

Opinion

IN THE MATTER OF
NATIONAL DYNAMICS CORPORATION, ET AL.

Docket 8803. Opinion and Order, May 1, 1973.

Opinion and order denying respondents' motion for reconsideration of Paragraph 4 (prohibition pertaining to claim of laboratory testing and results thereof) of the Commission's order issued February 16, 1973, or for reopening of the proceeding and modification of Paragraph 4 of the order, and for a stay of the effective date of the said order.

OPINION OF THE COMMISSION

By motion filed April 6, 1973, respondents request reconsideration or, in the alternative, reopening of this proceeding for the purpose of modifying Paragraph 4 of the Commission's order issued February 16, 1973.* Respondents further petition for a stay of the effective date of the order pending the disposition of this motion.

Specifically, the challenged order provision prohibits respondents from representing directly or by implication that:

any independent laboratory has tested any product or that any laboratory test substantiates or supports performance claims in said advertisement unless each performance claim in said advertisement has been substantiated by a competent scientific test conducted by said laboratory or laboratories and unless such laboratory or laboratories have supplied Respondents with a written report which describes in detail the entire test performed including, but not limited to, the product tested, instruments used, test procedures, data, and results of such tests.

In its complaint, the Commission charged respondents with falsely claiming that battery additive VX-6 had been fully

*See p. 488 herein.

tested by independent laboratories. In respondents' view, both the initial decision of the administrative law judge and the Commission's opinion agreed that the product had been fully tested by independent laboratories and that the Commission had failed to sustain its burden of proof on this point.

In this proceeding, essentially two kinds of representations were challenged. Respondents' performance claims were challenged as impliedly representing that respondents had competent scientific tests which supported each of the performance claims made for their product. Rather than hold respondents to the precise standard set forth in the complaint, the Commission determined to evaluate the substantiating material against the reasonable basis standard as adopted by the Commission in *Pfizer, Inc.*, Docket No. 8819, July 11, 1972 [81 F.T.C. 23]. Applying that standard to the test reports which respondents relied upon in support of their claims, the Commission found respondents had a reasonable basis for believing their performance claims were true.

Although experts who testified in this proceeding concluded that the test reports relied upon by respondents were not descriptive of competent scientific tests, the Commission was satisfied that respondents had sought the advice and assistance of numerous independent commercial laboratories in determining the validity of these reports; and the test reports issued by several different laboratories in the aggregate tended to corroborate and support the conclusions reached by any single laboratory. On the issue of substantiation, then, the Commission considered the deficiencies in respondents' test reports but was of the view that respondents had a reasonable basis for believing the effectiveness claims for the product were true.

The challenged order provision, however, is unrelated to findings respecting the implied representation of substantiation or the reasonable basis supporting the challenged performance claims. The evidence on this record clearly indicated that certain of respondents' advertisements represented the product as fully tested by laboratories and then listed in the same advertisement the performance attributes claimed for the product. The Commission found an implied representation in these advertisements which conveyed an impression to the public of laboratories having fully tested the product with respect to the performance claims made in the advertisements. Specifically, the Commission

stated that it is "of the view that advertisements which expressly or impliedly represent the product as laboratory tested, without qualification, [footnote omitted] and then proceed to describe the performance characteristics of the product, have a tendency and capacity to lead the public to believe that the laboratories have fully tested the product for each of the performance attributes claimed in the advertisement." Thus, it was the representation of full testing which was challenged as false and deceptive. Whether a reasonable basis existed for this representation was not in issue and was not relevant to a determination of truth or falsity of the "fully tested" claim.

When a Commission complaint places in issue the truth or falsity of a claim, the existence of a reasonable basis to support the claim is irrelevant and provides no defense where substantial evidence proves the claim to be false. In considering the test reports respondents submitted both in response to the substantiation charge and the allegation of deception arising out of the "fully tested" claim, the Commission recognized the deficiencies in respondents' test reports but concluded that respondents, on the particular facts of this case, nevertheless had a reasonable basis upon which to believe the effectiveness claims they were making were true. Thus, complaint allegations relating to respondents' failure to substantiate their performance claims were dismissed.

Contrary to respondents' assertion, however, these same test reports do not evidence full laboratory testing of each performance claim made in respondents' advertisements. Respondents concede in their motion that duration claims were not fully tested by independent laboratories, and substantial evidence on this record of the deficiencies in these test reports led the Commission to conclude that the laboratories relied upon by respondents had not fully tested the performance attributes claimed for the product. The Commission, therefore, determined upon the record evidence that the laboratories had not fully tested the product with respect to performance claims listed in respondents' advertisements and that respondents' representations to the contrary were false and deceptive. Thus, the challenged order provision is reasonably related to the violation found in this proceeding.

Accordingly, the Commission has determined that respondents' Motion for Reconsideration or in the Alternative

for Reopening of this Proceeding and for a Stay of the Effective Date of the Commission's Order should be denied. An appropriate order will be entered.

Chairman Engman not participating.

ORDER DENYING RESPONDENTS' MOTION

This matter having come before the Commission upon respondents' motion, filed April 6, 1973, requesting reconsideration of Paragraph 4 of the Commission's order, issued February 16, 1973,* or, in the alternative, for reopening of the proceedings and modifying Paragraph 4 of the order, and for a staying of the effective date of said order pending the determination of respondents' motion, upon the answer of counsel supporting the complaint in opposition to said motion, and upon respondents' reply to the answer of counsel supporting the complaint; and

The Commission having determined, for the reasons stated in the accompanying opinion, that said motion should be denied:

It is ordered, That respondents' motion, filed on April 6, 1973, be, and it hereby is, denied.

Chairman Engman not participating.
