

IN THE MATTER OF
CHRYSLER CORPORATION

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

Docket 8995. Complaint, Oct. 9, 1974—Final Order, April 13, 1976

Order requiring a Detroit, Mich., automobile manufacturer, among other things to cease misrepresenting the superiority of their products over those of their competitors with regard to quality or properties, characteristics, performance and/or fuel economy.

Appearances

For the Commission: *H. Robert Field*. Before the administrative law judge, *Melvin H. Orlans* and *Richard A. Bloomfield*.

For the respondent: *Walter B. Maher*, Detroit, Mich. Before the administrative law judge, *Lee Loevinger* and *James H. Sneed*, *Hogan & Hartson*, Washington, D.C.

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 Chrysler Corporation, 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 Chrysler Corporation is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its executive office and principal place of business located at 341 Massachusetts Ave., Detroit, Michigan.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the manufacture, distribution, sale, and advertising of various products including automobiles.

PAR. 3. Respondent causes the said products, when sold, to be transported from its place of business in various States of the United States to purchasers located in various other States of the United States and in the District of Columbia. Respondent maintains, and at all times mentioned herein has maintained, a course of trade in said products in commerce. The volume of business in such commerce has been and is substantial.

PAR. 4. In the course and conduct of its said business, respondent has

disseminated and caused the dissemination of advertisements concerning its aforementioned products including automobiles in commerce by means of advertisements printed in magazines and newspapers distributed by the mail and across State lines and transmitted by television stations located in various States of the United States and in the District of Columbia, having sufficient power to carry such broadcasts across States lines, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said products including automobiles.

PAR. 5. Among the advertisements so disseminated or caused to be disseminated by respondent is the advertisement attached as Exhibit A.

PAR. 6. Said Exhibit A and others substantially similar thereto (hereinafter referred to as said advertisements) represent *inter alia* that *Popular Science* magazine had reported concerning the gasoline economy of automobiles and in that report found all Chrysler small cars to be superior in terms of gasoline mileage to all Chevrolet Novas.

PAR. 7. In truth and in fact, all Chrysler small cars were not found in said report to be superior in terms of gasoline mileage to all Chevrolet Novas. Therefore, the said advertisements were, and are, deceptive and/or unfair.

PAR. 8. Respondent failed to disclose in said advertisement and others substantially similar thereto, that said report found Chevrolet Novas with certain eight cylinder engines were, in terms of gasoline mileage, equal or superior to Chrysler small cars with certain eight cylinder engines and respondent failed to adequately identify which types of Chrysler small cars had in fact been found superior in said report and which types of Chevrolet Novas had been found inferior in said report with respect to gasoline mileage.

PAR. 9. The facts set forth in Paragraph Eight are material in light of the representations contained in said advertisements and their omission makes these advertisements misleading in a material respect. Therefore, the said advertisements were, and are, deceptive and/or unfair.

PAR. 10. The facts set forth in Paragraphs Six through Eight constitute, with regard to gasoline mileage, a false comparison by respondent of Chrysler small cars with the Chevrolet Nova. Therefore, respondent has, through the use of the aforesaid acts and practices, disparaged the Chevrolet Nova.

PAR. 11. In the course and conduct of the aforesaid business, and at all times mentioned herein, respondent Chrysler Corporation has been and now is in substantial competition in commerce with corporations, firms, and individuals engaged in the sale and distribution of

automobiles of the same general kind and nature as those sold by respondent.

PAR. 12. The use by respondent of the aforesaid unfair and/or deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the consuming public into the purchase of substantial quantities of automobiles manufactured by respondent. Further, as a result thereof, substantial trade is being unfairly diverted to respondent from its competitors.

PAR. 13. 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 or deceptive acts or practices in commerce and unfair methods of competition in commerce in violation of Section 5 of the Federal Trade Commission Act.

INITIAL DECISION BY ADMINISTRATIVE LAW JUDGE MILES J.
BROWN

SEPTEMBER 4, 1975

PRELIMINARY STATEMENT

[1] The Federal Trade Commission issued its complaint in this matter on October 9, 1974 (mailed October 25, 1974), charging respondent with unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act. By answer, duly filed, respondent, although admitting that it disseminated the challenged advertisement, denied that it had violated the Federal Trade Commission Act.

[2] At a prehearing conference on February 19, 1975,¹ the administrative law judge approved a stipulation of facts entered into by the parties, and ordered that said stipulation be filed with the Secretary of the Commission for inclusion in the public record.² After certain discovery, during which certain materials were voluntarily supplied by respondent, and an exchange of trial briefs, one day of adjudicative hearings was held on April 29, 1975. A stipulation of transcript corrections was approved by the administrative law judge on June 13, 1975, and the record was closed for the receipt of evidence on June 17, 1975. Proposed findings and supporting memoranda were

¹ By order dated January 10, 1975, the undersigned administrative law judge was substituted for Judge Andrew C. Goodhope, retired.

² This stipulation (also referred to as CX 1) was modified by further stipulation dated August 1, 1975, to correct an erroneous date.

filed by both parties on July 21, 1975, and reply briefs were filed on August 1, 1975.

Any motions appearing on the record not heretofore or hereby specifically ruled upon either directly or by the necessary effect of the conclusions in this initial decision are hereby denied.

The proposed findings and conclusions submitted by counsel have been given careful consideration and to the extent not adopted by this decision in the form proposed or in substance are rejected as not supported by the evidence or as immaterial.

Some of the abbreviations used in this decision are as follows:

- Stip. - Stipulation of Facts approved February 19, 1975;
- CX - Commission's Exhibits;
- RX - Respondent's Exhibits;
- Compl. - Complaint;
- Ans. - Respondent's Answer to the Complaint;
- Tr. - Transcript of testimony

This case focuses on a series of advertisements, widely disseminated in magazines and newspapers, which purported to make a gasoline mileage claim for Chrysler's "small cars" based on a report appearing in the October 1973 issue of [3] *Popular Science* magazine.³ The principal question presented is whether Chrysler misrepresented the content of the *Popular Science* report. In this connection, the secondary question is whether, as alleged in the complaint, respondent represented in the challenged advertisements that "that report found all Chrysler small cars to be superior in terms of gas mileage to all Chevrolet Novas," and/or, as complaint counsel also contend, superior in terms of gasoline mileage to all comparable Novas.

Two of the challenged advertisements are similar with respect to the representations challenged (see CXs 2, 3). The third advertisement, containing the same printed material as CX 2, has superimposed thereon certain written material (see CX 4). These advertisements are reproduced on the following three pages. These reproductions, however, do not necessarily reflect the actual size of the advertisements as they appeared in newspapers and/or magazines (Stip. 22).⁴

At this posture of the case there appears to be little dispute over the evidentiary facts. Respondent's main contention is that the challenged advertisements are true in all respects and that the interpretations as to meaning placed thereon by the Commission in its complaint, and by

³ "Gas Mileage claim based on October 1973 *Popular Science* magazine. Tests performed by *Popular Science* for its report were conducted on '73 vehicles. Figures were adjusted by *Popular Science* to reflect 1974 model changes and the results of E.P.A. tests."

⁴ Some of the exhibits (CXs 2, 3, 4 and RXs 2-8) appear in the record as physical exhibits having been reproduced in a size approximating the originals. (See Physical Exh. 2-1/8995-1 through 2-10/8995-1; Tr. 53-54.)

complaint counsel during the subsequent proceedings, are strained, untenable and unreasonable, and that the challenged advertisements were only a small part of an overall advertising campaign that was clear, unmistakable and explicit in the area of comparative gasoline mileage claims.

Having reviewed the record in this proceeding, and having considered the demeanor of the witnesses as they testified, together with the pleadings, the proposed findings, conclusions and arguments submitted by counsel supporting the complaint and counsel for respondent, I make the following findings of fact based on the record considered as a whole:

Extra care in engineering...it makes a big difference in small cars.

THE SMALL CAR

THE SMALL CAR

You can buy a Volkswagen

you can buy a small car that's priced less than VW's most popular model.*

You can buy a Chevrolet Nova

you can buy a small car that can beat it on gas mileage.**

You can buy a Ford Maverick

you can buy a small car with up to 20 inches more total hiproom.

You can buy a Chevrolet Vega

you can buy a small car that seats an extra person or two.

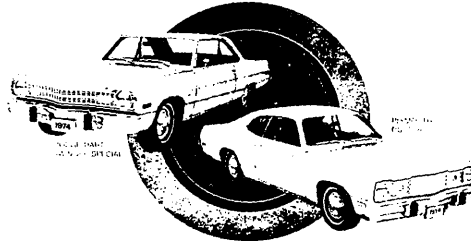
You can buy a Ford Pinto

you can buy a small car with two-to-three times more trunk space.

You can buy a small car that doesn't offer Electronic Ignition standard

you can buy a small car with Electronic Ignition standard that can save you up to \$62 on recommended ignition maintenance in the first 24,000 miles alone!

The answer is a small car
at your Chrysler-Plymouth and Dodge Dealer's.
(And you can drive one home today.)



CHRYSLER CORPORATION
DODGE PLYMOUTH CHRYSLER

SEE ALL THE DARTS AT YOUR  DEALER.
 SEE THE DUSTERS AND VALIANTS AT YOUR  DEALER.

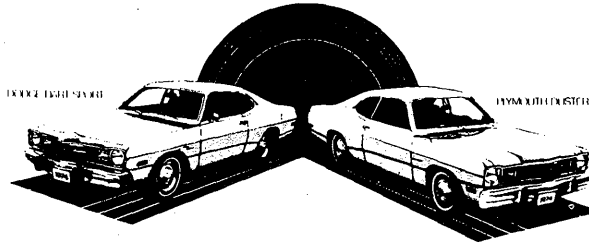
9000
 Chrysler Corp.
 4-25-76

Extra care in engineering...it makes a big difference in small cars.

Which small cars

- have more trunk space than 3 Pintos
- have 20" more total hiproom than Maverick
- are priced lower than the most popular VW
- and can go farther on a gallon of gas than Nova?

These small cars from Chrysler Corporation are the answer.



Small cars are not created equal.

Compare these small cars from Chrysler Corporation with any small car you may be considering. They not only give you the handling and economy of a small car, but a lot of the things you'd expect only in a big car. And best of all, you'll be surprised how little it costs to own one.

So, find out for yourself why the small cars from Chrysler Corporation are outselling all other compact cars.



SEE ALL THE DARTS AT YOUR DEALER.
SEE THE DUSTERS AND VALIANTS AT YOUR DEALER.



*Gas mileage claim based on October 1973 Popular Science magazine. Tests performed by Popular Science for its report were conducted on '73 vehicles. Figures were adjusted by Popular Science to reflect 1974 model changes and the results of E.P.A. tests.
Price comparison based on manufacturers' suggested retail prices, excluding destination charges, state and local taxes, and dealer preparation. Optional whitewall tires and wheel covers shown, \$53.20 extra.

Qx 3
#2
8995-1
SW: 27
Stoltz

Ad No. CC-056-74
Page (4 7/8 x 6 1/8 inches)—4 colors
Reader's Digest—Feb., '74

44787-0

(1)

W-2-12-20-73-87283

ROSS ROY INC.

FEDERAL TRADE COMMISSION DECISIONS

Initial Decision

87 F.T.C.



Room and luxury part
New Volant and will attract
New models our small car.
The big car to small car
switching

Any important reason why
Chrysler Corporation
sell a higher price
of small GM or Ford.

No other small car can
say that - or is saying it -
anywhere as we are
in this advertising.

You've still the only dealer
in town to offer this standard
on every small car you sell.

Get ready for action, now!

Get ready for action, now!

THE SMALL CAR THE STANDARD CAR

You can buy a Dodge Dart
for \$1,995.00. You can buy a
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can buy a Dodge Dart for \$1,995.00.

Here are some of the reasons
why Chrysler Motors
are selling small cars.

You can offer a lot
of value. First you can
offer it right now. Parts
are produced at a
good pace.

Over 70% of our 1954 year
"Slant Six" will be available.
Even more will be
produced to meet demands.



CN-H

Sec. 27

Blk. 108

2-3

8954



FINDINGS AS TO THE FACTS

[4] 1. Respondent Chrysler Corporation ("Chrysler") is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its executive office and principal place of business located at 341 Massachusetts Ave., Detroit, Michigan (Compl. Par. 1; Admitted, Ans. 1).

2. Chrysler is now, and at all times relevant hereto has been, engaged in the manufacture and advertising of various products, including automobiles. Its wholly-owned subsidiary, Chrysler Motors Corporation (also "Chrysler"), is now, and at all times relevant hereto has been, engaged in the distribution and sale of automobiles (Ans. 2).

3. Chrysler causes the said products when sold, to be transported from its place of business in various States of the United States to purchasers located in various other States of the United States and the District of Columbia. Chrysler maintains, and at all times mentioned herein has maintained, a course of trade in said products in commerce. The volume of business in such commerce has been substantial (Compl. Par. 3; Admitted, Ans. 3).

4. In the course and conduct of its said business, Chrysler has disseminated and caused the dissemination of advertisements concerning its aforementioned products including automobiles in commerce by means of advertisements printed in magazines and newspapers distributed by the mail and across State lines and transmitted by television stations located in various States of the United States and in the District of Columbia, having sufficient power to carry such broadcasts across State lines, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said products including automobiles (Compl. Par. 4; Admitted, Ans. 4).

5. In the course and conduct of its aforesaid business, and at all times mentioned herein, Chrysler has been and now is in substantial competition in commerce with corporations, firms and individuals engaged in the sale and distribution of automobiles of the same general kind and nature as those sold by Chrysler (Compl. Par. 11; Admitted, Ans. 11).

[5] 6. Commission Exhibit 2 (*see* reduced version, p.3A, *supra*) is a reproduction of an advertisement which Chrysler caused to be published in a very substantial number of newspapers throughout the United States in forty-six States and the District of Columbia, in most instances on December 19, 1973, and February 4, 1974 (*see* Stip. 1; Appendix A, A-1). This advertisement was also published in *Essence*, *Black*, *Encore* and *Jet*, magazines of national circulation between January and March 1974 (Stip. 1).

7. Commission Exhibit 3 (see p. 3B, *supra*) is a reproduction of an advertisement Chrysler caused to be published in the March 1974, issue of *Reader's Digest*, a magazine of national circulation (Stip. 2).

8. Commission Exhibit 4 (see reduced version, p. 3C, *supra*) is a reproduction of an advertisement Chrysler caused to be published in the February 4, 1974, issue of *Automotive News* and in the February issue of *Ward's Auto World*, magazines of national circulation (Stip. 3).

9. In pertinent part CX 2 states: "The Small Car vs. The Small Car * * * You can buy a Chevrolet Nova OR you can buy a small car that can beat it on gas mileage.* * * * The answer is a small car at your Chrysler-Plymouth and Dodge Dealers." Depicted in this advertisement are the "Dodge Dart Swinger Special" and the "Plymouth Duster." The asterisks footnote is the reference to the *Popular Science* report, set forth in full at note 3, *supra*, p. 3 (CX 2).

10. In pertinent part CX 3 states: "Which small cars * * * can go farther on a gallon of gas than Nova? These small cars from Chrysler Corporation are the answer." Pictured in this advertisement are the "Dodge Dart Sport" and the "Plymouth Duster." The text of the advertisement continues: "Small cars are not created equal. Compare these small cars from Chrysler Corporation with any small car you may be considering. They not only give you the handling and economy of a small car, but a lot of the things you'd expect only in a big car. And best of all, you'll be surprised how little it costs to own one. So, find out for yourself why the small cars from Chrysler Corporation are outselling all other compact cars.*" "See all the Darts at your Dodge dealer. See the Dusters and Valiants at your Chrysler-Plymouth dealer." The asterisk footnote is the reference to the *Popular Science* report set forth in full in note 3, *supra*, p. 3 (CX 3).

[6] 11. In pertinent part CX 4 contains the same printed language, including the asterisk reference to *Popular Science*, as that contained in CX 2. However, superimposed in handwriting (as contrasted to print) are the following legends pertaining to the gas mileage claim: "Here are some of the reasons why Chrysler Motors Corporation dealers have the edge in selling small cars." "Over 70% of our 73's had "Slant Sixes." This year even more will be available; production has been increased to meet demands" (CX 4).

12. By disseminating CX 2 and CX 3 Chrysler represented, *inter alia*, that *Popular Science* magazine had reported concerning the gasoline economy of automobiles and in that report found all Chrysler small cars to be superior in terms of gasoline mileage to all Chevrolet Novas. In this connection Chrysler also represented that all Chrysler small cars were superior in terms of gas mileage to all comparable Chevrolet Novas (see CX 2, CX 3). However, CX 4, has a specific

reference to the "Slant Six" engine, and it is found that Chrysler did not represent in that advertisement that *Popular Science* had reported that all Chrysler small cars were superior in terms of gasoline mileage to all Chevrolet Novas, but that small cars equipped with its six cylinder engines were superior in terms of gasoline mileage to all Chevrolet Novas (see CX 4).

13. *Popular Science* magazine is a monthly magazine of national circulation generally regarded as a reputable source for tests and information concerning automobile performance and equipment (Stip. 5). *Popular Science* reported the following results for the test referred to by Chrysler in the challenged advertisements:

	cyl.	c.u. in	H.P.	mpg
NOVA	6	250	100	16
	V8	350	145	14.5
	V8	350	185	12.8
PLYMOUTH VALIANT	6	198	95	18.5
	6	225	105	17.5
	8*	318	150	14.4
	8*	360	170	11.6
DODGE DART	6	198	95	18.5
	6	225	105	17.5
	8	318	150	14.4
	8	360	170	11.6

(Stip., Apdx. D.)

* A Due to a typographical or other error, the *Popular Science* magazine article attached to the Stipulation as Appendix D reports Plymouth Valiant 318 and 360 cubic inch engines as six cylinder engines. All Chrysler 318 and 360 cubic inch engines installed in Plymouth Valiants or other Chrysler automobiles were and are in fact V8 (eight cylinder) engines (Stip. 6).

14. In truth and fact *Popular Science* magazine reported that the Plymouth Valiant and Dodge Dart automobiles equipped with six cylinder engines obtained better gasoline mileage than Chevrolet Novas, but that those Chrysler small cars equipped with V8 engines did not obtain better gasoline mileage than Chevrolet Novas, including those equipped with V8 engines. Accordingly, Chrysler's representation in CX 2 and CX 3 that *Popular Science* had reported that all Chrysler small cars to be superior in terms of gasoline mileage to all Chevrolet Novas, or superior in terms of gasoline mileage to Chevrolet Novas equipped with comparable engines was not true and was false.

15. The failure to disclose in CX 2 and CX 3 that the report on gasoline mileage tests attributable to *Popular Science* magazine was either limited to test results on Chrysler small cars equipped with six cylinder engines or that the report showed that Chevrolet Novas equipped with V8 engines were superior in gasoline mileage to certain

Chrysler small cars equipped with V8 engines or that the report showed that Chevrolet Novas equipped with six cylinder engines were superior in gasoline mileage to Chrysler small cars equipped with V8 engines was a failure to disclose material facts and the omission of such material facts made such advertisements misleading in a material respect.

[8] 16. During the same general period of time that CX 2 and CX 3 were disseminated throughout the United States in a great many newspapers, Chrysler also disseminated four other advertisements in those same newspapers (Stip. 11, 12, 13, 14; Apdx. E, F, G, H). Respondent's Exhibit 2 (Stip. 11, Apdx. E) disseminated on or about December 5, 1973, contains the statement: "Which small cars * * * can go farther on a gallon of gas than Nova;" depicts "Dodge Dart Sport" and "Plymouth Duster;" and contains the following explanation:

Recent published test results by *Popular Science* show our slant six engine can go farther on a gallon of gas than Nova and you get a "Slant Six" engine standard on all our small cars. That means you get power for passing and acceleration. What's more this "Slant Six" engine gives you more miles per gallon than other comparable small cars like Maverick, Comet, Ventura and Apollo (RX 2).

Respondent's Exhibit 3 (Stip. 12, Apdx. F) disseminated on or about December 12, 1973, contains the statement: "Where's the only place in town to find a small car that * * * [among other comparatives] can go farther on a gallon of gas than Nova. Recently published test results by *Popular Science* show our 'Slant Six' engine can go farther on a gallon of gas than Nova, and you get a 'Slant Six' engine standard in all our small cars, which means you can get more miles per gallon than comparable size small cars like Maverick, Comet, Ventura and Apollo." "Dodge Dart Swinger Special" and "Plymouth Duster" are pictured (RX 3).

Respondent's Exhibit 4, disseminated on or about January 21, 1974 (Stip. 13, Apdx. G) contains the statement: "There are Good Little Cars and there are Great Little Cars * * * Good Little cars can get good gas mileage like Nova, Maverick, Comet and Ventura. Great little cars, like Dodge Dart and Plymouth Duster with a slant six engine, can get better gas mileage than Nova, Maverick, Comet and Ventura * * *" (RX 4).

Respondent's Exhibit 5, disseminated on or about January 28, 1974 (Stip. 14, Apdx. H) contains the statement: "What do you look for in a small car? * * * Good Fuel Economy? Dodge Dart and Plymouth

Duster with their slant six engines can go farther on a gallon of gas than Nova, Comet, Maverick, Apollo, Ventura and Omega"(RX 5).⁵

[9] 17. These four advertisements explicitly restricted the comparative mileage claims to Chrysler small cars with six cylinder engines and Chrysler's representation as to *Popular Science's* report on the superiority of Chrysler small cars as to Nova was accurate and true.

18. During the general time period that CX 2 and CX 3 were disseminated, Chrysler also disseminated advertisements in magazines of national circulation in which the comparative gasoline mileage results attributable to *Popular Science* magazine were explicitly limited to Chrysler's small cars equipped with "slant six" engines:

Newsweek	Feb. 11, 1974	RX 6	Stip., Apdx.	I
	Feb. 18, 1974	RX 6		I
	Feb. 11, 1974	RX 7		J
	Feb. 11, 1974	RX 8		K
	Mar. 4, 1974	RX 9		L
	Mar. 4, 1974	RX 10		M
	Apr. 15, 1974	RX 11		N
Sports Illustrated	Feb. 11, 1974	RX 6	Stip., Apdx.	I
	Feb. 11, 1974	RX 7		J
	Feb. 18, 1974	RX 7		J
	Feb. 11, 1974	RX 8		K
	Mar. 4, 1974	RX 9		L
	Apr. 15, 1974	RX 12		O
Time	Feb. 11, 1974	RX 6	Stip., Apdx.	I
	Feb. 11, 1974	RX 7		J
	Feb. 18, 1974	RX 7		J
	Feb. 11, 1974	RX 8		K
	Feb. 25, 1974	RX 9		L
	Feb. 25, 1974	RX 12		O
U.S. News & World Rpt.	Feb. 18, 1974	RX 6	Stip., Apdx.	I
	Feb. 11, 1974	RX 7		J
	Feb. 25, 1974	RX 9		L
	Feb. 25, 1974	RX 10		M
	Apr. 15, 1974	RX 11		N
Ms.	March 1974	RX 6	Stip., Apdx.	I
[10] Outdoor Life	March 1974	RX 7	Stip., Apdx.	J
Popular Science	March 1974	RX 7	Stip., Apdx.	J
Field & Stream	March 1974	RX 7	Stip., Apdx.	J
New Yorker	Feb. 11, 1974	RX 9	Stip., Apdx.	L

⁵ All four of these advertisements had the asterisk reference to the *Popular Science* test results. See n. 3, *supra* p. 8.

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	Feb. 18, 1974	RX 9	L
	Feb. 18, 1974	RX 10	M
	Feb. 11, 1974	RX 12	O
Car & Driver	March 1974	RX 9 Stip., Apdx.	L
	April 1974	RX 9	L
	March 1974	RX 10	M
	April 1974	RX 10	M
	March 1974	RX 12	O
	April 1974	RX 12	O
Motor Trend	March 1974	RX 9 Stip., Apdx.	L
	April 1974	RX 9	L
	March 1974	RX 10	M
	April 1974	RX 10	M
	March 1974	RX 12	O
	April 1974	RX 12	O

(Stip. 15-21).

19. The advertisements referred to in Finding 18, *supra*, explicitly restricted the comparative mileage claims to Chrysler's small cars with six cylinder engines and Chrysler's representation as to *Popular Science's* report on the superiority of Chrysler small cars as to Nova was accurate and true.

20. During the same period of time Chrysler did not disseminate in *Reader's Digest*, *Essence*, *Black*, *Encore* or *Jet* magazines any advertisement in which their reference to the *Popular Science* report on comparative gasoline mileage as between Chrysler small cars and Chevrolet Nova was limited to the Chrysler small cars equipped with six cylinder engines (*see* Stip.).

[11] 21. From the beginning of the 1974 model year through November 30, 1973,⁶ sales by Chrysler to dealers of Plymouth Valiant automobiles (including Duster) equipped with engines specified were:

198 cubic inch, six cyl. —	3,955
225 cubic inch, six cyl. —	70,326
318 cubic inch, V8 —	21,609
360 cubic inch, V8 —	579

(Stip. 8).

During the same period of time sales by Chrysler to dealers of Plymouth Duster automobiles with the engine specified were:

six cylinder engines — 48,044

⁶ By stipulation approved August 1, 1975, the parties agreed that a correction should be made to paragraphs 8 and 10 of CX 1, the Stipulation, and paragraphs 24, 26, and 28 and CX 5, the Supplemental Stipulation, so that the initial phrase of said paragraphs would read as follows: "From the beginning of the 1974 model year through November 30, 1973 * * *."

eight cylinder engines — 14,103
(CX 5B, Par. 26).

22. During the 1973 model year, sales by Chrysler to dealers of Plymouth Valiant automobiles (including Duster) equipped with engines specified were:

198 cubic inch, six cyl.	—	18,290
225 cubic inch, six cyl.	—	235,056
318 cubic inch, V8	—	71,798
340 cubic inch, V8	—	12,530

(Stip. 7).

During the same model year, sales by Chrysler to dealers of Plymouth Duster automobiles with the engines specified were:

six cylinder engines	—	167,572
eight cylinder engines	—	46,471

[12] 23. From the beginning of the 1974 model year through November 30, 1973, sales by Chrysler to dealers of Dodge Dart automobiles (including Sport) equipped with the engines specified were:

198 cubic inch, six cyl.	—	1,156
225 cubic inch, six cyl.	—	51,229
318 cubic inch, V8	—	24,343
360 cubic inch, V8	—	308

(Stip. 10).

During the same period of time, sales by Chrysler to dealers of Dodge Dart Swinger Special equipped with the engines specified were:

six cylinder engines	—	2,790
eight cylinder engines	—	275

(CX 5, Par. 24).

During the same period of time, sales by Chrysler to dealers of Dodge Dart Sport automobiles equipped with the engines specified were:

six cylinder engines	—	12,014
eight cylinder engines	—	6,360

(CX 5, Par. 28).

24. During the 1973 model year, sales by Chrysler to dealers of

Dodge Dart automobiles (including Sport) equipped with the engines specified were:

198 cubic inch, six cyl.	—	4,999
225 cubic inch, six cyl.	—	157,963
318 cubic inch, V8	—	78,232
340 cubic inch, V8	—	8,748

(Stip. 9).

During the same period of time, sales by Chrysler to dealers of Dodge Dart Swinger Special equipped with the engines specified were:

six cylinder engines	—	11,952
eight cylinder engines	—	1,213

(CX 5, Par. 23).

[13] During the same period of time, sales by Chrysler to dealers of Dodge Dart Sport automobiles equipped with the engines specified were:

six cylinder engines	—	33,736
eight cylinder engines	—	19,272

(CX 5, Par. 27).

25. During the 1973 model year and from the beginning of the 1974 model year until November 30, 1973, a substantial number of Plymouth Valiant (including Duster) and Dodge Dart automobiles (including Sport) equipped with V8 engines were sold to dealers by Chrysler (Findings 21, 22, 23, 24; see also Tr. 92 (Dow)).

DISCUSSION AND CONCLUSIONS OF LAW

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of respondent Chrysler Corporation. The Commission, upon issuing its complaint in this matter, determined that a proceeding by it would be in the public interest. There is nothing in this record to show to the contrary. See *American Airlines, Inc. v. North American Airlines, Inc.*, 351 U.S. 79, 83 (1956).

2. The acts and practices challenged in the complaint and in which Chrysler was found to have engaged were all to the prejudice and to the injury of the public and Chrysler's competitors and 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.

THE REPRESENTATIONS

It is well established that the meaning of an advertisement is a question of fact that may be determined by an examination of an advertisement itself. *Carter Products, Inc. v. Federal Trade Commission*, 323 F.2d 523, 528 (5th Cir. 1963); *The J. B. Williams Co. v. Federal Trade Commission*, 381 F.2d 884, 889 (6th Cir. 1967).

[14] Upon viewing the challenged advertisements (CX's 2, 3, 4), the administrative law judge is satisfied that CX 2 and CX 3 convey the representation alleged in the complaint, i.e., that *Popular Science* magazine had reported that all Chrysler small cars were superior in gas mileage to all Chevrolet Novas. In my opinion this is a reasonable interpretation of the message conveyed by the gasoline economy portion of each advertisement. On the other hand, CX 4 makes reference to the "Slant Six" engine and although it could be otherwise misleading, the advertisement does not represent, in my view, that *Popular Science* magazine had reported that all Chrysler small cars were superior in gasoline mileage performance to all Chevrolet Novas. In addition, CX 4 was directed to the dealers themselves and not the consuming public.

Chrysler contends that the language of CX 2 and CX 3 could not possibly represent that *all* Chrysler small cars were superior in gas mileage to *all* Chevrolet Novas, but, given the most expansive interpretation represents that *many* or even *most* Chrysler small cars gave superior performance. Chrysler argues that this realistic meaning is accurate and true, according to the *Popular Science* report.

I do not find anything in these two advertisements which would specifically limit the gas mileage comparison to a particular type, group or kind of Dodge Dart Swinger Special, Dodge Dart Sport, Plymouth Duster or Chevrolet Nova. The representation appears unequivocal and surely might be understood to apply to all of the particular models and styles mentioned.

Chrysler also contends that these advertisements are limited to comparisons with its small cars equipped with six cylinder engines because (1) no consumer would ever consider a "small car" to be equipped with a V8 engine, (2) the only options mentioned were whitewall tires and wheelcovers and the V8 engine is optional, and was not included in the list of optional items, (3) the competitive small cars mentioned, other than Nova and Maverick, did not offer an eight cylinder engine, and (4) the \$62 saving on ignition maintenance relates to the six cylinder engine, it being a \$90 saving for the V8 engine ignition maintenance.

[15] Significantly, however, these two advertisements contain no

language referring to the six cylinder engine. There is nothing except Chrysler's argument to demonstrate whether the mention of options, the engine size of some of the competing small cars mentioned, or the ignition maintenance savings were in any way meaningful to prospective consumers in the way Chrysler suggests. On the other hand other references made in the advertisements to physical characteristics such as trunk space, hip room, seating space, and the physical appearance of the cars actually pictured in the advertisement would be identical for automobiles equipped with six or eight cylinder engines (Tr. 144-145 (Schirmer)).

Finally, the term "small car" is quite ambiguous. It has been used by the automobile industry without regard to engine size. Chrysler officials candidly admitted that in the fall of 1973, when the so-called "energy crisis" hit the gasoline distribution system due to the oil embargo, Chrysler did not have a domestically produced compact or sub-compact car. It embarked on an extensive advertising campaign to overcome any competitive disadvantage that might exist. This campaign was designed to sell the "small car" idea (Tr. 51-52 (Dow)).

In this connection it caused the so-called Atlanta "focus group" survey to be conducted in order to determine what the general population might understand by the term "small car." It is the report on this interaction group comprised of only 28 persons upon which Chrysler would base its argument that *no one* would consider an automobile equipped with an eight cylinder engine as a small car (see RX 15-15C). I do not think the protocol for the "focus group" exercises or even its purpose could be considered support for Chrysler's position (see Tr. 150-158, 161-166 (Marr)). At most "engine size" was important to *some* people after the matter was discussed among them. To take this as reflecting how a prospective purchaser of an automobile might interpret the term "small car" as it appeared in the context of Chrysler's advertisements is too unscientific to support a finding that *no one* would consider an automobile equipped with an eight cylinder engine as a small car (see Tr. 219-221 (Karle)). In any event the reports on the individual responses to the ad copy shown to the members of the "focus groups" do not reflect the understanding suggested by Chrysler (RX 15h-15z9).⁷

[16] In my opinion the most persuasive support for the finding that CX 2 and CX 3 contain the representation alleged in the complaint is a comparison between the challenged advertisements and the other advertisements of record in which the explicit limiting reference to "slant six" is made. This simple, clear disclosure dovetails with the

⁷ In fact Chrysler appears to include its Dart and Duster automobiles equipped with V8 engines in its small car lineup. See Product Information Bulletins, RX 19, 21, 22.

content of the *Popular Science* report and makes the advertisements clear and unequivocal insofar as the gasoline mileage comparisons are concerned.

Complaint counsel, in their proposed findings (CPF 22), contend that through the use of the challenged advertisements "respondent has represented that *Popular Science* magazine had reported concerning the gasoline economy of automobiles and in that report found all Chrysler small cars to be superior in terms of gasoline mileage both to all Chevrolet Novas and to comparable Chevrolet Novas (emphasis added by the administrative law judge). They argue in their memorandum in support of their proposed findings that the existence of either of these two representations is sufficient to make out a violation, that the second "meaning" is embraced within the allegation set forth in the complaint, that respondent was notified of this alternative theory early in this proceeding, and that such an additional charge does not constitute objectionable variance from the allegations of the complaint (see memo, p. 1).

Respondent, arguing that the allegation as to meaning of the advertisement set forth in the complaint was not made out, objects to complaint counsel "unilaterally" amending the complaint to embrace the concept of automobiles equipped with comparable sized engines (Resp. Reply, pp. 2-5).

In my opinion, and as found in this initial decision, the challenged advertisement can be construed as also conveying the message that the *Popular Science* magazine had reported that all Chrysler small cars were found to be superior in terms of gas mileage to Chevrolet Novas equipped with comparable engines. This meaning is clearly within the scope of the meaning of said advertisement as alleged in the complaint and I see no variance between the allegations of the complaint and a finding that such a [17] representation was made.⁸ In any event, in view of the finding that CX 2 and CX 3 did convey the message as alleged in the complaint, further discussion of this other meaning would be mere surplusage.

Of course, by rejecting Chrysler's contention that the challenged advertisements did not contain the representation alleged in the complaint, I am not finding that the advertisements might not also convey the limited meaning suggested by Chrysler. Advertisements may be found deceptive if they are capable of being read in a misleading way, even though other, nonmisleading interpretations may also be possible, or even likely. *Merck & Co.*, 69 F.T.C. 526, 552 n. 2

⁸ Objectionable variance arises in a situation where respondent is surprised by a change in theory to such a degree that it has no opportunity to defend itself. No such situation exists in this case. See, *Armand Co. v. Federal Trade Commission*, 84 F.2d 973, 974 (2d Cir. 1936); *J. B. Williams Co., Inc. v. Federal Trade Commission*, 381 F.2d 884, 888 (6th Cir. 1967).

(1966), *aff'd sub nom Doherty, Clifford, Steers & Shenfield, Inc. v. Federal Trade Commission*, 392 F.2d 921 (6th Cir. 1968).

It is my finding and conclusion that CX 2 and CX 3 have the tendency and capacity to deceive the prospective customer into believing Chrysler's misrepresentation as to the content of the *Popular Science* test result. Misuse of test results is an unfair trade practice. *Country Tweeds, Inc. v. Federal Trade Commission*, 326 F.2d 144 (2d Cir. 1964). In addition, Chrysler's failure to disclose in said advertisements that the report on gasoline mileage attributable to *Popular Science* showed that Chevrolet Nova equipped with six cylinder and V8 engines were superior in gas mileage to certain Chrysler small cars equipped with V8 engines was a failure to disclose a material fact. It is well settled that the purchasing public is entitled to all material facts necessary to make a sensible and informed response to advertising, usually the decision whether or not to purchase the advertised product, and that failure to disclose such a material fact is an unfair trade practice in violation of Section 5 of the Federal Trade Commission Act. See, *Federal Trade Commission v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965). [18]

DISPARAGEMENT

In its complaint the Commission alleged that through misrepresentation of *Popular Science's* report as to the gas mileage superiority of Chrysler small cars over Chevrolet Novas and failure to disclose in said advertisements the true comparisons reported on the eight cylinder vehicles, Chrysler has disparaged the Chevrolet Nova. Complaint counsel argue that this charge of disparagement has been sustained, and seek a provision in a cease-and-desist order that would prohibit respondent from:

Disparaging the quality or properties of any competing product or products through the use of false or misleading comparisons.

In support of their contention complaint counsel cites *Steelco Stainless Steel, Inc. v. Federal Trade Commission*, 187 F.2d 693 (7th Cir. 1951) and "generally" 2 CCH Trade Reg. Rep. Par. 7659 at 12,357-67. As I read the case cited and the other cases referred to which relate to the quality or properties of competing products, I find that in the vast majority of adjudicated cases where the disparagement claim has been sustained or upheld, the challenged representation about the competitor's product was overt, direct and wholly untrue.

The instant case, however, is not the usual false advertising case but focuses on the inaccurate use of a single report as to the results of a

test. The truth or falsity of the actual mileage performance comparisons between Chrysler small cars and Chevrolet Novas are really not in issue. However, this record is replete with evidence that Chrysler's small cars of the 1974 model year were generally superior in gas mileage performance than the Chevrolet Novas (RX 23N; RX 24g; RX 25g, 25h, 25u). In my opinion, considering the record as a whole, Chrysler's misrepresentation of the *Popular Science* report does not reach the level of disparagement.

CONSUMER DECEPTION

As a logical extension of its argument as to the meaning that it would attribute to the challenged "small car" advertisements Chrysler points out that during the period [19] of time the challenged advertisements were disseminated it also disseminated numerous advertisements in both newspapers and magazines in which it clearly disclosed that the superiority of Chrysler small cars over Chevrolet Novas was limited to automobiles equipped with six cylinder engines. It argues that prospective customers would have seen the unchallenged type of advertisement and that only a small percentage⁹ would have only viewed the challenged advertisements.

Even assuming that Chrysler's statistical premise is correct, it is well established that it is unfair to make an initial contact or impression through a false or misleading representation, even though before purchase the consumer is provided with the true facts. *Carter Products, Inc. v. Federal Trade Commission*, 186 F.2d 821, 824 (7th Cir. 1951); *Exposition Press, Inc. v. Federal Trade Commission*, 295 F.2d 869, 873 (2d Cir. 1961).¹⁰ In this respect, complaint counsel need not prove actual deception. As stated before, it is sufficient to meet the requirements of demonstrating a violation of Section 5 of the Federal Trade Commission Act, if it is shown that the challenged advertisements have the tendency and capacity to deceive the prospective customer. See, *Charles of the Ritz. Dist. Corp. v. Federal Trade Commission*, 143 F.2d 676, 679-80 (2d Cir. 1944).

Chrysler's statistical premise as to the percent of perspective consumers being exposed to the "correct advertising" relates to the newspaper advertising only (Tr. 179-182 (Marr)). It should be emphasized that the challenged [20] advertisement appeared in certain

⁹ Apparently from a statistical point of view, considering the total number of times Chrysler's "small car" advertising was published in newspapers, only 2 percent of the recipients of newspapers containing one of the challenged advertisements (CX 2) would not have also received issues of the papers containing the unchallenged advertisements (Tr. 175-179 (Marr)).

¹⁰ Chrysler also argues that the challenged advertisements were but a small part of an otherwise extensive advertising campaign and, in the circumstances, do not justify this proceeding or an order. This sort of contention was rejected by the Commission in its recent decision in *Fedders Corporation*, Dkt. No. 8932 (dated Jan. 14, 1975) [85 F.T.C. 87].

magazines of national distribution (CX 2 - *Essence*, *Black*, *Encore* and *Jet*; CX 3 - *Reader's Digest*) in which the "correct" advertisement never appeared. Also the last of the series of six newspaper advertisements disseminated was CX 2, the challenged advertisement (Tr. 91 (Dow)).

Chrysler's argument as to the low percentage of persons who would have seen only the challenged advertisements is candidly geared to fitting this case under the rationale of Commission's recent "Dry Ban" decision.¹¹ However, there are some obvious points which distinguish that case from the instant case.

First, as the Commission seems to point out, Dry Ban is a relatively inexpensive item and the consumer, without much investment, can make up his or her own mind about whether it was as "dry" as represented (Slip. Opinion at p. 9 [85 F.T.C. 688 at 746]). Of course, an automobile is in an altogether different category. Second, the comparative dryness of an antiperspirant is just relative and goes to one's subjective needs in such a product. Comparative gasoline claims, on the other hand, are of critical importance to the prospective purchaser as a frame of reference of where to shop. Finally the 2-4 percent figure in "Dry Ban" referred to the results of a survey as to the meaning of an advertisement. Here the 2 percent related to newspaper exposure only, and not to the number of prospective customers that saw the challenged advertisements and understood them in the manner alleged in the complaint. In my opinion the "Dry Ban" case cannot control the result of the instant proceeding.

Chrysler also stresses the point that it did not intend to make the representation with which it has been charged. However, it is established law that the question of whether one intends to mislead or deceive is not relevant where the challenged advertisements have the requisite tendency and capacity to deceive. *Ford Motor Co. v. Federal Trade Commission*, 120 F.2d 175, 181 (6th Cir.), cert. denied, 314 U.S. 668 (1941); *Montgomery Ward & Co.*, 379 F.2d 666, 670 (7th Cir. 1967); *Koch v. Federal Trade Commission*, 206 F.2d 311, 317 (6th Cir. 1953). [21]

AVERAGING MILEAGE CLAIMS

Chrysler argues that, by issuing the consent order in File No. 742 3174 [C-2564] (General Motors Corporation) on July 22, 1974 [84 F.T.C. 653], and by proposing an identical order in the instant case, the Commission has authorized certain claims based on a showing of average product superiority.

¹¹ *Bristol-Myers Company, et al.*, Dkt. No. 8897 (dated April 22, 1975 [85 F.T.C. 707]). The study there showed only 2-4 percent of the viewers would think that the representation made was that "Dry Ban" would leave no visible residue.

Chrysler proposes that if its "small car" advertisements challenged herein did embrace the V8 equipped automobiles, then the test result reported by *Popular Science* would show Chrysler small cars to have an average superiority (6 cylinder and 8 cylinder engines considered) of 1.1 miles per gallon over the average computed for the Chevrolet Novas. Referring to certain language in a "staff analysis" of the General Motor's order, Chrysler concludes that, on the basis of facts asserted there, it could have published advertisements identical to those challenged herein without in any manner violating the "remedial" order proposed by complaint counsel. Put more rhetorically, Chrysler's argument is: How can any advertisement be considered substantial evidence of a violation of Section 5 when the same advertisement would not violate the terms of the order to cease and desist?

Notwithstanding certain language contained in the staff analysis of the *General Motors* consent order, I do not believe the order proposed in this case would permit the averaging of six and eight cylinder automobiles to demonstrate gasoline consumption comparatives unless a clear and conspicuous disclosure is made setting forth specifically just what the test results were for each sample or average for all samples tested. The proposed order talks in terms of the "valid average of identical samples of each model represented to have been tested." Automobiles equipped with six and eight cylinder engines are not, in my opinion, "identical samples" within the meaning of that order. In any event, if there is any inconsistency between the staff memorandum and the result reached in this initial decision, the ruling in this case prevails. See *Double Eagle Lubricants, Inc. v. Federal Trade Commission*, 360 F.2d 268, (10th Cir. 1965); *P. Lorillard Co. v. Federal Trade Commission*, 186 F.2d 52, 55 (4th Cir. 1950). [22]

REMEDY

The Commission is vested with broad discretion in determining the type of order necessary to ensure discontinuance of the unlawful practices found. *Federal Trade Commission v. Colgate-Palmolive Co.*, *supra*, 380 U.S. at 392. The Commission's discretion is limited only to the requirement that the remedy be reasonably related to the unlawful practices found. *Jacob Siegel Co. v. Federal Trade Commission*, 327 U.S. 608, 613 (1946); *Niresk Industries, Inc. v. Federal Trade Commission*, 278 F.2d 337, 343 (7th Cir. 1960), *cert. denied*, 364 U.S. 883.

It is also well settled that the Commission may require affirmative statements in advertising where failure to make such statements leaves false and misleading impressions. *Federal Trade Commission v.*

Colgate-Palmolive Co., supra; J. B. Williams v. Federal Trade Commission, supra.

In my opinion the notice order that accompanied the complaint satisfies the needs of this case, except that proposed paragraph 5 shall be deleted, it being my conclusion that the disparagement alleged in the complaint has not been made out in fact or in law.¹²

I have added a paragraph designed to supplement the compliance reporting requirements of the Commission's Rules of Practice if and when this proposed order, or any modification thereof, becomes "final" as "final" is used in Section 5(1) of the Federal Trade Commission Act. See *Tysons Corner Regional Shopping Center*, Dkt. 8886, Order Correcting Statement of Compliance Deadlines in Final Order (July 25, 1975). [23]

ORDER

It is ordered, That respondent Chrysler Corporation, and its officers, representatives, and agents and employees directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of products, sold by the respondent in commerce, as "commerce" is defined in the Federal Trade Commission Act do forthwith cease and desist from:

1. Representing directly or by implication, by reference to a test or tests, that any of respondent's automobiles is superior with regard to fuel economy to any other automobiles whether manufactured by respondent or others unless:

(a) such superiority has been demonstrated, as to the model(s) for which it is claimed, by such test or tests with respect to each sample, or the valid average of all identical samples, of each model represented to have been tested; or

(b) the valid test results for each sample, or the valid average of all identical samples, of each model so compared, including the advertised model as well as such makes and models to which the advertised model is compared, are clearly and conspicuously disclosed.

[24] For the purpose of this order "sample" shall mean an actual automobile tested.

2. Representing directly or by implication that any automobile or automotive product has been tested either alone or in comparison with other products unless such representations fully and accurately reflect the test results and unless the tests themselves are so devised and

¹² A "disparagement" paragraph appears in the *General Motors* consent order. However, I do not consider consent orders controlling case precedent. Such orders are negotiated by the parties, and although they are ultimately approved by the Commission, they are not based on any finding of violation, a necessary predicate to an adjudicated order.

conducted as to completely substantiate each representation as to any characteristic tested in the featured test.

3. Misrepresenting in any manner, directly or by implication, the purpose, content, or conclusion of any test, report, study, research, demonstration, or analysis.

4. Misrepresenting in any manner the fuel economy of any automobile or the superiority over competing products of any automobile in terms of fuel economy.

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

It is further ordered, That respondent notify the Commission at least 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, [25] 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 respondent shall, within sixty (60) days after this order becomes "final," file with the Commission a report, in writing, setting forth in detail the manner and form of its compliance with this order.

OPINION

By DOLE, *Commissioner*:

[1] The advertisements which are challenged in this proceeding were part of a promotional campaign sponsored by Chrysler Corporation during the "energy crisis" of 1973 and 1974.¹ The purpose of these advertisements was to inform the car-buying public that Chrysler produced several lines of compact model automobiles which were economical and competitive with the small cars sold by both foreign and domestic producers.² [2] The small-car campaign consisted of advertisements published nationwide from December 1973, through March 1974.³ These ads compared Chrysler's compact models with the

¹ The following abbreviations will be used throughout this opinion in citations to the record: CX - Commission Exhibits; RX - Respondent's Exhibits; Compl. - Complaint; Tr. - Transcript of Testimony; I.D. - Initial Decision of the Administrative Law Judge; App. Br. - Respondent's Appeal Brief; Ans. Br. - Complaint Counsel's Answer Brief; Reply Br. - Respondent's Reply Brief.

² The ad campaign was designed to counter the adverse publicity Chrysler was receiving for introducing a new line of large cars at a time when it did not produce a domestic sub-compact model car. Tr. 51, 52, 62, 74, 206. Chrysler manufactured several compact automobiles; however, its management became concerned, in response to press criticism, that consumers would come to think Chrysler did not offer a line of small cars and many, therefore, would avoid the Chrysler dealers' showrooms. Tr. 52. To "correct" this perception, Chrysler, in December 1973, abandoned its large car advertising and launched into its small-car campaign. Tr. 75.

³ The strategy behind the advertising was "to de-segment the small car segment for the consumer" by forcing the

(Continued)

subcompact and compact cars produced by its competitors.⁴ On the question of gas economy, one of the ads stated in pertinent part:

You can buy a Chevrolet Nova OR you can buy a small car that can beat it on gas mileage * * * The answer is a small car at your Chrysler-Plymouth and Dodge Dealer's.

Below this "answer," the ad depicted a Dodge Dart Swinger Special and a Plymouth Duster.⁵

[3] Another ad inquired and answered:

Which small cars * * * can go farther on a gallon of gas than Nova? These small cars from Chrysler Corporation are the answer.

The ad then illustrated a Dodge Dart Sport and a Plymouth Duster.⁶ Further on, the ad invited the reader to:

* * * find out for yourself why the small cars from Chrysler Corporation are outselling all other compact cars.

Both ads also invited the consumer to:

See all the Darts at your Dodge dealer. See the Dusters and Valiants at your Chrysler dealer.⁷

A *Popular Science* magazine report was cited in both instances as the basis for these mileage claims.⁸

Proceedings Before the Administrative Law Judge

The complaint in this matter alleges that these ads, among others, represented to the public that *Popular Science* found all Chrysler small cars superior in terms of gas mileage to all Chevrolet Novas; and in

consumer to consider compact cars and sub-compacts in the same class and compare both compacts and sub-compacts against the same criteria. RX 14L. Once the market was "de-segmented," Chrysler planned to "segment" it again, but in a different way. The Chrysler small cars would be positioned:

* * * as a whole different kind of entry in the small car field, which serves all the desired benefits with very little compromise * * * the best fuel performance of all the "bigger" small cars, and the best package of all the "smaller" small cars. RX 14m.

⁴ One of the ads, for example, represented that there was a Chrysler small car priced less than the most popular Volkswagen, with more hip room than a Ford Maverick, more trunk space than the Pinto, and more seating capacity than the Chevrolet Vega. CX 2.

⁵ CX 2.

⁶ CX 3.

⁷ CX 2, CX 3.

⁸ The reference to *Popular Science* advised that: Gas mileage claim based on October 1973, *Popular Science* magazine. Tests performed by *Popular Science* for its report were conducted on '73 vehicles. Figures were adjusted by *Popular Science* to reflect 1974 model changes and the results of E.P.A. tests. CX 2, CX 3. See RX 17a.

this respect Chrysler failed to disclose material facts about the *Popular Science* [4] report and misrepresented the findings in the report.⁹ Neither complaint counsel nor respondent dispute the content of the magazine article.¹⁰ It reveals that Chrysler's six-cylinder Dodge Darts and Plymouth Valiants had a gasoline economy edge over GM's six and eight-cylinder Novas. But the report did not stop at that point. It went on to reveal that GM's Novas with six or eight-cylinder engines delivered gas mileage superior to the Chrysler vehicles equipped with optional eight-cylinder engines.¹¹

Complaint counsel contend that Chrysler's ads were misleading because they had a tendency and capacity to convey an impression to consumers that all Chrysler small cars were found by *Popular Science* to provide better gas mileage than all Novas and all comparable Novas.¹² Chrysler, in contrast, argues that consumers could not have understood its comparisons with Nova to include cars equipped with eight-cylinder engines because the ads were talking about small cars and, according to Chrysler, consumers do not perceive eight-cylinder engines as the engines found in "small cars."¹³

The trial of this matter before the administrative law judge lasted one day.¹⁴ Counsel supporting the complaint introduced into evidence a stipulation of facts and several [5] of respondent's advertisements and, thereafter, rested his case.¹⁵ Respondent called five witnesses and entered several document exhibits on the record. The defense evidence relates primarily to consumer "perception" of the term "small car," Chrysler's preparations for the small-car campaign, and statistical data relating to the number of consumers exposed to the various periodicals in which the advertisements were published during the campaign. On September 4, 1975, the judge issued his decision. He found that Chrysler had misrepresented the content of the *Popular Science* report and had failed to disclose material facts concerning the findings in the report.¹⁶ Chrysler appealed.

⁹ Compl. paragraphs 6-9. The complaint, paragraph 10, also alleges that the ads disparaged the Chevrolet Nova; however, the administrative law judge dismissed this allegation and complaint counsel did not appeal. I.D. 18, 22. The Commission concurs in the judge's findings and conclusions on this issue.

¹⁰ Stipulation of Facts, Appendix D. The magazine article erroneously indicates that Plymouth Valiant 318 and 360 cubic inch engines were six-cylinder engines. The parties have stipulated that all Chrysler engines of this size are in fact V8 engines. CX 1b.

¹¹ The accuracy of the mileage figures reported by *Popular Science* was not challenged by the complaint. We should mention in passing, however, that an advertiser may, under Section 5, be held accountable for the truth of claims made in advertising derived from third-party source material. Compare *Perma-Maid Co., Inc. v. FTC*, 121 F.2d 282 (1941) with *Scientific Manufacturing Co., Inc. v. FTC*, 124 F.2d 640 (1941) at footnote 8.

¹² Ans. Br. pg. 4.

¹³ App. Br. pg. 7.

¹⁴ I.D. 2.

¹⁵ Tr. 30-33.

¹⁶ I.D. 6-7.

Small Car vs. Small Car (The Advertisements)

The Commission has carefully examined the record evidence and finds that the ads in question do indeed have a tendency and capacity to mislead consumers into a mistaken belief about the content of the *Popular Science* article and about the comparative gas economy of all Chrysler small cars and all Novas and all such vehicles equipped with comparable-sized engines.¹⁷ The ads refer broadly to Chrysler "small cars" and invite consumers to see "all the Darts" and "the Dusters and Valiants," without any stated references to the cars' engines.¹⁸ It [6] would not be readily apparent to consumers from any information the ads contain that the mileage claims were limited to small cars with six-cylinder engines¹⁹; nor are the references to [7] *Popular Science* qualified in any way which would assist consumers to understand that the magazine's support for Chrysler's fuel-economy claim was confined to six-cylinder cars. Thus, viewed in their entirety, we believe the ads could reasonably lead consumers to believe that the mileage claims referred to six and eight-cylinder cars and to vehicles equipped with comparable-sized engines.²⁰ The ads, therefore, have a tendency and capacity to deceive consumers into the mistaken belief that *Popular*

¹⁷ Compare CX 2 and CX 3 with CX 4. Several of the advertisements used in Chrysler's small car campaign included a specific reference to the "slant six" engines. CX 4, RX 3-12. The administrative law judge found these ads (RX 3-12) to be "accurate and true" or not misleading (CX 4). I.D. 8-10, 14. Complaint counsel did not appeal these findings. The Commission finds that the advertisements which expressly referred to the "slant six" engines were properly qualified and, therefore, did not misrepresent the content of the *Popular Science* report.

¹⁸ On appeal, Chrysler argues that CX 2 refers to "a" small car and, therefore, could not convey the impression to consumers that the mileage claim referred to all small cars. Yet, as the court observed in *Colgate-Palmolive Co. v. FTC*, "It should be obvious by now to anyone that advertisements are not judged by scholarly dissection in a college classroom." 310 F.2d 89 (1st Cir. 1962). See also 326 F.2d 517 (1st Cir. 1963), *rev'd*, *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965). In the context of this advertisement, which also refers to "small cars" generally and "all the Darts" and which depicts the "Dodge Dart Swinger Special" and the "Plymouth Duster," the Commission finds that the reference to "a" small car could reasonably be understood by consumers to mean all of the small car models with six and eight-cylinder engines depicted in or expressly referred to in the advertisement.

¹⁹ One of the challenged ads claimed that consumers could save up to \$62 on recommended ignition maintenance. CX 2. According to an internal Chrysler document, the savings of \$62 applied to the recommended maintenance on six-cylinder cars. A savings of \$90 could have been claimed if eight-cylinder engine comparisons had been used. RX 26. Yet, the consumer could not determine from the ad itself whether the \$62 savings claim applied to six-cylinder engines, eight-cylinder engines, or both.

Similarly, we must reject Chrysler's argument that its advertising representations were limited, unless otherwise expressly indicated, to vehicles equipped with standard equipment and, therefore, made no claims for cars equipped with optional extra-cost eight-cylinder engines. Four different engine options were available for each of the advertised vehicles, including a basic 198 cu. in. six-cylinder, an optional 225 cu. in. six-cylinder, a 318 cu. in. V8, and a 360 cu. in. V8. Although the director of Chrysler's advertising apparently did not know it, the record reveals that the 225 cu. in. six-cylinder engine was an extra-cost option available to consumers possibly looking for a small car with a little more horsepower than that which is developed by Chrysler's basic 198 cu. in. six-cylinder engine. Compare Tr. 97 with RX 19-22, RX 23g and RX 24a. The record also reveals that during the model years 1973 and 1974, approximately 276,000 Dodge Dart Swinger Specials and Sports and Plymouth Dusters sold by Chrysler to its dealers were equipped with six-cylinder engines. How many of these engines were optional extra-cost 225 cu. in. engines is not disclosed. During the same period, Chrysler sold to its dealers over 87,000 Darts and Dusters equipped with optional V8 engines. Stipulation of Facts CX 1b, 1c. These optional engines were available to consumers who wanted a little more "pep" from their small cars than the basic six-cylinder engine would provide. Under these circumstances, failure to identify the engine sizes to which the mileage superiority claims would apply could reasonably lead consumers to believe that the claims applied to the full range of engine options, including the optional extra-cost six and eight-cylinder engines.

²⁰ Chrysler argued before the administrative law judge and again on appeal that complaint counsel unilaterally

(Continued)

Science found Chrysler's small cars superior to the Novas in situations in which the magazine had actually reported that the Novas were the more fuel-efficient vehicles.

The Commission also finds that Chrysler's failure to disclose that the *Popular Science* report supported its mileage claim only in respect to its six-cylinder engines or, in the [8] alternative, to disclose the report's findings in respect to the eight-cylinder engines constituted an omission of material fact. The way the *Popular Science* magazine reference was used in the context of these advertisements was designed to disarm skeptical consumers who might question the reliability of Chrysler's fuel-economy claims.²¹ It was not, after all, just Chrysler's word that the consumer had to believe.²² The ads conveyed the impression to consumers that a presumably objective third party with no interest in selling respondent's automobiles had tests which proved, without qualification, that all Chrysler small cars had better gas mileage than all Chevrolet Novas.²³ This impression was misleading and deceptive and, accordingly, we find that Chrysler's failure to disclose findings in the *Popular Science* report which were unfavorable to its eight-cylinder cars, in the context of advertisements not expressly limited to its six-cylinder cars, constituted an omission of material fact and misuse of the *Popular Science* report in violation of Section 5 of the Federal Trade Commission Act.²⁴

Small Car vs. Small Car (The Defense)

Chrysler argues on appeal that a small car equipped with a V8 engine is not a small car and that consumers would not perceive such a car as a small car.²⁵ This defense is [9] predicated on conclusions derived from a "focus group" study conducted in Atlanta, Georgia, involving 28 consumer participants. The study itself involved group discussions which were observed by respondent's experts and which

amended the complaint to include the concept of automobiles equipped with comparable engines. I.D. 16, App. Br. 5, Reply Br. 5-6. The advertisements in question could reasonably be viewed by consumers as comparing vehicles with six-cylinder engines against other vehicles with six-cylinder engines and vehicles with eight cylinders against other vehicles with eight cylinders. The complaint allegations provided adequate notice to Chrysler that this issue would be litigated in this proceeding. Moreover, Chrysler presented its views to the administrative law judge and has fully briefed the issue on appeal. We believe Chrysler has been afforded an ample opportunity to defend itself in this proceeding and find no prejudice to its case.

²¹ Chrysler's Director of Advertising testified:

• • • [W]e were anxious to get third party authentication for our fuel economy advantages. And again that is why we relied on *Popular Science*. We could have said "our proving ground show" but it is not a question of just making the claim. It is a question of getting somebody to believe it, and we wanted some sort of third party authentication. Tr. 79-80. See RX 15 Z-4, RX 14i.

²² See *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965).

²³ See RX 14i, wherein it is recommended to Chrysler that tests relating to the fuel-economy question "should be treated as a proof point in communications • • •."

²⁴ See, note 17, *supra*.

²⁵ App. Br. pg. 6.

were apparently tape recorded; however, these tapes are not in evidence.²⁶

The record evidence relating to this study consists of the opinion testimony offered by respondent's experts and the verbatim responses to questionnaires concerning "mock" small-car advertisements filled out by the participants before the discussion sessions were conducted.²⁷ We first observe that none of the participants' verbatim responses contain specific references to particular engine sizes.²⁸ What transpired in the group discussions is not clear on this record; but this notwithstanding, respondent believes the discussions support the view that consumers perceive small cars as cars equipped only with engines powered by fewer than eight cylinders. Precisely how the "focus group" discussions came to focus so sharply on this issue, when none of the participants previously mentioned V8 engines, is a question for which respondent's evidence provides no sufficient answer.²⁹

[10] Despite these deficiencies in the evidence, the "focus group" discussions may have been, for respondent's purposes, a valid method for determining how its advertisements might appeal to consumers who were interested in small cars. But accepting the study as valid for this limited purpose does not necessarily mean it is an adequate test to determine the meaning of the advertisements. As respondent well knows, this test clearly was not designed to provide survey data on the way consumers interpret the specific ads we have before us.³⁰ The contention that the "focus study" and the testimony based upon it provide strong empirical evidence concerning how consumers relate to the term "small car" plainly overstates the value of this test. Many consumers, for example, receive the impressions conveyed by advertisements while perusing a newspaper or magazine; and it is not likely that many pause, as they apparently did in respondent's study, to conduct lengthy in-depth discussions about their meaning.³¹ Furthermore, the study provides no insight into the meaning of these

²⁶ RX 15c, Tr. 152.

²⁷ RX 15f, Tr. 152-156.

²⁸ RX 15 H-15, Z-9. According to Chrysler, these verbatim responses are not significant at all because the important findings result from the group discussions. Reply Br. 3-4, Tr. 165. They are, however, the only direct evidence of what the participants in the study actually had to say which has not been filtered through the testimony of respondent's experts. See, e.g., Tr. 158.

²⁹ It appears the subject of engine sizes was mentioned many times in the group discussions, and respondent's expert witnesses heard and viewed the discussion groups on a TV monitor located in another room. Tr. 183. However, as one of these experts indicated:

If some questions arise or some information is being discussed in the group, we can send a message to the moderator and tell him to pursue this particular topic or this particular subject, what-have-you. Tr. 153. See, also Tr. 174.

Whether the discussion of engine size may have been prompted by the moderator or raised spontaneously by a participant is not clear; nor is it clear on this record whether it was a subject the moderator was requested to pursue. Tr. 151-159.

³⁰ Tr. 161-163, Reply Br. pg. 3.

³¹ Respondent emphasizes that the "focus study" was a *qualitative*, not quantitative, study of consumer perception

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advertisements. Not only does it ignore the various contexts in which the term "small car" may be used, it ignores the specific context in which it was used in these advertisements. The ads in question had not yet been developed when the "focus group" study was conducted.³² But even if they had been considered in this study, the number of participants involved, 28 in all, would not, in any event, constitute a sufficiently large sample to provide statistically meaningful insight into impressions conveyed to consumers by the advertisements.³³

[11] In addition, according to respondent's experts, the "focus group" results convinced them that consumers view small cars as easy to handle and economical; small engines, specifically four and six-cylinder engines, may be an aspect of small-car economy.³⁴ While these conclusions suggest that engine size may be important to some consumers, a substantial number of consumers may still perceive advertisements for a compact vehicle with eight cylinders as an advertisement for a small car.³⁵ For some consumers, four and six-cylinder engines may well be an aspect of small-car economy. This, however, is not inconsistent with the notion that a small car equipped with a V8 engine may also be perceived by consumers as being more economical than a larger car equipped with a V8 engine. Yet in Chrysler's view, and the public's view as Chrysler understands it, if a vehicle has a four or six-cylinder engine, it may be a small car; if the same vehicle is equipped with an eight-cylinder engine, it may be a large car or a mid-size car, but whatever it is, it is no longer a small car.³⁶

[12] The record in this matter reveals that the public's understand-

and, therefore, it probed more deeply into consumer perceptions. Reply Br. pg. 3. Yet the "perceptions" consumers arrive at after discussing a subject with others who may influence their views may be different from the initial impressions they may have had. For this reason, group discussions may not be the best way to survey the impressions conveyed by an advertisement. In any event, the "perceptions" respondent apparently is relying upon in this proceeding concern the term "small car" in the abstract and are for this reason, if for no other, of little use to us here. Compare note 37 *infra*.

³² Reply Br. pg. 3.

³³ Tr. 220-221.

³⁴ Tr. 154-155, 206; RX 15b.

³⁵ The record as a whole suggests that both the "focus group" participants and Chrysler personnel tended to think of a small car as an amalgamation of features including the vehicle's length, its price, cost of maintenance, optional equipment, weight, and the size of its engine, among others. Tr. 63, 116, 154-155, 158, 183, 195, 203-204; RX 14e, 14f, RX 15. At the time the ads were published, the auto industry used the small-car label to describe economy imports, sub-compacts, and compact model cars. Tr. 76.

³⁶ One of the problems with Chrysler's argument is that it requires rigid adherence to a definition of "small car" which excludes reasonable alternative formulations. As the administrative law judge quite properly observed:

Of course, by rejecting Chrysler's contention that the challenged advertisements did not contain the representation alleged in the complaint, I am not finding that the advertisements might not also convey the limited meaning suggested by Chrysler. I.D. 17.

It is a well settled principle that advertisements may be deceptive if they have a tendency and capacity to convey misleading impressions to consumers even though other nonmisleading interpretations may also be possible. *Merck & Co.*, 69 F.T.C. 526, *aff'd sub nom.*, *Doherty, Clifford, Steers & Shenfield, Inc. v. FTC*, 392 F.2d 921 (6th Cir. 1968); *Continental Wax Corp. v. FTC*, 330 F.2d 475 (2d Cir. 1964); *Murray Space Shoe Corp. v. FTC*, 304 F.2d 270 (2d Cir. 1962).

To illustrate how the definition of a term may be different from the way people perceive the object of the

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ing of the term "small car" may be much more flexible [13] than respondent suggests in its argument on appeal; and indeed it is this flexibility which apparently encouraged Chrysler to undertake an advertising campaign to convince the public that Chrysler had "the best fuel performance of all the 'bigger' small cars and the best package of all the 'smaller' small cars."³⁷ A substantial portion of the consuming public could reasonably perceive Chrysler's compact cars with V8 engines simply as small cars with big engines or high-powered small cars. Under these circumstances, the narrow interpretation of the term "small car" urged by Chrysler on appeal is unwarranted and unsupported by this record, and we reject it.³⁸ [14]

Public Interest in These Proceedings

Chrysler believes the public interest requires dismissal of the complaint because it did not intend to deceive the public, and if there

definition, we refer respondent to the celebrated case of *Regina v. Ojibway*, a case not officially reported but which may be found in 8 Criminal Law Quarterly at 137 (Toronto, 1965). In *Ojibway*, the court interpreted the meaning of a "small bird" under the Ontario Small Birds Act. The issue in the case was whether a pony saddled with a feather pillow was a small bird within the meaning of the law. In an opinion by the Honorable Blue, J., the court concluded that for purposes of the Small Birds Act, all two-legged, feather-covered animals were birds and that the legislative intent clearly was to make two legs the minimum requirement; therefore, a horse with feathers on its back must be deemed, for purposes of the Act, to be a bird, "and *a fortiori*, a pony with feathers on its back is a small bird." The judge could have, but did not, include the finding in his opinion that a small bird is a pony, but had he done so, this opinion would be on "all fours" in support of respondent's argument.

The court was quick to note, however, that different things may take on the same meaning for different purposes, and to this we add that the same thing may take on different meanings to different people. Like *Ojibway*, however, this case is a horse of a different color, for a horse with feathers on its back may be defined as a bird, but to a bystander it may still be perceived as a horse. We find ourselves in the position of the bystander. Respondent asserts that a small car with an eight-cylinder engine is not a small car. But is a horse with a feather pillow on its back any the less a horse?

³⁷ See note 3, *supra*. While it appears the "focus group" study persuaded Chrysler to change its approach to "small car" advertising by deemphasizing how many inches long its cars measured, a statistic which apparently, in the abstract, meant little to the "focus group" participants, and by refocusing on the package of features offered by its cars, the underlying strategy of its campaign to "de-segment" the market remained unchanged. RX 15b, 15d; CX 2, CX 3.

³⁸ During the trial of this matter and at the oral argument before the Commission on January 16, 1976, Chrysler vigorously pursued the argument that consumers would not consider a "small car" as a car equipped with a V8 engine. I.D. 14; Transcript of Oral Argument pgs. 11, 14. It has come to our attention, on application filed by complaint counsel to supplement the record, that Chrysler has recently described in advertising, "a tough little package," its "new small" Road Runner. The commercial began with a musical jingle, two lines of which were: "Road Runner's small at a small car price; Small car economy is something kinda nice * * *." This vehicle comes equipped with no engine other than a V8 engine.

Chrysler admits "that the commercial in question was shown on December 20, 1975, * * *" but "denies both the authenticity of some of the material (submitted by complaint counsel) and the relevance of all of it." Opposition to Complaint Counsel's Motion to File New Documentary Evidence pgs. 3, 5. The Commission has determined that Exhibits C, D and E, attached to complaint counsel's motion filed on February 6, 1976, including two letters dated January 30, 1976, from Mr. Maher, one of Chrysler's attorneys, be admitted into evidence as Commission Exhibits 5 through 7. Exhibits A and B, annexed to complaint counsel's motion, are cumulative and are, therefore, rejected. The Commission has also determined that the attachment and Exhibits A and B, annexed to Complaint Counsel's Reply to Respondent's Opposition, be admitted into evidence as Commission Exhibits 8 through 11. In accepting these exhibits, we emphasize that the meaning of the commercials and the impressions they convey to the public are not before us. The ads discussed in Mr. Maher's letters are, however, relevant to the issue of Chrysler's use of the term "small car" in advertising promoting the sale of a vehicle with a V8 engine. Since the advertisement was aired on December 20, 1975, it was not available at the trial and we believe counsel have acted with due diligence, under the circumstances, in offering these documents into evidence. Chrysler's vague objections concerning the authenticity of "some of the material" are, in view of the correspondence from its own counsel discussing these materials in detail, overruled.

were any deceptive representations conveyed by two of the ads, it was "corrected" by other nondeceptive ads which were part of the same advertising campaign. We disagree with respondent.

Proof of Chrysler's intention to deceive is not a prerequisite to establishing a violation of Section 5.³⁹ It [15] is well settled that an advertiser's good intention does not immunize it from responsibility for representations which have a tendency and capacity to deceive the public.⁴⁰ Moreover, our order is not designed to punish Chrysler for its past deception but to ensure against a recurrence of the deception in the future.

We also find unpersuasive respondent's argument that the deception in the challenged advertisements was "cured" by other advertisements in the "small car" campaign. Evidence of this cure consists of statistical estimates, prepared by respondent's expert, indicating the percentage of people who had an opportunity to be exposed to both the deceptive and nondeceptive ads. According to these estimates, fewer than 2 percent of the people who received periodicals containing the deceptive ads would not have had an opportunity to be exposed to the other small-car ads.⁴¹

As the administrative law judge noted, it is significant that these raw statistical estimates relate to newspaper exposure only and not to the number of consumers who actually saw respondent's advertisement.⁴² Yet, even if we assume [16] that each consumer who read one of the ads in respondent's campaign read all of the ads, it would not cure the deception. Section 5 prohibits deception in advertisements which are disseminated in a single publication or numerous periodicals by mail, radio, or TV without regard to whether the ad was published once by itself or several times in conjunction with other ads in a media blitz or extended advertising campaign. The fact that nondeceptive ads may be part of an ad campaign is no basis for ignoring the advertisements which are deceptive. The Commission will evaluate

³⁹ *Merck & Co., Inc. v. FTC*, 392 F.2d 921 (6th Cir. 1968); *Feil v. FTC*, 285 F.2d 879 (9th Cir. 1960); *Koch v. FTC*, 206 F.2d 311 (6th Cir. 1953); *Charles of the Ritz v. FTC*, 143 F.2d 676 (2d Cir. 1941). Respondent notes that CX 3 appeared in the *Reader's Digest* and was a scaled-down version of a full-page newspaper advertisement. In reducing the newspaper advertisement to a size appropriate for *Reader's Digest*, the explicit reference to the "slant six" engine became too small to be legible and so it was edited out of the text of CX 3. App. Br. pgs. 13-14. As the Supreme Court observed in *Colgate-Palmolive, supra*:

All methods of advertising do not equally favor every seller. If the inherent limitations of a method do not permit its use in the way the seller desires, the seller cannot by material misrepresentation compensate for those limitations. At 391.

⁴⁰ *Ford Motor Co. v. Federal Trade Commission*, 120 F.2d 175, 181 (6th Cir.), cert. denied, 314 U.S. 668 (1941); *Montgomery Ward & Co.*, 379 F.2d 666, 670 (7th Cir. 1967); *Koch v. Federal Trade Commission*, 206 F.2d 311, 317 (6th Cir. 1953).

⁴¹ Tr. 176-179, 185-187.

⁴² Respondent's expert used a "data function distribution formula" to calculate the probability of being "potentially exposed to one newspaper and only one." Tr. 176. This statistic has little, if any, bearing on the percentage of people who saw respondent's advertisements and is, for this reason, clearly distinguishable from the type of survey which the Commission considered in *Bristol-Myers Co.*, Dkt. 8897 (April 22, 1975) [85 F.T.C. 707]. Tr. 180.

each ad in an ad campaign on its own merits; and while we may find, as we did here, that some of the ads are nondeceptive, this provides no license for the deception found in others. The public has a right to expect each of respondent's advertisements to be equally free of deception.⁴³

Chrysler has also argued on appeal that the Commission's recently issued fuel-economy guide specifies the requirements for advertising the results of automobile fuel-economy tests and, therefore, there is no need for an order.⁴⁴ Yet, if Chrysler should breach the guide by misusing the E.P.A. test figures as it has misused the *Popular Science* report, *de novo* enforcement proceedings requiring a new complaint and another trial would be necessary before the public would be any closer than it is now to the protection of an order.

[17] Moreover, the guide requires, *inter alia*, advertisers using automobile fuel-economy claims to disclose both the city and highway fuel economy of the advertised vehicle as determined by the U.S. Environmental Protection Agency.⁴⁵ It must also be clear in the advertisement that the E.P.A. figures are only estimates and will vary depending upon the consumer's driving habits, the driving conditions, and the car's condition and optional equipment. Disclosures relating to engine size, type of transmission, and other factors affecting fuel economy may, under certain circumstances, also be required. Thus, compliance with the guide depends upon a candid disclosure of the contents and limitations of test reports prepared by E.P.A.

Having found that Chrysler has, in the past, misused third-party test results, it is incumbent upon us to ensure against recurrences of this type of abuse not only in respect to tests relating to fuel economy but also tests or demonstrations which purportedly offer consumers objective proof for claims pertaining to other features of the products respondent promotes in its advertising.⁴⁶ The Commission, therefore, finds it necessary, in the public interest, that an order issue against Chrysler "fencing in" the abusive use of techniques for conveying the

⁴³ See *Exposition Press, Inc. v. FTC*, 295 F.2d 869 (2d Cir. 1961); *Carter Products, Inc. v. FTC*, 186 F.2d 821 (7th Cir. 1951). Respondent argues that the allegedly deceptive ads (CX 2 and CX 3) were preceded in its campaign by ads which were nondeceptive. Therefore, according to respondent, the "initial contact" with consumers was nondeceptive. App. Br. pg. 15, footnote 34; Reply Br. pg. 7. But this is of no moment. Section 5 enforcement would take an odd turn indeed if a seller were permitted to lure customers with truthful representations only to "loose the dogs" once the customers were within reach. In any event, we hold Chrysler strictly accountable for each of its ads individually.

⁴⁴ App. Br. pg. 16.

⁴⁵ *Guide Concerning Fuel Economy Advertising for New Automobiles*, 40 F.R. 42003, September 10, 1975. This guide was adopted as an interim measure on automobile fuel-economy advertising. A proposed trade regulation rule covering these types of claims was announced on September 24, 1974, by notice published in the *Federal Register*. 39 F.R. 34382. The Commission determined that further study of the E.P.A. test results would be needed before it would promulgate the final TRR.

⁴⁶ *FTC v. Colgate-Palmolive Co.*, *supra*, note 22.

impression to consumers that product claims have been objectively verified.⁴⁷

[18] Finally, Chrysler asks, "How can the Commission rationally forbid an advertiser to issue any future advertisement containing an unintentional ambiguity?"⁴⁸ To this we respond that the relief, in this instance, does not encompass "any" future advertisement. It is limited to those advertisements in which respondent abuses certain techniques which have a tendency and capacity to lead the public into believing respondent has objective proof for its product claims. When respondent employs such techniques in its future advertising, it must be mindful of the proscriptions of our order. Its provisions, although not punitive, are designed not only to protect consumers from the continuation of the deceptive practices we have found in this proceeding but, at the same time, to provide Chrysler with the type of guidance it may need to keep it from unintentionally misleading the public.

An appropriate order is attached to this opinion.

FINAL ORDER

[1] This matter having been heard by the Commission upon respondent's appeal from the initial decision; and

The Commission having considered the oral arguments of counsel, their briefs, and the whole record; and

The Commission, for reasons stated in the accompanying opinion, having denied the appeal; accordingly

It is ordered, That, except to the extent that it is inconsistent with the Commission's opinion, the initial decision of the administrative law judge be, and it hereby is, adopted together with the opinion accompanying this order as the Commission's final findings of fact and conclusions of law in this matter;

It is further ordered, That the following order be, and it hereby is, entered:

⁴⁷ Chrysler claims to have been denied a fair, impartial hearing on the merits because the administrative law judge, at page 13 of his initial decision, stated:

The Commission, upon issuing its complaint in this matter, determined that a proceeding by it would be in the public interest. There is nothing in the record to show the contrary. App. Br. pg. 19.

Respondent believes this indicates the judge relied upon the complaint as "some evidence of wrongdoing." First, we find no prejudice to respondent in Judge Brown's paraphrase of Subsection 5(b) of the F.T.C. Act. That subsection provides that a determination by the Commission as to whether or not it appears a proceeding would be in the public interest is a prerequisite to the issuance of a complaint. Second, it is apparent from a review of Judge Brown's comprehensive findings of fact that he made his determinations based on the record, as a whole, and, on this basis alone, found respondent's ads to be deceptive. It is evident from these findings that he gave no evidentiary weight to the complaint. Having found deception in advertisements promoting the sale of automobiles nationwide, Judge Brown was entitled to presume that an order putting a stop to it was in the public interest. His statement that "there is nothing in this record to show the contrary" indicates that respondent's evidence failed to persuade him that curing this deception and preventing its continuation in the future was not in the public interest. These statements by the judge do not demonstrate that respondent was denied due process of law in these proceedings.

⁴⁸ App. Br. pg. 17.

ORDER

It is ordered, That respondent Chrysler Corporation and its officers, representatives, and agents and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or [2] distribution of products sold by the respondent in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, by reference to a test or tests, that any of respondent's automobiles are superior with regard to fuel economy to any other automobiles whether manufactured by respondent or others unless:

a. such superiority has been demonstrated as to the model(s) for which it is claimed by such test or tests with respect to each sample, or the valid average of all identical samples, of each model represented to have been tested; or

b. the valid test results for each sample, or the valid average of all identical samples, of each model so compared, including the advertised model as well as such makes and models to which the advertised model is compared, are clearly and conspicuously disclosed.

For the purpose of this order, "sample" shall mean an actual automobile tested.

2. Representing, directly or by implication, that any performance or other characteristic of any automobile or automotive product has been tested, either alone or in comparison with other products, unless such representation(s) fully and accurately reflect the test results and unless the tests themselves are so devised and conducted as to completely substantiate each representation concerning any characteristic tested in the featured test.

3. Misrepresenting in any manner, directly or by implication, the purpose, content, or conclusion of any test, report, study, research, demonstration, or analysis.

4. Misrepresenting in any manner the fuel economy of any automobile or the superiority of any automobile over competing products in terms of fuel economy.

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

[3] *It is further ordered,* That respondent notify the Commission at least 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 which may affect compliance obligations arising out of the order.

It is further ordered, That respondent shall, within sixty (60) days after this order becomes "final," file with the Commission a report, in writing, setting forth in detail the manner and form of its compliance with this order.

Not having participated in the oral argument in this matter, Chairman Collier did not participate in the resolution of it.