

IN THE MATTER OF
WARNER-LAMBERT COMPANY

Docket 8891. Order, Mar. 26, 1976

Denial of respondent's petition to reopen proceedings to receive evidence of *ex parte* communications and of FDA findings concerning Listerine, and to withdraw final order pending consideration of such evidence.

Appearances

For the Commission: *Wallace S. Snyder* and *William S. Busker*.

For the respondent: *Mudge, Rose, Guthrie & Alexander*, New York City and *Larry Sharp, Bergson, Borkland, Margolis & Adler*, Washington, D.C.

Respondent has petitioned the Commission to reopen the proceeding for the purpose of receiving "evidence of *ex parte* communications and of FDA findings concerning Listerine, and to withdraw [the] final order pending consideration of such evidence."

First, respondent contends that the Commission staff, through written memoranda dealing with the Commission's over-the-counter drug program, has "singl[ed] out Listerine by name, [and] made improper and damaging *ex parte* arguments to the Commission" while the above-styled matter was pending. This contention is plainly without merit. The Commission has based its determinations and order in this proceeding solely upon the record compiled in Dkt. 8891. See *Encyclopaedia Britannica, Inc.* (Order Denying Motion To Reopen Record And Proceedings) (March 2, 1976¹). We have examined the memoranda² attached to respondent's Petition, as well as the portions of the memoranda which were excised prior to FOIA release. The only mention of Listerine occurs in a few statements that a proceeding exists with respect to respondent, *e.g.*, "* * *the Listerine case which is now before the Commission* * *." There are no arguments, as respondent contends, of the appropriateness of corrective advertising as a remedy in the Listerine proceeding. The references to Listerine are not *ex parte* communications since they are not statements "with respect to the merits," Rules of Practice Section 4.7.

Secondly, respondent contends that the record should be reopened since an FDA advisory panel, after issuance of the Commission's opinion and order, "found that combination products containing the

¹ Reported in this Volume.

² The memoranda, with one exception, consist of reports to the Commission or the Chairman as to the status of the Commission's Over-the-Counter Drug program. The exception is a report to the Director of the Bureau of Consumer Protection from the Division of National Advertising and was a wholly intra-Bureau communication.

active ingredients of Listerine may be efficacious for the symptomatic relief of colds and coughs and that until further test data can be developed, may continue to label and to sell the products as in the past, for the conditions indicated* * *." [footnote omitted]. We also find this contention to be without merit.

In the decision in this proceeding, the Commission concluded, on the basis of the preponderance of the evidence in the record before us, that the use of Listerine, as directed, will not prevent or cure colds or sore throats or ameliorate cold symptoms. Here the report that the respondent references in its Petition is a draft report by the FDA's review panel for over-the-counter cough and cold remedies. The report has not been adopted and thus there is no "finding," as respondent contends. The draft report has been placed on the public record for comment. *See* CCH Food, Drug & Cosmetic Law Reporter Para. 41,571 [41 F.R. 38312]. Moreover, "Category III," the category in which respondent claims its product's ingredients fall, is designated by FDA for drugs requiring additional study. Accordingly,

It is ordered, That the aforesaid petition be, and it hereby is, denied.

IN THE MATTER OF

MUTUAL CONSTRUCTION COMPANY, INC., ET AL.

ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT*Docket 9022. Complaint, Mar. 25, 1975—Final Order, Mar. 30, 1976*

Order requiring a Birmingham, Ala., seller and installer of home improvement products, including residential siding, among other things to cease using bait and switch tactics; using deceptive or misleading sales plans to obtain leads or sales prospects; disparaging products; misrepresenting sales as bona fide; misrepresenting time limitations or restricted offers; misrepresenting prices as reduced or special; failing to maintain adequate records; misrepresenting guarantees or warranties; misrepresenting durability, quality and maintenance of its products; and misrepresenting that purchasers' homes will be used for advertising or for demonstration purposes.

Appearances

For the Commission: *W. Roland Campbell and T. Douglas Wilson, Jr.*

For the respondents: *Gary P. Smith, Najjar, Najjar, Vincent & Smith, Birmingham, Ala.*

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 Mutual Construction Company, Inc., a corporation, and Joseph L. Cameron, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Mutual Construction Company, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Alabama, with its principal office and place of business located at 742 Valley Rd., in the city of Birmingham, State of Alabama.

Respondent Joseph L. Cameron is an individual and an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including those hereinafter set forth. His business address is the same as that of the corporate