

Complaint

69 F.T.C.

IN THE MATTER OF

MERCK & CO., INC., TRADING AS QUINTON COMPANY ET
AL.ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT*Docket 8635. Complaint, Aug. 7, 1964—Decision, April 8, 1966**

Order requiring a New Jersey drug manufacturer and its advertising agency to cease falsely representing in its television commercials or other media that its "Sucrets" or "Children's Sucrets" have any therapeutic effect upon throat infections in excess of temporary relief of minor pain.

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 Merck & Co., Inc., a corporation, trading as Quinton Company, and Doherty, Clifford, Steers & Shenfield, Inc., 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 complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Merck & Co., Inc., trading as Quinton Company, is a corporation, organized, existing and doing business under the laws of the State of New Jersey, with its principal office and place of business located at 126 East Lincoln Avenue, in the city of Rahway, State of New Jersey.

Respondent Doherty, Clifford, Steers & Shenfield, Inc., is a corporation, organized, existing and doing business under the laws of the State of New York, with its principal office and place of business located at 530 Fifth Avenue, in the city of New York, State of New York.

PAR. 2. Respondent Merck & Co., Inc., is now and has been for more than one year last past, engaged in the sale and distribution of two preparations which are drugs as the term "drug" is defined in the Federal Trade Commission Act.

The designations used by respondent Merck & Co., Inc., for said preparations, the formulas thereof and directions for use are as follows:

*Modified on July 20, 1966, 70 F.T.C. 45, to make Needham, Harper & Steers, Inc., successor advertising agency, subject to certain prohibitions of this order.

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- A. *Designation:* "Sucrets" throat lozenges
Formula: Each lozenge contains 2.4 mg. hexylresorcinol in a glucose-sucrose hard candy base with flavoring agent.
Directions: Use SUCRETS for minor sore throat and mouth irritations and smoker's throat. For best results let SUCRETS dissolve slowly—do not chew. SUCRETS bathe irritated tissue with hexylresorcinol, the antiseptic that relieves pain fast as it kills germs on contact.
NOTE: Persistent sore throat or sore throat accompanied by high fever, headache, nausea or vomiting usually indicates a severe infection and may be serious. Consult a physician promptly if sore throat persists more than 2 days. Do not administer to children under 3 years of age unless directed by physician.
- B. *Designation:* "Children's Sucrets" throat lozenges
Formula: Each lozenge contains 2.4 mg. hexylresorcinol in a cherry flavored glucose-sucrose hard candy base.
Directions: Give Children's Antiseptic "Sucrets" for minor sore throat and mouth irritation. For best results tell child to let "Sucrets" dissolve slowly without chewing. "Sucrets" bathe irritated tissues with Hexylresorcinol, the antiseptic that relieves pain fast as it kills germs on contact. These "Sucrets" contain a special cherry flavor which children love.
NOTE: Persistent sore throat or sore throat accompanied by high fever, headache, nausea or vomiting usually indicates a severe infection and may be serious. Consult a physician promptly if sore throat persists more than 2 days. Do not administer to children under 3 years of age unless directed by a physician.

PAR. 3. Respondent Merck & Co., Inc., causes the said preparations, when sold, to be transported from various places of its business located in the States of New Jersey, Massachusetts, Maryland, Pennsylvania, and elsewhere, to purchasers thereof located in various other States of the United States and in the District of Columbia. This respondent maintains, and at all times mentioned herein has maintained, a course of trade in said preparations 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 Doherty, Clifford, Steers & Shenfield, Inc., is now, and for some time last past has been, the advertising agency of Merck & Co., Inc., and now prepares and places, and for some time last past has prepared and placed, for dissemination, advertising material, including the advertising hereinafter referred to, to promote the sale of the said preparations.

PAR. 4. In the course and conduct of their business, respondents have disseminated, and caused the dissemination of, certain advertisements concerning the preparations referred to in Paragraph Two, above, by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, advertisements disseminated by means of television broadcasts transmitted by stations located in the District of Columbia, and in various States of the United States, having sufficient power to carry such broadcasts across State lines, in which certain statements and oral and pictorial representations were made with respect to Sucrets throat lozenges and Children's Sucrets throat lozenges, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of Sucrets throat lozenges and Children's Sucrets throat lozenges; and have disseminated, and caused the dissemination of, advertisements, in which certain statements and oral and pictorial representations were made with respect to Sucrets throat lozenges and Children's Sucrets throat lozenges, by various means, including but not limited to the aforesaid medium, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said preparations in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. A. Among and typical of the oral statements and representations contained in said advertisements concerning Sucrets throat lozenges disseminated as set forth in Paragraph Four, hereinabove, are the following:

When sore throat strikes and brings fiery pain, what do you do for relief? Millions of people depend on SUCRETS for relief of minor sore throat pain. Individually foil wrapped, remarkable SUCRETS lozenges relieve sore throat pain fast and kill even Staph and Strep germs with a special pain relieving antiseptic, HEXYLRESORCINOL. So, when minor sore throat strikes and brings fiery pain, SUCRETS relieve sore throat pain and kill even Staph and Strep germs. SUCRETS are fast. Within minutes you can talk, swallow, even smoke in comfort. So, when sore throat strikes, relieve pain fast and kill even Staph and Strep germs.

B. Among and typical of the pictorial representations contained in said advertisements concerning Sucrets throat lozenges disseminated as set forth in Paragraph Four, hereinabove, are the following:

(1) Frames of film televised to the viewing public, appearing simultaneously with the making of certain of the oral statements referred to in Paragraph Five (A), hereinabove, which pur-

ported to depict the degree of fiery throat pain which Sucrets throat lozenges would relieve. An enlargement of one of such frames is attached hereto, marked Exhibit "A," and incorporated herein by reference.*

(2) Frames of film televised to the viewing public which purported to depict the extent to which Sucrets throat lozenges would relieve the fiery throat pain depicted in the frames of film referred to in the foregoing subparagraph (1) of Paragraph Five (B). An enlargement of one of such frames is attached hereto, marked Exhibit "B," and incorporated herein by reference.*

C. Among and typical of the oral statements and representations contained in said advertisements concerning Children's Sucrets throat lozenges disseminated as set forth in Paragraph Four, hereinabove, are the following:

When your child has a sore throat . . . It can make you feel helpless. What do you do to relieve the pain? If he's too young to gargle . . . and you want something more effective than candy cough drops . . . try new CHILDREN'S SUCRETS . . . specially flavored for youngsters . . . by the makers of regular SUCRETS. CHILDREN'S SUCRETS contain hexylresorcinol—the *gentle* antiseptic. And, CHILDREN'S SUCRETS relieve pain fast and help fight infection. These lozenges are made especially for children. Look: When minor sore throat strikes and brings burning pain . . . CHILDREN'S SUCRETS gently . . . safely . . . take care of the pain . . . and help fight infection. In no time at all . . . your child's like himself again. So next time your child has sore throat . . . if he's too young to gargle . . . and you want something more effective than candy cough drops . . . Relieve pain fast . . . help fight infection. Get new CHILDREN'S SUCRETS!

D. Among and typical of the pictorial representations contained in said advertisements concerning Children's Sucrets throat lozenges disseminated as set forth in Paragraph Four, hereinabove, are the following:

(1) Frames of film televised to the viewing public, appearing simultaneously with the making of certain of the oral statements referred to in Paragraph Five (C), hereinabove, which purported to depict the degree of burning throat pain which Children's Sucrets throat lozenges would relieve. An enlargement of one of such frames is attached hereto, marked Exhibit "C," and incorporated herein by reference.*

(2) Frames of film televised to the viewing public which purported to depict the extent to which Children's Sucrets throat lozenges would relieve the burning throat pain depicted in the frames of film referred to in the foregoing subparagraph (1) of

*Pictorial Exhibits "A," "B," and "C" were omitted in printing.

Paragraph Five (D). An enlargement of one of such frames is attached hereto, marked Exhibit "D," and incorporated herein by reference.*

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 Sucrets throat lozenges and Children's Sucrets throat lozenges, by virtue of their hexylresorcinol content, will reach and kill the germs causing existing throat infections and thus are effective in the treatment of throat infections including those caused by the dangerous streptococcal and staphylococcal germs.

2. That Sucrets throat lozenges and Children's Sucrets throat lozenges are effective in relieving severe sore throat.

PAR 7. In truth and in fact:

1. Sucrets throat lozenges and Children's Sucrets throat lozenges will not, by virtue of their hexylresorcinol content, or otherwise, reach and kill the germs causing existing throat infections and are not effective in the treatment of any kind of throat infection. Furthermore, streptococcal and staphylococcal infections of the throat may be precursors of infections of the heart, kidney, blood, bones and other structures, and the failure to institute promptly adequate treatment of streptococcal and staphylococcal throat infections may seriously imperil health. A special hazard of inadequate treatment of streptococcal sore throat is the subsequent development in certain persons, particularly children, of acute rheumatic fever or acute nephritis.

2. Sucrets throat lozenges and Children's Sucrets throat lozenges have no beneficial effect on severe pain of sore throat, or on sore throat in excess of affording temporary relief of the pain of a minor sore throat.

Therefore, the advertisements referred to in Paragraph Five 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.

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 for the Commission.

*Pictorial Exhibit "D" was omitted in printing.

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Initial Decision

Covington & Burling, Washington, D.C., and *Mr. John M. Stocker*, Rahway, N.J., for respondent Merck & Co., Inc.

Davis, Gilbert, Levine & Schwartz, New York, N.Y., for respondent Doherty, Clifford, Steers & Shenfield, Inc.

INITIAL DECISION BY EDGAR A. BUTTLE, HEARING EXAMINER

This proceeding arises from a complaint issued by the Federal Trade Commission on August 7, 1964, charging respondents with falsely advertising "Sucrets" and "Children's Sucrets." The statutory theory is that such advertising participated in by Merck & Co., Inc., the manufacturing advertiser, and Doherty, Clifford, Steers & Shenfield, Inc., its advertising agent, constitutes unfair and deceptive acts and practices in commerce, in violation of Sections 5 and 12 of the Federal Trade Commission Act. The complaint is premised upon the further theory that both the principal and its advertising agent are equally responsible even though there was final approval of the advertising by the principal. Complaint counsel urges that appropriate relief should be applied to the advertising agent as well as the principal, since the advertising devices, from which misrepresentations may be imputed, were initially formulated by the advertising agency, although approved by respondent Merck, upon consultation. Respondents generally deny the charges of deceptive advertising, and respondent Doherty, Clifford, Steers & Shenfield, Inc., the advertising agents of Merck, aver that in any event no order should be issued against them since they were merely the agents of Merck, which approved the advertising they devised jointly with Merck. Furthermore, they assert that the advertising prepared by them for Merck, at its request, was premised upon facts given to them by the principal, Merck. The major issues, therefore, are as to the falsity of the advertising, either directly or by implication, and the participation of the respondents, jointly or severally, in producing the advertising which the Commission contends is deceptive.

The hearing examiner has carefully considered the proposed findings of fact and conclusions submitted by the counsel in support of the complaint and counsel for respondents, and such proposed findings and conclusions if not herein adopted, either in the form proposed or in substance, are rejected as not supported by the record or as involving immaterial matters.

Upon the entire record in the case the hearing examiner makes the following:

FINDINGS OF FACT*

1. Respondent Merck & Co., Inc. (hereinafter sometimes referred to as "Merck"), trading as Quinton Company, is a corporation, organized, existing and doing business under the laws of the State of New Jersey, with its principal office and place of business located at 126 East Lincoln Avenue, in the city of Rahway, State of New Jersey.¹

2. Respondent Doherty, Clifford, Steers & Shenfield, Inc. (hereinafter sometimes referred to as "DCSS"), is a corporation, organized, existing and doing business under the laws of the State of New York, with its principal office and place of business located at 530 Fifth Avenue, in the city of New York, State of New York.²

3. Respondent Merck & Co., Inc., is now, and has been for more than one year last past, engaged in the sale and distribution of two preparations which are drugs as the term "drug" is defined in the Federal Trade Commission Act.³

4. The designations used by respondent Merck & Co., Inc., for said preparations thereof and directions for use are as follows:

A. *Designation:* "Sucrets" throat lozenges

Directions: Use SUCRETS for minor sore throat and mouth irritations and smoker's throat. For best results let SUCRETS dissolve slowly—do not chew. SUCRETS bathe irritated tissue with hexylresorcinol, the antiseptic that relieves pain fast as it kills germs on contact.

NOTE: Persistent sore throat or sore throat accompanied by high fever, headache, nausea or vomiting usually indicates a severe infection and may be serious. Consult a physician promptly if sore throat persists more than 2 days. Do not administer to children under 3 years of age unless directed by physician. Keep all medications out of the reach of children.

B. *Designation:* "Children's Sucrets" throat lozenges.

Formula: Each lozenge contains 2.4 mg. hexylresorcinol in a cherry flavored glucose-sucrose hard candy base.

Directions: Give Children's Antiseptic "Sucrets" for minor sore throat and mouth irritation. For best results tell child to let "Sucrets" dissolve slowly without chewing. "Suc-

*CX refers to Commission's exhibits, RMX to respondent Merck, and RDX to respondent Doherty.

¹ Admitted by respondent Merck's answer.

² Admitted by respondent DCSS's answer.

³ Partially admitted by respondent Merck's answer. The preparations are drugs within the meaning of the Federal Trade Commission Act (sec. 15(c)), having been advertised for killing staphylococcal and streptococcal germs, and fighting infection in human beings (as shown in respondent's advertising).

rets" bathe irritated tissues with Hexylresorcinol, the antiseptic that relieves pain fast as it kills germs on contact. These "Screts" contain a special cherry flavor which children love.

NOTE: Persistent sore throat or sore throat accompanied by high fever, headache, nausea or vomiting usually indicates a severe infection and may be serious. Consult a physician promptly if sore throat persists more than 2 days. Do not administer to children under 3 years of age unless directed by a physician. Keep all medications out of the reach of children.⁴

5. The formulas of "Screts" and "Children's Screts" are as follows:

A. ("Screts")

Hexylresorcinol	2.4 mg.
Menthol	less than .5 mg.
Anise Oil	less than .5 mg.
Cinnamaldehyde	less than .5 mg.
Methyl Salicylate	between 3 and 5 mg.
Oil of Peppermint	less than .5 mg.
Glucose—Sucrose Hard Candy Base to make a 2.5 gm. lozenge	

B. ("Children's Screts")

Hexylresorcinol	2.4 mg.
Amaranth (Red No. 2)	less than 1 mg.
Sucaryl Sodium	between 10 and 15 mg.
Saccharin	less than 2 mg.
Citric Acid	between 20 and 30 mg.
Wild Cherry	between 10 and 15 mg.
Glucose—Sucrose Hard Candy Base to make a 2.5 gm. lozenge ⁵	

6. Respondent Merck & Co., Inc., causes the said preparations, when sold, to be transported from various places of its business located in the States of New Jersey, Massachusetts, Maryland, Pennsylvania, and elsewhere, to purchasers thereof located in various other States of the United States and in the District of Columbia. This respondent maintains, and at all times mentioned herein has maintained, a course of trade in said preparations in commerce, as "commerce" is defined in the Federal Trade Commission Act. The volume of business in such commerce has been and is substantial.⁶

7. Respondent Doherty, Clifford, Steers & Shenfield, Inc., is

⁴ See complaint and answer.

⁵ See Stipulation, Tr. 12 and 13.

⁶ Admitted by respondent Merck's answer.

now, and for some time last past has been, the advertising agency of Merck & Co., Inc., and now prepares and places, and for some time last past has prepared and placed, for dissemination, advertising material, including advertising hereinafter referred to, to promote the sale of "Sucrets" and "Children's Sucrets."⁷

8. The aforesaid Doherty, Clifford, Steers & Shenfield, Inc., was retained to furnish and perform the regular services of an advertising agency pursuant to an agreement between Merck and Doherty, Clifford, Steers & Shenfield, Inc., which defines the duties of Doherty, Clifford, Steers & Shenfield, Inc., as including obligations to:

(a) Study the products assigned by Merck, and the market for those products.

(b) Examine marketing opportunities for new products.

(c) Make recommendations covering development and promotion of new products.

(d) Offer general marketing consultation for both new and existing products.

(e) Formulate advertising plans within the scope of the budget made available by Merck.

(f) Prepare layouts and copy for advertisements.

(g) Prepare merchandising plans if and when requested and authorized by Merck.

(h) Contract with advertising media "in behalf of" Merck in connection with the advertising for Merck. When responsibility for radio or television commercials is delegated to Doherty, Clifford, Steers & Shenfield, Inc., by Merck, then the agency is to prepare such commercials.

The advertising agency at all times acted in accordance with these requirements.⁸

9. Respondent Doherty, Clifford, Steers & Shenfield, Inc., could not act at any time or in any way which would bind Merck without Merck's prior approval. Paragraph 3 of the agreement between Merck and the agency specifically provides that before Doherty, Clifford, Steers & Shenfield, Inc., could exercise any idea, plan or program on behalf of Merck, it had to obtain from Merck general approval thereof. Thereafter, it must submit to Merck for specific approval copy, layouts, artwork, radio and television commercials, and all material to be used in connection with

⁷ Admitted by respondents' answers. Merck retained Doherty, Clifford, Steers & Shenfield, Inc., as its advertising agent during the summer of 1961. A formal written advertising contract was entered into, dated and effective as of January 1, 1962 (CX 3).

⁸ Tr. 219.

the advertising; also, schedules showing which media it is proposed to use; schedules showing the times and time periods during which the advertising is proposed to be published, displayed, broadcast, or presented; estimates of the cost of various items for the advertising, including costs of production, artwork, talent, films, time, and all other aspects incident to the advertising. Doherty, Clifford, Steers & Shenfield, Inc., could not proceed with any of these functions until Merck first approved.⁹ However, their function was to originate advertising ideas; otherwise of course their retention would have served no purpose. The advertising at issue, therefore, is the product of both respondents jointly.

10. Merck, at all times, reserved the right "in its own discretion and for any reason deemed by it to be sufficient" to modify any and all plans submitted by Doherty, Clifford, Steers & Shenfield, Inc., and to direct it to cease work in connection with any or all of such plans; in such event the agency is required to notify all publishers, printers, engravers, artist, designers and other third parties engaged in working on the advertising, to cease all work thereon. On several occasions, Merck exercised its right and authority under this provision and the agency complied therewith and followed the directions of Merck.¹⁰

11. Final authority, and the final right to approve, disapprove or modify all advertising and all steps in the course of the preparation of all advertising, rested solely in Merck.¹¹

12. Doherty, Clifford, Steers & Shenfield, Inc., at all times acted under the direction and control of Merck, and all services rendered by it for Merck were at all times "pursuant to directions, instructions, or conferences with" Merck. The agency was compensated for its services to Merck on a commission basis.¹²

13. During the course of the preparation of the commercials involved in this proceeding, Doherty, Clifford, Steers & Shenfield, Inc., and Merck jointly cooperated in the selection and development of ideas and concepts, and the advertising agency worked on the development of those ideas and concepts approved by Merck.¹³

14. Although the contracts in connection with the advertising for Merck, including the commercials involved in this proceeding, were entered into by Doherty, Clifford, Steers & Shenfield, Inc.,

⁹ CX 3.

¹⁰ CX 3, par. 10; Tr. 211.

¹¹ CX 3; Tr. 867, 845.

¹² Tr. 844, 219-220.

¹³ CX 8; Tr. 109-110, 145, 148-149, 151, 165, 216, 228, 246.

specifically as agent for Merck,^{14A} the relationship of principal and agent does not vitiate the responsibility of the agent for its participation in formulating and disseminating advertising the falsity of which, as here, should have been apparent. Regardless of intent, which is not in issue, the public interest is best protected by enjoining all participants significantly contributing to any deceptive device.

15. Doherty, Clifford, Steers & Shenfield, Inc., developed and put into final form the commercials involved in this proceeding.^{14B} It is the final form of these commercials from which the falsity of the advertising may reasonably be imputed as hereinafter set forth.

16. In the course and conduct of their business, respondents have disseminated the aforesaid advertising at issue and caused the dissemination of such advertisements concerning the preparations identified herein by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including advertisements disseminated by means of television broadcasts transmitted by stations located in the District of Columbia and in various States of the United States, having sufficient power to carry such broadcasts across States lines, in which certain statements and oral and pictorial representations were made with respect to "Screts" and "Children's Screts"; and have disseminated, and caused the dissemination of, advertisements in which certain statements and oral and pictorial representations were made with respect to "Screts" and "Children's Screts," by the aforesaid medium, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said preparations in commerce, as "commerce" is defined in the Federal Trade Commission Act.¹⁵

17. Among and typical of the oral statements and representations contained in said television advertisements concerning "Screts," disseminated as aforesaid, were the following:

When sore throat strikes and brings fiery pain, what do you do for relief? Millions of people depend on SURETS for relief of minor sore throat pain.

^{14A} Tr. 229-231.

^{14B} Proposed Finding 9 of respondent DCSS.

¹⁵ Admitted by respondent Merck in its answer. As to respondent DCSS, it prepared the advertising copy in question (Tr. 107, 168, 196; CX's 20-22), and placed the advertising (in the form of sound films) with over 100 television stations throughout the United States for telecasting to the viewing public, which advertising was telecast by those stations (Tr. 199). "Ideas are disseminated when spread abroad for propagation," Webster's International Dictionary of the English Language, 2nd Ed. The dissemination that occurred in this instance was dissemination in commerce, as "commerce" is defined in the Federal Trade Commission Act.

Individually foil wrapped, remarkable SUCRETS lozenges relieve sore throat pain fast and kill even Staph and Strep germs with a special pain relieving antiseptic, HEXYLRESORCINOL. So, when minor sore throat strikes and brings fiery pain, SUCRETS relieve sore throat pain and kill even Staph and Strep germs. SUCRETS are fast. Within minutes you can talk, swallow, even smoke in comfort. So, when sore throat strikes, relieve pain fast and kill even Staph and Strep germs.¹⁶

18. Among and typical of the pictorial representations contained in said advertisements concerning "Sucrets," disseminated as above stated, were frames of film televised to the viewing public, appearing simultaneously with the making of oral statements which purported to depict the degree of fiery throat pain which "Sucrets" would relieve.¹⁷

19. Among and typical of the oral statements and representations contained in said television advertisements concerning "Children's Sucrets," disseminated as aforesaid, were the following:

When your child has a sore throat . . . It can make you feel helpless. What do you do to relieve the pain? If he's too young to gargle . . . and you want something more effective than candy cough drops . . . try new CHILDREN'S SUCRETS . . . specially flavored for youngsters . . . by the makers of regular SUCRETS. CHILDREN'S SUCRETS contain hexylresorcinol—the *gentle* antiseptic. And, CHILDREN'S SUCRETS relieve pain fast and help fight infection. These lozenges are made especially for children. Look: When minor sore throat strikes and brings burning pain . . . CHILDREN'S SUCRETS gently . . . safely . . . take care of the pain . . . and help fight infection. In no time at all . . . your child's like himself again. So next time your child has sore throat . . . if he's too young to gargle . . . and you want something more effective than candy cough drops . . . Relieve pain fast . . . help fight infection. Get new CHILDREN'S SUCRETS!¹⁸

20. Among and typical of the pictorial representations contained in said advertisements concerning "Children's Sucrets," disseminated as above stated, were frames of film televised to the viewing public, appearing simultaneously with the making of oral statements which purported to depict the degree of burning throat pain which "Children's Sucrets" would relieve.¹⁹

¹⁶ See Commission's Exhibit 21A, B, C, which is the print presentation of the audio portion of the film, CX 20, relating to "Sucrets" (Tr. 197). See also Tr. 198, 208-210 and 240-242.

Stipulated CX 20 (received without limitation) same as complaint.

¹⁷ CX 20.

¹⁸ See Commission's Exhibit 22A, B, C, which is the print presentation of the audio portion of the film, CX 20, relating to "Children's Sucrets" (Tr. 197). See also Tr. 198, 208-210 and 240-242.

Stipulated CX 20 (received without limitation) same as complaint.

¹⁹ *Id.*

21. Through the use of said advertisements, respondents have represented, directly and by implication, that "Sucrets" and "Children's Sucrets," by virtue of their hexylresorcinol content, will unqualifiedly reach, kill, or render ineffectual, germs, including streptococci and staphylococci in the throat tissues, that are contributing to an existing throat infection. The evidence indicates to the contrary as hereinafter discussed.

22. Hexylresorcinol is the principal active ingredient in both products. Each lozenge has 2.4 mgs. in a 2.5 gram tablet. The concentration is thus approximately one part hexylresorcinol to 1,000 parts of other ingredients. Experiments performed at the Merck Institute of Therapeutic Research established that the concentration of "Sucrets" ingredients in saliva during normal use is between 5 and 20 percent, with the average being close to 10 percent. The concentration of hexylresorcinol in the saliva during normal use is, therefore, approximately one part hexylresorcinol to 10,000 parts other material.²⁰

23. Hexylresorcinol in 1 to 10,000 concentration is highly bactericidal against organisms known to be pathogenic, including beta-hemolytic streptococci and staphylococcus aureus, and has antibacterial effects on other bacteria.²¹

24. Other ingredients in the products, such as menthol, anise oil and methyl salicylate, also have antibacterial effects²² but not as extensively as the hexylresorcinol.

25. Consistent with the experiments performed with hexylresorcinol, and experience with other of the ingredients found in the products, laboratory tests performed at the Merck Institute of

²⁰ Mortimer, Tr. 686; Rammelkamp, Tr. 595; Formulae, Tr. 12; 2.4 mgs. x 1000 = 2.4 grams. The Merck Institute of Therapeutic Research is a separately incorporated research institution with a separate board of trustees and a board of scientific advisors. Three of the board of advisors are Nobel laureates in medicine and the other members are of comparable caliber. Robinson, Tr. 877. The Institute has a large staff of technically trained people, and the disciplines represented are comparable to those found in a medical school; there are endocrinologists, bacteriologists, parasitologists, pharmacologists, physiologists, biochemists, toxicologists, and other "ologists". Robinson, Tr. 877-878. These people are primarily engaged in basic research in all areas of human and animal diseases, including neoplastic disease (cancer), infectious diseases, anti-immune diseases, diseases of the gastrointestinal tract and the whole area of cardiovascular research. Robinson, Tr. 879-882. Most of this work is done *in vitro* or in experimental animals, but Institute personnel on occasion participate in and often help design clinical follow-up research. Robinson, Tr. 1140-1146, 1148-1150; Examiner. Tr. 1150. Among the drugs developed by the Institute or with which it has done pioneering work are the sulfa drugs, penicillin, streptomycin, cortisone, a measles vaccine and thia-bendazole. Robinson, Tr. 876, 885-886, 1149, 1228-1230. Dr. Harry J. Robinson was Director of the Merck Institute at the time of the hearings. Robinson, Tr. 874, 895-896, 946-947; RMX 9, p. 17, Fig. 28. Concentration of hexylresorcinol in "Sucrets" (1:1000) x concentration of "Sucrets" in saliva (1:10) = 1:10,000.

²¹ Robinson, Tr. 1078-1079, 1098, 1100-1102, 1108-1110; RDX 8, pp. 609, 611; RDX 9, pp. 31-32, 34; RDX 11, pp. 8-9; RMX 19.

²² Ortenzio, Tr. 525; Rammelkamp, Tr. 595-598, 655-656.

Therapeutic Research using concentrations encountered in use establish that on contact the products will kill known pathogenic organisms, including beta-hemolytic streptococci and staphylococcus aureus, and have antibacterial effects upon other bacteria. Experiments performed by the Commission's witness, Dr. Ortenzio, support the same conclusion. The ability of the products to kill germs is confirmed by antibacterial tests performed on each lot of "Sucrets" or "Children's Sucrets" before it is released for sale.²³

26. Human saliva normally contains .2% organic matter. The ability of hexylresorcinol and the products to kill germs is not affected by the presence of organic matter in more than twice the normal concentration.²⁴

27. The products retain their antibacterial power when dissolved in saliva. This power exists even when abnormally large numbers of pathogenic organisms are used.²⁵

28. Hexylresorcinol and the products retain their antibacterial activity when in contact with living animal and human tissue. This fact has been verified on the peritoneal lining of living rabbits and guinea pigs, and in the peritoneal and oral cavities of human beings.²⁶

29. Consistent with the results obtained in laboratory experiments performed with "Sucrets," and experiments with, and clinical use of, hexylresorcinol and ST-37, *in vivo* experiments performed at the Merck Institute of Therapeutic Research establish that on contact the products kill pathogenic bacteria, including beta-hemolytic streptococci and staphylococcus aureus in the mouth and throat. This is corroborated by results obtained in two double-blind clinical studies of a total of 340 persons having sore throats in which the antibacterial effects of "Sucrets" were compared with those of a plain candy lozenge and a lozenge containing all of the ingredients of "Sucrets" except hexylresorcinol.²⁷

²³ Robinson, Tr. 984-987, 1135; RMX 9, pp. 3-6, Figs. 1-4, Tables 1-4; RMX 11, pp. 1-12; Ortenzio, Tr. 506-508, 534-535; Robinson, Tr. 1040-1041; Sinotte, Tr. 1355-1358; RMX 34, RMX 35, Exhibit VII.

²⁴ Robinson, Tr. 905-906, 911-912, 937, 908-912; RMX 9, pp. 7-8, Tables 5-6; RDX 8, pp. 610-611; RDX 9, pp. 32-34; RDX 11, pp. 9-10.

²⁵ Robinson, Tr. 932-933, 936-937, 965, 989-990, 995-997; RMX 9, pp. 13-18, Figs. 7-29, Table 7; RMX 11, pp. 13-16. These test results are consistent with those observed in experiments performed with "Sucrets" in saliva at the Sharp & Dohme Research Laboratories as early as 1937. RMX 36; Tr. 1370-1371; Robinson, Tr. 989-990.

²⁶ Robinson, Tr. 963-965, 1000-1001, 1004, 1008-1111, 1118-1121, 1123-1126; RMX 9, pp. 19-21, Figs. 30-31, Tables 8-9; RMX 11, pp. 30-39; RMX 20, p. 707; RMX 22, pp. 362-363; RDX 10, pp. 489, 491; RDX 11, pp. 8-9.

²⁷ ST-37 is a solution of 70% water and 30% glycerine, containing 0.1% hexylresorcinol. RDX 8, p. 611; RDX 9, p. 34; RDX 11, p. 11; RMX 22, p. 362. ST-37 is a registered trademark of Merck. Robinson, Tr. 938-958, 1135, 1157, 1166-1168, 1170; RMX 9, pp. 15-18, Fig. 28; McDonnell, Tr. 1869-1870, 1913-1915; Cimniera, Tr. 1982, 1992-1993; Hamburger, Tr.

Although these studies were in some respects uncontrolled, since they were dependent in part upon outpatient subjective analysis, they have considerable probative weight as corroboration of the laboratory results.

30. "Sucrets" as statistically indicated are more effective in killing bacteria, including streptococci and staphylococci, in the human mouth and throat than are the two control products. Since reduction of the number of bacteria in the oral cavity may be useful in mitigating the likelihood of secondary infection, the reductions in bacteria counts observed may be medically significant²⁸ under certain conditions. Cognizance of such medical significance, however, cannot be taken without considerable qualification since mitigation may be unimportant in the presence of sub-tissue infection.

31. Because of the size of the "Sucrets" clinical studies (340 patients), and the use of double-blind randomization of test products, the various conditions experienced by the test patients were distributed among the three test products. Therefore, the studies establish that persons with the varieties of sore throats actually encountered under all conditions of use have more of the bacteria in their mouths and throats killed if they use "Sucrets" than if they use the control products.²⁹

32. Because of its low surface tension, the hexylresorcinol in the products is partially effective in reaching and killing organisms within the tiny interstices interlacing the mucous and tonsillar tissues of the throat. Also, because of its low surface tension, a certain amount of hexylresorcinol in "Sucrets" can be expected to penetrate through the surface of the throat into the basal tissues themselves.³⁰ However, effective penetration deeper than the epithelial layer is unestablished.

2264; RMX 26, pp. 2-4; RMX 27, pp. 2-3; RMX 62, pp. 1-2; RMX 105, p. 2; RMX 108, p. 3; RMX 110, pp. 1, 3-5; RMX 111-A, pp. 1, 11-15; RMX 114, p. 1, Table III; RMX 116, p. 1, Table III.

²⁸ Ciminera, Tr. 1982, 1992-1993.

²⁹ Robinson, Tr. 1062-1063; McDonnell, Tr. 1868-1869, 1879-1884; Ciminera, Tr. 1969-1972, 1983-1984, 1986, 1988-1990, 1994; Rammelkamp, Tr. 661. Ciminera, Tr. 1983, 1986, 1994.

³⁰ RDX 8, p. 607; RDX 9, p. 26; RDX 11, p. 5; RMX 20, p. 712. Dr. Robinson described surface tension as a force exerted on a liquid, tending to pull a liquid towards the center of a sphere. Surface tension is what makes water, which has a high surface tension, form into balls, such as drops of dew on a leaf. When one adds a detergent, or other surface tension reductent, to water, or other liquids, the balls spread out because the surface tension has been reduced. Fluids of low surface tension penetrate into minute crevices and interstices impenetrable by water and other fluids of higher surface tension. Hexylresorcinol is a powerful surface tension reductent. Robinson, Tr. 1079-1080, 1094-1095; Robinson, Tr. 1095-1097; Gershenfeld, Tr. 2113-2118; RDX 8, pp. 604-611; RDX 9, pp. 22-24, 33-34; RDX 11, pp. 3-8, 10-11; RMX 17, pp. 163-164; RMX 20, pp. 704-705, 707, 711-712; Keefer, Tr. 1444-1445, 1498-1499; Gershenfeld, Tr. 2116-2118; Robinson, Tr. 1159-1160, 1232-1234; RMX 22, p. 362.

33. Although "Sucrets" and "Children's Sucrets" will, by virtue of their hexylresorcinol content, kill germs, including staphylococci and streptococci, on contact therewith, they will not normally reach, kill, or render ineffectual, germs, including streptococci and staphylococci in the throat tissues, that are contributing to an existing throat infection.³¹

34. Streptococcal and staphylococcal infections of the throat may be precursors of infections of the heart, kidney, blood, bones and other structures, and the failure to institute promptly adequate treatment of streptococcal and staphylococcal throat infections may seriously imperil health. A special hazard of inadequate treatment of streptococcal sore throat is the subsequent development in certain persons, particularly children, of acute rheumatic fever or acute nephritis. Aside from the evidence that respondents' advertising implies, "Sucrets" will kill germs in the throat tissues that are contributing to an existing throat infection (for which one should see a doctor), there is no substantial evidence that suggests respondents have made misrepresentations to the effect that taking "Sucrets" makes seeing a doctor unnecessary.³²

35. "Sucrets" and "Children's Sucrets" temporarily relieve sore throat pain. However, they will not afford permanent relief of such pain. Hexylresorcinol is essentially an antiseptic having an anesthetic effect.

36. The principal active ingredient of the products, hexylresorcinol, is a potent local anesthetic.³³ Other ingredients in "Sucrets" and "Children's Sucrets" are counter-irritants,³⁴ and sugar, which constitutes the greatest bulk of both products in terms of volume. "Sucrets" and "Children's Sucrets" have a palliative and

³¹ The expert witness, Bernstein, Tr. 392-396, 400, 402-404, 406, 411-412, 432-433; the expert witness, Rammelkamp, Tr. 572-573, 579-581, 595, 606; the expert witness, Mortimer, Tr. 676, 679-782, 686, 688.

³² Selected pages of the Merck Manual, CX's 27 through 32; the expert witness, Bernstein, Tr. 414-415, 423, 425, 427-430; the expert witness, Rammelkamp, Tr. 567, 601, 605, 614-615, 617; the expert witness, Mortimer, Tr. 678. Although this finding does not relate to the substantive issues regarding the truth or falsity of the respondents' misrepresentations by implication, or otherwise, it does relate to the question of the keen public interest in representations concerning drugs and the nature of the relief that should ensue in protecting such public interest. It also relates to the degree of care that must be exercised by drug manufacturers in advertising their products.

³³ This fact has been established by comparison of the effects of hexylresorcinol and known local anesthetics on animals, using standard tests. Mattis, Tr. 1638, 1640, 1644-1645, 1647; RMX 53, 54, 57. Hexylresorcinol produced a more lasting local anesthetic effect than did the well known topical anesthetic, benzocaine. Mattis, Tr. 1640; RMX 53. Expert witnesses had observed this effect of hexylresorcinol in the mouths and throats of human beings. Kane, Tr. 1606-1607, 1625; Keefer, Tr. 1460-1461; Mattis, Tr. 1651; McDonnell, Tr. 1925-1927.

³⁴ Kane, Tr. 1608-1609; Keefer, Tr. 1460.

soothing effect on inflamed tissues³⁵ and an anesthetic effect in reducing pain.

37. Because of their ingredients, the aforesaid products alleviate, as indicated, the pain of sore throat. This is corroborated in some degree by clinical studies on 300 patients that tested the pain-relieving effect of "Sucrets" in comparison with a plain sugar lozenge and a lozenge with all the ingredients of "Sucrets" except hexylresorcinol,³⁶ by personal observations of expert witnesses³⁷ and by the indication of the patients as to relief attained. The difficulty with such outpatient tests, however, is that controls are limited because of the subjectivity of results and because performance of instructions cannot be absolutely assured.

38. Nevertheless, the clinical studies have sufficient probative weight to establish that the pain relief given by the products at issue is material,³⁸ particularly in view of the overwhelming and uncontradicted evidence that hexylresorcinol is an analgesic having an anesthetic effect. "Sucrets" have therefore, as could be expected, afforded material relief of pain in a significantly greater number of cases than did a candy lozenge and "Sucrets" without hexylresorcinol,³⁹ as evidenced by the studies.

39. The clinical studies also establish that "Sucrets" give material relief of moderate as well as minor sore throat pain.⁴⁰

40. The "Sucrets" clinical studies⁴¹ and testimony of expert witnesses⁴² further establish that "Sucrets" give material relief of pain in a significant percentage of cases of sore throat characterized by severe pain.⁴³

³⁵ Kane, Tr. 1608-1609; Keefer, Tr. 1425, 1471-1472; Weinstein, Tr. 1564.

³⁶ McDonnell, Tr. 1869, 1899-1900; Ciminera, Tr. 1982, 1992; RMX 27, p. 3; RMX 62; RMX 105, p. 2; RMX 108, pp. 2-3; RMX 110; RMX 111-A, pp. 5-7, 15; RMX 114, Table I; RMX 116, Table I.

³⁷ Keefer, Tr. 1459-1460; Garfield, Tr. 1020; Gershenfeld, Tr. 2091-2092; Lyght, Tr. 346; Goodwin, Tr. 1824.

³⁸ 84% of the patients treated with "Sucrets" were afforded two-step pain relief (on a five-step scale). RMX 111-A, Table 4, p. 6.

³⁹ Ciminera, Tr. 1982, 1992. Less than half the percentage of patients treated with sugar lozenges reported as much pain relief as was experienced by the patients treated with "Sucrets." RMX 111-A, Table 4, p. 6.

⁴⁰ 91% of the patients originally reporting moderate pain were afforded two-step pain relief (on a five-step scale) after being treated with "Sucrets." Only 38% of the patients with moderate pain treated with the sugar lozenge reported two-step pain relief. RMX 111-A, Table 6, p. 7. This difference in effect is statistically significant. RMX 116, Table I.

⁴¹ McDonnell, Tr. 1870; RMX 111-A, pp. 5-7, 15. 83% of the patients with severe and very severe pain experienced two-step pain relief (on a five-step scale) after being treated with "Sucrets." RMX 111-A, Table 6, p. 7.

⁴² Kane, Tr. 1610-1611; Keefer, Tr. 1461-1462; Garfield, Tr. 1021-1022; Gershenfeld, Tr. 2092.

⁴³ The amount of pain relief afforded cases of severe pain of sore throat by "Sucrets" was so much greater than that afforded by the sugar lozenge that the odds are less than 5 in 10,000 that the differences observed could have been due to chance. RMX 116, Table I. This

41. Whether the pain caused by a physical condition can be relieved by a given preparation is not controlled by the medical seriousness of the condition that is producing the discomfort. Since the products anesthetically, and therefore temporarily, relieve throat pain of mild, moderate, or severe degree caused by minor conditions,⁴⁴ it is reasonable to assume they should similarly relieve pain in some degree when caused by serious conditions. This effect may reasonably be inferred from the fact that "Sucrets," and similar products, are recommended by doctors for temporary relief of pain in cases of bacterial infections of the throat⁴⁵ regardless of the severity of the infection, which may also be treated by the use of other drugs.

42. Nevertheless, the aforesaid advertisements were and are misleading, and constituted and now constitute "false advertisements," as that term is defined in the Federal Trade Commission Act, in that they deceptively impute "Sucrets" as aforesaid (a) will kill or render ineffectual⁴⁶ germs in the throat tissues that are contributing to an existing throat infection,⁴⁷ and (b) will afford permanent or long lasting relief⁴⁸ of sore throat pain.

CONCLUSIONS

It is apparent from the evidence that the representations made by respondents are literally true. Hexylresorcinol contained in "Sucrets" and "Children's Sucrets" does kill germs, including streptococci and staphylococci, on contact. Although the wording on the packages gives this forewarning, the representations considered herein reflected in TV commercials are without qualification. It is merely stated that "when minor sore throat strikes and brings fiery pain, 'Sucrets' relieves sore throat pain and kills even Staph and Strep germs," and that "Children's Sucrets" (unqualifiedly) "relieve pain fast and help fight infection." The difficulty is that infections within the tissues of the throat are not reached by the hexylresorcinol which can only make external contact in the throat. There is some evidence that hexylresorcinol does penetrate the epithelial layer, but certain infections involving germs,

difference in effect is well within the range of statistical significance used in biological work since results which might be due to chance in one case out of twenty are considered significant in such work. Ciminera, Tr. 1967.

⁴⁴ Sec. VII 4-7, *supra*.

⁴⁵ Rammelkamp, Tr. 639-640; Keefer, Tr. 1459, 1467, 1527; Garfield, Tr. 1030-1031; Bernstein, Tr. 433-434; CX 30, p. 411.

⁴⁶ It is assumed that nonreduction of germ virulence suggested by some medical evidence is used in this sense.

⁴⁷ This shall be construed to apply to major or minor sore throat conditions.

⁴⁸ *I.e.*, beyond the point of temporary relief normally afforded by an analgesic having an anesthetic effect in major or minor sore throat conditions.

including streptococci and staphylococci, are usually more deeply seated than in that layer. The penetration, therefore, at best is extremely limited and the evidence does not justify respondents' unqualified representations.

The fact that the advertising may be literally true in the sense that hexylresorcinol will kill germs on contact in the throat does not warrant a dismissal of the complaint. The implication from the language used in the advertising is that "Sucrets" or "Children's Sucrets" are materially curative because the germs are killed or rendered ineffectual. A person with a sore throat, upon hearing these representations, may reasonably assume that if such germs are killed, the product advertised is a cure for an existing throat infection. This is all the buyer of such a product is interested in, aside from relief of pain, which the evidence indicates "Sucrets" do afford, not permanently, but temporarily. It is well recognized that "words and sentences may be literally and technically true and yet be framed in such a setting as to mislead or deceive." *Bockenstette, et al. v. F.T.C.*, 134 F.2d 369, 371; *D.D.D. Corporation v. F.T.C.*, 125 F.2d 679, 682. Furthermore, "advertisements are not to be judged by their effect on the scientific or legal mind which will dissect and analyze each phrase, but rather by their effect upon the average member of the public." *Ward Laboratories, Inc., v. F.T.C.*, 276 F.2d 952.

Respondent Doherty, Clifford, Steers & Shenfield, Inc., urges that it was merely the agent of Merck, could not act without its approval, and that it initiated advertising subsequently reviewed and approved by Merck, which was reflective of its understanding of the facts that had been presented to it by Merck concerning "Sucrets." However, the advertising formulated by the advertising agent was clearly conceived to present to the public not only the advantages of the product sought to be sold as literally stated, but also to work upon the public imagination. It is common knowledge that those who are ill seek cures with hope. This stimulates their imagination into optimistically believing what they read without analytical caution. It is therefore important and in the public interest that extreme care be exercised to make sure that deception will not result from lack of caution in describing the effectiveness of drugs. Misrepresentation by implication may be as detrimental to the public welfare and health as direct misstatements. In the instant case the public interest is clearly contravened.

On the other hand, the inadvertence or lack of caution exer-

cised by the respondents herein should not in any way undermine the public confidence in highly ethical pharmaceutical companies and leaders in medical research such as the respondent Merck. It would appear to the hearing examiner that in reviewing the advertising prepared for Merck by its advertising agent, that Merck inadvertently approved an advertising format without thoroughly considering its implications, aside from its correct literal meaning. Every manufacturer has a subjective sense about his own product which makes objective analysis difficult where imaginative advertising is prescribed by an advertising agent. In this case, of course, it may be, although there is no evidence to this effect, that the advertising agent itself believed that there was no implied falsity in the advertising they disseminated on behalf of, and with the approval of, Merck & Co., Inc. Nevertheless, they were a participant in the preparation of the advertising and the same required caution must be imposed upon them as would be imposed upon their client or advertiser. The public interest and protection, therefore, clearly necessitates that an order be issued against the advertising agent as well as its client, the product manufacturer.

Although intent is not in issue in determining whether or not any cease and desist order should be issued, the evidence does not suggest that there was any sinister intent on the part of Merck & Co., Inc., or its advertising agent, to misrepresent its product, *i.e.*, "Sucrets" and "Children's Sucrets" to the public. A conservative order limited to restricting the implied misrepresentations is therefore justified.

With regard to the nature of the order to be issued, complaint counsel proposes that respondents be enjoined from representing that "Sucrets" or "Children's Sucrets":

(a) Will reach or kill streptococcal, staphylococcal, or other germs causing an existing throat infection, or otherwise that it is effective in the treatment of any kind of throat infection;

(b) Will have any beneficial effect on:

(1) Severe pain of a sore throat, or

(2) Sore throat in excess of affording temporary relief of the pain of a minor sore throat.

This order, however, appears to be ambiguous with regard to part (a), particularly in the use of the word "effective," which has devious meanings. Furthermore, this portion of the order is inconsistent with the evidence adduced, since the primary question is whether or not "Sucrets" are materially curative insofar as

throat infection is concerned. The generality of the language used also would make such an order difficult to apply because its construction leaves much to conjecture. The evidence establishes that "Sucrets" will not kill or render ineffectual germs in the throat tissues that are contributing to an existing throat infection. An order precluding the representation that "Sucrets" will kill or render ineffectual such germs which specifically relates to the deceptive practice would, therefore, appear to be more understandable and therefore preferable in the public interest.

As regards the second part of the proposed order identified as (b), this also seeks relief inconsistent with the evidence. It has been well established that "Sucrets" containing hexylresorcinol, which is an antiseptic having an anesthetic effect, will not afford permanent relief of sore throat pain. Nevertheless, the evidence does establish that this product will afford temporary relief. The reference to a minor sore throat, under the proposed order, has the effect of creating an ambiguity and makes the order difficult to apply, since the evidence establishes there is no relationship between the amount of pain and a minor or major sore throat. In fact, the complaint counsel's evidence thoroughly establishes that severe pain may accompany a minor sore throat condition and minor pain may accompany a major sore throat condition such as streptococcal and staphylococcal infection. The proposed order, therefore, seems inappropriate. The respondents, however, should be enjoined from representing that "Sucrets" will afford permanent or long lasting relief of sore throat pain. Such relief would be entirely consistent with the evidence in this case.

In accordance with the limitations indicated, the dissemination by the respondents of the false advertising, 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. Accordingly, the following order shall issue:

ORDER

It is ordered, That respondents Merck & Co., Inc., a corporation trading as Quinton Company or under any other name, and Doherty, Clifford, Steers & Shenfield, Inc., a corporation, and their officers, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of "Sucrets" throat lozenges, or "Children's Sucrets" throat lozenges, or any other

preparation of similar chemical composition or properties, do forthwith cease and desist from, directly or indirectly:

1. Disseminating, or causing to be disseminated, by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which represents directly or by implication that any of the aforementioned preparations, by virtue of their hexylresorcinol content, or otherwise:

(a) Will kill or render ineffectual, germs in the throat tissues that are contributing to an existing throat infection;

(b) Will afford permanent or long lasting relief of sore throat pain.

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

OPINION OF THE COMMISSION

APRIL 8, 1966

BY REILLY, *Commissioner*:

This matter is before the Commission on cross appeals of counsel supporting the complaint and respondent Merck & Co., Inc. (trading as Quinton Company), and an appeal by the respondent advertising agency, Doherty, Clifford, Steers & Shenfield, Inc., from an initial decision holding that respondents had violated Sections 5 and 12 of the Federal Trade Commission Act.

The complaint charges respondents with the dissemination of false advertisements in connection with the sale and distribution of Sucrets throat lozenges and Children's Sucrets throat lozenges (hereinafter sometimes referred to as Sucrets). More specifically, it charges that respondents falsely represented in television commercials (1) that these preparations reach and kill germs causing existing throat infections and thus are effective in the treatment of throat infections, including those caused by streptococcal and staphylococcal germs; and (2) that they are effective in relieving severe pain of sore throat.

The following facts are not in serious dispute: There is no substantial difference between Sucrets and Children's Sucrets inso-

far as the medical usefulness of these products is concerned. The principal active ingredient in each is an antiseptic, hexylresorcinol, and each contains this ingredient in the same proportion or concentration, *i.e.*, 2.4 mg. hexylresorcinol in a lozenge having a total weight of 2.5 grams. The concentration of hexylresorcinol in Sucrets is approximately 1 part to 1,000 parts other ingredients, and experiments have disclosed that in normal use of the product the concentration of hexylresorcinol in saliva is approximately 1 part hexylresorcinol to 10,000 parts other ingredients. Laboratory tests have also disclosed that this concentration of hexylresorcinol will kill certain organisms on contact and will have antibacterial effects on others.

The majority of sore throats are caused either by viruses or by physical or chemical trauma, such as those associated with excessive smoking, talking, shouting, exhaust fumes, or smog. The remainder are for the most part the result of bacterial infection caused by the beta-hemolytic streptococci. No known drug will directly affect the viruses which cause sore throat, and traumatic sore throats can be cured only by the removal of the physical or chemical cause of the irritation. No product, including antibiotics, will shorten the duration of an existing beta-hemolytic streptococcal throat infection. Such an infection may be followed by more serious infections and the failure to institute adequate treatment (which requires complete eradication of the streptococci) may seriously imperil health. A special hazard of inadequate treatment of streptococcal sore throat is the subsequent development in certain persons, particularly children, of acute rheumatic fever or acute nephritis. Penicillin, a drug which can only be prescribed by doctors, is the therapy of choice for the condition because it can eradicate the bacteria and thereby reduce the incidence of the more serious sequelae of such infections.

The television advertisements used in connection with the sale and distribution of the two products are very similar. The following oral representations are made in the Sucrets commercial:

When sore throat strikes and brings fiery pain, what do you do for relief? Millions of people depend on SUCRETS for relief of minor sore throat pain. Individually foil wrapped, remarkable SUCRETS lozenges relieve sore throat pain fast and kill even Staph and Strep germs with a special pain relieving antiseptic, HEXYLRESORCINOL. So, when minor sore throat strikes and brings fiery pain, SUCRETS relieve sore throat pain and kill even Staph and Strep germs. SUCRETS are fast. Within minutes you can talk, swallow, even smoke in comfort. So, when sore throat strikes, relieve pain fast and kill even Staph and Strep germs.

The following oral representations are made in the Children's Sucrets advertisement:

When your child has a sore throat . . . It can make you feel helpless. What do you do to relieve the pain? If he's too young to gargle . . . and you want something more effective than candy cough drops . . . try new CHILDREN'S SUCRETS . . . specially flavored for youngsters . . . by the makers of regular SUCRETS. CHILDREN'S SUCRETS contain hexylresorcinol—the *gentle* antiseptic. And, CHILDREN'S SUCRETS relieve pain fast and help fight infection. These lozenges are made especially for children. Look: When minor sore throat strikes and brings burning pain . . . CHILDREN'S SUCRETS gently . . . safely . . . take care of the pain . . . and help fight infection. In no time at all . . . your child's like himself again. So next time your child has sore throat . . . if he's too young to gargle . . . and you want something more effective than candy cough drops . . . Relieve pain fast . . . help fight infection. Get new CHILDREN'S SUCRETS!

Included in both advertisements and appearing simultaneously with the above representations are pictures of flame being extinguished in the throat of a person using Sucrets or Children's Sucrets, as the case may be. The video portion of each commercial also portrays a person recovering from sore throat. For example, the Children's Sucrets advertisement depicts an obviously ill child suffering from the pain of sore throat. After taking a lozenge he is shown to be feeling well again, playing normally without any indication of sore throat pain.

With respect to the first charge in the complaint, the hearing examiner held on the basis of his own observation of the advertisements that respondents had represented that Sucrets and Children's Sucrets are materially curative of existing throat infections, including those caused by staphylococcal and streptococcal germs. He specifically found in this connection that "The implication from the language used in the advertising is that 'Sucrets' or 'Children's Sucrets' are materially curative because the germs are killed or rendered ineffectual. A person with a sore throat, upon hearing these representations, may reasonably assume that if such germs are killed, the product advertised is a cure for an existing throat infection." He held this representation to be false and deceptive, finding in this connection that "although 'Sucrets' and 'Children's Sucrets' will, by virtue of their hexylresorcinol content, kill germs, including Staphylococci and Streptococci, on contact therewith, they will not normally reach, kill, or render ineffectual, germs, including Streptococci and Staphylococci in the throat tissues, that are contributing to an existing throat infection."

As to the second charge, the hearing examiner held that respondent's advertising conveys the impression that Sucrets and Children's Sucrets will afford permanent or long-lasting relief of sore throat pain.¹ He found this implied representation to be false since the evidence disclosed that the product would relieve only temporarily the pain of sore throat.

In its appeal from the initial decision, respondent Merck does not contest the examiner's medical findings, *i.e.*, that Sucrets will not cure or help cure an existing throat infection and will not afford permanent or long-lasting relief of sore throat pain. Its principal argument is that neither the hearing examiner nor the Commission may interpret the Sucrets advertising without the aid of consumer testimony. This argument is, of course, contrary to the well-established rule that the Commission "is not required to sample public opinion to determine what meaning is conveyed to the public by particular advertisements," *E. F. Drew and Co., Inc. v. F.T.C.*, 235 F.2d 735 (2d Cir. 1956) and "is entitled to draw upon its experience in order to determine, in the absence of consumer testimony, the natural and probable result of the use of advertising expressions." *Id.* at 741. *Federal Trade Commission v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965); *Double Eagle Lubricants, Inc. v. F.T.C.*, 360 F.2d 268 (10th Cir. 1965); *Libbey-Owens-Ford Glass Co. v. F.T.C.*, 352 F.2d 415 (6th Cir. 1965); *Bakers Franchise Corporation v. F.T.C.*, 302 F.2d 258 (3rd Cir. 1962); *Exposition Press, Inc. v. F.T.C.*, 295 F.2d 869 (2d Cir. 1961); *New American Library of World Literature v. F.T.C.*, 213 F.2d 143 (2d Cir. 1954); *Rhodes Pharmacal Co., Inc. v. F.T.C.*, 208 F.2d 382 (7th Cir. 1953); *Zenith Radio Corporation v. F.T.C.*, 143 F.2d 29 (7th Cir. 1944). In two of the above cases the courts upheld the Commission's finding as to the probable impression created by advertising and labeling on the public, even though there was consumer evidence to the contrary, *Rhodes Pharmacal, supra*, and *Double Eagle, supra*, the court holding in the latter case "If the Commission can find deception without evidence that the public was deceived, we believe that it can make the same finding on the basis of its visual examination of exhibits, even though numerous members of the public have testified that they were not deceived."

We note that in making its argument, Merck attempts to distin-

¹ The examiner failed to make any ruling on the allegation that respondents had represented, either directly or by implication through the advertisements, that the products are effective in relieving severe sore throat pain.

guish between advertisements containing implied representations and those containing express representations, contending that the Commission can make its own determination as to the meaning conveyed by the latter but must rely on public witnesses to ascertain the meaning of the former. However, neither the cases cited by Merck nor any other decisions support this novel view.² As a matter of fact, Merck's contention that the Commission may not draw its own inferences as to an advertisement's meaning is directly contrary to the Supreme Court's ruling in two recent cases. In *F.T.C. v. Colgate-Palmolive Co.*, *supra*, respondents contended that the Commission had erred in finding that the television commercials under consideration impliedly represented that the viewer was seeing for himself an experiment which verified the claim that sandpaper could be shaved by respondents' product. The Court rejected this argument holding that "... since this is a matter of fact resting on an inference that could reasonably be drawn from the commercials themselves, the Commission's finding should be sustained." And in sustaining the Commission's holding that the advertising was materially deceptive, the Court stated, "Nor was it necessary for the Commission to conduct a survey of the viewing public before it could determine that the commercials had a tendency to mislead, for when the Commission finds deception it is also authorized, within the bounds of reason, to infer that the deception will constitute a material factor in a purchaser's decision to buy." Similarly, in *F.T.C. v. Mary Carter Paint Co., Inc.*, 379 U.S. 957 (1965) the Commission had found, without the aid of consumer testimony, that respondents' use of the word "free" in connection with one product in a combination offer constituted a representation as to the usual and customary price of the other product. In holding that the Circuit Court should have sustained the Commission's finding of deception based on this interpretation of respondents' advertising the Court stated, "There was substantial evidence in the record to support the Commission's finding; its determination that the practice here was deceptive was neither arbitrary nor clearly wrong."

We also reject Merck's contention that the hearing examiner

² The court decisions cited by Merck do not support its argument but stand only for the proposition that the conclusion of the Commission with respect to the meaning of an advertisement to the public may be reversed if, in the court's opinion, it is "arbitrary" or "clearly wrong." See *Rhodes Pharmacal Co., Inc. v. F.T.C.*, *supra*, and *Gulf Oil Corporation v. F.T.C.*, 150 F.2d 106 (5th Cir. 1945). In the Matter of *American Music Guild, Inc.*, Docket 8550 (1965) [68 F.T.C. 13], the Commission simply disagreed with the hearing examiner's interpretation of parts of respondent's advertising.

erred in finding that the advertising in question contains the implied representations that Sucrets and Children's Sucrets (1) will kill or render ineffectual germs that are contributing to an existing throat infection and are thus materially curative of such an infection, and (2) that these products will afford permanent or longlasting relief of sore throat pain.³ As to the first representation found by the examiner, the statement that Sucrets will relieve sore throat pain and "kill even Staph and Strep germs" is repeated three times in the Sucrets advertisement. Similar emphasis is placed on the statement "help fight infection" in the advertisement for Children's Sucrets. A person seeing and hearing these advertisements could certainly interpret the claims to mean that the products will kill germs causing an existing throat infection or will help fight the infection causing the throat pain. The consumer is told by the Sucrets advertisement that the product is to be used to alleviate the pain of sore throat and that it will also kill germs.⁴ Hearing and seeing the "germ killing" claim in this context, therefore, he would logically believe that the germs referred to are those causing the condition of which the pain is symptomatic. It would be completely unreasonable to assume that a prospective purchaser would construe the advertising to mean that Sucrets will kill only staph and strep germs in laboratory tests or only staph and strep germs other than those which may be causing the sore throat which prompted him to purchase throat lozenges in the first place. The same reasoning would apply to the claim that Children's Sucrets "help fight infection." It is unlikely that a parent would think that the infection which a throat lozenge will help fight is an infection other than the one which may be causing a child's sore throat. And certainly, as to both claims, the consumer could reasonably believe that a product which will kill germs causing an infection or which will help

³ In deciding whether an advertisement has the capacity to deceive, the issue is not whether the only meaning which it conveys or the implication that "jumps out from it" is the false one, as Merck seems to contend. It is whether the advertisement may reasonably be understood to have that meaning by consumers even though it may also be susceptible of a different interpretation. "Advertisements which are capable of two meanings, one of which is false, are misleading", *Rhodes Pharmacal Co., Inc. v. F.T.C.*, 208 F.2d 382 (7th Cir. 1953), *rev'd. on other grounds*, 348 U.S. 940 (1955). And since it is not difficult to choose statements, designs, and devices which will not deceive, those which are susceptible of both a misleading and truthful interpretation will be construed against the advertiser. *United States v. 95 Barrels of Vinegar*, 265 U.S. 438 (1924); *Libbey-Owens-Ford Glass Co. v. F.T.C.*, *supra*; *Country Tweeds, Inc. v. F.T.C.*, 326 F.2d 144 (2d Cir. 1964).

⁴ The fact that staph germs referred to in the advertisement cause sore throats only in rare instances does not help Merck's case. The claim that Sucrets "kill even Staph and Strep germs" when considered in the context of the advertisement constitutes a representation that these germs cause sore throats.

fight an infection will have an effect on the course of the infection or will cure or help cure the infection.

We also agree with the examiner's finding that the advertising conveys the impression that the product will afford permanent or long-lasting relief of sore throat pain. In the first place, the flame depicted in the advertisement, which certainly may be understood to represent pain, is shown to be extinguished when Sucrets are used. But more important, the advertising implies, as we have already stated, that Sucrets are effective in removing the cause of the pain, *i.e.*, kills the germs or helps fight infection. Consequently, the advertising as a whole may well lead the viewer to believe that the product will provide more than temporary relief of sore throat pain.

Respondent Merck also takes exception to that part of the examiner's order pertaining to the duration of pain relief afforded by the products, arguing that this prohibition goes beyond the issues raised in the pleadings. This argument is also rejected. The complaint alleges that Sucrets and Children's Sucrets "have no beneficial effect on severe pain of sore throat, or on sore throat in excess of affording temporary relief of pain of a minor sore throat." And the proposed order accompanying the complaint would prohibit representations that these products will have any beneficial effect on "Sore throat in excess of affording temporary relief of the pain of a minor sore throat."

Counsel supporting the complaint have appealed from the examiner's order² and from certain findings and conclusions in the initial decision concerning the ability of respondents' products to kill germs in the throat and to relieve severe pain of sore throat. We will consider first that part of the appeal requesting modification of the order to cease and desist.

The first paragraph of this order would require respondent to stop representing that Sucrets or Children's Sucrets "[W]ill kill or render ineffectual germs in the throat tissues that are contributing to an existing throat infection." Complaint counsel contend that the examiner erred in limiting this prohibition to claims concerning the action of the products on "germs in the throat tissues," and in not prohibiting representations that the products will reach or have any effect on germs contributing to a throat infection or otherwise will be effective in the treatment of throat infection.

We agree with complaint counsel that the first paragraph of the order is inadequate to prevent the false representation found

by the examiner to be implicit in respondents' advertising, *i.e.*, that Sucrets and Children's Sucrets will kill or render ineffectual germs contributing to an existing throat infection and that they are materially curative of an existing throat infection. Since this claim is not limited to the effectiveness of the product in killing only those germs in throat tissues, an order prohibiting its use should not be so limited. While it is true that the claim was found by the examiner to be deceptive because the products will not kill germs in throat tissues, we cannot assume that the public is aware that germs causing an existing throat infection are in the throat tissues. In other words, consumers may be led to believe by claims that Sucrets will kill germs or fight infection, that the product will cure or help cure a throat infection even if they are not told that the product will kill germs in throat tissues.

Paragraph (a) of the order originally proposed by complaint counsel would prohibit respondents from representing that Sucrets or Children's Sucrets "[W]ill reach or kill Streptococcal, Staphylococcal, or other germs causing an existing throat infection, or otherwise that it is effective in the treatment of any kind of throat infection." The examiner found this portion of the order to be ambiguous "particularly in the use of the word 'effective' which has devious meanings," and further concluded that it was inconsistent with the evidence. We do not agree. This provision of the order is obviously intended to prevent respondents from claiming that Sucrets or Children's Sucrets are of any value whatsoever in curing an existing throat infection or in killing or eradicating the germs causing such infection. The evidence clearly supports such a prohibition. As a matter of fact, the evidence adduced by complaint counsel that Sucrets will not cure or help cure an existing throat infection is undisputed.

Complaint counsel also take exception to the second paragraph of the order contained in the initial decision, contending that the examiner should properly have restricted respondents' claims of pain relief to claims for the temporary relief of *minor* pain of sore throat. The examiner's order would prohibit only representations that Sucrets or Children's Sucrets "will afford permanent or long lasting relief of sore throat pain." He had found in this connection that the products relieve severe pain of sore throat irrespective of cause, and the principal issue raised by counsel's argument concerns the accuracy of this finding.

In reviewing the initial decision on this phase of the case, we note at the outset that the examiner failed to make any ruling on

the allegation that respondents had represented that Sucrets and Children's Sucrets are "effective in relieving severe sore throat." His only ruling as to the meaning of respondents' advertisements, insofar as pain relief is concerned, is that they "impute" that Sucrets "will afford permanent or long lasting relief of sore throat pain." While duration of pain relief is an issue in this case, as we have stated above, it is not the principal one raised by the above charge. The complaint specifically alleges, in this connection, that respondents had represented that "Sucrets throat lozenges and Children's Sucrets throat lozenges are effective in relieving severe sore throat."

Apparently, the examiner's failure to find that the advertising implies that Sucrets will relieve severe sore throat pain was an oversight since he has ruled on the efficacy of the product in relieving such pain. There would seem to be no doubt, in this connection, that the advertising conveys such an impression. The viewer is shown a fire being extinguished by Sucrets in the throat of the user. It is difficult to conceive of any other pictorial representation which would be more suggestive of the alleviation of extreme pain.

We are of the opinion that the evidence relied upon by the examiner fails to support his conclusion as to the efficacy of the products in relieving severe pain. The examiner specifically held in this connection that "the 'Sucrets' clinical studies and testimony of expert witnesses further establish that 'Sucrets' give material relief of pain in a significant percentage of cases of sore throat characterized by severe pain." We have examined this evidence and find that neither the testimony of the expert witnesses nor the clinical studies conducted by Merck establish that Sucrets or Children's Sucrets are effective in relieving severe sore throat pain or will substantially ease the severe pain of sore throat.⁵ None of the experts whose testimony is cited in the initial decision testified that Sucrets or Children's Sucrets will substantially ease severe sore throat pain. Each of them was called by respondents and each was asked by Merck's counsel whether Sucrets would give some relief of moderate pain or pain in excess of mild pain—not whether the products would substantially relieve severe pain of sore throat.⁶

⁵ In response to respondent Merck's motion to clarify the complaint and narrow the issues, complaint counsel advised that the phrase "effective in relieving" in subparagraph 2 or paragraph 6 of the complaint means that "it will either substantially ease the severe pain or beneficially affect the condition which seriously imperils health." (T-24)

⁶ For example, Dr. Gershenfeld testified as follows on direct examination:

"Q. One of the Government's concessions—I think the only one—is that they don't contend

No reference is made in the initial decision to testimony which is squarely on point. Dr. Rammelkamp, recognized as one of the leading authorities on streptococcal throat infections, testified in support of the complaint that in cases of severe sore throat when it is painful for a patient to swallow "The pain usually won't be relieved materially without some compound like codeine."⁷ He further testified that "... in these situations one has to use a compound that acts deep in the tissues because the inflammation is deep. You have to get some compound that will get into these areas, and even then it may not be successful."⁸ He also testified as follows in response to the question whether Sucrets antiseptic throat lozenges provide any measurable relief of severe pain of sore throat:

Hearing Examiner Buttle: Well, you could say "measurable relief." Would that satisfy you, Doctor?

The Witness: It would. I know of no antiseptic that would give measurable relief to sore throat as determined by proper studies, in my opinion.

Mr. McGlothlin: You are thinking of the severe sore throat of streptococcal infection?

The Witness: I was not. I was thinking of both. I know of no study of antiseptics that will show that it relieves sore throat that I would accept as the proper control published in the literature in any place that I know of.

* * * * *

Hearing Examiner Buttle: You were speaking of—

The Witness: what we call soreness of the throat.

Hearing Examiner Buttle: You were speaking of pain?

The Witness: Yes."⁹

None of the evidence adduced by respondents, including the Merck clinical studies relied upon by the examiner, tends to rebut Dr. Rammelkamp's testimony. The studies themselves have little probative value on the pain relief issue. They were not conducted for the purpose of showing that Sucrets substantially relieve the severe pain of sore throat but merely for the purpose of comparing the effectiveness of Sucrets with two placebos on the subjective relief of pain of uncomplicated sore throat.¹⁰ While it

that Sucrets do not relieve minor pain when produced by a minor cause. Would you tell us your experiences as to the ability of Sucrets to relieve pain of more than minor degree? I will define 'minor' for you as a tickle in the throat.

A. Well, I get more than a tickling. I get more than what they sometimes even call a scratchy throat if I talk too long or for any extended period of time. I find, as far as myself is concerned, I get relieved of the discomfort.

Q. With Sucrets?

A. With Sucrets." (T-2092)

⁷ T-608.

⁸ T-609.

⁹ T-612.

¹⁰ Patients with inflammation and infection of the throat were excluded from the studies.

is true that the studies indicated that patients with "severe" or "very severe" pain experienced "two-step" pain relief after being treated with Sucrets, they also indicated that patients who were treated with only a plain sugar lozenge experienced similar relief. Moreover, it is impossible to determine from the studies how much of the pain relief experienced by patients over the 48-hour testing period (whether treated with Sucrets or with the control products) can be attributed to the lozenges and how much can be attributed to the natural or spontaneous abatement of the symptoms of sore throat. The evidence is uncontradicted, in this connection, that the symptoms of viral sore throat or traumatic sore throat usually disappear within that time period. And even as to streptococcal throat infection Dr. Rammelkamp testified "Any compound you give after 24 hours will show improvement as far as the patient's report to you because everybody is getting better."¹¹

Despite evidence that pain of infectious sore throat is caused by inflammation in the tissues which cannot be reached by a topical or surface application such as that provided by Sucrets, the examiner nevertheless assumed that Sucrets should "relieve pain in some degree when caused by serious conditions."¹² The examiner then bolstered this assumption by inferring that Sucrets should have this effect from testimony that Sucrets and similar products are recommended by doctors for temporary relief of pain in cases of bacterial infections of the throat. While it is true that doctors testified that they recommended lozenges for severe sore throat, this is no basis for finding that such products, which include cough drops, substantially relieve the severe pain of sore throat. Certainly, it is no basis for concluding that Sucrets will provide the degree of pain relief shown in the advertisements. We find in this connection that the advertisements conveyed the impression that Sucrets will promptly eliminate severe pain of sore throat. We further find on the basis of this record that the products will not provide substantial relief of such pain.

For the foregoing reasons, we are of the opinion that the examiner's findings and conclusions as to the efficacy of Sucrets and Children's Sucrets in relieving severe sore throat pain are erroneous and should be set aside. The order based on these findings will be modified as requested by counsel supporting the complaint.

¹¹ T-613.

¹² This statement falls far short of a finding that Sucrets substantially ease severe sore throat pain caused by a serious condition and seems to be only an observation that taking Sucrets in such cases is better than taking nothing at all.

Complaint counsel also take exception to the examiner's finding that Sucrets and Children's Sucrets kill pathogenic bacteria, including beta-hemolytic streptococci, in the throat. The evidence does not show that the products have the ability to kill any medically significant number of germs in the throat. Moreover, to the extent that this finding suggests that the products kill germs causing an existing throat infection and may therefore have some effect on the course of that infection, it is highly misleading. It will therefore be stricken.

The respondent advertising agency has filed a separate appeal from the initial decision contending that the hearing examiner erred in holding it equally liable with Merck for the advertising claims found to be deceptive and placing it under an order to cease and desist. The principal argument made by the agency is that in developing the advertising it acted in good faith in reliance upon information furnished by Merck, and that mere participation in the preparation of advertising claims is not a sufficient basis for imposing liability on an advertising agency.

The examiner found in effect that while the agency should have known that the advertising claims were deceptive (Initial Decision, par. 14) the record did not establish that the agency had actual knowledge of the falsity of these claims (Initial Decision, conclusion, pp. 544-545). His decision did not turn on the question of knowledge or intent, however. He specifically held that the agency was a "participant in the preparation of the advertising and the same required caution must be imposed upon them as would be imposed upon their client or advertiser."

We agree with the conclusion of the hearing examiner that the agency should be held but not solely because it was a mere "participant in the preparation of the advertising." We believe that the record in this case establishes that the agency was at least equally responsible with its principal for the deception found to be implicit in the advertising under consideration. Moreover, we believe that the agency should have been aware of the deceptive capacity of such advertising. Although the agency contends, in this connection, that it relied on information furnished by Merck, the deception found to exist stems not from the falsity of this information but from the use made of it by the agency. The advertising was based on two pieces of information, *i.e.*, laboratory tests established that Sucrets and Children's Sucrets by virtue of their hexylresorcinol content would under certain conditions kill germs, including staphylococcal and streptococcal germs, on contact and

that they would relieve the pain of minor sore throat. As used by the agency, these facts became at best half-truths and exaggerations. We refer particularly to the repeated use of the unqualified claims that the products "kill even staph and strep germs" and "help fight infection" in conjunction with the portrayal of a throat engulfed in flame and the prompt recovery of the user.¹³ A false impression can be made by words and sentences which are literally and technically true but framed in such a setting as to mislead or deceive, *Bockenstette v. F.T.C.*, 134 F. 2d 369 (10th Cir. 1943), and as one writer has pointed out "The skillful advertiser can mislead the consumer without misstating a single fact. The shrewd use of exaggeration, innuendo, ambiguity and half-truth is more efficacious from the advertiser's standpoint than factual assertions."¹⁴

Nothing in the information supplied by Merck indicated that Sucrets or Children's Sucrets would have any effect on the course of either a viral or bacterial infection of the throat. Nor was there anything to indicate that these products would promptly eliminate severe pain, such as that symbolized by fire. To the contrary, the agency knew that the products were recommended only for the relief of minor sore throat pain, mouth and throat irritations.¹⁵ Despite this knowledge, it developed advertising, which by the use of "exaggeration, innuendo, ambiguity and half truth" conveyed the false impression that the products would cure or help cure existing throat infections and would be effective in relieving severe pain of sore throat. As found by the examiner, the falsity of such advertising should have been apparent to its creator.

Nor is it a defense to the agency that the advertising was approved by Merck's legal and medical departments. The agency, more so than its principal, should have known whether the advertisements had the capacity to mislead or deceive the public. This is an area in which the agency has expertise. Its responsibility for creating deceptive advertising cannot be shifted to the principal who is liable in any event.

¹³ This advertising was aimed primarily at "self-medicating consumers" who, according to the agency, "depend upon advertising for product information, not upon the druggist or the physician." These consumers were regarded as "confused" and as "neither well-informed nor well-trained." The agency also believed that a "'sore throat' is a real disease to consumers" and that "the potential seriousness should be exploitable." CX-4.

¹⁴ Handler, *The Control of False Advertising Under the Wheeler-Lea Act*, 6 Law & Contemp. Prob. 91, 99 (1939).

¹⁵ CX-1, CX-2, and CX-4.

All arguments made by respondents not specifically discussed herein are rejected.

The order proposed by counsel supporting the complaint, although quite similar to that which accompanied the complaint, is very narrow in that it prohibits misrepresentations only as to Sucrets and Children's Sucrets and products of similar chemical composition or properties. As so drafted, its prohibitions are in effect confined to the advertising of throat lozenges having hexyl-resorcinol as the principal ingredient. Although testimony adduced during the hearings reveals quite clearly the very limited efficacy of other non-prescription drugs sold as sore throat "remedies," the proposed order leaves respondents free to make whatever representations they please with respect to the therapeutic usefulness of such preparations. The probability that they will make claims as to the medical effectiveness of any such proprietary drug they may sell is great¹⁶ and, on the facts of this record, the probability of misrepresentation is correspondingly real. Consequently, we believe that to be effective and to afford adequate protection of the public our order should be broadened to encompass false advertising by respondents of any proprietary throat preparation.¹⁷

The appeals of both respondents are denied. The hearing examiner's initial decision will be modified to conform with this opinion and, as so modified, will be adopted as the decision of the Commission.

FINAL ORDER

This matter having been heard by the Commission upon cross appeals from the hearing examiner's initial decision and upon

¹⁶ See the following comments of the respondent advertising agency emphasizing the importance of such claims:

"The battleground for proprietary drugs is in the consumer's mind. The consumer, through advertising, must be persuaded of a brand's unique advantages compared to competitive products which may be formulated to fulfill the same basic need. The product difference may be small. The advantage may be a real or an imagined difference. But, the consumer will only prefer one brand over another if he believes that it is really superior.

"Successful consumer products start with the consumer point of view. SUCRETS' potential can no longer be evaluated strictly through the eyes of the research and development group, the doctor, or the druggist. Its advantages and potential must be interpreted through the eyes of the consumer.

"Once these advantages are so viewed, then they must be expressed concisely and consistently in advertising which will be understandable and persuasive to the consumer." (Emphasis in the original.) CX-4

¹⁷ As to the respondent advertising agency, this portion of the order will apply only to misrepresentations which the agency knows, or has reason to believe, are false or deceptive. See Opinion of the Commission on Remand, *Colgate-Palmolive Company*, Docket 7736, February 18, 1963. [62 F.T.C. 1269]

briefs and oral argument in support of and in opposition to said appeals; and

The Commission having determined for the reasons stated in the accompanying opinion that the appeal of counsel supporting the complaint should be granted, that respondent's appeals should be denied, and that certain of the findings as to the facts and conclusions and the order to cease and desist contained in the initial decision should be modified to conform to the views expressed in said opinion:

It is ordered, That the initial decision be modified by striking finding number 21 and substituting therefor the following:

21. Through the use of said advertisements, respondents have represented, directly and by implication, that "Sucrets" and "Children's Sucrets," by virtue of their hexylresorcinol content, will unqualifiedly reach, kill, or render ineffectual, germs, including streptococci and staphylococci in the throat tissues, that are contributing to an existing throat infection, and that said products are effective in relieving severe sore throat pain.

It is further ordered, That the initial decision be modified by striking findings numbered 29 through 42 and substituting therefor the following:

29. Although "Sucrets" and "Children's Sucrets" will, by virtue of their hexylresorcinol content, kill germs, including staphylococci and streptococci, on contact therewith, they will not normally reach, kill or render ineffectual, germs, including streptococci and staphylococci in the throat tissues, that are contributing to an existing throat infection.

30. Streptococcal and staphylococcal infections of the throat may be precursors of infections of the heart, kidney, blood, bones and other structures, and the failure to institute promptly adequate treatment of streptococcal and staphylococcal throat infections may seriously imperil health. A special hazard of inadequate treatment of streptococcal sore throat is the subsequent development in certain persons, particularly children, of acute rheumatic fever or acute nephritis.

31. "Sucrets" and "Children's Sucrets" have no beneficial effect on severe pain of sore throat, nor will they provide relief of the pain of sore throat in excess of temporary relief of minor pain.

32. The aforesaid 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.

It is further ordered, That the initial decision be modified by striking therefrom that part of the section entitled "Conclusions" beginning on page 544 with the words "On the other hand" and ending on page 546 with the words "the following order shall issue" and substituting therefor the following:

The dissemination by the respondents of the false advertising, 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.

It is further ordered, That the initial decision be modified by striking the order on pages 546 and 547 and substituting therefor the following:

It is ordered, That respondent Merck & Co., Inc., a corporation trading as Quinton Company or under any other name, and its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of throat lozenges or any similar preparation, do forthwith cease and desist from, directly or indirectly:

1. Disseminating, or causing to be disseminated, by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which represents directly or by implication that "Sucrets" or "Children's Sucrets," or any other preparation of similar chemical composition or properties, by virtue of their hexylresorcinol content, or otherwise:

(a) Will reach, kill or have any effect upon germs contributing to an existing throat infection, or otherwise that they are effective in the treatment of throat infection.

(b) Will provide relief of the pain of sore throat in excess of temporary relief of minor pain.

2. Disseminating, or causing to be disseminated, by the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which misrepresents directly or by implication the efficacy or therapeutic value of any throat lozenge or similar preparation.

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

It is further ordered, That respondent Doherty, Clifford, Steers & Shenfield, Inc., a corporation, and its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of throat lozenges or any similar preparation, do forthwith cease and desist from, directly or indirectly:

1. Disseminating, or causing to be disseminated, by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which represents directly or by implication that "Sucrets" or "Children's Sucrets," or any other preparation of similar chemical composition or properties, by virtue of their hexylresorcinol content, or otherwise:

(a) Will reach, kill or have any effect upon germs contributing to an existing throat infection, or otherwise that they are effective in the treatment of throat infection.

(b) Will provide relief of the pain of sore throat in excess of temporary relief of minor pain.

2. Disseminating, or causing to be disseminated, by the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which misrepresents directly or by implication the efficacy or therapeutic value of any throat lozenge or similar preparation: *Provided, however*, That it shall be a defense hereunder that respondent neither knew nor had reason to know of the falsity or deceptive capacity of such advertisement.

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

Complaint

69 F.T.C.

It is further ordered, That the hearing examiner's initial decision, as modified by this order and the accompanying opinion, be, and it hereby is, adopted as the decision of the Commission.

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