

IN THE MATTER OF
BLOCK DRUG COMPANY, INC., ET AL.

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

Docket 9050. Complaint, July 29, 1975 — Final Order, Dec. 21, 1977

This order, among other things, requires a Jersey City, N.J. manufacturer and distributor of denture adhesives and denture cleansers to cease misrepresenting the effectiveness of its products and to cease making unsubstantiated performance claims.

Appearances

For the Commission: *Melvin H. Orlans* and *Mark A. Heller*.

For the respondents: *James M. Nicholson, Robert E. Liedquist* and *Edward A. Geltman, Nicholson & Carter*, Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Block Drug Company, Inc., a corporation, and Grey Advertising, Inc., a corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Block Drug Company, Inc. 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 257 Cornelison Ave., Jersey City, New Jersey.

Respondent Grey Advertising, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 777 Third Ave., New York, New York.

PAR. 2. Respondent Block Drug Co., Inc. is now, and for some time last past has been, engaged in the manufacture, distribution, sale and advertising of various products, including denture adhesives and denture cleansers, which are drugs, devices and/or cosmetics within the meaning of the Federal Trade Commission Act. [2]

Respondent Grey Advertising, Inc. is now, and for some time last past has been, an advertising agency of respondent Block Drug Co.,

Inc., and now and for some time last past has prepared and placed for publication and caused the dissemination of advertising referred to herein, to promote the sale of various products of respondent Block Drug Co., Inc., including denture adhesives and denture cleansers.

PAR. 3. Respondent Block Drug Co., Inc. 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 Block Drug Co., Inc. 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 their said businesses, respondents Block Drug Co., Inc. and Grey Advertising, Inc. have disseminated and caused the dissemination of advertisements concerning the aforementioned products, including denture adhesives and denture cleansers, in or affecting commerce by means of advertisements printed in magazines and/or 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 denture adhesives and denture cleansers.

PAR. 5. Among the advertisements so disseminated or caused to be disseminated by respondents are the advertisements attached as Exhibits A through D.

PAR. 6. Exhibits A, B and C hereto and others substantially similar thereto (hereinafter referred to as the "denture adhesive advertisements") represent that:

1. Users of Poli-Grip or Super Poli-Grip denture adhesive, regardless of their particular denture holding problems, can eat each of a group of so-called "problem" foods (including, for example, apples, peanuts, carrots, steak, corn-on-the-cob, celery, thick sandwiches, fried chicken and caramels) without embarrassment or discomfort. [3]

2. After the use of Poli-Grip or Super Poli-Grip, dentures will hold in place for denture wearers, regardless of particular denture holding problems, when the wearer eats each of the aforementioned "problem" foods.

PAR. 7. In truth and in fact:

1. Users of Poli-Grip or Super Poli-Grip denture adhesive cannot eat each of the aforementioned "problem" foods without embarrass-

ment or discomfort and without regard to particular denture holding problems.

2. After the use of Poli-Grip or Super Poli-Grip, dentures will not hold in place for denture wearers, regardless of particular denture holding problems, when the wearer eats each of the aforementioned "problem" foods.

Therefore, the denture adhesive advertisements were, and are, deceptive and/or unfair.

PAR. 8. Exhibit D hereto and others substantially similar thereto (hereinafter referred to as the "denture cleanser advertisements") represent that users of New Extra Effervescent Polident denture cleanser will see a visible and significant improvement in the cleanliness of their dentures relative to results they would obtain through the use of Extra Strength Efferdent, a competitive product.

PAR. 9. In truth and in fact, at the time respondents made the representations as alleged in Paragraphs Six and Eight, respondents did not possess and rely upon a reasonable basis for making said representations. Therefore, the denture adhesive advertisements and the denture cleanser advertisements were, and are, unfair and/or deceptive.

PAR. 10. The denture adhesive advertisements and the denture cleanser advertisements represent, directly or by implication, that respondents had a reasonable basis for making, at the time they were made, the representations as alleged in Paragraphs Six and Eight. [4]

PAR. 11. In truth and in fact, at the time respondents made the representations as alleged in Paragraph Ten, respondents had no reasonable basis for making the representations as alleged in Paragraphs Six and Eight. Therefore, the denture adhesive advertisements and the denture cleanser advertisements were, and are deceptive and/or unfair.

PAR. 12. In the course and conduct of its aforesaid business, and at all times mentioned herein, respondent Block Drug Company, Inc. has been and now is in substantial competition in commerce with corporations, firms, and individuals engaged in the sale and distribution of denture adhesives and denture cleansers of the same general kind and nature as those sold by said respondent.

In the course and conduct of its aforesaid business, and at all times mentioned herein, respondent Grey Advertising, Inc. has been, and now is, in substantial competition in commerce with other advertising agencies.

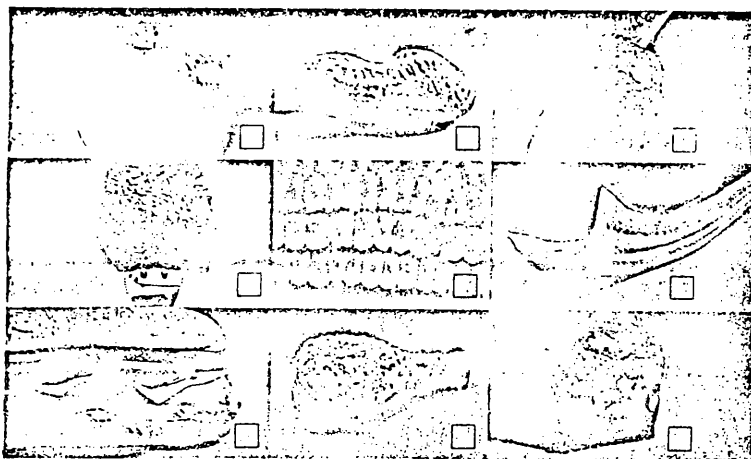
PAR. 13. The use by respondents of the aforesaid unfair and/or deceptive statements, representations and practices has had, and

now has, the capacity and tendency to mislead members of the consuming public into the purchase of substantial quantities of denture adhesives and denture cleansers manufactured by respondent Block Drug Co., Inc.

PAR. 14. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair or deceptive acts or practices in or affecting commerce and unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, and false advertisements disseminated by United States mails, and in commerce, in violation of Section 12 of the Federal Trade Commission Act.

Commissioners Thompson and Nye dissenting.

**Denture wearers,
check the foods you can eat
without worry.**

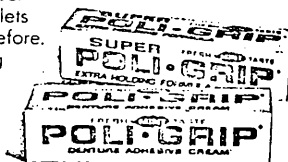


Check Poli-Grip and take a good healthy bite.

Millions of Americans who wear dentures depend on Poli-Grip to help them eat the foods they love without embarrassment or discomfort. Poli-Grip's exclusive holding formula helps keep dentures in place for hours. And for extremely hard-to-hold dentures — or during the period of adjustment to new dentures — there's Super Poli-Grip, the extra-holding formula that lets you eat many foods you worried about before.

No matter what your denture holding problem, Poli-Grip helps you eat — almost anything your heart desires.

Poli-Grip — America's number one cream denture adhesive.



Advertised in Reader's Digest — May, 1974

(Preprint for Identification Only)

EXHIBIT A

Block Drug - Poli-Grip Exhibit
 File No: 10-29-74
 Agency: 10-29-74
 Date: 10-29-74

Complaint

90 F.T.C.

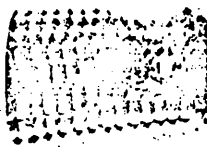
Block Drug Company
267 Cornelison Avenue, Jersey City, New Jersey

PRODUCT: POLI-GRIP
TITLE: "BITE" II

LENGTH: 30 SEC.
CODE NO.: BDSP4020



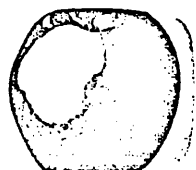
1. ANNCR: (VO) Denture Wearers, listen!!!! (SFX)



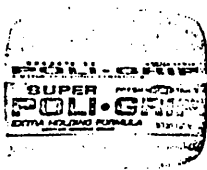
2. CHORUS: Go on now eat as you like! (SFX)



3. Yeah! Eat as you like! (SFX)



4. Take your good, healthy bite of life! (SFX)



5. ANNCR: (VO) Now with Super Poli-Grip Cream Denture Adhesive



6. you can eat almost anything. (SFX)



7. Its strong-holding, long-holding plastic formula



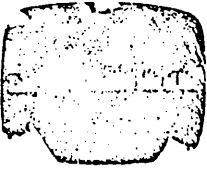
8. helps keep even hard-to-hold dentures in place



9. so problem foods aren't such a problem. (SFX)



10. Super Poli-Grip with plastic, or regular Poli-Grip.



11. CHORUS RETURNS: Take a good healthy bite of life!



12. (SFX: CHOMP)

EXHIBIT B

Block Drug-Poli-Grip Exhibit
File No: 7-13 5032 7-13 5032

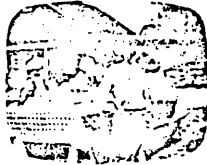
893

Complaint

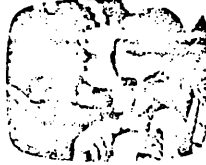
Block Drug Company
257 Cornalison Avenue, Jersey City, New Jersey

PRODUCT: POLI-GRIP
TITLE: "GOOD EATING" II

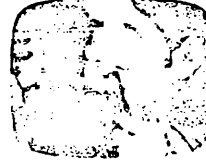
LENGTH: 30 SEC.
CODE NO.: BDSP4019



1. CHORUS: Go on now eat as you like!



2. Yeah, eat as you like.



3. Take your good, healthy bite of life!



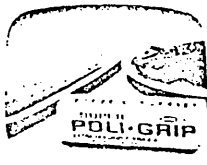
4. ANNCR: (VO) So what if you wear dentures?



5. Now, super Poli-Grip's plastic cream formula



6. holds strong, holds long,



7. helps keep even hard-to-hold dentures in place,



8. so you can eat almost anything.



9. Super Poli-Grip with plastic, or regular Poli-Grip.



10. Go on, eat as you like!



11. REPRIS: Take a good, healthy bite of life!

EXHIBIT C

Block Drug-Poligrip Exhibit
File No: 101-5032
Ad. No: 113
Date: 10-29-74

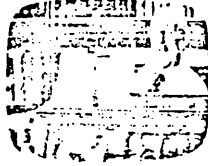
Complaint

90 F.T.C.

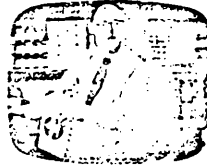
Block Drug Company
257 Cornelison Avenue, Jersey City, New Jersey

PRODUCT: POLIDENT TABLETS
TITLE: "STORE OWNER"

LENGTH: 30 SECONDS
CODE NO.: BDPT3173



1. HENRY: If just yesterday, you asked me:



2. "Henry, which denture cleanser should I buy?"



3. What could I tell you?



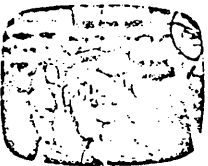
4. One turns blue, one turns green. They both work.



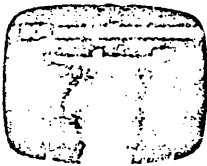
5. Well today! Today there's a new one.



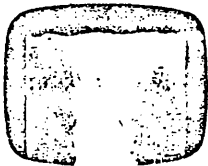
6. New Extra Effervescent Polident Tablets.



7. Extra.



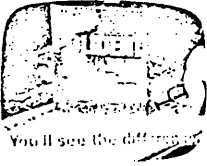
8. That means 50% more effervescent cleaning action than it ever had before.



9.To work better on stains and odors.



10. But don't just take my word. Take home some New Polident.



11. You'll see the difference.

Block Drug Company
257 Cornelison Avenue, Jersey City, N.J. 07310
10-29-74

EXHIBIT D

9337

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DISSENTING STATEMENT OF COMMISSIONER NYE

JULY 29, 1975

I agree that staff has presented the Commission with reason to believe that Block Drug Company did not have sufficient substantiation for its advertising of Poli-Grip. I am concerned, however, that the Commission has decided to proceed against Block without first investigating the substantiation its competitors have for their denture-adhesive claims, which appear equally unsupportable. Although the law does not require the Commission to proceed against all alleged malefactors simultaneously, we should when we can, and we can in this case. I would therefore complete our investigation and, thereafter, file all law enforcement actions warranted at the same time.

DISSENTING STATEMENT OF COMMISSIONER MAYO J. THOMPSON

JULY 29, 1975

It is with concern that I note today that the Commission has, with this complaint, started down the road toward the prosecution of another "Dry Ban" case.

The majority has voted to issue a complaint alleging, among other things, that certain Block Drug print advertisements falsely represented that use of Block's Poli-Grip or Super Poli-Grip denture adhesive would allow denture wearers, regardless of their denture-holding problems, to eat "problem foods" such as apples, corn-on-the-cob, and candy caramels without embarrassment or discomfort. The complaint also includes a charge that Block had no "reasonable basis" for claims that its denture cleanser New Extra Effervescent Polident would clean dentures significantly better than the Warner-Lambert product Extra Strength Efferdent.

I do not challenge my fellow Commissioners' decision that they had the requisite statutory "reason to believe" that a significant number of consumers perceived from the challenged advertisements the claims which the complaint alleges were made, nor do I challenge their decision that they had "reason to believe" the claims were false or unsubstantiated.

But I cannot agree that this proceeding is in the "public interest," as I am required by Section 5 of the Federal Trade Commission Act to determine before voting a complaint against any respondent.

As I stated in my opinion concurring in the dismissal of the complaint against the Bristol-Myers Company and its advertising agency, Ogilvy & Mather, Inc., for their advertisements for the

underarm deodorant Dry Ban, Dkt. 8897 (April 22, 1975) [85 F.T.C. 688], I do not believe it is in the public interest for the Commission to challenge advertising claims the truth or falsity of which the average consumer can judge through use of one rather [2] inexpensive jar, tube, or box of the advertised product. As I stated in the Dry Ban case, even if one believes that deceptive advertising claims can convince the consumer to purchase a product he would not otherwise have purchased, if the consumer can judge the truth or falsity of the claim himself, he is not likely to repeat the purchase if he has been misled. Surely it is repeat sales that a company needs in order to survive, and if a company attempts to deceive the public with claims the consumer can quickly determine to be false, the company will not enjoy repeat sales and may even lose market share.

I believe these principles apply quite properly to this case. The costs of one tube or box of the products involved in this case are not high in absolute amounts, and they surely make up a negligible percentage of any purchaser's budget. Further, I believe denture wearers should be able to judge the efficacy of these products quite easily. Their experience should enable them to judge whether Polident really does clean 50 percent better than the other leading brand. And as for Block's denture adhesives, it is inconceivable to me that any denture wearer who applied Poli-Grip or Super Poli-Grip and bit into a red apple and then saw his dentures smiling back at him would ever purchase the Gripper again.

Some might argue, though, that persons who would be likely to purchase denture adhesives, for example, are in general elderly and on fixed incomes, and that they cannot really afford even the cost of one tube of an ineffective denture adhesive. But this argument assumes that absent the false claims these persons would not purchase denture adhesives at all. I find this difficult to believe.

Information in this file shows that experts generally agree that persons owning well-fitting dentures probably do not need to use denture adhesives, but that the adhesives probably provide some aid to those with dentures that do not fit properly. I suspect that most persons owning ill-fitting dentures are aware that the adhesives help them to some extent and that they will continue buying them so long as they are advertised and sold. Seeing nothing in this file to indicate that Block Drug's adhesives are either less effective or more expensive than other products in this market, I am not convinced that singling out Block Drug Company and challenging certain specific advertising claims is in the public interest.

INITIAL DECISION* BY MILES J. BROWN, ADMINISTRATIVE LAW
JUDGE

OCTOBER 4, 1977

PRELIMINARY STATEMENT

The Federal Trade Commission issued its complaint in this matter on July 29, 1975 (mailed August 21, 1975), charging Block Drug Company, Inc. ("Block")¹ with unfair or deceptive acts or practices in or affecting commerce and unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45), and false advertisements disseminated by U.S. mail and in commerce, in violation of Section 12 of the Federal Trade Commission Act (15 U.S.C. 52). [2]

In the complaint it was alleged that Block, through certain particular advertisements, had falsely represented that —

1. Users of Poli-Grip or Super Poli-Grip denture adhesive, regardless of their particular denture holding problems, can eat each of a group of so-called "problem" foods (including for example, apples, peanuts, carrots, steak, corn-on-the-cob, celery, thick sandwiches, fried chicken and caramels) without embarrassment or discomfort, and

2. After the use of Poli-Grip or Super Poli-Grip, dentures will hold in place for denture wearers, regardless of particular denture holding problems, when the wearer eats each of the aforementioned "problem" foods.

It was also alleged that in certain advertisements respondents had represented that users of New Extra Effervescent Polident denture cleanser will see a visible and significant improvement in the cleanliness of their dentures relative to results they would obtain through use of Extra Strength Efferdent, a competitive product.

It was further alleged that, at the time it disseminated the challenged advertisements, Block did not possess or rely upon a reasonable basis for making the alleged representations, which constituted a violation of the Federal Trade Commission Act. In addition, it was alleged that Block falsely represented that it had a reasonable basis for making such representations.

In its answer, Block denied the substantive allegations of the complaint. By way of affirmative defenses, it challenged the validity

* Reported as modified by the Commission's Final Order of December 21, 1977.

¹ The complaint also named Grey Advertising, Inc., a corporation ("Grey"). On July 13, 1977, the Administrative Law Judge certified to the Commission a joint motion of Grey and complaint counsel to withdraw the matter from adjudication as to Grey to consider an agreement containing a consent order to cease and desist. By order dated July 22, 1977, the Commission withdrew the matter from adjudication as to Grey.

of the Commission's "reasonable basis" doctrine on several grounds, and asserted that the Commission's proceeding against it was arbitrary and not in the public interest.

On February 3, 1976, Administrative Law Judge Harry R. Hinkes² certified to the Commission Block's motion to dismiss, or in the alternative to suspend, proceedings in [3] this matter because on November 11, 1975 the Commission proposed a Trade Regulation Rule Proceeding that would govern Over-the-Counter ("OTC") drug advertising including representations concerning denture products. On March 22, 1976, the Commission denied the motion to terminate or suspend the proceeding.

Thereafter the parties initiated their discovery. Complaint counsel filed their proposed exhibit and witness lists on October 15, 1976, and their trial brief on November 1, 1976. Respondents filed their proposed exhibit and witness lists on November 15, 1976. Adjudicative hearings were scheduled to commence February 21, 1977.

On January 12, 1977, upon joint motion of counsel, the initial hearing date was rescheduled for March 21, 1977. Respondent's trial brief was filed February 4, 1977.

At a prehearing conference held March 8, 1977, complaint counsel announced their plan to move to amend the complaint in a significant respect and moved for postponement of the adjudicative hearings. Respondents opposed the motion for postponement and the Administrative Law Judge denied the motion (Tr. 22-23; see also order dated March 15, 1977). Complaint counsel's motion to amend was certified to the Commission.³ On March 18, 1977, the Commission declined to upset the Administrative Law Judge's ruling that the adjudicative hearings would not be stayed.

Hearings commenced March 21, 1977, at which time complaint counsel's documents were offered into evidence and rulings were made on objections thereto. No witnesses were called and the hearings were adjourned until March 28, 1977. On March 28, 1977, counsel filed a joint motion to continue the hearing until April 18, 1977, to permit them an opportunity to expedite the ultimate resolution of this matter. The joint motion was granted.

A further continuance was granted, after counsel advised the Administrative Law Judge that they intended to submit this matter on a stipulated record and an agreed order (see order dated April 15, 1977). [4]

On June 6, 1977, respondent Grey and complaint counsel filed

² The matter was reassigned to the undersigned on October 22, 1976.

³ By order dated June 21, 1977, the Commission granted complaint counsel's unopposed motion to withdraw the motion to amend the complaint.

their joint motion to withdraw the matter from adjudication as to Grey (see footnote 1, *supra*). On July 6, 1977, hearings were held for completion of the record as to Block at which time the parties filed the affidavits of their expert witnesses (CXs 93-96; RXs 1-4)⁴ and a stipulation (CX 97). In addition, certain documents received into the record at the March 21, 1977, hearing were withdrawn (CXs 14-21, 27-35, 41, 47, 50, 53, 55, 60-61, 66). On August 2, 1977, the Administrative Law Judge issued his order receiving substitute Affidavit-Exhibit CX 94 A-H into evidence, and closing the record for the receipt of evidence.

The evidentiary facts are not the subject of significant dispute. The affidavits of the Commission's expert witnesses and respondent's employees and expert witness were received into the record without objection and both parties have recommended an identical order to be issued if the findings of fact in this Initial Decision are substantially similar to the findings of fact proposed by complaint counsel. However, it should be emphasized that this proceeding is not a consent order proceeding. The Administrative Law Judge and the Commission may, on the evidentiary record, issue any order deemed appropriate. The dilemma posed by the situation that prevailed in *National Biscuit Co.*, Docket No. 5013, will not be present. See *National Biscuit Company v. Federal Trade Commission*, 400 F.2d 270 (5th Cir. 1968); *Nabisco, Inc. v. Federal Trade Commission*, 459 F.2d 1023 (5th Cir. 1972). Of course, Block and complaint counsel reserve the right to appeal any order issued in this matter that does not conform substantially to the agreed-upon order.

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

The proposed findings and conclusions submitted by counsel supporting the complaint ("CXCPF") and counsel for Block ("Resp. PF") have been given careful consideration and [5] to the extent not adopted by this decision, in the form proposed or in substance, are rejected as not supported by the evidence or as immaterial.

Having reviewed the entire record in this proceeding, together with the pleadings, the proposed findings, and conclusions, I make the following findings of fact based on the record considered as a whole:

⁴ One of the affidavits (CX 94) had not as of that date been executed properly.

FINDINGS AS TO THE FACTS

1. Respondent Block is a New Jersey corporation with its principal place of business located at 257 Cornelison Ave., Jersey City, New Jersey (Ans. Par. 1; Resp. PF 1).

2. Block does now, and at all times relevant hereto did, engage in the manufacture, distribution, sale and advertising of denture adhesive and denture cleansers. These products are transported from Block's 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 (Compl. Pars. 2, 3; Ans. Pars. 2, 3; Resp. PF 2).

3. Block authorized the publication of numerous advertisements, including the advertisements challenged in the complaint, in publications of interstate circulation, and by national network television (CXs 23, 24, 26). Dissemination of such advertisements has been substantial. Approximately \$7.4 million per year for the last three years has been expended for the purpose of selling its denture adhesive products Poli-Grip and Super Poli-Grip and its denture cleanser product New Effervescent Polident (CX 97d (Stip.)).

4. Block maintains, and at all times relevant to this proceeding has maintained, a substantial course of trade in commerce in the said denture adhesive products and denture cleanser product as "commerce" is defined in the Federal Trade Commission Act and the challenged acts and practices are "in commerce" and "affect commerce" as such terms are defined in said Act (see CX 97a, c (Stip.)).

5. Block is in competition with corporations engaged in the sale and distribution of denture cleansers and adhesives (Ans. Par. 12; see Resp. PF 5). [6]

6. Physical Exhibit B (see storyboard CX 10) is typical of the challenged denture adhesive advertisements that were included in Block's advertising campaign entitled "Bite of Life" (see 97d (Stip.)). This advertisement is a 30-second television advertisement entitled "Good Eating II" and may be described as follows:

The commercial opens by showing several people heartily enjoying, and eating at, an outdoor picnic. The audio chorus sings: "Go on now eat as you like" (Frame 1). A close-up is then shown of a male picnicker eating his fried chicken with gusto and confidence. The chorus simultaneously sings: "Yeah, eat as you like. Take your good healthy bite of life" (Frames 2, 3). The camera then shifts to a female picnicker who is enthusiastically eating corn-on-the-cob. The audio portion becomes an announcer's voice, which notes "So what if you

wear dentures" (Frame 4). The video immediately changes to a box of Super Poli-Grip on the table next to an ear of corn while the announcer's voice states that "Now, Super Poli-Grip's plastic cream formula (Frame 5) holds strong, holds long (Frame 6) helps keep even hard to hold dentures in place" (Frame 7). Toward the latter part of the announcer's statement, the scene shifts back to a close-up of another female eating a spare-rib (Frame 6). The box of Super Poli-Grip is again shown on the table, this time surrounded by a plate of spare-ribs as well as an ear of corn (Frame 7). The scene then shifts, this time to a close-up of a man in a business suit biting a thick sandwich. The announcer continues: "So you can eat almost anything" (Frame 8). Boxes of Poli-Grip and Super Poli-Grip are then shown on the table, surrounded by an ear of corn, a plate of spare-ribs, and a thick, "hero"-type sandwich. The announcer states: "Super Poli-Grip with plastic, or regular Poli-Grip" (Frame 9). The scene then returns to the picnic with the people identified as denture wearers eating several different foods with enjoyment and without difficulty, embarrassment or apparent discomfort. The chorus sings "Go on, eat as you like. [Frame 10] Take a good healthy bite of life!" (Frame 11). At the last line of the song, the camera shows a man biting an apple, on the upper portion of the screen; the lower portion contains the Poli-Grip and Super Poli-Grip boxes, and in the middle of the screen the phrase "take a good healthy bite of life" is superimposed. [7]

7. Physical Exhibit A (see storyboard CX 9), entitled "Food Bite", contains substantially the same audio material as the "Good Eating" commercial (see finding 6, *supra*), but contains a video portion featuring the simulated biting of corn-on-the-cob, a piece of chicken, an apple (twice), a piece of celery and a carrot. Each food item first is shown whole and then with a bite taken out of it. The "bite" sequence is accompanied by a distinct audio "chomp."

8. Block conducted so-called "copy tests" of the advertisements "Food Bite" and "Good Eating" (CXs 59, 64). These "copy tests" involved showing the advertisements to a number of consumers and asking them questions about them.

The results reported in CX 59(s) (1974) under the category "eating benefits" may be summarized as follows:

	<i>Percent (of 150 viewers) who perceived message</i>	
Message Perceived	"Food Bite"	"Good Eating"
Can eat difficult foods/problem foods	42	39

	Initial Decision	90 F.T.C.
Can eat anything	24	34
Similar results reported in CX 64(j) (1975) were as follows, although the test involved 126 viewers.		
Can eat difficult		
foods/problem foods	39	75
Can eat anything	51	46

9. By and through the use of the challenged denture adhesive advertisements (CXs 6-12); Physical Exhibits A, B, D), respondent Block represented that —

(a.) Users of Poli-Grip or Super Poli-Grip denture adhesive, regardless of their particular denture holding problems, can eat each of a group of so-called “problem” foods (including, for example, apples, peanuts, carrots, steak, corn-on-the-cob, celery, thick sandwiches, fried chicken and caramels) without embarrassment or discomfort; and

(b.) After the use of Poli-Grip or Super Poli-Grip, dentures will hold in place for denture wearers, regardless of particular denture holding problems, when the wearer eats each of the aforementioned “problem” foods. [8]

10. Dentures are man-made replacements for natural teeth. Dentures are usually constructed out of porcelain or acrylic, and are intended cosmetically to look like natural teeth. As replacements for natural teeth, dentures enable denture wearers to recover but a small portion of the function of the natural teeth which they no longer possess (CX 94b (Kapur)).

Dentures are constructed so that the forces involved in eating, or otherwise in using the dentures, are evenly distributed over a maximum area. This makes functions such as biting, which concentrates the force in one area, difficult to perform. In addition, the front teeth in many dentures are placed against the lips to keep the lips from collapsing without support. Although this placement maximizes aesthetic appearance, it minimizes the functional utility of the front teeth. The fundamental principles incorporated into denture construction make it difficult to bite or tear food with the front teeth (CX 94d (Kapur); see CX 93c (Atwood); 95c(Kratochvil)).

There is a wide variation among the denture wearing population in terms of the ability to eat with dentures. Such factors as the physical condition of the denture wearer’s support area including mouth tissue and bone, the dimension and fit of the denture, the person’s ability to adjust to the use of dentures and the wearer’s tolerance to discomfort and pain, vary widely from individual to

individual. In addition various types of foods will present varying degrees of problems to different people.

An apple is recognized as being hard to bite, but not hard to chew. On the other hand, sticky candy is hard to chew. Certain fibrous foods like celery are difficult to manage for denture wearers (CX 94d-e (Kapur); CX 93d (Atwood); 95d (Kratochvil)).

A denture adhesive is a sticky substance generally either karaya gum, a natural substance, or an artificial plastic (CX 94b (Kapur); 95b (Kratochvil)).

Poli-Grip's active ingredient is gum karaya. This ingredient has been used in denture adhesive products for over 50 years. Super Poli-Grip's active ingredients are synthetic, non-toxic water soluble substances with excellent adhesive qualities (RX 3 (Fischer); RX 2 (Rosenthal)). [9]

The denture adhesive is applied to the base of the denture in as even a layer as possible. When the denture is then placed in the mouth, the adhesive acts as a sort of temporary glue and creates an adhesive bond (CX 94b-c (Kapur)).

A denture adhesive aids in remedying only one of the various factors that affect a wearer's denture performance, namely retention. Unless this factor represents the totality of the wearer's problem, an adhesive will not solve the biting or chewing problems experienced by the wearer (CX 93b (Atwood); 95b, c (Kratochvil)).

Accordingly, the very manner in which many dentures are constructed results in the situation where the front teeth are virtually useless for biting and only serve cosmetic purposes. The back teeth then become the surface for pulverizing food. Because of the limitation in denture functions, many denture wearers cannot eat hard-to-bite foods such as apples and corn-on-the-cob, with or without the use of an adhesive (CX 93c (Atwood)). For many of them dislodgement of the dentures will occur if they attempt to eat such foods, with or without the use of an adhesive (CX 93d (Atwood); 95d(Kratochvil)).

11. Respondent's claims that users of denture adhesives, Poli-Grip and Super Poli-Grip, regardless of their particular denture holding problems, can eat each of a group of so-called "problem foods" (including, for example, apples, peanuts, carrots, steak, corn-on-the-cob, celery, thick sandwiches, fried chicken and caramels) without embarrassment or discomfort, and that, after the use of a denture adhesive Poli-Grip and Super Poli-Grip, dentures will hold in place for denture wearers, regardless of their particular denture holding problems, when the wearer eats each of the aforementioned

“problem” foods, are false (CX 93b (Atwood); CX 94c (Kapur); CX 95b (Kratochvil)).

12. The limited extent to which denture adhesives can serve to ameliorate the usual problems that denture wearers encounter in using dentures is well known among the professional ranks of those specializing in all aspects of the fitting and functioning of dentures and in the use of denture adhesives (“prosthodontics”)(CX 95 (Kratochvil); CX 94 (Kapur); CX 93 (Atwood)). Block’s employees, [10] including Murray Rosenthal, Block’s Vice-President, Research and Development, on the basis of such general knowledge as well as certain tests that had been conducted in the use of such products since 1962, were of the opinion that Poli-Grip and Super Poli-Grip would help *many* denture wearers eat various types of foods where the denture wearers’ primary problem was retention (RX 2 (Rosenthal)). No representative of Block has stated that they had any reason to believe that Poli-Grip or Super Poli-Grip would accomplish the results promised in the advertising claims that Block made in the challenged commercials as alleged in the complaint and found in this decision.

13. Accordingly, Block, at the time it caused the dissemination of the challenged advertisements did not possess or rely upon a reasonable basis for the claims made therein. Failure to have a reasonable basis for such claims is an unfair practice.

14. In making the claims contained in the challenged advertisements, Block represented, directly or indirectly, that it had substantiation for said claims.

15. As found above (finding 13), Block did not have a reasonable basis for the said claims and its representation that it did, was false and misleading.

16. The challenged denture cleanser television advertisement (CX 13; Physical Exhibit C), entitled “Store Owner,” is a 30-second commercial and portrays a man named Henry, standing behind a store counter, who offers the following advice:

Frame 1 If just yesterday, you asked me:

Frame 2 “Henry, which denture cleanser should I buy?”

Frame 3 What could I tell you?

Frame 4 One turns blue, one turns green. They both work.

Frame 5 Well today! Today there’s a new one.

Frame 6 New Extra Effervescent Polident Tablets.

Frame 7 Extra

Frame 8 That means 50 percent more effervescent cleaning action than it ever had before.

Frame 9 To work better on stains and odors. [11]

Frame 10 But don't just take my word. Take home some New Polident.

Frame 11 You'll see the difference.

In the video portion of the commercial Frames 8 and 9 demonstrate the "effervescence" action of the tablet in what appears to be a glass of water.

17. The purpose of the aforesaid commercial was to introduce New Extra Effervescent Polident to supersede old Polident, its predecessor product (CX 97c (Stip.)). The phrase "one turns blue (CX 13 (Frame 4)), is a reference to Extra Strength Efferdent, a competitive product marketed by Warner-Lambert Co. (CX 97a,c (Stip.)). The phrase "one turns green" (CX 13 (Frame 4)) is a reference to the old Polident product (CX 97a, b, c, (Stip.)).

18. By and through the use of the challenged denture cleanser advertisement respondent Block has represented that users of New Extra Effervescent Polident denture cleanser will see a visible and significant improvement in the cleanliness of their dentures relative to results they would obtain through the use of Extra Strength Efferdent, a competitive product.

19. The material submitted to the Commission in response to a Commission order to substantiate the advertising claim for New Extra Effervescent Polident did not consist of reliable scientific evidence upon which Block could form a "reasonable basis" for such a claim. For the most part the tests submitted related to comparisons between New Extra Effervescent Polident and the prior Polident product. Where comparisons between New Extra Effervescent Polident and Efferdent were attempted the results showed that there was no appreciable difference in the visible appearance as to whiteness after using the various denture cleansers (see CX 69z170; CX 96b, e, f, g; see also CX 37 (*in camera*)).

20. Accordingly, Block, at the time it caused the dissemination of the challenged advertisement did not possess or rely upon a reasonable basis for the claim made therein. Failure to have a reasonable basis for such a claim is an unfair practice.

21. In making the claim contained in the challenged advertise-

ment, Block represented, directly or indirectly, that it had substantiation for said claim. [12]

22. As found above (finding 20), Block did not have a reasonable basis for such a claim and its representation that it did, was false and misleading.

DISCUSSION

The principal issue at this posture of the proceeding is whether Block, by the challenged advertisements, made the representations as alleged in the complaint. It is Block's position that it did not make such claims, and that the claims it did make were not only true, but were substantiated.

It is well settled that the meaning of an advertisement is a question of fact and that such meaning 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). Advertisements may have more than one meaning. Implications and inferences may be made from statements actually made as well as from information not set forth therein, if the excluded facts are material *i.e.*, are facts considered to be material to the consumer's choice whether to purchase the product advertised. *Chrysler Corp. v. Federal Trade Commission*, D.C. Cir. (decided July 6, 1977, slip opinion at p. 12); *Federal Trade Commission v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965).

In my opinion it is clear that the challenged denture adhesive advertisements did make the claims alleged in the complaint. This determination has been made from carefully considering the advertisements, including the format and the emphasis placed on certain words and phrases contained therein. The so-called "Food Bite" commercial with its video and audio "chomp" sequences on various foods is a clear promise that Poli-Grip and Super Poli-Grip will enable any denture wearer to eat those same foods without any difficulty and without concern as to retention problems.

Block contends that the advertisement represented only that Poli-Grip and Super Poli-Grip will help many denture wearers eat various types of food (see Resp. PF pp. 5-6). Clearly, the message conveyed by these commercials is not such a qualified representation as to the efficacy of Block's denture adhesives. [13]

If there was any doubt as to the message conveyed by these denture adhesive advertisements, such doubt is dispelled by the results of the "copy tests", where a not insubstantial number of

persons sampled perceived the messages as representing eating benefits similar to the allegations of the complaint.

The material submitted by Block for purposes of substantiation goes to the claim that its denture adhesives will help many denture wearers eat various types of food. Block does not make an attempt to substantiate the broader claim actually made in the commercials. Indeed, the expert testimony, which is not controverted, demonstrates that many denture wearers cannot eat problem foods in the manner portrayed, whether or not they use a denture adhesive, and that the physical limitations on the use of dentures by many wearers would make substantiation of the broad claims impossible.

Block contends that it was the intended purpose of the "Store Owner" advertisement to communicate to denture wearers the superiority of the cleansing power of the new Polident formula as compared to its old product formula. In my opinion the advertisement claims much more. It includes the competing product (Efferdent) "the blue one" in the comparison and promises that the consumer will "see the difference." The important difference to the consumer would be the appearance of the dentures as to cleanliness.

There is no charge in this matter that the "Store Owner" commercial was false. The allegations of violations of the Federal Trade Commission Act are that Block had no substantiation for the claim actually made.

Although the material of record demonstrates that Block has done considerable testing with respect to its new formula Polident as compared to its old formula Polident, the testing of new Polident as compared to Efferdent, the competing product, was very limited, and the results were quite inconclusive as to the relative appearance of dentures cleansed by use of those two products. No substantiation which would constitute a reasonable basis for the claim made has been demonstrated. [14]

There is no longer any dispute in this proceeding as to whether it is an unfair practice in violation of Section 5 of the Federal Trade Commission Act to make a product claim without possessing and relying upon a reasonable basis for that claim at the time the product claim is made. The Commission's "reasonable basis" doctrine has been upheld by the circuit courts of appeals. See *Firestone Tire & Rubber Co. v. Federal Trade Commission*, 481 F.2d 246 (6th Cir. 1973); *Fedder Corp. v. Federal Trade Commission*, 529 F.2d 1398, 1400-1 (2d Cir. 1976).

Finally, there is the question as to whether the products in question come within the coverage of Section 12 of the Federal Trade Commission Act. Block, throughout this proceeding, has maintained

that its products are not "devices" within the meaning of the Act. Complaint counsel have not pressed this point in their proposed findings and it is deemed abandoned.

In any event, the issue does not appear to have any substantive importance in this matter.

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction over respondent Block and the acts and practices which are the subject matter of this proceeding.

2. Block, at all times relevant hereto, has been engaged in "commerce" within the meaning of Section 5 of the Federal Trade Commission Act, and has been and now is, in substantial competition, in commerce, with corporations, firms or individuals in the sale of denture adhesives, denture cleansers and other dental products.

3. The advertisements pertaining to denture adhesives and the statements and representations therein that are challenged in this proceeding are false, misleading and unsubstantiated. The advertisement pertaining to denture cleansers and the statements and representations therein challenged in this proceeding are unsubstantiated. Therefore, the challenged statements and representations were, and are either false, deceptive and/or unfair in material respects.

4. The use by the respondent of the aforesaid advertisements had and now have the capacity and tendency to mislead members of the consuming public into the erroneous and mistaken belief that said advertisements and the statements and representations in connection therewith were and are true and/or substantiated. As a result, substantial trade has been and is being unfairly diverted to Block, from its competitors in the dental product market. [15]

5. The aforesaid acts and practices of Block, as charged in the complaint and as reflected in the record, were and are all to the prejudice and injury of the public and of Block's competitors and constituted, and now constitute, unfair and deceptive acts and practices "in commerce" and "affecting commerce" and are unfair methods of competition in commerce in violation of Section 5 of the Federal Trade Commission Act.

6. This proceeding is in the public interest. The Commission so determined upon the assumption of jurisdiction through the issuance of the complaint. *American Airlines, Inc. v. North American Airlines, Inc.* 351 U.S. 79, 83 (1956). Nothing in the record or the findings requires a different result. See *Federal Trade Commission v. Klesner*, 280 U.S. 19 (1929).

7. No determination has been made in this proceeding as to whether the denture products subject to the complaint are "devices" within the meaning of Section 12 of the Federal Trade Commission Act.

REMEDY

Complaint counsel and respondent Block have submitted an agreed-to order, recommending that it be entered in the event the Administrative Law Judge finds the violations alleged in the complaint.

Upon review of the terms of the order, I am of the opinion that it satisfies the needs of this proceeding. It is reasonably related to the practices found to be unlawful and prohibits Block's use of those and similar practices in the future. It also provides that should any Trade Regulation Rule permit any practice prohibited by the recommended order, that such provision of the order shall "abate" upon final promulgation of such a Rule. This provision appears to be consistent with the ongoing Commission policy of reconciling the terms of outstanding orders with its Rules and Guides.

ORDER

It is ordered, That respondent Block Drug Company, Inc., and its officers, representatives, agents and employees directly or through any corporate or other device, in [16] connection with the advertising, offering for sale, sale or distribution of products, sold by the respondent in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Making any statements or representations directly or by implication concerning any performance or other characteristic or attribute of any dental product, except denture cleansers, without possessing and relying upon a reasonable basis for each such statement or representation at the time it is made.
2. Making any comparative statements or representations directly or by implication concerning any performance attribute of any competitor's denture cleanser product without possessing and relying upon a reasonable basis for each such statement or representation at the time it is made.
3. Misrepresenting in any manner the effectiveness of any denture adhesive product.
4. Representing, directly or by implication, that:
 - a. Every user of denture adhesives, regardless of his or her

particular denture holding problem, can eat any of a group of so-called "problem" foods (including, for example, apples, peanuts, carrots, steak, corn-on-the-cob, celery, thick sandwiches, fried chicken and caramels) without embarrassment or discomfort; and/or [17]

b. After the use of a denture adhesive, dentures will hold in place for every denture wearer, regardless of his or her particular denture holding problem, when the wearer eats any of the aforementioned "problem" foods.

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.

It is further ordered, That the respondent submit to the Commission, in writing, a compliance report detailing the manner and form in which it complied with this order. Such reports shall be submitted sixty (60) days after the entry of a final order and, thereafter, annually for two (2) years from the date of the first submission. [18]

In addition, any provision of this order shall abate when inconsistent with a final Federal Trade Commission trade regulation rule if the trade regulation rule specifically authorizes any claim prohibited herein.

It is further ordered, That the complaint, insofar as it charges Block with violation of Section 12 of the Federal Trade Commission Act, is dismissed.

FINAL ORDER

The administrative law judge filed his initial decision in this matter on October 4, 1977, and service of the initial decision was completed on October 28, 1977. No appeal from the initial decision has been filed, and the Commission has determined that the initial decision and order contained therein shall become the decision and order of the Commission, with the following minor changes:

Page 2, line 1, change "is" to "it."

Page 5, Finding 2, line 2, delete final "r" in "manufacturer."

Page 12, line 5, change "principle" to "principal."

Therefore, it is ordered, That the initial decision (as modified above) and order contained therein, shall become the decision and order of the Commission on the date of issuance of this order.

Interlocutory Order

90 F.T.C.

IN THE MATTER OF

CHRYSLER CORPORATION, ET AL.

Docket 9072. Interlocutory Order, Dec. 27, 1977

Order denying respondents' motion to dismiss complaint. Only in extraordinary circumstances, not shown in the instant case, will the Commission review a determination of public interest after a complaint has issued.

ORDER DENYING MOTION TO DISMISS

Respondents Chrysler Corporation and Chrysler Credit Corporation have moved to dismiss the complaint herein on the ground that the theory on which it rests should have been pursued by rulemaking rather than adjudication. Movants requested that, to the extent the Administrative Law Judge lacked authority to rule on this motion, it be certified to the Commission. By order of September 7, 1977,¹ Administrative Law Judge Parker certified a portion of the motion and denied the remainder.

As it comes to us,² the ground urged for dismissal is supported by two arguments: 1) that a rule would have industrywide application and would thus be more equitable and more effective; and 2) that adjudication is not the appropriate forum for the determination of preemption issues (to the extent they are presented). The resolution of the present motion, however, is controlled by our decision on the very similar motion in the companion *Ford Motor Co.* case.³ There, the Commission noted that "[o]nly in the most extraordinary circumstances, not shown here, will the Commission review [the determination that a particular adjudicative proceeding is in the public interest] once a complaint has issued." Nothing presented here distinguishes the present motion from that in *Ford* in any way relevant to that standard. Accordingly,

It is ordered, That the motion to dismiss be, and it hereby is, denied.

¹ Due to an unfortunate clerical lapse, this order was not transmitted to the Commissioner responsible until November 23.

² Insofar as the motion is based upon the argument that the complaint should be dismissed because it assertedly conflicts with state and federal statutes, the Administrative Law Judge correctly determined that he had authority to rule upon it, and did so. This argument, as such, is not before us.

³ *Ford Motor Co., et al.*, Dkt. 9073, Order Denying Motion to Dismiss Complaint, issued May 25, 1976. See also our July 7, 1976 order, identically titled, in the third companion case, *General Motors Corporation et al.*, Dkt. 9074.