exhibits, adequately marked for identification, shall be retained in the record so as to be available for consideration by any reviewing authority.

All counsel were afforded full opportunity to be heard, to examine and cross-examine all witnesses presented, and to introduce such evidence as is provided for under Section 4.12 (b) of the Commission's Rules of Practice for Adjudicative Proceedings.

⁶ Tr. 63-69; 119.

⁷ Tr. 201, 222, 249, 251, 255, 435, 437.

⁸ Tr. 384-390.

Proposed findings of fact, conclusions and supporting briefs were filed by respective counsel, and counsel supporting the complaint submitted a proposed order to cease and desist. Proposed findings and conclusions submitted and not adopted in substance or form as herein found and concluded are hereby rejected.

After carefully reviewing the entire record in this proceeding as hereinbefore described, and based on such record and the observation of the witnesses testifying herein, the following findings of fact and conclusions therefrom are made, and the following order issued.

FINDINGS OF FACT

1. Respondent Sterling Drug, Inc., 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 1450 Broadway in the city of New York, State of New York.⁹

Sterling Drug, Inc., is now, and for some time last past has been, engaged in the sale and distribution of a product which comes within the classification of a drug as the term "drug" is defined in the Federal Trade Commission Act.¹⁰ The designation used by respondent Sterling Drug, Inc., for said product, and the formula thereof and directions for use are as follows:

Designation: "Bayer Aspirin"

Formula: Each tablet contains five (5) grains of aspirin.

Directions: Take one (1) or two (2) tablets with water three (3) or four (4) times daily as required.¹¹

Sterling Drug, Inc., causes the said product, when sold, to be transported from a place of business in the State of New Jersey 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 product in commerce, as "commerce" is defined in the Federal Trade Commission Act. The volume of business in such commerce has been and is substantial.¹²

2. Respondent Thompson-Koch Company is a corporation organized, existing and doing business under and by virtue of the laws

⁹ Admitted by respondents' answer at page 1.

¹⁰ Section 15 (c). "Aspirin is a drug whose tolerances are prescribed by the United States pharmacopoeia". (Tr. 112.)

¹¹ Admitted by respondent's answer at page 2.

¹² Averred by respondent's answer at page 3. Respondent's annual product sales exceed \$25,000,000 (Tr. 112).

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of the State of Ohio, with its principal office and place of business located at 1450 Broadway in the city of New York, State of New York.¹³ Thompson-Koch Company is a wholly owned subsidiary of Sterling Drug, Inc., and is used by the latter for the placement of print advertising.¹⁴

3. Respondent Dancer-Fitzgerald-Sample, Inc., 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 347 Madison Avenue in the city of New York, State of New York.¹⁵

Dancer-Fitzgerald-Sample, Inc., prepared all advertising referred to in the amended complaint disseminated by and on behalf of respondent Sterling Drug, Inc., for the latter's promotion of the sale of the product designated Bayer Aspirin. The print advertising for publication in newspapers was prepared by this respondent for placement by and was placed in such media by respondent Thompson-Koch Company. The television and radio advertising disseminated by respondents, including that referred to in the amended complaint, was prepared by this respondent and placed by it with the broadcast media for dissemination throughout the United States.¹⁶

4. Respondents, in the course and conduct of their business, have disseminated, and caused the dissemination of, certain advertisements concerning Bayer Aspirin 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 and other advertising media, and by means of television and radio continuities broadcast over networks through stations located in various States of the United States and in the District of Columbia, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said Bayer Aspirin; and have disseminated, and caused the dissemination of, advertisements concerning the said Bayer Aspirin by various means, including but not limited to the aforesaid media, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said product in commerce, as "commerce" is defined in the Federal Trade Commission Act.¹⁷

¹³ Admitted by respondent's answer at page 1.

¹⁴ Tr. 113-114.

¹⁵ Admitted by respondent's answer at page 1.

¹⁶ Tr. 113-115.

¹⁷ Admitted in part by answer of respondents Sterling Drug, Inc., and Thompson-Koch Company at page 3; admitted in part by answer of Dancer-Fitzgerald-Sample, Inc., at page 3; see also, affidavit of James H. Luther, Jr., and Exhibits A through F to said affidavit appearing at pages 61-95 of Comm. Ex. No. 2 in evidence.

5. Appearing in the December 29, 1962, issue of the Journal of the American Medical Association is an article entitled "A Comparative Study of Five Proprietary Analgesic Compounds". This article is Comm. Ex. No. 3 in evidence and is attached hereto and made part of this Initial Decision. The content of this report has not been challenged in this proceeding and no witness was called either to support or to controvert the worth of such study. The statement at the report's end that "This study was supported by a grant from the Federal Trade Commission, Washington, D. C." is also accepted and not controverted by the respective counsel. There is further, no dispute that this article was published and circulated in the Journal of the American Medical Association on a certain date and that such publication of the said article was authorized by an undisclosed staff official of the Federal Trade Commission. No witness herein testified to the background for and as to what, if any, official meaning is to be ascribed to this authorization and all the evidence in such connection is confined to what appears in the documentary exhibits of record.¹⁸

Similarly, no representative for the Journal of the American Medical Association or for the Association itself was called to testify herein, and such evidence as is directed to what, if any, official meaning is to be ascribed to the publication of the said article in the said Journal is also confined to what appears in the documentary exhibits of record.¹⁹

6. Following the publication and circulation of the foregoing article in the December 29, 1962, issue of the Journal of the American Medical Association, the respondents, in connection with the sale of the drug product Bayer Aspirin, caused to be published and circulated advertisements referring to the said article in various newspapers²⁰ and other media,²¹ including television and radio.²² Comm. Ex. No. 1 in evidence, a complete copy of which is attached hereto and made part of this Initial Decision, is a typical such advertisement. This advertisement reads in pertinent part:

¹⁸ Comm. Ex. No. 2, stipulation between counsel, at pages 149-151. See, also, statement by the Chairman, Federal Trade Commission, at page 109 of Comm. Ex. No. 2. See, also, the statement of respondents' counsel in the instant proceeding at Tr. 414-415 in this regard.

¹⁹ For example, affidavit of Dr. E. B. Howard and Exhibits A and B to said affidavit. See, Comm. Ex. No. 2 at pages 50-53.

²⁰ The advertisement referring to said article appeared in approximately 188 newspapers in some 98 cities across the United States. See, Comm. Ex. No. 2 at pages 63-69.

²¹ The advertisement also appeared in the special New York editions of Life Magazine for January 18, 1963, and in editions for the rest of the country in the Life Magazine issue of January 25, 1963. See, Comm. Ex. No. 2 at page 61.

²² Extensive network television and radio commercials also featured this advertisement. See Comm. Ex. No. 2 at pages 70-95.

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Government-Supported Medical Team Compares Bayer Aspirin
and Four Other Popular Pain Relievers

Findings reported in the highly authoritative journal of the American Medical Association reveal that the higher priced combination-of-ingredients pain relievers upset the stomach with significantly greater frequency than any of the other products tested, while Bayer Aspirin brings relief that is as fast, as strong, and as gentle to the stomach as you can get.

This important new medical study, supported by a grant from the federal government, was undertaken to compare the stomach-upsetting effects, the speed of relief, and the amount of relief offered by five leading pain relievers, including Bayer Aspirin, aspirin with buffering, and combination-of-ingredients products. Here is a summary of the findings.

Upset Stomach

According to this report, the higher priced combination-of-ingredients products upset the stomach with significantly greater frequency than any of the other products tested, while *Bayer Aspirin, taken as directed, is as gentle to the stomach as a plain sugar pill.*

Speed and Strength

The study shows that there is no significant difference among the products tested in rapidity of onset, strength, or duration of relief. Nonetheless, it is interesting to note that within just fifteen minutes, *Bayer Aspirin had a somewhat higher pain relief score than any of the other products.*

7. The amended complaint in this proceeding challenges such aforesaid advertising by the respondents and alleges it to be false, misleading and deceptive and in violation of Sections 5 and 12 of the Federal Trade Commission Act. The amended complaint alleges that respondents, directly and by implication, and contrary to the truth and the fact, represent in such advertising:²³

1) That the findings of the medical team of clinical investigators referred to in said advertisements have been endorsed and approved by the United States Government.

2) That the publication of a report of said study, together with the findings of the clinical investigators, in The Journal of The American Medical Association, is evidence of endorsement and approval thereof by that association and by the medical profession.

3) That the clinical investigators found that Bayer Aspirin will not upset the stomach, is as gentle to the stomach as a sugar pill and is more gentle to the stomach than any analgesic product containing more than one ingredient, and that there is no analgesic product available to the consumer which is more gentle to the stomach than Bayer Aspirin.

²³In construing and evaluating such alleged representations as are claimed in the complaint to have been made by the respondents, it is to be noted that "The Commission cannot interpolate into the petitioner's representations words not there, and then find the petitioner guilty of misrepresentations because the petitioner's product does not meet the Commission's revised representations." See, *International Parts Corporation v. Federal Trade Commission* (1943) 133 F. 2d 883 and *Folds v. Federal Trade Commission* (1951) 187 F. 2d 658.

4) That the clinical investigators concluded that Bayer Aspirin, after fifteen minutes following administration, affords a higher degree of pain relief than any other product tested.

8. Prior to the administrative hearing on the merits in this matter, a proceeding to enjoin the respondents from further disseminating this challenged advertising, pending the disposition of the complaint before the Commission, was argued and briefed before a United States District Court and a United States Circuit Court. These particular alleged misrepresentations set forth in the instant amended complaint were there examined and made the subject of written court opinions.²⁴ The documentary exhibits before the courts included all those herein received in evidence as well as the many herein offered and rejected as being improper to the instant administrative proceeding. Not before these two Federal courts for consideration at such time was the additional and further evidence since adduced in the form of the oral testimony of witnesses now of record in this proceeding.

The opinion of the United States Circuit Court, on the appeal from the order of the District Court, concluded with reference to the adduction of further evidence against the respondents herein:

Our affirmance of the order of the District Court should not, however, be thought to render fruitless the Commission's activities in its pending administrative proceeding against Sterling Drug, Inc. Should further evidence there be adduced in support of its allegations of violation of the Federal Trade Commission Act, a cease and desist order may well be valid and its issuance properly sustained upon judicial review. We are sympathetic with the commission's commendable efforts in carrying out the important tasks assigned to it by Congress; we simply hold that in this case, it has failed to make that showing which Congress itself deemed requisite to judicial relief.

9. It would appear clear from a reading of the above-quoted conclusion in the Circuit Court's prior opinion in this injunction matter, that further evidence than that then before it and found wanting is needed to support the issuance of a valid order to cease and desist in the instant proceeding. It would also appear obvious that this further evidence must be both credible and reliable and of sufficient substantial probative weight to supply and overcome the lack of evidence spelled out in this opinion as being needed if a valid showing is to be made that respondents' challenged advertising contains the misrepresentations alleged in the instant complaint. Accordingly, the four primary allegations of the complaint directed to respondents' challenged advertising are hereinafter set forth *seriatim*.

²⁴ *Federal Trade Commission v. Sterling Drug, Inc., Dancer-Fitzgerald-Sample, Inc., and Thompson-Koch Company* (March 8, 1963) 215 F. Supp. 327, affirmed (May 6, 1963) 317 F. 2d 669.

together with that part of the Circuit Court opinion pertinent to the particular allegation:

1) That the findings of the medical team of clinical investigators referred to in said advertisements have been endorsed and approved by the United States Government.

The Circuit Court opinion on this point notes that the Commission selected the research team, supported the study with a grant, and authorized the publication of the report. The Court stated that the capsulized expression "Government-Supported" could not, therefore, be held as misleading. With regard to the large type reference in the advertisement to a "Government-Supported Medical Team" giving the misleading impression that the United States Government endorsed or approved the findings of the research team, the court stated:

Surely the fact that the word "supported" might have alternative dictionary definitions of "endorsed" or "approved" is not alone sufficient to show reason to believe that the ordinary reader will probably construe the word in this manner. Most words *do* have alternative dictionary definitions; if that in itself were a sufficient legal criterion, few advertisements would survive. Here, no impression is conveyed that the *product itself* has its source in or is being endorsed by the Government; for this reason, the cases cited by the Commission are inapt.

10. The second allegation of the complaint regarding said advertising is as follows:

2) That the publication of a report of said study, together with the findings of the clinical investigators, in The Journal of The American Medical Association, is evidence of endorsement and approval thereof by that association and by the medical profession.

The Circuit Court on this point had this, in part, to say:

The Commission's attack upon the use of the phrase "Findings reported in the highly authoritative Journal of the American Medical Association," as misleadingly connoting endorsement and approval, is similarly unfounded, for much the same reasons already discussed. To assert that the ordinary reader would conclude from the use of the word "authoritative" that the study was endorsed by the Journal and the Association is to attribute to him not only a careless and imperceptive mind but also a propensity for unbounded flights of fancy. This we are not yet prepared to do. If the reader's natural reaction is to think that the study, because of publication in the Journal, is likely to be accurate, intelligent, and well-documented, then the reaction is wholly justified, and one which the advertiser has every reason to expect and to seek to inculcate.

11. The third allegation of the complaint regarding said advertising is as follows:

3) That the clinical investigators found that Bayer Aspirin will not upset the stomach, is as gentle to the stomach as a sugar pill and is more gentle to the stomach than any analgesic product containing more than one ingredient, and that there is no analgesic product available to the consumer which is more gentle to the stomach than Bayer Aspirin.

With regard to this point, Comm. Ex. No. 3 states in the summary concluding the comparative study concerned:

Anacin, Bayer Aspirin, Bufferin, Excedrin, and St. Joseph's Aspirin were compared with a placebo and with each other from the point of view * * * of incidence of gastrointestinal distress * * * There was no difference between the incidence of gastrointestinal effects after the placebo and that after Bayer Aspirin, Bufferin, or St. Joseph's Aspirin. The incidence of such side effects was higher after Anacin or Excedrin.

The Circuit Court opinion states with reference to the study this regard:

Upon investigating the incidence of stomach upset after the administration of the five drugs as well as the placebo, the researchers came to this conclusion: "Excedrin and Anacin form a group for which the incidence of upset stomach is significantly greater than is the incidence after Bayer Aspirin, St. Joseph's Aspirin, Bufferin, or the placebo. The rates of upset stomach associated with these last 4 treatments are not significantly different, one from the other." The accompanying table revealed that of the 829 doses taken of Bayer Aspirin, there were nine episodes of upset stomach, a rate of 1.1%; the placebo was administered in 833 cases, and caused stomach upset seven times, a rate of 0.8%.

As regards the use of the term "sugar pill" in the respondents' advertising instead of the word placebo, the Circuit Court opinion held that the pill used as a control in the study was constituted of sugar and that the use of the term "sugar pill" was therefore neither inaccurate nor misleading. With regard to use of the other comparative statements in the advertisement the Court held they "could only be understood to refer to the four other products tested." With reference to the challenged use of the words "as gentle as" leading the reader to conclude that Bayer Aspirin is not in the slightest bit harmful to the stomach and the argument that use of the substitute words "no more upsetting" than a placebo was therefore necessary because use of the placebo in the study caused a very minor degree of stomach upset, the Court stated:

Unlike the standard of the average reader which the Commission avidly endorses throughout these proceedings, it here would have us believe that he is linguistically and syntactically sensitive to the difference between the phrases "as gentle as" and "no more upsetting than." We do not find that the Commission has reason to believe that this will be the case, and we therefore reject its contentions.

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12. The fourth allegation of the complaint regarding said advertising is as follows:

4) That the clinical investigators concluded that Bayer Aspirin, after fifteen minutes following administration, affords a higher degree of pain relief than any other product tested.

With regard to this point, Comm. Ex. No. 3 states in the summary concluding the comparative study:

Anacin, Bayer Aspirin, Bufferin, Excedrin, and St. Joseph's Aspirin were compared with a placebo and each other, from the point of view of analgesic efficacy * * * There was no striking difference among the agents so far as rapidity of onset, peak effect, or duration of analgesia was concerned.

With reference to the foregoing conclusion of the comparative study, the opinion of the Circuit Court states, in part, the following:

As we understand the Commission's argument, no objection is taken to the statement that "The study shows that there is no significant difference among the products tested in rapidity of onset, strength, or duration of relief." Indeed, no objection can properly be taken, for the statement reproduces almost verbatim one of the conclusions enumerated in the article. It is thought, however, that the advertisement improperly represents greater short-run pain relief with Bayer Aspirin by stating that "Nonetheless, it is interesting to note that within just fifteen minutes, Bayer Aspirin had a somewhat higher pain relief score than any of the other products." As we have seen, the statement is literally true, for Bayer's "score" after fifteen minutes was 0.94 while its closest competitor at that time interval was rated 0.90. The fact that the margin of accuracy of the scoring system was 0.124—meaning that the second-place drug might fare as well as or better than Bayer over the long run of statistical tests—does not detract from the fact that on this particular test, Bayer apparently fared better than any other product in relieving pain within fifteen minutes after its administration. It is true that a close examination of the statistical chart drawn up by the three investigators reveals that they thought the difference between all of the drugs at that time interval not to be "significantly different." But that is precisely what the Bayer advertisement stated in the sentence preceding its excursion into the specifics of the pain-relief scores.

* * * * *

The Commission relies heavily, especially as to the pain-relief aspects of its case, upon *P. Lorillard Co. v. Federal Trade Commission*, 186 F. 2d 52 (4th Cir. 1950). There, Reader's Digest sponsored a scientific study of the major cigarettes, investigating the relative quantities of nicotine, tars, and resins * * * An examination of that case shows that it is completely distinguishable in at least two obvious and significant respects. Although the statements made by Old Gold were at best literally true, they were used in the advertisements to convey an impression diametrically opposed to that intended by the writer of the article * * * In the instant case, Sterling Drug can in no sense be said to have conveyed a misleading impression as to either the spirit or the specifics of the article published in the *Journal of the American Medical Association*.

No additional and further evidence of record was adduced herein for consideration on this particular point. The evidence of record in the instant regard is none other than what was discussed and passed upon in the hereinbefore cited prior District and Circuit Court opinions.²⁵

13. In addition to the documentary evidence of record introduced in this proceeding, 21 witnesses were called to testify during the presentation of the case-in-chief.²⁶ Under the controlling case law, such witnesses need not have been called, for the Commission, on its own authority, is empowered to find that the questioned advertisements were deceptive and misleading. As has been held, "Actual consumer testimony is in fact not needed to support an inference of deceptiveness by the Commission" and "In evaluating the tendency of language to deceive, the Commission should look not to the most sophisticated readers but rather to the least." *Exposition Press, Inc., et al. v. Federal Trade Commission*, (1961) 295 F. 2d 869. Further, the Commission may recognize that the deception was by innuendo rather than outright false statement. That deception may be so accomplished is recognized by the cases. *Bakers Franchise Corporation, et al. v. Federal Trade Commission*, (1962) 302 F. 2d 258. Again, and still further, as the case law points out, "Moreover, advertisements are not to be judged by their effect upon the scientific or legal mind which will dissect and analyze each phrase but rather by their effect upon the average member of the public who more likely will be influenced by the impression gleaned from a quick glance at the most legible words." *Ward Laboratories, Inc., et al. v. Federal Trade Commission*, (1960) 276 F. 2d 952, *cert. denied* 364 U.S. 827.

In the light of the foregoing and the later District Court and Circuit Court opinions in the present matter, the worth of the testimony of the witnesses herein called will be evaluated.

14. Prior to testifying in this matter, all the witnesses called herein had been previously interviewed by an attorney-examiner of the Commission and shown respondents' challenged advertising and questioned about it. Their responses thereto were noted in the handwriting of the attorney-examiner and this statement, at his request, was signed by the prospective witness.²⁷ These interviews took place

²⁵ Tr. 19 discloses that witnesses would be called by Commission counsel to testify only "On three points—as to United States Government endorsement, endorsement and approval by the American Medical Association, and the clarification as to the question of what 'no more stomach upset than a plain sugar pill' means."

²⁶ These witnesses were called to testify only for purposes as stated in footnote 25, *supra*.

²⁷ Tr. 164-170; 184-187; 216-217; 233-236; 266-267; 274; 300; 346; 353-355; 367-368.

in neighborhoods in or adjacent to Metropolitan Washington, D.C., but the record does not disclose the number of prospective witnesses interviewed. The witnesses testifying in this proceeding comprised 11 housewives,²⁸ an employee of General Motors Acceptance Corporation,²⁹ a mechanical engineer,³⁰ a bookkeeper,³¹ two aircraft mechanics,³² a military construction inspector,³³ and four military personnel.³⁴

All these witnesses were again interviewed by counsel supporting the complaint before taking the witness stand.³⁵ Upon the witness stand, after again being asked to read the challenged advertising, they were subjected to questions concerning it on direct examination, and, in most instances, also on cross-examination. In various instances, upon request, their prior signed statements were tendered to respondents' counsel for the aid of such cross-examination.³⁶ An extensive analysis of this varied testimony by each of these witnesses extending from page 122 through page 383 of the transcript of record, or 261 pages in length, would unduly burden this Initial Decision.

15. Before passing judgement on this testimony, the nature of its content is first to be defined. It is not testimony directed to and does not purport to show that any of the witnesses testifying were deceived by respondents' challenged advertising to the extent that they would not have purchased Bayer Aspirin except for their belief that the advertising representations made for said product were such as alleged by the complaint. The testimony further does not purport to show dissatisfied customers or users of a product which did not meet or live up to the advertising representations allegedly made for it. The testimony under consideration in this proceeding was solely directed to an attempted showing that a reading of respondents' challenged advertising would cause the reader to derive and understand the meaning the complaint alleges it to convey.

The Hearing Examiner, after giving the instant testimony full and complete consideration, finds it to be both insufficient and inconclusive and, accordingly, that it lacks the over-all substantial weight necessary to adequately support the allegations of the complaint. If

²⁸ Tr. 122; 158; 179; 202; 224; 258; 262; 309; 348; 364; 376.

²⁹ Tr. 146.

³⁰ Tr. 171.

³¹ Tr. 269.

³² Tr. 212; 228.

³³ Tr. 295.

³⁴ Tr. 315; 324; 341; 357.

³⁵ Tr. 271-272; 301-303; 319-320; 336-337.

³⁶ Tr. 166-169; 187; 216-217; 235-236.

one was to sift, pick and choose among this testimony, some of it might be found, directly or by implication, tending to support the allegations of the complaint. Using again the same process of elimination, other of such testimony might be found, directly or by implication, which would appear to be contradictory of the allegations of the complaint.

This testimony, in addition to this lack of adequate substantial weight, is also found to suffer the further infirmity of being suspect as to its credibility. This is not to say that any of the witnesses were knowingly telling an untruth, but that their testimony was not a spontaneous first impression, unclouded by prior contacts and given upon a first viewing of the challenged advertising from the witness stand. In various instances, it was the product of uncertainty as to the meaning of the questions asked by counsel, confusion or uneasiness induced by the hearing room procedures, prior discussion of the advertisement with others, an attempt to recall former impressions given on a prior occasion, and the like.

To cite but a few of the examples:

(a) The first witness, a housewife, was found necessary to be temporarily excused from the hearing room and, upon recall, was withdrawn by complaint counsel from the witness stand. This resulted following a lengthy colloquy between the Hearing Examiner and respective counsel as to the probative weight to be given testimony of the nature being elicited in the face of extended legal and factual argument made before the witness. (Tr. 137-145).³⁷

With regard to various of the further witnesses called, the following (b), (c), (d), (e), (f) and (g) are portions of their testimony taken from the transcript of record herein:

(b) HEARING EXAMINER SCHRUP: Do you remember the question?

THE WITNESS: I am just so confused now, really. I don't know. They are talking about a sugar pill and they are talking about Bayer Aspirin and I am telling you, I don't know half the time what you are talking about. (Tr. 199.)

* * * * *

(c) HEARING EXAMINER SCHRUP: You may answer the question to the best of your ability.

THE WITNESS: I don't know how. I'm sorry. I'm very upset.

HEARING EXAMINER SCHRUP: I can understand that.

THE WITNESS: If I could go through the way I answered the questions when the man first presented them to me that came to my house . . . I really don't know. (Tr. 259-260.)

* * * * *

³⁷ Tr. 210-211 is also here in point. Further, see Tr. 153, 161, 182, 198, 215, 323-333. While no implication is meant to be derived that respective counsel acted other than as proper and diligent advocates, the foregoing excerpts do serve to point up the probable lack of credibility and reliability of evidence of this nature when given by an impressionable and confused witness in the face of arguments, pro and con, by articulate and persistent counsel.

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(d) Q But you never opened a newspaper and saw an ad all by yourself of this type.

A No, I did not.

Q It was first called to your attention by the investigator?

A Yes.

Q And he asked you questions about it.

A Yes, sir.

Q And he made notes of your answers?

A Yes, sir.

Q Now, when you examined the ad a moment ago and said "Well, now, just let me think" were you trying to recall what you had told him?

A No, I was just nervous. I just could not —

Q What were you thinking about? Were you trying to recall something?

A No, I just could not remember what I was reading. (Tr. 266-267.)

* * * * *

(e) Q So when you read it here on the witness stand, you had really just finished reading it a few minutes ago; is that right?

A Yes, sir.

Q Now, did you get any more out of it reading it the second time than you did the first time?

A I didn't get anything out of it the first time. I didn't get any more out of it.

Q When was the really first time you read this particular advertisement?

A When the representative from the Federal Trade Commission came to my house. I had never seen the ad before that. (Tr. 273-274.)

* * * * *

(f) Q Mrs. -----, directing your attention to the second portion of the advertisement, this paragraph which begins, "Findings reported in the highly authoritative journal", etc., what does that mean to you? What is your impression or opinion of that?

THE WITNESS: If I remember right, when this guy asked me this question before, when I was summonsed here or subpoenaed or whatever you call it, I didn't give an answer for that, because I didn't understand it. (Tr. 311.)

* * * * *

(g) Q You say that you don't recall having read anything in the Journal about this. As I understand it, you don't recall having read anything—you recall having read this ad maybe in another paper.

A In a newspaper; yes.

Q But you had no recollection of it?

A Exactly.

Q Until the investigator came and called your specific attention to it?

A When he came and asked me if I had seen it before, I suggest I could recall seeing it, but I hadn't studied it quite as carefully as I did when he was there.

Q So that your testimony here today is based on consideration of the ad in greater detail during the interview with the investigator?

A Well, yes. He asked me to read it over.

Q And not with your casual reading on a prior occasion?

A No. . . .

Q Mrs. -----, what was the nature of the discussions which you and Mrs. ----- had?

A When we got the subpoenas, of course, I mean, we were trying to remember, and recall, exactly what answers we had given. That was, trying to remember exactly the words we had—the answers we had given the gentleman, was all. (Tr. 372-374.)

16. In *Zenith Radio Corporation v. Federal Trade Commission* (1944) 143 F. 2d 29, the Circuit Court of Appeals held:

The Commission was not required to sample public opinion to determine what the petitioner was representing to the public. The Commission had a right to look at the advertisements in question, consider the relevant evidence in the record that would aid it in interpreting the advertisements, and then decide for itself whether the practices engaged in by the petitioner were unfair or deceptive, as charged in the complaint.

If the Commission arrived at its finding fairly "and has substantial evidence to support it, so that it cannot justly be said to be palpably wrong and therefore arbitrary" it is our duty to uphold the Commission's findings,

Counsel supporting the complaint, on June 17, 1963, filed a "Reply Memorandum to Respondents' Proposed Findings and Order", which cites the above *Zenith* case and then goes on to state:

While the materiality of misrepresentation, it is submitted, inherent in respondents' advertising is evident from a comparison thereof with the medical study it purports to interpret, and no consumer testimony would have been necessary to establish this fact, counsel supporting the complaint nevertheless offered some such testimony with regard to three aspects of the advertising, simply as corroboration of facts alleged by the complaint. The testimony of the witnesses was reliable and probative and provided substantial evidence to confirm the falsity of the advertising.

Based on the above case law and the finding herein made that this so-called corroborative testimony of the witnesses called in this proceeding was inconclusive and of insufficient probative weight to afford acceptable proof of the allegations of the complaint, the only other evidence of record left for consideration appears to be the documentary exhibits in evidence. The posture of the case then stands and is the same with regard to the allegations of the complaint, as when previously adversely passed on by both a United States District Court and a United States Circuit Court of Appeals.³⁸

Admittedly, in so doing, both of these courts acted upon and applied the standard set forth in Section 13 (a) of the Federal Trade Commission Act which requires only that the Commission "has reason to believe" in seeking to enjoin an advertisement in alleged violation of Section 12, pending the issuance and determination of a

³⁸ See footnote 24, *supra*.

complaint charging violation of Section 5 of the Act. It will also be noted that Section 5 of the Act applies the same criterion as regards the issuance of such a complaint, for subsection (b) of Section 5 likewise states, "Whenever the Commission shall have reason to believe * * * it shall issue and serve * * * a complaint stating its charges in that respect * * *". The quantum of proof required to support the issuance of a valid order to cease and desist quite obviously would thus afford a substantially different test than that needed only to sustain the requirement of "reason to believe" in the initial issuance of the complaint. This fact appears to be recognized in the memorandum of the Commission accompanying its order, filed herein on May 16, 1963, denying respondents' motion that the Commission declare itself disqualified to make any adjudication of Paragraph Seven (1) of the amended complaint in this proceeding.

Based on the foregoing, it would well follow that the present record could carry or be given no more probative weight than that which was before and found insufficient by two Federal courts to sustain an application requiring a showing of only "reason to believe". This is so because also here absent in practical effect is the further evidence since adduced of record and not being given any substantial probative weight in the instant proceeding. Accordingly, the present record would not appear to meet the test of the aforesaid Circuit Court opinion which states, "Should further evidence there be adduced in support of its allegations of violation of the Federal Trade Commission Act, a cease and desist order may well be valid and its issuance properly sustained upon judicial review."

17. There is no dispute herein and the finding is made that the study entitled "A Comparative Study of Five Proprietary Analgesic Compounds" was made pursuant to a contract between the doctors concerned and the Federal Trade Commission, and that a report of this study was authorized to be published in the December 29, 1962 issue of the Journal of the American Medical Association by a staff official of the Federal Trade Commission. There is also no dispute and the further finding is made that the report, when published, stated "This study was supported by a grant from the Federal Trade Commission, Washington, D.C."

The word "supported" has various dictionary definitions, depending on the context in which used. The Hearing Examiner finds that the word "supported", as used in the above report in connection with the word "grant" in reference to the word "study", can here sensibly and properly only be taken to mean that financial aid was being given to those participating in its preparation and that the said

study was financed or paid for by the Federal Trade Commission.³⁹ The respondents' challenged advertising states in this regard in the opening paragraph or the heading or top of the advertisement:

Government-Supported Medical Team Compares Bayer Aspirin and Four Other Popular Pain Relievers

Again, the word "Supported", as used in this context, is to be read as before and its meaning not distorted, and it is here again therefore found that it can only sensibly and properly be taken as meaning not the endorsement and approval of the result of the study itself, but only that the medical team doing the study was given financial aid or being paid by the government for participating in or doing the work therein involved. This finding is reinforced by the advertisement itself, which later states, in part, with reference to this medical study, "supported by a grant from the federal government". Accordingly, the word "supported", as thus used with the word "government", cannot be found to mean endorsement and approval of the content of the study itself instead of a payment for or the giving of financial aid by the government to the personnel making or performing the study.

It would therefore appear that this allegation of the complaint is not supported by the greater weight of the reliable, probative, and substantial evidence of record and the finding is accordingly made that the record herein fails of adequate proof that respondents have represented, and are now representing, directly and by implication:

1) That the findings of the medical team of clinical investigators referred to in said advertisements have been endorsed and approved by the United States Government.

18. Respondents' challenged advertisement, in its second paragraph, following the opening paragraph, states:

Findings reported in the highly authoritative Journal of The American Medical Association reveal that the higher priced combination-of-ingredients pain relievers upset the stomach with significantly greater frequency than any of the other products tested, while Bayer Aspirin brings relief that is as fast, as strong, and as gentle to the stomach as you can get.

The complaint first alleges, with reference to that part of the above advertisement reading "Findings reported in the highly authoritative Journal of The American Medical Association" that such words, taken in conjunction with the publication of the report's alleged findings, are evidence of endorsement and approval thereof by that Association and the medical profession. While the record dis-

³⁹ See, Tr. 54 and admission of Commission counsel that "The study was paid for by a grant of funds from the Federal Trade Commission."

closes documentary disclaimers⁴⁰ of any such endorsement and approval of this study by the American Medical Association and the medical profession, no affirmative evidence of any substantial probative weight is herein present which would establish that a reading of respondents' advertisements would convey, or did convey, the meaning alleged by the complaint.

The mere fact of publication of an investigative clinical study in a professional medical journal, no matter how respected a journal, would not alone appear to show endorsement and approval of this study by a medical association and the medical profession. It would be fair to recognize that such a study most probably would be performed by reputable medical and technical personnel in a responsible manner before being accepted for publication, but no finding can be made that the mere fact of publication and a recital of the content of the study, alone and without more, would constitute substantial and probative evidence of endorsement and approval of such study by the American Medical Association or the medical profession.

Furthermore, respondents' above advertisement does not so state or represent that the study's findings reported in the Journal of the American Medical Association have been endorsed and approved by the Association and the medical profession. Use of the words "highly authoritative" as descriptive of the aforesaid Journal would appear to be an appropriate and proper description, but such use does not amount to and cannot herein be found to be a representation by the said advertisement that the study and its content, because of being so published, was also thereby endorsed and approved, as alleged by the complaint, nor that such would be so understood by a reader of respondents' advertising describing both the fact of such publication and its alleged content.

It would, therefore, appear that this allegation of the complaint is not supported by the greater weight of the reliable, probative, and substantial evidence of record and the finding is accordingly made that the record herein fails of adequate proof that respondents have represented, and are now representing, directly and by implication:

2) That the publication of a report of said study, together with the findings of the clinical investigators, in The Journal of The American Medical Association, is evidence of endorsement and approval thereof by that association and by the medical profession.

19. The next allegation of the complaint directed to respondents' foregoing advertisement is to the latter part of the second paragraph set forth on the preceding page herein and the following further part of the said advertisement:

⁴⁰ Comm. Ex. No. 2, pages 50-53.

Upset Stomach

According to this report, the higher priced combination-of-ingredients products upset the stomach with significantly greater frequency than any of the other products tested, while Bayer Aspirin, taken as directed, is as gentle to the stomach as a plain sugar pill.

The Comparative Study of Five Proprietary Analgesic Compounds, upon which the above is based, states the following:

Excedrin and Anacin form a group for which the incidence of upset stomach is significantly greater than is the incidence after Bayer Aspirin, St. Joseph's Aspirin, Bufferin, or the placebo. The rates of upset stomach associated with these last 4 treatments are not significantly different, one from the other.⁴¹

It will be noted that the paragraph immediately above the paragraph headed "Upset Stomach" in the said advertisement speaks of five leading pain relievers, including Bayer Aspirin, aspirin with buffering, and combination-of-ingredients products. The study itself speaks of Excedrin and Anacin as forming a group for which the incidence of upset stomach is significantly greater than for Bayer Aspirin, St. Joseph's Aspirin, Bufferin and the placebo. As between these latter products and the placebo, one from the other, there is no significant difference in the rate of upset stomach, according to the study. The study is further confined to these five products and the placebo for comparative purposes, and respondents' challenged advertising is directed to the comparisons therein made as between each of them and Bayer Aspirin.

A reading of respondents' advertisement does not disclose any statement therein that the clinical investigators found that Bayer Aspirin will not upset the stomach, but only that the combination-of-ingredients pain relievers will upset the stomach with significantly greater frequency than any of the other products tested, among which, as stated in the advertisement, was Bayer Aspirin. This statement the study supports for it specifies there is a higher rate of frequency for Excedrin and Anacin than for the others and that there was no significant difference in frequency between Bayer Aspirin, St. Joseph's Aspirin, Bufferin and the placebo.

Accordingly, Bayer Aspirin, under the study, rates as gentle to the stomach as the placebo or a sugar pill, and either is as gentle to the stomach as you can get in the light and the confines of such report. Further, and as noted in the Circuit Court opinion, a table in the study shows that of 829 doses taken of Bayer Aspirin, there

⁴¹ According to the report, "The placebo used in the study was made in the pharmacy of Baltimore City Hospitals and consisted of corn starch and lactose without coloring or flavoring agents." The Circuit Court opinion in this matter held the pill used as a control was constituted of milk sugar and the use of the term "sugar pill" was neither inaccurate nor misleading.

were nine episodes of upset stomach, a rate of 1.1%; the placebo was administered in 833 cases and caused stomach upset but seven times, a rate of 0.8%. This minute difference between Bayer Aspirin and the "sugar pill" is not found misleading in a material respect, as is required in defining a "false advertisement" under Section 15(a)(1) of the Act.

It would therefore appear that this allegation of the complaint is not supported by the greater weight of the reliable, probative and substantial evidence of record and the finding is accordingly made that the record herein fails of adequate proof that respondents' said advertisement is a "false advertisement" and that respondents, in said advertisement, have falsely represented, and are now falsely representing, directly and by implication:

3) That the clinical investigators found that Bayer Aspirin will not upset the stomach, is as gentle to the stomach as a sugar pill and is more gentle to the stomach than any analgesic product containing more than one ingredient, and that there is no analgesic product available to the consumer which is more gentle to the stomach than Bayer Aspirin.

20. The fourth and final allegation of the complaint is directed to the following statement in respondents' advertisement:

Speed and Strength

The study shows that there is no significant difference among the products tested in rapidity of onset, strength, or duration of relief. Nonetheless, it is interesting to note that within just fifteen minutes, Bayer Aspirin had a somewhat higher pain relief score than any of the other products.

The complaint does not challenge the first sentence of the above-quoted paragraph from the advertisement, for the comparative study comments in such connection:

On the basis of this study, it seems that within the limits of generalization permitted by the population studied, there are no important differences among the compounds studied in rapidity of onset, degree, or duration of analgesia.

This last allegation states the said advertisement to here represent that the clinical investigators concluded that Bayer Aspirin, after fifteen minutes following administration, afforded a higher degree of pain relief than any other product tested. A reading of the advertisement shows it not to say that the clinical investigators so concluded, but only to state what a table in the study actually shows. Such evidence of record as supports this allegation of the complaint is limited to the documentary exhibits in evidence. The following reasoning of the Circuit Court opinion on this point in interpreting this material when the matter was before it is herein persuasive:

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As we have seen, the statement is literally true, for Bayer's "score" after fifteen minutes was 0.94 while its closest competitor at that time interval was rated 0.90. The fact that the margin of accuracy of the scoring system was 0.124—meaning that the second-place drug might fare as well as or better than Bayer over the long run of statistical tests—does not detract from the fact that on this particular test, Bayer apparently fared better than any other product in relieving pain within fifteen minutes after its administration. It is true that a close examination of the statistical chart drawn up by three investigators reveals that they thought the difference between all of the drugs at that time interval not to be "significantly different." But that is precisely what the Bayer advertisement stated in the sentence preceding its excursion into the specifics of the pain-relief scores.

Further, it seems apparent that this particular paragraph of the advertisement, read as a whole, is not misleading in a material respect as is required by Section 15(a)(1) of the Act.

It would therefore appear that this allegation of the complaint is not supported by the greater weight of the reliable, probative and substantial evidence of record and the finding is accordingly made that the record herein fails of adequate proof that respondents' said advertisement is a "false advertisement" and that respondents, in said advertisement, have falsely represented, and are now falsely representing, directly and by implication:

4) That the clinical investigators concluded that Bayer Aspirin, after fifteen minutes following administration, affords a higher degree of pain relief than any other product tested.

21. Following the foregoing consideration of the entire record in this proceeding, the documentary exhibits in evidence, and the testimony of all the witnesses and the probative weight to be given such testimony, it appears clear, and the finding is made, that the complaint has not been sustained by the greater weight of the reliable, probative and substantial evidence of record herein.

CONCLUSION

The complaint should be dismissed.

ORDER

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

FINAL ORDER

Counsel in support of the complaint having filed an appeal from the hearing examiner's initial decision dismissing the complaint for the reason that the advertisements challenged therein were not shown

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to have been "false advertisements" within the meaning of Section 15 of the Federal Trade Commission Act, as alleged; and

It appearing that the hearing examiner's action was based in large part upon the decision of the United States Court of Appeals for the Second Circuit in *Federal Trade Commission v. Sterling Drug, Inc., et al.*, 317 F. 2d 669 (1963) [7 S. & D. 683], in which the Court held that the record in that case failed to show that the Commission had "reason to believe" the same advertisements were false and misleading; and

It further appearing that the record in this proceeding contains no substantial evidence in addition to that considered by the Court; and

The Commission having been informed that, in any event, the respondents are not now disseminating the advertising involved and have no intention of resuming it:

It is ordered, That the appeal of counsel in support of the complaint be, and it hereby is, denied.

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

Commissioner MacIntyre concurring only in the result.
