

Complaint

87 F.T.C.

IN THE MATTER OF
FORD MOTOR COMPANY

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

Docket 9001. Complaint, Dec. 10, 1974—Remand Order, April 13, 1976

Opinion and order affirming a ruling of the administrative law judge that advertisements of Ford Motor Company, a Dearborn, Mich., manufacturer of automobiles, represented that the gasoline-consumption rates specified in the ads approximate or equal the performance an ordinary driver can typically obtain from standard production model cars when taking long or cross-country trips, and that Ford lacked a reasonable basis for the representation. The order adopted the initial decision's findings of facts 1-10 and 13 as findings of the Commission, set aside the remainder of the initial decision, and remanded the complaint to the administrative law judge to conduct hearings in respect to allegations that Ford made unsubstantiated fuel economy claims for its Pinto, Capri, Mustang II, Maverick, and Comet model small cars.

Appearances

For the Commission: *Wallace S. Snyder and Heidi P. Sanchez.*

For the respondent: *Robert L. Wald, Carleton A. Harkrader, Robert A. Skitol, Thomas W. Brunner and Lewis M. Popper, Wald, Harkrader & Ross, Washington, D.C. and David R. Larrouy, Dearborn, Michigan.*

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 Ford Motor Company, a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Ford Motor Company 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 The American Road, Dearborn, 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 State 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 are the advertisements attached as Exhibits A and B.

PAR. 6. Said Exhibits A and B and others substantially similar thereto contain one or more false, deceptive and misleading representations and fail to disclose facts which are material in the light of the representations contained therein. Therefore, the representations contained in said advertisements were, and are, deceptive and/or unfair.

PAR. 7. Said Exhibits A and B and others substantially similar thereto (hereinafter referred to as said advertisements) represent, directly or by implication, that the gasoline consumption rates specified in the advertisements approximate or equal the performance an ordinary driver can typically obtain from standard production model cars when taking long or cross-country trips.

PAR. 8. In truth and in fact, at the time respondent made the representations as alleged in Paragraph Seven respondent did not possess and rely upon a reasonable basis for making these representations. Therefore the said advertisements were, and are unfair and/or deceptive.

PAR. 9. Said Exhibits A and B and others substantially similar thereto represent, directly or by implication, that respondent had a reasonable basis for making, at the time they were made, the representations as alleged in Paragraph Seven.

PAR. 10. In truth and in fact, at the time respondent made the representations as alleged in Paragraph Nine respondent had no reasonable basis for making the representations as alleged in Paragraph Seven. Therefore, the said advertisements were, and are deceptive and/or unfair.

PAR. 11. Respondent failed to disclose in said advertisements that it had no evidence that any or all of the conditions under which the tests described in the advertisements were conducted approximated or equalled the conditions under which an ordinary driver would operate his automobile when taking long or cross-country trips and that respondent had no evidence that would tend to show whether or not the conditions under which said tests were run were typical or atypical of conditions encountered by ordinary drivers.

PAR. 12. The facts set forth in Paragraph Eleven are material in light of the representations contained in said advertisements and their omission make these advertisements misleading in a material respect. Therefore, the said advertisements were, and are deceptive and/or unfair.

PAR. 13. In the course and conduct of the aforesaid business, and at all times mentioned herein, respondent Ford Motor Company 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 that sold by respondent.

PAR. 14. 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. 15. 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.

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Complaint

**February 19th: General Environments Corporation
tested the highway mileage of Ford Motor Company's small cars.
Today: the results.**

EXHIBIT

A

All 5 Ford Motor Company small cars got over 26 MPG.

The test.

At 7:15 AM, February 19th, five 1974 Ford Motor Company small cars (wheelbase under 112") were driven from Phoenix to Los Angeles to learn the kind of mileage they could get. The cars were a Ford Pinto, a Ford Maverick, a Ford Mustang II, a Mercury Comet and one of Mercury's Capris.

All the cars were regular production models with standard engines

and transmissions. They weren't, however, brand new. They had been broken in to simulate 6,000 miles of normal driving. All the cars used regular gas and had normal dealer preparation. The drivers were not professionals. And they did not exceed 50 MPH. In many respects, the test was similar to one run on December 28th, 1973, where five 1974 Ford LTD's delivered an average of 18.8 MPG.

The results.

These results show dramatically that these five small cars from Ford and Lincoln-Mercury did deliver economical gas mileage.

Of course, the mileage you will get depends on many factors

equipment, engine displacement, vehicle weight, local road conditions and your personal driving style. So the mileage you get may be less or even more than the figures quoted here.

Ford and Lincoln-Mercury dealers offer more types of gas-saving engines for small cars than anyone.

One of the most important factors determining small car mileage is a gas-saving engine. And Ford and Lincoln-Mercury dealers offer more types of gas-saving engines for small cars than anyone.

Two 4-cylinder engines. Some manufacturers of so-called "economy" cars don't even offer a 4-cylinder engine. Ford Motor Company makes two different sizes of 4-cylinder engines. A 2.0 liter which was used in Pinto and Capri for this test, and the 2.3 liter used in Mustang II. The 2.0 liter is the smallest displacement engine available today in an American-made car from any major American manufacturer. Ford Motor Company sells more 4-cylinder engines in American-made cars than anyone else.

Two 6-cylinder engines. Ford and Lincoln-Mercury dealers offer two sizes of 6-cylinder engines for small cars: a 200 CID which was used in Maverick and Comet for this test, and an optional 250 CID

engine for all of its car lines.

A V-4 engine. Ford Mustang II is the only car made by a major American manufacturer to offer an optional V-4. Mercury's imported Capri offers an optional 2.8 liter V-6 engine at a cost thousands of dollars less than any other V-6 powered import.

An economy V-8 engine. Ford and Lincoln-Mercury dealers offer a 302 CID V-8 engine, the smallest displacement V-8 available from any major American manufacturer. It provides extra performance while still delivering good gas mileage.

Explanation of engine designations. CID OR LITER, the total volume, in cubic inches or liters (metric system), that the pistons displace in all the engine's cylinders.

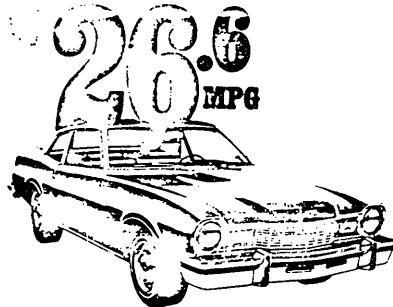


**FORD MOTOR COMPANY HAS MADE MORE SMALL CARS*
THAN ANYONE ELSE IN THE WORLD (THAT INCLUDES
VW, AMC, TOYOTA, GM, FIAT, DATSUN OR CHRYSLER)**

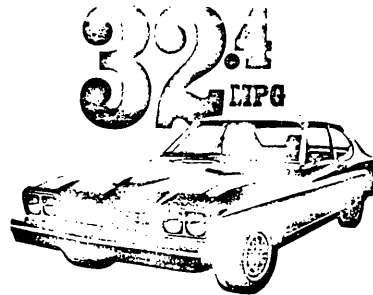
*Small car: wheelbase under 112"

Complaint

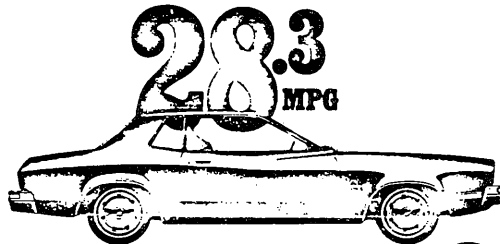
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**MERCURY COMET.**

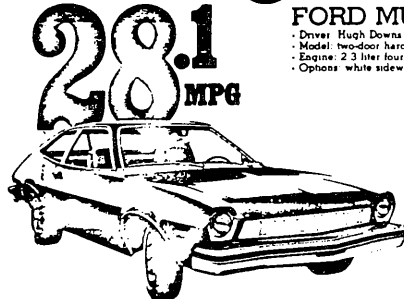
- Driver: Fulip Roye
- Model: two-door sedan
- Engine: 200 CID six-cylinder
- Options: white sidewall tires, wheel covers, vinyl roof

**MERCURY'S CAPRI.**

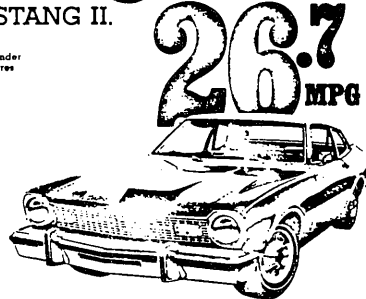
- Driver: Roger Rutherford
- Model: Sport Coupe
- Engine: 2.0 liter four-cylinder
- Options: none

**FORD MUSTANG II.**

- Driver: Hugh Downs
- Model: two-door hardtop
- Engine: 2.3 liter four-cylinder
- Options: white sidewall tires

**FORD PINTO.**

- Driver: Mickey Sholder
- Model: two-door sedan
- Engine: 2.0 liter four-cylinder
- Options: white sidewall tires, wheel covers and Accent Group

**FORD MAVERICK.**

- Driver: Jane Milo
- Model: two-door sedan
- Engine: 200 CID six-cylinder
- Options: white sidewall tires, wheel covers and Exterior Decor Group

Ford and Lincoln-Mercury dealers offer 35 different small car models and engines, 20 with sticker prices under the best-selling import model.



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A13

Two Lincoln-Mercury MILEAGE CARS

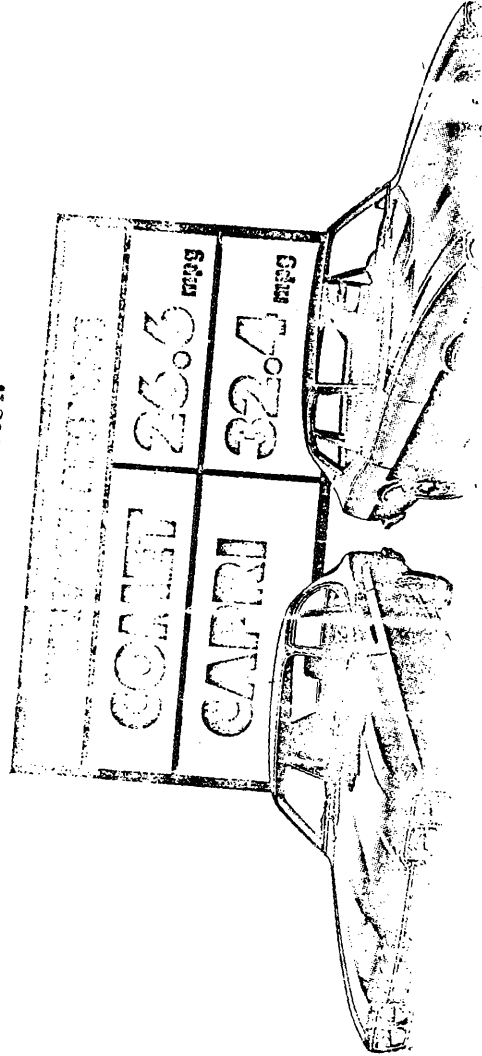
EXHIBIT

B

A 6-cylinder Comet and a 4-cylinder Capri
put to the test.

FORD MOTOR CO.
Complaint

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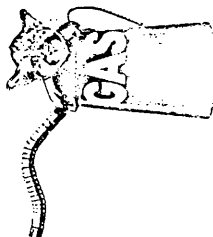


Complaint

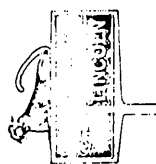
87 F.T.C.



4-cylinder Capri



February 19, 1974: In a 379 mile highway test through Arizona and California, supervised by General Environments Corporation, a Comet and a Capri with standard engines and transmissions delivered the kind of gas mileage you'd like to get. Each car was broken in the equivalent of 6,000 miles and driven by non-professional drivers, never exceeding 50 mph. You yourself might actually average less, or for that matter more! Because mileage varies according to maintenance, equipment, total weight, driving habits and road conditions. And no two drivers, or even cars, are exactly the same. Stop in at your Lincoln-Mercury dealer's Mileage Headquarters and see what kind of mileage you can get.



Lincoln-Mercury Division



WASHINGTON
LEE D. BUTLER, INC.
1121 21ST STREET, N.W.
WASHINGTON, D.C.

SUBURBAN

DAVE PTILES LINCOLN-MERCURY, INC.
6500 LITTLE RIVER TURNPIKE
ALEXANDRIA, VIRGINIA

O'BRIEN & ROHALL, INC.
3910 LEE HIGHWAY
ARLINGTON, VA.

BILL BOGLEY LINCOLN-MERCURY, INC.
7809 WISCONSIN AVENUE
BETHESDA, MARYLAND

B. M. WOODFIELD MERCURY
26501 RIDGE ROAD
DAMASCUS, MARYLAND

HERNDON MOTOR COMPANY, INC.
93 WASHINGTON AVENUE
HERNDON, VA.

TOM CURRO LINCOLN-MERCURY, INC.
123-27 WASHINGTON BLVD.
LAUREL, MARYLAND

JIM ECKELS LINCOLN-MERCURY, INC.
8389 CENTERVILLE ROAD
MANASSAS, VIRGINIA

WILSON POWELL LINCOLN-MERCURY, INC.
4700 BRANCH AVENUE
MARLOW HEIGHTS, MARYLAND

EAST-WEST LINCOLN-MERCURY, INC.
7591 ANNAPOLIS ROAD
LANDOVER HILLS, MARYLAND

THOMASSEN LINCOLN-MERCURY, INC.
1723 ROCKVILLE PIKE
ROCKVILLE, MARYLAND

SAFFORD LINCOLN-MERCURY
8507 COLESVILLE RD.
SILVER SPRING, MARYLAND

CHESTER LINCOLN-MERCURY, INC.
8550 LEEBURG PIKE
TYSON'S CORNER, VIRGINIA

INITIAL DECISION* BY MILES J. BROWN, ADMINISTRATIVE LAW
JUDGE ON MOTION FOR SUMMARY DECISION AND CROSS-MOTION
FOR SUMMARY DECISION

AUGUST 1, 1975

PRELIMINARY STATEMENT

[1] The Federal Trade Commission issued its complaint in this matter on December 10, 1974 (mailed January 2, 1975), charging respondent with 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 (15 U.S.C. §45).

By answer duly filed respondent denied that it had violated the Federal Trade Commission Act as alleged in the complaint. In addition, respondent raised certain affirmative defenses challenging the legal theory of the complaint on numerous grounds and further alleging that the Commission's simultaneous trade regulation rule proceeding on gasoline consumption rates denies it due process of law.

[2] On March 21, 1975, counsel supporting the complaint filed their motion for summary decision ("motion"). On May 15, 1975, respondent filed its cross-motion for summary decision and its opposition to complaint counsel's motion for summary decision ("cross-motion"). On June 13, 1975, complaint counsel filed their memorandum in opposition to respondent's motion for summary decision, and in support of complaint counsel's motion for summary decision upon all issues presented in this proceeding ("Memo. Op."). On June 27, 1975, respondent filed its reply to complaint counsel's opposition ("Reply").¹

In its answer to complaint counsel's request for admissions (Motion Exh. F) respondent admitted the dissemination in commerce of four advertisements (see Motion, Exh. A, B, C, D). The advertisements designated as Exhibits A & B, which were disseminated in February and March of 1974, appeared substantially as follows (see Cross-Motion, Att. A & B).²

Order to file Special Report ("6b order")³ (Motion, Exh. I).

On or about April 8, 1974, shortly after Exhibit A appeared, the Commission issued its order to file special report. Referring to Exhibit A and two other advertisements

* Reported as corrected by the administrative law judge's order dated August 25, 1975.

¹ The great part of the record in this proceeding is presented as Exhibits or Attachments to the Motion and Cross-Motion for summary decision. The references herein to such documents will be to the pleading and the exhibits such as "Motion Exh. J" or "Cross-Motion, Att. H," "Memo. Op. Exh. B."

² All substantive issues in this matter may be resolved on consideration of these two advertisements although the findings and discussion and conclusions relate to all four of the challenged advertisements.

³ The order to file special report and respondent's response thereto will be referred to herein as "6b order" and "6b report."

Initial Decision

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**February 19th: General Environments Corporation
tested the highway mileage of Ford Motor Company's small cars.
Today: the results.**

All 5 Ford Motor Company small cars got over 26 MPG.

The test.

At 7:15 AM, February 19th, five small Ford Motor Company cars (wheelbase under 112") were driven from Phoenix to Los Angeles to learn the kind of mileage they could get.

The cars were regular production models with standard engines and transmissions. They weren't brand new.

They were broken in to simulate 6,000 miles of normal driving. All the cars used regular gas and had normal dealer preparation.

The drivers were not professionals. And they did not exceed 50 MPH. In many respects, the test was similar to one in which five 1974 Ford LTD's averaged 18.8 MPG.

The results.

All five small cars from Ford and Lincoln-Mercury delivered over 26 MPG.

Of course, the mileage you get may be less or even

more depending on many factors: equipment, engine displacement, total vehicle weight, road conditions and your driving style.

Ford and Lincoln-Mercury dealers offer more types of gas-saving engines for small cars than anyone.

Two 4-cylinder engines. The 2.0 liter is the smallest displacement engine available today in an American-made car from any major American manufacturer.

It was used in Pinto and Capri for this test. And a 2.3 liter was used in Mustang II.

Two 6-cylinder engines. A 200 CID was used in Mercury and Comet for this test. There is also an optional 2.8 CID available.

A V-6 engine. Ford Mustang II is the only car made by a major American manufacturer to offer an optional V-6. And Mercury's imported Capri offers an optional 2.8

liter V-6 engine in a car priced thousands of dollars less than any other V-6 powered import.

The smallest V-8. The 302 CID V-8 is the smallest displacement V-8 available from any major American manufacturer.

Explanation of engine designations. CID OR LITER: The total volume, in cubic inches or liters (metric system), that the pistons displace in all the engine's cylinders.



FORD MOTOR COMPANY HAS MADE MORE SMALL CARS*
THAN ANYONE ELSE IN THE WORLD (THAT INCLUDES
VW, AMC, TOYOTA, GM, FIAT, DATSUN OR CHRYSLER)

*Small car - wheelbase under 112"



26.6
MPG

MERCURY COMET.

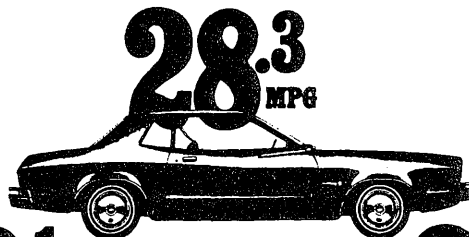
- Driver: Philip Rowe
- Model: two-door sedan
- Engine: 200 CID six-cylinder
- Options: white sidewall tires, wheel covers, vinyl roof



32.4
MPG

MERCURY'S CAPRI.

- Driver: Roger Rutherford
- Model: Sport Coupe
- Engine: 2.0 liter four-cylinder
- Options: none



28.3
MPG

FORD MUSTANG II.

- Driver: Hugh Downs
- Model: two-door hardtop
- Engine: 2.3 liter four-cylinder
- Options: white sidewall tires



28.1
MPG

FORD PINTO.

- Driver: Mickey Sholder
- Model: two-door sedan
- Engine: 2.0 liter four-cylinder
- Options: white sidewall tires, wheel covers and Accent Group



26.7
MPG

FORD MAVERICK.

- Driver: Jana Mulo
- Model: two-door sedan
- Engine: 200 CID six-cylinder
- Options: white sidewall tires, wheel covers and Exterior Decor Group

Ford and Lincoln-Mercury dealers offer 35 different small car models and engines, 20 with sticker prices under the best-selling import model.

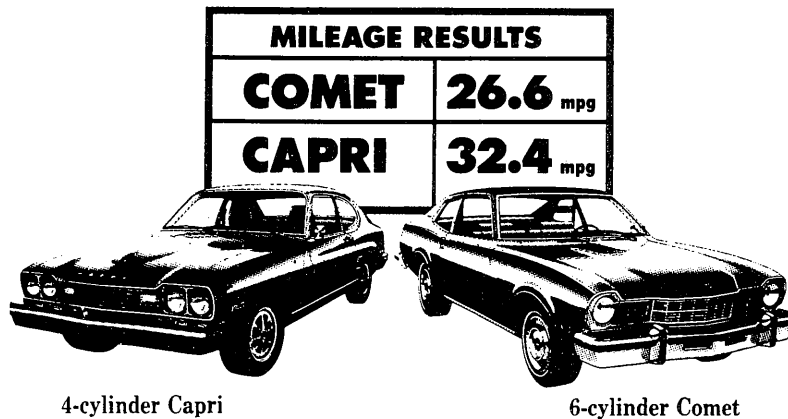


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Two Lincoln-Mercury MILEAGE CARS

A 6-cylinder Comet and a 4-cylinder Capri
put to the test.



Shown with optional WSW tires,
wheel covers and vinyl roof.



February 19, 1974: In a 379 mile highway test through Arizona and California, supervised by General Environments Corporation, a Comet and a Capri with standard engines and transmissions delivered the kind of gas mileage you'd like to get. Each car was broken in; the equivalent of 6,000 miles and driven by non-professional drivers, never exceeding 50 mph. You yourself might actually average less, or for that matter, more! Because mileage varies according to maintenance, equipment, total weight, driving habits and road conditions. And no two drivers, or even cars, are exactly the same. Stop in at your Lincoln-Mercury dealer's Mileage Headquarters and see what kind of mileage you can get.

(DEALER'S NAME)



Sign of the Times

Detroit

D580-53-N74-406-4 cols. x 150 lines = 600 lines—K&E—Detroit

[6] *not* referred to in the complaint⁴ the order alleged that said advertisements appeared to make the following explicit or implied claims (*Id.* at Specification I).

1. That the gasoline consumption rates specified in the advertisements are representative of the performance an ordinary driver can expect routinely from standard production model cars equipped with the designated equipment when taking long or cross-country trips.

2. That the gasoline consumption rates specified in the advertisements are representative of the performance an ordinary driver can expect routinely from typical driving patterns or conditions.

3. That the gasoline consumption rates specified in the advertisements are representative of the performance an ordinary driver can expect routinely under all driving patterns or conditions.

As a preface to requesting specific detailed data relating to any substantiating tests, the 6b order stated in pertinent part:

With regard to each of these claims and without regard to whether you believe that the specified messages are contained in the attached advertisements, state whether or not the Corporation had in its possession substantiation for each of the specified claims at the time of dissemination of such advertising. For those claims which the Corporation maintains are substantiated by materials in its possession, submit copies of all documents and other substantiation involved. * * *

The order further required:

II. With regard to each of the claims set forth in Specification I [see 1., 2., and 3., *supra*], state your belief as to whether the claims are contained in the advertisements. If the Corporation is of the belief that the claims specified above are not contained in the advertisements please set [7] forth the claims which the Corporation believes are contained in the advertisements in question and submit all documents or other substantiation supporting such claims.

Response to Order to File Special Report ("6b Report") (Motion, Exh. J)

In its 6b report, respondent submitted a summary which reads in pertinent part:

The Commission's Order requires Ford to substantiate its recent highway fuel economy advertisements for five Ford LTD's and for a Pinto, Maverick, Mustang II, Capri and Comet.

These ads, based on test runs supervised by an independent testing agency, General Environments Corporation, accurately report that the vehicles were standard production units, driven over the highway from Phoenix to Los Angeles at speeds not over 50 miles-per-hour, that the LTD's averaged 18.8 miles-per-gallon, with a range of 16.3 to 20.3 miles-per-gallon, and that each of the five small cars got more than 26 miles-per-gallon.

⁴ One of these other advertisements related to the Ford LTD and the second to a TV commercial disseminated on the Bob Hope Special of January 24, 1974, featuring Hugh Downs.

The LTD's were driven by both professionals and nonprofessionals, at an average speed of 47.4 mph, while the small cars were driven by nonprofessionals only at an average speed of 48.4 miles-per-hour.

No other claims were made and the ads carefully pointed out that the mileage other drivers would get might be different depending on maintenance, driving habits, weight, equipment and driving conditions.

Each of the claims made is completely substantiated by the General Environments Corporation Reports and numerous affidavits of those participating in preparing for and conducting the test runs.

The Commission alleges that, by some implication, the ads make claims with respect to "ordinary drivers," "routine" expectations and "typical" or "all driving patterns and conditions." Such [8] claims were not made, expressly denied and cannot fairly be implied. Accordingly, Ford did not develop any substantiation for such alleged claims.
* * *

In response to Specification II of the order, respondent stated:

The Company does not believe that the ads and television commercial, * * * contain any claims, explicit or implied, that the gasoline consumption rates specified are representative of the performance an "ordinary driver" could expect "routinely" from standard production model cars equipped with the designated equipment when taking long or cross-country trips * * * or from typical driving patterns or conditions * * * or under all driving patterns or conditions * * *. Therefore, the Company has not prepared nor does it have within its possession substantiation for the information demanded in Specifications I-1, 2 and 3.

THE GASOLINE CONSUMPTION CLAIMS THAT THE COMPANY BELIEVES ARE SET FORTH IN THE ADS AND TELEVISION COMMERCIAL ARE AS FOLLOWS:

A. *1974 Ford LTD Ad and Television Commercial*

1. The Ford LTD can give you surprising gas mileage.
2. Independent test results reveal 18.8 mpg average of five production line Ford LTD 4-door pillared hardtops equiped with 351 CID V-8 engines when driven from Phoenix to Los Angeles, under highway driving conditions never exceeding 50 miles-per-hour * * *
3. Driven sensibly, the Ford LTD offers real economy and convenience on today's roads.

All three of these claims are further qualified by the express statement that mileage depends on maintenance, driving habits, total weight, road and driving conditions and *you may not get the same results*. The television commercial goes on to point out that *cars and drivers are never exactly alike*. (Underscoring added [by respondent]). [9]

B. *Small Car Test Ad: Pinto, Maverick, Mustang II, Comet and Capri*

1. All five Ford Motor Company small cars (regular production models) got over 26 mpg in highway driving between Phoenix and Los Angeles under the following conditions:
 - a. The cars were not brand new, but were broken-in to simulate 6,000 miles of normal driving;
 - b. The drivers were not professionals and did not exceed 50 miles-per-hour.

Again it was specifically stated that the mileage you get may be less or more

depending on many factors: equipment, engine displacement, total vehicle weight, road conditions and *your driving style*. (Underscoring added[by respondent]). * * *

Following these statements, respondent submitted detailed technical data along with affidavits of the persons involved in both "mileage tests" to substantiate the claims it believed were made by the advertisements, including Exhibit A, the "small car" advertisement.

Significantly, respondent reported and submitted corroborating data, that, in connection with the small car test, each car was driven over the same, principally highway, route from Phoenix, Arizona, to Los Angeles, California, described the equipment on each of the small cars, noted the fact that no air conditioning was employed, described the highway driving conditions and the results achieved in miles-per-gallon. Also reported was how the vehicles were selected, how they were "broken-in" and pre-tested prior to the actual test including the results of that pre-test, as well as a description of the drivers and the speeds driven during the tests. In this respect respondent stated:

* * * The small car test originally started out with three each: Pintos, Mavericks, Mustang II's, Capris and Comets * * * They were broken-in and tested at our Kingman, Arizona Test Facility and the vehicle obtaining the lowest fuel economy was selected for the actual test. This assured us that the vehicles [10] finally used in the test represented the kind of performance available to most of our customers. * * * [T]he car samples used were such that approximately 80 percent of the population of similar vehicles would produce similar or better results in similar tests.

In further response, respondent stated:

The Company has no evidence that any or all of the conditions under which these tests were conducted approximate or are equal to conditions under which an ordinary driver would operate his automobile when taking long or cross-country trips, or under typical driving patterns involving both long distance and urban/suburban driving patterns or conditions, or are in fact representative of all driving patterns or conditions encountered by motorists. Neither does the Company have any documents that would tend to show whether or not the conditions under which these tests were run are typical or atypical of conditions encountered by ordinary drivers. As previously stated, our ads specifically pointed out that mileage was subject to many variables depending on individual routes, drivers and conditions. Obviously, no claim was made as to an "ordinary" driver or as to "typical" conditions.

And in specific response to the Specification I-1, respondent stated:

The Company took great pains to specifically point out that no driver could routinely expect a particular mileage performance since "mileage depends on maintenance, driving habits, total weight, road and driving condition," and "*you may not get the same results*." (Underscoring added [by respondent]). In addition, the advertised results were clearly limited to a test run which "never exceeded 50 mph, and was conducted with 6,000-mile vehicles." Clearly, the ad did not represent that these gasoline consumption rates would be obtained by an ordinary driver (though they could be). Rather, these rates

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were explicitly stated to be the results obtained by individual drivers under the particular conditions outlined in the ad.

Thus the Company sees no need for and has no substantiation of the claim postulated in Commission Inquiry I-1. However, [11] as indicated in the affidavits of John VanDewater * * * if other groups of the cars involved were driven over the same course, in the same manner and under the same conditions * * * at least 80 percent of the population of similar vehicles in a similar test could be expected to obtain equivalent or better mileage as in the small car test.

Finally, in conclusion, respondent added:

The Company believes that the foregoing Responses and information referred to therein fully substantiate the mileage claims actually made in the ads in question.

* * * * *

The Company does not believe the ads in question in any way claim that the gasoline consumption rates set forth relate to any drivers, type of driving or driving conditions other than those carefully detailed therein; however, if other drivers practiced the fuel-economy conservation measures recommended in Enclosure A-14⁵ and drove over the test route in question in the same model vehicles with the same equipment and under the same conditions as the test vehicles, we are confident (Enclosures A-13 and B-15) that these drivers would obtain the gasoline mileage similar to that reported in the ads.

COMPLAINT

The heart of the Commission's complaint contains the following allegations:

PARAGRAPH SIX: Said Exhibits A and B and others substantially similar thereto contain one or more false, deceptive and misleading representations and fail to disclose facts which are material in the light of the representations contained therein. Therefore, the representations contained in said advertisements were, and are, deceptive and/or unfair.

PARAGRAPH SEVEN: Said Exhibits A and B and others [substantially] similar thereto (hereinafter referred to as said advertisements) represent, directly or by implication, that the gasoline consumption rates specified in the advertisements approximate or equal the performance an ordinary driver can typically obtain from standard production model cars when taking long or cross-country trips.

[12] PARAGRAPH EIGHT: In truth and in fact, at the time respondent made the representations as alleged in Paragraph Seven respondent did not possess and rely upon a reasonable basis for making these representations. Therefore the said advertisements were, and are unfair and/or deceptive.

PARAGRAPH NINE: Said Exhibits A and B and other substantially similar thereto represent, directly or by implication, that respondent had a reasonable basis for making, at the time they were made, the representations as alleged in Paragraph Seven.

PARAGRAPH TEN: In truth and in fact, at the time respondent made the representations as alleged in Paragraph Nine respondent had no reasonable basis for making the representations as alleged in Paragraph Seven. Therefore, the said advertisements were, and are deceptive and/or unfair.

PARAGRAPH ELEVEN: Respondent failed to disclose in said advertisements that it had no evidence that any or all of the conditions under which the tests described in the

⁵ Ford's *The Closer You Look Fuel Economy Book*.

advertisements were conducted approximated or equalled the conditions under which an ordinary driver would operate his automobile when taking long or cross-country trips and that respondent had no evidence that would tend to show whether or not the conditions under which said tests were run were typical or atypical of conditions encountered by ordinary drivers.

PARAGRAPH TWELVE: The facts set forth in Paragraph Eleven are material in light of the representations contained in said advertisements and their omission make these advertisements misleading in a material respect. Therefore, the said advertisements were, and are deceptive and/or unfair.

ANSWER ("ANS.")

In its answer, respondent denied that it had made the representation alleged in Paragraph Seven of the complaint and asserted that "gasoline consumption rates an 'ordinary driver' can 'typically obtain' is not a valid or meaningful concept." Respondent averred that it had a "reasonable basis" for believing that the gasoline consumption rates obtained in the test described in said advertisements were [13] generally indicative of, relevant to, and within the range of gasoline consumption rates reasonably obtainable from the advertised vehicles in the trip described in said test or trips similar thereto, subject to the limitations affirmatively asserted in each such advertisement, and

further avers, assuming *arguendo* that the gasoline consumption rates an "ordinary driver" can "typically obtain" is a valid and meaningful concept, that respondent's test reported in said advertisements constituted and constitutes a reasonable basis for believing that the gasoline consumption rates specified in the advertisements approximate or equal the performance an "ordinary driver" can "typically obtain" from standard production models of the advertised cars when taking long or cross-country trips.

Admitting that respondent had not made disclosures as alleged in Paragraph Eleven of the complaint, respondent asserted that it had expressly advised consumers that the mileage they would get from the advertised cars might differ from the mileage quoted in the advertisements, by means of disclosures such as the following:

- a. Of course, the mileage you will get depends on many factors: equipment, engine displacement, vehicle weight, local road conditions and your personal driving style. So the mileage you get may be less or even more than the figures quoted above. (Exhibit A * * *)
- b. You yourself might actually average less, or for that matter more. Because mileage varies according to maintenance, equipment, total weight, driving habits, and road conditions. And no two drivers, or even cars, are exactly the same. (Exhibit B * * *)⁶

Complaint Counsel's Motion for Summary Decision ("Motion")

⁶ The six affirmative defenses asserted by respondent are in my opinion all legal questions, and they are discussed in the DISCUSSION part or REMEDY part of this opinion (*infra*, pp. 20 - 34).

In their motion for summary decision complaint counsel assert that, in their opinion, based on the documents and affidavits attached thereto, there were no genuine issues [14] as to the facts relating to Paragraphs Seven through Twelve of the complaint and that they were entitled to a ruling in their favor on the issues raised in those paragraphs as a matter of law.

The material submitted in support of complaint counsel's motion consist of the following:

- Exh. A — "5 Small Cars" Advertisement (Exh. A to Comp.)
- Exh. B — "Comet-Capri" Advertisement (Exh. B to Comp.)
- Exh. C — "Comet" Advertisement
- Exh. D — "Thinking Small Car" Advertisement
- Exh. E — Request for Admissions
- Exh. F — Answer to Request for Admission
- Exh. G — Affidavit of Ivan L. Preston Attachment - Preston Vita
- Exh. H — Affidavit of D. Morgan Neu Attachment 1 - Starch Report, Scope, Method and Use Attachment 2 - Starch Report on "5 Small Cars" Advertisement - Time Magazine Attachment 3 - Starch Report on "5 Small Cars" Advertisement - Newsweek
- Exh. I — Order to File Special Report
- Exh. J — Response to Order to File Special Report
- Exh. K — Statement of Ford Motor Company - Trade Regulation Rulemaking Proceeding - Advertising of Automobile Fuel Economy, Dated November 25, 1974.

It is complaint counsel's position that it is entirely proper for the administrative law judge, upon examination of the advertisements themselves, to make the factual determination as to whether they contain the representations alleged in the complaint, and that if such a determination is made in their favor, the issues presented as to whether respondent had a "reasonable basis" for such a claim may be resolved on the basis of respondent's 6b report.

As to the issue of proper disclosure of material facts, counsel assert that the administrative law judge could make a determination on examination of the advertisements in light of respondent's 6b report.

Respondent's Cross-Motion for Summary Decision and Opposition to Complaint Counsel's Motion for Summary Decision (Cross-Motion)

In its cross-motion and opposition respondent contends that the advertisements in issue were not intended and did not [15] make the representation alleged in the complaint and that if such representation was made, it was true. Respondent also contends that it had a reasonable basis on which to make such a representation and in support thereof presents data and opinions which it maintains corroborate the

existence of such a reasonable basis. (See Attachments H, I, J, K, L, M, N, O, P, Q, R.)

All of the material submitted by respondent may be described as follows:

- Att. A — "5 Small Cars" Advertisement (Exh. A to Comp.)
- Att. B — "Comet-Capri" Advertisement (Exh. B to Comp.)
- Att. C — "Comet" Advertisement
- Att. D — "Thinking Small Car" Advertisement
- Att. E — Affidavit of Robert A. Schneider - Report on Burke Day-After-Recall Survey on Exhibit A to Complaint
- Att. F — Affidavit of D. Morgan Neu (and reprint of Motion, Exh. H, with attachment)
- Att. G — Letter dated July 8, 1974, to Secretary, Federal Trade Commission, from Ford Motor Company, re: Proposed Addition of Sec. 3.40 to Commission's Rules of Practice.
- Att. H — Affidavit of Howard P. Freers, on 1974 Test Tract Fuel Economy and opinion on "reasonable basis"
- Att. I — Affidavit of Robert W. Irvin, writer Detroit News - Detroit to Chicago trip February 19, 1974.
- Att. J — Affidavit of DeWain C. Belote - EPA Highway Fuel Economy Driving Cycle Results, April 30, 1975.
- Att. K — Affidavit of Fred K. Kern, Jr. corroborating opinion of Freers on "reasonable basis"
- Att. L — Affidavit of Donald A. Klokkenga - Vehicle Mission Simulation Results, May 7, 8, 1975.
- Att. M — Affidavit of Harley E. Holt - Opinion on report of Fuel Consumption Tests
- Att. N — Affidavit of Hugh Downs (test driver)
- Att. O — Affidavit of Jana Milo (test driver)
- Att. P — Affidavit of Phillip Roye (test driver)
- Att. Q — Affidavit of Roger Rutherford (test driver)
- Att. R — Affidavit of Mickey Sholdar (test driver)

Finally, respondent asserts that the advertisements did not fail to disclose any material facts and were not misleading in any other respect. [16]

Complaint Counsel's Memorandum In Opposition to Respondent's Cross-Motion for Summary Decision ("MEMO. OP")

In their answering memorandum complaint counsel argue that respondent should not now be permitted to take a contrary position to its earlier sworn admission that it did not possess or rely upon substantiation for the type of advertising representation alleged in the complaint. Complaint counsel argue that the new material presented

by respondent in its cross-motion must not be accorded probative weight as to the "reasonable basis" issue unless it was in respondent's possession and relied upon at or before the time the advertisements were disseminated. In this respect complaint counsel would have the administrative law judge evoke "judicial estoppel" in order to avoid a situation which would be an affront to the Commission's "Ad Substantiation Program."

In addition complaint counsel appended the following material to their memorandum:

Exh. A — Affidavit of Ivan L. Preston commenting on Burke Marketing Research Survey

Exh. B — Attachment A to Publication of 1975 Fuel Economy Data

Respondent's Reply to Complaint Counsel's Opposition ("Reply")

Finally, respondent, in way of reply to complaint counsel's opposition to its cross-motion, contends that any ruling which would preclude its showing any fact which demonstrated "reasonable basis", whether or not contained in the 6b report, would be contrary to the Commission's Rules of Practice and a violation of their procedural (Administrative Procedure Act) and constitutional rights (Reply, pp. 6 - 21).⁷

Summary Decision

Section 3.24 of the Commission's Rules of Practice authorizes the Administrative Law Judge to entertain and grant a motion for summary decision if the pleadings, admissions, and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to such decision as a matter of law.

[17] Upon consideration of the pleadings (complaint and answer), the admissions of respondent as to the dissemination of the advertisements, the affidavits filed by both parties, the 6b report, and the briefs filed in this matter, it appears to the administrative law judge that there is no genuine issue as to the evidentiary facts relevant to the issues presented in the pleadings and, accordingly, this matter may be properly disposed of by summary decision.

The evidentiary record in this case will consist of the pleadings and the various materials submitted by the parties as Exhibits and Attachments to the motions and memoranda. These materials are described above and will be referred to and discussed hereinafter. Any motions appearing in the record not heretofore or herein specifically ruled upon either directly or by the necessary effect of the conclusions in this initial decision are hereby denied.

⁷ Respondent's Motion for Leave to File Reply to Complaint Counsel's Memorandum in Opposition is granted.

Having reviewed said evidentiary record, and the arguments presented by complaint counsel and respondent, I make the following findings as to the facts:

FINDINGS OF FACTS

1. Respondent Ford Motor Company 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 The American Rd., Dearborn, Michigan. (Admitted, Ans.)

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. (Admitted, Ans.)

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 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. (Admitted, Ans.)

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 [18] 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. (Admitted, Ans.)

5. Among the advertisements so disseminated or caused to be disseminated by respondent are the advertisements set forth in this initial decision (*supra*, pp. 3-5, Admitted, Ans.; see Ans. to Request for Admissions, Motion, Exh. F). In addition, respondent disseminated or caused to be disseminated Exh. C and D to motion for summary decision (see Ans. to Request for Admissions, Motion, Exh. F).

6. Exhibit A was disseminated or caused to be disseminated by respondent in newspapers of general circulation and magazines distributed nationally, including the March 11, 1974 issues of *Time* and *Automotive News*; the March 18, 1974 issue of *Newsweek*; the *Wall Street Journal*, Midwest and Pacific editions, February 27, 1974; *Wall Street Journal*, Eastern and Southwest editions, February 28, 1974; the *Seattle Post Intelligencer*, February 22, 1974; and the *Seattle Times*,

February 22, 1974. (Admitted, Ans. to Request for Admissions, Motion, Exh. F.)

7. Exhibit B was disseminated or caused to be disseminated by respondent in newspapers of general circulation during February and March 1974 in the following cities: Detroit, Cleveland, Atlanta, Jacksonville and St. Louis. (Admitted, Ans. to Request for Admissions, Motion, Exh. F.)

8. Exhibit C to complaint counsel's motion for summary decision was disseminated or caused to be disseminated by respondent in newspapers of general circulation in the following cities on July 8 and 9, 1974: Boston, Chicago, Cleveland, Dallas/Fort Worth, New York, Philadelphia, Detroit, and Washington, D.C. (Admitted, Ans. Request for Admissions, Motion, Exh. F.)

9. Exhibit D to complaint counsel's motion for summary decision was disseminated or caused to be disseminated by respondent in the following newspapers of general circulation during April 1974: New York: *Daily News*, *Times*, *Newsday*, *Westchester-Rockland*; Chicago: *Tribune*, *Sun-Times*; Detroit: *News*, *Free Press*; Los Angeles: *Times*, *Herald Examiner*, *Long Beach Independent*, *Press Telegram*; Philadelphia: *Bulletin*, *Inquirer*; Washington, D.C.: *Post*, *Star-News*; Boston: *Globe*, *Herald American*; San Francisco: *Chronicle/Examiner*, *Oakland Tribune*, *San Jose Mercury News*; Cleveland: *Plain Dealer*, *Press*; Dallas/Fort Worth: *News*, *Times Herald*, *Star Telegram*, *Press*. (Admitted, Ans. Request for Admissions, Motion, Exh. F.)

[19] 10. Said Exhibits A, B, C, and D represent, directly or by implication, that the gasoline consumption rates specified in the advertisements approximate or equal the performance an ordinary driver can typically obtain from standard production model cars when taking long or cross-country trips (Advertisements themselves; see also Cross-Motion, Att. E), (Burke Report-Verbatim Responses; Memo. Op. Exh. A), (Preston affidavit).

11. At the time respondent made the representation set forth in Finding 10, *supra*, it did not possess or rely upon a reasonable basis for making that representation (Motion, Exh. J(6b Report); see also Cross-Motion Att. H).

12. Dissemination of advertisements containing specific gas consumption claims without a reasonable basis for said claims is an unfair act and practice.

13. Said Exhibits A, B, C, and D represent directly or by implication that respondent had a reasonable basis for making the representation set forth in Finding 10, *supra*. (Advertisements Themselves.)

14. At the time respondent made the representation set forth in

Finding 13, *supra*, it had no reasonable basis for making the representation set forth in Finding 10, *supra*. (see Finding 11, *supra*.)

15. Dissemination of advertisements falsely representing that respondent had a reasonable basis for specific gas consumption claims is an unfair and deceptive act and practice.

16. Respondent had no evidence at the time it made the representations set forth in Findings 10 and 13, *supra*, that any or all of the conditions under which the tests described in the advertisements were conducted approximated or equalled the conditions under which an ordinary driver would operate his automobile when taking long or cross-country trips nor did respondent at the time it made the representations set forth in Findings 10 and 13, *supra*, have evidence that would tend to show whether or not the conditions under which said tests were run were typical or atypical of conditions encountered by ordinary drivers (Motion, Exh. J (6b report)).

17. The fact that respondent had no evidence as to the matters set forth in Finding 16, was a material fact in light of the representations made as set forth in Findings 10 and 13, *supra*.

[20] 18. The description of the test and the limitations set forth in the advertisements were not an adequate disclosure of the material facts set forth in Finding 16, *supra*.

19. Failure to disclose material facts in advertisements is an unfair and deceptive act and practice.

20. In the course and conduct of the aforesaid business, and at all times mentioned herein, respondent Ford Motor Company 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 that sold by respondent.

DISCUSSION AND CONCLUSIONS OF LAW

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of respondent, The Ford Motor Company.

2. The said acts and practices challenged in the complaint were all to the prejudice and the injury of the public and of respondent's competitors and constitute unfair methods of competition in commerce and unfair and/or deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

THE REPRESENTATION

It is well established that the meaning of an advertisement is a

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

Upon viewing the advertisements in question the administrative law judge is satisfied that the representation alleged in the complaint is not only a reasonable interpretation of the message conveyed by the advertisement considered as a whole, but is the principal message a consumer-reader would receive from either a casual look at the so-called headline portion thereof or from a more detailed reading of the entire text of the advertisement.

At least since the Fall of 1973, due to the so-called energy crisis and/or the increasing price of gasoline, gasoline consumption claims have been and are of utmost interest to the consumer. The consumer-person's interest is not in what someone [21] else is getting in the way of gas mileage, but rather in what performance he or she is getting or would get. Any advertisement such as Exhibit A which prominently displays gas consumption claims in specific numerical miles-per-gallon is bound to be interpreted by the consumer at first glance as a promise as to the gas consumption rate he or she could expect if he or she owned the advertised car. One way of describing this understanding is, as stated in the complaint, *i.e.*, what an "ordinary driver" could "typically obtain" in the way of gas mileage.

Respondent, throughout the development of this case has adamantly argued that the concept of an "ordinary driver" and a "typically obtained" gasoline consumption rate is meaningless, in that neither actually exist due to the numerous variances that affect gas consumption. Respondent misses the point of such verbal descriptions. The best explanation is that such language equates gasoline consumption to the impersonal, unknown "you" to whom the advertisement is necessarily directed.

Respondent also has contended throughout that it never intended to make the representation alleged. But the advertisements are clearly directed to prospective consumers' expectations, instead of merely reporting on a particular test situation. Exhibit A, for example, stresses that the cars tested "were regular production models with standard engines and transmissions. They weren't brand new. They were broken in to simulate 6,000 miles of normal driving. All the cars used regular gas and had normal preparation. The drivers were not professionals. And they did not exceed 50 MPH * * *" Clearly such a group of statements equate the test conditions over an actual highway (Phoenix to Los Angeles) to what a consumer might expect in normal driving. But there is more: The advertisement continues: "Of course,

the mileage you get may be less or even more depending on many factors; equipment, engine displacement, total vehicle weight, road conditions and your driving style." I think it is clear that the advertisement equated the test and the test results to what a prospective consumer could expect to get in the way of gas mileage from any of the 5 small cars referred to.

The language of Exhibit B is similar: "* * * a Comet and a Capri with standard engines and transmissions delivered the kind of gas mileage you'd like to get. Each car was broken in the equivalent of 6,000 miles and driven by non-professional drivers, never exceeding 50 M.P.H. You yourself might actually [22] average less, or for that matter more. Because mileage varies according to maintenance, equipment, total weight, driving habits and road conditions. And no two drivers, or even cars, are exactly the same. Stop in at your Lincoln-Mercury dealer's Mileage Headquarters and see what kind of mileage you can get." This advertisement also equated the test results to what a prospective consumer could expect to get in the way of gas mileage from the two small cars referred to.

My conclusion that the representation alleged in the complaint was in fact contained in the challenged advertisements is fully corroborated by the Burke Market Research Survey submitted by respondent. Notwithstanding the analysis of the surveyors, the verbatim responses of the interviewees clearly demonstrate that a great number of them equated the mileage claims with what they ("you") might expect to obtain. This is close enough. (See Preston Affidavit, Memo. Op. Exh. A.) Compare Survey Results in *Firestone Tire & Rubber Co.*, 81 F.T.C. 398 (1972), order affirmed, *Firestone Tire & Rubber Co. v. Federal Trade Commission*, 481 F.2d 246 (6th Cir. 1973).

It should be pointed out that the interpretation placed on the advertisements in the complaint is somewhat conservative, in that the allegation is limited to mileage claims for long or cross-country ("highway") trips. This gives the benefit of the doubt to respondent. Actually the Burke Research Report, and the verbatim responses therein, indicate that a large number of the interviewees did not qualify their understanding of the mileage claims to highway driving. Of course there may be many other representations or meanings to an advertisement than the one stated by the complaint, including those stated by respondent. This fact, however, does not detract from the finding that the advertisement did in fact also make the representation alleged in the complaint.

REASONABLE BASIS — THEORY OF THE COMPLAINT

The overriding issue in this case is whether respondent, at the time it

disseminated the challenged advertisements, had a reasonable basis for the gasoline consumption representations as stated in the complaint.⁸

[23] In support of their theory as to the scope of the "reasonable basis" issue, complaint counsel have cited several Commission cases, specifically: *Pfizer, Inc.*, 81 F.T.C. 23 (1972); *Firestone Tire & Rubber Co.*, 81 F.T.C. 398 (1972); *National Dynamics Corp.*, 82 F.T.C. 488 (1973); and *Crown Central Petroleum Corp.*, Dkt. 8851 (Nov. 26, 1974).

In reading these cases over and over again I am impressed by the collage of different ideas and applications that have been put forth by the Commission in only a matter of three years, in what would appear to be a simple area of law. Perhaps in *Crown*, the Commission put to rest any idea that "reasonable basis" means anything different than "reasonable basis." At least the complaint in this matter seems to be precise in that respect.

Determination of whether an advertiser possessed and relied upon a "reasonable basis" for believing a representation to be true requires evaluation of "both the reasonableness of an advertiser's actions and the adequacy of the evidence upon which such actions were based" *Pfizer*, 81 F.T.C. at 64. The basic inquiry is whether the advertiser "acted upon information which would satisfy a reasonably prudent businessman" that the representation is true and that he thus acted in "good faith," *National Dynamics Corp.*, 82 F.T.C. at 553, 557.

Significantly, only one of the prior Commission "reasonable basis" cases has stood a good court test. In *Pfizer*, although the Commission said that respondent had not demonstrated that it had a reasonable basis to support its claims, the Commission further said that the record did not show that respondent lacked reasonable basis for its advertising claims. But, instead of remanding the matter for further proceedings, the Commission dismissed the complaint.

In *National Dynamics* the Commission held that notwithstanding the lack of competent tests, respondent did have "reasonable basis" for its claims and thus that issue did not go to court.⁹

Although *Crown* has filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit, briefs have not yet been filed and it is not known in what context the "reasonable basis" issue will be raised.

But in *Firestone*, the Sixth Circuit clearly sustained the Commission's determination that the advertisement implied that Firestone's performance and safety claims had been substantiated by scientific

⁸ In *National Dynamics Corp.*, 82 F.T.C. 488, 553 (1973) the Commission stated: "The test in this case, as in each case that comes before us on these issues, should be whether on the full record the substantiation constitutes a reasonable basis for the challenged claims. * * * [A]s outlined herein, the substantiation shown to underlie the challenged performance claims has satisfied us that a reasonable basis for them existed."

⁹ See Commissioner Jones' intriguing dissent. 82 F.T.C. at 545.

tests and that the test relied on did [24] not constitute a substantiating scientific test, and that, accordingly, the unsubstantiated claim was unfair and deceptive irrespective of whether the Wide Oval tire would in fact “stop 25% quicker.” *Firestone Tire & Rubber Co. v. Federal Trade Commission*, 481 F.2d 246, 251 (6th Cir. 1973), *cert. denied*, 414 U.S. 1112.

REASONABLE BASIS — RESPONDENT’S AFFIRMATIVE DEFENSES

Respondent contends that the failure to possess a “reasonable basis” for an advertising claim is neither unfair nor deceptive nor an unfair method of competition within the meaning of Section 5 of the Federal Trade Commission Act and that such a decision is a matter for Congress and outside the Commission’s power. (Ans. First affirmative defense; see also Cross-Motion at pp. 40-42).

This contention must be rejected. The entire legislative history surrounding the creation of the Federal Trade Commission demonstrates that Congress desired to create a body of experts to define unfair trade practices and thereafter to prevent those practices by issuing cease and desist orders against those persons, partnerships, or corporations who were engaged in the trade practices deemed to be “unfair.” Although such determinations were subject to court review,¹⁰ the principal objective was to have the administrative agency stop unfair practices in their incipency by defining them and this theme has prevailed throughout the history of the Commission; *The Atlantic Refining Co. v. Federal Trade Commission*, 381 U.S. 357, 367 (1965); see *National Petroleum Refiners Ass’n. v. Federal Trade Commission*, 482 F.2d 672, 685, 688-689 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974).

Then as now, the Commission may meet the needs of the times by using its power to define in the first instance what it considers “unfair.” *Federal Trade Commission v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972).

This administrative law judge can think of few practices that are more “unfair” than for an advertiser to make a specific performance claim for its product without having a “reasonable basis” for such claim. If I read the Commission’s cases correctly, it is of the same view. See *Firestone Tire & Rubber Co.*, 81 F.T.C. 398 (1972); *Pfizer*, 81 F.T.C. 23, 62 (1972).

[25] Absent a viable “money back guarantee” if the product does not perform as promised, it is an unfair practice to entreat a prospective customer to rely upon a performance claim that looks valid on its face

¹⁰ See *Federal Trade Commission v. Beech-Nut Packing Co.*, 257 U.S. 441 (1922); *Federal Trade Commission v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965).

when the advertiser does not have a "reasonable basis" for the claim and where the prospective consumer can not verify the accuracy of the claim until after he has spent his or her money. When the product is a new automobile, the practice is even more "unfair."

Actually this is not a particularly novel case. The "false-proof" mock-up theory that evolved from the *Colgate-Palmolive* "sandpaper" case after remand from the First Circuit is very close. There the Commission had determined that it was "unfair" for an advertiser to represent in a television commercial that a depicted demonstration proved something about a product when in fact the demonstration involved the undisclosed use of a mock-up and did not prove anything. This result was reached notwithstanding the fact that the actual demonstration would constitute proof of the claim but, because of some technical problems, it was impossible to transmit the actual demonstration on television. The Commission's theory was sustained by the Supreme Court.¹¹

Thus to state the results of a gasoline consumption test in such a manner that the prospective consumer may expect to obtain the same gas economy, where in fact the test does not actually prove that the consumer would obtain such gas economy, is, in my opinion, very analogous to the undisclosed use of a mock-up in a "to-prove" advertisement.

Respondent also contends that the Commission's "reasonable basis" doctrine shifts the burden of proof in a Section 5 enforcement proceeding thus depriving it of due process (Ans.; Second and Third Affirmative Defenses; see Cross-Motion pp. 42-43). The simple answer is that the procedural steps of proof that evolve from a "reasonable basis" case are more akin to the "show cause" procedures that are literally part of the Federal Trade Commission's statutory mandate. I am not aware of any constitutional bar to a "show cause" procedure in administrative law. Nevertheless, in the proceeding before us complaint counsel carried their burden to show the challenged advertisements and the material respondent ostensibly had relied upon as substantiation for the claims made in the advertisements. In this proceeding the burden of proof shifted properly.¹²

[26] Respondent also contends that the imposition of a vague, ill-defined "reasonable basis" duty creates a chilling effect upon the dissemination of truthful and informative advertising representations, thereby impinging on First Amendment rights (Ans.; Second and Third Affirmative Defenses; see Cross-Motion pp. 44-46). Taken to its

¹¹ *Colgate-Palmolive Co.*, 62 F.T.C. 1269 (1963), order set aside, 326 F. 2d 519 (1st Cir. 1963), Commission order reinstated, 380 U.S. 374 (1965).

¹² Without comment the administrative law judge notes that respondent's burden-of-proof argument might be raised in a civil penalty enforcement proceeding under Section 5. But that is not this case.

logical conclusion, respondent might be arguing that it can safely engage in an inherently “unfair” practice because of its First Amendment privileges. The exception of “commercial” speech from absolute protection is not limited to “deceptive” or “untrue” statements, but necessarily extends to “unfair” trade practices.

Respondent also contends that applying the “reasonable basis” doctrine to representations that the Commission finds are implied in an advertisement, representations that respondent did not intend or expressly make, also raises serious questions of “free speech” and “due process” (Ans.; Third Affirmative Defense; see Cross-Motion pp. 46-47). This argument would be more persuasive in a case where the implied meaning was not so clear as it is here. In addition, however, is the omission of the material fact that respondent had no evidence supporting the claims. This omission makes the representation misleading even if the actual claim turned out to be true because of subsequent developments. There is no doubt that the Commission can require an affirmative disclosure to prohibit any misleading facet of advertising. See *Colgate-Palmolive Co.*, *supra*.

Respondent also argues that the “reasonable basis” concept is an announced rule of general application made without the notice-and-comment procedures required by the Administrative Procedure Act (Ans.; Fourth Affirmative Defense; see Cross-Motion pp. 47-52). Although the cases cited by respondent point up the practical differences between adjudication and rulemaking in order to establish legal obligations, no court has ruled that the Commission is precluded from defining “unfair” trade practices through the adjudicative procedures set forth in Section 5. Unlike rulemaking, respondent has the opportunity and has taken that opportunity of challenging the legal sufficiency of the “reasonable basis” concept imposed in this case.

REASONABLE BASIS — THE MERITS

In its 6b report respondent candidly admitted that it did not have any substantiation, other than the results of the Phoenix-Los Angeles test and previous test track results, [27] for their advertisements. Significantly, respondent denied making the claims attributed to said advertising by the Commission (see Motion, Exh. J).¹³

Although complaint counsel contend that respondent, having

¹³ In the Commission's 6b order the advertisement (Exhibit A, *supra*) was interpreted to make the following claim: “That the gasoline consumption rates specified in the advertisements are representative of the performance an ordinary driver can expect routinely from standard production model cars equipped with the designated equipment when taking long or cross-country trips” (Motion, Exh. I).

admitted it had "no substantiation of this claim," has no substantiation for the claim as alleged in the complaint,¹⁴ further argue that the test showed that the mileage had only been measured under one set of conditions. They argue that the response failed to show whether any or all of the many variables that affect gas mileage¹⁵ were taken into account prior to, or used to interpret the result of the test. They add that there is no evidence that all of these variables were measured and if so how they compare to ordinary conditions and that the test does not show how or whether the results can be extrapolated to ordinary use if any or all of the factors listed above differ from those typically encountered by ordinary drivers. Moreover, they assert, a test conducted under one set of variables (such as the one Phoenix-Los Angeles trip) cannot support a broad, unlimited representation of obtainable mileage, in view of the undisputed multitude of variables which affect mileage (Memorandum in support of Motion at pp. 14-17).

In this case respondent contends that it relied on the material submitted in its 6b report and that such material does in fact substantiate the claims made in the advertisements as [28] alleged in the complaint.¹⁶ In this respect respondent contends that its engineers, before approving use of the February 19, 1974, Phoenix-Los Angeles test results for advertising —

fully satisfied themselves and the company that the results were well within the range of mileage obtainable by the general population in normal highway driving in the kinds of cars tested. [Cross-Motion at p. 20.]

The principal support for respondent's contention as to the nature of its reliance on this material is set forth in an affidavit of Mr. Howard Freers (Cross-Motion, Att. H), who was Chief Car Engineer, Product Development Group, Ford Motor Company, from 1971 to 1975, and who was in charge of all preparations for the Phoenix-Los Angeles test, review and analysis of the test results, and engineering approval of the use of the test results in respondent's advertising.

Mr. Freers stated that based on prior test experience with the Phoenix-Los Angeles route in a fuel economy test involving five Ford LTD's, and extensive knowledge of highway design specifications and highway usage patterns throughout the United States, he and his engineers concluded that the Phoenix-Los Angeles route did not differ

¹⁴ The advertisements "represent, directly or by implication, that the gasoline consumption rates specified in the advertisements approximate or equal the performance an ordinary driver can typically obtain from standard production model cars when taking long or cross-country trips" (Complaint, Par. Seven).

¹⁵ *E.g.*, road surface and grade, altitude, weather conditions, acceleration/deceleration rates, steady or variable speeds, idling time, number of stops, average speed, driver experience, method and extent to which car is broken in, tune-up condition, optional equipment weight and operation (see Motion, Exh. K).

¹⁶ These materials consisted of a full description of the test conditions and procedures followed in the Phoenix-Los Angeles test, the company's own analysis of the test results, and its comparison of those results to data from extensive earlier testing of those and identically equipped cars in respondent's own highway cycle tests.

significantly from other inter-city routes in the United States in terms of highway and driving conditions and that: "If all other factors are held constant, we would expect mileage obtained on most inter-city routes to be within one mile of the mileage obtained in the Phoenix to Los Angeles route" (Cross-Motion, Att. H at p. 4).

Mr. Freers added that he was aware that a Detroit newspaperman had obtained better gas mileage than the results of Ford's LTD test in a personal drive from Detroit to Chicago. He also had compared the actual test results with previous track test results obtained by respondent on the same cars and had considered the fact that the test cars with the poorest fuel economy were actually selected for use in the Phoenix-Los Angeles test (*Id.* at pp. 4-5).

On the basis of his analysis of all such data Mr. Freers gave the approval to the use of the test results in proposed advertising. In his affidavit, Mr. Freers said that he concluded that "the Phoenix to Los Angeles small car trip had been a [29] sound and meaningful test of the fuel economy obtainable from the cars there involved, and * * * had provided an accurate indication of the mileage generally available in those cars in the kind of highway driving that many people do." (*Id.* at p. 8).

Mr. Freers added that "the validity of that conclusion was recently confirmed by results we obtained by running 1974 model cars, of the same configurations as those involved in the Phoenix to Los Angeles trip, through the 1975 EPA highway fuel economy dynamometer test" (*Id.* at p. 8).

Respondent does not explain why an affidavit of Mr. Freers was not included in its 6b report or why no reference to Mr. Freers' conclusion was made by any person involved in preparing that report. Another difficulty with respondent's present presentation is that if Mr. Freers' conclusion was known to others, the advertising claim alleged by the Commission to be contained therein would be a natural result of that conclusion. But in its 6b report respondent denied the existence of any such claim. Also, Mr. Freers does not assert that he approved the challenged advertisements, only that he approved the use of the results in proposed advertising.

It is significant, I think, that Mr. Freers qualified his prediction as to the availability of the consumption rate to others by the condition that "all other factors remain the same." But these factors are admitted variables and do change.¹⁷

The material on which respondent relied also points up the variations

¹⁷ Mr. Freers stated: "We would not expect the results to be identical [to the test track results] because of such factors as stops, acceleration and deceleration, grade variations, and adverse weather conditions affecting the results of the [Phoenix-Los Angeles] trip." (Cross-Motion, Att. H at p. 7.)

that are possible as between various highways and various automobiles. For example, in the four stages of the actual Phoenix-Los Angeles test the gas consumptions varied widely during different stages and in step three (Desert Center, California, to Banning, California) ran 3.3 miles-per-gallon below the average consumption rate on three cars, 2 miles-per-gallon lower on the Comet, but only 1.1 miles-per-gallon lower for the Maverick (see Motion, Exh. J at pp. 112, 113, 114, 121, 122). In addition, the test track fuel economy results for the steady speed of 50 miles-per-hour although approximating the actual Phoenix-Los Angeles results, varied significantly for other types of driving. The suburban driving results for the Pintos and Capris ran almost 5 miles-per-gallon less (on the average) than the 50 miles-per-hour results, and the average urban/suburban driving results ran almost 9 miles-per-gallon less (on the average) than the 50 miles-per-hour results.

[30] Examination of the protocols for the various tests revealed that the test cars were always tuned according to the manufacturer's specifications immediately before each test (see Motion, Exh. J at pp. 109, 117-118, 131). In the highway run the drivers were given specific economy tips and apparently were given a trial drive to practice "good economy" driving (Cross-Motion, Att. M; Motion, Exh. J at p. 97). Only one of each of the small cars participated in the highway run, although the cars selected had demonstrated the lowest gas mileage in the pre-test. The test track runs, however, were not for any extended distances (Motion, Exh. J at pp. 132-133).

In order to demonstrate the validity of Mr. Freers' conclusions as stated in his affidavit, respondent has also presented the results of certain tests it ran in 1975 on its 1974 small cars identical to those used in the Phoenix-Los Angeles trip. These tests were made pursuant to the United States Environmental Protection Agency (EPA) 1975 fuel economy Highway Cycle protocol. (Cross-Motion, Att. J; see also Cross-Motion, Att. K, Exh. A & B). The results of this test are equivalent to or better, in terms of gas mileage, than the results of the Phoenix-Los Angeles test.

In further support of Mr. Freers' conclusion and also in support of its contention that it had "a reasonable basis" for the claim in advertising that the gasoline consumption rates specified therein approximate or equal the performance an ordinary driver can obtain from standard production model cars when taking long or cross-country trips, respondent submits the opinion of Mr. Fred R. Kern, Jr., a senior scientist with a large engineering and scientific consulting, research and development firm. In Mr. Kern's opinion, Mr. Freers, on the basis of information available to him at the time the advertisements were

approved, "made a fully appropriate and amply supported engineering judgment in advising Ford's management that the Phoenix to Los Angeles test was a valid test of fuel economy obtainable from test cars, and that it had provided an accurate indication of the highway mileage generally available in those cars" (Cross-Motion, Att. K at p. 11). In addition, Mr. Kern, on the basis of a review of "substantial additional technical data" furnished to him by respondent, along with the "affidavits of Howard Freers [Cross-Motion, Att. H], Harley E. Holt [*Id.*, Att. M], DeWain C. Belote [*Id.*, Att. J], and the drivers participating in that test [*Id.*, Att. N-R], review of data concerning this and other routes prepared [31] pursuant to my specifications by the Cummins Engine Company [*Id.*, Att. L] and other data," and an examination of "the Environmental Protection Agency, the Department of Transportation and the Federal Trade Commission and other relevant publications concerning fuel economy" concluded (1) "that the Phoenix-Los Angeles route as driven presented conditions which were no more favorable to good fuel economy than a highway-type track test or the average highway route in the United States excluding the Rocky Mountains;" (2) was "confident that the Phoenix-Los Angeles route would generally yield fuel economy results no more favorable than the average of American highways;" (3) was of the view that "the Ford highway track tests provided a significant basis for a judgment that the Phoenix-Los Angeles test were a reasonable measure of the mileage obtainable under typical highway driving conditions; and (4) concludes that the Ford figures are shown on another independent basis to be a fair, conservative, and realistic statement of the highway fuel economy obtainable from these cars in typical highway driving." (Cross-Motion, Att. K pp. 5, 7, 8, 10). Mr. Kern further concludes "that the Phoenix-Los Angeles test was a reasonable measure of the highway fuel economy obtainable from these types of cars by drivers attempting to be reasonably careful about fuel consumption" (*Id.*, p. 11).

Although I am not sure that the materials relied upon by Mr. Kern would establish the consumption rates that an ordinary driver could typically obtain in highway driving, his analysis, in my opinion, does point up the minimum type of substantiation necessary to form a "reasonable basis" for support of such gasoline consumption claims. Thus, although Mr. Freers' conclusion, as stated in his affidavit, might appear reasonable in light of subsequent testing and analysis, the material he relied upon which constituted the substantiation for the advertisements, did not form a "reasonable basis" for the claim contained therein at the time it was made.

Accordingly, on the basis of the record and considered as a whole, the

administrative law judge must find that respondent, at the time the challenged advertisements were disseminated, had no evidence that any or all of the conditions under which the tests described in the advertisements were conducted approximated or equalled the conditions under which an ordinary driver would operate his automobile when taking long or cross-country trips and, further, that respondent had no evidence to show whether or not the conditions were typical or atypical of conditions encountered by ordinary drivers. It is found and concluded that at the time respondent disseminated the challenged advertisements it did not have a "reasonable basis" [32] for its representation that the gasoline consumption rates specified in the advertisements approximate or equal the performance an ordinary driver can typically obtain from standard production model cars when taking long or cross-country trips.

FAILURE TO DISCLOSE MATERIAL FACTS

In light of the representation found to have been made in the advertisements, the fact that respondent did not have evidence at the time it disseminated the advertisements to demonstrate the typicality of the conditions an ordinary driver would encounter was a material fact. Of course failure to disclose such material facts may have the tendency and capacity to deceive members of the purchasing public. 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. *Federal Trade Commission v. Colgate-Palmolive Co.*, *supra*.

In the circumstances, considering the nature of the product advertised, the importance of the subject matter of the claim to the decision whether to purchase an automobile manufactured by respondent, and the direction of the claim at user performance, failure to disclose the material fact had a tendency and capacity to mislead, and accordingly was an unfair and deceptive act and practice in violation of Section 5 of the Federal Trade Commission Act.

JUDICIAL ESTOPPEL

Complaint counsel, asserting that respondent played "fast and loose" with the Commission's compulsory 6b order argues that respondent should not now be heard to take a position flatly inconsistent with its original response. They contend that the administrative law judge should invoke something in the nature of "judicial estoppel" (Memo. Op.). In effect, complaint counsel are contending that respondent should not be heard, even in way of argument in the adjudicative

proceeding, because their prior admission, in effect, supplies the conclusions of fact and law necessary to sustain an order to cease and desist.

It seems to me that the general rule that an admission is the best evidence is more appropriate in an administrative proceeding brought under Section 5 of the Federal Trade Commission Act and that attempts to apply strict judicial procedures tend to take away from the flexibility inherent [33] in the administrative process. I agree with respondent that, if a proposed respondent did supply certain factual matters in response to a "substantiation request," but concluded that it did not have substantiation for a certain alleged claim, yet it was possible that it might still have demonstrated a "reasonable basis" for its claim on the basis of the materials submitted (see Reply, pp. 6-8). At least this seems to be possible under the Commission's *Pfizer* and *National Dynamics* cases.

For example, in this case the 6b order requested substantiation for three separate advertising claims ostensibly flowing from three advertisements, all of which respondent denied making, and for which it asserted it had no substantiation. At the same time it did supply its test and certain other materials upon which it had relied.

The complaint which initiated this proceeding was founded on only one of the representations asserted in the prior request and alleged that only one of the advertising claims set forth in the prior request was false or misleading.

With the benefit of a complete record and 20-20 hindsight it is obvious that the two claims abandoned by complaint counsel could not have been substantiated in any way on the material respondent had on hand, or possibly ever substantiated. From the evolution of this case, however, it appears that respondent's assertion that it did not make those two claims was accepted by the Commission. I think it would be unfair not to permit respondent to argue and, indeed, supplement its response in an effort to show "substantiation" or a "reasonable basis" as to the remaining claim upon which the complaint was framed.

Accordingly, complaint counsel's request for invoking the doctrine of estoppel against respondent in this case is denied, and the decision in this case is made upon the entire record.

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.*, 380 U.S. 374, 392 (1965). The Commission's [34] 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. The Commission is not limited to prohibiting the illegal practices in the exact form in which they were found to have been employed in the past. *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470, 473 (1952).

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*.¹⁸ *J. B. Williams v. Federal Trade Commission*, 381 F.2d 884(6th Cir. 1967).

In my opinion the notice order that accompanied the complaint satisfied the needs of this case. Complaint counsel suggest that certain additional language, which details exactly what type of "reasonable basis" is expected in compliance with the order, relating "reasonable basis" to "competent scientific tests." This standard appears to conform to the Commission's *Firestone* order, affirmed by the Sixth Circuit, and shall be adopted here.

Complaint counsel also request that a "record-keeping" paragraph be added to the order. This requirement appears in many orders and appears to be proper, although perhaps extraneous. At least it permits respondent to dispose of such material, if it wishes, after three years. [35]

ORDER

It is ordered, That complaint counsel's motion for summary decision be, and the same hereby is, granted.

It is further ordered, That respondent's cross-motion for summary decision be, and the same hereby is, denied.

It is further ordered, That respondent Ford Motor Company, and its officers, representatives, and agents and employees directly or through any corporate or other device, in connection with the advertising,

¹⁸ Respondent raises several other points about the entry of an order. First it says it would not be in the public interest (Ans. Fifth Affirmative Defense; see Cross-Motion, pp. 52-54). The public interest question was resolved by the Commission upon issuance of the complaint. *American Airlines, Inc. v. North American Airlines, Inc.*, 351 U.S. 79, 83 (1956); *Koch v. Federal Trade Commission*, 205 F.2d 311, 319 (6th Cir. 1953). Second, it says that entry of the order against it while leaving its foreign competitors outside of any restrictive regulation is an abuse of discretion. (Fifth Affirmative Defense; see Cross-Motion, pp. 52-56). It should be noted that the Commission has proceeded against two of respondents' domestic competitors. In any event the decision on how to proceed is up to the Commission. I do not see any abuse in discretion in the choice of how to proceed. (see *Federal Trade Commission v. Universal-Rundle Corp.*, 387 U.S. 244, 251 (1967). Finally, respondent argues that they can not get a fair trial because the Commission, by initiating the Trade Practice Rule relating to fuel economy claims, will not be able to decide this case on the record in this case (Ans. Sixth Affirmative Defense; see Cross-Motion, pp. 56-58). That's the Commission's problem although probably not too serious a one. (see *United States v. Litton Industries, Inc.*, 462 F.2d 14 (9th Cir. 1972). The findings and decision by the administrative law judge are based on the record in this case.

offering for sale, or distribution of products, sold by respondent in commerce, as "commerce" is defined in the Federal Trade Commission Act do forthwith cease and desist from:

1. Making any statements or representations directly or by implication, concerning the performance of any motor vehicle or automotive product other than a product subject to any order entered in File No. 722 3122[Ford Motor Company, et al., Dkt. C-2582, 84 F.T.C. 729], unless there exists a reasonable basis for such statements or representations. Such reasonable basis shall consist of competent scientific tests which fully and completely support all representations made regarding any performance claim made directly or by implication.

[36] 2. Representing directly or by implication that any motor vehicle 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 test itself is so devised and 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. Failing to maintain accurate records which may be inspected by Commission staff members upon reasonable notice:

(a) Which consist of documentation in support of any claim included in advertising or sales promotional material disseminated by respondent, insofar as the text is prepared, or is authorized and approved, by any person, who is an officer or employee of respondent, or of any division or subdivision of respondent, or by any advertising agency engaged for such purpose by respondent or by any division or subsidiary, which claim concerns the performance of any motor vehicle or automotive product;

[37] (b) which provided the basis upon which respondent relied as of the time the claim was made; and

(c) which shall be maintained by respondent for a period of three years from the date such advertising or sales promotional material was last disseminated by respondent or any division or subsidiary of respondent.

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, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

OPINION OF THE COMMISSION

By DOLE, *Commissioner*:

[1] This case is before the Commission on appeal of a summary decision entered by the administrative law judge against Ford Motor Company.¹ The proceeding, commenced by complaint issued December 10, 1974, was based on information received from Ford in response to compulsory process served on it by the Commission implementing the Advertising Substantiation Program. The Commission directed Ford, by order issued under Section 6(b) of the Federal Trade Commission Act, to provide all documents and other types of materials it possessed, including expert opinions which it relied upon, to substantiate certain implied fuel-economy claims in advertisements promoting the sale of the Ford Pinto, Capri, Mustang II, Maverick, and Comet model small [2] cars. The advertisements for which the Commission requested substantiation, and which were subsequently challenged in the complaint, reported the results of a gasoline-mileage test in which five cars were driven one way from Phoenix to Los Angeles. These ads were published from February through July 1974. According to the advertisements, "All 5 Ford Motor Company small cars got over 26 MPG."²

Shortly after this promotional campaign appeared in newspapers and magazines in cities throughout the country, the Commission advised Ford, in the ad substantiation order, that the ads, among other claims, allegedly represented by implication:

That the gasoline consumption rates specified in the advertisements are representative of the performance an ordinary driver can expect routinely from standard production model cars equipped with the designated equipment when taking long or cross-country trips.

The same order required Ford to produce, whether or not it agreed that the alleged representation was conveyed by the ads, all of the

¹ A large part of the record in this proceeding is presented as exhibits or attachments to the Motion and Cross-Motion for Summary Decision. References herein to such documents will be to the pleading and the exhibits such as "Motion Exh. A." The abbreviation "I.D." will refer to the initial decision of the administrative law judge.

² Motion Exh. A, Cross-Motion Att. A. In print much smaller than the "Headline," the ad noted that the cars used in the test were regular production models with standard engines and transmissions and had been broken in to simulate 6,000 miles of normal driving. The cars used regular gas, had normal dealer preparation, and were driven by nonprofessional drivers at speeds not exceeding 50 MPH. Further on it was noted:

* * * the mileage you get may be less or even more depending on many factors: equipment, engine displacement, total vehicle weight, road conditions and your driving style.

substantiation in support of the claim it possessed at the time the ads were published.

Several weeks after it received the Commission's demand, Ford filed its reply. A Ford Vice President, John B. Naughton, denied, on Ford's behalf, that the ads contained the implied [3] gas-consumption claims.³ In addition, respondent advised the Commission it did not prepare, nor did it possess, substantiation for the claim.⁴

THE COMPLAINT

The complaint in this matter issued primarily on the basis of Ford's statement in response to the 6(b) questionnaire. In view of the advertisements' alleged implications, which the Commission had reason to believe the ads conveyed, and Ford's negative response to the 6(b) order for production of its substantiation materials, Ford was charged with violations of Section 5 for its failure to possess and rely upon a reasonable basis for the implied fuel-consumption claim.⁵ [4]

PROCEEDINGS BEFORE THE ADMINISTRATIVE LAW JUDGE

On Motion for Summary Decision filed by complaint counsel and Cross-Motion for Summary Decision filed by Ford, together with the supporting documents and affidavits filed by both sides, the administrative law judge, on August 1, 1975, granted complaint counsel's motion and entered an order against Ford. With respect to issues concerning the meaning of the advertisements, he reasoned that the interpretation of advertising is a question of fact which can be determined by an examination of the advertisements themselves. As such, the administrative law judge found that the ads conveyed the representation alleged in the complaint, notwithstanding conflicting expert opinions concerning consumer perceptions of the ads as reflected in a consumer survey commissioned by Ford for use in this litigation. The administrative law judge also concluded, after reviewing documents and affidavits submitted by Ford in defense to

³ Motion Exh. J, pgs. 4, 21.

⁴ *Id.* Although respondent claimed to possess no substantiation for the implied representation set forth in the 6(b) order, it did submit, for the purpose of substantiating the claims it thought were in the ads, affidavits and detailed technical data concerning, among other things, vehicle selection, preparations, and protocols for its mileage test. See, Attachments to Motion Exh. J.

⁵ The "reasonable basis" theory of the complaint was first formulated by the Commission in *Pfizer, Inc.*, 81 F.T.C. 23 (1972), and subsequently applied in *Firestone Tire and Rubber Co.*, 81 F.T.C. 398 (1972), *aff'd*, 481 F.2d 246 (6th Cir. 1973), *cert. denied*, 414 U.S. 1112 (1973); and *National Dynamics Corp.*, 82 F.T.C. 488 (1973), *aff'd*, 492 F.2d 1333 (2d Cir. 1973), *cert. denied*, 419 U.S. 933 (1974). As the administrative law judge observed:

Determination of whether an advertiser possessed and relied upon a "reasonable basis" for believing a representation to be true requires evaluation of "both the reasonableness of an advertiser's actions and the adequacy of the evidence upon which such actions were based," *Pfizer*, 81 F.T.C. at 64. The basic inquiry is whether the advertiser "acted upon information which would satisfy a reasonably prudent businessman" that the representation is true and that he thus acted in "good faith," *National Dynamics Corp.*, 82 F.T.C. at 553, 557.

complaint counsel's motion, including an affidavit by one Howard Freers, Ford's chief car engineer, Product Development Group from 1971 to 1975, that Ford lacked a reasonable basis for its advertising representation.

THE MEANING OF THE ADVERTISEMENTS

Ford argues on appeal that the evidence it has introduced raises genuine issues of material fact with respect to the representations conveyed by the advertisements which cannot be resolved on summary decision.⁶ For legal support, [5] Ford draws on the Second Circuit's opinion in *U. S. v. J. B. Williams*, 492 F.2d 414 (2d Cir. 1974), a decision in which the court ruled that, in a penalty proceeding, the meaning of an advertisement is a question of fact for the jury. We note, however, that the *J. B. Williams* case may be distinguished from Commission administrative proceedings.⁷

It is well established that the Commission need look no further than the advertisement itself in interpreting its meaning. *Carter Products, Inc. v. FTC*, 323 F.2d 523 (5th Cir. 1963); *J. B. Williams Co., Inc. v. FTC*, 381 F.2d 884 (6th Cir. 1967). As the Commission observed in *National Dynamics Corp.*, *supra* at pg. 548, its "expertise is sufficient to interpret an advertisement without consumer testimony as to how an advertisement is perceived by the public." *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 391-392 (1965); *Niresk Industries, Inc. v. FTC*, 278 F.2d, 342 (7th Cir.), *cert. denied*, 364 U. S. 883 (1960). The Commission is not required to survey public opinion to determine what the Ford ads represent to the public; nor is it bound to review respondent's experts' testimony, based on consumer survey data, which constitutes a surrogate form of direct consumer testimony. The test applied by the Commission is whether, after reviewing an advertisement in its entirety, an interpretation is reasonable in light of the claims made in the advertisement. *National Dynamics*, *supra*. As a practical matter, an advertisement may convey more than one representation to the public; and indeed the same claim may be susceptible of more than one interpretation by the public. *See, Continental Wax v. FTC*, 330 F.2d 475 (2d Cir. 1964); *Murray Space Shoe Corp. v. FTC*, 304 F.2d 270 (2d Cir. 1962). Furthermore, if an advertisement is capable of conveying

⁶ I.D. at pgs. 20-22. The evidence bearing on issues concerning how the ads may reasonably be interpreted consisted of the advertisements themselves, a communications study commissioned by Ford and conducted by Burke Marketing Research, Inc. (Cross-Motion Att. E), and affidavits which reflect the differing opinions of experts on the question of consumer perception of the advertisements. *See* Motion Exh. G (Affidavit of Dr. Ivan L. Preston); Exh. H (First Affidavit of Dr. D. Morgan Neu); Cross-Motion Att. E (Affidavit of Robert A. Schneider, Executive Vice President of Burke Marketing Research, Inc., and Burke Study Report); Att. F (Second Affidavit of Dr. D. Morgan Neu).

⁷ Unlike Commission administrative proceedings, penalty suits are filed in Federal district court and seek monetary judgments for violations of Commission orders.

two or more impressions about the advertised product, one of which is false, the ad may be found to be misleading. *Rhodes Pharmacal Co., Inc. v. FTC*, 208 F.2d 382, 387 (7th Cir. 1953), *aff'd*, 348 U.S. 940 (1955). The Commission may find, from its own review of an advertisement, the impressions which it is likely to convey to the public and, beyond that, whether such impressions possess a tendency or capacity to deceive the purchasing public even in situations where a number of consumers may testify that they were not actually deceived. *Certified Building Products, Inc., et al.* Dkt. 8875, issued October 5, 1973 [83 F.T.C. 1004]; *Charles of the Ritz Distributors Corp. v. FTC*, 143 F.2d 676, 680 (2d Cir. 1944); *Fioret Sales Co. v. FTC*, 100 F. 2d 358, 359 (2d Cir. 1938). As the Tenth Circuit noted in affirming the Commission's decision in *Certified*:

[6] Evidence of actual deception is not necessarily essential to a finding of unfair and deceptive practices. It is the capacity to deceive which is important. *Double Eagle Lubricants, Incorporated v. FTC*, 360 F.2d 268 (10th Cir. 1965). And as was said in *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965), "an administrative agency which deals continually with cases in the area * * * is often in a better position than are courts to determine when a practice is 'deceptive' within the meaning of the Act."

See *Certified Building Products, Inc. v. FTC*, Slip Opinion, issued March 18, 1975, at page 8 [512 F.2d 176]. These precedents suggest that the *J. B. Williams* decision, upon which respondent relies, should not be controlling before this Commission.

The complaint in this matter alleges that Ford impliedly represented that the gasoline-consumption rates specified in advertisements approximate or equal the performance an ordinary driver can typically obtain from standard production model cars when taking long or cross-country trips. See complaint paragraph 7. Viewed in their entirety, the ads prominently display gas-consumption claims and specific miles per gallon which could reasonably be understood by consumers as the gas-consumption rate which could be expected by the owner of the advertised cars. One of the ads, for example, advises consumers that the cars tested:

were regular production models with standard engines and transmissions. They weren't brand new. They were broken in to simulate 6,000 miles of driving. All the cars used regular gas and had normal preparations. The drivers were not professionals and they did not exceed 50 MPH * * *.

The ad further notes:

Of course, the mileage you get may be less or even more depending on many factors: equipment, engine displacement, total vehicle weight, road conditions and your driving style.

[7] We agree with the administrative law judge that this group of statements has the capacity to lead consumers to believe that the test conditions and the mileage obtained by respondent's automobiles in the test represent the type of performance a consumer might expect in normal driving during a long or cross-country trip.

Similarly, the second advertisement stated:

* * * a Comet and a Capri with standard engines and transmissions delivered the kind of gas mileage you'd like to get. Each car was broken in the equivalent of 6,000 miles and driven by nonprofessional drivers, never exceeding 50 mph. You yourself might actually average less, or for that matter, more! Because mileage varies according to maintenance, equipment, total weight, driving habits and road conditions. And no two drivers, or even cars, are exactly the same. Stop in at your Lincoln Mercury Dealers Mileage Headquarters and see what kind of mileage you can get.

The Commission finds that this advertisement also has the capacity to lead consumers to equate the test results to the gas mileage performance which could be expected from the two cars depicted in the advertisement during long or cross-country trips.

Ford, throughout this proceeding, has objected to the concept of an "ordinary driver" and a "typically obtained" gas-consumption rate. In its view, these concepts concerning the universe of drivers and driving conditions are not at all meaningful and neither actually exist. Yet its advertisements were directed to viewers throughout the country; and we reject Ford's contention that the ad which ran in the *Boston Globe*, for example, conveyed no message about the fuel-consumption rates Bostonians might expect from the advertised models unless they were driving from Phoenix to Los Angeles or on a route similar to the one used in Ford's test.⁸ The advertisements were directed to consumers in general, expressed in the complaint as the "ordinary driver," and clearly could be understood by the viewer to be making a gasoline-consumption claim which can be "typically obtained" from the automobiles Ford was urging him or her to consider.

[8] We also find that respondent, in making its mileage-performance claims, further represented to the public that it had a reasonable basis for believing the mileage claims it was making were true. *National Dynamics Corp., et al.*, 82 F.T.C. 488, 549 (1973), *aff'd*, 492 F.2d 1333 (2d Cir. 1974), *cert. denied*, 43 U.S.L.W. 3277 (Nov. 12, 1974); *Firestone Tire & Rubber Co.*, 81 F.T.C. 398, 450-51 (1972), *aff'd*, 481 F.2d 246, 251 (6th Cir. 1973), *cert. denied*, 414 U. S. 1112 (1973); *Crown Central Petroleum Corp.*, Dkt. 8851 (Nov. 26, 1974 [84 F.T.C. 1493]), *aff'd per curiam* by unpublished order of the court (C.A.D.C. March 4, 1976); *Standard Oil of California*, Dkt. 8827 (Nov. 26, 1974 [84 F.T.C. 1401]).

Having reviewed respondent's advertisements in their entirety, we

⁸ Exh. D, Respondent's App. Br., pg. 13.

have concluded that the administrative law judge did not err in granting complaint counsel's Motion for Summary Decision concerning the meaning of respondent's advertisements.

"REASONABLE BASIS" ISSUES

In respect to the "reasonable basis" issues which are before us on this appeal, the Freers affidavit is a key document for several reasons. We believe it raises, particularly when read in conjunction with other affidavits on this record, genuine issues of material fact concerning the substantiation, if any, Ford had and relied upon at the time the ads were disseminated. Yet, the Freers affidavit constitutes a statement, under oath, which appears to contradict the previous statement of Ford Vice President Naughton in response to the Commission's precomplaint investigation. Although it appears neither Mr. Freers nor his opinions were mentioned in the 6(b) report, he emerged, for the first time, at trial as a cornerstone of Ford's defense.⁹ That Ford had to resort to a "surprise" witness at the eve of trial in an attempt to save itself from prior statements it has made to this Commission does not reflect well on one of the country's leading firms.

According to Mr. Freers, Ford marketing personnel and legal advisors "contacted us concerning a proposed fuel economy test" of five small cars which were to be driven [9] from Phoenix to Los Angeles. He advised the legal and marketing people that, in his opinion, the Phoenix to Los Angeles route was an appropriate route for a highway fuel-economy test. Moreover, he states that he reviewed the test results and gave his "approval to the use of the test results in advertising."¹⁰

[10] Complaint counsel argued before the administrative law judge, and again on appeal, for a ruling which would estop Ford from

⁹ I.D. at pg. 29.

¹⁰ Cross Motion Att. H at page 8. The administrative law judge, at pages 28 and 29 of I.D., captures the essence of Mr. Freers' affidavit:

Mr. Freers stated that based on prior test experience with the Phoenix-Los Angeles route in a fuel economy test involving five Ford LTD's, and extensive knowledge of highway design specifications and highway usage patterns throughout the United States, he and his engineers concluded that the Phoenix-Los Angeles route did not differ significantly from other inter-city routes in the United States in terms of highway and driving conditions and that:

If all other factors are held constant, we would expect mileage obtained on most inter-city routes to be within one mile of the mileage obtained in the Phoenix to Los Angeles route. (Cross-Motion Att. H at pg. 4.)

Mr. Freers added that he was aware that a Detroit newspaperman had obtained better gas mileage than the results of Ford's LTD test in a personal drive from Detroit to Chicago. He also had compared the actual test results with previous track test results obtained by respondent on the same cars and had considered the fact that the test cars with the poorest fuel economy were actually selected for use in the Phoenix-Los Angeles test. (*Id.* at pgs. 4-5.)

On the basis of his analysis of all such data, Mr. Freers gave the approval to the use of the test results in proposed advertising. In his affidavit, Mr. Freers said that he concluded that:

• • • the Phoenix to Los Angeles small car trip had been a sound and meaningful test of the fuel economy obtainable from the cars there involved, and • • • had provided an accurate indication of the mileage generally available in those cars in the kind of highway driving that many people do. (*Id.* at pg. 8.)

Mr. Freers added that:

• • • the validity of that conclusion was recently confirmed by results we obtained by running 1974 model

(Continued)

attempting to contradict its 6(b) report and which would bar consideration of the new materials submitted by Ford. The administrative law judge rejected this theory and so do we.¹¹

A similar situation recently arose in *Peacock Buick Inc.*¹² In *Peacock*, the Commission noted:

In the face of a clear conflict in testimony, we believe it was incumbent upon counsel to go further in their proof than mere reliance on the 6(b) questionnaire, which did not after all refer by its terms to the particular claims challenged in the complaint.¹³

[11] Although there are differences between the implied claim specified in the 6(b) served on Ford and the implied claim alleged in the complaint, these differences are not, in our opinion, substantial; nor do they excuse the contradictions reflected in the 6(b) response and the Freers affidavit. Summary decision, however, is not, in our view, the proper vehicle for resolving issues raised by these conflicting statements.

We have carefully examined the Freers affidavit and find it neither frivolous nor manifestly unbelievable. Therefore, we would not disregard it on motion for summary decision. It, like 6(b) reports, is submitted under oath. Moreover, it discusses communications and events involving Mr. Freers and others in Ford's legal and marketing departments. At trial, the witnesses may verify, clarify, or dispute Mr. Freers' recollections, and may, in the process, shed some light on the reasons Ford, in responding to the Commission's order, failed to mention Mr. Freers' pivotal role in evaluating the Phoenix to Los Angeles test and in approving the use of the test in advertising. Certainly an inquiry along these lines could have a bearing on the weight we would accord to the evidence Ford has recently brought forth, as would the question of credibility which is, in the first instance, within the province of the administrative law judge who can observe the demeanor of the witnesses. Yet if, on this record, the facts are construed against the motion as they should be on summary decision¹⁴, we must conclude that Freers has provided an accurate account of Ford's effort to substantiate its claim. His affidavit, at least, raises a genuine issue of fact in these respects.

Disputed issues of material fact on this record abound. Whether the materials Mr. Freers says he relied upon in formulating his opinions

cars, of the same configurations as those involved in the Phoenix to Los Angeles trip, through the 1975 EPA highway fuel economy dynamometer test. (*Id.* at pg. 8.)

¹¹ The Commission, it should be noted, has published a proposed rule which would limit proof of substantiation in instances of failure to make timely and complete return to compulsory process demanding substantiation of an advertisement. (Proposed Rule 3.40, 39 F.R. 17238, May 14, 1975.) It should be unnecessary to emphasize that the proposed rule is not applicable in this proceeding; nor is it herein addressed.

¹² Dkt. 8976, issued December 19, 1975 [86 F.T.C. 1531].

¹³ *Id.* at pg. 4 [86 F.T.C. 1531 at 1552].

¹⁴ *Hearst Corporation*, 80 FTC 1011, 1014 (1972).

could have constituted a reasonable basis for the alleged claim is clearly an issue. Dr. Fred R. Kern, who on affidavit appears to qualify as an expert in mechanical engineering, reviewed the information available to Mr. Freers at the time the challenged ads were approved and concluded that Mr. Freers' judgments were fully appropriate and amply supported.¹⁵

[12] The Commission believes, in this instance, that full development of the facts relating to these types of issues would be relevant in evaluating the reasonableness of Ford's purported reliance on the data and information Freers reviewed and in assessing whether it could provide a reasonable basis for Ford's fuel-consumption claim. The scientific facts and the justifiable conclusions which experts may draw either directly or by reasonable extrapolation from such facts are the types of issues on this record which preclude summary decision.

Accordingly, the Commission affirms the administrative law judge's summary decision on the meaning of Ford's advertisements. We have further determined there should, in this matter, be further evidentiary hearings before the administrative law judge on the types of "reasonable basis" issues herein set forth. An appropriate order is attached to this opinion.

ORDER REMANDING FOR FURTHER PROCEEDING

This matter having been heard by the Commission upon the appeal of Ford Motor Company from the administrative law judge's initial decision and order, and upon briefs and oral argument in support thereof and in opposition thereto, and the Commission, for the reasons stated in the accompanying opinion, having determined that respondent's appeal should be granted, in part, and denied, in part,

It is ordered, That the initial decision findings of fact 1-10 and 13 be, and they hereby are, adopted as findings of the Commission.

It is further ordered, That the remainder of the initial decision and the order be, and they hereby are, set aside.

It is further ordered, That the complaint be, and it hereby is, remanded to the administrative law judge for further proceedings consistent with the views expressed in the attached opinion.

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

¹⁵ According to Dr. Kern, Mr. Freers:

• • • made a fully appropriate and amply supported engineering judgement (sic) in advising Ford's management that the Phoenix to Los Angeles test was a valid test of the fuel economy obtainable from the tested cars, and that it had provided an accurate indication of the highway mileage generally available in those cars. (Cross-Motion Att. K at 11.)

Complaint

87 F.T.C.

IN THE MATTER OF

THRIFTY DRUG STORES CO., INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT AND SEC. 2 OF THE CLAYTON
ACT

Docket C-2816. Complaint, Apr. 13, 1976—Decision, April 13, 1976

Consent order requiring a Los Angeles, Calif., chain of retail drug and discount stores and retail sporting goods stores, among other things to cease knowingly inducing and receiving from its suppliers discriminatory promotional allowances, services, facilities, and net prices. Further, the order prohibits respondent from overcharging for promotional activities.

Appearances

For the Commission: *D. Kenneth Kaplan.*

For the respondent: *Henry C. Thumann, O'Melveny & Myers, Los Angeles, Calif.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, (15 U.S.C. §45), and the Clayton Act, as amended, (15 U.S.C. §§13 and 21), and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Thrifty Drug Stores Co. Inc., (Thrifty), a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Acts, and believing that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, charging in that respect as follows:

PARAGRAPH 1. Respondent Thrifty Drug Stores Co. Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of California with its principal office and place of business located at 5051 Rodeo Rd., Los Angeles, California.

PAR. 2. Respondent is now, and for many years past has been, engaged in the operation of a chain of retail drug and discount stores and a chain of retail sporting goods stores with total sales for its fiscal year ending August 31, 1974 of \$458,947,000. Thrifty currently operates over four hundred fifty (450) drug and discount stores under the trade names Thrifty Drug and Discount Stores, Giant T Stores, Discount Drug Stores and Thrifty Discount Stores and over thirty (30) sporting goods stores under the trade name Big 5. Approximately ninety percent of its drug and discount stores are located in California,