

Modifying Order

90 F.T.C.

IN THE MATTER OF
SOFT SHEEN COMPANY, INC., ET AL.

MODIFYING ORDER, IN REGARD TO ALLEGED VIOLATION OF
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2786. Complaint, Jan. 27, 1976 — Modifying order, Sept. 30, 1977

This order modifies a cease and desist order issued January 27, 1976, 41 FR 7939, 87 F.T.C. 164 to conform with obligations of a consent order issued against a competitive firm, by limiting substantiation requirements for safety claims in Provision I.B., and revising the third warning, pertaining to hair relaxers, in Provision III.

Appearances

For the Commission: *Sharon S. Armstrong.*

For the respondents: *John O. Nelson, Molinair, Allegretti, Newitt & Witcoff and Rickey J. Ament, Chicago, Ill.*

ORDER MODIFYING ORDER TO CEASE AND DESIST

On October 28, 1976, respondent Soft Sheen Co., Inc. petitioned the Commission to reopen this proceeding to modify the third warning in Provision III of the consent order issued January 28, 1976 against respondents in this matter. The third warning, which is to be made in connection with the sale and distribution of respondents' hair relaxer and which is to appear on the packaging, package inserts and the labels of the product, reads, "Do not use on bleached, dyed or tinted hair. If you have previously relaxed your hair, relax only the new growth, as described in the directions." Respondent objects to the inclusion of tinted hair in the warning.

On March 18, 1976, Soft Sheen requested by letter that the order's product coverage be limited to hair relaxers. Our request is incorporated into the October 28, 1976, petition to reopen.

Complaint counsel support the petition and recommend that the warning be modified to read:

3. Do not use on bleached hair. Do not use on permanently colored hair which is breaking, splitting or otherwise damaged. For hair that has been permanently colored and shows no sign of damage, use only mild strength formula.
4. If you have previously relaxed your hair, relax only the new growth, as described in the directions.

We agree that the petition should be granted. Most if not all, of the products manufactured and sold by Soft Sheen are hair care products, and a substantial portion of the firm's revenues is derived

from the sale of hair relaxers. These latter products are generally sold directly to professional beauticians. Under these circumstances, the Commission believes that modification of the order to limit the substantiation requirements for safety claims to hair care products, and for efficacy claims to hair straighteners, will serve adequately to protect the public interest. Furthermore, additional expert information provided to the Commission after issuance of the Soft Sheen order, supports revision of the warning requirement.

Finally, after entry of its order in this matter, the Commission issued a consent order [89 F.T.C. 1] against Revlon, Inc., a competitor of Soft Sheen in the sale of hair relaxers, which includes a warning and product coverage identical to the changes recommended by complaint counsel here. For these reasons, the Commission believes that it is in the public interest to grant the modification sought by Soft Sheen.

Accordingly,

It is ordered, That the proceeding be, and it hereby is, reopened.

It is further ordered, That the order to cease and desist be, and it hereby is, modified by substituting the following for the WARNING contained in Provision III of the order:

WARNING:

1. This product contains potassium hydroxide (lye). You must follow directions carefully to avoid skin and scalp burns, hair loss, and eye injury.
2. Do not use if scalp is irritated or injured.
3. Do not use on bleached hair. Do not use on permanently colored hair which is breaking, splitting, or otherwise damaged. For hair that has been permanently colored and shows no sign of damage, use only mild strength formula.
4. If you have previously relaxed your hair, relax only the new growth, as described in the directions.
5. If the relaxer causes skin or scalp irritation, rinse out immediately and neutralize with the shampoo in the kit. If irritation persists or if hair loss occurs, consult a physician.
6. If the relaxer gets into eyes, rinse immediately and consult a physician.

It is further ordered, That the order to cease and desist be, and it hereby is, modified by substituting the following Provision for I.B. of the order, and relettering the remaining paragraphs accordingly:

B. Representing, in any manner, directly or by implication, the efficacy of any hair straightening product or the ingredients therein, unless, at the time such representation is made, respondents have in

their possession a reasonable basis, consisting of competent and reliable controlled tests, to support such representation; or misrepresenting in any manner the nature of any such product or its ingredients or the effect of any such product or its ingredients on hair or skin or any other structure of the body.

C. Representing, in any manner, directly or by implication, the safety of any hair care product or the ingredients therein, unless at the time such representation is made, respondents have in their possession a reasonable basis, consisting of competent and reliable controlled tests, to support such representation.

IN THE MATTERS OF

BRISTOL-MYERS COMPANY, ET AL. - D. 8917

AMERICAN HOME PRODUCTS CORPORATION, ET AL. -
D. 8918

STERLING DRUG INC., ET AL. - D. 8919

Dockets 8917, 8918, 8919. Interlocutory Order, Oct. 7, 1977

Denial of complaint counsel's motion for reconsideration of August 23, 1977, order denying on procedural grounds their application for review of a discovery ruling.

ORDER DENYING COMPLAINT COUNSEL'S MOTION FOR
RECONSIDERATION

Complaint counsel seek reconsideration of our order of August 23, 1977, which denied on procedural grounds their application for review of a discovery ruling requiring production of two memoranda of interviews with potential witnesses. The Commission's ruling is characterized as excessively rigid and formalistic, and the underlying issue as a "controlling question" within the meaning of Section 3.23(b) of our Rules.

That our August 23 ruling represented a strict application of the terms of Section 3.23 is conceded. Interlocutory appeals in general are disfavored, as intrusions on the orderly and expeditious conduct of our adjudicative process. Interlocutory appeals from discovery rulings merit a particularly skeptical reception, because particularly suited for resolution by the administrative law judge on the scene and particularly conducive to repetitive delay. In the absence of close and decisive supervision by the administrative law judge, the discovery process in any but the simplest case can be productive of endless dispute, sincere or contrived, to the point that any eventual remedial order relates only to history. Further, any perception on the part of our administrative law judges that the Commission will exercise broadly its undisputed authority to review interlocutory rulings will tend toward the atrophy of their sense of responsibility for the impact of their rulings on the proceedings before them.

These considerations, as noted, apply to interlocutory review generally and to review of discovery rulings particularly. Concededly, however, the Commission has by its Rule Section 3.23(a) afforded a special status to appeals from rulings which, as here, require the disclosure of Commission records. This provision must nonetheless not be understood as a signal that such appeals are favored, but as a