

Complaint

97 F.T.C.

IN THE MATTER OF

TED BATES & COMPANY, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3059. Complaint, March 17, 1981—Decision, March 17, 1981*

This consent order requires, among other things, a New York City advertising agency to cease referring to any test or survey of "experts" or "consumers" when making representations regarding the performance, benefit, choice or superiority of a product, unless the referenced test or survey has been scientifically designed, executed and evaluated by experts; and provides substantiation for the representations. The firm is further barred from representing, by reference to a test or survey, that experts or consumers surveyed or tested recommended or used a particular brand of product, without disclosing that an equal or greater percentage of such respondents had not indicated any brand preferences. Additionally, the order requires the company to maintain, for a period of three years, records substantiating advertising claims.

Appearances

For the Commission: *Mitchell Paul* and *Julie Niemasik*.

For the respondent: *Elhanan C. Stone*, in-house counsel.

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 Ted Bates & Company, Inc., 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 Ted Bates & Company, Inc. ("Ted Bates") is a corporation, organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal place of business located at 1515 Broadway, New York, New York.

PAR. 2. Respondent Ted Bates was for some time an advertising agency of Standard Brands, Inc. ("Standard Brands") and prepared and placed for publication and caused the dissemination of advertising material, including but not limited to the advertising referred to

herein, to promote the sale of Standard Brands' "Fleischmann's Margarine" products.

PAR. 3. In the course and conduct of its business, respondent has disseminated and caused the dissemination of advertisements concerning "Fleischmann's Margarine" products in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, 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 "Fleischmann's Margarine" products.

PAR. 4. Among the advertisements so disseminated or caused to be disseminated by respondent are the advertisements attached as Exhibits A through D hereof.

PAR. 5. In Exhibits A through D and others substantially similar thereto, disseminated as aforesaid, respondent has represented directly or by implication that:

- a) When a doctor chooses margarine, chances are it's Fleischmann's;
- b) Twice as many doctors recommend Fleischmann's margarine as any other brand of margarine;
- c) Twice as many doctors personally use Fleischmann's margarine as any other brand of margarine;
- d) Twice as many doctors recommend and personally use Fleischmann's as any other brand of margarine;
- e) Every 15 seconds a doctor recommends Fleischmann's margarine.

PAR. 6. In Exhibits A through D and others substantially similar thereto, respondent has represented directly or by implication that a survey of doctors proves the representations in Paragraph Five above.

PAR. 7. In Exhibits C and D and others substantially similar thereto, disseminated as aforesaid, respondent has represented directly or by implication that:

- a) Of those doctors who recommend a polyunsaturated margarine, twice as many recommend Fleischmann's as any other brand of margarine;
- b) Of those doctors who recommend a polyunsaturated margarine,

twice as many personally use Fleischmann's as any other brand of margarine;

c) Of those doctors who recommend a polyunsaturated margarine, twice as many recommend and personally use Fleischmann's as any other brand of margarine.

PAR. 8. In Exhibits C and D and others substantially similar thereto, respondent has represented directly or by implication that the aforementioned survey proves the representations in Paragraph Seven above.

PAR. 9. In truth and in fact, the aforementioned survey, conducted for Standard Brands by William Douglas McAdams, Inc. and entitled "Marketing Insights Into Physicians' Attitudes and Opinions Concerning Lipids and Cardiovascular Disease (General Medicine)" (hereinafter referred to as the "McAdams survey"), does not prove the representations in Paragraphs Five and Seven for reasons including but not limited to the following:

a) Of those survey respondents who were asked the question, "Which brand(s) of margarine do you recommend?", most (84.5%) did not state that they recommended Fleischmann's margarine;

b) Of those survey respondents who were asked the question, "Which brand(s) of margarine do you recommend?", most (at least 67.5%) did not recommend a specific name brand of margarine;

c) Of those survey respondents who were asked the question, "Do you use margarine at home? If yes: Which brand?", most (82.2%) did not state that they personally used Fleischmann's margarine;

d) Of those survey respondents who were asked the question, "Do you use a margarine at home? If yes: Which brand?", nearly one-half (47.1%) did not state that they used margarine or were unaware of the specific name brand of the margarine they personally used;

e) The survey respondents neither were asked nor stated the frequency of their recommendations of Fleischmann's margarine to their patients or to anyone else.

Therefore, the representations referred to in Paragraphs Six and Eight were and are unfair and deceptive.

PAR. 10. In Exhibits A through D and others substantially similar thereto, disseminated as aforesaid, respondent represented directly or by implication that, in responding to the survey, respondents had used their medical expertise in recommending, using, or choosing Fleischmann's Margarine.

PAR. 11. In Exhibits A through D and others substantially similar thereto, disseminated as aforesaid, respondent represented directly

or by implication that it possessed and relied upon a reasonable basis for the representations in Paragraphs Five, Six, Seven, Eight and Ten at the time of their initial and each subsequent dissemination.

PAR. 12. In truth and in fact, respondent did not possess or rely upon a reasonable basis for the representations in Paragraphs Five, Six, Seven, Eight and Ten at the time of their initial and each subsequent dissemination. Therefore, such representations were and are unfair and deceptive.

PAR. 13. In the course and conduct of its aforesaid business, and at all times mentioned herein, respondent Ted Bates has been, and now is, in substantial competition in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, with other advertising agencies.

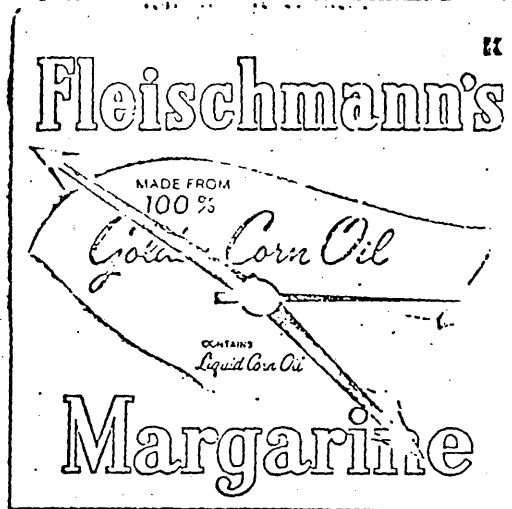
PAR. 14. The use by respondent of the aforesaid unfair and/or deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the consuming public into the purchase of substantial quantities of Fleischmann's margarine manufactured by Standard Brands.

PAR. 15. The aforesaid acts and practices of respondents, 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 or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

Complaint

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Every 15 seconds
a doctor recommends
Fleischmann's Margarine



Somewhere right about now a doctor is telling a patient to watch his cholesterol and advising him to eat sensibly. And one product he may recommend is Fleischmann's Margarine. A recent survey shows that twice as many doctors recommend Fleischmann's as any other margarine. In fact, based on the frequency with which those doctors made a recommendation, a doctor somewhere is recommending Fleischmann's Margarine every 15 seconds.

Many of those same doctors practice what they preach. The survey also showed twice as many doctors personally use Fleischmann's at home.



Fleischmann's is the only leading margarine made from 100% corn oil. Fleischmann's was part of a clinical test that lowered serum cholesterol levels an average 17%. In that test Fleischmann's was part of a total dietary program along with reduced fats, fewer eggs and skim milk.

Many doctors also recommend Egg Beaters, Fleischmann's fresh-frozen, cholesterol-free egg substitute. With Egg Beaters instead of two eggs for breakfast you can save 450 mgs. of cholesterol and still enjoy the good taste of eggs. Can you afford not to serve your family Fleischmann's?

Fine products of Standard Brands

Fleischmann's makes sensible eating delicious.

FL-15508

The advertisement features a large, stylized hash symbol (#) on the left side. To the right of the hash symbol are several boxes of Fleischmann's Margarine. The boxes are arranged in a grid-like fashion, with some boxes partially overlapping. Each box displays the Fleischmann's logo, which includes a stylized 'F' and the word 'Margarine' below it. The text 'Fleischmann's' is prominently displayed above the logo. Below the logo, the word 'Margarine' is written in a smaller font. The boxes are shown in various orientations, some upright and some tilted. The background of the advertisement is dark and textured.

More doctors use and recommend Fleischmann's than any other margarine.

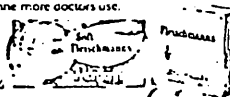
Below the headline, there is a block of small, illegible text. At the bottom right of the advertisement, there is a small circular logo featuring the Olympic rings.



**When a doctor chooses margarine,
chances are it's Fleischmann's.**

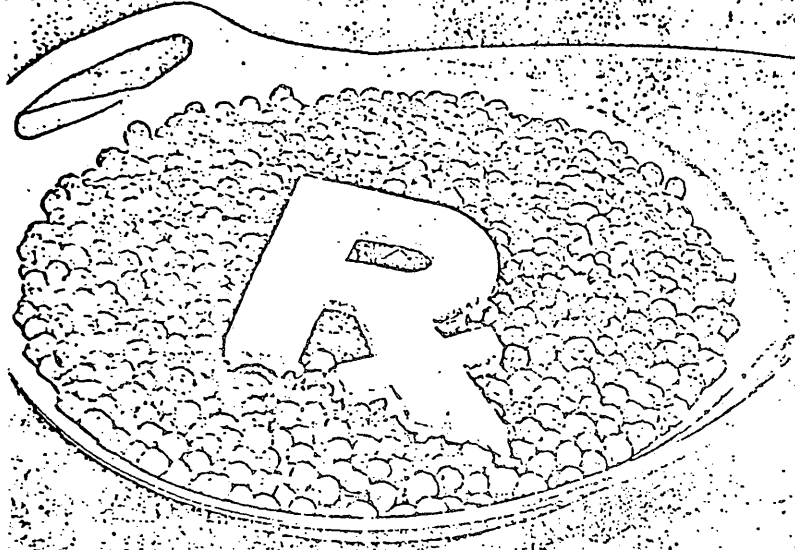
A recent survey of doctors who believe cholesterol levels can be lowered through a total dietary program proved they practice what they preach! Of those doctors who recommend a polyunsaturated margarine to their patients, twice as many recommend and personally use Fleischmann's as any other brand.

But doesn't make you reach for Fleischmann's when you shop, remember it's the only leading margarine made from 100% corn oil, 35% high polyunsaturates and low in saturated fats. Fleischmann's is ideal in a total dietary program designed to lower serum cholesterol. Canva tests show liquid corn oil is unsurpassed among vegetable oils for lowering serum cholesterol. And 100% corn oil means light, delicious flavor your family will love. Serve your family the margarine more doctors use.



Another fine product of *Standard Brands*

Is the margarine most
recommended by doctors?



a recent survey, doctors who recommended polyunsaturated margarines to their patients were asked which brand they chose. Twice as many doctors recommended Fleischmann's® Margarine as any other brand.

And twice as many personally used Fleischmann's, too.

Fleischmann's contains no cholesterol, is the only leading margarine made from 97% corn oil. And even it is low in very

Of course, you're aware that no one food will significantly reduce serum cholesterol levels. But used in a total dietary program... along with lean meats, fewer eggs and skim milk... Fleischmann's 100% corn oil margarine can help lower your patients' serum cholesterol levels.

By as much as 17% as shown in clinical tests.

And what's more, Fleischmann's has a light, delicious taste. So compliance to the

patients.

You see, like you, we believe an ounce of prevention is worth a pound of cure.



...and it's actually reducing serum cholesterol levels.

Want to see? Ask for Egg Doctors® and Fleischmann's Margarine at your favorite restaurant. Another fine product of *Standard Brands*

FLH 1312 EXHIBIT D

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of such agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Ted Bates & Company, Inc., is a corporation, organized, existing and doing business under and by virtue of the laws of the State of New York, with its executive office and principal place of business located at 1515 Broadway, New York, New York. Ted Bates/New York Division is the sole operating division of Ted Bates & Company, Inc.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent and the proceeding is in the public interest.

ORDER

Part I

It is ordered. That respondent Ted Bates & Company, Inc., a corporation (hereinafter referred to as respondent) and its successors, assigns, officers, agents, representatives and employees, direct-

ly or through any corporation, subsidiary, division or other device in connection with the advertising, offering for sale, sale or distribution, in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, of any product whose advertising account is: (1) currently or in the future assigned to Ted Bates/New York Division; or (2) currently or in the future assigned to Ted Bates/New York Division and is transferred from Ted Bates/New York Division to any subsidiary of Ted Bates & Company, Inc., do forthwith cease and desist from:

1. Making representations, directly or by implication, by reference to a survey or test of "experts" or "consumers" (as hereinafter defined in Part II of this Order), or the results thereof, concerning the performance or any characteristic, benefit, recommendation, usage or choice of or other preference for such Product, unless:

(a) such survey or test of experts or consumers is designed, executed and analyzed in a competent and reliable scientific manner; and

(b) such survey or test of experts or consumers substantiates the claim(s) represented by providing a reasonable basis therefor; and

(c) in regard to any claims of superiority based thereon, such survey test of experts or consumers establishes that such Product is superior to each compared product in respect to which the specific representation is made to a degree that will be discernible to or of benefit to consumers or potential consumers to whom the representation is directed.

2. Representing, directly or by implication, by reference to a survey or test that experts or consumers surveyed or tested:

(a) recommend such Product more often than any competing product when, in fact, an equal or greater percentage of such respondents do not recommend a specific brand of the product, without disclosing such fact(s); or

(b) use such Product more often than any competing product when, in fact, an equal or greater percentage of such respondents do not use a specific brand of the product, without disclosing such fact(s); or

(c) use such Product more often than any competing product when, in fact, an equal or greater percentage of such respondents are not aware of the specific brand of the product which they do use, without disclosing such fact(s).

3. Representing, directly or by implication, by reference to a

survey or test of experts, that experts recommend, use, choose, or otherwise prefer such Product in any respect unless:

(a) such experts in fact possess the expertise to evaluate such Product with respect to such representation; and

(b) such experts actually exercised their expertise by evaluating or testing such Product, and based their stated preferences, findings, or opinions on such exercise of their expertise; and

(c) such representation, to the extent it expresses or implies a product comparison, is supported by an actual comparative evaluation or test by such experts; and

(d) such representation, to the extent it expresses or implies that such Product is superior to competing products, is supported by an actual comparative evaluation or test by such experts and by a conclusion therefrom that such Product is superior in fact to the competing products with respect to the feature(s) so represented as compared.

4. Representing, directly or by implication, by reference to a survey or test of consumers that consumers recommend, use, choose, or otherwise prefer such Product in any respect unless and only to the extent that respondent has a reasonable basis for such representation. A reasonable basis shall consist of any competent and reliable evidence which substantiates a statement or representation.

5. Failing to maintain records

(a) which provided the basis upon which respondent relied at the time of the initial and each subsequent dissemination of the claim; and

(b) 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.

Part II

For purposes of this Order, each of the terms listed below is defined as follows:

1. The term *experts* shall be deemed to be an individual(s), group(s) or institution(s), possessing, as a result of experience, study or training, knowledge of a particular subject, which knowledge is superior to that generally acquired by ordinary individuals.

2. The term *consumers* shall be deemed to be any person(s) who is a user or potential user of the product.

3. An advertising claim which is a personal endorsement of a product reflecting solely the subjective opinion of the endorser shall not be deemed to be a test.

Part III

It shall be an affirmative defense to any compliance action brought pursuant to this Order alleging that an advertisement was, in whole or in part, unsubstantiated, or not supported by a reasonable basis, for respondent to show that, prior to disseminating an advertisement containing a statement or representation challenged in such compliance action, respondent submitted to its client in writing all the claims which it reasonably believed were contained in the advertising prepared by it and exercised due care to assure itself that the advertiser possessed and relied upon a reasonable basis for those claims.

It shall be an affirmative defense to any compliance action brought pursuant to this Order alleging that an advertisement was, in whole or in part, false, misleading or deceptive, for respondent to show that, prior to disseminating an advertisement containing a statement or representation challenged in such compliance action, respondent submitted to its client in writing all the claims which it reasonably believed were contained in the advertising prepared by it and exercised due care to assure itself that those claims were neither false, misleading nor deceptive when placed by respondent.

Provided, however, that nothing in this Order shall be deemed to deny or limit respondent with respect to any other right, defense, or other affirmative defense to which respondent may otherwise be entitled by law in such compliance action or any other action; nor shall any inference adverse to respondent be drawn in any case from its failure to invoke this paragraph or to rely on the procedures provided herein.

It is further ordered, That respondent shall, within 60 days after service upon it of this Order, file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with this Order.

It is further ordered, That respondent shall forthwith distribute a copy of this Order to the senior executive officer of each account assigned to respondent's Ted Bates/New York Division and the executive in charge of research for such Division.

It is further ordered, That respondent notify the Commission at least 30 days prior to any proposed change in the 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 this Order.

IN THE MATTER OF
STANDARD BRANDS, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3060. Complaint. March 17, 1981—Decision. March 17, 1981

This consent order requires, among other things, a New York City manufacturer of various products, including "Fleischmann's Margarine" products, to cease referring to any test or survey when making representations regarding the performance, benefit, choice or superiority of a product, unless referenced test or survey has been scientifically designed, executed and analyzed; and provides substantiation for those claims. The firm is further barred from representing that survey respondents recommend or use a particular brand of product more often than a competitive brand, unless the company discloses the fact that an equal or greater percentage of such respondents have no brand preference. Additionally, the order requires the firm to maintain, for a period of three years, records substantiating advertising claims.

Appearances

For the Commission: *Mitchell Paul and Julie Niemasik.*

For the respondent: *C. Henry Freas, Jr.,* in-house counsel.

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 Standard Brands, Inc., 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 Standard Brands, Inc. is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 625 Madison Ave., New York, New York.

PAR. 2. Standard Brands, Inc. is now, and for some time in the past has been, engaged in the manufacture, distribution, advertising and sale of various products, including "Fleischmann's Margarine" products.

PAR. 3. Respondent Standard Brands causes the said products, when sold, to be transported from its place of business in various