

sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF
GEORGIA FABRIC CORPORATION, ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION, THE TEXTILE FIBER PRODUCTS IDENTIFI-
CATION AND THE WOOL PRODUCTS LABELING ACTS

Docket C-2289. Complaint, Sept. 21, 1972—Decision, Sept. 21, 1972.

Consent order requiring an Atlanta, Georgia, purchaser and wholesaler of fabrics, among other things to cease falsely advertising, deceptively guaranteeing, and misbranding his textile fiber products; misbranding the fiber content of his wool products; and misrepresenting the prices of certain products as being at "cost or below" and discounted from the "regular" price.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, the Wool Products Labeling Act of 1939, and the Textile Fiber Products Identification Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Georgia Fabric Corporation, a corporation, and Elliott I. Reich, individually and as an officer of Georgia Fabric Corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the rules and regulations promulgated under the Wool Products Labeling Act of 1939, and the Textile Fiber Products Identification Act, and it now appearing to the Commission that a proceeding by it in

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

PARAGRAPH 1. Respondent Georgia Fabric Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Georgia. The respondent corporation maintains its main offices and principal place of business at 4440 Commerce Circle, S.W., Atlanta, Georgia.

Respondent Elliott I. Reich is an officer of said corporation. He assists in formulating, directing and controlling the practices of the corporate respondent. He maintains offices at 108 W. 39th Street, New York, New York.

Respondents are engaged in the business of purchasing fabrics from various sources, and the wholesaling of such fabrics throughout the United States.

PAR. 2. Respondents are now and for some time last past have been engaged in the introduction, delivery for introduction, manufacture for introduction, sale, advertising, and offering for sale, in commerce, and in the transportation or causing to be transported in commerce, and in the importation into the United States, of textile fiber products; and have sold, offered for sale, advertised, delivered, transported and caused to be transported, textile fiber products which have been advertised or offered for sale in commerce; and have sold, offered for sale, advertised, delivered, transported, and caused to be transported after shipment in commerce, textile fiber products, either in their original state or contained in other textile fiber products, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act.

PAR. 3. Certain of said textile fiber products were misbranded by respondents within the intent and meaning of Section 4(a) of the Textile Fiber Products Identification Act and the rules and regulations promulgated thereunder, in that they were falsely and deceptively stamped, tagged, labeled, invoiced, advertised or otherwise identified as to the name or amount of the constituent fibers contained therein.

Among such misbranded textile fiber products, but not limited thereto, were textile fiber products, namely fabric, which were advertised in commerce as "Color Linens" and "Bonded Linen" by Georgia Fabric Corporation but which, in fact, did not contain the fiber linen but substantially different types of fibers.

PAR. 4. Certain of said textile fiber products were misbranded by respondents in that they were not stamped, tagged, labeled, or otherwise identified as required under the provisions of Section 4(b) of the Textile Fiber Products Identification Act, and in the manner and form

as prescribed by the rules and regulations promulgated under said Act.

Among such misbranded textile fiber products, but not limited thereto, were textile fiber products, namely fabric, with labels affixed by Georgia Fabric Corporation which failed to disclose the true generic names of the fibers present.

Also among such misbranded textile fiber products were fabrics offered by Georgia Fabric Corporation which did not have labels affixed thereto disclosing:

1. The percentages of the fibers present by weight.
2. The name, or other identification issued and registered by the Commission, of the manufacturer of the products or one or more persons subject to Section 3 with respect to such products.

PAR. 5. Respondents, in violation of Section 5(a) of the Textile Fiber Products Identification Act, have caused and participated in the removal of, prior to the time textile fiber products subject to the provisions of the Textile Fiber Products Identification Act were sold and delivered to the ultimate consumer, labels required by the Textile Fiber Products Identification Act to be affixed to such products, without substituting therefore labels conforming to Section 4 of said Act and in the manner prescribed by Section 5(b) of said Act.

PAR. 6. Respondents, in substituting a stamp, tag, label, or other identification pursuant to Section 5(b) of the Textile Fiber Products Identification Act, have not kept such records as would show the information set forth on the stamp, tag, label, or other identification that was removed, and the name or names of the person or persons from whom such textile fiber products were secured in violation of Section 6(b) of said Act.

PAR. 7. Respondents, in violation of Section 4(c) of the Textile Fiber Products Identification Act, have falsely and deceptively advertised textile fiber products by disclosing or implying fiber content in written advertisements without disclosing therein the same information as that required to be shown on the stamp, tag, label, or other identification under Section 4(b) (1) and (2), of said Act, except percentages of the fibers present need not be stated.

Among such textile fiber products falsely and deceptively advertised, but not limited thereto, were those fabrics described by Georgia Fabric Corporation solely through the terms "Orlons," "Dacron," and "Corduroy."

PAR. 8. Respondents, in violation of Section 10(b) of the Textile Fiber Products Identification Act, have furnished a false guaranty under said Act by falsely claiming textile fiber products will not be misbranded or falsely or deceptively invoiced or advertised within the

meaning of the Textile Fiber Products Identification Act and the rules and regulations thereunder when such is not the fact.

PAR. 9. The acts and practices of respondents as set forth above were, and are, in violation of the Textile Fiber Products Identification Act and the rules and regulations promulgated thereunder, and constituted, and now constitute, unfair methods of competition and unfair and deceptive acts and practices, in commerce, under the Federal Trade Commission Act.

PAR. 10. Respondents, now and for some time last past, have manufactured for introduction into commerce, introduced into commerce, sold, transported, distributed, delivered for shipment, shipped, and offered for sale, in commerce, as "commerce" is defined in the Wool Products Labeling Act of 1939, wool products as "wool product" is defined therein.

PAR. 11. Certain of said products were misbranded by respondents in that they were not stamped, tagged, labeled, or otherwise identified as required under the provisions of Section 4(a) (2) of the Wool Products Labeling Act of 1939 and in the manner and form prescribed by the rules and regulations promulgated under said Act.

PAR. 12. The acts and practices of the respondents as set forth above were, and are, in violation of the Wool Products Labeling Act of 1939 and the rules and regulations promulgated thereunder, and constituted, and now constitute, unfair methods of competition and unfair and deceptive acts and practices, in commerce, within the meaning of the Federal Trade Commission Act.

PAR. 13. Respondents, Georgia Fabric Corporation and Elliott I. Reich, are now and for some time last past have been engaged in the advertising, sale, offering for sale and distribution of fabrics, in commerce, as "commerce" is defined in the Federal Trade Commission Act.

In the course and conduct of their business, the said respondents have advertised their fabrics by means of circulars sent through the United States mails to numerous persons in the State of Georgia and various other States of the United States.

Also in the course and conduct of their business, said respondents now cause, and for some time last past have caused, their fabrics when sold, to be shipped from their place of business in the State of Georgia to purchasers thereof located in various other States of the United States.

Said respondents maintain and at all times mentioned herein have maintained, a substantial course of trade in said fabrics in commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 14. The said respondents in the course of their business, as aforesaid, have made certain statements with respect to the pricing of

fabrics in their advertising by mail. Among and typical, but not all-inclusive of such statements, are the following:

'70 SELLOUT EVERYTHING MUST GO COST OR BELOW

DACRON & COTTON POPLIN 25 yd. pcs. 5/10 pc./assortment BELOW OUR COST 45" wide now only 42½¢ yd.

PAR. 15. The said respondents in the course of their business, as aforesaid, have made further statements with respect to the pricing of other fabrics in their advertising by mail. Among and typical, but not all-inclusive of such statements are the following:

100% Cotton Fancy Pique White & Col. 44"/45" wide * * * reg. \$1.00 yd. sale 62½¢ yd.

PAR. 16. By and through the use of the above quoted statements, and others of similar import not specifically set out herein, the said respondents have represented directly or by implication that certain prices set forth in the advertisements were the "cost prices" or "below the cost prices" of the fabrics to the said respondents from their suppliers, and that certain other prices advertised were the prices that such fabrics were sold or offered for sale by the said respondents, in good faith, for a reasonably substantial period of time in the recent regular course of their business, and that the prices of the fabrics were reduced from the higher stated prices and the amounts of such reductions represented savings to the purchasers thereof.

PAR. 17. In truth and in fact the fabrics were not sold at the "cost prices" or "below the cost prices" of the fabrics to the said respondents from their suppliers and the "reg." (regular) prices set out in the advertisements were not the prices at which the advertised fabrics were sold or offered for sale by the said respondents, in good faith, for a reasonably substantial period of time in the recent regular course of their business, and the prices of the fabrics were not reduced from the higher prices; therefore, the amounts of such reductions were not as represented.

PAR. 18. The aforesaid acts and practices of respondents, as herein alleged in Paragraphs Fourteen, Fifteen, Sixteen and Seventeen, were and are, all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition, in commerce, within the intent and meaning of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a

copy of a draft of complaint which the Atlanta Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act, the Wool Products Labeling Act of 1939 and the Textile Fiber Products Identification Act; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Georgia Fabric Corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Georgia. Its offices and principal place of business is located at 4440 Commerce Circle, S.W., Atlanta, Georgia.

Respondent Elliott I. Reich is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of the corporate respondent including those hereinafter referred to. The address of Elliott I. Reich is 108 West 39th Street, New York, New York.

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

ORDER

It is ordered, That respondents Georgia Fabric Corporation, a corporation, its successors and assigns, and its officers, and Elliott I. Reich, individually and as an officer of Georgia Fabric Corporation, and respondents' representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the introduction, manufacture for introduction, sale, advertising or offering for sale, in commerce, or the transportation or causing to be transported in commerce, or the importation into the

United States of any textile fiber product; or in connection with the sale, offering for sale, advertising, delivery, transportation, or causing to be transported, of any textile fiber product which has been advertised or offered for sale, in commerce; or in connection with the sale, offering for sale, advertising, delivery, transportation or causing to be transported, after shipment in commerce, of any textile fiber product, whether in its original state or contained in other textile fiber products, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act, do forthwith cease and desist from:

A. Misbranding textile fiber products by:

1. Falsely or deceptively stamping, tagging, labeling, invoicing, advertising or otherwise identifying such products as to the name or amount of the constituent fibers contained therein.

2. Failing to affix a stamp, tag, label, or other means of identification to each such product showing in a clear, legible and conspicuous manner each element of information required to be disclosed by Section 4(b) of the Textile Fiber Products Identification Act.

B. Removing or mutilating, or causing or participating in the removal or mutilation of, the stamp, tag, label or other identification required by the Textile Fiber Products Identification Act to be affixed to any textile fiber product, after such textile fiber product has been shipped in commerce, and prior to the time such textile fiber product is sold and delivered to the ultimate consumer without substituting therefor labels conforming to Section 4 of said Act and the rules and regulations promulgated thereunder and in the manner prescribed by Section 5(b) of the Act.

C. Failing to maintain and preserve, as required by Section 6(b) of the Textile Fiber Products Identification Act, such records of the fiber content of textile fiber products as will show the information set forth on the stamps, tags, labels or other identification removed by respondents, together with the name or names of the person or persons from whom such textile fiber products were received, when substituting stamps, tags, labels or other identification pursuant to Section 5(b) of the Textile Fiber Products Identification Act.

D. Advertising textile fiber products by disclosing or implying fiber content in any written advertisement which is used to aid, promote, or assist directly or indirectly in the sale or offering for sale of such textile fiber product, unless the same information as

that required to be shown on the stamp, tag, label or other identification under Section 4(b)(1) and (2), Textile Fiber Products Identification Act, is contained in the heading, body, or other part of such written advertisement, except that the percentages of the fibers present in the textile fiber product need not be stated.

It is further ordered, That respondents Georgia Fabric Corporation, a corporation, its successors and assigns, and its officers, and Elliott I. Reich, individually and as an officer of Georgia Fabric Corporation, and respondents' representatives, agents and employees, directly or through any corporation, subsidiary, division, or other device, do forthwith cease and desist from furnishing a false guaranty that any textile fiber product is not misbranded or falsely or deceptively invoiced or advertised under the provisions of the Textile Fiber Products Identification Act.

It is further ordered, That respondents Georgia Fabric Corporation, a corporation, its successors and assigns, and its officers, and Elliott I. Reich, individually and as an officer of Georgia Fabric Corporation, and respondents' representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the introduction, or manufacture for introduction, into commerce, or the offering for sale, sale, transportation, distribution, delivery for shipment or shipment, in commerce, of wool products, as "commerce" and "wool product" are defined in the Wool Products Labeling Act of 1939, do forthwith cease and desist from misbranding such products by:

Failing to securely affix to, or place on, each such product a stamp, tag, label, or other means of identification showing in a clear and conspicuous manner each element of information required to be disclosed by Section 4(a)(2) of the Wool Products Labeling Act of 1939.

It is further ordered, That respondents Georgia Fabric Corporation, a corporation, its successors and assigns, and its officers, and Elliott I. Reich, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the offering for sale, sale or distribution of fabrics or any other articles of merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing the price of any fabrics or any other articles of merchandise as being "reg.," "regular," "regularly," "usually," "normally," or any other term of the like import, unless the price quoted is the actual bona fide price at which the described fabrics or any other articles of merchandise were openly and actively

offered by respondents to the purchasing public on a regular basis for a reasonably substantial period of time in the recent, regular course of business.

2. Representing any fabrics or any other articles of merchandise as being offered for sale at "Below Our Cost," "Below Cost," or other terminology of like meaning, unless such fabrics or any other articles of merchandise are being offered by respondents at below actual purchase invoice cost.

3. Misrepresenting in any manner, the amount of savings available to purchasers of respondents' fabrics or any other articles of merchandise or the amount by which the price of fabrics or any other articles of merchandise have been usually and customarily sold by respondents in the recent regular course of business or from the prices at which they have been usually and customarily sold at retail in the trade area where the representations are made.

4. Failing to maintain full and adequate records disclosing the facts upon which any pricing claims are based.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent, Georgia Fabric Corporation, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

It is further ordered, That the respondent corporation, Georgia Fabric Corporation, shall forthwith distribute a copy of the order to each of its operating divisions.

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

Complaint

81 F.T.C.

IN THE MATTER OF

THE FIRESTONE TIRE & RUBBER COMPANY

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE
COMMISSION ACT*Docket 8818. Complaint, June 29, 1970—Decision, Sept. 22, 1972.**

Order requiring an Akron, Ohio, manufacturer of tires to cease misrepresenting the effectiveness of respondent's quality control or inspection procedures; using the words "The safe tire," without disclosing in close conjunction that the safety of any tire is affected by conditions of use such as inflation pressure, vehicle weight, etc.; representing that any of respondent's automobile tires have any safety or performance characteristics or are superior in quality or performance without substantiated, competent, scientific tests. The order dismisses the charges in the complaint relating to the advertising of prices.

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 the Firestone Tire & Rubber Company, a corporation, hereinafter referred to as respondent, has 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 the Firestone Tire & Rubber Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its principal office and place of business located at 1200 Firestone Parkway, in the city of Akron, State of Ohio.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the manufacture, advertising, offering for sale, sale and distribution of automobile tires and other products.

PAR. 3. In the course and conduct of its business, respondent sells automobile tires and other products to the purchasing public through its wholly-owned stores and through distributors and jobbers for resale to retailers who sell to the purchasing public. Respondent's wholly-owned retail outlets, distributors and jobbers are located throughout the United States. In the course of its business as aforesaid, respondent ships its automobile tires and other products from its various manufacturing plants and warehouses located in a number of states to its

*Petition to review filed by respondent Oct. 5, 1972, U.S.C.A. 6th Circuit.

retail outlets, distributors and jobbers located in various other States of the United States and in the District of Columbia. Respondent maintains, and at all times mentioned herein has maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. To promote the sale of its automobile tires and other products, respondent prepares, or causes to be prepared, advertisements which it publishes or causes to be published, or places in the hands of others for publication, in newspapers, magazines and other media throughout the United States.

Among and typical, but not all inclusive, of such advertisements are the following:

(a) Gigantic July 4th Offer. 10 Day Offer Now thru Sat. July 2.

TIRE JAMBOREE

Low, low prices on our popular high quality nylon cord tire * * * the Firestone Safety Champion.

Jamboree Prices Start at \$16 Plus \$1.61 per tire Fed. Excise tax, sales tax and trade-in tire with recappable cord body 6.00-13 tubeless blackwall.

[Advertisement includes listing of other sizes of Safety Champion tires with price listed for each.]

(b) Spectacular July Tire OFFER 12 Big Days Now thru July 30 Low, low prices on our most popular tire! Firestone Deluxe Champions. Prices start at \$18 plus \$1.38 Fed. excise tax, sales tax and trade-in tire with recappable cord body. 6.00-13 tubeless blackwall.

[Advertisement includes listing of other sizes of Deluxe Champions with price listed for each.]

(c) Now thru Sept. 3 SAVE BIG! BUY NOW AT DISCOUNT PRICES.

FIRESTONE

Pre-Labor Day

TIRE SALE

Prices slashed on

FIRESTONE

Safety Champions

Sale Prices Start at \$16 Plus \$1.61 Fed. excise tax and trade-in tire off your car.

[Advertisement includes listing of other sizes of Safety Champion tires with price listed for each.]

Complaint

81 F.T.C.

Your choice of 2 fine quality FIRESTONE Nylon Cord Tires Any Size One Low Price!

Firestone Nylonaire

Any size listed \$12

Firestone Safety Champion

Any size listed \$20

[Advertisement contains listing of sizes offered under each price category.]

THE SAFE TIRE FIRESTONE When you buy a Firestone Tire—no matter how much or how little you pay—you get a safe tire. Firestone tires are custom-built one by one. By skilled craftsmen. And they're personally inspected for an extra margin of safety. If these tires don't pass all of the exacting Firestone inspections, they don't get out.

* * * * *

Firestone—The Safe Tire, At 60,000 Firestone Safe Tire Centers. At no more cost than ordinary tires.

(f) * * * Like the original Super Sports Wide Oval Tire. It came straight out of Firestone racing research.

It's built lower, wider. Nearly two inches wider than regular tires. To corner better, run cooler, stop 25% quicker.

PAR. 5. By and through the foregoing statements and representations as set forth in Paragraph Four hereof, respondent represented, directly or by implication, that:

1. As to the advertisements identified as (a)–(c): the tires advertised were being offered at prices which were significantly reduced from the actual bona fide prices at which those tires had been sold to the public at retail by respondent in the recent regular course of its business prior to the publication of the advertisement and purchasers would thereby realize bona fide savings in the amount of such reduction.

2. As to the advertisement identified as (d): the tires listed in each price grouping were being offered at a price which was significantly reduced from the actual bona fide price at which each of the tires listed, including the smallest size, had been sold to the public at retail by respondent in the recent regular course of its business prior to the publication of the advertisement and purchasers of each size tire would realize bona fide savings in the amount of such reduction.

3. As to the advertisement identified as (e): a purchaser of a tire bearing the brand name "Firestone" is assured of receiving a tire which will be free from any defects in materials or workmanship or any other manufacturing defects.

4. Further as to the advertisement identified as (e): a consumer purchasing tires bearing the brand name "Firestone" will receive tires which will be safe under all conditions of use.

5. As to the advertisement identified as (f): respondent had established through adequate scientific tests that any car equipped with Firestone Super Sports Wide Oval tires could be stopped 25 percent quicker under typical road and weather conditions for the usable life of the original tread of such tires when compared with the performance of the same vehicle under the same conditions when equipped with any manufacturer's tires of a particular construction.

PAR. 6. In truth and in fact,

1. The advertised tires were not being offered at prices which were significantly reduced from the actual bona fide prices at which those tires had been sold to the public at retail by respondent in the recent regular course of its business prior to the publication of the advertisements and purchasers did not thereby realize bona fide savings in such amounts.

2. The tires listed in each price grouping were not being offered at a price which was significantly reduced from the actual bona fide price at which each of the tires listed, including the smallest size, had been sold to the public at retail by respondent in the recent regular course of its business prior to the publication of the advertisement and purchasers of each size tire would not realize bona fide savings in such amounts.

3. A purchaser of a tire bearing the brand name "Firestone" is not assured of receiving a tire which will be free from any defects in materials or workmanship or any other manufacturing defects. Although respondent may exercise due care in the course of manufacturing its tires, respondent cannot assure that tires containing defects in materials or workmanship or other manufacturing defects will not reach the hands of the purchasing public.

4. Although tires bearing the brand name "Firestone" may meet or exceed applicable governmental and industry safety standards, such tires will not be safe under all conditions of use. The safety of any tire is affected by the conditions under which it is used such as inflation pressure and vehicle weight, but respondent makes no disclosure in advertisements regarding the safety of its tires or the existence of such limitations on the safety of its tires. Respondent's failure to make such disclosure enhances the capacity and tendency of respondent's advertisements to mislead and deceive prospective purchasers as to the safety of respondent's tires.

5. Respondent had not established through adequate scientific tests that any car equipped with Firestone Super Sports Wide Oval tires could be stopped 25 percent quicker under typical road and weather conditions for the usable life of the original tread of such tires when

Complaint

81 F.T.C.

compared with the performance of the same vehicle under the same conditions when equipped with any manufacturer's tires of a particular construction.

Therefore, the statements and representations as set forth in Paragraphs Four and Five hereof were, and are, false, misleading and deceptive.

PAR. 7. In the course and conduct of its business, respondent has engaged in the additional unfair and deceptive acts and practices, as follows:

Respondent has published, or caused to be published, numerous advertisements containing offers to sell tires at the prices specified therein. Said advertisements contained no statements or representations, direct or by implication, that the advertised tires would be sold at the advertised prices only upon request or other specific response to the advertised offer. Notwithstanding the general nature of said advertised offer, respondent, through its wholly-owned retail outlets, during the time that such advertised offers were in effect, frequently sold the advertised tires to purchasers at prices which were substantially in excess of the advertised prices while selling such tires to other purchasers at the advertised prices.

Such acts and practices on respondent's part were, and are, unfair and deceptive acts and practices.

PAR. 8. In the course and conduct of its business as aforesaid, respondent has engaged in the following unfair and deceptive acts and practices.

Among the tire names used by respondent to designate its various lines of tires is the name "Safety Champion." By and through the use of such name, respondent represents, directly or by implication, that the tires so designated have unique construction or performance features which render them safer than other tires.

In truth and in fact, respondent's tires designated by the name "Safety Champion" do not have any unique construction or performance features which render them safer than other tires. There are other tires available to consumers, including other of respondent's tires, which are as safe as those designated "Safety Champion."

Therefore, the use of the name "Safety Champion" as aforesaid is misleading and deceptive.

PAR. 9. In the course and conduct of its business, and at all times mentioned herein, respondent has been in substantial competition, in commerce, with corporations, firms and individuals engaged in the sale of automobile tires and other products of the same general kind and nature as those sold by respondent.

PAR. 10. The use by respondent of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondent's products by reason of said erroneous and mistaken belief.

PAR. 11. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

Mr. Robert J. Hughes and Mr. Larry P. Weinberg supporting the complaint.

Mr. Hammond E. Chaffetz, Mr. Fred H. Bartlit, Jr., Mr. Thomas A. Gottschalk and Mr. James M. Amend, of Kirkland, Ellis, Hodson, Chaffetz & Masters, Chicago, Illinois. Mr. John F. Floberg, Mr. Anthony J. Destro, Mr. Harold L. Henderson, Akron, Ohio, for respondent.

Mr. Victor H. Kramer and Mr. L. Geoffrey Cowan, Washington, D.C. for intervenor, Students Opposing Unfair Practices, Inc.

Mr. Gilbert H. Weil, of Weil, Lee & Bergin, New York, New York, for intervenor, Association of National Advertisers, Inc.

INITIAL DECISION BY EDWARD CREEL, HEARING EXAMINER

AUGUST 17, 1971

PRELIMINARY STATEMENT

The Federal Trade Commission issued its complaint in this proceeding on June 29, 1970, charging respondent the Firestone Tire & Rubber Company with violations of Section 5 of the Federal Trade Commission Act. It was alleged in the complaint that respondent had represented that the prices of its tires were significantly reduced from the customary or regular price; that these tires were free from defects; that they were safe under all conditions of use; and that they would stop a vehicle 25 percent quicker under typical road and weather conditions than would other tires. It was further alleged that the advertised tires were not offered at prices which were significantly reduced from the regular price; that respondent could not assure purchasers that tires containing defects would not be sold; that respondent's tires were not safe under all conditions of use; and that respondent had not

established through adequate scientific tests that any car equipped with its tires could be stopped 25 percent quicker under typical road and weather conditions than it would if equipped with other tires. It was also alleged that respondent had sold the advertised tires to some purchasers at prices which were substantially higher than such tires were sold to other purchasers. In its answer, filed September 8, 1970, respondent denied the principal allegations of the complaint.

Two prehearing conferences were held before hearings began and these conferences resulted in stipulations between the parties that substantially reduced the length of the hearings.

Prior to the commencement of hearings, the Commission had ordered that Students Opposing Unfair Practices, Inc. (hereinafter referred to as "SOUP"), be permitted to intervene for the limited purposes of:

- (1) presenting, at the conclusion of complaint counsel's case-in-chief, relevant, material, and non-cumulative evidence on the issue of whether the proposed order to cease and desist adequately protects the public interest;
- (2) presenting, with respect to said issue, briefs and oral argument in such manner and to such extent as the examiner may deem reasonable; and
- (3) exercising, with respect to said issue, such discovery rights as the examiner shall deem reasonable and necessary.

Following this order, the hearing examiner granted, in part, a motion to intervene filed by the Association of National Advertisers, Inc. (hereinafter referred to as "ANA") and ordered that that organization

* * * be permitted to intervene for the limited purpose of presenting relevant, material, and non-cumulative evidence on the issue of whether the proposed order to cease and desist adequately protects the public interest. This evidence may be offered at the conclusion of the reception of respondent's evidence in defense of the case-in-chief presented against it.

By agreement of the parties, both limited intervenors were permitted to cross-examine all witnesses and to object to the introduction of evidence as though they were, in fact, parties to the proceeding. Both of them presented evidence and filed proposed findings of fact on the matters permitted by their limited intervention. Hearings in this matter were held in Washington, D.C., beginning on March 9, 1971, and ending April 22, 1971. Additional evidence was received by order and the record was closed for reception of evidence on May 20, 1971.

The abbreviations used herein are:

Comp.—Complaint.

Ans.—Answer to complaint.

CX—Commission Exhibit.

RX—Respondent Exhibit.

Tr.—Transcript of testimony and of prehearing conferences.

SOUP Ex.—Exhibit of intervenor SOUP.

ANA Ex.—Exhibit of intervenor ANA.

This proceeding is before the hearing examiner for final consideration upon the complaint, answer, testimony and other evidence, and proposed findings of fact and conclusions filed by counsel for respondent, counsel supporting the complaint, counsel for intervenor SOUP, and counsel for intervenor ANA. Many of the proposals of the parties and the intervenors are adopted and used herein either in whole or in part. It is believed that the order contained herein clearly informs the parties of the disposition of their proposals. Consideration has been given to all of the proposed findings of fact and conclusions, replies thereto, and briefs; and all proposed findings of fact and conclusions not hereinafter specifically found or concluded are rejected as being inaccurate or as not being necessary or material; and the hearing examiner, having considered the entire record herein, makes the following findings of fact and conclusions drawn therefrom, and issues the following order:

FINDINGS OF FACT

1. Respondent the Firestone Tire & Rubber Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its principal office and place of business located at 1200 Firestone Parkway, in the city of Akron, State of Ohio.
2. Respondent is now, and for some time last past has been, engaged in the manufacture, advertising, offering for sale, sale, and distribution of automobile tires and other products.
3. In the course and conduct of its business, respondent sells automobile tires and other products to the purchasing public through its wholly-owned stores and through distributors and jobbers for resale to retailers who sell to the purchasing public. Respondent's wholly-owned retail outlets, distributors, and jobbers are located throughout the United States. In the course of its business as aforesaid, respondent ships its automobile tires and other products from its various manufacturing plants and warehouses located in a number of states to its retail outlets, distributors, and jobbers located in various other States of the United States and in the District of Columbia. Respondent maintains and at all times mentioned herein has maintained a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.
4. To promote the sale of its automobile tires and other products, respondent prepares or causes to be prepared advertisements which it publishes, causes to be published, or places in the hands of others for publication in newspapers, magazines, and other media throughout the United States.

Initial Decision

81 F.T.C.

Among such advertisements were the following:

(a) Gigantic July 4th Offer. 10 Day Offer Now thru Sat. July 2.

TIRE JAMBOREE

Low, low prices on our popular high quality nylon cord tire * * * the Firestone Safety Champion.

Jamboree Prices Start at \$16 Plus \$1.61 per tire Fed. Excise tax, sales tax and trade-in tire with recappable cord body 6.00-13 tubeless blackwall.

[Advertisement includes listing of other sizes of Safety Champion tires with price listed for each.]

(b) Spectacular July Tire OFFER 12 Big Days Now thru July 30. Low, low prices on our most popular tire! Firestone Deluxe Champions. Prices start at \$18 plus \$1.38 Fed. excise tax, sales tax and trade-in tire with recappable cord body, 6.00-13 tubeless blackwall.

[Advertisement includes listing of other sizes of Deluxe Champions with price listed for each.]

(c) Now thru Sept. 3 SAVE BIG! BUY NOW AT DISCOUNT PRICES

FIRESTONE

Pre-Labor Day

TIRE SALE

Prices slashed on

FIRESTONE

Safety Champions

Sale Prices Start at \$16 Plus \$1.61 Fed. excise tax and trade-in tire off your car.

[Advertisement includes listing of other sizes of Safety Champion tires with price listed for each.]

(d) Your choice of 2 fine quality FIRESTONE Nylon Cord Tires Any Size One Low Price!

Firestone Nylonaire Any size listed \$12 Firestone Safety Champion Any size listed \$20.

[Advertisement contains listing of sizes offered under each price category.]

(e) THE SAFE TIRE FIRESTONE. When you buy a Firestone Tire—no matter how much or how little you pay—you get a safe tire. Firestone tires are custom-built one by one. By skilled craftsmen. And they're personally inspected for an extra margin of safety. If these tires don't pass all of the exacting Firestone inspections, they don't get out.

* * * * *

Firestone—The Safe Tire. At 60,000 Firestone Safe Tire Centers. At no more cost than ordinary tires.

(f) * * * Like the original Super Sports Wide Oval Tire. It came straight out of Firestone racing research.

It's built lower, wider. Nearly two inches wider than regular tires. To corner better, run cooler, stop 25% quicker.

(All of the foregoing facts were admitted in the answer.)

5. It is found that by and through the foregoing statements and representations as set forth in the preceding finding, respondent represented, directly or by implication, that:

(1) As to the advertisements identified as (a)–(c): the tires advertised were being offered at prices which were significantly reduced from the actual bona fide prices at which those tires had been sold to the public at retail by respondent in the recent regular course of its business prior to the publication of the advertisement and purchasers would thereby realize bona fide savings in the amount of such reduction.

(2) As to the advertisement identified as (d): the tires listed in each price grouping were being offered at a price which was significantly reduced from the actual bona fide price at which each of the tires listed, including the smallest size, had been sold to the public at retail by respondent in the recent regular course of its business prior to the publication of the advertisement and purchasers of each size tire would realize bona fide savings in the amount of such reduction.

(3) As to the advertisement identified as (e): a purchaser of a tire bearing the brand name "Firestone" is assured of receiving a tire which will be free from any defects in materials or workmanship or any other manufacturing defects.

(4) Further as to the advertisement identified as (e): a consumer purchasing tires bearing the brand name "Firestone" will receive tires which will be safe under all conditions of use.

(5) As to the advertisement identified as (f): respondent had established that any car equipped with Firestone Super Sports Wide Oval tires could be stopped 25 percent quicker under typical road and weather conditions for the usable life of the original tread of such tires when compared with the performance of the same vehicle under the same conditions when equipped with any manufacturer's tires of a particular construction.

These findings of the meaning of the advertisements are the constructions that are alleged in the complaint except that the words "through adequate scientific tests" are deleted from subpart 5 of Paragraph 5 of the complaint are the constructions the hearing examiner places on them.

The Pricing Issue

6. Copies of these advertisements were received into evidence in the form of five newspaper advertising mats. Two different advertising mats were introduced for the "Any Size One Low Price!" advertisement, Finding 4(d), *supra* (CX 9). These five advertising mats are stipulated by and between counsel to be the price advertisements relied upon and selected from a large number of respondent's newspaper advertising mats provided to Commission personnel during the precomplaint investigation (CX 9; Tr. 90-92). The fact of the actual publication of each promotion was expressly not waived by respondent (CX 9, 15). The parties stipulated that either copies of published advertisements or affidavits from newspaper employees would be sufficient evidence and proof of the publication (or nonpublication) of these or other advertisements (CX 9).

7. The evidence indicates that three regions—Philadelphia, Pennsylvania; Baltimore, Maryland; and Washington, D.C.—were typical of respondent's other regions throughout the nation and that the practices found to be present in those regions should be regarded as the practices then engaged in by respondent in the other regions throughout the nation (Tr. 99; CX 10-C). During the precomplaint investigation, Commission personnel reviewed and copied certain sales slips from three wholly-owned outlets of respondent located at the following addresses:

- (a) 13th & K Streets, N.W., Washington, D.C.
- (b) 2001 North Howard Street, Baltimore, Maryland.
- (c) 32nd & Market Streets, Philadelphia, Pennsylvania.

Counsel supporting the complaint selected certain of these sales slips for use as evidence in this proceeding (CX 15; Tr. 102, 104). To avoid burdening the record, the parties stipulated that certain machine tabulations, or printouts, containing information appearing on the sales slips selected by counsel supporting the complaint would be received into evidence. The information extracted from the sales slips was arranged in several different "schedules" to facilitate comparison of the information with the four price advertisements relied upon by counsel supporting the complaint. The parties further stipulated that these schedules accurately set forth the lines (or brands), sizes, sidewall colors, and prices of some tires sold on certain indicated dates by the three respondent stores (CX 15).

8. A. The parties stipulated that the factual issues regarding the four price advertisements are,

- (1) Did "July 4th Jamboree," "July Tire Offer," and "Any Size One Low Price!" advertisements represent that the advertised prices

offered reductions or savings from the prices at which the tires advertised were regularly sold?

(2) Are the selected sales slips fairly representative of respondent's sales in a) Baltimore, Maryland, b) Washington, D.C., and c) Philadelphia, Pennsylvania?

(3) Are the selected sales slips fairly representative of respondent's sales of the lines and sizes of tires advertised?

(4) Are the selected sales slips representative of respondent's sales with respect to the prices at which tires were sold during a) the time periods covered by the four price advertisements and b) the time periods when no advertised prices for the same tires were in effect?

(5) Do the selected sales slips show that (when various commercial and other negotiated discounts are considered) the prices published in the four price advertisements were significantly reduced from the prices actually charged in time periods when no advertised prices for the same tires were in effect?

(6) Do the selected sales slips show that the prices published in the four price advertisements were honored by respondent? (CX 1)

B. As is more specifically found herein, the answer to each of these stipulated issues is in the affirmative except that only three of the four price advertisements are in issue. There is no evidence that the advertisement alleged in paragraph 4(d) of the complaint was published in the areas involved during the time periods in issue.

Advertising Periods in Issue

9. Counsel supporting the complaint introduced into evidence copies of five newspaper advertising mats in connection with the four price advertisements challenged in the complaint. Prior to hearing, respondent notified counsel supporting the complaint that it would not stipulate that each of these mats was actually published in each of the three cities from which sales slips were selected. Proof of publication was expressly reserved for hearing (CX 9, 15).

10. Counsel supporting the complaint introduced no evidence of the publication of any of the five newspaper advertising mats on which he relied. Respondent stipulated that three of the five advertising mats had been published in the cities indicated below and were effective for the time periods shown (Tr. 1215-16; CX 9; Tr. 890):

"July 4th Jamboree:"

Washington: June 22, 1966 through July 2, 1966

Philadelphia: June 22, 1966 through July 2, 1966

Baltimore: June 22, 1966 through July 2, 1966

"July Tire Offer:"

Washington: July 17, 1966 through July 30, 1966

Philadelphia: July 18, 1966 through July 30, 1966

"Pre-Labor Day Sale:"

Baltimore: September 1, 1966 through September 3, 1966.

These periods hereinafter are referred to as the advertising periods in issue; the prices advertised during these periods are referred to as the advertised prices in issue.

11. From the face of the advertising mats (CX 9), it is apparent that the advertisements were prepared for possible publication during the following time periods:

"July 4th Jamboree:" June 22, 1966 through July 2, 1966

"July Tire Offer:" July 17, 1966 through July 30, 1966

"Pre-Labor Day Sale:" not later than September 3, 1966.

The "Pre-Labor Day Sale" advertisement appeared in Baltimore newspapers only on September 1, 1966 (RX 18; Tr. 890-91).

12. Pursuant to the stipulation of the parties (CX 9), it is established by the uncontested affidavits of employees of the major metropolitan newspapers in Washington, D.C., Baltimore, and Philadelphia that the "July Tire Offer" advertisement was not published in Baltimore during the period July 17, 1966, through July 30, 1966; the "Pre-Labor Day Sale" advertisement was not published in Washington, D.C., during the period August 17, 1966, through September 3, 1966, and was not published in Philadelphia during the period August 17, 1966, through September 3, 1966; the "Any Size One Low Price!" advertising mats were not published in Washington during November and December 1966 nor in Baltimore during November and December 1966 nor in Philadelphia during November and December 1966 (RX 17; CX 9).

13. The "Any Size One Low Price!" advertisement, Finding 4(d), *supra*, was therefore not published in any of the three cities from which sales slips were selected during the time period at issue, and the representation made in it is not in issue.

14. The prices advertised in the "July 4th Jamboree," "July Tire Offer," and "Pre-Labor Day Sale" advertisements were reduced at least 10 percent from the retail exchange prices published by respondent in the printed price lists then in effect for the tires advertised (Tr. 1236; CX 13). In 1966, as well as today, "exchange" prices were the prices to be charged by respondent stores to retail customers who traded in a recappable cord body with each new tire purchased (Tr. 973-74; CX 13). Exchange prices are lower than list prices for the same tires and are the lowest published retail prices to be charged

individual consumers, provided a recappable cord body is traded in (Tr. 972-73; CX 13, 15).

15. In 1966, by advertising prices which were reduced by at least 10 percent from its printed retail prices, respondent offered substantial price reductions or savings to retail customers.

16. Apart from respondent's printed price lists (CX 13), counsel supporting the complaint's only evidence of respondent's retail prices before, during, and after the advertising periods identified in Finding 10 are the sales slips listed in the following schedules:

(1) *Schedule F*, pp. 1-9 (CX 15, pp. 50-58) is a listing of information from selected sales slips reflecting all purchases of Deluxe Champion tires which are relied upon by complaint counsel (CX 15, p. 3).

(2) *Schedule G* (CX 15, pp. 71-77) is a listing of information from selected sales slips reflecting all purchases of Safety Champion tires which are relied upon by complaint counsel during a period approximately 60 days prior to through 90 days following the dates on which the "July 4th Jamboree" advertisement was published (CX 15, p. 3).

(3) *Schedule I* (CX 15, pp. 86-87) is a listing of information from selected sales slips reflecting all purchases of Safety Champion tires from respondent's Baltimore store, which are relied upon by counsel supporting the complaint during a period approximately 90 days prior to through 90 days following the date on which the "Pre-Labor Day Sale" was published (CX 15, p. 3).

17. Mr. Thomas Donahoe, a certified public accountant and a partner in Price Waterhouse & Co. (Tr. 1223), testified regarding an analysis made by him of the sales slips selected by counsel supporting the complaint. He correctly determined that there were a total of 357 different sales slips listed in the three schedules of sales slips identified in the preceding finding, excluding the Baltimore store's sales slips reflecting purchases of Deluxe Champion tires (Tr. 1232-33; RX 46, pp. 2, 59).

18. Pursuant to stipulation (CX 9), it is established that price advertisements were published on behalf of the three stores and were effective during the time periods and for the lines of tires indicated: *Washington, D.C.*

Safety Champion, May 18-May 28, 1966 (RX 36, 37); August 28-September 3, 1966 (RX 39, 40)

Deluxe Champion, May 26-May 28, 1966 (RX 37); June 12-June 21, 1966 (white sidewall only) (RX 4, 38)

Philadelphia, Penn.

Safety Champion, May 18-May 31, 1966 (RX 42, 43); August 22-September 3, 1966 (RX 44)

Deluxe Champion, June 12-June 21, 1966 (RX 3)
Baltimore, Md.

Safety Champion, May 9-May 28, 1966 (RX 41)

The effective dates for the June 12 through 21, 1966, Deluxe Champion promotion in Philadelphia and Washington and the May Safety Champion promotion in Baltimore are confirmed also by other evidence (RX 26).

19. All the sizes and sidewall colors of Deluxe Champion and Safety Champion tires appearing on the sales slips relied upon by counsel supporting the complaint appear also in the advertisements for those lines identified in the preceding finding. The prices advertised in those advertisements were approximately 10 percent lower than respondent's published exchange prices (CX 13, p. 15; RX 3, 4, 36-44; Tr. 973-74).

20. Through affidavits of four employees from the three stores, it is established that eighteen customers identified on the 357 selected sales slips had been charged less than exchange prices because they were employed by a commercial, wholesale, or national account or they were employed by respondent or they enjoyed a special relationship to a respondent employee (RX 19, 20, 21, 22). Two of these affidavits also established that five other customers had received lower prices because they ordered tires during a period when advertised prices were in effect (RX 20, 22). Three affidavits established that five other customers could not be located and were therefore unavailable (RX 19, 20, 22).

Two of the four employees who had prepared affidavits testified and confirmed that their affidavits were accurate (Tr. 893-94, 909). Counsel supporting the complaint waived cross-examination of the other two employees who submitted affidavits.

The information established by these four affidavits is summarized in the following table:

	Number and type of customers	Number of employees' relatives or friends	Number ordering tire during sale	Number of customers unavailable
Washington	1 Commercial		1	2
	1 National			1
Baltimore	2 Firestone			1
Philadelphia	1 Firestone	2 Relatives	4	2
	7 Commercial	1 Friend		
	1 Wholesale			
	2 National			
Total	15	3	5	5

21. Mr. Donahoe submitted as his report worksheets and bar graphs summarizing his worksheets that categorized the sales slips which he reviewed in the following manner (RX 46; Tr. 1228-29):

(1) All sales slips referred to in the four store employees' affidavits (RX 19-22) were classified according to whether they were referred to as employee discounts, customer unavailable for contact, and miscellaneous.

(2) Next, the other sales slips were classified according to whether the prices charged before or after advertising periods in issue were at least 10 percent higher than the advertised prices in issue.

(3) Next, the remaining sales slips were classified according to whether the prices charged were advertised prices during advertising periods in issue or during advertising periods not in issue (RX 49, 3, 4, 36, 44).

(4) The remaining sales slips were classified as the "remainder."

Mr. Donahoe's classification of the sales slips, on his worksheets is accurate.

22. Of the 357 sales slips, 208 reflected prices charged retail customers before or after the advertising periods in issue, which prices were at least 10 percent higher than the advertised prices in issue; 104 reflected purchases at advertised prices during both the advertising periods in issue and other advertising periods not in issue; 28 were referred to in the store employees' affidavits, one showed on its face that a retail customer received a special price as a reward for his honesty in returning the tires put on his car by mistake; and the 16 that remained reflect either a) prices which were lower than exchange prices and were charged to customers before or after the advertising periods in issue or b) prices which were higher than the advertised prices in issue and were charged to customers during advertising periods in issue (RX 46, p. 2).

23. Of the 357 selected sales slips, it is established that there were 154 from the Washington store, 160 from the Philadelphia store, and 43 from the Baltimore store (RX 46, p. 3).

Of the 154 Washington sales slips, 99 reflected retail purchases that were at prices at least 10 percent higher than the advertised prices in issue and that occurred either before or after the advertising periods in issue; 48 were at advertised prices during the periods in which advertised prices were in effect; five were referred to in the affidavits; and two remained that reflected a) purchases at prices lower than exchange prices during nonadvertising periods or b) purchases at prices greater than advertised prices during advertising periods in issue (RX 46, p. 3).

Of the 160 Philadelphia sales slips, 84 reflected purchases that were at prices at least 10 percent higher than the advertised prices in issue and that occurred either before or after advertising periods in issue; 44 were at advertised prices during periods in which advertised prices were in effect; 21 were covered by affidavits; and the 11 that remained reflected a) purchases at prices lower than the exchange prices during nonadvertising periods or b) purchases at prices greater than advertised prices during advertising periods in issue (RX 46, p. 3).

Of the 43 Baltimore sales slips, 25 reflected purchases that were at prices at least 10 percent higher than the advertised prices in issue and that occurred either before or after advertising periods in issue; 12 were at advertised prices or lower during periods in which advertised prices were in effect; three were referred to in an affidavit; and three remained that reflected a) purchases at prices lower than exchange prices during nonadvertising periods or b) purchases at prices greater than advertised prices during advertising periods in issue (RX 46, p. 3).

24. As to the three stores, the 357 sales slips, covering purchases of tires for a 6-month period, generally showed that the advertised prices in issue were reduced by at least 10 percent from the prices actually charged in time periods when no advertised prices for the same tires were in effect.

Although these stores were generous in allowing discounts to friends and others, they had a going retail price that was substantially higher than the sale price.

Through the process of elimination, it is concluded from the stipulation of the issues that the charge of violation of law by respondent for charging substantially higher prices to some purchasers than to others has been abandoned (CX 1).

The foregoing findings, regarding details of advertising and sales, are based on the proposals submitted by respondent. It is concluded that the alleged pricing misrepresentations have not been established by the evidence and the charges in the complaint relative to pricing should be and are dismissed.

The Safety Issue

25. The other issue in this case may be characterized as the safety issue. In several advertisements respondent referred to "The safe tire," used the brand name Safety Champion, and made representations that its tires were free from defects and that they would "Stop 25% quicker." Examples of these representations are set out in Finding 4.

26. The respondent offered in evidence a survey which it had had prepared by an expert consultant that was designed to discover whether "The safe tire" advertising stated or implied to readers that a purchaser of "Firestone" brand tires was assured of receiving tires free from any defects and was assured of receiving tires that would be safe under all conditions of use, including overloading and improper inflation. The survey was designed and conducted in a professional and competent manner, and the results are shown in RX 53. In this survey, a number of prospective tire buyers were shown an advertisement, which is attached to RX 53, headed "The Safe Tire. Firestone" that makes various claims regarding the safety of this tire. The majority of those interviewed (52.7 percent) thought the advertisement said that respondent did all it could to use the best procedures to make its tires safe and as free as possible from defects.

Of those interviewed, 30.2 percent understood the advertisement to say that "almost all" of respondent's tires were safe under normal conditions or that "each model" of respondent's tires at least met minimum Government safety standards.

Of those interviewed, 15.3 percent thought the advertisement said that respondent's tires were absolutely safe or absolutely free from defects.

Respondent contends that these and other results of the survey establish that no significant segment of the average tire-buying public would actually purchase its tires by construing "The safe tire" text as alleged in the complaint. It is doubted that only 15 percent of the purchasing public would construe the statement as did those responding in the survey because it is clear that the statement says and implies that the tires are safe and free from defects, but even if the percentage is correct, this 15 percent of the purchasing public is entitled to be told the truth regarding the safety of the tires offered to them.

"Firestone" brand tires were not free from all defects in materials, workmanship, or other manufacturing defects during the years 1967 and 1968. There is no contention that respondent does not exercise due care in the manufacture of its tires, but in the present state of the art, tires cannot be manufactured without some of them being defective. Also, they cannot be thoroughly tested without destroying them (CX 3; Tr. 265-71, 292, 346).

There is an additional advertisement which states:

The Test of a Tire

Before we sell a single tire each of our designs is thoroughly tested on indoor testing machines that put the tire through tortuous tests of strength and safety far exceeding any driving conditions you will ever encounter.

Initial Decision

81 F.T.C.

In addition, these tire designs are proven at our own outdoor test tract at Ft. Stockton, Texas, over roads simulating the most difficult types of terrain to be found in any part of the country.

And finally, before any design is put in production we test under actual day-to-day driving conditions on fleets of passenger cars, taxis and commercial fleets which pile up high mileage in short periods of time.

All of these tests result in providing you with an extra margin of safety in any Firestone tire you buy.

So, tire safety standards aren't new to us. All Firestone tires have met or exceeded the new testing requirements for years.

The Safe Tire.

When you buy a Firestone tire—no matter how much or how little you pay—you get a *safe tire*. That's the only way we know how to make a tire. (CX 14-D)

There is evidence that respondent's tires meet or exceed current Government safety standards but the safe use of a tire is affected by several conditions which should be revealed in connection with safety claims in order to make such claims correct. The safety of tires is affected by factors such as inflation pressure, overloading, and wear. Although it may be difficult to mention such matters in advertising which promotes safety claims; nevertheless, an advertisement proclaiming safety is not complete unless this is done. Respondent's advertising did not make references to such factors and respondent did not reveal that Safety Champion is the brand name of a second-line tire, which is two steps below a premium grade tire (CX 2).

Many other tire manufacturers have used the word "safety" in brand names of second- and third-line tires. Other tires, including other of respondent's tires, are as safe as respondent's Safety Champion brand tires (CX 6).

27. The brand name Safety Champion was discontinued in 1969 (Tr. 1001, 1055); and the phrase "Stop 25% quicker" has not been used by respondent since September 20, 1968 (CX 4). Advertising space was purchased for "The safe tire" ad in the following publications which were circulated throughout the United States on the dates shown:

<i>Publication</i>	<i>Date of Publication</i>
Newsweek	December 25, 1967
Saturday Evening Post	February 10, 1968
Look	March 15, 1968
Life	March 22, 1968
Saturday Evening Post	March 23, 1968
Playboy	May 1968
Saturday Evening Post	May 18, 1968
	(CX 3, 4)

The complaint alleges that the tire brand Safety Champion constituted a representation that such tires had unique construction or performance features which rendered them safer than other tires; that the tires so designated did not have any unique construction or performance features that rendered them safer than other tires; and that there were other tires available that were as safe as those designated Safety Champion. Counsel supporting the complaint contends that the literal meaning of the term "Safety Champion" is that it is supreme over all competitors, unexcelled, and first rate. Counsel supporting the complaint cites a dictionary for this definition and argues that it is reasonable to infer that this term represents that the tires were supreme over all competitors as to safety. While it is believed that this may be literally true, the common acceptance of the term would more likely be the same as it would be for the term "The safe tire."

One study which respondent had had prepared indicates that the term did not designate a safer tire than other tires with similar brand names, such as Safety All-Weather, Safety-Traction Tread, Grip Safe, Super Safety 800, and Safety Master (RX 52). It is thus found that the term "Safety Champion" means that the tire is safe, but it does not indicate that the tire is safer than all other tires.

Respondent contends that the Commission has approved the use of the brand name Safety Champion because in respondent's efforts to comply with the Tire Advertising Guides issued by the Commission May 20, 1958, respondent on September 18, 1958, submitted proposed tire names to the Commission for approval as conforming to the Tire Advertising Guides. The names submitted were:

- "Premium Quality" (premium level)
- "500" (premium level)
- "Supreme Champion" (original equipment)
- "Safety Champion" (second level)
- "Champion" (third level).

(CX 2)

On September 24, 1958, respondent made the following representation to the Commission:

We also wish to conform in writing our statements of this morning with respect to the safety characteristics of the tire proposed to be called Safety Champion; that under normal driving conditions, including driving at maximum legal limits on super highways, this tire has exclusive Firestone construction features and will give excellent performance from a safety standpoint.

and on October 1, 1958, a Commission staff opinion was communicated to respondent, stating:

With respect to the proposed designation "Safety Champion" as descriptive of the second level tire, we would interpose no objection, provided, of course, the tire so designated is safe under the conditions outlined in your letter. (CX-2)

Although the FTC staff did not question the use of the brand name Safety Champion, except as it indicated, the above statement did not indicate approval by the Commission of the safe characteristics of the Safety Champion brand tire.

Respondent also contends that because a Commission opinion in a formal case referred to respondent's revising its tire designations in a "manner acceptable to the Bureau of Consultation" that this constituted approval by the Commission. It is found herein, however, that in that proceeding, the Commission did not directly consider the possible deception of the use of the word "safety."

28. Another part of this issue is the quicker stopping claim that was made. It is undisputed that the tires advertised as stopping 25 percent quicker would, in fact, stop 25 percent quicker than would ordinary tires on glare ice. There is no evidence that tests were made on any other surface, but there is evidence that these test results do not show that these tires would stop a vehicle 25 percent quicker on other surfaces (Tr. 273-337). These tires, that were so advertised, were wide oval tires with wider tread than ordinary tires. The charge in the complaint is not that the tires will not stop 25 percent quicker but that

Respondent had not established through adequate scientific tests that any car equipped with Firestone Super Sports Wide Oval tires could be stopped 25% quicker under typical road and weather conditions for the usable life of the original tread of such tires when compared with the performance of the same vehicle under the same conditions when equipped with any manufacturer's tires of a particular construction.

Since this issue is related to the safe use of tires and since we are dealing here with the safety of human life, it would seem that the claim of stopping quicker should be described completely and accurately and should be supported factually.

29. It is found that respondent's tires are not safe under all conditions of use; that they are not free from defects; and that respondent has not established that any of its tires would stop a vehicle 25 percent quicker under typical road and weather conditions than would other tires.

30. In the course and conduct of its business, and at all times mentioned herein, respondent has been in substantial competition, in commerce, with corporations, firms, and individuals engaged in the sale of automobile tires and other products of the same general kind and nature as those sold by respondent (answer).

The Intervenor's Evidence

The two organizations that were granted limited intervention are sometimes referred to as intervenors and the following findings of fact are based on the evidence which they offered and upon their proposed findings of fact.

This evidence was received to aid the Commission in determining the kind of order which should issue in this case in the event an order, except one of dismissal, should be issued.

31. Students Opposing Unfair Practices, Inc. (SOUP), the first intervenor in this case, is a nonprofit organization incorporated in the District of Columbia whose members are law students. SOUP's interest in this proceeding was to offer evidence and urge the issuance of an order that it considered to be in the interest of the public. (Amended Motion of SOUP, Inc., to Intervene, etc.) SOUP presented a number of exhibits and the oral testimony of three witnesses who were Darrell B. Lucas, Ph. D., a licensed psychologist, professor of marketing at New York University, and co-author of standard texts on advertising; Douglas F. Greer, Ph. D., assistant professor of Economics at the University of Maryland; and Harvey Louis Paul Resnik, M.D., clinical professor of psychiatry at the George Washington University School of Medicine and chief of the Center for Suicide Prevention of the National Institute of Mental Health.

32. Dr. Lucas testified that, since nearly all advertising makes its contact at an inappropriate time and place for purchase, all useful advertising impressions must have some effect on memory until there is an occasion to buy; and in general, most advertising impressions fade rapidly in the minds of readers, but the memory of some advertisements remains in the minds of some readers for more than a year after the campaign has ended. Vivid individual advertisements and especially whole advertising campaigns may leave a significant lasting impression (Tr. 412, 419-20, 516-17).

33. He stated further that as a result of advertising, consumers may remember the claimed virtues of the advertised product long after conscious memory of the advertisements are forgotten (Tr. 531, 851-52, 867). Advertising copywriters endeavor to write advertisements which will cause people to buy the product and not necessarily to remember the specific advertisement. As a consequence, unconscious memory impels purchase, even though the purchaser does not consciously remember the specific advertisement (Tr. 417).

34. National advertisers engaged in national advertising campaigns expect their advertising to continue to pay off in sales for one or two years after the end of the campaign (Tr. 414); and the memory of the

persons exposed to the advertising, both conscious and unconscious, is the means by which the impact of the campaign can continue beyond the time of actual exposure (Tr. 416-47). There has been only limited use of pay-out planning because there has been a lack of adequate data showing the effects of past advertising (Tr. 485-86).

35. There is no survey or test in the record attempting to determine the extent to which any of the specific advertisements or claims at issue herein were or are remembered by persons who read them.

36. Some economists consider advertising outlays a form of capital investment that depreciates through time and there is widespread agreement among economists that advertising has cumulative, or lagged, effects on sales (SOUP Ex. 4; Tr. 576, 1527-28, 419).

37. Econometricians have developed economic theories concerning the lagged effects of advertising, as well as techniques for estimating and measuring those effects (SOUP Ex. 4, p. 1; Tr. 1528).

38. Employing these techniques, Dr. Greer estimated that the lagged effect of all of respondent's tire and tube advertising in 1968 was approximately 35 percent in 1969; 12 percent in 1970; 4 percent in 1971; and 1.5 percent in 1972. If 1967 advertising is included, this last figure is increased to 2 percent. (SOUP Ex. 4; Tr. 597-99, 608-09). He stated that these estimates provide rough approximations of the goodwill created by respondent's advertising in 1967 and 1968 that continue to generate sales in the years indicated (Tr. 597-609; SOUP Ex. 4, p. 15). In his opinion, it was not possible, with the information and techniques available to him, to measure quantitatively the lagged effect of a specific advertising campaign for a specific line of tires (Tr. 607).

39. Dr. Resnik, chief of the Center for Suicide Prevention of the National Institute of Mental Health (Tr. 828), testified that on the basis of his clinical experience as a psychiatrist, specializing in suicidology and high-risk-taking patients, an undetermined but relatively small proportion of the car-driving population may be classified as high-risk takers and that this class of drivers tends to use equipment up to and beyond the limits of what it believes to be its safety (Tr. 838-39). In Dr. Resnik's opinion, those high-risk takers using respondent's tires who believed the advertising that the tires are safe and stop 25 percent quicker could be expected to drive less carefully. In addition, Dr. Resnik testified that an undetermined number of persons who might be classified as average-risk takers who read and believed that respondent's wide oval tires were safe and would stop 25 percent quicker could also be expected to drive less carefully (Tr. 836-37).

40. The Association of National Advertisers, Inc. (ANA), the second intervenor in this case, is a trade association comprised of approxi-

mately 500 concerns. Membership is confined to manufacturers and others who advertise on a regional or national basis. It is a leading professional body that is concerned with the study and improvement of the practice of advertising (Motion of ANA to intervene). ANA offered the following evidence:

41. Alfred Kuehn, Ph. D., an econometrician, is presently engaged in research consultation, primarily in the marketing area but also with a significant amount of work in computer systems and research operations as head of Management Science Associates, Inc., and Market Science Associates (Tr. 1527). He is also involved in the construction and utilization of econometric models (Tr. 1483).

Dr. Kuehn testified that he has studied, analyzed, and estimated lagged effects of advertising outlays, and his total research experience establishes that the direct delayed advertising effect is very small compared to the repeat purchase or habit effect, being on the order of zero to 50 percent a month in most cases, and probably seldom over 75 percent a month, which translates into an annual delayed effect ranging from zero to approximately 3 percent, but generally under 1 percent (Tr. 1520-21, 1717, 1720-21). His investigations and studies of lagged advertising effects show them to be so small compared to the effect of other variables that he frequently no longer even includes lagged advertising as a variable factor in his market analysis and predictive models and studies (Tr. 1523).

42. Dr. Kuehn does not agree with the validity of the premises employed by Dr. Greer in measuring the lagged effects of respondent's advertising. He testified that Dr. Greer measured "habit" or repeat purchase probabilities as distinguished from lagged or cumulative effects of advertising (Tr. 1506-07). In Dr. Kuehn's opinion, there are other factors, in addition to and much more important than advertising, that would induce a purchaser, originally persuaded through advertising, to repeat his purchase of the advertised product in subsequent years (Tr. 1716). Dr. Greer, on the other hand, is of the opinion, at least in the absence of evidence to the contrary, that respondent's tire advertising has played the major role in persuading its customers to repeat their purchases of respondent's tires (Tr. 1133).

43. ANA produced evidence through three other witnesses to the effect that the great bulk of advertising claims is rapidly forgotten. Two of these witnesses, Messrs. Charles D. Jacobson and Ernest A. Rockey, testified essentially on the basis of their experience with the testing of retention of advertising by members of the public, and the third, Edward G. Gerbic, testified on the basis of his experience as an executive having responsibility for the advertising programs and

budgets of several leading advertisers and from his general knowledge and experience as a man active in the affairs of the advertising industry.

44. Mr. Rockey had been employed 21 years by Gallup & Robinson, Incorporated, first, as an interviewing supervisor, then in their coding operation where he supervised the coding criteria. Later he served in the analytical department, which studied the reasons for the performance of the data that evolved. At present he is in client contact, service, and sales work (Tr. 1443-44).

45. Mr. Rockey presented evidence compiled from certain data of his employer, Gallup & Robinson, to the effect: first, that the claims made in magazine and television advertisements do not continue to register with the vast majority of persons presumably exposed to them, even after so short a period as one day following that exposure; and second, that there are wide variations in the degrees to which such advertising claims do continue to register with members of the public even for one day after exposure to them, such variations being manifest among product categories, as well as among different advertisers within the same product category, and also among different advertisements of the same advertiser (Tr. 1454, 1457-58).

46. Since 1949, Gallup & Robinson has been engaged in the testing of advertising to evaluate how well magazine ads and television commercials are retained, after exposure, among the people who watched the television program or read the magazine in which such advertising appeared (Tr. 1444). (The procedure used by Gallup & Robinson in such testing is described at pages i-iii of ANA Exhibit 7 and at Tr. 1445-50, 1471-74.)

47. At the request of ANA, Gallup & Robinson, through Mr. Rockey, prepared an analysis of data it had built up over the years from such testing. Gallup & Robinson was asked to examine the data on ads and commercials to ascertain the extent of uniformity with which the main idea of commercials or magazine advertisements is retained by members of the public. To do that it chose five product categories for which it had information regarding both magazine and television advertising. These included items bearing different prices and representing both products and services. The five categories were tires, automobiles, men's after-shave lotion and cologne, television receivers, and insurance. The rationale behind this selection was: a) tires, knowing the basis for the hearing; b) automobiles, because Gallup & Robinson gets a great deal of research information in both magazines and television for that category; c) men's after-shave lotion and cologne, because it is a low-priced item and also because Gallup & Robinson had informa-

tion regarding such products in both magazines and television; d) television receivers (not stated); and e) insurance, because it is a service, and one for which it had at least some information in both magazines and television. It made every effort to get a widespread number of products and services in order to obtain as representative a sample of product and service categories as it could for purposes of the investigation. It took all the ads and commercials it had tested in those categories, during the 2-year period of 1969 and 1970, with the exception that for after-shave lotion and cologne it went back an additional year in order to build up enough ads or commercials and with the further exception that for television commercials of tires it went back to the fall of 1967 to get results on 27 different commercials. The data utilized included the number of readers or viewers questioned and how well the featured idea in the ad or commercial registered with those people or was retained by them at the time when they were interviewed, which was essentially one day later (Tr. 1451-64; ANA Ex. 7).

48. The results of the Gallup & Robinson analysis of its data, which is reported in ANA Exhibit 7, were that:

(1) As to the extent to which the featured idea in such advertisements was retained by readers or viewers one day after exposure to it: The highest registration for any single advertisement was 39.5 percent for an automobile magazine advertisement. The lowest was zero percent for insurance advertisements for both magazine and television, and zero percent for television commercials for tires and automobiles. The highest of the product category averages for continued registration of the featured idea was 9.6 percent for after-shave/cologne television commercials; the lowest was 2.6 percent for insurance magazine advertisements. Advertising for tires averaged an 8.2 percent retention among magazine readers and a 5.5 percent retention among television program viewers the day following their exposure to the respective magazines or television programs. Stated differently, the rate of communication among total readers of magazine advertisements for tires was a 24-hour registration of the featured ideas in the advertisements upon 1,048 readers out of a total 12,786 and upon 300 television viewers out of 5,462. Another set of charts illustrates that 9 out of 54 magazine advertisements for tires continued to register their featured ideas with 12 percent or more of the magazine readers. 21 of the 54 so registered with 4.0 to 7.9 percent of the readers, 13 with zero to 3.9 percent; and 23 out of 27 television commercials for tires so registered with less than 12 percent of the program viewers, 13 of which so registered with zero to 3.9 percent of them.

(2) As to the lack of uniformity of retained registration of featured ideas of advertising among product categories, the highest average re-

tention was 9.6 percent of television viewers of after-shave/cologne advertising, the lowest 2.6 percent of magazine readers for insurance advertisements. Among different advertisers within the same product category: The range of registration of featured idea spread (disregarding those brands for which only a single advertisement was studied) from an average for tire advertisements of 2.9 to 19.1 percent and for tire television commercials from 1.3 to 11.0 percent. Among tire advertisements featuring the same product claim (*i.e.*, "polyglas/fiberglas") the range was from 2.2 to 12.6 percent, with an average of 8.3 percent. To the same point, television commercials for tires featuring the same claim concept ("traction") ranged from 1.5 to 9.8 percent, with an average of 6.2 percent. Among advertisements of the same advertisers: Discrepancies among the advertisements for the same brand of tires as, in one case, a low of 9.5 percent and a high of 29.4 percent with an average of 19.1 percent; in another, a low of 2.6 percent with a high of 26.8 percent and an average of 9.1 percent; and in still another, zero to 13.8 percent with an average of 5.4 percent.

(3) As to the results reported for product categories other than tires, they are essentially the same as those for tires with respect to substantiating a) the short duration of registration of featured ideas in magazine and television advertisements and b) the lack of any uniform time pattern for the retention of the registration of such advertising claims within the short term of its duration.

49. Mr. Jacobson based his testimony upon many years of intensive experience with field research operations into matters involving public memory and retention of advertising claims. After experience with other firms, he joined Daniel Starch & Staff, Incorporated, in 1969. Its operations take into account the factors of human memory and retention of advertising (Tr. 1376-78). The Starch company has been doing such research for more than 40 years (Tr. 1377).

50. In addition to Mr. Jacobson's own research experience, his business and professional activities have required that he keep up with and be aware of studies, reports, records, and activities of other workers in the field that touch upon memory for advertising. Based upon his experience and activities, he expressed his opinion "that the most general situation, by far the most common situation, is that advertising is not retained over any considerable period of time." (Tr. 1384).

51. He also testified about the results of specific research conducted by the Starch company, a considerable part of the report of which he himself wrote and the rest of which he was familiar, including the underlying records and data upon which it was based. That study, conducted in Atlanta, Georgia, in the spring of 1969, demonstrated that of

the people interviewed within 2 or 2½ hours of the airing of a commercial, and who had viewed that channel within the half hour in which the commercial appeared, only 32 percent on the average reported remembering they had seen that commercial. To the further question "What brand was advertised?" only half of them (16 percent) were able to identify the correct brand (8 percent didn't know; 8 percent named an incorrect brand) (Tr. 1379-1432).

52. Mr. Jacobson's testimony also embraced the subjects of "unconscious memory" and "prolonged advertising payoff." He testified to research in those areas, concluding: "The largest part of the evidence from those penetration studies was that the retention of specific things or retention of things which were traceable to specific pieces of advertising or specific campaigns by far the largest part of this is very small; that the trace, the amount that can be traced to specific campaigns, is very small. That what is in consumers' minds from advertising, most often, disappears very, very rapidly." (Tr. 1409-10B).

53. Mr. Gerbic had been vice-president and director of marketing and had been in charge of all advertising, merchandising, and product development for Johnson & Johnson. All told he had had some 30 years experience in advertising, marketing, and management with various firms (Tr. 1760). Mr. Gerbic stated that in his opinion it would not be correct to say that as a general rule advertising claims persist in the memory of the public for a substantial period of time after the advertiser has ceased making those representations (Tr. 1765).

Mr. Gerbic agrees with Dr. Lucas that in order for advertising to be profitable it must leave some impression on the recipient's memory until he has an occasion to buy, but Mr. Gerbic said that in actual practice advertisers consider it "pretty hazardous to spend money to buy consumer advertising at the wrong time and at the wrong place and in the wrong way." (Tr. 1769-70).

54. Mr. Gerbic also said that some advertising is the exception to the general rule, in that it does command a more persistent memory following its termination, but he pointed out the inability to assign any particular criteria or reasons for such exceptions, by saying: "Well, I think in the very nature of things it is possible for one to remember something that made a deep impression on him years ago and, for no good reason, a reason which I don't think he begins to understand why he would remember." Such instances, however, do not represent any substantial ratio of the total advertising claims that were made during the same period as they ran. (Tr. 1768).

The Remedy

From the conclusions reached above, it is clear that a cease and desist order should be entered prohibiting the unexplained or unlimited use of safety claims.

Intervenor SOUP has urged an order, in the event a cease and desist order is issued at all, that would require notification to buyers that the representations regarding the safety features of the tires had been found to be false and that 25 percent of the advertising of safety features during the following year should disclose the nature of the findings in this case.

The respondent and the intervenor ANA oppose the issuance of a corrective or restitutional order: first, on the ground that the Commission lacks the authority to issue such an order; and second, it argues that even if the Commission had such authority, the facts in this case do not warrant its issuance. Although the question of the Commission's authority to issue this type of order has been thoroughly briefed in this case, the Commission has settled the question by the issuance of two recent orders. The Commission has provisionally entered an order in ITT Continental Baking Co., Inc., File No. 712-3447, under consent order procedure that would require that for one year, one-fourth of all advertising of a bread would be required to declare that the product is not a reducing aid. Even more recently in Curtis Publishing Company, et al., Docket No. 8800 [78 F.T.C. 1472], the Commission clearly held that it had authority to order restitutionary relief and to restore "the competitive *status quo* which was disrupted by the deceptive practice." Thus, the remaining question is whether such an order is necessary or desirable in this case.

Although this is a matter of judgment, it appears that such an order is not necessary or desirable in this case for the following reasons:

- (1) There has been a considerable lapse of time since the advertising occurred.
- (2) There is no reason to believe that many of the tires advertised as safe have enough tread left on them for the owners to believe they are safe.
- (3) The evidence shows that the residual effect of the advertising will be slight indeed by the end of this year even if the evidence offered by SOUP is viewed in the most favorable light.
- (4) Many of the respondent's competitors have made safety claims through the use of brand names similar to "Safety Champion" and are under no cease and desist order of any kind.

The prohibitions of the following order are, in substance, the same as those proposed in the attachment to the complaint that relate to the

398

Initial Decision

safety of tires or other products except that there is no requirement that the tests referred to in Paragraph 5 of this order be scientific tests. It is believed that they could be road tests or other practical tests competently observed and recorded.

CONCLUSIONS

The use by respondent of the aforesaid false, misleading, and deceptive statements, representations, and practices relating to the safety of its tires has had and now has the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondent's products by reason of said erroneous and mistaken belief. The acts and practices of respondent were and are all to the prejudice and injury of the public and of respondent's competitors; and they constituted and now constitute unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

ORDER

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

1. Representing, directly or by implication, that every purchaser of tires bearing the brand name "Firestone," or any other brand name, is assured of receiving tires free from defects in materials or workmanship or other manufacturing defects.
2. Misrepresenting, in any manner, the effectiveness of respondent's quality control or inspection procedures.
3. Using the words "Safety Champion," "The safe tire," or any other word or phrase of similar import or meaning to describe or designate respondent's tires or otherwise representing, directly or by implication, that respondent's tires will be safe under all conditions of use.
4. Making any representation, directly or by implication, regarding the safety of respondent's tires without disclosing clearly and conspicuously and in close conjunction with such representation that the safety of any tire is affected by conditions of use, such as

inflation pressure, vehicle weight, wear, and other operating conditions.

5. Representing, directly or by implication, that any of respondent's consumer products have any safety or performance characteristics or are superior in quality or performance to other products unless each such characteristic is fully and completely substantiated by competent tests, and the results are available for inspection.

It is further ordered, That the charges in the complaint relating to the advertising of prices be, and they hereby are dismissed.

It is further ordered, That respondent deliver a copy of this order to each of its operating departments, divisions, and subsidiaries engaged in the advertising, offering for sale, sale, or distribution to the public at retail of automobile tires or other merchandise and to the manager of each present and every future retail outlet owned and operated by respondent.

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation that may affect the compliance obligations arising out of the order.

SEPARATE STATEMENT OF COMMISSIONER JONES DISSENTING TO THE
ORDER ENTERED IN THIS CASE

In my view, this Commission has a duty to provide the public with its analysis of the testimony and documentation offered by both intervenors on the corrective advertising issue, indicate its views as to those portions of the record which it is believed are applicable or inapplicable, adequate or inadequate, or insufficiently established or incomplete. Failure to do so can only becloud rather than illuminate the Commission's position with respect to the types of cases or fact situations which it believes would warrant the application of this remedy as well as the types of testimony and documentation which it will require in order to form a conclusion as to the need for the application of this remedy in appropriate cases.

The need for this type of careful Commission analysis is particularly important with respect to the issue of corrective advertising in view of the ten formal complaints approved by a majority of the Commission in which this remedy is currently being sought and the three consent orders which that same Commission majority accepted and in which the respondent agreed to engage in such corrective ad-

vertising. The public surely has a right at some point to know whether and in what circumstances the Commission believes corrective advertising may be warranted. The *Firestone* case presents the Commission with its first opportunity to articulate on the public record just what its position with respect to this remedy is in the context of a formal record in the light of the particular facts presented. It does not do for a quasi-judicial body like the Commission, in my judgment, to avoid this responsibility on some rationale that we should gain more experience before committing ourselves. Presumably that degree of experience existed at the time we asserted our reason to believe that such a remedy might be warranted and necessary.

A major function of the Commission and its adjudicatory proceedings is to provide guidance to the public as to the standards of conduct which it is believed are required by law, the sanctions which may attach to violations of these standards of conduct and the circumstances under which such sanctions will be imposed. Even negative decisions, those in which orders are *not* issued, can provide useful vehicles for providing this guidance as both Chairman Kirkpatrick and Commissioner Dennison have recognized in their Pfizer and Sterling opinions. The effectiveness of the Commission and the willingness of the public to adhere to its rulings and precedents is directly proportionate in my judgment to the credibility which attaches to its actions, to the consistency and fairness with which it acts and to the clarity of the guidance which its actions provide to the public concerned with the issues which it confronts.

It may be of some value to the parties and to the public, therefore, for me to present my analysis of this record together with the conclusions which I believe can appropriately be drawn from it in its present shape as well as to indicate the areas in the record which I believe could well have been supplemented in order to provide as complete a picture as is possible under what I understand is the current state of the art of the impact of these Firestone advertisements on consumers.

The evidence in the record offered by the intervenors SOUP and ANA with respect to the issue as to the need for corrective advertising in the instant case covers essentially three major points: (1) the extent to which an advertised message as a whole or any portion of it can be recalled by a consumer; (2) the process by which information communicated by an advertisement is integrated by the listener in affecting subsequent purchase decisions; and (3) the impact of advertising on repeat purchases of the advertised product. Each of these points will be considered seriatim.

A. The Recall of Advertised Messages

There was a general agreement among the witnesses offered by both intervenors that the length of time during which specific advertising messages or themes can be recalled by consumers is in the area of days, weeks or months, but that certain types of advertising messages have a potentiality for longer recall periods.¹

Dr. Darrell B. Lucas, a psychologist and professor of marketing at New York University, called as a witness by SOUP, after agreeing generally with these estimates of short recall periods also testified as to various other research studies suggesting the need to qualify any general conclusions as to absolute short recall periods for all types of advertising messages. In this connection, Dr. Lucas pointed to research findings indicating that after the initial precipitous drop in recall, subsequent forgetting was a much slower process. (Tr. 466-478).² He also noted that the typical short recall of advertisements was affected by the repeated exposure of the consumer to the ad and also by the type of advertising copy, some of which by making a strong initial impression can extend a consumer's recall time frame. (Tr. 418, 517, 520-521, 544.)

None of the witnesses, however, were able to apply the existing empirical data respecting recall of ads to the particular advertisements challenged here so as to make any definitive conclusion as to whether they were of a type likely to create lasting impressions in the

¹ Mr. Jacobson and Mr. Rockey, ANA witnesses employed by organizations involved in the measurement of consumer recall, testified that a large portion of consumers cannot recall having seen an advertisement or its central theme within a few days or weeks following exposure to the advertisement. This short recall was revealed in tests involving advertisements of tires as well as other product categories. (Tr. 1451-64, ANAX, 7.)

² This research, originated by Ebenhause on the forgetting of learned material, was summed up by Dr. Lucas in the following colloquy with SOUP's counsel:

Q. * * * the passage of time is important in forgetting?

A. That is right, except that forgetting is a much slower process in the later stages.

Q. So, it falls off rapidly to a small number and that small number may hang on for some time?

A. To a base number, yes, which is usually less than half of the original.

Q. And you don't know how long that would hang on with regard to any particular type of advertisement?

A. I don't think I have ever run into evidence or been approached with a question before, so I never formulated any kind of opinion. (Tr. 478.)

I conclude, therefore, that the evidence in this record demonstrates that as a general principle only a small proportion of consumers can *consciously* recall specific ads. However, the record contains additional testimony that whether a consumer is able to remember the specific ad may have little bearing on whether consumers exposed to an ad have nevertheless derived information from it which affects their later purchasing decisions irrespective of their conscious recall of the specific ad. Accordingly, this portion of the evidence on specific recall cannot be determinative of the issue of the adequacy of the relief required in this case. Instead it must be considered in the context of other evidence in the record on the role which an advertising message plays in influencing consumers' purchasing decisions relating to the advertised product.

minds of consumers or to be forgotten after relatively short periods of time.³

B. Relationship of Advertisements to Subsequent Purchasing Decisions

The witnesses offered by both SOUP and ANA generally agreed that advertisements seek to penetrate the memory of the consumer so that at some later time they will trigger or increase the likelihood of a purchase by that consumer of the advertised products.⁴ Advertising thus is designed to have an impact after the initial exposure and after the campaign has ended. (Tr. 414.) As Dr. Lucas stated, and as corroborated by ANA's witness, Mr. Gerbic:

[S]ince all regular advertising reaches the prospective consumer at a time and place not appropriate for making a purchase or response, it must leave some impression on his memory until there is an occasion to buy. (Tr. 412, 1769.)

The manner in which the advertising message leaves an impression on the consumer's mind and ultimately influences the consumer purchase is a complex process. Dr. Lucas described this process in terms of the role of unconscious memory in impelling or relating the advertising message to the consumer's subsequent purchasing decision. (SOUP Ex. 11; Tr. 416-417, 528, 1409.) In other words, according to Dr. Lucas, the impact of an advertisement on consumer memory may not be reflected in terms of conscious recall of the particular advertised claim but in terms of the consumer's general attitude towards the product. As Dr. Lucas put it, "I used a broad definition of memory which includes present disposition and attitudes * * *" (Tr. 528.) Dr. Lucas elaborated these processes in terms of consumer behavior as follows:

I think it is important to point out that when we talk about the memory of an advertisement campaign in the conscious sense, that advertising creative

³ The record thus contains no precise evidence as to whether there may be some consumers who were exposed to Firestone's deceptive claims four years ago who may still have some recall of those claims. The state of the art is apparently not sufficiently advanced to permit firm opinions as to the likely impact of specific advertisements on their audiences.

⁴ In addition to the initial advertising influencing later purchases, we must also consider the possible impact of those initial advertising impressions on the way in which the product is used. If a consumer purchasing Firestone tires was impressed by the specific safety claims at issue in this case, his assessment of their safety might influence his willingness to assume risks on the usage of those tires. While no evidence was offered to show that Firestone tire purchasers exposed to the ads in question actually did use less precaution than would normally be warranted, SOUP presented a witness, Dr. Resnik, a psychiatrist and Chief of the Center for Suicide Prevention of the National Institute of Mental Health, who indicated that there may be some small proportion of individuals in the population who could be expected to drive less carefully as a result of the claims in the ads in question.

people are told to write advertisements which cause people to buy the product, not to remember the specific advertisement, not necessarily to remember it.

The element of unconscious memory, then would mean presumably that an advertising impression may impel someone to buy or to be more inclined to buy the advertised product without his consciously remembering the advertisement.

So unconscious memory, both of specific advertisements *and of ideas*, necessarily is involved in the later behavior of the consumer in the marketplace, presumably as evidenced by his being more inclined towards the advertising product. (Tr. 417, emphasis added.)

ANA witnesses Dr. Kuehn and Mr. Jacobson agreed that specific recall of an advertising message does not set out the sole metes and bounds of the process by which advertising impressions are made and ultimately related to purchase decisions. They both testified, for example, that advertising creates increased brand identification and favorable product impressions in the consumer's mind which are designed to influence his purchasing decisions favorably towards the advertised product. (Tr. 1726, 1412.) Both Dr. Lucas and Mr. Jacobson, while expressing their expert opinions on the existence of this relationship between advertising and favorable brand impression agreed upon the difficulties of pinpointing empirically traceable effects of past advertising on subsequent purchasing decisions. (Tr. 481-2, 491-3, 1410.)

A fair summary of the testimony of all witnesses on this general advertisement-sales purchase relationship is that advertisers and researchers agree that advertisements are effective in triggering purchases of the advertised product by the consumer. They agree that any *specific* recall of the ad or of any of its claims is relatively short-lived being of a magnitude of weeks or months at best. They also agreed that the information taken from an advertisement by its audience is not necessarily stored (retained) in the memory of the consumer in its original form as a claim in an advertisement. Rather it is more likely to be integrated either in the form of a positive association with the product or as information about the product quite disembodied from the advertising claim which was the original vehicle for its penetration of the consumer's memory. Finally, it was agreed that there is today very little research and virtually no empirical studies which can establish or demonstrate the actual way in which information gleaned from an advertisement which initially penetrated a consumer's memory operates to trigger in that consumer an intent to purchase the advertised product. The record here and the state of the art generally give no insight into how long a piece of information in this more generalized form of favorable product association in a consumer's memory storage bank can operate to trigger or influence consumer action. Finally, the witnesses all agreed that advertising is designed to influence purchases and that it has been shown empirically

that it is effective in doing this even though the way in which it performs this task—the communication process within the consumer's conscious or unconscious memory—is not yet fully understood.

C. The Operation of the Repeat Purchase Phenomenon

The witnesses called by both intervenors were in substantial agreement that advertising influenced or had a carry-over effect on later sales not only as a function of the consumer's absorption of the information communicated in the advertisement but also as a function of what was referred to as the repeat purchase phenomenon.

According to ANA witness, Dr. Kuehn, it is well known that a substantial number of purchasers of a particular brand will tend to repeat their purchase of that brand. (Tr. 1521.) The role which advertising plays in this repeat purchase pattern was summarized by Dr. Kuehn in the following three points:

1. Advertising affects the percentage of repeat buyers with the qualification that there are many other probably more important variables operating here. (Tr. 1726.)
2. Advertising contributes to enforcing and reinforcing habitual brand choice. (Tr. 1728-29, 1757-58.)
3. A substantial amount of advertising contributes to and is specifically designed to contribute to brand identification, and habitual brand choice will be higher, the greater the brand identification. (Tr. 1727-28, 1757-58.)

Intervenor SOUP sought to demonstrate and quantify this carry-over effect of advertising in a systematic fashion through its witness Dr. Greer, an econometrician at the University of Maryland. Dr. Greer presented empirical estimates based on an econometric model which he had constructed designed to measure the sales impact in 1971 due to consumer memory of Firestone's 1968 advertising.⁵ Dr. Greer's estimates indicate that approximately two percent of the purchases of Firestone tires in 1972 can be directly attributed to the influence of Firestone's advertising in 1968. (SOUP Ex. 4, Tr. 597-99.) Through Dr. Kuehn, ANA presented testimony that indicated that Dr. Greer's empirical estimates were primarily measurements of the carryover due to the repeat purchase phenomena and did not, therefore, demonstrate a direct link between the initial advertising and repeat purchases.

⁵ While the econometric data presented by Dr. Greer indicates that there may be carry-over impact on Firestone sales due to Firestone's advertising, the data does not address the form in which the deceptive ads found herein have been integrated by the consumer in his memory and thus does not provide a basis on which to judge the likely effect of corrective advertisements in relieving any misconceptions due to those ads.

I believe that ANA's contentions in this respect are valid, although I do not believe they diminish the model's utility in supporting the existence of a strong repeat purchase phenomenon. Hence it is important to understand just how this repeat purchase phenomenon operates in relationship to advertising.

Both Dr. Lucas and Dr. Kuehn agreed that of many possible variables influencing repeat purchases, advertising's role may be of lesser significance except as it serves to contribute to brand identification and reinforce brand choice. (Tr. 493, 1521, 1680, 1726-28; SOUP Ex. 14.)⁶ Their reasoning underlying this conclusion is important since it depends rather heavily on their belief that the consumer's experience with a product is likely to outweigh or supersede any initial impressions about the product which they might have gained from specific advertising claims made about the product.

In the case of tire purchases which are probably on a two to four year purchase cycle for most consumers, the experience factor is likely to be far less significant than it would be for more frequently purchased items. Also, the types of misrepresentations made by Firestone challenged here are not the types of claims which are capable of verification by a consumer based on experience. As a result, the evidence that advertising affects both the initial purchase and to some extent less well known the repeat purchase as well is relevant to the question of whether a mere prohibition of the particular false claims is adequate relief.

As I interpret the evidence offered with respect to the repeat purchase phenomenon, it tells us that advertising has some continuing role in influencing purchases and that new advertising campaigns are designed to reinforce the continued existence of the initial impressions made by prior advertising.

Applying the record evidence on the relationship of advertising claims to sales in the instant case, it is our obligation to determine whether the deceptive representations as to the stopping qualities and safety of Firestone tires can be eliminated by preventing their repetition in the future, or whether their deceptive nature must be brought

⁶ As Dr. Kuehn pointed out:

Advertising can initially create some exposure of the consumer to a product, but the experience with the product—its satisfaction, the consistency of that experience with what the advertising promise or advertising claim may have been—is a large factor in whether or not the consumer repeats.

And consequently we can't assume that the advertising carryover here is at all precise. In fact, if the product is unacceptable or inconsistent with what the consumer expected, he is very likely not to purchase the product.

And consequently this is one of the very big factors which distinguishes successful from unsuccessful products, namely, the factors other than the advertising. (Tr. 1686-87.)

home in some form to consumers even though the particular misrepresentations found to have been made here have not been made since 1968, some four years ago. Resolution of this question must turn in large part on the extent to which there is a reasonable likelihood that these misrepresentations are still operating to influence consumers to purchase Firestone tires. Secondly, it must turn on whether the deception can be effectively eradicated unless those consumers who may have integrated this deceptive information into their attitudes and perceptions of Firestone tires and developed a favorable brand association based on that information are afforded an opportunity to reassess their attitudes towards the product on the basis of the disclosure of the deception previously communicated to them. Consumers clearly must be entitled to re-examine their purchasing habits and create for themselves either new attitudes and intentions or persist in their old ones on the basis of accurate information about the product.

The evidence is clear that it is highly unlikely—to the point of virtual certainty—that consumers perceiving the Firestone ads in question back in 1967 and 1968 have any conscious recall either of the content of these ads or even of having perceived the ads. It is equally unlikely that Firestone tire purchasers in that period could tell now whether or not their tire purchases were influenced by the ads in general or by the particular claims here found to be deceptive. However, the evidence is clear that distinctions must be drawn between consumers' specific and conscious recall of an advertising message and a favorable consumer attitude towards the product generated by the advertising or the maintenance of a favorable impression generated by the advertising through the operation of the brand loyalty phenomenon, satisfactory experience with the product and other variables. Further, it is clear that these latter effects upon consumers' impressions and attitudes may continue to influence to some extent their purchasing decisions.

Contrary to ANA's and respondent's beliefs, it is not necessary to quantify with precision the lingering effects of respondent's advertisements in order to justify a corrective advertising order. It is enough that the Commission find "some fair probability" that consumers continue to be deceived. *See Herzfeld v. FTC*, 140 F. 2d 207 (2d Cir. 1944); *see also Montgomery Ward & Co. v. FTC*, 379 F. 2d 666, 670 (7th Cir. 1967); *Charles of the Ritz Dist. Corp. v. FTC*, 143 F. 2d 676 (2d Cir. 1944).

Intervenor ANA argues, however, that corrective advertising is unnecessary with respect to consumers who may have initially been

influenced by the message to purchase Firestone tires because once the initial purchase has been made, other factors beyond advertising, notably the consumer's actual experience with the product, take over and influence the consumer's attitude towards a repeat purchase of the Firestone tire.

ANA's arguments that actual experience with a product is a far more reliable factor in influencing the consumer's attitude towards a product than any advertising message which might initially persuade them to try the product and undoubtedly relevant and important in many purchase situations. In the instant case, however, the nature of respondent's claims here found to be deceptive raises considerable doubt as to the reliability of consumers' experiences in shaping their perceptions as to the particular safety representation found to be deceptive in this case. We have found that Firestone falsely represented that its tires stopped "25 percent quicker," were assured of being defect free and were safe under conditions of use. None of these representations are of the type that are readily susceptible to consumer verification. Using a Firestone tire would in no way tell a consumer whether the tire in fact stops 25 percent quicker and unfortunately will never tell a consumer whether it is safe—or more to the point—whether the same Firestone tires they purchase tomorrow or the next day will be safe. Moreover, we have also to note in this connection the length of the typical purchase cycle for tires. Tires are purchased infrequently and hence it is not unreasonable to assume that tire purchasers in 1968 (when these ads were being run) may only now be making their first or second purchase of Firestone tires since their exposure to the misrepresentations in the Firestone advertisements. Therefore, I do not find persuasive ANA's argument that for those consumers who may have purchased Firestone tires on the basis of these deceptive representations, their own experience could in fact take over and give them a realistic basis on which to evaluate the deceptive claims—in this case to find them untrue—thereby rendering unnecessary a corrective advertising order aimed at enabling them to correct or modify attitudes towards the advertised tires formed on the basis of the deceptive claims. Moreover, ANA's arguments in no case affect the prospective tire purchasers who may be considering their first Firestone purchase.

The hearing examiner's argument that corrective advertising was unnecessary here because of the fact that tires purchased in reliance on these deceptive advertisements after four years would be so threadbare that they would no longer be regarded by the purchaser as safe is similarly without merit. The issue is not as to the present condition of

a Firestone tire owned by a consumer but rather the consumer's attitude about Firestone tires gleaned from "The Safe Tire" and 25 percent quicker stopping advertising claims. As this record demonstrates, advertising messages may continue to operate to influence a consumer's behavior long after they have been discontinued either because of a favorable brand association stored by the consumer as a result of the message or because of a continued pattern of brand loyalty. Brand loyalty or repeat purchases obviously are applicable to the consumer's general attitude towards the advertiser's product rather than to the specific item purchased as a result of the advertisement. Thus neither a thread bare tire today nor a consumer's experience with Firestone tires generally is likely in our judgment to operate to eradicate any general attitudes formed by a consumer towards Firestone tires as a result of Firestone's particular performance and safety claims which we have found to be misleading and deceptive.

It is my view of this record, as I have sought to analyze it, that it contains a sufficient body of evidence to warrant this Commission to conclude that there is a reasonable probability that there are consumers today who are still acting in reliance on or are influenced by the deceptive claims in issue to require remedial action beyond a cease and desist order directed solely at the future dissemination of the particular advertising claims.

It is also clear to me, however, that this record could have been strengthened if it had contained additional factual material going beyond the expert testimony offered with respect to the general workings of advertisements on consumer decision processes. In particular it would have been helpful, to the extent to which the current state of the art would permit, if this record had included more precise data on how advertisements affect consumer attitudes and perceptions of the product as well as some empirical data linking the applicability of such generalized concepts to the particular advertisements in issue.

In the instant case, for example, while Dr. Lucas testified as to the existence of a carryover effect for all advertisements, he was not precise as to the magnitude of this carryover under varying conditions. Thus, this record might have been substantially strengthened, if it had contained more documentation bearing on the expected magnitude of the carryover for various types of advertising.

The need for corrective advertising in certain instances might also have been demonstrated through other empirical approaches. The state of the art may not be sufficient to develop empirical methodologies demonstrating precise linkages in all instances between a particular advertisement and current consumers' perceptions and attitudes to-

wards a product. Nevertheless, taking into account whatever problems may be currently associated with developing such methodologies, it would have been helpful if some indication could have been developed as to the linkages between the ad in question and its lingering impact, if any, on consumers.

One direct empirical linkage between the deceptive ad and a need for corrective advertising would be a showing of significant consumer recall of the particular messages found to have been deceptive which were conveyed by the Firestone advertisement. However, the evidence in this record indicates that the integration of advertising messages by consumers is a process that does not necessarily result in conscious recall of the specific message, but rather results in attitudinal and perceptual changes relating to the brand being advertised. Therefore, it would have been helpful if this record had contained alternative empirical showings of the linkage between the deceptive ad and its carryover designed to probe such attitudinal and perceptual changes irrespective of whether or not the particular advertising message was recalled by a consumer. For example, one manner of empirically probing to determine the existence of such a linkage might involve a systematic survey demonstrating that there are a significant number of consumers who perceive the brand as it was deceptively represented in the challenged advertisement. While an empirical showing of this nature would not necessarily demonstrate that the consumers' perception of the brand, even though it is consistent with the deceptive ad, was due only to the challenged advertisement, it could indicate a reasonable likelihood that the ad led to or reinforced a deceptive representation of the brand that should be corrected through future advertisements. Other empirical approaches demonstrating the linkage between challenged advertisements and the subsequent carryover in the consumer's memory may also be possible.

In my own view, SOUP presented sufficient evidence supporting the likelihood of a continuing effect of the Firestone advertisement on consumers as to shift to the respondents the need to go forward with other proof tending to refute such likelihood. However, it is clear that the question of which party should have the burden of going forward with this type of empirical proof is an issue on which reasonable differences of opinion could arise.

These and other important issues respecting the applicability of the corrective advertising remedy are unfortunately not resolved by the instant case.

For the foregoing reasons, I support the order entered in this case but dissent to the failure of this order to require corrective advertising.

COMMISSIONER DENNISON, CONCURRING IN PART AND DISSENTING IN PART

I join in the foregoing opinion to the extent that it finds that Firestone's "25 percent quicker stopping" claim violated Section 5 and that advertisements for its "Safe Tire" falsely implied that the tires were free from all defects. Therefore, I agree to Paragraphs One and Two of the order.

However, I do not agree that these advertisements also represented that respondent's tires would be safe under all possible conditions of use. Therefore, I do not concur in Paragraphs Three and Four of the Commission's order.

Additionally, I cannot agree with Paragraph Five of the order as it is presently written. It would require respondent to substantiate all tire safety and performance claims with *scientific* tests, but as the Commission recently recognized in *Pfizer*, Docket No. 8819 [p. 23 herein], not all substantive product claims need be supported with rigorous scientific tests since some product characteristics may be well-established in the arts and industry. Indeed, many performance claims which a tiremaker might assert come from general information common to everyone. To require respondent to engage in additional testing in these circumstances would be unduly stringent.

With respect to the issue of corrective advertising, I would leave for future cases, having stronger evidentiary bases, any extended consideration and discussion of what should guide the Commission in this area.

SEPARATE STATEMENT OF CHAIRMAN KIRKPATRICK

I concur in Commissioner Jones' opinion. I concur also in the Commission's order and findings except that I dissent from those parts of the opinion and findings relating to the "conditions of use claim" and from Paragraphs 3 and 4 of the order relating thereto. My dissent is occasioned by my belief that claims read into an advertisement vary with the degree of knowledge which the public already possesses about the product. In this case, the implication found by the majority—that Firestone tires are safe under *all* conditions of use—seems to me to be remote when contrasted with common knowledge regarding minimal levels of tire care, and I cannot find that the ads stood for the proposition advanced in the complaint.

I also find that I cannot agree with Commissioner Jones' separate statement on the appropriateness of a corrective advertising order in this case. As a general analysis of advertising's intended effect, particularly on consumer purchasing behavior, and as an explanation of

why it may in some circumstances be proper, indeed essential, to require advertisers to correct or otherwise remedy any lingering effects of a deceptive advertisement, the testimony offered by intervenor SOUP on the question of corrective advertising has contributed significantly to the body of knowledge which will assist the Commission to chart the law in this area. That testimony has not, however, gone beyond a general explanation of broad advertising and behavioral principles—principles which were insufficiently applied, in my judgment, to the specific facts before us. No showing was made that the particular advertisements challenged by the complaint in this matter were in fact commercials which succeeded in achieving the effect desired by advertisers—*i.e.*, to continue to influence consumers' purchasing decisions long after the advertisements had been perceived by consumers.

Commissioner Jones notes in her separate statement:

This record could have been strengthened if it had contained additional factual material going beyond the expert testimony offered with respect to the general workings of advertisements on consumer decision processes. In particular it would have been helpful, to the extent to which the current state of the art would permit, if this record had included more precise data on how advertisements affect consumer attitudes and perceptions of the product as well as some empirical data linking the applicability of such generalized concepts to the particular advertisements in issue.

To my mind, particularly at this preliminary stage of experience with this remedy, such information would not have been merely helpful but was indispensable to the intervenor's case. Absent such evidence, we can require corrective advertising only by engaging in assumptions based on the general principles set out by the witnesses in this matter and stated by Commissioner Jones in her separate statement. If we adopt these assumptions and follow Commissioner Jones' approach, a corrective advertising order would be warranted every time the Commission finds a claim to be potentially deceptive, regardless of how much time has elapsed since the ad appeared (in this case, four years), the media in which the advertisement appeared (here, in print), the frequency with which it ran, the length of time over which it was run, the size of the audience it reached, the audience's characteristics, the blatancy of the deception, and the potential for danger to health and safety; the only limitation to such an all-inclusive approach being that affirmative correction might not be necessary if the original deceptive claim could easily be verified by the consumer.

My view is that our understanding of the process involved in perceiving, storing and acting upon advertising messages is still in its beginning stages; and at this early date in our involvement in this

field, I am not prepared to engage in the generalizations and assumptions which would be required to order corrective advertising in this case and on the record before us.

It may be that future advertising cases will provide us with specific information or with a picture of advertising as a whole which would justify a presumption that all deceptive advertising is in fact integrated into the conscious or unconscious memories of a significantly sufficient number of consumers to warrant the requirement of a corrective advertisement whenever deception is found. I am simply not prepared to take that step on the basis of only one fully adjudicated case involving this issue. Subsequent cases may demonstrate that the number of commercial messages which fail to have a residual effect is so small that a "per se" rule would be appropriate. Similarly, our experience may disclose that the state of advertising technology is such that residual effect is exceedingly difficult if not impossible to prove in any particular instance and yet is so frequently present that the public interest requires that the Commission relieve complaint counsel of the burden of proving the continuing influence of the deceptive advertising being challenged. For the present, however, it is my view that our knowledge in this area is not deep enough to justify such an approach.

SEPARATE STATEMENT OF COMMISSIONER DIXON

Commissioner Dixon concurs only in the Order to Cease and Desist and the findings and rationale of the opinion in support thereof.

STATEMENT OF COMMISSIONER MACINTYRE CONCURRING IN PART AS TO THE RESULT

I concur in the decision of the Commission to issue those provisions of the order appearing in Paragraphs (1), (2), (3), and (4) and the underlying findings of the Commission in support thereof. I do not concur in the decision of the Commission for the issuance of Paragraph (5) of the Order to Cease and Desist or the Opinion of the Commission in this case.

OPINION OF THE COMMISSION

BY JONES, *Commissioner*:

In June 1970, the Commission issued a complaint against the Firestone Tire and Rubber Company, charging that it had violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1964), in making certain advertising claims as to the price, performance and

safety of its tires.¹ The complaint alleged that respondent had falsely represented:

- (1) that its tires were being offered at prices substantially lower than regular or customary prices;
- (2) that it had established through adequate scientific tests that Firestone Super Sports Wide Oval tires would stop 25 percent quicker than regular tires under typical road and weather conditions;
- (3) that Firestone tires were free from any defects; and
- (4) that Firestone tires were safe under all conditions of use. (Compl. paras. 4(a)-(f), 5(1)-(5), 6(1)-(5).)

The complaint also charged that respondent's use of the tire name "Safety Champion" was deceptive in that it falsely represented that such tires were safer than other tires. (Compl., para. 8.)

In its answer, respondent denied the principal allegations of the complaint.

Prior to the hearings in this case, the Commission on October 23, 1971, ordered that Students Opposing Unfair Practices, Inc. (SOUP) be permitted to intervene in the proceedings for the purpose of presenting evidence and arguments on the issue of whether the notice order attached to the complaint would adequately protect the public interest. Thereafter on December 14, 1970, the hearing examiner permitted the Association of National Advertisers, Inc. (ANA) to intervene to present evidence and arguments on the same issue.

The case proceeded to hearing in March 1971. The examiner issued an initial decision finding against respondent on all complaint allegations excepting those concerning the false advertising of prices² and the deceptive nature of the tire name "Safety Champion."³ The examiner entered a proposed order against respondent which required

¹ The following abbreviations will be used for citations:

Compl.—Complaint
ID—Initial decision of hearing examiner
Tr.—Transcript of testimony
CX—Commission Exhibit
RX—Respondent Exhibit
SOUP Ex.—Exhibit of intervenor SOUP
ANA Ex.—Exhibit of intervenor ANA
App. Br.—Brief on Appeal of respondent (Res.) or complaint counsel (C.C.)
Ans. Br.—Answering brief
Rep. Br.—Reply brief

² The charges relating to the pricing issues were dismissed by the examiner and counsel supporting the complaint does not appeal from this decision. Accordingly, this issue is no longer in the case and we do not treat it here other than to affirm the examiner's conclusion that no liability was shown.

³ Although the hearing examiner found that the name "Safety Champion" did not imply that the tire was safer than other tires, as alleged in the complaint, he ordered respondent to cease and desist from using the name, apparently on the theory that the name deceptively conveyed the idea that respondent's tires were free from any defects and safe under all conditions of use. (ID, 20, 30 [pp. 417, 427, herein].) See discussion, *infra*, pp. 24-25 [pp. 456-58, herein].

that it cease and desist from the practices found to be unlawful but which did not include the relief provisions urged by SOUP.

This matter is now before the Commission on appeals from the initial decision by three of the parties—respondent, complaint counsel and intervenor SOUP. Respondent contends (1) that the examiner erred in finding that its advertising with respect to the stopping performance and safe qualities of Firestone tires was deceptive, and (2) that the proposed order is overly broad in scope. Complaint counsel challenges certain of the examiner's factual findings and his failure to recommend the precise form of the proposed order which accompanied the complaint. Intervenor SOUP contests the examiner's determination that its additional provisions for relief were unwarranted in this case. We will consider first the issues of liability raised on appeal by respondent and complaint counsel and then the issues of relief raised by the three appealing parties.

I

ISSUES OF LIABILITY

The complaint allegations charging respondent with false and misleading advertising were based primarily on two advertising claims, one claiming that respondent's Wide Oval tires stop 25 percent quicker than regular width tires and the other indicating that the Firestone tire is "The Safe Tire." Additionally, the complaint charged that Firestone's brand name tire, "Safety Champion" also implied representations as to the safety of respondent's tire which were misleading and deceptive. Respondent denies that its advertisements and its use of the brand name Safety Champion conveyed any of the representations alleged in the complaint and hence that they did not violate Section 5 of the Federal Trade Commission Act. We will consider these contentions in detail.

A. Respondent's 25 Percent Quicker Stopping Claim

The advertisement cited in the complaint which presented the 25 percent quicker stopping claim reads in part as follows:

[The Firestone Super Sports Wide Oval tire is] built lower, wider. Nearly two inches wider than regular tires. To corner better, run cooler, stop 25% quicker.

The complaint charged that through this ad, respondent represented that it:

* * * had established through adequate scientific tests that any car equipped with Firestone Super Sports Wide Oval tires could be stopped 25% quicker under typical road and weather conditions for the usable life of the original tread of

such tires when compared with the performance of the same vehicle under the same conditions when equipped with any manufacturer's tires of a particular construction. (Compl. para. 5(5).)

It was further charged that respondent had not in fact performed adequate scientific tests to establish that its Wide Oval tires performed as described above. (Compl. para. 6(5).)

The hearing examiner found on the basis of the record evidence that the tires in question would stop 25 percent quicker on "glare ice," that no tests were made on other road surfaces and that respondent's test, therefore, did not show that its tires would stop 25 percent quicker on other surfaces. The examiner concluded that respondent had not established that any of its tires would stop 25 percent quicker under typical road and weather conditions than would other tires and that accordingly, respondent's advertising claim was unfair and deceptive and in violation of Section 5. (ID, 28 [p. 418, herein].)

In its appeal, respondent does not contest the complaint allegation that its advertisement represented that its stopping claim was supported by adequate scientific tests and that the claim as advertised related to the stopping capacities of its tire under typical road and weather conditions. Respondent also concedes that the test underlying the claim was made solely on a wet hazardous surface. Respondent argues, however, that its test was in fact adequate to support its broader stopping claim that the Wide Oval tire would perform equally as well on dry, non-hazardous surfaces. (Res. App. Br., 10-12.)

The sole question at issue, therefore, is whether respondent's test of the stopping capabilities of its tires made on a hazardous surface was an "adequate scientific" test to support its generalized, unlimited 25 percent quicker stopping claim. In our view, the record evidence amply demonstrates that respondent's test was not an adequate scientific test upon which to make such a broader unconditional claim.

The evidence submitted on this issue by complaint counsel consisted largely of (a) the actual tire tests made by respondent, and (b) the testimony of Dr. F. Cecil Brenner of the National Bureau of Standards who was offered as an expert witness on the issue of tire testing, to show that tire tests made on one road surface are not adequate to demonstrate tire performance on other road surfaces.

1. *Respondent's Test*

According to the uncontested evidence in the record, respondent conducted ten comparative stopping distance tests on wet concrete "skid pads" having a coefficient of friction from .15 to .20. (CX 7, 20.) One set of Firestone Wide Oval tires was tested against one set of Firestone Super Sports tires; the load and inflation pressure were

kept the same for both sets. (Tr. 275, CX 7, 20.) All the test runs were made at 15 miles an hour, the wheels were locked as in an emergency stop, and the relative stopping distances were measured and averaged for both sets of tires. (Oral Arg. Tr. 72-93, CX 7, 20.) The test runs revealed an average stopping distance of 75.8 feet for the narrow tire, and 53.2 feet for the Wide Oval tire, or a greater average stopping ability of 29.8 percent for the Wide Oval. (CX 20.)

2. Dr. Brenner's Testimony

Complaint counsel offered the testimony of Dr. F. Cecil Brenner, Chief of the Tire System Section of the National Bureau of Standards, in order to establish the limited nature of the tests conducted by respondent and the difficulties of applying the results of a test made under one set of conditions to other types of conditions. Dr. Brenner testified that the particular coefficient of friction (.15 to .20) for the road surface used in respondent's Wide Oval test was equivalent to "glare ice" and was not typical of roads in the United States. (Tr. 278.)⁴ He opined that respondent's test data would not correlate with many common road surfaces in the United States. (Tr. 285.) Further, he explicitly stated his opinion that respondent's test data did not show that its tires would react in the same relative way on dry surfaces as they had on wet. (Tr. 280.) When asked for the basis for this opinion Dr. Brenner stated:

In the course of my duties, * * * we have tested several hundred tires using vehicles such as this and other devices on a variety of surfaces. The particular surface that gives the poorest relationship with normal surfaces is the smooth surface of this coefficient, or approximately this coefficient of friction.

We can find a tire that looks very good on that surface that will look quite bad relative to other tires on other surfaces that are more typical of normal use, of normal pavement. (Tr. 280-81.)⁵

He further testified on the basis of tests he had supervised not only that the comparative performance of tires tested on a smooth and a rough surface may not stay fixed, but that indeed the tire relation-

⁴ He agreed on cross examination that this coefficient of friction might approximate certain other types of road conditions such as "bleeding" asphalt and traffic control paint. (Tr. 295.) He also testified that there is no "typical" road surface in the country because there are a whole spectrum of surfaces, each with its own characteristics which can affect stopping capabilities. (Tr. 315.)

⁵ Dr. Brenner again made this observation when testifying later as to a particular tire test he supervised for the National Highway Safety Bureau. The test results had shown, he said, that:

The one surface that gave the poorest correlation agreement with all other surfaces was our artificially smooth surface. * * * We found very low correlation between the behavior of tires on that surface with concrete and the other three asphaltic surfaces. (Tr. 334.)

ships may even reverse.⁶ When asked the explanation for this phenomenon, Dr. Brenner replied:

Well, this is a complex problem. It has to do with the relationship * * * of the way in which the rubber at the contact patch is deformed—interacts with the surface. Now the fact that you have two coefficients of friction measured by any one of the techniques that are equal, the texture could be quite different. Now if you have a sharp pointed aggregate on the other surface, the way that the tire is distorted at those points is quite different, and the rubber may react in different ways in these cases. (Tr. 328, 330.)

Dr. Brenner testified generally that numerous factors affect the stopping performance of tires, including their width, tread design and rubber compound. (Tr. 307, 344.) The texture of the road surface also affects stopping qualities so that the same tire may perform differently on different textured road surfaces although they might have the same coefficient of friction. (Tr. 314, 320.) As Dr. Brenner explained,

* * * the chemistry of (surface) material is different and therefore, the forces of adhesion between the tire and the surface will be different, and this is one reason why the behavior of a tire on one surface does not necessarily relate to the behavior of the same tire on another surface with the same coefficient of friction. (Tr. 314.)

The evidence further shows that in conducting his own tire performance tests, Dr. Brenner took into account the numerous variables which he testified affect the stopping performance of tires.⁷

In response to questions on cross examination by respondent's counsel, Dr. Brenner also set forth his opinion as to the effect of one particular factor, tire width, on the stopping performance of tires. Specifically, Dr. Brenner was asked by respondent's counsel for his views on whether the extra width of respondent's Wide Oval tire was one factor causing the tire to stop faster. The following colloquy, then took place:

Dr. Brenner:

A: I have a view that it [the extra width] would have an effect on it—it would be a more pronounced effect on dry surfaces than on wet; the effect on wet, and especially at these low coefficients would—it is not that clear.

* * * * *

⁶ These tests, run with about sixty-five sets of tires on 5 different surfaces, had been conducted for the National Highway Safety Bureau.

⁷ His tests, which were conducted to measure the performance of regrooved bus tires, were run with tires having differing tread design and tread groove depths at varying speeds (20, 40, and 50 miles per hour) on three surfaces (worn concrete and coarse and fine graded asphaltic concrete) with coefficients of friction ranging from .24 to .45. (RX 6, at 6, 10; Tr. 320.)

Q: In other words, the physics of the tread width, you mean if it's wider there is more rubber in contact with the road?

A: Yes. But the unit pressures are less.

Q: Well, I guess that if there is more rubber on the road it stands to reason that at least on a dry surface when you don't get hydroplaning * * * the more rubber on the road, the quicker you'll stop?

A: Yes, in this situation.

Q: So that in your view the fact that the Firestone wide oval tire tested in Exhibit 7 is two inches wider * * * might have more significance on a dry pavement than it does on a wet pavement described here?

A: It would have significance. (Tr. 341-42.)

Dr. Brenner further testified that due to the numerous factors affecting the relationship of one tire with another, one does not know how a particular tire will compare with another unless one runs tests and that it is an accepted practice to make whatever extrapolations and interpolations are reasonable from such tests. (Tr. 344.)

3. Respondent's Argument

Respondent's argument is a simple one. Respondent argues that Dr. Brenner's single (and somewhat ambiguous) statement that the effect of the broader tire width would be "more pronounced" on dry than on wet surfaces constitutes a complete justification for its claim that its test results on wet hazardous surfaces can be scientifically extrapolated to apply equally to all surfaces.

Respondent argues that it is normal for scientists to make extrapolations and deductions from actual tests and it was appropriate and scientifically valid to do so here. (Resp. App. Br., 12.) We do not agree.

We do not believe that a fair reading of Dr. Brenner's testimony in its entirety supports respondent's contentions as to the proper implications which can be scientifically drawn from its narrow hazardous surface test. Dr. Brenner was asked direct questions on the precise issue of correlating tire performance under one set of conditions with tire performance under a different set of conditions and testified in response that it was virtually impossible to correlate performance because of the many variables involved.

His testimony reveals that the variables affecting tire performance range from the type of road surface involved, to the type and construction of the tire in terms of the kind of rubber used, to the type of tread and its width, plus many other factors. He specifically denied the applicability of the results of respondent's tests to road surfaces with different friction coefficients. He testified that in conducting perform-

ance test of tires, he himself employed road surfaces of several friction coefficients and textures and tested at varying speeds.⁸ At one point in his testimony he gave as his unequivocal opinion that it was impossible to assume that a tire performing better on a smooth surface would maintain an identical superior relationship on a surface with a higher friction coefficient. Indeed he opined that a reverse relationship might emerge.

Viewed in the most favorable light for respondent's argument, at best Dr. Brenner's single sentence relied upon by respondent is a statement that the width of a tire is one factor affecting the stopping performance of a tire and to the extent this one factor by itself influences stopping performance, this influence would be more pronounced on dry than on wet* surfaces or at least would have significance on wet surfaces. (Tr. 341-43.) Indeed as part of the same sentence on which respondent places such major reliance for its position, Dr. Brenner offered the view that the effect of the extra width "is not that clear." Further, Dr. Brenner was merely asked if he had "any view" as to the effect that tire width would have on stopping distances, and he gave his rather equivocal "view." He was not asked if this was equivalent to a scientifically valid extrapolation, and in light of his entire testimony, it is doubtful whether he would have agreed with respondent's counsel that his view expressed in response to a simple question represented his "scientific judgment" as to the scope which could or should properly be attributed to respondent's test results. By no stretch of the imagination can Dr. Brenner's testimony about the theoretical reasonableness of making some extrapolation from tire tests be read as stating that respondent's particular extrapolation was scientifically valid.⁹

The issue here is not whether reasonable extrapolations can generally be made from tire performance tests. Nor is the issue here whether the width of tires affects their stopping capabilities and will be of significance when applied to wet road surfaces or to dry surfaces. The

⁸ Respondent accurately points out that in one test Dr. Brenner used only wet surfaces. On this ground respondent argues that it was therefore justified in limiting its own test to such surfaces. (Res. App. Br., 8.) It should be noted, however, that Dr. Brenner's test was intended to measure the safety of bus tires and not for use as the basis for a stopping claim on all types of surfaces as was respondent's test. Furthermore, aside from the use of wet surfaces, Dr. Brenner's test varied greatly from respondent's test, *i.e.*, in testing at different speeds, on a variety of surfaces and with tires of varying tread design and groove depth.

⁹ It should be noted in this connection that the hearing examiner, who had the opportunity to hear Dr. Brenner's testimony given as a consecutive whole with all of the inflections and emphasis which cannot be reproduced in a printed record, did not view Dr. Brenner's remarks as respondent would have us do. Although he did not deal with specific aspects of Dr. Brenner's testimony, the examiner concluded that the evidence as a whole proved respondent's test was inadequate to support the 25 percent quicker stopping claim for surfaces other than those tested (ID, 22 [p. 418, herein].)

*Reported as corrected by order of the Commission, Feb. 16, 1973.

issue here is simply whether a test of the comparative stopping qualities of respondent's Wide Oval tire made on a hazardous road surface is adequate scientific support for respondent's claim that its Wide Oval tire will stop a precise percentage quicker on all road surfaces.

We conclude that the evidence demonstrates clearly that respondent's ten test runs were inadequate to support its advertised claims respecting the stopping qualities of its Wide Oval tires. Respondent's test was extremely limited in scope in contrast to respondent's unqualified advertising claim. The expert witness called by complaint counsel explicitly stated that the test was not scientifically adequate to support respondent's claim. Respondent failed to call any experts to controvert this testimony but chose to rely on one small equivocal portion of Dr. Brenner's testimony as its sole basis to support its contentions as to the adequacy of its tests.

Respondent's further argument that it was acting in a responsible manner in selecting a wet surface upon which to test its tires since such surfaces present the most serious risks for accidents is not relevant to this proceeding. The selection of the surface in itself is not the issue here, but whether, whatever surface is used, the specific advertising claim made by respondent on the basis of its tests is in fact adequately substantiated by the test data. If respondent had limited its claim to the stopping performance of its Wide Oval tires on "wet slippery surfaces," as it did in later ads, this claim *might* have been substantiated by the test.¹⁰ The practice of respondent being challenged here was not in the design of its particular test but in its failure to limit its advertising claim to the type of comparative tire performance which its test results substantiated.

Finally, respondent also argues that if it had limited its claim to wet slippery surfaces, such a claim would have made tire purchasers feel more disposed toward the Wide Oval tire than the claim challenged here and would have caused them to buy more Wide Ovals. On this basis respondent concludes that its ad was not deceptive, since it used a claim which had diminished rather than enhanced the appeal of its products. (Res. App. Br. 14-15.)

¹⁰ Complaint counsel indicated that he would have been "reluctant to challenge respondent's ad if limited to "wet slippery surfaces." (C.C. Find., 18.) This more limited advertisement is not before us and we need not consider its lawfulness. We note, however, that numerous variables besides friction coefficients affect the relative stopping performance of tires, so that respondent's test using a single type of wet surface and comparing the Wide Oval with only one set of regular tires might not in fact be adequate to support a claim even as to all wet slippery surfaces without further specific qualification as to the surface involved and the types of other tires against which its tire was compared.

First, we cannot agree that respondent's ad diminished the appeal of its product. Certainly there is no evidence to this effect.¹¹ Also, it is illogical to assume that consumers would prefer a tire tested only on a wet surface to one tested on a variety of wet and dry surfaces. Certainly the risks of accidents are not limited to wet surfaces, and given the congested traffic of our cities and the speeds of our super highways, stopping capacity can be equally important to drivers on dry surfaces as well as wet. Furthermore, to consumers in arid climates an advertisement as to stopping capacity on wet slippery surfaces may in fact have little appeal. In short, assuming any relevancy to respondent's argument, there would seem to be little or no basis for assuming that respondent's advertisement challenged here would have less consumer appeal than one limited to wet slippery surfaces.

In any event, whether or not respondent could devise a more appealing advertisement substantiated adequately and scientifically by its test data is irrelevant to this proceeding. The legal determination as to whether an advertisement is deceptive is not based on its effectiveness relative to truthful ads in selling products. If this were the test, companies could deceptively advertise with impunity so long as they could show that a truthful advertisement would sell even more products. Clearly the existence of a more appealing but truthful ad does nothing to cure the defects of a deceptive ad and has no relevance to a determination of whether a particular advertisement is deceptive.

The legal test for determining if advertising has violated Section 5 is whether:

* * * the use by accused of the false and misleading statements and representations has the *capacity and tendency* to deceive and mislead members of the public * * * into the erroneous and mistaken belief that said statements and representations are true. *U.S. Retail Credit Ass'n. v. FTC*, 300 F. 2d 212, 221 (4th Cir. 1962).

This test has been met in the instant case. Respondent agrees that its advertisement represents that its 25 percent quicker stopping claim has been substantiated by adequate scientific tests. This was the thought that the advertisement erroneously conveyed to the public. As shown above, respondent did not adequately substantiate its advertising claim. Thus, consumers were led to believe that respondent's tires had been adequately tested when in fact they had not. Clearly, respondent's advertisement thus had the capacity and tendency to deceive members of the public into an erroneous and mistaken

¹¹ It is difficult to imagine that respondent would have selected such an advertisement to sell its product if it did not attract customers.

belief as to respondent's product. That consumers were actually deceived need not be shown. *Charles of the Ritz Distributors Corp. v. FTC*, 143 F. 2d 676, 680 (2d Cir. 1944); *Fioret Sales Co. v. FTC*, 100 F. 2d 358, 359 (2d Cir. 1938).

Respondent argues that complaint counsel was required to show that respondent's advertisement would have been likely to cause consumers to buy its product when they otherwise would not have done so. *Bockenstette v. FTC*, 134 F. 2d 369, 371 (10th Cir. 1943); *Indiana Quartered Oak Co. v. FTC*, 26 F. 2d 340, 342 (2d Cir. 1928). We do not agree that these cases stand for the proposition that such a showing is required to prove deception, although certainly a showing that consumers obtained from the ad an erroneous impression of the product's performance capabilities could be one way in which deception could be proved.¹² The fact that consumers were not harmed because they would have purchased the products anyway under truthful advertisements is not relevant to this proceeding.¹³ The sole relevant consideration is whether respondent's advertisement truthfully represented the facts about respondent's Wide Oval tire to the public. We hold that it did not.

In sum, we find that the admitted circumstances under which respondent tested its tires were limited and that despite these limited test conditions, respondent used these tests as its sole support for its advertisement representing that its Wide Oval tires would stop 25 percent quicker under all road and weather conditions and relative to all other types of regular tires. Its tests did not support, either directly or by reasonable extrapolation, respondent's broad stopping claim. The particular claim at issue here involves a matter of human safety. It is a claim which consumers themselves cannot verify since they have neither the equipment nor the knowledge to undertake the complicated tire tests required. They must rely on the technical expertise of the manufacturer to assure the validity of its claims. Under such circumstances, it is both unfair and deceptive to consumers to make a specific advertising claim without substantial scientific test

¹² *Indiana Quartered Oak*, a case decided before the 1938 Wheeler-Lea amendment, considered only the showing necessary to prove unfair competition, not deceptive practices. *Bockenstette* indicates only that to show deception, it is "sufficient" that a probable result of the practice is to "cause one to do that which he would not otherwise do." 134 F.2d 369, 371.

¹³ In *Montgomery Ward & Co. v. FTC*, 379 F.2d 666 (7th Cir. 1967) the court found that even if petitioner honored its policy of a money-back guarantee, this could not justify false advertising. If it were otherwise, "anything might be advertised as long as unsatisfied customers were returned their money." 379 F.2d at 671. The same rationale applies here. Even if we were to accept, which we do not, respondent's contention that consumers were not harmed because they would have purchased its tires anyway under a truthful advertisement, this does not erase the initial deception that the advertisement conveys and which the Commission is obligated to correct.

data to support it. In light of the record evidence in this case as outlined above, we agree with the examiner that respondent's test did not constitute adequate scientific support for its 25 percent quicker stopping claim, and that the advertisement was thus unfair and deceptive within the meaning of Section 5 of the Federal Trade Commission Act.

B. Respondent's Safe Tire Representations

The complaint alleged that through the following advertisement and others similar to it respondent made two misrepresentations: (1) that its tires are safe under all conditions of use, and, (2) that it can assure that its tires are free from any defects. The advertisement reads as follows:

The Safe Tire Firestone

When you buy a Firestone Tire—no matter how much or how little you pay—you get a safe tire. Firestone tires are custom-built one by one. By skilled craftsmen. And they're personally inspected for an extra margin of safety. If these tires don't pass all of the exacting Firestone inspections, they don't get out.

Every new Firestone design goes through rugged tests of safety and strength far exceeding any driving conditions you'll ever encounter. We prove them in our test lab. On our test track. And in rigorous day-to-day driving conditions. All Firestone tires meet or exceed the new Federal Government testing requirements. (They have for some time.)

Firestone—The Safe Tire. At 60,000 Firestone Safe Tire Centers. At no more cost than ordinary tires. (Compl. para. 4(e).)¹⁴

The principal issue on appeal is whether, as the examiner found, the advertisement of Firestone tires as "The Safe Tire" represents that Firestone tires are free from all defects and are safe under all conditions of use.¹⁵

Respondent argues first as to both claims that the record does not support the examiner's findings because its consumer survey "squarely rebutted" the construction of the advertisement alleged in the complaint. In addition to relying on its survey evidence, respondent also argues that as a matter of "common sense" consumers would not construe its ad as representing that its tires are absolutely defect free nor infer from the ad that its tires are safe under all conditions of use

¹⁴ An additional Firestone advertisement was entered into evidence containing similar "safety" representations. (ID, 18-19, [p. 411 herein] CX 14-D.)

¹⁵ Respondent acknowledges that it cannot insure that its tires are absolutely free from defects but only that they were manufactured with due care using the best manufacturing techniques known to the industry. (CX 3.) It also concedes that its tires are not absolutely safe under all conditions of use and that their safe performance depends on their being properly cared for and run with correct inflation and tire pressures for the load carried. (Res. App. Br., 25.)

because it is a matter of "common knowledge and experience * * * that tires need adequate air and bald tires may be dangerous." (Res. App. Br., 22.)

We will consider first respondent's survey evidence which bears upon both alleged misrepresentations in the "Safe Tire" ad. Then, because respondent's additional arguments as to the proper construction of the advertisement differ somewhat between the two alleged deceptive safety claims, we will deal with each separately.

1. *Respondent's Survey Evidence*

In order to support its contentions as to how its advertising message was in fact perceived by consumers, respondent conducted a probability survey of a scientifically selected sample of the universe of tire purchasers. These purchasers were shown the full text of "The Safe Tire" ad set forth above. After removing the ad from view, they were asked which of the following four statements came closest to what they thought the ad said:

- (a) Firestone does all it can to use the best manufacturing and testing procedures to make its tires safe and as free as possible from defects of any kind;
- (b) Almost all Firestone tires are safe under normal conditions and are free from defects that might make them unsafe;
- (c) Each model of Firestone tires at least meets the minimum government safety standards;
- (d) Every Firestone tire is absolutely safe no matter how it is used and regardless of the tire inflation pressure and load of the car; or every single Firestone tire will be absolutely free from any defects. (RX 53, 4.)

Over half (52.7 percent) of the interviewees selected statement (a) as coming closest to what they thought the ad said; 15.9 percent selected (b); 14.3 percent selected (c); and 15.3 percent selected (d), the statement containing the interpretation of the ad as alleged in the complaint. This last group of 15.3 percent were also asked if they believed the ad and 5.4 percent stated that they thought the ad exaggerated. (RX 53, 5.)

The hearing examiner did not explicitly decide whether or not the survey was valid.¹⁶ He indicated his view that even if the survey results were correct, the 15 percent interviewed who perceived the ad as alleged by complaint counsel constituted a sufficiently significant percentage of the buying public who were entitled to be told the truth regarding the safety of respondent's tires. (ID, 18 [p. 415, herein].) Respondent now asks the Commission to rely on its survey results in

¹⁶ At one point the examiner "doubted that only 15 percent of the purchasing public would construe the statement as did those responding in the survey" and at another point indicated that the survey was "designed and conducted in a professional and competent manner." (ID, 17, 18 [p. 415, herein].)

determining whether or not its ads were unfair or deceptive to consumers.

It is clear that the Commission, if it so chooses, need not rely on respondent's survey but may rely on its own reading of the tire advertisement to determine its meaning to the public and whether it has the tendency or capacity to deceive the public. The law is clear that the Commission's expertise is sufficient and that it need not resort to survey evidence or consumer testimony as to how an advertisement may be perceived by the public or whether they relied upon the ad to their detriment. *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 391-92 (1965); *J. B. Williams & Co. v. FTC*, 381 F. 2d 884, 890 (6th Cir. 1967); *Niresk Industries, Inc. v. FTC*, 278 F. 2d 337, 342 (7th Cir.), *cert. denied*, 364 U.S. 883 (1960); *E. F. Drew & Co. v. FTC*, 235 F. 2d 735, 741 (2d Cir. 1956), *cert. denied*, 352 U.S. 969 (1957), *Charles of the Ritz Distributors Corp. v. FTC*, 143 F. 2d 676, 680 (2d Cir. 1944).

In the instant case, respondents chose to offer into the record a scientifically determined sample of consumer views as to how this advertisement was in fact perceived by them. It is incumbent upon us, therefore, to consider this evidence and determine the weight, if any, which should be attributed to it in adding to the expertise which we must bring to bear upon the issue of whether this advertisement constituted an unfair or deceptive practice.

We find no problems in the sampling methodology used in conducting the survey. The interviewers were properly selected on a random probability basis, the use of oral interrogation was entirely proper and appropriate and the impartiality of the interviewers was without question. However, we find serious problems in the survey instrument itself which casts substantial doubt on the usefulness and applicability of the answers elicited.

The essential flaw in the survey technique stems from the fact that no one of the four separate statements about the advertisement's content is mutually exclusive of any other. Hence, if one statement is selected as "closer" than another to what the individual perceived the ad was saying, this fact does not take into account the possibility that the interviewee might also have perceived the ad as conveying more than one of the statements selected. For example, it is conceivable that a consumer could perceive both that "Firestone does all it can to use the best manufacturing and testing procedures to make its tires safe and as free as possible from defects of any kind (statement (a) above) and that "Every single Firestone tire will be absolutely free from any defects" (part of statement (d) above). Or he could perceive that "Each model of Firestone tires at least meets the minimum government safety stand-

ards" (statement (c)) and that "Every single Firestone tire will be absolutely free from any defects" (statement (d)).

The distortions inherent in the results flowing from the required selection of statements which are not mutually exclusive are aggravated by the inclusion among the choices of statement (c): "Each model of Firestone tires at least meets the minimum government safety standards." Since the "safe tire" ad in issue expressly made the statement that "All Firestone tires meet or exceed the new Federal Government Testing requirements," it is unreasonable to assume that persons who chose this statement did not also gain other perceptions from the ad which might have been encompassed by one or more of the other statements even though not perceived as "closer" to the ad, however "closer" was interpreted by the interviewees.

Another difficulty with the survey which casts doubt on its validity in determining the issues in this case stems from the fact that respondent sought to address two separate complaint allegations by this survey. The first allegation is that the Firestone ad constitutes a representation that Firestone tires are free of all defects. The second allegation is that the ad represents the tires are safe under all conditions of use. The respondent's survey failed to test these allegations separately, although they represent two separate questions for the Commission to resolve. Statement (d) about which the interviewees were interrogated coupled both the free-from-defects representations and the safe-under-all-conditions-of-use issue. The interviewees were thus confronted with the choice of a compound statement among other non-compound statements. Consequently, some interviewees may have thought that the entire statement (d) had to be perceived in respondent's advertisement in order to select that statement. Since statement (d) was of a different structure than the other three statements, respondent should have demonstrated through appropriate pre-tests of the questionnaire how the statement was understood by interviewees, or more appropriately the two allegations should have been addressed separately.

In short, we conclude that an effort to determine consumers' perceptions of a multi-statement advertisement through the device of asking them to select only one statement from several non-mutually exclusive statements which might be perceived in the ad is an impermissible method of determining consumer perceptions about that advertisement. As a result, we can ascribe little probative weight to the statistics purporting to reflect consumer perceptions about this ad. We do not believe, therefore, that respondent's survey provides any insight into how this advertisement was in fact perceived by consumers.

We turn now to the remaining evidence and arguments concerning

each of the alleged deceptions contained in respondent's "safe tire" advertisement.

We note at the outset that both alleged misrepresentations go to the issue of the safety of respondent's product, an issue of great significance to consumers. On this issue the Commission has required scrupulous accuracy in advertising claims, for obvious reasons. If consumers are misled or uninformed as to the safety of a product, the consequences may not be limited to monetary loss but personal injury as well. Thus, the Commission has frequently decided that the omission of product safety information is an unfair and deceptive practice. For instance, where no safety claim has been made about a product, but the product itself is inherently dangerous, the Commission has required parties to affirmatively state that such dangers exist. *In re Stupell Enterprises*, 67 F.T.C. 173 (1965); *In re Novel Mfg. Corp.*, 60 F.T.C. 1748 (1962); *In re Fisher & Deritis*, 49 F.T.C. 77 (1952). In these cases the Commission has determined that where the danger is not readily observable, the law requires affirmative disclosures of the danger to focus the attention of consumers on this fact. Otherwise, the Commission has found, consumers assume that products put into commerce are safe under normal use. *In re Stupell*, *supra*, at 187. In addition, the Commission has held that where specific claims as to product safety are advertised without any qualifications or limitations, it is unlawful not to affirmatively reveal any limitations which may in fact exist. *In re Universe Co.*, 63 F.T.C. 1282 (1963), *aff'd sub. nom. Kirchner v. FTC*, 337 F. 2d 751 (9th Cir. 1964); *In re Nuclear Products Co.*, 49 F.T.C. 229 (1952). Under such circumstances, the Commission has required respondents to disclose the limits of their safety claims so as to prevent the dangers inherent in consumers' believing a product to be absolutely safe.

These cases make clear that advertisers are held to a high standard of care in making representations involving the safety of their products in order to assure to the greatest extent possible that their claims will not be misunderstood by the public. It is against the background of these principles as enunciated in these and other cases that we must consider the two complaint allegations regarding the representations contained in respondent's "safe tire" advertisement.

Free of All Defects Claim

Respondent vigorously denies complaint counsel's contention that its "safe tire" ad constituted a representation that its tires were free from any manufacturing defects or defects in materials or workmanship. (Compl. para. 5(3).) Respondent argues that the proper interpretation

of the advertisement is that respondent exercised the highest degree of care and exerted its best efforts to make its tires safe. (Resp. App. Br., 17.) Respondent also urges that the word "safe" should not be considered an absolute term, citing *Raladam v. FTC*, 42 F.2d 430 (6th Cir. 1930), and argues further that consumers would not construe the term "safe" in the absolute sense.

Respondent's ad made an unqualified reference to its tires as "safe." Moreover, its advertisement went further and dwelt at some length on the pains to which respondent went to make them safe. Viewing the ad as we must in its entirety, *Rhodes Pharmacal Co., Inc. v. FTC*, 208 F.2d 832, 387 (7th Cir. 1953), it is clear that the advertisement directly associated the safety of its tire with the quality of its manufacture. Thus, the advertisement in question represented that Firestone tires are "custom built, one by one," that "skilled craftsmen" build them, that they are personally inspected," and if they don't pass all the exacting Firestone inspections, "they don't get out." To any one who is not an expert on tire testing, and who does not know, therefore, that it is impossible under current tests to assure that tires are free of defects,¹⁷ we find that this advertisement not only affirmatively implied that only Firestone tires which are free of defects reach the consuming public but also affirmatively negated any possible contrary assumption on the part of consumers.

Respondent by its own admission¹⁸ cannot guarantee that its tires are defect free. The import of its advertisement thus contravenes the admitted facts in this case. Respondent argues that complaint counsel has not shown that any defective or unsafe Firestone tires have actually reached the public. However, such a showing was unnecessary. The complaint alleges that the import of respondent's advertisement was that a purchaser of its tires would be *assured* of receiving a defect free tire, when in truth and in fact, a purchaser could not be assured of receiving such a tire. (Compl. para. 5(3), 6(3).) Thus, it was enough for complaint counsel to show that respondent made the alleged representation and that it could not truthfully make such an assurance of no defects because present tests cannot detect all tire defects.

As noted above, when making safety claims respondent must be held to a standard of unqualified truthfulness. This is particularly true when such claims are of a type which consumers cannot themselves test as is the case here. Consumers must thus rely on the expertise and complete honesty of respondent. These circumstances de-

¹⁷ The current state of the art is such that tires cannot be thoroughly tested for defects without being destroyed. (ID, 18 [p. 415, herein].)

¹⁸ As indicated in note 15, *supra*, respondent stipulated to the fact that it is impossible to insure that each tire is defect free.

mand scrupulous adherence to the truth, which we find absent in this advertisement. We conclude that respondent's absolute representation that its tires are "safe" is false and deceptive on its own admission that tires cannot under today's technology be assured of being free of defects. In view of this technological impossibility, it is an unfair and deceptive act and practice for respondent to make the unqualified assertion of safety which it made in this case.

Conditions of Use Claim

While it is clear from the face of the advertisement that respondent makes no *explicit* claim that its tires are safe under all conditions of use, we believe it does so implicitly. Respondent's advertisement asserts flatly that the Firestone tire is "The Safe Tire" and describes the exacting rugged tests ("far exceeding any driving conditions" consumers will ever encounter) which the tires are put through to assure this safety. Respondent's advertisement gives no indication that there is any limit to the safety of this tire or what such limits might be.

Respondent argues that it is "common knowledge" that conditions of use such as inflation pressure, overloading, and tire wear affect tire safety. Respondent concludes from this "common knowledge" notion that knowledgeable consumers will not give full credence to its unlimited safety claims as written but will read the conditions-of-use qualifications into the advertisement's flat assertion. (Resp. App. Br., 25.) The record in this case, however, establishes clearly that under certain conditions tires may not be safe. Furthermore, the record contradicts respondent's claims about consumer knowledge as to tire use.

Dr. Brenner testified that tires which are overinflated for instance, will have less impact resistance and will be more easily damaged by running over obstacles than tires properly inflated. He also stated that when tires are underinflated they will run hotter and the core rubber and adhesive are more likely to disintegrate and fail. The same dangers exist when tires are overloaded. (Tr. 268-69.)

Regarding the consumer's knowledge about the relationship of these conditions of use to tire safety, Dr. Brenner essentially disagreed with respondent's suggestions that the relationship was common knowledge. He testified that he would "hope" that people knew such facts. He pointed out, however, that a tire use survey he conducted showed that many people do not follow safe practices in using their tires. (Tr. 339, RX 7.)¹⁹ For example, more than 25 percent of the cars tested

¹⁹ Dr. Brenner's survey studied how people in the United States were using their tires so that a safety standard could be developed which would be pertinent to that use. (Tr. 356.)

had at least one seriously underinflated tire. (RX 7, iii.) The report indicates that such underinflation increases tire temperatures at high speeds, thereby increasing the danger of tire disablement. In addition, tire underinflation reduces tread wear and affects the handling properties of the vehicle, thus reducing its capacity to respond safely. (RX 7, viii.)

The record before us does not reveal whether people are ignorant of the danger of improper tire care or whether people are aware of the danger but choose to assume the risks out of indifference. Respondent would have us assume the latter alternative. We disagree.

Too much is at stake, especially in matters of safety, to make any assumptions about consumer knowledge. Certainly this record provides us with no basis on which to do so. Tire care is not a simple matter. Firestone itself seems to recognize the fact that consumers are not fully informed as to tire care, since it prepares and distributes a booklet to consumers of its tires telling them about the proper steps to maintain their tires.²⁰ Furthermore, Dr. Brenner's tire use study lends some support to the notion that tire buyers may not be aware of the dangers of improper tire care.²¹

The Commission cannot and should not assume a degree of sophistication on the part of tire buyers such that they will themselves read into respondent's advertisement certain disclaimers with respect to its safety claims which are made in such absolute and unqualified terms. The law aims to protect the vast multitude of consumers which includes, "the ignorant, the unthinking and the credulous." *Charles of the Ritz Distributors Corp. v. FTC*, 143 F.2d 676, 679 (2d Cir. 1944). Whatever amount of information consumers may have about tire safety, the burden is hardly upon them to read material facts into an advertisement in order to make it truthful. The burden is on the respondent to include such material information in the advertisement. Here respondent, not the consumer, chose to make explicit safety claims about its tires. Respondent, not the consumer, had the known expertise regarding tire safety. Respondent alone was in the position to assure that its advertisement was accurate and consumers had to

²⁰ The booklet informs the consumer, *inter alia*, about proper inflation for the load carried, tire inspection and tire rotation. Respondent argues that this booklet dispels any possible misunderstanding by consumers as to the claimed safety of respondent's tires. However, respondent cannot avoid liability by trying to undo advertising deception by post-sale information. The harm is already done when the misleading advertising induces the consumer to purchase the product. *Montgomery Ward & Co. v. FTC*, 379 F.2d 666, 670 (7th Cir. 1967).

²¹ The study did not determine why consumers fail to follow safe practice in caring for their tires. There are at least two possible explanations: (a) ignorance of the danger of improper care and (b) carelessness. It is certainly not logical to assume, however, that all or even very many consumers with neglected and unsafe tires were merely careless, especially if they knew the risks of using such tires.

rely on its accuracy, since they could not test the claim themselves. Clearly, respondent's duty was in this instance to set forth all material facts regarding the limitations on its safety claim so that its advertisement could not be misleading or unfair even to those consumers completely ignorant of proper tire care. Respondent has failed to do so here in omitting any mention of the fact that conditions of use affect the safety of its tires.

We conclude that respondent had the burden of making its safety claims unqualifiedly truthful to insure, to the greatest extent possible, that its representations would be fully and completely understandable and would create no possible room for doubt, ambiguity, or misinterpretation. We find respondent here failed to meet this standard of truthfulness in its "safe tire" advertisement thereby violating Section 5 of the Federal Trade Commission Act.

C. "Safety Champion" Issue

The complaint charged that respondent's use of the tire name "Safety Champion" was misleading and deceptive in that it represented that such tires had unique construction or performance features rendering them *safer than other tires when in fact they were not safer*. (Compl. para. 8, emphasis added.) Respondent and complaint counsel stipulated to the fact that the tires in question do not have unique construction or performance features which render them safer than other tires. (CX 6, 2.) Thus, the sole issue in question is whether the name "Safety Champion" in fact constitutes a representation to the public respecting unique construction and special safety features of this particular tire rendering it safer than other tires as alleged in the complaint.

The hearing examiner concluded that while it may be literally true that the name "Safety Champion" means that the tires were supreme over all competitors as to safety, as alleged in the complaint, the common acceptance of that name would more likely be the same as it would be for the phrase, "the safe tire." In other words, the examiner apparently concluded that the name "Safety Champion" would be perceived by consumers as representing that the tires were free from defects and safe under all conditions of use. On this basis, the examiner recommended an order provision requiring respondent to cease and desist from using the words "Safety Champion" to describe its tires.

Complaint counsel contests the hearing examiner's finding of fact on this issue since his interpretation of the "Safety Champion" name departs from the complaint allegation, but he supports the examiner's order. Complaint counsel's position is, in effect, that the Commission

should determine on the basis of its own expert judgment the proper interpretation to be given the name "Safety Champion." Complaint counsel asserts that through respondent's frequent use of the word "champion" in its tire names, it has conveyed the sense that Firestone tires are better than all other tires, and when, "champion" is similarly used in conjunction with a safety theme, it conveys the message that the Firestone tire is safer than other tires. (C.C. App. Br., 9-10.)

Respondent, on the other hand, contests the hearing examiner's order to cease using the "Safety Champion" name, arguing that the complaint allegation as to the deceptive nature of the name was resolved by the examiner in respondent's favor and, therefore, no order provision on this claim is warranted.

Respondent asks the Commission to interpret the name "Safety Champion" on the basis of a survey designed by Dr. Hans Zeisel to determine consumers' perceptions as to the comparative degree of safety conveyed by tire names. (RX 52.) The survey was a national probability sample representative of past and potential tire buyers. The interviewees were shown a card with six tire names with the word "safety" in each name and asked whether, based on the names alone, they thought any of the tires had unique performance or construction characteristics which would make one tire safer than others. Those who thought one or more of the tires listed would be safer than others were then asked which tire was safer than the rest. Only 1.4 percent of all interviewees selected the tire named "Safety Champion" as one with unique performance or construction characteristics making it safer than others.²² This percentage was substantially lower than that for four of the other tire names.²³

Complaint counsel argues that the survey was biased in that it only included names with the word "safety" in them. This fact, however, does not destroy the probative value of the test results with regard to the particular complaint allegations at issue here. The complaint alleged that the name "Safety Champion" represented that the tires were "safer than other tires." (Compl. para. 8.) Both counsel for respondent and the Commission stipulated that the issue was whether the name represented to a "significant segment" of the tire-buying public that the tires were "safer than *all* other tires." (CX I, emphasis added.) It was thus fair to select *any* tire names for purposes of comparison, including those with the word "safety" in them, to show

²² Of these 1.4 percent, 0.8 percent also selected at least one other brand name as safer than the rest, thus reducing the percentage of persons selecting only "Safety Champion" as the safest tire to .6 percent of all those interviewed.

²³ The survey results showed that 23.1 percent selected the name "Safety All Weather;" 11.3 percent selected "Safety Traction Tread;" 7.4 percent, "Grip Safe;" 5.0 percent, "Super Safety 800;" 1.4 percent, "Safety Champion;" and .9 percent, "Safety Master."

that the "Safety Champion" name did not in fact represent it was the safest tire made, and thereby to disprove the complaint allegation.

In the instant case, we find respondent's survey of value in informing us as to consumers' perceptions of the "Safety Champion" name. The probability sample was properly conducted and administered, the interviewing procedures were fair, and the questionnaire was appropriate to determine consumer perceptions of the "Safety Champion" name.

Accordingly, in light of respondent's survey showing a very low percentage of consumers who would perceive the "Safety Champion" name as alleged in the complaint, and in view of our own reading of the name, which does not compel a contrary conclusion, we find, as did the hearing examiner, that the name "Safety Champion" does not represent that the tire is safer than all other tires.²⁴ However, we disagree with the examiner's conclusion that it was nevertheless proper to prohibit the use of this brand name on the basis of an interpretation neither alleged in the complaint nor argued by the parties.

Accordingly, having found that complaint counsel has failed to prove the complaint allegation concerning the Safety Champion issue, we conclude that the allegation must be dismissed.

II

ISSUES OF RELIEF

We will consider first those issues of relief raised by complaint counsel and respondent which concern specific provisions of the examiner's proposed order and second the affirmative relief provisions sought by intervenor SOUP.

A. Specific Order Provisions

Complaint counsel argues that the examiner erred in failing to order respondent to substantiate its future safety, performance or quality claims about its consumer products with "competent *scientific* tests," as required in the original notice order. (Emphasis added.) The examiner rejected the requirement that the test be "scientific," stating his belief that the tests could be "road tests or other practical tests competently observed and recorded." (ID, 32 [p. 427, herein].) In his order he required respondent to cease and desist from making any

²⁴ Because of the resolution of this issue in respondent's favor, there is no need to consider respondent's contention that the Commission approved the use of the name "Safety Champion" as not being false or misleading and that it is, in effect, estopped from now proceeding against respondent for the use of such name. Similarly, there is no need to deal with respondent's contention that it discontinued using this tire name before it was aware the name might be challenged. (Resp. Ans. Br. 2-3.)

representations as to the quality, safety or performance of its consumer products unless they are "fully and completely substantiated by competent tests and the results are available for inspection." (ID, 34 [p. 428, herein].)

As we stated in *Pfizer*, "there may be some types of claims or some types of products for which the only reasonable basis, in fairness and in the expectations of consumers, would be a valid scientific or medical basis. The precise formulation of the 'reasonable basis' standard, however, is an issue to be determined at this time on a case-by-case basis." In the circumstances of *this* case, we believe that consumers could reasonably have expected Firestone's performance and safety claims to have been substantiated by scientific tests.

Accordingly, we agree with complaint counsel that in the circumstances of this case respondent should be required to substantiate its claims by "scientific" tests. In our view a scientific test is one in which persons with skill and expertise in the field conduct the test and evaluate its results in a disinterested manner using testing procedures generally accepted in the profession which best insure accurate results. This is not to say that respondent always must conduct laboratory tests. The appropriate test depends on the nature of the claim made. Thus a road or user test may be an adequate scientific test to substantiate one performance claim, whereas a laboratory test may be the proper test to substantiate another claim. Respondent's obligation is to assure that any claim it makes is adequately substantiated by the results of whatever constitutes a scientific test in those circumstances.

The examiner's order requires respondent to keep its test results available for inspection without indicating the period of time for doing so. Complaint counsel would require that the results be kept available for three years following the last use of the claim. We believe that a time limit should be indicated and that three years following the termination of the claim is an appropriate period. Therefore, we have incorporated this limitation into the order accompanying this opinion. We have also limited Paragraph 5 of our final order to automobile tires since the test obligation imposed by this provision was directed solely to this type of product. We have further enlarged upon the record keeping requirement to assure that not only test results are available for inspection, but also the original test data which was collected in the course of the test and a detailed description of how the test was performed. Without the benefit of this information, neither the Commission nor the consumer will be able to evaluate the accuracy of the test results and whether they in fact substantiate the advertising claim.

The order recommended by the examiner also prohibits respondent

from making any representations regarding the safety of its tires without disclosing that the safety of any tire is affected by conditions of use, such as inflation pressure, vehicle weight, wear, and other operating conditions. Respondent urges that this provision is unjustified in its breadth. (Resp. App. Br., 26.) Respondent argues that the affirmative disclosure that tire safety is affected by conditions of use is not appropriate for all safety claims but only when the advertised safety feature of the tire may actually be affected by conditions of use. For instance, respondent argues, there is no reason to set forth qualifications regarding conditions of use in an advertisement describing quality control procedures.

We do not agree that such fine distinctions between safety claims should be made in this case. Any claims which go to the safety of respondent's tires, including those regarding quality control procedures, tend to imply that those tires are safe in use. After all, it is the safe performance of the tires which consumers are interested in and which the advertisers in the end hope to promote with their safety claims. Therefore, to assure complete accuracy all representations of safety, whether express or implied, should be properly qualified to indicate that safety of any tire is affected by conditions of use. Accordingly, we agree with the examiner's recommended order as originally proposed.

Respondent also urges the Commission to dismiss the examiner's order provision requiring respondent to cease and desist from using the name "Safety Champion." Inasmuch as we have found that complaint counsel failed to prove the allegation concerning the use of this brand name, we concur in respondent's view and delete this provision from the order.

B. Affirmative Relief Sought by SOUP

Intervenor SOUP contends—indeed this was the sole purpose of its intervention in this proceeding—that a mere prohibitory order requiring Firestone not to repeat its deceptive advertising claims in the future will not constitute adequate relief for the deceptions found to have been made. SOUP argues the public interest will not be served unless respondent is required to publicize the fact that it had in the past made false claims about the performance and efficacy of its tires.²⁵

²⁵ SOUP seeks two additional order provisions: (1) that Firestone's future advertisements of its tires containing representations as to their safety or performance must contain a corrective message in a form approved by the Commission indicating that certain of its prior advertisements were false, deceptive or misleading; and (2) that Firestone be required to send a corrective letter to all Firestone tire purchasers over the period January 1, 1967 to December 31, 1970 making the same disclosures. (SOUP App. Br., 39-40.)

It is SOUP's contention that a negative cease and desist order prohibiting the making of the deceptive claims is not a sufficient remedy because there are residual effects from the deceptive claims in consumers' minds which will not be eradicated by a mere prohibition on the making of these misrepresentations in the future. SOUP also argued that Firestone is still deriving sales benefits from the deceptive ads and that neither their monetary benefits nor the possible physical injury to consumers which might flow from Firestone's misrepresentations will be remedied by an exclusively prohibitory cease and desist order. Further SOUP argues that the Commission had found Firestone engaged in false advertising on two previous occasions so that a stronger remedy should now be imposed.

Intervenor ANA²⁶ and respondent Firestone both argue that SOUP has failed to prove that the residual effects of respondent's advertisement may still produce sales or persist in the mind of the public so as to require affirmative eradication. They also argue that the Commission has no power to order this type of affirmative relief.

The advertisements which gave rise to SOUP's relief request appeared in national magazines during the period from January 1967 through September 1968.²⁷

In his initial decision the hearing examiner concluded that the Commission has the authority to issue a corrective order but that in the present case such relief was not necessary. (ID, 31 [p. 426, herein].) After summarizing the wide array of evidence going to the existence and

²⁶ ANA did not appeal from the hearing examiner's decision but submitted briefs in opposition to SOUP's request for a corrective advertising order.

²⁷ The time periods and frequency of appearances differed as respects Firestone's "safe-tire" ad and its 25 percent quicker stopping ad. The publication dates, magazines and frequencies of publication submitted for the record for these two ads were as follows:

Publication	Number of appearances of ad in publication	Dates of publication
"Safe-Tire" ads:		
Newsweek.....	1	Dec. 25, 1967.
Saturday Evening Post.....	1	Feb. 10, 1968.
Look.....	1	Mar. 15, 1968.
Life.....	1	Mar. 22, 1968.
Saturday Evening Post.....	1	Mar. 23, 1968.
Playboy.....	1	May, 1968.
Saturday Evening Post.....	1	May 18, 1968.
"25 percent Quicker" ads:		
Life.....	6	January, 1967 through
Look.....	4	Sept., 1968.
Saturday Evening Post.....	3	
Time.....	8	
Newsweek.....	6	
U.S. News.....	7	
Sports Illustrated.....	7	
Readers Digest.....	6	
Playboy.....	9	
Ebony.....	5	
Total appearances.....	68	

magnitude of the residual effects of the Firestone ads in question, he reached the following conclusion:

Although this is a matter of judgment, it appears that such an order is not necessary or desirable in this case for the following reasons:

(1) There has been a considerable lapse of time since the advertising occurred.

(2) There is no reason to believe that many of the tires advertised as safe have enough tread left on them for the owners to believe they are safe.

(3) The evidence shows that the residual effect of the advertising will be slight indeed by the end of this year even if the evidence offered by SOUP is viewed in the most favorable light.

(4) Many of respondent's competitors have made safety claims through the use of brand names similar to "Safety Champion" and are under no cease and desist order of any kind. (ID, 31-32 [p. 426, herein].)

SOUP has appealed from this portion of the examiner's findings and conclusions. Intervenor ANA and respondent Firestone both support the examiner's conclusions as to the applicability of the relief in this case but dispute his legal conclusion as to the existence of this power in the Commission.

Neither the Bureau of Consumer Protection nor complaint counsel argued in support of intervenor SOUP's request for the imposition of corrective advertisements in this case, although both strongly argued in support of the legal power of the Commission to order such relief in appropriate cases.²³

Thus the issues posed by the parties span both the broad question as to the Commission's power to order the relief contended for by SOUP as well as the propriety of its exercise in the instant case. We shall deal first with the arguments of counsel on the existence of the power and, because we agree with the examiner that such power

²³ The Bureau of Consumer Protection asserted affirmatively that it was taking "no position with respect to the propriety of imposing a corrective advertising remedy in this particular case." It stated that its brief was submitted solely "in support of the naked legal proposition that the Commission has authority to issue 'corrective advertising' orders." (C.C. Ans. Br. to Intervenor.)

Complaint counsel took the position that:

[A]lthough the Commission clearly possesses the authority to require, in appropriate matters, corrective advertising by a respondent found to have violated Section 5 of the FTC Act, the record in this case does not support the inclusion of such a provision herein. (C.C. App. Br., 3.)

However, in his reply brief on appeal complaint counsel would not particularize his reasons for concluding that corrective advertising was not warranted in this case. (C.C. Rep. Br., 2-3.)

does exist, we shall then consider the second issue raised as to the propriety or necessity for its exercise in the instant case.²⁹

1. *Commission's Authority To Issue Corrective Ad Orders*

Numerous cases are cited by the parties respecting the Commission's authority to issue a "corrective advertising" order as recommended by SOUP. Both sides agree that the Commission has the power to bring about an elimination of unfair and deceptive practices and that the order provisions designed to effectuate this power must bear a "reasonable relation" to the unlawful practices found to exist. *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 613 (1946). It is over the interpretation of this phrase "reasonable relation" that the parties disagree.

Respondent and ANA urge us to accord a narrow interpretation to the case law bearing on the scope of the Commission's remedial powers, confining the applicability of these cases only to similar factual situations. Since none of the Commission's past cases has involved the same issues of relief raised here, nor have they developed records on the residual effects of advertising, respondent and ANA conclude that these cases do not lend support to the proposition that the Commission has authority to issue corrective advertising orders. They argue further that the Commission's power extends only to terminating past illegal conduct and insuring that similar violations do not recur in the future. They assert that orders must be prospective in nature and that the order sought by SOUP seeking to dissipate the effects of respondent's past utterances is retrospective and, therefore, beyond the scope of the Commission's authority. Both ANA and respondent see the corrective order as a punitive measure and ANA argues further that it would have a chilling effect on respondent's advertising in violation of the First Amendment. We disagree.

The courts have repeatedly recognized that to deal with the ever expanding scope of unfair and deceptive practices, the Commission must be permitted wide latitude in fashioning effective relief. In *Jacob Siegel Co. v. FTC* 327 U.S. 608, 612-13 (1946) the Court stated:

The Commission is the expert body to determine what remedy is necessary to eliminate the unfair and deceptive trade practices which have been disclosed. It has wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist.

Again in *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1957) the Supreme Court reiterated this view:

²⁹ The Commission has previously indicated its conclusion that it has the power to issue corrective advertising orders. *In re Campbell Soup*, FTC Docket C-1741 (May 25, 1970) [77 F.T.C. 664]. Nevertheless, we feel it appropriate here to review the basis for this conclusion in light of the arguments put forth by the various participants in this proceeding.

Congress placed the primary responsibility for fashioning such orders upon the Commission, and Congress expected the Commission to exercise a special competence in formulating remedies to deal with problems in the general sphere of competitive practices. (Footnote omitted.)

The court pointed out that if the Commission is to carry out the objectives envisioned by Congress "it cannot be required to confine its road block to the narrow lane the transgressor has traveled," but must be able "to close all roads to the prohibited goal." *Ruberoid, supra* at 473.

Such wide latitude in determining remedy has been deemed necessary so that the Commission can effectively carry out the statutory policy of the Federal Trade Commission Act to protect consumers and maintain competitive vigor in the marketplace. As the Ninth Circuit stated in *Carter Products, Inc. v. FTC*, 268 F.2d 461, 498 (9th Cir. 1959):

Shaping a remedy is essentially an administrative function. Congress has entrusted the Commission with the responsibility of selecting the means of achieving a statutory policy—the relation of remedy to policy is peculiarly a matter for administrative competence.

The Seventh Circuit recently reflected this same view in *L. G. Balfour Co. v. FTC*, 442 F.2d 1, 24 (7th Cir. 1971):

The Commission must be accorded latitude in forming its orders for "the Commission alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically." *Moog Industries, Inc. v. FTC*, 355 U.S. 411, 413, 78 S. Ct. 377, 379, 2 L. Ed. 2d 370 (1958).

Through the years, the Commission has exercised its discretion in fashioning a wide variety of order provisions to effectively deal with the unlawful practices it has found to exist. These orders have been upheld in the courts as falling within the broad scope of the Commission's discretion in determining relief. Thus, Commission orders have been upheld requiring divestiture, *L. G. Balfour Co. v. FTC*, 442 F.2d 1 (7th Cir. 1971); ordering compulsory licensing of a patent on a reasonable royalty basis, *Charles Pfizer & Co., Inc. v. FTC*, 401 F.2d 574 (6th Cir. 1968), *cert. denied*, 394 U.S. 920 (1969); limiting the purchases of certain products between respondents, *Luria Bros. & Co., Inc. v. FTC*, 389 F.2d 847 (3d Cir.), *cert. denied*, 393 U.S. 829 (1968), placing a dollar limitation on respondents' consumer contracts, *Arthur Murray Studio of Washington, Inc. v. FTC*, No. 71-1807 (5th Cir., March 21, 1972); and ordering the refund of money to consumers if there is a recurrence of deceptive and unfair practices, *Windsor Distributing Co. v. FTC*, 437 F.2d 443 (3rd Cir. 1971). The courts have

also held that the Commission may suppress not only illegal activities but those that are legal as well if such action is deemed warranted to prevent resumption of the unlawful activities. *FTC v. National Lead Co.*, 352 U.S. 419 (1957); *FTC v. Mandel Bros.*, 359 U.S. 385 (1959). This listing of orders which is far from complete serves merely to emphasize the Commission's broad authority to insure the discontinuance of injury to the public. As this list reveals, and as the Supreme Court pointed out in *FTC v. Mandel Bros.*, 359 U.S. at 392:

One cannot generalize as to the proper scope of these [cease and desist] orders. It depends upon the facts of each case and a judgment as to the extent to which a particular violator should be fenced in.

Thus the Commission's remedial powers have emerged through the years as broadly analogous to the equity power of the courts. *See Pan American World Airways v. United States*, 371 U.S. 296, 312, n. 17 (1963). Recently, the Supreme Court specifically likened the Commission to a court of equity in that it must consider public values when determining whether a violation of law has occurred. *FTC v. The Sperry & Hutchinson Co.*, 40 U.S.L.W. 4241, 4244 (U.S. Mar. 1, 1972). It follows that in fashioning its remedies the Commission must similarly function like a court of equity if it is to assure that its relief will adequately serve the public interest.

We find ANA's and respondent's narrow reading of prior Commission case law delineating the Commission's authority to fashion relief completely contrary to the intent and spirit of these cases.

Respondent and ANA argue, however, that the Commission is not permitted to impose orders which are solely punitive in nature, with the only purpose and effort being to impose penalties on wrongdoers for past actions. While their statement of the law is accurate, its application to the proposed order provision in the instant case is misplaced.

The fact that the remedy may be deemed by the court to have severe consequences to the respondent does not in itself render the order punitive if the order is also deemed a "needed public precaution." *All-State Industries of North Carolina, Inc. v. FTC*, 423 F. 2d 423, 425 (4th Cir.), *cert. denied*, 400 U.S. 828 (1970). Nor does the fact that the party's *past* conduct is taken into account in fashioning a remedy render the order retroactive or punitive in nature. Past conduct, in fact, must determine to some extent what the proper scope of relief should be. Thus the Supreme Court in reviewing the Commission's order in *FTC v. National Lead Co.*, 352 U.S. 419, 429 (1957), determined that the remedy was proper on the grounds, *inter alia*, that the originator of the unlawful practices "had been previously adjudged a violator of the antitrust laws."

Opinion

81 F.T.C.

The Commission recently expanded upon the distinction between prospective and retrospective relief in its opinion in *In re Curtis Publishing Co.*, 3 CCH Trade Reg. Rep. ¶19,719 at 21,757 (FTC 1971) [78 F.T.C. 1472]:

Every Commission order is "retrospective," in the sense that it looks to and is based upon the causes and results of the acts found to violate the statute, and at the same time it is "prospective" in the sense that its design, purpose, and effect is to dissipate any lingering effects of the past violations and to prevent their recurrence in the future. In reality, the "prospective/retrospective" formulation seems based upon concern that the Commission in structuring its orders might go beyond the bounds of what is reasonably necessary to eradicate the violations found to exist and impose requirements that are in essence punitive because they are superfluous.

In short, the Commission necessarily must take into account the past acts and practices of respondents in order to fashion effective relief.

ANA and respondent contend that a corrective advertising order is retrospective and therefore unlawful because it seeks to dissipate the effects of illegal conduct. In our view, however, such an order is quite obviously not retrospective if its purpose and effect is to terminate *continuing* injury to the public. This continuing injury may be in the form of lingering effects which a misrepresentation may have on consumers' minds or in the form of a lessening of competitive vigor in the marketplace due to the deceptive practices. Under such circumstances, the appropriate relief is that which will terminate the continuing injury to the public.

Both ANA and respondent argue, however, that past Commission orders have been aimed at terminating illegal *conduct* and that the Commission's authority does not include the power to terminate the *effects* of past conduct. If this were true, of course, the Commission would be severely limited in designing effective relief. Its job is to terminate the continuing injury to the public in whatever form it is found to continue.

In the past, the Commission has, of course, frequently framed its orders in terms of stopping particular conduct which it found injurious to the public. This should not be interpreted, however, as precluding other types of relief where injury continues in forms other than active conduct. See *In re Curtis Publishing Co.*, *supra*; *L.G. Balfour Co.*, FTC Docket No. 8435 (July 29, 1968), *aff'd*, 442 F.2d 1 (7th Cir. 1971). The purpose and effect of Commission orders to terminate public injury are the same whether the particular order goes to conduct or to the continuing effects of the conduct found to be unlawful. It becomes in the end an argument over semantics as to

whether the continuing operation of an advertising theme should be regarded as conduct or as the effect of conduct. Applicable relief to protect the public interest cannot rest on such esoteric matters of fiction. We find respondent's and ANA's argument that the Commission's authority extends to conduct but not to its effects to be completely without merit.

Thus we conclude that an order requiring corrective advertising is well within the arsenal of relief provisions which the Commission may draw upon in fashioning effective remedial measures to bring about a termination of the acts or practices found to have been unfair or deceptive. If such relief is warranted to prevent continuing injury to the public, it is neither punitive nor retrospective.

Finally, ANA argues that in addition to the Commission's lack of authority to issue corrective advertising orders, such orders would be unlawful for the reason that they would conflict with the First Amendment guarantee of free speech. ANA argues that the remedy is so harsh that it will have a "chilling effect" upon respondent's freedom to advertise truthfully. It argues that First Amendment protection does not depend upon the form of the utterance, *i.e.*, book, pamphlet or paid advertisement, "but rather upon the nature of its content." (ANA Ans. Br., 33.) ANA maintains that where the advertisement contains "matters of public importance," it should be subject to full First Amendment protection, whether or not its purpose is mercenary, *i.e.*, to sell the product. ANA indicates that matters of public importance would include all types of product information, especially in connection with items relating to "health, safety, environment, ecology, the young, the aged, the poor, and the rational exercise of purchase decisions." (ANA Ans. Br., 36.) Thus, ANA would grant immunity to a wide variety of commercial advertising claims, which we believe cannot be immune from challenge precisely because they involve "matters of public importance." The public importance of an advertising claim is simply another way of saying that the claim is material. It is clear that material claims made by an advertiser are precisely those which demand regulation in order to protect the public from false and deceptive claims.

Moreover, ANA's contentions are at variance with existing case law where issues of the First Amendment's relationship to advertising have been involved. The regulation of false commercial advertising has been repeatedly upheld as constitutional. *Donaldson v. Read Magazine, Inc.*, 333 U.S. 178 (1948); *Murray Space Shoe Corp. v. FTC*, 304 F. 2d 270, 272 (2d Cir. 1962); *E.F. Drew & Co. v. FTC*, 235 F. 2d 735, 739-40 (2d Cir. 1956), *cert. denied*, 352 U.S. 969 (1957);

American Medicinal Products, Inc. v. FTC, 136 F. 2d 426, 427 (9th Cir. 1943). The courts have recognized that the public interest would hardly be served by an interpretation of the First Amendment which would permit deceptive and fraudulent advertising claims to be perpetrated upon the public. *Donaldson*, 333 U.S. at 191-2. Furthermore, in *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942), the Supreme Court expressly held that the First Amendment does not protect "purely commercial advertising," which in that case amounted to the hand bills promoting and soliciting visitors to respondent's business. As the Court also made clear in *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964), "purely commercial advertising" is distinguishable from other forms of speech in terms of the applicability of the First Amendment. In that case the Court decided that a paid advertisement would be protected under the First Amendment which "communicated information, expressed opinion, recited grievances, protested claimed abuses and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern." 376 U.S. 266. Since the views expressed were of a nature falling within the First Amendment protections, it mattered not that it was a paid advertisement, since this was simply a means by which the constitutionally protected views could be widely published. The Court was careful to point out, however, that this ad was not a "commercial" ad in the sense in which that word was used in *Valentine, supra*.

We cannot agree, as ANA would have us do, that merely because respondent chose to make product claims of importance to consumers that it thereby entered the realm of free speech fully protected by the First Amendment. Nor has ANA cited any cases in support of its position that respondent's advertisement aimed solely at promoting its product as a business pursuit must receive First Amendment protection. To so find would make a mockery of the case law and of the congressional mandate to the Federal Trade Commission to prohibit advertising claims which are unfair or deceptive. Advertisers would merely need to append to their ads "a civil appeal, or a moral platitude, to achieve immunity from the law's command." *Valentine*, 316 U.S. at 55. One circuit court has summarized the reasons for denying commercial advertising the protection of the First Amendment in the following manner:

As a rule [promoting the sale of a product] does not affect the political process, does not contribute to the exchange of ideas, does not provide information on matters of public importance, and is not, except perhaps for the ad-men, a form of individual self-expression. It is rather a form of merchandising subject to limitations for public purposes like other business practices. *Banzhaf v. F.C.C.*,

405 F. 2d 1082, 1101-1102 (D.C. Cir. 1968), *cert. denied, sub nom. Tobacco Institute, Inc. v. F.C.C.*, 396 U.S. 842 (1969).

ANA contends, however, that the argument that the First Amendment does not protect false advertising is not at issue here because the chilling effect of corrective advertising would curtail truthful as well as false claims.³⁰ This argument proceeds essentially on the premise—which we have found inapplicable to the advertisement here in question—that the First Amendment guarantees apply to commercial speech. Moreover, the argument fails even if viewed on the basis of its own factual premises. The order here is designed to cure the effects of unfair and deceptive advertising. ANA argues that it is so difficult to determine whether a claim is accurate that advertisers will shy away from making any factual claims at all for fear of prosecution by the Commission. We are hard put to understand the basis for such an argument in the instant case and even more to the point to accept the logic of such an argument as a basis for not ordering a relief measure which in our judgment is required. How an advertiser reacts to a particular order provision is clearly within his province. But his dire predictions that it will lead him to discontinue advertising or to eliminate factual claims from his advertisement is hardly a basis on which we could justify ordering a particular relief measure which in our judgment was less effective than another. The courts have been singularly unimpressed with the relevance of arguments of this nature to the fashioning of effective relief. As the court in *E. F. Drew & Co. v. FTC*, 235 F. 2d 735, 740 (2d Cir. 1956), *cert. denied*, 352 U.S. 969 (1957) pointed out, in advertising one's products, "[i]t is not difficult to choose statements, designs and devices which will not deceive."

Accordingly, we find no merit in ANA's contention. We conclude that corrective advertising orders where necessary and appropriate will violate neither the letter nor the spirit of the First Amendment guarantees of free speech and press and are clearly within the remedial authority of the Commission.

We turn now to the question of whether a corrective advertising order is warranted on the basis of the record in this case. Commissioners Kirkpatrick, Dixon, MacIntyre and Dennison do not believe that the order in this case should contain a corrective advertising provision. Accordingly Soup's request for such a provision is rejected

³⁰ To support this contention of the "chilling effect," ANA points to the testimony of Walter Bregman to the effect that the threat of corrective advertising would probably move advertisers into the area of general image, non-specific product claims such as "this is a nice product, why don't you buy it, kind of thing." (Tr. 1815.)

and the order as proposed by complaint counsel with the amendments noted in this opinion will be entered.

Commissioners Kirkpatrick, Dixon, MacIntyre and Dennison concurred in part and did not concur in part in the findings of the Commission as set forth in the Opinion of Commissioner Jones, and each submitted separate statements setting forth their positions.

Commissioner Jones dissented in part from the order entered and submitted a separate statement setting forth her position.

FINAL ORDER

This matter having been heard by the Commission upon the appeals from the initial decision of respondent, complaint counsel, and intervenor SOUP (Students Opposing Unfair Practices, Inc.), and upon briefs and oral argument in support thereof and in opposition thereto; and

The Commission having concluded that on this record and the facts and circumstances set forth therein that the appeals should be granted in part and denied in part;

It is ordered:

(1) That the initial decision be, and it hereby is, adopted as the decision of the Commission to the extent consistent with, and rejected to the extent inconsistent with, the accompanying opinion;

(2) That the following order be, and it hereby is, substituted for the order contained in the initial decision:

It is ordered, That respondent the Firestone Tire & Rubber Company, a corporation, its successors, assigns, officers, representatives and employees directly or through any corporate or other device, in connection with the advertising, offering for sale, sale, or distribution of automobile tires or any other product, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that every purchaser of tires bearing the brand name "Firestone," or any other brand name, is assured of receiving tires free from defects in materials or workmanship or other manufacturing defects.

2. Misrepresenting, in any manner, the effectiveness of respondent's quality control or inspection procedures.

3. Using the words, "The safe tire," or any other word or phrase of similar import or meaning to describe or designate respondent's tires or otherwise representing directly or by implication, that respondent's tires will be safe under all conditions of use.

4. Making any representation, directly or by implication, regarding the safety of respondent's tires without disclosing clearly and conspicuously and in close conjunction with such representation that the safety of any tire is affected by conditions of use, such as inflation pressure, vehicle weight, wear, and other operating conditions.

5. Representing, directly or by implication, that any of respondent's automobile tires have any safety or performance characteristic or are superior in quality or performance to other products unless each such characteristic was fully and completely substantiated by competent scientific tests, with the results of the test, the original test data collected in the course of the test, and a detailed description of how the test was performed available in written form for inspection for at least three years following the final use of the representation.

It is further ordered, That the charges in the complaint relating to the advertising of prices be, and they hereby are, dismissed.

It is further ordered, That respondent deliver a copy of this order to each of its operating departments, divisions, and subsidiaries engaged in the advertising, offering for sale, sale, or distribution to the public at retail of automobile tires or other merchandise and to the manager of each present and every future retail outlet owned and operated by respondent.

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation that may affect the compliance obligations arising out of the order.

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

Commissioners Kirkpatrick, Dixon, MacIntyre, Jones and Denison concurring in part and not concurring in part, as set forth in their attached separate statements.

Complaint

81 F.T.C.

IN THE MATTER OF

ACCEPTANCE FINANCE COMPANY

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT*Docket C-2290. Complaint, Sept. 27, 1972—Decision, Sept. 27, 1972.*

Consent order requiring a Clayton, Missouri, finance company and its 74 subsidiaries, among other things to cease providing to customers negotiable instruments known as or similar to "Reddy Checks" unless it has received an affirmative, written, signed and dated authorization from customers. Such authorization shall include a clear explanation of the number of such instruments to be mailed each year; the approximate dates of such mailings; the approximate face amount of such instruments; the period of validity of such instruments; the length of time the consumer's consent to participate will be valid; and certain consequences if such instruments are negotiated.

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 Acceptance Finance Company, a corporation, hereinafter referred to as respondent, has 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 Acceptance Finance Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 8012 Bonhomme Avenue, Clayton, Missouri.

Acceptance Finance Company operates through approximately seventy-four (74) wholly-owned subsidiary loan offices located in fourteen (14) states. Each subsidiary is incorporated in the respective state in which it is located under the name of NATIONWIDE FINANCE COMPANY OF (location identity). Respondent Acceptance Finance Company does not engage in any consumer loan transactions itself. The officers of the parent and each subsidiary are: Charles W. Morgan, president; Meyer M. Frank and Dan D. Morgan, vice presidents; and Milton Ferman, secretary-treasurer. Respondent Acceptance Finance formulates and controls the policies, acts and practices of each of the wholly-owned subsidiaries, including the acts and practices hereinafter set forth.