

IN THE MATTER OF
THE READER'S DIGEST ASSOCIATION, INC.

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

Docket C-2075. Consent Order, Nov. 2, 1971—Modifying Order, Sept. 30, 1983

This order reopens the proceeding and modifies the Commission's order issued against The Reader's Digest Association, Inc. on Nov. 2, 1971 (79 F.T.C. 696), *modified* March 12, 1974 (82 F.T.C. 1356). The modified order deletes the prohibition on use of the word "lucky" in contest promotions; allows truthful special selection claims; reinstates a conditional odds disclosure requirement to apprise consumers of their likelihood of winning; limits the recordkeeping requirement of Paragraph I.A. (7)-(9) to 3 years; and permits respondent to disclose the terms and conditions of a sales offer in its catalog instead of on order forms or return reply coupons. Further, respondent is no longer required to disclose the value of all free promotional items, but rather is prohibited from misrepresenting these items' value.

ORDER REOPENING THE PROCEEDING AND MODIFYING
CEASE AND DESIST ORDER

On March 3, 1983, the Reader's Digest Association, Inc., (Reader's Digest) requested that the Commission reopen and modify its November 2, 1971, order to cease and desist (79 F.T.C. 696), as modified on March 12, 1974 (82 F.T.C. 1356). In a letter dated June 21, 1983, Reader's Digest amended its request to ask for specific modifications it negotiated with the staff. For the reasons discussed below, the Commission reopens the proceeding and modifies the order.

The Commission's 1971 order arose from an investigation of practices Reader's Digest used in connection with its sweepstakes promotions. Respondent has used such contests to promote its magazine and book sales. The Commission's complaint alleged that Reader's Digest engaged in unfair and deceptive acts or practices, by, *inter alia*, failing to award all advertised prizes, misrepresenting contestants' chances of winning, and mailing simulated items of value. The consent order prohibited these practices, and required Reader's Digest to disclose the odds of winning all advertised prizes. In 1974, however, following the Commission's dismissal of a complaint against D.L. Blair Corp. (82 F.T.C. 252) for allegedly deceptive sweepstakes practices, the Commission deleted the odds disclosure requirement from the Reader's Digest order.

In 1975, the Commission brought a civil penalty action alleging that Reader's Digest mailed simulated checks and bonds in violation of the order. The district court, after granting summary judgment on liabili-

ty, awarded \$1.75 million in civil penalties. 494 F.Supp. 770 (D. Del. 1980), *aff'd*, 662 F.2d 955 (3d Cir. 1981), *cert. denied* 455 U.S. 908 (1982).

Reader's Digest asks the Commission to modify the order provisions governing simulated items of value, use of the word "lucky", "especially selected" representations, affirmative disclosure of the value of premium items, disclosure of the terms and conditions of its catalogue sales offers, and the duration of record-keeping requirements.

Respondent seeks the deletion of order paragraph II.C(3), which prohibits:

Using or distributing simulated checks, currency, "new car certificates," or using or distributing any confusingly simulated item of value.

Reader's Digest argues that this provision is unnecessary because such items do not in fact mislead consumers. The respondent has submitted in support of its request (1) an economic analysis discussing the value of sweepstakes advertising; (2) sample simulated items of value its competitors have used during the past year; and (3) surveys to show that consumers do not mistake the simulated items of value cited in the Commission's original complaint and in the civil penalty action as having value. From this data respondent argues that no cognizable percentage of recipients would be misled by simulated items. Reader's Digest contends that, given its competitors' frequent use of simulated items of value and the lack of any evidence that such items deceive consumers, the order provision unjustifiably hinders its ability to compete. Respondent also alleges that the prohibition violates its first amendment rights.

The Commission concludes from the surveys and other data submitted by respondent, taken together with the lack of any complaints from consumers that they have been misled, that the use of simulated items of value in advertising respondent's products is unlikely to mislead consumers. Moreover, any deception that might exist would cause only *de minimis* injury—the cost of the time necessary to open and read the materials. Because the costs that the absolute ban on simulated items of value imposes on respondent appear to outweigh any consumer benefits the ban may confer, the Commission concludes on the facts submitted that the public interest requires eliminating paragraph II.C(3).

Respondent seeks to modify paragraph I.A (4) to eliminate the absolute prohibition on using the term "lucky" in contest promotions. The provision now prohibits:

Using the word "lucky" to describe any number, ticket, coupon, symbol, or other

entry; or representing in any other manner directly or by implication that any number, ticket, coupon, symbol, or other entry confers or will confer an advantage upon the recipient that other recipients will not have or is more likely to win a prize than are others, or has some value that other entries do not have.

The company argues that banning "lucky" is unnecessary because "lucky" is "harmless puffing," and because the restriction infringes its free speech rights.

The Commission believes that the term "lucky" is not inherently deceptive and should not, therefore, be barred. The remainder of this provision as modified will be sufficient to protect consumers against false claims that they have an advantage in respondent's contests.

Respondent next requests that the Commission remove its absolute ban on claims that participants have been "especially selected" to win a prize. Paragraph I.A (3) of the order prohibits:

Representing directly or by implication that the number of participants has been significantly limited; or that any person has been especially selected to win a prize.

This provision was intended to protect consumers from being misled regarding their chances of winning a prize. Reader's Digest contends that it does in fact specially select persons to whom they send some contest mailings, so that the order improperly restricts truthful representations. Respondent seeks permission to make such truthful claims provided it discloses the odds of winning each offered prize.

The Commission believes that truthful specially-selected representations, coupled with an odds disclosure, would not mislead consumers. When the Commission previously modified this order to delete the odds disclosure requirement, the order prohibited all special selection claims. Because the Commission now modifies the order to allow truthful special selection claims, reinstating a conditional odds disclosure requirement to apprise consumers of their likelihood of winning is in the public interest.

Reader's Digest also seeks alterations to paragraph I.A (2), governing premium value disclosures, paragraph I.A (4), regarding disclosing the terms and conditions of catalogue sales, and paragraphs I.A (7)-(9), concerning record keeping. Paragraph I.A (2) now requires Reader's Digest to disclose the value of all free promotional items. Respondent argues that because such items are often bought in bulk, they may not have a readily ascertainable retail value. The Commission agrees with respondent's request to change the current order's affirmative disclosure requirement to a provision prohibiting misrepresenting these items' value. Paragraph I.A. (4) requires all of respondent's order coupons to disclose all terms and conditions of the sales offer. Reader's Digest asserts that this provision requires un-

necessarily duplicative disclosures in its catalogues. The Commission agrees that respondent can effectively disclose the required information by having a single catalogue disclosure, provided that each coupon directs consumers to the place in the catalogue at which the disclosure is located. Finally, Reader's Digest seeks to limit its record-keeping obligations in paragraphs I.A. (7)-(9) to three years; its current obligations are indefinite. The Commission agrees that three years is sufficient for its monitoring purposes, and Reader's Digest has agreed to further modify the order to allow the Commission ready access to all required contest records.

The Commission, having considered the request, has determined that Reader's Digest has submitted adequate evidence and made a satisfactory showing that changes in fact and the public interest require the Commission to reopen the proceeding and modify the order as requested, and therefore:

It is ordered, That the proceeding be, and hereby is, re-opened.

It is further ordered, That the Decision and Order issued on November 2, 1971, and modified on March 12, 1974, be, and hereby is, further modified by:

1) Substituting for paragraph 3 of subpart A of Part I of that Decision and Order the following:

(3) representing, directly or by implication, that in any sweepstakes the number of participants has been significantly limited or that any person has been especially selected to win a prize; *provided, however*, that respondent may make a truthful representation that a person has been especially selected to receive the opportunity to participate in a sweepstakes as long as with that representation (but not necessarily in immediate conjunction therewith) respondent clearly and conspicuously discloses the approximate odds of that person's winning each prize to be awarded in that sweepstakes.

2) Substituting for paragraph 4 of subpart A of Part I of that Decision and Order the following:

(4) falsely representing, directly or by implication, that any number, ticket, coupon, symbol or other entry confers or will confer an advantage upon the recipient that other recipients do or will not have, or is more likely to win a prize than are others, or has some value that other entries do not have.

3) Substituting for paragraph 7 of subpart A of Part I of that Decision and Order the following:

(7) failing, for two years after the conclusion of the promotional

device, to furnish to any requesting individual a complete list of names of winners of all prizes having a retail value of \$15 or more, together with the city and state of, and prize won by, each.

4) Substituting for paragraph 8 of subpart A of Part I of that Decision and Order the following:

(8) failing to maintain for three years after the conclusion of the promotional device, and to furnish upon request to the Federal Trade Commission, adequate records (a) which disclose the facts upon which any of the representations of the type described in Paragraphs 1-7 of this order are based, and (b) from which the validity of the representations of the type described in Paragraphs 1-7 of this order can be determined.

5) Substituting for paragraph 9 of subpart A of Part I of that Decision and Order the following:

(9) failing to maintain for three years after the conclusion of the promotional device, and to furnish upon request to the Federal Trade Commission, the following:

(a) a complete list of the names and addresses of the winners of each prize, and an exact description of the prize, including its approximate value;

(b) a list of the winning numbers or symbols, if utilized, for each prize;

(c) the total number of coupons or other entries distributed;

(d) the total number of participants in the promotional device;

(e) the total number of prizes in each category or denomination which were made available; and

(f) the total number of prizes in each category or denomination which were awarded.

6) Deleting "C." from the beginning of paragraph 1 of the *It is ordered* paragraph of Part II of that Decision and Order.

7) Substituting for paragraph 2 of the *It is ordered* paragraph of Part II of that Decision and Order the following:

(2) falsely representing, directly or by implication, to any purchaser or prospective purchaser of respondent's products the value of any gift or other item furnished without charge, or at a nominal charge, or at a cost substantially below its retail value.

8) Deleting paragraph 3 of the *It is ordered* paragraph of Part II of that Decision and Order.

9) Substituting for paragraph 4 of the *It is ordered* paragraph of Part II of that Decision and Order the following:

(3) failing to disclose clearly and conspicuously on the order form, return reply coupon, or similar material the way in which persons may participate in respondent's promotional devices without making or committing themselves to a purchase, or incurring any other obligation, or agreeing to any other act or condition; or offering any product for sale when all of the terms and conditions of the offer are not explained fully and clearly and set forth conspicuously on any order form furnished with the offer to be used to order the product or, in the case of offers in a catalogue, either on such order form or elsewhere in the catalogue with a clear and conspicuous disclosure on such order form of a notice such as "See page [] for important terms and conditions to this offer."

SEPARATE STATEMENT OF COMMISSIONER PERTSCHUK

In 1971, the Commission was concerned that simulated checks included in Reader's Digest sweepstakes promotions misled consumers into believing that the checks had actual cash value. Research presented by Reader's Digest indicates that such is not the case today.

Today's action by the Commission, together with its prior civil penalty action against Reader's Digest for flagrantly violating the provisions modified today, clearly demonstrates the appropriateness of refusing to permit respondents to flout Commission orders, as well as the need to grant relief from those orders when the proper showing has been made.

IN THE MATTER OF

FOOTE, CONE & BELDING ADVERTISING, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF
THE FEDERAL TRADE COMMISSION ACT*Docket C-3116. Complaint, Sept. 30, 1983—Decision, Sept. 30, 1983*

This consent order requires a Chicago, Ill. advertising agency affiliated with Amana Refrigeration, Inc., among other things, to cease representing that only Amana microwave ovens passed independent laboratory testing conducted in 1980 and that Amana microwave ovens rated "best quality" in a 1980 consumer survey. The order prohibits misrepresentations concerning the purpose, content or conclusion of any test or survey and requires the agency to maintain accurate records which substantiate and/or contradict any claim made for products covered by this order. Further, the agency must have a reasonable basis for all future quality, safety or comparative performance representations made for microwave ovens.

Appearances

For the Commission: *Andrew Sacks* and *Joel Winston*.

For the respondent: *Elroy H. Wolff* and *Philip J. Carihfield, Sidley & Austin*, 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 Foote, Cone & Belding Advertising, Inc., a corporation, hereinafter sometimes 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 Foote, Cone, & Belding Advertising, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located in Chicago, Illinois.

PAR. 2. Respondent is now and at all times relevant to this complaint has been an advertising agency of Amana Refrigeration, Inc.

PAR. 3. Respondent has caused to be prepared and placed for publication and has caused the dissemination of advertising and promo-