It is further ordered, That respondents deliver a copy of this order to cease and desist to each operating division and to all present and future personnel of respondents engaged in the consummation of any extension of consumer credit or in any aspect of preparation, creation or placing of advertising, and that respondents secure a signed statement acknowledging receipt of said order from each such person.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents 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 corporations which may affect compliance obligations arising out of the order.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

It is further ordered, That no provision of this order shall be construed in any way to annul, invalidate, repeal, terminate, modify or exempt respondents from complying with agreements, orders or directives of any kind obtained by any other agency or act as a defense to actions instituted by municipal or State regulatory agencies. No provisions of this order shall be construed to imply that any past or future conduct of respondents complies with the rules and regulations of, or the statutes administered by the Federal Trade Commission.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

BRISTOL-MYERS COMPANY, ET AL.

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

Docket 8897. Complaint, Sept. 12, 1972 - Decision, Apr. 22, 1975

Order setting aside the initial decision of the administrative law judge and dismissing the complaint against a New York City seller and distributor of aerosol spray

anti-perspirants and its advertising agency for alleged false television demonstrations.

Appearances

For the Commission: *Lynne C. McCoy, William S. Busker* and *Charles E. Ludlam.*

For the respondents: *Gilbert H. Weil* and *Jay Sands Davis, Weil, Lee & Bergin*, New York City, for Bristol-Myers Company. *Leonard Orkin* and *Patricia Hatry, Davis, Gilbert, Levine & Schwartz*, New York City, for Ogilvy & Mather, Inc.

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 the Bristol-Myers Company, a corporation, and Ogilvy & Mather, 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 Bristol-Myers Company 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 345 Park Ave., in the city of New York, State of New York.

Respondent Ogilvy & Mather, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business located at 2 E. 48th St., in the city of New York, State of New York.

PAR. 2. Respondent Bristol-Myers Company now and for some time last past, has been engaged in the sale and distribution of Dry Ban spray anti-perspirants, which when sold, are shipped to purchasers located in various states of the United States. Thus respondent Bristol-Myers maintains, and at all times mentioned herein has maintained, a substantial course of trade in said spray anti-perspirants in commerce, as "commerce" is defined in the Federal Trade Commission Act.

Respondent Ogilvy and Mather, Inc., now and for some time last past, has been the advertising agency for Bristol-Myers Company and now, and for some time last past, has prepared and placed for publication advertising material, including but not limited to the advertising referred to herein, to promote the sale of Bristol-Myers' Dry Ban spray anti-perspirant.

PAR. 3. Respondent Bristol-Myers Company at all times mentioned herein has been, and now is, in substantial competition in commerce

with individuals, firms and corporations engaged in the sale and distribution of spray anti-perspirants of the same general kind and nature as those sold by respondent Bristol-Myers Company.

PAR. 4. In the course and conduct of its business and for the purpose of inducing the sale of the said Dry Ban spray anti-perspirant, respondents have advertised Dry Ban by means of demonstrations, and various statements used in connection therewith, in television broadcasts 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.

Said demonstrations and the statements used in connection therewith are contained in the following commercials, entitled "Rusty Rev," "Show-Up," "Dry Manhattan," "Spotty Performance," and "Glasses."

In the first four commercials, the same demonstration is used, whereby the "leading spray" and Dry Ban both are sprayed on a dark surface. The other spray appears white and thick; whereas, the Dry Ban appears completely clear and dry. At the conclusion of the demonstration, the voice-over asks, "Which do you prefer?"

In the commercial entitled "Glasses," two girls in an elevator spray Dry Ban and "a leading anti-perspirant spray" on separate eyeglass lenses. The "leading anti-perspirant spray" appears white and thick; whereas, the Dry Ban spray appears completely clear and dry. At this point, Girl #1 states, "I see the difference." The voice-over later announces, "Clear Dry Ban helps keep you feeling clean and dry."

PAR. 5. Through the use of the aforesaid demonstrations and the statements and representations used in connection therewith, respondents represent, directly or by implication, that said demonstrations are evidence which actually proves that Dry Ban is superior to competing anti-perspirant sprays because it is a dry spray that is not wet when applied to the body and because it leaves no visible residue when applied to the body.

PAR. 6. In truth and in fact:

1. Dry Ban is not a dry spray and it is wet when applied to the body, and

2. After application to the body, Dry Ban dries out leaving a visible residue.

The aforesaid demonstrations, including the statements and representations used in connection therewith, are not evidence which actually proves that Dry Ban is superior to competing anti-perspirant sprays. Therefore, the advertisements containing said demonstrations are false, misleading and deceptive.

PAR. 7. The use by the respondents of the aforesaid false, misleading and deceptive advertising and representations used in connection

therewith has had, and now has, the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that said advertising and representations were and are true, and into the purchase of a substantial quantity of respondent Bristol-Myers' spray anti-perspirant because of such erroneous and mistaken belief.

PAR. 8. 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 Bristol-Myers' competitors, and constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition in commerce, in violation of Section 5 of the Federal Trade Commission Act.

INITIAL DECISION BY DANIEL H. HANSCOM, ADMINISTRATIVE LAW JUDGE

NOVEMBER 28, 1973

ALLEGATIONS OF COMPLAINT

In a complaint served on Sept. 20, 1972, the Commission charged Bristol-Myers Company (hereinafter "Bristol-Myers") and its advertising agency, Ogilvy & Mather, Inc. (hereinafter "Ogilvy & Mather") with utilizing false, misleading, and deceptive practices in the advertising and sale of Bristol-Myers' Dry Ban spray anti-perspirant in violation of Section 5 of the Federal Trade Commission Act.

The complaint alleged that respondents promoted Dry Ban through a series of television commercials "Rusty Rev," "Show-Up," "Dry Manhattan," "Spotty Performance," and "Glasses," each of which compared Dry Ban with a "leading" competitive spray by means of a demonstration. In the first four commercials, the "leading spray" and Dry Ban were both sprayed on a surface. According to the complaint, the "leading spray" appeared white and thick, whereas Dry Ban appeared completely clear and dry. A voice asked, "Which do you prefer?" In "Glasses," two girls in an elevator sprayed Dry Ban and "a leading anti-perspirant spray" on separate eyeglass lenses. The "leading anti-perspirant spray" appeared white and thick, whereas Dry Ban appeared completely clear and dry. One of the girls then said, "I see the difference." According to the complaint, the demonstration in each of the commercials represented to the consuming public that it was evidence actually proving that Dry Ban was superior to competing anti-perspirant sprays because it was a dry spray that was not wet when applied to the body, and because it left no visible residue.

The complaint charged, however, that Dry Ban was not in truth a dry

spray, that it was wet when applied to the body, that after application it left a visible residue, and that the demonstration in each commercial was not evidence actually proving the contrary. Accordingly, the commercials and the demonstrations in each were challenged as being false, misleading and deceptive.

Bristol-Myers and Ogilvy & Mather denied these allegations in answers filed Oct. 10, 1972, and Oct. 18, 1972, respectively. After pretrial proceedings, including discovery by each side and the disposition of a number of motions and other matters, hearings on the merits were completed and the record was closed on July 5, 1973. As a result of certain contentions relating to the product coverage of the notice order advanced by complaint counsel for the first time in their proposed findings, proceedings were reopened by the undersigned on Aug. 31, 1973, on motion of respondent Bristol-Myers to permit the offer of evidence limited to the product coverage of the order proposed by complaint counsel. A hearing was held on Oct. 9, 1973, and the record was again closed on Oct. 10, 1973.

This matter is now before the undersigned for initial decision based on the allegations of the complaint, answers, evidence, and the proposed findings of fact, conclusions, and briefs filed by counsel for respondents and complaint counsel. All proposed findings of fact, conclusions and arguments not specifically found or accepted herein are rejected. The undersigned, having considered the entire record, makes the following findings and conclusions and issues the order set out at the end hereof:

FINDINGS OF FACT

Respondents

1. Respondent Bristol-Myers 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 at 345 Park Avenue, New York, N.Y. Bristol-Myers markets a wide variety of over-the-counter pharmaceuticals, cosmetics, and household products, including such well-known items as Bufferin, Excedrin, Bromo Quinine, Sal Hepatica, Vitalis, Clairol, and many others (CX 84; BMRX 2; Edmondson, Tr. 1627).[1] Respondent Bristol-Myers has since 1968 been engaged in the sale and distribution of Dry Ban spray anti-perspirant (CX 86(1)). Annual sales volume of all products by Bristol-Myers is over $1,000,000,000, and total advertising expenditures are approximately $225,000,000 (Edmondson, Tr. 1630).

2. Respondent Ogilvy & Mather is a corporation organized, existing and doing business under and by virtue of the laws of the State of New

[1] "CX" - Complaint Counsel's Exhibit; "BMRX" - Bristol - Myers' Exhibit; "OMRX" - Ogilvy & Mather's Exhibit; "Tr." - Transcript Page.

York, with its principal office and place of business at 2 E. 48th St., N.Y., N.Y. Ogilvy & Mather is one of the nation's largest advertising agencies with billings in the United States alone of $200,000,000 annually, and has handled the promotion of consumer products for many of the nation's major corporations including respondent Bristol-Myers.

3. Bristol-Myers for a considerable period has sold and shipped Dry Ban to purchasers located throughout the United States, and has maintained a substantial course of trade and commerce in Dry Ban as "commerce" is defined in the Federal Trade Commission Act. At all times mentioned in the complaint, Bristol-Myers has been, and now is, in substantial competition in commerce with individuals, firms and corporations engaged in the sale and distribution of spray anti-perspirants of the same general kind and nature as sold by respondent Bristol-Myers.

4. Ogilvy & Mather for a substantial period prepared and placed for dissemination advertising materials to promote the sale of Bristol-Myers' Dry Ban, and was the advertising agency which prepared and disseminated the commercials challenged in the complaint (CX 12, 14, 18). Ogilvy & Mather, at all times mentioned in the complaint, has been, and now is, in substantial competition in commerce with other individuals, firms and corporations engaged in the advertising business.

5. Respondents Bristol-Myers and Ogilvy & Mather have advertised Dry Ban by means of demonstrations and various statements used in connection therewith, as set out later herein, in television broadcasts transmitted by 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.

Dry Ban

6. When Dry Ban was introduced by Bristol-Myers late in 1968, it was promoted as a superior aerosol deodorant competing with such brands as Arrid, Right Guard, Secret, Avon, Mum, Mennen, and others (CX 86, 47 (18)). Spray anti-perspirant products are heavily utilized by the consuming public, and constitute the most important of all aerosol product categories (CX 85). Production of aerosol spray anti-perspirants and deodorants in 1970 amounted to 482,000,000 units obviously involving enormous consumer expenditures (CX 85(13)). Sales of Dry Ban in 1969 amounted to $7,385,000, and grew to $7,891,000 in 1970 (CX 83).

7. Dry Ban aerosol spray anti-perspirant was formulated with an alcohol base (CX 12) which looked clear when sprayed on a surface, whereas major competing brands of aerosol spray anti-perspirants then on the market were formulated with an oil base which, when sprayed

on a surface, produced an oily, opaque and whitish or creamy appearance (Mayers, Tr. 1151-1154; CX 86(6)(13); CX 75(2)).

The Challenged Commercials

8. Shortly after the introduction of Dry Ban it was determined by respondent Bristol-Myers and its advertising agency, Ogilvy & Mather, to exploit the difference between the "clear, clean" and "quick drying formula" of Dry Ban and the "oily, opaque" formula of competing brands (CX 86 (2-6); Mayers, Tr. 1150). A number of commercials were prepared for broadcast over television containing comparative demonstrations utilizing the foregoing strategy (CX 14, 17, 23-24). The five commercials listed earlier herein were ultimately selected for broadcast and were disseminated over network or spot television during the approximately 14-month period between July 28, 1969, and September 11, 1970, at a cost of $5,800,000 (CX 81). "Rusty" was broadcast over network television, "Show-Up," "Glasses," and "Dry Manhattan" were broadcast over both network and on "spot" television, and "Spotty Performance" was utilized only for "spot" broadcast (CX 82). Each contained a comparative demonstration dramatizing the difference between Dry Ban's "clear, clean" appearance and the "oily, opaque" appearance of the "leading" competing spray anti-perspirant (CX 1-5, 6-10).

9. "Rusty," "Show-Up," "Dry Manhattan," and "Spotty Performance" all contain the same demonstration. The demonstration in "Glasses" is somewhat different, although employing essentially the same concept. A film of these five commercials is contained in the record (CX 1-5), and may be viewed with a suitable projector. The commercials on CX 1-5 are identical to those disseminated by respondents for actual broadcast purposes. The "storyboards" for these commercials are also in the record (CX 6-10). "Storyboards" are utilized in the advertising industry for conveying the basic idea and theme for commercials in use or under consideration, but are not fully representative of the actual commercial broadcast (CX 12). The storyboards for "Rusty" (CX 6) and "Glasses" (CX 10) are reproduced herein. The significance of these commercials cannot be fully appreciated, however, without viewing the entire commercial as broadcast over television (CX 1-5).

10. "Rusty," "Show-Up," "Dry Manhattan," and "Spotty Performance" all contain the following sequence: After a preliminary filming of two persons in a scene meant to be humorous, the camera shows a close-up of two cans of spray anti-perspirants, the "leading" brand which is not identified and a can of Dry Ban, and the announcer states, "Compare Dry Ban to the leading anti-perspirant spray." A sequence is then shown in which the "leading" brand is sprayed on a surface over

the words "OTHER SPRAY" and the announcer states, "the leading spray goes on like this." The camera shows a whitish, creamy, and thick deposit where the "leading" brand has been sprayed. Dry Ban is sprayed on an adjacent surface over the words "DRY BAN" and the announcer states, "Dry Ban goes on like this." An apparently clear and dry area is shown where Dry Ban has been sprayed. A finger is pictured running through the deposit of the "leading" brand demonstrating it to be thick and wet. A finger is then run through the area where Dry Ban has been sprayed with no apparent effect, or one so slight as to probably escape notice. The announcer states, "Which do you prefer?" A close-up of a can of Dry Ban is then shown and the label "Dry Ban" virtually fills the television screen. Each commercial concludes with a scene of the characters shown initially singing or stating, "How dry I am" (CX 1-4, 6-9).

11. The commercial identified as "Glasses" commences with a scene of two girls and a man in an elevator. The first girl states she has a "leading anti-perspirant spray" and the second rejoins, "Me too." The second girl then adds, "But mine's Dry Ban." The first girl replies, "Mine helps you keep dry" and the second girl says, "So does my Dry Ban." The second girl then reaches up and takes off the man's glasses, to his surprise, and sprays the first

OGILVY & MATHER INC.
2 EAST 48 STREET, NEW YORK 10017
MURRAY HILL 8-6100

Client: BRISTOL-MYERS
Product: DRY BAN
Title: "RUSTY REV."
Commercial No.: OMO7-02224-30C
Date Approved: 8/14/69

1. GIRL: Dance?

2. MAN: Oh no, I'm a little rusty.

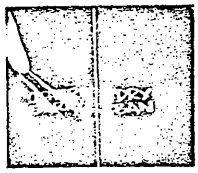
3. GIRL: C'mom... MAN: No-no.

4. I forgot to use Dry Ban Anti-perspirant -

5. and (SFX) I'm a little rusty. (LAUGHS) (MUSIC)

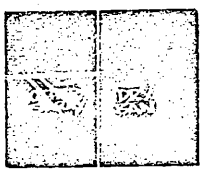
6. ANNCR: (VO) Compare Dry Ban to the leading anti-perspirant spary.

7. Both help keep you dry,

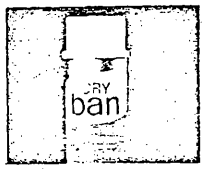


8. but the leading spray goes on like this.

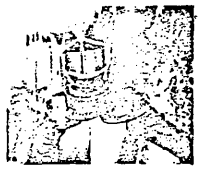
9. Dry Ban goes on like this.



10. Which do you prefer?



11. Dry Ban helps keep you feeling clean and dry.



12. MAN AND GIRL: How dry I am.

OGILVY & MATHER INC.
2 EAST 48 STREET, NEW YORK 10017
MURRAY HILL 8-8100

Client: BRISTOL-MYERS
Product: DRY BAN
Title: "GLASSES"
Commercial No.: OMO7-02226-30C
Date Approved: 8/69

1. (SFX)

2. GIRL #1: Guess what I just happen to have? GIRL #2: What?

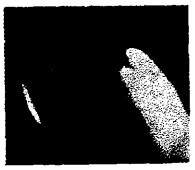
3. GIRL #1: A leading anti-perspirant spray.

4. GIRL #2: Me too.

5. But mine's Dry Ban.

6. GIRL #1: Mine helps keep you dry.

7. GIRL #2: So does my Dry Ban. Watch. Yours goes on - (SFX) like this.



8. My Dry Ban goes on - (SFX) like this.

9. GIRL #1: Uhh...hmm... I see the difference.

10. I...I'll try it on my boss' glasses.

11. ANNCR: (VO) Clear Dry Ban helps keep you feeling clean and dry.

girl's anti-perspirant on one of the lenses saying, "Yours goes on * * * like this." A whitish, creamy, and thick deposit is shown covering most of the lens where the "leading anti-perspirant" has been sprayed. The second girl then sprays Dry Ban on the other lens saying, "My Dry Ban goes on * * * like this." The camera shows a close-up of the lens where Dry Ban has been sprayed revealing it to be clear and apparently dry, without a visible deposit. The first girl then says, "Uhh * * * hmm * * * I see the difference (CX 5, 10).

Representations Inherent in Challenged Commercials

12. "Rusty," "Show-Up," "Dry Manhattan," "Spotty Performance," and "Glasses" had the capacity to convey to members of the viewing public the net impression (1) that Dry Ban was a dry spray that was not wet when applied to the body; (2) that it left no discernible or visible residue after application to the body; (3) that viewers were seeing a comparative demonstration proving that Dry Ban in fact possessed those physical characteristics; and (4) that Dry Ban was superior to competing anti-perspirant sprays because of them.

13. The spraying of the "leading" spray in "Rusty," "Show-Up," "Dry Manhattan," and "Spotty Performance" onto a surface labeled in the center "OTHER SPRAY," the thick and whitish spray deposited thereon, the spraying of Dry Ban on an adjacent surface labeled conspicuously in the center "DRY BAN," the clear and transparent look resulting, the absence of apparent wetness where Dry Ban was sprayed, the name of the product "Dry" Ban, the presentation of the can itself conspicuously on the television screen in a close-up emphasizing the label "Dry Ban," the repeated use of the word "dry" in both audio and visual portions of the commercials, the running of a finger through the deposit left by the "leading" spray proving its thick, wet, and creamy quality, the running of a finger across the surface where Dry Ban had been sprayed showing virtually no visible result, all collectively had the tendency and capacity to represent to the viewing public that Dry Ban was dry, went on dry and left no discernible or visible residue on application, and that a real demonstration was taking place actually proving those characteristics, and the superiority of Dry Ban because of them. "Glasses" likewise had the foregoing tendency and capacity. In "Glasses," the "leading" spray was shown to be thick, wet, and creamy, with a heavy residue. In contrast, Dry Ban was seen to be clear and transparent, in fact, practically invisible with little or no sign at all of wetness or of any deposit on the glasses' lens. As in the foregoing four commercials, the word "dry" was repeated many times in the voice accompaniment, and the can showing "Dry" Ban was held up prominently at the end. Holding the pair of glasses up after spraying them revealed to the television audience that it was impossible to see

through the glasses' lens which had been sprayed with the "leading" spray, although the lens which had been sprayed with Dry Ban was clear and without a deposit.

The fact that the statements and representations in the commercials may also have had the ability to communicate the message that Dry Ban was "clear" or "non-greasy," or helped "keep you dry," did not in any way negate the fact that the representations were communicated that Dry Ban was superior to competing products because it was *in itself* dry and went on dry, and left no visible residue on application to the body. It is possible for a commercial to be subject to several different interpretations by the public. The conclusion that the challenged commercials had the tendency and the capacity to convey the foregoing representations, and that viewers were being shown demonstrations actually proving those representations, is made on the basis of the contents of the commercials themselves, and the viewing thereof by the administrative law judge. There is, however, an abundance of confirming evidence in the record.

Concept of Demonstration in Challenged Commercials Exploiting Differences in Formula of Dry Ban and Competing Anti-perspirants

14. The basic alcohol formula for Dry Ban, as stated, differed from competing anti-perspirant deodorants at the time of the introduction of Dry Ban, and during the period when the commercials challenged in the complaint were broadcast over network and spot television, or otherwise disseminated. A contemporary memorandum from Ogilvy & Mather to an official of Bristol-Myers stated:

> * * * the basic formula of DRY BAN differs from other leading anti-perspirant sprays, (Secret excepted) the DRY BAN spray appears quite different when applied to a clean surface (CX 23).

Dry Ban appeared to be "clear, clean" while the others appeared "oily, opaque" and "creamy" (CX 15, 17, 74, 75, 86 (6-14); BMRX-6; Mayers, Tr. 1150-54). The "clear, clean" appearance of Dry Ban in contrast to the "oily, opaque" and "creamy" appearance of competing spray anti-perspirants formulated with an oil base held true whether the surface on which such deodorants were sprayed was plastic, skin, or something else (CX 17).

15. The difference in appearance between Dry Ban and competing spray anti-perspirants formulated with an oil base was uniquely subject to a comparative demonstration *on film* which had the capacity to convey a false, misleading, and deceptive impression of the true physical characteristics of Dry Ban. A *live* comparative demonstration in which Dry Ban and an oil base competing spray anti-perspirant are sprayed in juxtaposition results in the perception of Dry Ban as watery, wet, and runny (CX 76; Tr. 845-849).

16. Respondent Bristol-Myers and its advertising agency, Ogilvy &

Mather, concluded that television commercials incorporating a demonstration of the "clear, clean" characteristic of Dry Ban due to its alcohol base in contrast to the "oily, opaque" and "creamy" appearance of a competitive brand might prove an effective advertising device to persuade members of the public to purchase Dry Ban (Mayers, Tr. 1150-56; CX 86(2)). It was determined by respondents to replace the prior advertising strategy by a filmed demonstration of the difference between Dry Ban's "clear, clean" appearance and the "oily, opaque" and "creamy" appearance of a leading competitive brand (CX 56, 57, 86(7)). The president of Bristol-Myers Products Division testified:

> The idea of the demonstration was my concept. I had final approval of the commercials before they were put on the air (Mayers, Tr. 1150).

17. Although the basic concept and the representations made in "Rusty," "Show-Up," "Dry Manhattan," "Spotty Performance," and "Glasses" exploiting Dry Ban's appearance versus that of a leading competitive brand of spray anti-perspirant was developed by respondent Bristol-Myers, the senior vice-president of Ogilvy & Mather wrote that his organization:

> * * * took the concept from its earliest stages to the finished production in an effort to dramatize the Bristol-Myers supplied product difference (CX 18).

Preliminary Testing by Respondents of Demonstration Exploiting "Clear, Clean" Formula of Dry Ban Versus "Oily, Opaque" And "Creamy" Formula of Competing Anti-perspirants and Results Disclosed

18. The concept of a television commercial utilizing a demonstration exploiting the "clear, clean" appearance of Dry Ban and contrasting it to the "oily, opaque" and "creamy" appearance of a leading competitive brand was initially tested with members of the consuming public. In a letter from a member of the Ogilvy & Mather organization to the Dry Ban "Product Manager" of respondent Bristol-Myers, it was reported that on Apr. 9 and 10, 1969, forty persons had been interviewed in a mobile van placed in a shopping center in Manhasset, N.Y. (CX 23, 75(3), 105). These consumers had been individually shown a videotape demonstrating the effect of spraying unidentified Dry Ban and another unidentified spray anti-perspirant on a flat piece of glass. The videotape demonstration (CX 75(23-24)), similar in essential respects to the demonstration contained in the challenged commercials, was reported by Ogilvy & Mather to Bristol-Myers in a research report entitled "A Communication Test Of The Dry Ban 'Greasy' Demonstration" to constitute in advertising an effective "reason why" consumers should purchase Dry Ban (CX 75(2)). A significant proportion of viewers preferred Dry Ban because it was perceived from the demonstration to be "Cleaner/Clearer/Invisible" and "Leaves No Film/Residue" (CX 75(9)).

19. On May 15 and 16, 1969, another test, this time by Schrader Research and Rating Service (Schrader, Tr. 217-19, 230), was conducted of a videotape demonstration of the clear formula of Dry Ban, labeled for the purpose of the test "Clear and Dry" and the competitive "creamy" or "greasy" formula. The test was conducted in a mobile van parked in a shopping center in the vicinity of New Brunswick, N.J. (CX 74(3-4)). The van was staffed by interviewers recruited by the Schrader organization for the purpose (Tr. 257). A questionnaire, previously prepared by the research department of Ogilvy & Mather (Tr. 230-31), was provided these interviewers who were briefed on the project. Women shoppers at the center were individually invited into the van to view the videotape and, immediately after seeing the film, were asked the questions contained in the questionnaire and their answers were recorded. A second and related test utilizing a pictured demonstration in a printed advertisement was conducted on May 22 and 23, 1969. The printed advertisement was shown to each woman volunteer and she was permitted to examine it for as long as she wished. It was then removed from sight, the woman volunteer was asked the questions in the questionnaire and her answers were recorded. Approximately 100 women were included in the test utilizing the videotape, and approximately 100 were shown the printed advertisement (CX 74(3-5)). Upon the conclusion of the test utilizing the videotape and the test with the printed advertisement, the responses of the two hundred women were noted, and the results were transmitted to Ogilvy & Mather (Tr. 263-64).

20. On receipt of the results from the Schrader organization, the Research Department of Ogilvy & Mather in June 1969 prepared a report for Bristol-Myers (CX 74; Tr. 425-27, 518) advising that, after seeing the videotape demonstration, the biggest advantages of "Clear and Dry" (Dry Ban) named by the women were that "it is clear and it is dry" (CX 74(8)). Table 3 of this report shows that a significant number of the women who viewed the videotape demonstration liked "Clear and Dry" (Dry Ban) because, among other things, they perceived the representation conveyed by the demonstration to be "It's dry" (CX 74(14)). Ogilvy & Mather likewise reported to respondent Bristol-Myers that a significant number of the women who were shown the printed advertisement picturing the demonstration also perceived the message conveyed about "Clear and Dry" (Dry Ban) to be "It's dry" (CX 74(14)).

21. Thereafter, still another van test was conducted on July 2, 1969, in a Philadelphia shopping center. It was reported in the letter, mentioned earlier, reviewing "DRY BAN Copy Research" from Ogilvy & Mather to Bristol-Myers that interviews had been conducted with 50

women who had been shown the "clear, clean" versus "oily, opaque" videotape demonstration, which had been inserted into a Dry Ban commercial known as "Laplanders." The objective of this consumer test was to determine whether the demonstration could effectively communicate Dry Ban's superiority over competition in the area of "dryness," and "being better for clothes." Ogilvy & Mather reported to the Bristol-Myers Dry Ban "Product Manager":

> Two-thirds of the women said the biggest difference between the competitive product and BAN is the dryness. Almost one-half of the women conveyed "BAN is dry" as the main idea of the commercial (CX 23(3)).

22. Preliminary testing of a demonstration basically like the demonstration ultimately used in "Rusty," "Show-Up," "Dry Manhattan," "Spotty Performance," and "Glasses" thus disclosed that a significant and substantial proportion of viewers, among other communications, derived the message that Dry Ban was a dry spray, went on dry (like a powder), and left no film or visible residue on the body.

Testing by Respondents of Finished Commercials Utilizing "Clear, Clean" Versus "Oily, Opaque" Demonstration and Results Disclosed

23. A demonstration similar in essentials to that tested preliminarily, as set out in the prior findings, exploiting the difference in a film of the appearance of Dry Ban when sprayed on a surface and the appearance in the film of the "leading" spray anti-perspirant, was incorporated into "Rusty," "Show-Up," "Dry Manhattan," "Spotty Performance," and "Glasses." These commercials were of short duration lasting 30 seconds, and were prepared for broadcast in the course of network television programs or as "spot" commercials. The foregoing four were completed and approved during July 1969 (CX 1-4, 6-9), and "Glasses" was completed in Aug. 1969 (CX 5, 10).

24. These commercials, and certain others employing either the identical demonstration or one essentially similar, see, *e.g.*, "Your Move" (CX 60(29)), "Spokeswoman" (CX 65(19)), and "Showcase" (CX 71(21)), were evaluated by Ogilvy & Mather, utilizing the Schrader organization, already mentioned, and two other advertising and market research firms, H. D. Ostberg Associates, Inc., and N. T. Fouriezos & Associates, Inc. (see Schrader, Tr. 246; Ostberg, Tr. 15; Rosen, Tr. 320). Each of these organizations submitted the results of their consumer tests to Ogilvy & Mather. In the case of the Schrader organization, such results consisted primarily of completed consumer interviews (Schrader, Tr. 263), whereas the Ostberg and Fouriezos organizations submitted full research reports (Sapirstein, Tr. 497-499, 509-11; CX 45, 47, 50, 58, 63, 66, 70). On receipt of the results of the testing performed by the Schrader, Ostberg and Fouriezos organizations, respondent Ogilvy & Mather prepared reports for Bristol-Myers on the commer-

cials or demonstrations being evaluated, and incorporated therein the results and information supplied by those firms (CX 23, 56-57, 59-61, 65, 67, 69 and 71).

25. The Schrader organization tested "Glasses" (CX 5, 10) in a shopping center in New Jersey pursuant to working arrangements with respondent Ogilvy & Mather (CX 61; Tr. 232-35, 246, 266-69). A mobile van was parked in a center, and 50 to 60 women shoppers (CX 61, 61(7)) found there were invited to view "Glasses." The commercial was shown to each of these women individually (Schrader, Tr. 250-53) and, immediately upon completion of the viewing, an interviewer asked the questions contained in a questionnaire previously prepared jointly with Ogilvy & Mather (CX 61(11-14)) concerning the messages communicated (Tr. 250-54). Among the questions were inquiries such as: "What do you think was the main idea of the commercial? In your own words, what do you think the manufacturer was trying to tell you in order to get you to try Ban?" (CX 61(12); Tr. 232-33). The answers to the questionnaires were written down and also were tape recorded (Tr. 256-58). The completed questionnaires and all tapes were transmitted to respondent Ogilvy & Mather (Tr. 272-73). The results were then tabulated (Sapirstein, Tr. 443) in a series of handwritten pages and were submitted to respondent Bristol-Myers with a covering letter of Sept. 26, 1969 (CX 61).

26. The Schrader test results transmitted by respondent Ogilvy & Mather to respondent Bristol-Myers by letter of Sept. 26, 1969, reported that most women who viewed "Glasses" saw that commercial as communicating the message "Ban is Dry," and that this quality was seen as an "advantage" and "meaningful." According to the handwritten report submitted by Ogilvy & Mather, "Glasses" "got the point across" that "Ban is dry." After seeing "Glasses," the women viewers, among other characterizations, "most frequently described" Ban as "Dry/not wet" and "Not messy (filmy)" (CX 61(5)). A large majority of the women viewing "Glasses" translated "Ban's dryness into personal terms," half doing so "spontaneously" (CX 61(6)). The "leading" spray anti-perspirant competing with Dry Ban was seen as "wet/watery/runny" (CX 61(5)). The Ogilvy & Mather representative advised Bristol-Myers that "Based upon this morning's meeting, it was decided to go national with 'Glasses':30 until we have the results of the on-air and R.E.A.P. tests" (CX 61). Various officials and representatives of respondent Bristol-Myers and respondent Ogilvy & Mather were sent copies (Sapirstein, Tr. 426, 449).

27. In the fall of 1969, pursuant to arrangements with Ogilvy & Mather, H. D. Ostberg Associates, Inc. conducted consumer surveys on "Glasses," "Rusty," and "Your Move." The latter had the same

demonstration as "Rusty," "Show-Up," "Dry Manhattan", and "Spotty Performance," but was never commercially used over television. These tests were quite similar to the van tests conducted by the Schrader organization except that the viewers who were shown the commercials were questioned approximately twenty-four hours later, rather than immediately after seeing the commercial in the van (CX 47, 50, and 63; Tr. 38-40). Such tests are known in the industry as "R.E.A.P." tests. In these tests, vans were located in shopping centers in the metropolitan areas of Philadelphia, Chicago, and Los Angeles. Members of the public, predominantly women who used spray anti-perspirants, were surveyed. Ladies were invited into the mobile van, and were individually shown three commercials, one of which was the Dry Ban commercial. Thereafter, within twenty-four hours, they were recontacted by telephone and questioned about what they had seen. The answers to the questions asked (see, *e.g.*, CX 47(25), (33), (38-41)) were recorded by the telephone interviewer. When all the telephone interviews had been completed, the Ostberg organization analyzed the responses, grouped them within a number of categories ("codes") (Examples: CX 47(8), CX 50(9)), and transmitted research reports to respondent Ogilvy & Mather. The reports set out the results of the tests in a series of tables with such headings as "Persuasion," "Copy Recall," "Reaction to Claims," "Brand Usage," "Main Difference Between Deodorants," "Way In Which Commercial Showed Ban To Be A Better Product," etc.

28. The research report evaluating "Rusty" submitted by the Ostberg organization to respondent Ogilvy & Mather in Sept. 1969 advised that 16 percent of the members of the public who were shown "Rusty," and who were interviewed by telephone within twenty-four hours, believed that the message communicated by this commercial was that the main difference between the two anti-perspirants shown in the demonstration in the commercial was that "Ban sprayed on dry (like a powder); starts dry, dries immediately" (CX 47(22)).

29. The research report evaluating "Glasses" submitted by the Ostberg organization to respondent Ogilvy & Mather in Nov. 1969 stated under "Correct Copy Point Recall" that 15 percent of those seeing this commercial thought that it conveyed the message that Dry Ban "Leaves no film; is clear, clean," and 14 percent thought it conveyed the message that Dry Ban "Sprays on dry" (CX 50(9)). According to this Ostberg report, 14 percent of those viewing "Glasses" had a "Correct Visual Recall (net)" of the "Glasses" commercial as communicating "Ban spraying on dry, going on dry" (CX 50(10)). The message perceived by 15 percent of the viewers contacted twenty-four hours later by telephone was that "Glasses" showed the main difference between the two deodorants to be that Dry Ban "Sprays on

dry, goes on dry," and 9 percent saw the message of "Glasses" to be "Ban is clean, leaves no film, is clean" (CX 50(14)).

30. A similar research report was submitted by the Ostberg organization to respondent Ogilvy & Mather on "Your Move" in Nov. 1969. "Your Move" was prepared for commercial broadcast over television by respondents, as noted, but was never so utilized. It was offered by complaint counsel and was received on the issue of the "intent" of respondents. The storyboard for "Your Move" is in the record (CX 60(29)). As stated, "Your Move" utilized the identical demonstration found in the first four commercials listed in the complaint. As in the case of the surveys conducted on "Rusty" and "Glasses," "Your Move" was evaluated by the Ostberg organization through a survey of consumers in shopping centers in Philadelphia, Chicago, and Los Angeles. The Ostberg organization reported to respondent Ogilvy & Mather that 18 percent of those who saw "Your Move" received the message that Dry Ban "Sprays on dry," and 9 percent perceived "Your Move" as conveying the message that Dry Ban "Leaves no film; is clear, clean" (CX 63(9)).

31. On Sept. 15, 1969, the Research Department of Ogilvy & Mather transmitted a report to respondent Bristol-Myers evaluating the commercial "Rusty," and incorporated in this report the results obtained by the Ostberg organization from the consumer surveys conducted in the Philadelphia, Chicago, and Los Angeles shopping centers. The report noted that approximately 200 women had been interviewed in Aug. 1969 in those three locations after having been shown "Rusty." Under "Communication of Ideas," respondent Ogilvy & Mather advised Bristol-Myers that "The idea that BAN is *in itself* dry, from the 'demonstration' section of the commercial, was recalled by one-quarter of the women, mostly in the general sense of either 'BAN is dry' or simply labeled 'Dry BAN' (16 percent)" (emphasis in original; CX 57(4)). The report also advised Bristol-Myers that when directly asked the point of the demonstration, that is, what was the main difference between the two anti-perspirants in the commercial, one-third of those recalling a difference (16 percent of total) said "BAN sprays on dry" (CX 57(6-7)). In the tables accompanying this report, Bristol-Myers was informed by Ogilvy & Mather that 16 percent of those who were interviewed by telephone 24 hours after viewing "Rusty" thought the main difference between the two anti-perspirants was that "BAN sprays on dry (like a powder/dries immediately)" (CX 57(15)).

32. On Dec. 5, 1969, the Research Department of respondent Ogilvy & Mather forwarded to respondent Bristol-Myers a report on the Ostberg organization's copy test of "Glasses" and "Your Move" (CX 60).

Ogilvy & Mather reminded respondent Bristol-Myers that "Glasses" and "Your Move" were two new demonstrations for Dry Ban, and had been "created with the primary objective of communicating that 'BAN is dry' and goes on clean and clear" (CX 60(3)). Bristol-Myers was advised that "Glasses" was "more successful" than "Rusty" in communicating the "primary copy point" that "Ban is dry." Before setting out specific data in a series of tables, Ogilvy & Mather advised Bristol-Myers (CX 60(9)):

In conclusion, therefore, we feel that "Glasses" is the most effective commercial compared to "Rusty" and "Your Move." Not only is "Glasses" a powerful execution in terms of persuasion but it also best communicates the new BAN strategy-"BAN is dry."

Ogilvy & Mather reported that 34 percent of those who viewed "Glasses" and "Your Move" specifically mentioned that "Ban is dry," whereas for "Rusty" the comparable level was 24 percent (CX 60(6)). Additionally, Bristol-Myers was informed that the major difference perceived by viewers between the two anti-perspirants shown in "Glasses" was that "Ban is dry," and that the "most common visual mention for 'Glasses' consisted of 'BAN spraying on clearly, not filmy' " (CX 60(7)).

33. The Ostberg organization transmitted to respondent Ogilvy & Mather completed questionnaires obtained by telephone interviews within 24 hours with those who had been shown the Dry Ban commercials in the shopping centers in Philadelphia, Chicago, and Los Angeles, together with typed "verbatim" responses of those interviewed (Sapirstein, Tr. 499). These "verbatim" responses were incorporated by Ogilvy & Mather into some of their research reports to respondent Bristol-Myers (see, *e.g.*, CX 60(48-56)), and bear directly on the allegations of the complaint.

34. The following are some of the verbatim responses transmitted by respondent Ogilvy & Mather to respondent Bristol-Myers of members of the public who were interviewed by the Ostberg organization within 24 hours after being shown "Glasses." These reveal unmistakably that many of those interviewed received the communication from "Glasses" that Dry Ban was dry and not wet when applied to the body, and after application left no visible residue (CX 60(48-56); emphasis added):

It keeps you dry all day. It's new and improved and has some chemical to do so. Stay dry all day long and yet have no odors. This lady showed it sprayed on something, and *how you wouldn't even see it.* It sort of dissolved before it even hit the object. * * *

Ban *sprayed on dry - not wet.* * * * Ban wasn't messy or runny* * *

Sprays on dry, but you have to use it sometimes twice a day.

Put on man's glasses *to show how dry it was. Goes on dry* - stays dry.

Sprayed on glasses on man in elevator. *Dry and clear.*

Used man's glasses *to show difference of dry and wet.* Try it to stay dry.

Has no film when you put it on. A lady spraying man's glasses. *It goes on dry.*

Dry - not wet. Glasses - *one wet, one dry.* Keeps you dryer.

One was foggy and one was *clear** * *

Ban is clear. Brand X is pasty and sticky. It dries faster. Woman spraying it on a man's glasses in elevator. *One is clear.*

Dry Ban keeps you dry. Sprays glasses on man to show the difference. *Goes on dry.*

That it's the new Dry Ban. *It goes on dry* and keeps you dry longer.* * *

A woman grabbing man's glasses. Ban stresses the dry aspect.

The girls put Ban and another deodorant on eyeglasses. The other deodorant was wet and sticky, *but Ban was dry** * *

They used a pair of men's eyeglasses. *Ban didn't leave a film, whereas the other brand did. It doesn't leave a film on my skin* where other brands do.

Women in the elevator with a man wearing glasses. The glasses are removed and each lens is sprayed with a different deodorant. *Ban leaves the lens clear* and *the other one makes the lens filmy.*

It doesn't rub off and it *sprays on clear.* They sprayed it on a glass to show it was clear. That *it didn't leave a residue* on your clothes. It keeps you dry.

The gals were taking off a guy's glasses and spraying their deodorant on them. *One was wet and the other was dry. Ban was the one that was dry.* The other deodorant was drippy. *Ban is dry - not drippy.*

The other product was sticky and *Ban was clear.* Two women in an elevator spraying eyeglasses to show the difference. *It wouldn't show under your arm.*

* * * It goes on *in a dry spray* and stays that way.* * *

One is dry and the other a liquid. Ban is the dry one and the other one is wet and messy. A lady sprayed the two onto a pair of glasses and the *Ban went on and stayed dry* while the other one was all runny. That it is new and improved.

That it's a new Dry Ban *that goes on dry* and remains dry. It's an anti-perspirant type of a product. *Ban goes on dry.** * *

Ban sprays on clear and *doesn't leave a film.* In an elevator, they sprayed Ban on a man's glasses to show it *left no film.** * *

The girls took a pair of glasses off a man and they sprayed one lens with Ban and the other with another deodorant. Dry Ban was clear and didn't cloud. The other deodorant clouded the lens. It compared Ban with another product. *Ban didn't leave a residue.*

It didn't go on sticky. *It went on dry.* Three people in an elevator. Women were talking about underarm deodorant. They each had a bottle with them. They demonstrated on eyeglasses. *It doesn't go on wet. It goes on dry.*

Two women sprayed deodorant on some glasses. Both were extra dry deodorants. *Ban went on dry.* The other went on foamy. A poor guy's glasses were sprayed with the Ban and another deodorant. *Ban went on dry.*

One woman tells another that she bought the wrong kind of deodorant. Two women on an elevator. They put Ban on a person's glasses. One one side *it went on dry. You couldn't see it on the glasses.* That was Ban. The other side was foamy. *You would stay dry if the deodorant went on dry in the first place.*

A man's glasses. They tested the two deodorants. One side was filmy. *Ban didn't leave a film.*

Ban was extra-dry. In elevator. They took glasses and sprayed them with two deodorants. One was messy, *one was dry.** * *

It keeps you fresher and drier longer. Not sticky. Two girls and a man in an elevator. They sprayed some on his glasses and *there wasn't any film.* It's effective.

A lady said she used Ban and another lady said she used another brand. They sprayed two eyeglasses with Ban and a nameless product. *Ban left no trace at all.* The other left a trace on the lens. It is the best on the market.

It goes on dry. They sprayed it on glasses to show the difference.

It's new Dry Ban. They have added something to it that *makes it go on dry* and remain dry all day long.* * *

Clear and dry. A man's glasses being sprayed to show the clearness. Ban went on clearer.

It's new Dry Ban that keeps you dry and free from perspiration, wetness and odor for a longer period of time. This lady used it on glasses. She sprayed it on and *the Ban you didn't even see, but the other one ran all down the lens.* It was messy compared to Dry Ban. *It's dry* and not at all messy feeling.

It's supposed to go on dry and keep you dry from then on. *They sprayed it on and it was dry. Another brand was wet. That was the difference.* That it keeps you dry after it goes on.

Dry powder going on to keep you drier. Spraying it on a man's glasses.

Other deodorant was wet and Ban was dry. They sprayed it on glasses to show the difference. It keeps you dry longer.

Ban was drier than other deodorant. Using a man's glasses in an elevator. *Goes on dry.*

Extra dry. *It sprays on dry.*

It's new, Dry Ban. It's in a new form with a new ingredient. *They sprayed glasses and the Ban showed nothing,* but the other brand was runny. It's not a messy, runny spray. It's new *and dry when you put it on.*

It's an extra dry deodorant. When you apply it, *it goes on dry and remains that way. It doesn't run and leave any film that can be messy* or itchy until it dries, or even after, for that matter. It's dry, if you like dry deodorants.

35. In Jan. 1970 and Mar. 1970, respondent Ogilvy & Mather submitted reports to respondent Bristol-Myers providing the results on two additional commercials: "Spokeswoman" and "Showcase." The storyboard for the former is in the record as CX 67(22), and for the latter, as stated, is CX 71(21). The demonstrations utilized in both of these commercials were quite similar to the demonstrations contained in the commercials identified in the complaint (CX 1-5; CX 6-10). These two reports (CX 67, 71) were offered by complaint counsel and received on the issue of the "intent" of respondents to communicate to members of the public that Dry Ban was a dry spray that was not wet when applied to the body, and that it left no visible residue when applied to the body.

36. In the report on "Showcase" (CX 71), Ogilvy & Mather advised Bristol-Myers that a significantly greater proportion of respondents viewing that commercial were able to "play back the major copy message, i.e., that 'BAN is dry' " (CX 71(4)). Ogilvy & Mather noted that this difference "may be influenced by the fact that at the time 'Showcase' was tested the 'Demonstration' strategy had been on-air for several months in a similar executional format (i.e., 'Glasses'), whereas no 'Demonstration' commercial had been aired prior to testing 'Glasses' " (CX 71(4)). In the same report Ogilvy & Mather advised Bristol-Myers that 60 percent of viewers were able to "playback at least one visual feature" of "Showcase" and that (CX 71(6)):

"BAN spraying on dry/going on dry" (20%) and "BAN spraying on clearly/not filmy" (20%) were the most frequently mentioned visuals."

37. In Apr. 1970 Ogilvy & Mather reported to Bristol-Myers on a new commercial "What Are We Doing" advising that the major copy point was that Dry Ban keeps you dry whereas (CX 69(3)):

"Glasses" major point is to communicate that BAN *IS* Dry.

38. In the report on the commercial "Spokeswoman" (CX 67(22)), Ogilvy & Mather informed Bristol-Myers that this commercial was "particularly successful in communication of the major copy message 'Ban is dry' " (CX 67(5)). Ogilvy & Mather stated (CX 67(5)):

"Spokeswoman" was particularly successful in communication of the major copy message "Ban is dry." Playback of this message in "Spokeswoman" was almost twice as high (62%) as in "Glasses" (34%) and "Your Move" (34%) indicating that the "Spokeswoman" demonstration is a very clear and understandable one.

39. In addition to the consumer surveys conducted by the Schrader and Ostberg organizations, respondent Ogilvy & Mather utilized N. T. Fouriezos & Associates, Inc., already mentioned, for "on-air" testing (Rosen, Tr. 310). This type of survey utilized the technique of "splicing" the commercial to be tested into a specific program broadcast over television in a specific city. Thereafter, within 24 hours telephone interviews were conducted with people who viewed the program containing the test commercial (Rosen, Tr. 321). In the work done for Ogilvy & Mather, the commercial "Rusty" was incorporated into the "Doris Day" show (CX 45(18); CX 56(15)), and broadcast in the metropolitan areas of Denver, Kansas City, and Hartford (CX 45(2)). Thereafter, names were selected on a random basis from the telephone directory and the persons were called to see if they had seen the "Doris Day" show into which the test commercial had been "spliced." If so, the person was questioned as to the messages, if any, perceived from the commercial "Rusty" (Rosen, Tr. 319-327). In this manner 108 housewives (CX 56(15)) in the foregoing three cities, Kansas City (37), Denver (18), and Hartford (53), were telephonically interviewed. The replies of the housewives were recorded on a questionnaire (CX 56(37-40)), and the completed questionnaires were tabulated and submitted to respondent Ogilvy & Mather (Rosen, Tr. 316-17, 320-335; CX 56). The latter prepared a report which it submitted to respondent Bristol-Myers, evaluating "Rusty" from a number of standpoints. Attached to the report were the verbatim responses obtained by interviewers from the housewives telephoned (CX 56(30-33)). Each represented a verbatim comment reflecting a communication received from "Rusty" (CX 56(29)).

40. The following are verbatim responses transmitted by respondent Ogilvy & Mather to respondent Bristol-Myers of some of those who were interviewed by the Fouriezos organization within 24 hours after seeing "Rusty" on the "Doris Day" show (CX 56(15)(30-33). The

verbatim responses represented recall of communications which "definitely" came from "Rusty" (CX 56(30); emphasis added):

One kind not Ban was sprayed on and there was a line. Then Ban was sprayed and with Ban there wasn't a line. I said I saw a line down the center of the screen. *They said that Ban sprays on dry.** * *

They sprayed it on something and then sprayed on another kind. *Then they ran their fingers through it to show Ban was dry and the other was wet.* The usual stuff about deodorant. That it was a spray. The message I got was that this was different from their usual deodorant by emphasizing that it was dry. That it was dry. *It is a dry spray - like a powder.*

Other deodorant sprayed on wet and *Ban sprayed on dry.* They had two metal discs. They sprayed one with Ban and one with another deodorant, then marked both with an X and the *Ban was dry and the other was wet and messy.* * * *

Cartoon figure and knight and lady at party. It keeps you dry. One was dry and the other was wet. It was more effective and dry. *It was dry and like a powder.*

Spray Ban - *showed Ban was dry* and other left you wet. Ban sprays on one article and other deodorant on another article. Leaves you dry. Kept you dry. Ban always leaves you dry.

* * * It's cool and dry. Just that it's dry and comfortable to use. *It is dry!*

* * *It has an extra dry quality. *Ban is the dry deodorant.*

41. In addition to the survey of the commercial "Rusty," N. T. Fouriezos & Associates, Inc. conducted a survey among members of the public on "Your Move" and "Glasses" (CX 58). The cities in which this survey was made were Salt Lake City, Kansas City, and Hartford. "Glasses" was spliced into the telecast of "That Girl" show (CX 59(9)). Approximately 100 housewives who had seen this show were reached by telephone a day after the broadcast. Respondent Ogilvy & Mather submitted a research report to respondent Bristol-Myers on the results of this "on-air" test by the Fouriezos organization (CX 59). In the introduction to this report, Ogilvy & Mather noted that "Rusty" was the "first commercial produced to communicate that BAN dries clear while other deodorants dry leaving a greasy film" (CX 59(3)). Ogilvy & Mather also noted that the "Rusty" commercial had "presented the non-greasy *demonstration within* the context of the *questions format*," but that "R.E.A.P. [Ostberg tests] and on-air recall testing [Fouriezos tests] had indicated that the approach utilized was neither persuasive nor did it communicate the BAN is dry strategy" (CX 59(3); emphasis in original). Ogilvy & Mather again noted that "Glasses" and "Your Move" had been "created with the primary objective of communicating that BAN is dry and goes on clear whereas other anti-perspirant deodorants go on wet and leave a greasy film" (CX 59(3)). Ogilvy & Mather reported to Bristol-Myers that 15 percent of the housewives interviewed who remembered seeing "Glasses" perceived the message that " 'Ban is Dry': Ban is Dry (drier), Ban goes on dry" (CX 59(6)), and that 14 percent of the housewives perceived the message "Ban is Dry" as the major difference between the two anti-perspirants (CX 59(7)).

42. The research report of Ogilvy & Mather transmitted to Bristol-Myers a substantial number of verbatim comments of housewives who had seen "Glasses" (CX 59(18-19, 20)). The following are some of the verbatim comments transmitted to Bristol-Myers (emphasis added):

Two girls were in an elevator and one sprayed BAN on a man's glasses . . . *It goes on dry* and outsells other deodorants* * * *It goes on dry.*

It showed a man with glasses. One deodorant was sprayed on one side, another deodorant was sprayed on the other. *One left a film the other didn't. One was wet,* the other was dry. *Ban was dry.* It's drier, it wasn't moist. Ban will not stick to clothes. *It's dry so the clothes will stay dry.*

They sprayed deodorant on glasses. It's the leading anti-perspirant. It's better than others. *It goes on dry* and lasts longer.

Two girls were spraying a man's glasses with two different deodorants. Ban didn't smear but the other one did smear. *It was dry.*

It says it's dry. Two girls and a man were in an elevator. The girl sprayed the deodorant on the man's glasses. *It was dry. No wetness. Ban was dry, no wetness.*

Someone sprayed someone's glasses. *Ban went on dry. It didn't leave you sticky.* It's a new idea that it fells [sic] dry when it goes on. *The deodorant shown, left a residue that was sticky.* You could not see through it, it wasn't clean.

43. Although "Your Move" was only tested but not used commercially, the verbatim comments of housewives seeing it, as reported to respondent Bristol-Myers by Ogilvy & Mather (CX 59(21-22)), are nevertheless material because the demonstration in "Your Move" is the same as that in "Rusty," "Show-Up," "Dry Manhattan," and "Spotty Performance." (The headings on CX 59(21) are contradictory; however, the undersigned interprets the verbatims on this document to apply to "Your Move.") The following were reported to Bristol-Myers:

All I remember is the new dry brand. They put it on a blotter or paper and pulled their finger through it. *It goes on dry.* It's suppose [sic] to keep you dry. *Ban was dry and the other was not.*

Ban was better. It was suppose [sic] to be drier. The fact it was drier. *Ban was dry and the other was wet.*

The regular deodorant goes on wet and Dry BAN goes on dry. The regular deodorant makes a streak because it's wet. *It goes on dry and wouldn't you rather have one that goes on dry than one that goes on wet.* It goes on dry and keeps you dry. *It starts out dry and stays dry.*

It sprays on like a powder and your body isn't wet like the other kind. This dry and won't make you wet. They sprayed two spots. *One was wet from the other deodorant, one was dry from the kind they were selling,* the anti-perspirant. *It goes on dry and you don't get wet. It's dry and not a wet deodorant* and it keeps you drier. You don't get wet as I said before. *That you don't have to wait and let the deodorant dry under your arms, it goes on dry* and keeps you dry. It keep [sic] your clothes dry. *You don't get wet using this and it goes on you dry.*

There are two kinds, spray and powder. The spray was wet, *the powder was dry. One kept you dry and the other wet. There is no wetness.* [Ogilvy & Mather noted that this verbatim could have come from previous Ban commercials.]

44. William D. Wells, Professor of Psychology and Marketing, Graduate School of Business, University of Chicago, testified as an expert witness in this proceeding (Tr. 852, *et seq.;* CX 80). Dr. Wells

examined the research reports in the record prepared by the Schrader, Ostberg, and Fouriezos organizations, and the verbatim responses of members of the public who were interviewed which were included with them. Dr. Wells collected these verbatim responses and then grouped them under certain categories (CX 99, 100; see also, Tr. 900, 916-17, 930, 946-48, 950-55, 964, 1402, 1433-34, 1462-63, 1476). Dr. Wells found that a substantial number of the members of the public interviewed after seeing "Rusty," "Your Move," or "Glasses" reported receiving the communication that Dry Ban was a dry spray not wet on application to the body. Dr. Wells' chart was received in evidence, as follows (CX 99):

Mentioned Or Indicated Ban Sprays On Dry

Rusty On-Air (CX 56)	8/21	38%
Your Move On-Air (CX 59)	4/7	57%
Your Move R.E.A.P. (CX 60)	38/137	28%
Glasses On-Air (CX 59)	6/19	32%
Glasses R.E.A.P. (CX 60)	30/116	28%

After analysis of all the verbatim responses received from viewers seeing the foregoing commercials, Dr. Wells concluded that between 25 percent and 33 percent reported a perception that Dry Ban is dry and not wet when applied to the body (Wells, Tr. 947, 964). As the foregoing table reveals, out of 116 verbatim responses obtained by the Ostberg organization from consumers viewing "Glasses," Dr. Wells found that 30 or 28 percent indicated that the commercials conveyed the message that "Ban sprays on dry." With respect to "Your Move," Dr. Wells found that 28 percent of 137 verbatim responses obtained by the Ostberg organization mentioned or indicated receiving the message "Ban sprays on dry" (CX 99). Dr. Wells also found that between 5 percent and 20 percent of the verbatim responses from copy tests by the Fouriezos and Ostberg organizations indicated consumers receiving the message that Dry Ban sprays on clear (CX 100), which many perceived as meaning without a residue.

Respondents' objection to the calculations of Dr. Wells on the ground that the verbatim responses *available* were used as the denominator in figuring the percentages listed by him, rather than the *total* consumers interviewed (see Wells, Tr. 1432-33, 1521-22), is not valid, in the opinion of the undersigned.

Persons contacted in copy research for various reasons do not always provide the interviewer with comments which can be recorded (Wells, Tr. 917; see generally Tr. 908-918). Use of the total number of persons contacted as the denominator in calculating the percentages of those who perceived the commercials as representing that Dry Ban went on dry, and was clear (without a residue), involves an assumption that none of the remaining consumers for whom no verbatims exist received

those communications from the commercials. Such an assumption is completely unfounded in view of the evidence and the verbatims available.

45. The record establishes that a substantial portion of the viewing public equated "clear" and "clean" with a representation that Dry Ban left no visible residue after application (CX 60 (48 to 64)). Examples: "Ban leaves the lens clear and the other one makes the lens filmy" (CX 60 (50)); "They sprayed it on a glass to show it was clear. That it didn't leave a residue on your clothes" (CX 60 (50)); "Ban sprays on clear and doesn't leave a film. In an elevator, they sprayed Ban on a man's glasses to show it left no film" (CX 60 (52)). The research reports of Ogilvy & Mather also reported that members of the public often equated "clear" with "leaves no visible residue." Thus, in coding responses from those viewing "Glasses" and "Your Move," Ogilvy & Mather reported to Bristol-Myers that nine percent recalled the latter commercial as having "Showed Ban spraying on clearly, not filmy" (CX 60 (20)), and that nine percent of those seeing "Glasses" thought the main difference between the two anti-perspirants shown in the commercial was that Dry Ban "is clean, leaves no film, is clear" (CX 60 (21)). In fact, Ogilvy & Mather advised Bristol-Myers (CX 60 (7)):

> The most common visual mention for "Glasses" consisted of BAN spraying on clearly, not filmy (15%).

In the report on "Spokeswoman" Ogilvy & Mather advised Bristol-Myers that 31 percent of the viewers mentioned receiving the communication from the visual portion of the commercial "Ban spraying on clearly, not filmy" (CX 67(5)). In a similar report on "Showcase" (CX 71 (21)), Ogilvy & Mather advised that 20 percent of the viewers were able to "playback" the visual feature of the commercial "BAN spraying on clearly/not filmy" (CX 71 (6)).

Both Respondents Played an Active Role in The Development and Testing of the Challenged Commercials and Both Were Fully Informed and Knowledgeable with Respect to the Results Thereof

46. As prior findings demonstrate, Bristol-Myers and Ogilvy & Mather were responsible for the conception, creation, and development of the challenged commercials. Both respondents played a vital role, and were active participants throughout. In a letter to the Commission, mentioned earlier, the senior vice president of Ogilvy & Mather acknowledged that his agency took the basic concept and the representations in the foregoing commercials from respondent Bristol-Myers in the "earliest stages" and developed the finished commercials "in an effort to dramatize the Bristol-Myers supplied product difference" (CX 18).

The many research reports, communications with Bristol-Myers, and other documentation in evidence confirm the foregoing statement and show the complete involvement of Ogilvy & Mather, as well as Bristol-Myers, in the creation of the commercials, in the determination of their content, and in the broadcasting thereof over network and local television. The senior vice president of Ogilvy & Mather testified that the advertising strategy incorporated in "Rusty," "Show-Up," "Dry Manhattan," "Spotty Performance," and "Glasses" was implemented by Ogilvy & Mather after analysis of the competitive situation, consumers perceptions, and differences between Dry Ban's formula and that of competing anti-perspirant sprays (Sowers, Tr. 1715-33). Ogilvy & Mather, as described earlier, tested the comparative demonstration (CX 23, 74, 75) ultimately utilized in the commercials, recommended its use after such tests, and produced the commercials incorporating it (Sowers, Tr. 1722-23, 1728, 1732-33, 1773-74, 1782; Mayers, Tr. 1232-33).

The extensive research conducted by Ogilvy & Mather in conjunction with respondent Bristol-Myers (Mayers, Tr. 1202; Sapirstein, Tr. 426, 469-74, 499, 536) utilizing the Schrader, Ostberg and Fouriezos organizations has been set out. Ogilvy & Mather planned and actively supervised such research (Schrader, Tr. 214-15, 238, 245, 263; Rosen, Tr. 321-22, 326; Ostberg, 20, 22, 28, 36-37). Through it Ogilvy & Mather thoroughly evaluated and analyzed the strategy of the comparative demonstration, the reaction of members of the public viewing the demonstration and the finished commercials utilizing it, the messages and representations communicated to such viewers by the finished commercials, and reported on all these aspects in complete detail to respondent Bristol-Myers as shown in prior findings (see CX 23-25, 27, 30, 56-57, 59-61, 65, 67, 69, 71, 74-76).

During the course of the development, testing and evaluation of "Rusty," "Show-Up," "Dry Manhattan," "Spotty Performance," and "Glasses," and the demonstrations in them, representatives and officials of respondent Bristol-Myers and respondent Ogilvy & Mather played active roles and were in continuous communication and consultation. Thus, John C. Horvitz, Product Manager for the Bristol-Myers Products Division, as previously described, on July 3, 1969, wrote to Tony Manlove, an account executive of Ogilvy & Mather (CX 90, 105), summarizing areas in which "our interest is high," and suggesting that Manlove interpret the summary as a "project list." Among the projects were the Dry Ban "test research" results, and "anything else we can do" to emphasize the story that "Ban goes on clean and dry" (CX 90). On Sept. 26, 1969, an Ogilvy & Mather project director (Tr. 444) transmitted the initial "communications test" results obtained by the Schrader organization on "Glasses" and "Your Move"

to Guy Parker of the Bristol-Myers Research Department (Tr. 426). This letter which has already been referenced stated (CX 61):

> This morning I presented the results of our quick van test for Dry Ban to Jack Morgan and John Horvitz. Enclosed is a copy of the tabular data as it was given to them and a copy of the revised questionnaire that we used. Based upon this morning's meeting, it was decided to go national with "Glasses": 30 until we have the results of the on-air and R.E.A.P. tests.
>
> Both "Glasses" and "Your Move" will be on-air tested next Thursday, October 2nd (interviewing October 3rd) and R.E.A.P. tested - "Your Move" on October 3rd; "Glasses" the following week.
>
> Phyllis or I will be sending you further information on the research as it progresses.

"Phyllis" was Phyllis Sapirstein, a research group head of Ogilvy & Mather (Tr. 408). Jack Morgan was the Bristol-Myers Product Division vice-president (CX 105), and John Horvitz, as stated, was the Bristol-Myers Product Manager. Copies of the foregoing letter were sent to Dr. Edwin Berdy, the research director (marketing area) of Bristol-Myers (Tr. 449), Froni Biggard of the Bristol-Myers Research Department (Tr. 426), the Ogilvy & Mather Research Director (Tr. 449), and other agency personnel.

On Oct. 22, 1969, an official of Ogilvy & Mather wrote to Mr. R. Raskopf, Bristol-Myers Product Manager, giving a complete review of the status and results of "DRY BAN Copy Research" as of that date, including research on "Rusty," and informing him of additional copy research projects currently in progress which involved "on-air" testing of "Glasses" and "Your Move" and R.E.A.P. testing of these commercials (CX 23). Copies of this letter were sent to the Bristol-Myers "Group Product Manager" (CX 105), and various Ogilvy & Mather officials. On Oct. 31, 1969, an account executive of Ogilvy & Mather prepared a Conference Report of a meeting on Oct. 27, 1969, with Mr. Raskopf to discuss "BAN Copy Strategies and Future Creative Work." Among the "Agreements" reported were:

> The copy strategies for both DRY BAN and BAN Roll-On were felt to reflect accurately the creative direction which is most meaningful for the brands to take at this time (CX 24).

Agreement was also reported on Dry Ban "Current Strategy" and "Creative Development" including the "on-air" and "R.E.A.P." copy testing of "Glasses" and "Your Move" (CX 24). Copies of this report were also sent to top Ogilvy & Mather officials, including Robert S. Sowers, the management supervisor and later vice-president (Tr. 1715). Again, on Nov. 7, 1969, the same Ogilvy & Mather account executive wrote Bristol-Myers' Mr. Raskopf relating to "topline REAP test results for 'Glasses'," with copies to Mr. Sowers, and others of Ogilvy & Mather, and J. Weiner, Bristol-Myers Group Product Manager (CX 25).

On Dec. 23, 1969, another Conference Report by J. Dell 'Aquilo of Ogilvy & Mather was sent to Mr. Raskopf reporting a meeting on that

date between top officials of Bristol-Myers and Ogilvy & Mather (CX 27). Present for Bristol-Myers were "Mr. F. Mayer, Mr. J. Morgan, Mr. J. Weiner, Mr. R. Raskopf." (The President of Bristol-Myers Products was Frank Mayers, (Tr. 1146-47; CX 105), the vice-president, as noted, was Jack Morgan (CX 105)). Objectives of this conference were:

To present topline data from the R.E.A.P. and On-Air tests of the DRY BAN "Spokeswoman" commercial.

In light of the research scores, to present the agency's recommendation for the posture of future DRY BAN advertising.

To present four executions for approval.

Agreements were reached, as follows:

II. AGREEMENTS

Despite the high (25%) persuasion score of "Spokeswoman," it was agreed not to run this commercial on the air. The rationale behind this decision was:

a. The low recall of major copy points. (8% for "Spokeswoman" vs. 15% for "Glasses")

b. The relatively low brand recall score (27% for "Spokeswoman" vs. 34% for "Glasses")

We will continue to run "Glasses," at least for the early part of 1970. We have also undertaken a R.E.A.P. test to determine the persuasion score of the commercial after three months on the air.

We will produce, and put on the air "Jewelry Store" as a pool out to "Glasses." The two will run in even rotation.

The agency will undertake the assignment of coming up with an execution capturing the "warmth," "Sincerety" [sic] and persuasiveness of "Spokeswoman," but adding to it the extra dimension of arousing interest.

We will not produce "Motorcycle," "Board Meeting" or "Birdwatchers" at this time (CX 27).

On Feb. 5, 1970, Froni Biggard, previously mentioned as a member of the Research Department of Bristol-Myers, forwarded an internal memorandum to the Bristol-Myers Product Manager with copies to Bristol-Myers officials "E.M. Berdy, J.S. Morgan, G.S. Parker and J.D. Weiner" advising of the results of copy testing on "Spokeswoman" (CX 28). The memorandum reported:

Attached are the agency's reports on the Dry Ban "Spokeswoman": 30 on-air and trailer commercial tests.

To summarize the agency's conclusion, "Spokeswoman" is a better vehicle than "Glasses" or "Your Move" for communicating the demonstration message ("Ban is dry") as evidenced by the trailer test (forced exposure) results. However, "Spokeswoman" lacks the attention-getting power of the previously tested commercials in a "normal" viewing situation (on-air test) leading to a recommendation for revising the commercial to correct that deficiency.

Our view of these test results minimizes the on-air scores for two reasons:

1. Testing was conducted only two weeks prior to Christmas when the respondents' attention to *any* commercial we might have tested would be at a low point. Thus, the lower recall scores for "Spokeswoman" than "Glasses" or "Your Move" is more a function of when the tests were conducted than of the actual pulling-power of the executions.

2. In addition, the tests are based on about 100 respondents making large differences in the scores (8-10 points) necessary to consider them statistically different. This

magnitude of difference between "Spokeswoman" and "Glasses" is for the most part lacking.

Therefore, we would conclude that "Spokeswoman" is not as deficient as the agency's analysis indicates.

If you feel that a meeting with agency to discuss these findings would be warranted, please let me know and I will set it up.

Copies of the actual Ogilvy & Mather research reports were provided to Messrs. Raskopf, Morgan and Weiner. On April 8, 1970, Mr. Costello, an Ogilvy & Mather account executive, transmitted to Mr. Raskopf additional "DRY BAN Test Scores" (CX 30).

In sum, Bristol-Myers and Ogilvy & Mather worked closely together, and conferred and communicated regularly and frequently concerning the challenged commercials and the testing thereof. The reports and communications described earlier herein, and others, discussing and analyzing the results of such consumer research (copy tests) were regularly prepared by Ogilvy & Mather for Bristol-Myers and were plainly transmitted to that firm as a matter of routine practice. The undersigned finds that respondent Bristol-Myers was an active participant in, and was fully knowledgeable, aware, and informed of, all the testing and evaluation of the challenged commercials and the demonstrations incorporated in them, of similar commercials never actually broadcast commercially, and of the reports of consumer reactions to all the foregoing. Contentions to the contrary are rejected.

The Consumer Research of Respondents Constitutes Reliable, Probative and Substantial Evidence of the Representations Communicated to the Public by the Challenged Commercials

47. The consumer research conducted by respondent Ogilvy & Mather in conjunction and consultation with respondent Bristol-Myers, and utilizing the Schrader, Ostberg and Fouriezos organizations, constitutes reliable, probative and substantial evidence of the messages and representations conveyed, directly and by implication, by the commercials "Rusty," "Show-Up," "Dry Manhattan," "Spotty Performance," and "Glasses," to members of the public viewing them. The Schrader organization has been evaluating television commercials and print advertising for over 20 years, and such evaluation involving the designing of surveys, the preparation of questionnaires, the conducting of consumer interviews, and the construction of reports constituted the bulk of that firm's work (Schrader, Tr. 211-16). Ogilvy & Mather has been a client since the Schrader organization was founded, and other clients over the years have included major U.S. corporations (Schrader, Tr. 213). Through Ogilvy & Mather and other agencies, the Schrader organization in the past has done substantial work on various Bristol-Myers products. Like the Schrader organization, H.D. Ostberg &

Associates is well-known in the advertising industry, and for a number of years has performed advertising research for many agencies and corporate clients including respondents Bristol-Myers and Ogilvy & Mather (Ostberg, Tr. 10-14). N.T. Fouriezos & Associates, as well as its parent organizations, has likewise been doing consumer surveys and market research for many years (Rosen, Tr. 309-12). Respondent Bristol-Myers has been a continuous client, as has Ogilvy & Mather (Rosen, Tr. 313). The consumer surveys and tests conducted by the Schrader, Ostberg and Fouriezos organizations, sometimes referred to in the advertising industry as "copy tests," were not different from the type routinely utilized in the advertising industry, and by respondents, to obtain information and data on which to base advertising and marketing decisions. Indeed, such was the very purpose here. None of the research was conducted with litigation in view or for any other purpose which might interject a bias. All appear to have been objective and were conducted simply to evaluate the efficacy of the commercials long prior to any question of challenge to them, or to the demonstrations in them of "clean, clear" Dry Ban versus the "oily, opaque" and "creamy" competitive brand.

In conducting copy research for respondents, as earlier described, the Schrader, Ostberg and Fouriezos organizations each utilized somewhat different techniques. The Schrader firm exhibited the Dry Ban commercials or the Dry Ban demonstrations in mobile vans parked in shopping centers to volunteers obtained there, and questioned such persons about their perceptions immediately after the viewing (CX 61; Tr. 251). The Ostberg research (REAP tests) used the same mobile van system, but contacted the viewers about their perceptions by telephone the next day (CX 47, 50, and 63; Tr. 36-41; the analysis of this work by respondent Ogilvy & Mather may be found in CX 57 and 60). The Fouriezos organization inserted the commercial to be tested into an actual television broadcast in selected metropolitan areas, and then telephoned persons the next day on a random basis to determine their perceptions (CX 45, 58; Tr. 321-22; the Ogilvy & Mather analysis may be found in CX 56 and 59). The Fouriezos technique is known as "on-air" testing. Since questioning occurred immediately, the Schrader procedure did not measure the degree to which the commercial and its messages would be remembered by viewers after a time lapse, although it may have been somewhat more efficient than the Ostberg and Fouriezos techniques in picking up communications transmitted. On the other hand, the latter procedures had a greater ability to determine how well the commercials being tested and their messages were recalled, and the Fouriezos tests additionally provided some measure of the effectiveness of the commercial to command attention

in the context of normal television viewing, and the distractions of the home or place where viewing took place. See generally with respect to these different techniques, Schrader, Tr. 253, Wells, Tr. 885-901. All three systems, however, were relatively effective in determining the messages and representations communicated to viewers by the commercials being tested, although there is evidence, as indicated, that the Schrader procedure with immediate questioning is superior in this respect (Wells, Tr. 901).

The tests herein conducted by the Schrader organization were personally supervised by the president, Donald P. Schrader, and the interviews were tape recorded utilizing questions familiar to and long used by Ogilvy & Mather (Schrader, Tr. 217-19, 230-36, 242-43, 245-263). The responses of the persons interviewed were compared with the tape recorded answers. The answers and tapes were transmitted to respondent Ogilvy & Mather (Schrader, Tr. 258-263, 273) and, as described, were included in reports furnished to respondent Bristol-Myers. Validation checks, later discussed, were not always considered necessary in view of the person-to-person aspect of these interviews, and the use of tape recording, although in some instances telephone validation was accomplished (Schrader, Tr. 257-58). The questions propounded were considered carefully to eliminate bias (Schrader, Tr. 260-61).

The Ostberg organization was also a veteran in the advertising industry. The questionnaire format utilized for the van tests conducted by the Ostberg organization in shopping centers in the metropolitan centers of Philadelphia, Chicago, and Los Angeles was developed by representatives of various major advertising agencies including respondent Ogilvy & Mather, and the research department of respondent Bristol-Myers (Ostberg, Tr. 20-22). Dr. Ostberg did not believe the questions used for the interviews contained any undue bias (Ostberg, Tr. 23-26). The mobile van technique and the consumer sampling method used in the Ostberg surveys were specifically desired by representatives of respondent Bristol-Myers (Ostberg, Tr. 144; see also Tr. 28, and Sapirstein, Tr. 653) who, with personnel of respondent Ogilvy & Mather, were considered by Dr. Ostberg to be highly knowledgeable in the area of consumer testing (Ostberg, Tr. 189-91). Representatives of both respondent Bristol-Myers and respondent Ogilvy & Mather participated in planning the surveys (Ostberg, Tr. 190-91), and representatives of the latter went out "in the field" periodically to check on the work (Ostberg, Tr. 184). Interviewers who conducted the telephone contacts with members of the public were carefully selected and trained, and were required to sign a certificate that the information they recorded from the persons contacted was

accurate and that they would so testify under oath (Ostberg, Tr. 184-86; for the interviewer certificate see OMRX 3(48)). "Validation" checks were conducted by Dr. Ostberg's organization as a matter of standard procedure on a substantial percentage of the members of the public interviewed in copy tests similar to those employed on the Dry Ban commercials (Ostberg, Tr. 34, 197). This involved recontacting the persons questioned by the interviewers over the telephone and verifying the answers previously given (Ostberg, Tr. 97-99). Although Dr. Ostberg could not recall specifically whether the standard procedure of "validation" was performed with respect to the tests his organization conducted on the Dry Ban commercials here involved, there is nothing in this record to indicate that his firm's standard procedure of validation was not followed. Indeed, Dr. Ostberg testified "I would say that if there was no validation, I would be aware of it" (Ostberg, Tr. 189). Ogilvy & Mather, furthermore, insisted that firms doing consumer research for it conduct validation checks (Sapirstein, Tr. 618). When the questionnaires were received from the interviewers in the field, personnel in the offices of the Ostberg organization in New York checked and coded the responses (Ostberg, Tr. 36-37, 200). "Coding" involves grouping the responses of the members of the public interviewed under certain headings expressing a common theme and the objectives of the study (Ostberg, Tr. 168; Rosen, Tr. 344, 375-76). The codes utilized for the Dry Ban surveys conducted by the Ostberg organization were approved by Ogilvy & Mather (Ostberg, Tr. 37, 186). All responses of the members of the public interviewed were grouped under appropriate codes, tabulated and transmitted to Ogilvy & Mather and Bristol-Myers (Ostberg, Tr. 37, 45, and 54).

The Fouriezos organization, like both the Schrader and Ostberg organizations, was highly experienced in performing consumer and market research. In conducting the "on-air" surveys (CX 45, 58), the procedures set out by Ogilvy & Mather were followed (Rosen, Tr. 320). The selection of those interviewed, as noted, was on a random basis, and the questionnaire used was prepared by Ogilvy & Mather whose involvement in the work, according to an official of Fouriezos, was unusually high (Rosen, Tr. 321-26). The interviewers were told to record the answers given by those who had seen the Dry Ban commercials in the words actually used, and validation was performed on a substantial number of those interviewed (Rosen, Tr. 327, 300). As in the case of the Ostberg tests, the answers of the persons interviewed were grouped in codes approved by Ogilvy & Mather (Rosen, Tr. 322, 326, 332; Sapirstein, Tr. 661), and an effort was made to make the codes used as representative of the actual or verbatim responses as possible (Rosen, Tr. 343-44). The verbatim responses of the persons interviewed

were submitted to Ogilvy & Mather and transmitted by that firm to respondent Bristol-Myers with only grammatical editing (Sapirstein, Tr. 510-11).

The cost of the surveys by the Schrader, Ostberg and Fouriezos organizations was substantial (see, *e.g.*, Ostberg, Tr. 192-94; Rosen, Tr. 366). In sum, the consumer surveys and tests by the Schrader, Ostberg and Fouriezos organizations were performed in accordance with the standards prevailing in the advertising industry. The results are valid evidence of the messages, communications, and impressions conveyed by the challenged commercials. Although the methodology utilized was not of the type permitting projection to the entire population viewing the Dry Ban commercials, the results are clearly projectable to a substantial proportion of that population.

The Consumer Research of Respondents Established that the Challenged Commercials Communicated to a Substantial Portion of Viewers the Representations that Dry Ban Was Dry and Not Wet when Applied to the Body and Left No Visible Residue

48. The demonstrations in "Rusty" and "Your Move" are the same, as described earlier, and identical to the demonstrations in "Show-Up," "Dry Manhattan," and "Spotty Performance." The demonstration in "Glasses" is essentially similar. The consumer research and surveys conducted by respondents utilizing the Schrader, Ostberg, and Fouriezos organizations, set out in prior findings, establish that a substantial portion of the public viewing "Rusty," "Show-Up," "Dry Manhattan," "Spotty Performance," and "Glasses," understood those commercials to convey the representations that Dry Ban was a dry spray that was not wet when applied to the body, that it left no visible residue when applied to the body, and that, because of those physical characteristics, Dry Ban was superior to competing anti-perspirant sprays.

Respondents Knew or Should Have Known from Their Consumer Research that the Challenged Commercials Had the Capacity to Convey and Conveyed the Foregoing Representations

49. Bristol-Myers and Ogilvy & Mather knew or should have known from the nature and content of "Rusty," "Show-Up," "Dry Manhattan," "Spotty Performance," and "Glasses," that those commercials had the tendency and capacity to convey to members of the public viewing them the representations that Dry Ban was dry and not wet when applied to the body, and left no visible residue on application to the body. Aside from the nature and content of the commercials them-

selves, the consumer research conducted by respondent Ogilvy & Mather in conjunction and consultation with respondent Bristol-Myers, and utilizing the Schrader, Ostberg and Fouriezos organizations, set out in detail and discussed hitherto, provided both respondents with information that the Dry Ban commercials, and the demonstrations contained in them, had the tendency and capacity to communicate, and communicated, the foregoing representations to members of the public viewing them.

When Respondents Broadcast the Challenged Commercials, They Knew or Should Have Known the Representations Those Commercials Had the Capacity to Convey and Conveyed

50. Respondents Bristol-Myers and Ogilvy & Mather broadcast one or another of "Rusty," "Show-Up," "Dry Manhattan," "Spotty Performance," and "Glasses" over network and spot television to the nation's public from July 1969 through Sept. 1970 even though they had reliable and substantial evidence in their possession, and knew, or should have known, that the foregoing commercials had the tendency and capacity to represent, and represented to a substantial portion of the viewing public, that Dry Ban was a dry spray and not wet when applied to the body, that it left no visible residue, and that it was superior to competing spray anti-perspirants because of those characteristics.

Dry Ban in Fact Is not a Dry Spray but Is Wet when Applied to the Body and after Application Dries Leaving a Visible Residue

51. Dry Ban is a liquid and is wet when sprayed on the body. The formula for Dry Ban consists of 37 percent "Alcohol, SD40-B Anhydrous" 55 percent liquid propellent, and certain other ingredients (CX 12). Dry Ban in the can is a liquid (Tr. 1077-78). When Dry Ban is sprayed from the can the substance emitted is a liquid spray and is wet. As Bristol-Myers senior research engineer testified (Weinstein, Tr. 1077-78):

Q. * * * you are stating, then, that Dry Ban is a liquid when it is in the can?
A. That's correct.
Q. And it is wet?
A. Well, it's a liquid; yes.
Q. Okay. And then when it comes in contact with the vapor coming out of the spray nozzle, it may become drier but it's still wet; isn't that correct?
A. Well, you have liquid particles which tend to be broken up, create a mist.
Q. But they are still liquid particles?
A. Yes.
Q. And they are still wet?
A. Well, they are liquid; yes.

A can of Dry Ban is in the record as Commission Physical Exhibit 6. In

a demonstration during the hearings in this case, the foregoing can of Dry Ban was used to spray on a piece of flat glass, and on the forearm of a person. The transcript reflects not only the fact that Dry Ban was obviously wet and runny, but *looked* wet and runny, in fact, like water (Tr. 845-46). Although the manner of holding the can, *e.g.*, horizontal or vertical or some variation of either, and the position of the "dip tube" within the can, may affect to some extent the composition of the spray emitted (Weinstein, Tr. 1057-1074; BMRX 11 (1) (2)), in any case the spray is wet. The answer of Bristol-Myers, by admitting that Dry Ban "dries out" after application to the body in effect concedes that on application it is wet. See also OMRX 2, and Sowers, Tr. 1861 and 1736 R.

52. A videotape showing the spraying of Dry Ban on flat glass and the forearm of a person, and the results thereafter continuously over a five (5) minute period (Tr. 790-96), was introduced into the record by complaint counsel (CX (Physical Exhibit) 8). Contrary to the demonstrations in "Rusty," "Show-Up," "Dry Manhattan," "Spotty Performance," and "Glasses," this *uncut* and *continuous* portrayal clearly reveals to the viewer the wet, runny, liquid, and watery nature of Dry Ban when sprayed on the body or on a surface, as well as the plain and obvious residue deposited on the body or on a surface by such spraying. The residue left after spraying consists of the solid ingredients suspended in the liquid in the can (Sandland, Tr. 1678, 1701-09). In sum, Dry Ban is wet and watery when applied to the body and remains wet for several minutes before drying, and upon drying leaves a substantial and visible residue.

Ogilvy & Mather Knew or Should Have Known that Dry Ban Was Wet when Applied to the Body and on Drying Left a Visible Residue

53. Ogilvy & Mather knew or should have known that Dry Ban was not a dry spray but was wet when applied to the body, and left a visible residue after application. As a matter of agency procedure, Ogilvy & Mather fully informed itself about the characteristics of products being handled and did so with Dry Ban (Sowers, Tr. 1720). Simple examination and spraying of Dry Ban reveals it to be a wet and watery spray which leaves a visible and obvious residue after spraying (see Sowers, Tr. 1736, 1774-75, 1861, 1863).

The Representations Were Characteristics Material To Promotion And Sale of Dry Ban

54. The representations of dryness of application and lack of residue were important, desirable and material in the marketing and sale of Dry Ban. The many consumer surveys and copy tests, most of which have been discussed in one particular or another earlier herein,

attest to the materiality of these characteristics to members of the consuming public, as do the verbatim responses attached to the reports of these tests. See also "A Consumer Survey on Deodorants and Anti-Perspirants" (CX 85).

DISCUSSION

A viewing of "Rusty," "Show-Up," "Dry Manhattan," "Spotty Performance," and "Glasses," is convincing that they possessed the tendency and capacity to represent, and represented, directly and by what was implied, that Dry Ban was dry, went on dry (like a powder), and left no discernible or visible residue on the body. The undersigned has specifically so found based on the viewing of the commercials themselves.

The authority of the Commission to draw its own inferences from challenged advertisements has been sanctioned repeatedly over the years. *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 391-92 (1965); *Carter Products, Inc.* v. *Federal Trade Commission*, 323 F.2d 523, 528 (5th Cir. 1963); *Merck & Co.* v. *Federal Trade Commission*, 392 F.2d 921, 925 (6th Cir. 1968); *Kalwajtys* v. *Federal Trade Commission*, 237 F.2d 654, 656 (7th Cir. 1956), *cert. denied*, 352 U.S. 1025; *Exposition Press, Inc.* v. *Federal Trade Commission*, 295 F.2d 869, 872 (2d Cir. 1961), *cert. denied*, 370 U.S. 917 (1962); *E.F. Drew & Co.* v. *Federal Trade Commission*, 235 F.2d 735, 741 (2d Cir. 1956), *cert. denied*, 352 U.S. 969.

The principle was reiterated recently in *Firestone*, order of Sept. 22, 1972 [81 F.T.C. 398, 454], CCH Trade Reg, Rep., 1970-73 Transfer Binder, ¶20,112. The Commission there stated:

> * * *The law is clear that the Commission's expertise is sufficient and that it need not resort to survey evidence or consumer testimony as to how an advertisement may be perceived by the public or whether they relied upon the ad to their dertriment.* * *

Respondents do not contest this principle, but argue that the Commission cannot draw unreasonable or "outlandish" inferences, citing *Kirchner*, 63 F.T.C. 1282, 1290 (1963). There a swimming-aid device was represented, among other things, as being "invisible." The Commission dismissed this allegation commenting that a representation did not become false and misleading because it might be "unreasonably misunderstood" by an "insignificant and unrepresentative" segment of the class of persons to whom it was addressed. In the opinion of the undersigned, there is no parallel whatever between the hyperbole involved in calling waterwings "invisible," and the conclusion that significant segments of the public would or might seriously perceive respondents' commercials to represent that Dry Ban was dry, went on dry and left no visible residue on the body. There is nothing

far-fetched, outlandish or unreasonable in deriving those impressions from "Rusty," "Show-Up," "Dry Manhattan," "Spotty Performance," and "Glasses," as respondents' own empirical evidence verified. Respondents' argument that the advertisements only communicated "that Dry Ban was a clear, clean product" and an alternative to the "opaque and oily" competitive product (memorandum of Bristol-Myers, pp. 8-37) is rejected. True, this communication may have been in the commercials, but the commercials had the capacity to convey several representations to the public. Such is often the case as the Commission recognized in *Firestone*. Advertisements which are capable of two or more meanings, one of which is deceptive, are false and misleading. *Rhodes Pharmacal Co.* v. *Federal Trade Commission*, 208 F.2d 382, 387 (7th Cir. 953), modified by reinstating Commission's order, 348 U.S. 940; *Giant Food, Inc.* v. *Federal Trade Commission*, 322 F.2d 977, 981 (D.C. Cir. 1963), *cert. dismissed*, 376 U.S. 967 (1964). Such advertisements are construed against the advertiser. *Murray Space Shoe Corporation* v. *Federal Trade Commission*, 304 F.2d 270 (2d Cir. 1962); *United States* v. *95 Barrels of Vinegar*, 265 U.S. 438, 443 (1924). There is no question whatever, based on the commercials themselves, that they had the tendency and capacity to convey, and conveyed, the representations alleged in the complaint. A tendency and capacity to deceive, of course, are all that is necessary for a violation. *Charles of the Ritz Dist. Corp.* v. *Federal Trade Commission*, 143 F.2d 676, 680 (2d Cir. 1944); *U.S. Retail Credit Ass'n.* v. *Federal Trade Commission*, 300 F.2d 212, 221 (4th Cir. 1962). The representations are so plainly in the commercials that there is little need to invoke an additional principle applicable to their interpretation, i.e., that in deciding whether advertisements are or may be deceptive the Commission must look to the gullible and credulous rather than to the cautious and knowledgeable. *Charles of the Ritz Dist. Corp.* v. *Federal Trade Commission, supra; Exposition Press, Inc.* v. *Federal Trade Commission, supra.*

As the findings set out hitherto disclose, however, it is not necessary to rest upon an examination of the commercials themselves. Contemporaneous consumer surveys and research conducted at the instance of respondents themselves, already reviewed in detail, reveal that "Rusty," "Show-Up," "Dry Manhattan," "Spotty Performance," and "Glasses" in fact communicated the representations alleged. Respondents, however, object to consideration of these research reports in deciding this proceeding (memorandum of Bristol-Myers, pp. 48-72; of Ogilvy & Mather, pp. 6-10). Bristol-Myers contends that the reports do not establish the "meaning alleged," that the persons interviewed and the design of the studies made them non-representative, that the reports lacked any foundation proving trustworthiness, and that they

do not meet the established legal standard for probative evidence. Ogilvy & Mather contends that the surveys "fall far short of the legal requirements for their admission as to the truth of their contents."

In the opinion of the undersigned these contentions lack substance. The research reports are respondents' own contemporaneous records. Respondents prepared "Rusty," "Show-Up," "Dry Manhattan," "Spotty Performance," and "Glasses" and evaluated them by determining consumer reaction on seeing them. As set out in prior findings, reputable, long established research organizations well-known in the advertising industry were engaged to conduct the surveys. They were supervised closely by Ogilvy & Mather, and the results were analyzed and organized by that firm's research department. As extensive earlier discussion reveals, there was constant communication and consultation relating to the research between Ogilvy & Mather and Bristol-Myers during the conduct thereof which extended over a substantial period of time. The research was of a type routinely utilized in the advertising industry to evaluate advertising contemplated or in use. Respondent Bristol-Myers not only was completely familiar with the techniques employed, but took an active role in planning and supervising the entire project.

Respondents themselves plainly regarded the consumer surveys as accurate and reliable for charting business courses. Indeed, the so-called REAP (Ostberg) tests were developed by respondent Ogilvy & Mather (Sapirstein, Tr. 653), and Bristol-Myers "felt very strongly" that the "forced exposure" mobile van technique should be used (Ostberg, Tr. 144). See also Schrader, Tr. 231, 249. And respondents relied on the research as the record discloses. The letter earlier quoted (see prior proposed finding 46) from Ogilvy & Mather to Bristol-Myers (CX 61) reporting on the Schrader "van" tests of Glasses" and "Your Move" stated that based on "this morning's meeting," which discussed the foregoing tests, "it was decided to go national with 'Glasses':30 until we have the results of the on-air and R.E.A.P. tests." In the research report of Dec. 5, 1969, Ogilvy & Mather advised Bristol-Myers of the results of REAP testing of "Glasses" and "Your Move":

> * * * "Glasses" is the most effective commercial compared to "Rusty" and "Your Move." Not only is "Glasses" a powerful execution in terms of persuasion but it also communicates the new BAN strategy - "Ban is dry" (CX 60(9)).

Broadcasting of "Rusty" was terminated on December 24, 1969, "Your Move" was never utilized (CX 81, 82), and "Glasses" was broadcast for nine months thereafter until Sept. 11, 1970.

The fact that the surveys were not conducted with the precision of a scientific experiment, and are not properly projectable to the entire population of the nation does not render them inadmissible and unusable. Examination of the research reports and the testimony

surrounding them confirms their reliability. Hundreds of consumers were interviewed in a variety of shopping centers and over the telephone in diverse geographic areas. In only five research reports evaluating "Rusty," "Glasses," and "Your Move," over 700 persons were interviewed (CX 56-61). These are not insignificant numbers. Although the persons interviewed were possibly not completely representative of the total television audience, they were clearly representative of very large segments of that audience. Certainly the results are not limited to the persons interviewed, and can be projected to a substantial portion of the viewing public. That is all that is necessary for purposes of this proceeding. The fact that none of the members of the public who were interviewed, and none of the interviewers were called as witnesses, does not disqualify the research reports from consideration or connote a failure to establish trustworthiness (memorandum of Bristol-Myers, pp. 63-64). Again, these were respondents' own studies and nothing indicates unreliability. Indeed, the circumstantial guarantees of trustworthiness are of a high order, contrary to respondents' contentions. The very magnitude of the research, performed in the absence of any factors tending to tilt the results one way or another, is in itself convincing of the reliability of the surveys, aside from other considerations mentioned herein. Hundreds of "verbatims" are involved eliminating the significance of conceivable inaccuracies in reporting individual "verbatim" comments.

The research reports are not unreliable because the techniques used, particularly in the so-called "forced exposure" (mobile van tests), did not reflect true television viewing in the home or elsewhere. In making this argument respondents suggest that the communications received from van tests are not necessarily those obtained from the challenged commercials under "real life" conditions. The fact that the mobile van "forced exposure" technique is artificial in many respects does not invalidate the results insofar as the communication of ideas is concerned. Indeed, there is expert testimony that the "forced exposure" technique with immediate questioning, as in CX 61, is the best procedure to determine the ideas communicated by a commercial (Wells, Tr. 918). If the demonstrations in "Rusty," "Show-Up," "Dry Manhattan," "Spotty Performance," or "Glasses," upon being shown in a mobile van, communicated to a substantial portion of viewers that Dry Ban was dry and not wet, and left no visible residue on the body, those commercials had the tendency and capacity to communicate those representations when broadcast over commercial television. There may, of course, be fewer distractions in the mobile van, and the commercial is not imbedded in a continuous broadcast of programs and other advertising. But these factors would only bear on the attention

viewers might give respondents' commercials, not on the ability of the commercials to communicate ideas in one setting but not in another. In short, if a commercial can communicate an idea in a mobile van showing, it can communicate that idea over network television. The results obtained in the mobile van tests, moreover, were confirmed by so-called "on-air" tests (see prior finding 39) where one of the challenged commercials, or a commercial containing the same demonstration, was incorporated into a program actually being broadcast (see, *e.g.*, CX 59). In sum, the research reports are trustworthy and constitute reliable, probative, and substantial evidence as hitherto found.

Complaint counsel seek a finding that respondents "specifically intended" to convey the representations to the public that Dry Ban was a dry spray, was not wet when applied to the body, and on application left no visible residue. Intent, of course, is not necessary for a violation. *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U.S. 67, 79-80 (1934); *Gimbel Bros., Inc.* v. *Federal Trade Commission*, 116 F.2d 578 (2d Cir. 1941); *Montgomery Ward & Co., Inc.* v. *Federal Trade Commission*, 379 F.2d 666 (7th Cir. 1967). A specific intent to convey the representations, however, would be material in at least two respects. First, it would bear on the interpretations to be placed on the commercials themselves and, second, such an intent might be a factor as to the "fencing in" required in any cease and desist order issued.

Contemporary documentation relating to intent is subject to conflicting interpretations. Although, as already described, there are items which speak of communicating the "Ban is dry" strategy, there are other items indicating a purpose to communicate the "clear, clean" representation in contrast to the "oily, opaque" competitive product. Ogilvy & Mather's "Ban Deodorant 1970 Marketing Plan" states (CX 86(2)):

> The DRY BAN creative strategy will assume a competitive stance against other leading anti-perspirant sprays. Persuasive, new "reason why" copy will be used to convince potential customers that DRY BAN is a superior aerosol anti-perspirant (continuing to exploit the characteristics of the clear, quick drying formula).

This Marketing Plan further noted, in reviewing 1969 marketing efforts, that the original advertising strategy adopted for Dry Ban which "positioned the Brand competitively against deodorant aerosols" had been subject to a "major change" which had been "implemented in mid-year" (CX 86(5-6)). The new strategy was incorporated in "Rusty," "Show-Up," "Dry Manhattan," "Spotty Performance," and "Glasses," and involved (CX 86(6)):

> * * *the visual demonstration of the difference between Dry Ban's "clear, clean" application appearance and the competition's "oily, opaque" appearance.

In carrying out the new strategy, it was planned that Dry Ban television copy would focus on the "non-oily demonstration" (CX

86(11)). A Nov. 1969 letter from Ogilvy & Mather to Bristol-Myers relating to "Top Line R.E.A.P. Test Results for Glasses" noted that the commercial was extremely successful in "persuading customers that the clear, clean story is meaningful" (CX 25).

A number of statements in the research studies are similar. In Aug. 1969, Ogilvy & Mather in submitting the results of a R.E.A.P. test to Bristol-Myers on "Rusty" reviewed the concept behind the commercial in an "Introduction" to the study. Ogilvy & Mather stated (CX 56 (3)):

"Rusty":30 is the first commercial produced for BAN which is unique in utilizing a combination *demonstration* and "questions" format approach to additionally communicate that BAN goes on clear while other deodorants go on "greasy." This new strategy was created with the realization (resulting from previous research) that consumers have a definite preference for a deodorant which is non-oily.

A day-after-recall test of this new :30 commercial was conducted in order to ascertain primarily whether viewers did in fact notice the visual demonstration aspect of the commercial showing the added non-oily benefit when using Dry BAN deodorant. The test was conducted on the July 22nd telecast of the *Doris Day Show* in Kansas City, Denver and Hartford (emphasis in original).

Under "Conclusions" Ogilvy & Mather remarked to Bristol-Myers that "Rusty" did poorly in "its primary objective, namely the communication of the visual 'greasy' demonstration" (CX 56 (5)). In Sept. 1969 Ogilvy & Mather reported to Bristol-Myers on another R.E.A.P. test of "Rusty" in which it was stated that the initial advertising strategy for Dry Ban, after it was introduced in 1968, was to "communicate Dry BAN's ability to stop perspiration wetness as well as odor," and that "Rusty" was the first commercial designed (CX 57 (2)):

* * * to communicate that BAN goes on clear while other anti-perspirants go on "greasy."

Ogilvy & Mather noted that:

This new strategy was created with the realization (based on previous research) that consumers have a definite preference for an anti-perspirant that is non-greasy and that this "demonstration" is effective in communicating BAN's superiority in this area.

In Mar. 1970 Ogilvy & Mather again noted (CX 71 (3)):

"Glasses" :30, "Your Move" :30 and "Spokeswoman" :30 were the first three DRY BAN "Demonstration" commercials which did not employ the "Questions" format. The primary objective of these executions was to communicate that BAN goes on clean and clear, while other anti-perspirant deodorants go on with an oily/opaque appearance. After R.E.A.P. and On-Air testing the commercials, it was decided to run "Glasses."

"Showcase" :30 is a pool-out of the "Glasses" execution for DRY BAN. In this commercial a young couple in a jewelry store compare DRY BAN to another anti-perspirant on the glass counter, illustrating that DRY BAN goes on clean and clear while the other anti-perspirant deodorant has an oily/opaque appearance when applied.

Pilot studies as early as Apr. 1969, and well prior to the preparation and broadcasting of any of the challenged commercials (CX 82), also contained statements indicating the purpose of the commercials was to communicate to the consumer in a graphic way the clear appearance of Dry Ban in contrast to the "white and creamy" look of the competitive

brand (CX 75). A demonstration very similar to the one incorporated in the challenged commercials was utilized (CX 75 (24)). There are no statements indicating that the purpose of the demonstration was to represent that Dry Ban went on dry (like powder) and left no discernible or visible residue, or an attempt to find out if that message was in truth communicated. Ogilvy & Mather reported to Bristol-Myers the conclusion that (CX 75 (4)):

> The demonstration communicates a product plus for Ban Anti-perspirant over Arrid Extra Dry in terms of Ban being perceived as clearer and less greasy, which is translated by consumers into important benefits (non-staining, not sticky, etc.). The demonstration should prove effective in advertising.

The questionnaire utilized in this "Communication Test of the Dry Ban 'Greasy' Demonstration" (CX 75 (17-22)) fails to indicate any interest in ascertaining whether the demonstration conveyed the message that Dry Ban went on dry, and left no residue (see particularly CX 75 (21)). If respondents intended to convey these representations, one would have thought that they would have been looking to see whether the demonstration in fact communicated them.

A pilot study in June 1969 "A Test of the 'Greasy' Demonstration-Dry Ban and Clear and Dry" reported that a demonstration of Dry Ban's "clear formula" versus the "creamy formula" of the leading competitive brand was highly effective in creating a "preference for the clear formula" (CX 74 (2)). Bristol-Myers was advised that the results showed that housewives "overwhelmingly selected the clear formula over the greasy formula in the demonstration." About a year later in June 1970 Ogilvy & Mather reported to Bristol-Myers (O&MRX 3 (3)):

> Recent advertising for DRY BAN has emphasized the fact that the product sprays on clear. The currently aired commercial execution of this strategy, "Glasses" :30, features a demonstration of DRY BAN spraying on clear while another deodorant goes on with an oily/opaque appearance.
>
> A new strategy developed for DRY BAN shifts the emphasis to the product's quick drying property. One commercial execution of this strategy is a 60-second commercial entitled "Slow Burn." The commercial features a man eating breakfast with his arms extended because his deodorant would not dry. The demonstration segment of the commercial shows BAN and another anti-perspirant being sprayed on the back of a man's hand. Time lapse photography shows how BAN is dry in three minutes while the other anti-perspirant is still wet one half-hour later.

In contrast to the foregoing, however, complaint counsel point to documentation examples of which have been quoted earlier, where respondents have made reference to an advertising strategy to communicate "Ban is dry" (see, *e.g.*, CX 59(3), 60(3), 65(3), 67(3), 69(3), 90(1)). Complaint counsel also point to the fact that, as found herein, respondents' research studies clearly revealed that a substantial segment of consumers who viewed the challenged commercials derived

the message that Dry Ban went on dry, and left no residue, yet respondents continued to broadcast one or more of the commercials.

In resolving what appear to be conflicting indications from contemporaneous documents, several considerations are germane. If respondents had a specific intent to misrepresent Dry Ban as dry and non-wet, it seems probable that the leading spray would have been shown to be wetter and runnier than it was. Furthermore, the questions used to elicit reactions of members of the public to the commercials were "open-ended," that is, they were general, allowing members of the public to extemporize their understanding of the commercial (Ostberg, Tr. 105; Wells, Tr. 922-25). Example: What ideas about BAN were brought out in the commercial? The questions plainly did not indicate a search to discover whether the person interviewed received the message that Dry Ban went on dry, left no residue, etc. (see, *e.g.*, CX 45 (17-18), CX 47(38-39), CX 56(29), CX 58(21), CX 59(25), CX 60(37-38, 46), CX 61(12-14)). Again, if there had been a specific intention to communicate the foregoing representations, one would have thought that respondents would have specifically sought to determine the effectiveness of the commercials in that respect.

Statements in contemporaneous documentation that the advertising purpose of "Rusty," "Show-Up," "Dry Manhattan," "Spotty Performance," and "Glasses," was to "communicate the BAN is dry strategy" (*e.g.*, CX 59(3)), in the opinion of the undersigned, reveal negligence, carelessness, and lack of judgment in use of the word "dry" rather than a specific and calculated intent to mislead. For example, the "codes" (see Ostberg, Tr. 105-140) used to organize the interviews of consumers who saw one or another of the challenged commercials in mobile vans or "on-air," and to group the messages and communications they received from such commercials, incorporated a number of different and sometimes incompatible ideas under the concept "dry" (CX 59 (13, 15, 16), CX 60(18, 21)). Thus, under "Ban is Dry (Net)" in Table 3 of the report to Bristol-Myers on the consumer testing of "Glasses" and "Your Move" appear, among other communications, "Protects Clothes" and "Doesn't smear/isn't sticky, messy" (CX 59(13)). Similarly, in an evaluation of "Spokeswoman," the Ostberg organization under "Ban is Drier (Net)" grouped the communications "Ban is clean, leaves no film, is clean," "Ban is not sticky, messy," "Ban does not run, is not watery," "Ban dries faster," as well as "Sprays on dry, goes on dry" and "Ban is drier (general), dry Ban" (CX 66(12)).

Inasmuch as "codes" are developed in conducting surveys of consumers to determine the effectiveness of advertisements and are based on the objectives of the advertising (Ostberg, Tr. 106-08, 168-69), a specific and calculated intention on the part of respondents to convey

to the public that Dry Ban went on dry and left no residue is not clearly apparent. Accordingly, the undersigned, in weighting these various indications and items of evidence, concludes that respondents in disseminating "Rusty," "Show-Up," "Dry Manhattan," "Spotty Performance," and "Glasses," did not possess a *specific intent* to represent that "Dry Ban is superior to competing anti-perspirant sprays because it is a dry spray that is not wet when applied to the body and because it leaves no visible residue when applied to the body."

As previously found, however, there is no question that the commercials in fact had the tendency and capacity to make, and made, those representations.

Moreover, from the consumer research conducted by them, as found, respondents knew, or should have known, that a substantial portion of the viewing public interpreted the challenged commercials as conveying those representations. The many "verbatim" responses quoted earlier herein, and the great number in the record are very clear in this respect. The comment of Dr. Wells on this aspect is telling:

> If I saw this kind of result coming up in a copy test, I would be immediately alerted to the possibility that the consumer was getting a message which I did not intend to project, if indeed I did not intend to project the message that the product sprays on dry (Tr. 1404).

If respondents did not know from the consumer research studies that the challenged advertisements were conveying the questioned representations to the public, they should have known that fact. The research reports not only summarized the ideas communicated by the commercials to the members of the public who received them, and who were interviewed, but contained the "verbatim" comments of members of the public surveyed (CX 59(18-22), CX 60(48-67), CX 67(23-35)).

Complaint counsel, as noted, point out that respondents continued the dissemination of the commercials even though the consumer research demonstrated that they were communicating false, misleading and deceptive representations as to the physical characteristics and product features of Dry Ban. Complaint counsel contend that this circumstance establishes a specific intent to mislead. Although this is an argument of some cogency, the undersigned is not prepared to go that far, but rests on this issue with the finding that respondents knew or should have known that the challenged commercials had the tendency and capacity to mislead and deceive, and misled and deceived, a substantial portion of the viewing public. Negligence, carelessness, or lack of judgment, or even culpable lack of concern in the use of words and in the interpretation of the research, however reprehensible, is not the equivalent of a calculated, specific intent to mislead.

Ogilvy & Mather argue that the advertising has been terminated and no order is required (Answer and Memorandum, p. 4). Cessation of the practices, of course, does not mean that no order is necessary, because

the Commission is responsible not only for ending unlawful activities, but for ensuring that they will not be resumed in other forms or with respect to other products. *Federal Trade Commission* v. *Ruberoid*, 343 U.S. 470 (1952); *Spencer Gifts, Inc.* v. *Federal Trade Commission*, 302 F.2d 267 (3rd Cir. 1962); *Guziak* v. *Federal Trade Commission*, 361 F.2d 700 (8th Cir. 1966), *cert. denied*, 385 U.S. 1007 (1967).

The complaint did not specifically allege that Ogilvy & Mather was in "substantial competition in commerce with individuals, firms and corporations engaged in the promotion and sale of spray anti-perspirants of the same general kind as Dry Ban." This is a technical defect of no substance. The allegation was implicit in the complaint as a whole and, was, in any event, tried in this proceeding; there is no question that Ogilvy & Mather understood the issues and had full opportunity to defend. *Golden Grain Macaroni Co.* v. *Federal Trade Commission*, 472 F.2d 882 (9th Cir. 1972), *cert. denied*, May 29, 1973, 412 U.S. 918.

CONCLUSIONS

(1) The Dry Ban commercials "Rusty," "Show-Up," "Dry Manhattan," "Spotty Performance," and "Glasses," had the tendency and capacity to convey, and conveyed, materially false, misleading and deceptive representations concerning the physical characteristics and product features of Dry Ban spray anti-perspirant, and were therefore false, misleading, and deceptive.

(2) Respondents knew or should have known when they disseminated the Dry Ban commercials "Rusty," "Show-Up," "Dry Manhattan," "Spotty Performance," and "Glasses," that those commercials had the tendency and capacity to convey, and conveyed, materially false, misleading, and deceptive representations concerning the physical characteristics and product features of Dry Ban spray anti-perspirant, and were therefore false, misleading and deceptive.

(3) The dissemination by respondents Bristol-Myers and Ogilvy & Mather in commerce of the false, misleading, and deceptive commercials "Rusty," "Show-Up," "Dry Manhattan," "Spotty Performance," and "Glasses," had the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that the representations in them were true, and into the purchase of substantial quantities of Bristol-Myers' Dry Ban spray anti-perspirant because of such erroneous and mistaken belief.

(4) The acts and practices of respondents Bristol-Myers and Ogilvy & Mather, as alleged in the complaint and as found herein, were to the prejudice and injury of the public and of their competitors, and constituted unfair and deceptive acts and practices, and unfair methods

of competition in commerce, in violation of Section 5 of the Federal Trade Commission Act.

Relief

Part I of the order issued herein prohibits each of respondents from advertising "Dry Ban spray anti-perspirant or any other product" in commerce "by presenting evidence, including tests, experiments or demonstrations or parts thereof" as actual proof of any fact or product feature that is material to inducing the sale of such product, or of such product's superiority over brands in competition therewith, which evidence does not actually prove "such fact, product feature or product superiority." This order is the same as to respondent Bristol-Myers as the notice order.

With respect to Ogilvy & Mather, however, the notice order would have applied to Dry Ban spray anti-perspirant or any other "anti-perspirant or deodorant," whereas part I of the order issued herein applies the same coverage to Ogilvy & Mather as applied to Bristol-Myers, *viz.*, Dry Ban spray anti-perspirant "or any other product" in commerce. In other words, part I of the order represents significantly broader product coverage as to Ogilvy & Mather than contained in the notice order. Although, of course, respondents do not agree to the entry of any order in this proceeding, they object, if any order is to be entered, to broad product coverage.

Bristol-Myers argues that its divisions and subsidiaries manufacture over 283 different items and that corporate management "exercised no control over the advertising decisions with respect to at least the products of the Products Division" (memorandum of Bristol-Myers in Reply, p. 34). Further, Bristol-Myers contends that an order applicable to all its products would be "punitive," would subject Bristol-Myers to restraint "more rigorous than any which has been imposed upon an advertiser in any litigated case," and would impose on it the burden of making compliance reports for all of its advertisements for all 283 products. Bristol-Myers further contends that the order is vague, and that it will be impossible in the future to determine what conduct would constitute a violation.

The circumstance that Bristol-Myers is a very large company with a number of divisions and subsidiaries, and hundreds of products provides little reason for limited product coverage. Corporate management at the "top" has an obligation and a responsibility to police the company's promotional and advertising practices. Indeed, the size and importance of Bristol-Myers, and the fact that it engages in advertising of great magnitude to the extent of approximately $225,000,000 annually, using local, regional, and national media, would seem in view

of the present record to point to the urgency of careful "fencing in" rather than the reverse. What is involved in this proceeding is not simply a question of misrepresentation of the physical characteristics of Dry Ban, but an issue of responsibility and integrity in advertising. Respondents disseminated the challenged commercials over a 14-month period from July 1969 to Sept. 1970 (CX 82) at a cost of $5,800,000 (CX 81) notwithstanding information coming to them prior to and during such dissemination that substantial segments of the public were being seriously misled and deceived by the demonstrations in them. The demonstration technique used in "Rusty," "Show-Up," "Dry Manhattan," "Spotty Performance," and "Glasses" is readily adaptable to a large proportion of Bristol-Myers' products, over forty (40) of which are advertised over television (CX 84), and 90 percent are advertised in some medium (Edmondson, Tr. 1629). It is unreasonable to require the public to undertake the high costs of investigation and adjudication repeatedly against a respondent. If the order herein is limited to Dry Ban spray anti-perspirant and other anti-perspirants and deodorants, future Commission proceedings may have to be undertaken to end violations similar to the one here in issue. Respondent has no right to insist that the public bear this risk. There is no necessary assumption in this viewpoint that respondent is likely to violate the law in the future, only that the public is entitled to take the most effective action available to close the door to such a possibility. The Commission has a responsibility to ensure that future violations similar to those involved herein do not occur, as noted under "Discussion," and has wide discretion in fashioning a remedy to achieve that objective. *Federal Trade Commission* v. *Ruberoid Co., supra,* 343 U.S. at 473; *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 428-430 (1957). The authority of the Commission to issue an order applicable to all products of a respondent is clear. *Niresk Industries, Inc.* v. *Federal Trade Commission,* 278 F.2d 337, 342-343 (7th Cir. 1960), rehearing denied June 8, 1960, *cert. denied,* 364 U.S. 883; *Benrus Watch Company* v. *Federal Trade Commission,* 352 F.2d 313, 324 (8th Cir. 1965), *cert. denied,* 384 U.S. 939 (1966); *Western Radio Corp.* v. *Federal Trade Commission,* 339 F.2d 937, 940 (7th Cir. 1964), *cert. denied,* 381 U.S. 938; *Carter Products, Inc.* v. *Federal Trade Commission,* 323 F.2d 523, 532-33 (5th Cir. 1963); *Consumer Sales Corp.* v. *Federal Trade Commission,* 198 F.2d 404 (2nd Cir. 1952); *Firestone Tire & Rubber Company,* [*aff'd,*] 481 F.2d 246 (6th Cir. 1973) [*cert. denied,* 414 U.S. 1112, (1973)], CCH 1973 Trade Cases, Vol. 5, ¶94,581. In the latter case the Court of Appeals affirmed the order of the Commission prohibiting the misrepresentation of quality control or inspection procedures in the marketing of tires "or any other product." Although there are decisions

which have limited broad product coverage, they have done so on the conclusion that the broad coverage bore no reasonable relation to the violation found. *E.g.*, *American Home Products Corp.* v. *Federal Trade Commission*, 402 F.2d 232 (6th Cir. 1968).

Part I of the order herein, in the judgment of the undersigned, is necessary, appropriate and reasonably related to the violation. Indeed, the case most nearly like this one involved a broad product order which was sustained by the Supreme Court. *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 62 F.T.C. 1269 (1963). In that case the Commission remarked, in refusing to issue an order with narrow, limited product coverage (62 F.T.C. at 1276):

> We consider, finally, the questions of (1) the applicability of the "demonstration" part of the order to all products advertised by Colgate.* * *
>
> The Court of Appeals recognized, without deciding, that if a certain type of advertising demonstration is unlawful, "it might be appropriate * * * to enter a broad order forbidding all such demonstrations en masse." We think that the entry here of such a broad order is not only appropriate but, in the circumstances presented, our duty to the public and honest competitors under the Federal Trade Commission Act. It would be less than adequate protection of consumers and competitors to enjoin the use of this unfair method of competition (*i.e.*, sham "demonstrations" that actually demonstrate or prove nothing) only insofar as it could be used in advertising one product, but not others. Respondents having been found to have engaged in that unlawful practice, the Commission was obliged to order them to stop it once and for all. If the function and purpose of a cease and desist order here are to halt respondents' unfair method of advertising, it would make no sense for the order to forbid them to stage spurious television demonstrations in advertising shaving cream, but to allow them to continue the practice in advertising toothpaste or soap.

The Supreme Court affirmed the Commission order noting that "the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist." *Federal Trade Commission* v. *Colgate-Palmolive*, 380 U.S. 374, 394 (1965).

The argument that the terminology of Part I is vague, and fails to delineate clearly what advertising may constitute a violation of the order, is rejected. In *Colgate* the Supreme Court considered a similar claim, and rejected it noting (380 U.S. at 393):

> The crucial terms of the present order-"test, experiment or demonstration* * *represented* * *as actual proof of a claim"—are as specific as the circumstances will permit. If respondents in their subsequent commercials attempt to come as close to the line of misrepresentation as the Commission's order permits, they may without specifically intending to do so cross into the area proscribed by this order. However, it does not seem "unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line."

The phrase in Part I "that is material to inducing the sale of such product" was included in the notice order, and has not been omitted here despite the urging of complaint counsel. It is true that the Commission may infer materiality of a representation. *Federal Trade Commission* v. *Raladam*, 316 U.S. 149 (1942). Nevertheless, the

foregoing language in the order is not mere "surplusage." As counsel for respondent Bristol-Myers states, a "representation that is not material is not an illegal one." Also, the word "experiments" found in the notice order has been retained. Complaint counsel would substitute "studies." The thrust of Part I of the order, which was derived from the allegations of the complaint, is to prohibit the presentation of evidence which "invites the viewer to rely on his own perception for demonstrative proof of the claim" as the Court observed in *Colgate, supra*, 380 U.S. at 393. "Experiments" is tailored to that concept, as the notice order recognized, whereas "studies" would extend the order far beyond that concept. "Demonstration" and "experiment," are not precisely synonymous, in the opinion of the undersigned, so there is no redundancy.

What has already been said applies in essentials to Ogilvy & Mather. It is true, as counsel for that firm emphasize, that Ogilvy & Mather has no history of law violations. As has been found, Ogilvy & Mather was an active participant in the preparation of the commercials, and knew or should have known that the commercials had the tendency and capacity to communicate false, misleading, and deceptive representations. *Doherty, Clifford, Steers & Shenfield, Inc.*, v. *Federal Trade Commission*, 392 F.2d 921 (1968); *ITT Continental Baking Company, Inc.*, Docket 8860, Order and Opinion of Oct. 19, 1973 [83 F.T.C. 865]. Ogilvy & Mather, moreover, was in a unique position to terminate the false, misleading and deceptive commercials utilized in this proceeding. Prior findings make this circumstance very clear. When the results of the consumer surveys were under analysis, and reports were being prepared for respondent Bristol-Myers, Ogilvy & Mather knew or should have known that substantial numbers of the persons tested received a false, misleading, and deceptive message. Ogilvy & Mather, nevertheless, failed to take any action whatever to discontinue dissemination of the advertising. The technique of a demonstration utilized in the challenged commercials, moreover, plainly is not unique to Dry Ban, but may be employed in the promotion of many different products. Under the circumstances there is nothing inappropriate in the application of a broad order to respondent Ogilvy & Mather, as was done in *Colgate* with respect to the advertising firm there involved.

As made abundantly clear herein, the challenged commercials misrepresented the physical characteristics and attributes of Dry Ban. An order provision prohibiting such misrepresentations in the future is therefore necessary in the public interest. The complaint in this proceeding is very similar to that issued in *Colgate*, 59 F.T.C. 1452 (1961), and there an order provision enjoining future misrepresentations was issued. 62 F.T.C. 1269 (1963).

The more limited product coverage in Part II applicable to Bristol-Myers, that is, Dry Ban spray anti-perspirant or any other product "applied to the body," and applicable to Ogilvy & Mather, Dry Ban spray anti-perspirant "or any other anti-perspirant or deodorant" is tailored to the misrepresentations in both instances. Although the language of any order may be susceptible to difficulty in interpretation, the terminology "applied to the body" is as precise as circumstances permit, In *Colgate* the Commission regretted issuing originally a very narrow order relating to misrepresentation remarking (62 F.T.C. 1277):

> In respect to the prohibition against misrepresentation of the quality or merits of products, our previous order was narrowly limited to Rapid Shave and other shaving creams. In view of our findings as to respondents' misrepresentations in that regard, as well as the fact that respondents are already subject to a number of outstanding orders and stipulations containing similar prohibitions with respect to other products, the Commission would be amply justified in extending the prohibition against such misrepresentations to all products similarly advertised by respondents. However, since our earlier order, though perhaps overly generous to respondents, has in this regard been reviewed and sustained by the Court of Appeals, we will not disturb the limitation to Rapid Shave or other shaving creams.

The order herein avoids the extreme narrowness of the original *Colgate* order, yet as to misrepresentation would not encompass every Bristol-Myers product. It is even more narrow with respect to Ogilvy & Mather. Admittedly, a degree of discretion and judgment is involved. There are differences in presenting a demonstration, or the like, as actual proof of something it does not in fact prove, and misrepresenting the physical characteristics or other features of a product. In the opinion of the undersigned the product coverage of Part II of the order is also appropriate, necessary, and reasonably related to the violation found.

The order issued herein is fully justified on the basis of the facts brought out in this proceeding. Additional support for it with respect to Bristol-Myers, however, may be found in the past record of that respondent. As complaint counsel emphasize, Bristol-Myers is no stranger to Federal Trade Commission proceedings. Bristol-Myers has been the recipient of three (3) prior litigated cease and desist orders involving false and deceptive advertising, has entered into six (6) prior stipulations and one (1) consent settlement relating to the advertising of seven different products, and was the subject of a relatively recent decision by the Commission that a finding of false and misleading advertising of an analgesic drug was "supportable" on the record, although no order was entered. *Orders:* 36 F.T.C. 707 (1943), order prohibiting misrepresentation of the therapeutic effect of a laxative; 46 F.T.C. 162 (1949), order prohibiting misrepresentation of the results of a survey of dentists regarding the use and recommendations for Ipana toothpaste and claims of therapeutic value of that toothpaste; 71 F.T.C.

822 (1967), *aff'd* in part, 418 F.2d 489 (5th Cir. 1969), prohibiting misrepresentation of the therapeutic effect of hemorrhoid preparations; *Stipulations:* 24 F.T.C. 1546 (1937), relating to health claims for "Vitalis;" 24 F.T.C. 1554 (1937), relating to claims for Ipana toothpaste as an effective treatment for gum diseases; 24 F.T.C. 1558 (1937), relating to claims for "Sal Hepatica," a laxative, as a purge of poisonous wastes from the body, and as effective in the treatment of various maladies; 25 F.T.C. 1626 (1937), claims for "Minit-Rub" cold remedy; 27 F.T.C. 1602 (1938), relating to skin claims for "Ingram's Milkweed Cream"; and 27 F.T.C. 1609 (1938), claims of health benefits from "Ingram's Shaving Cream." In 47 F.T.C. 1441 (1950), a consent agreement and order were entered requiring discontinuance of claims that "Resistab," a cold preparation, would cure, prevent, or shorten the duration of a common cold. In 74 F.T.C. 780 (1968), as stated, the Commission found a violation of Section 5 for false and deceptive advertising of an analgesic drug "supportable" on the record, but terminated the proceedings without an order.

Bristol-Myers objects to consideration of past orders and stipulations based on consent rather than "full evidentiary adjudication," and notes that settlements are often entered into for extraneous reasons, to avoid expense, publicity, etc. Bristol-Myers further argues that, even if considered, past orders and stipulations entered against it or involving it are relatively insignificant when viewed against its background of selling 283 different products through seven separate divisions with advertising expenditures of $225 million annually, and extensive marketing and advertising activities extending over many years since the 1930's.

These objections, however, are not well taken. The foregoing record of Bristol-Myers is not *de minimis* or one of "ridiculous insignificance" (Supplemental Memorandum of Bristol-Myers of Oct. 29, 1973, p. 3). The past record of a respondent is relevant to consideration of the order to be entered. Consent orders have consistently been considered by the Commission in weighing the scope or propriety of orders to be issued in particular cases. *ITT Continental Baking Company*, Docket 8860, Order and Opinion of Oct. 19, 1973 [*supra*]; *Colgate-Palmolive*, *supra*, 62 FTC at 1277. In the former case, in ruling on the objection of Ted Bates & Co., Inc., to broad product coverage, the Commission remarked that "Bates is already subject to a series of cease and desist orders entered both after litigation and on consent based on challenges to advertising in which it participated as illegal under Section 5 of the F.T.C. Act." The Commission then cited four consent orders. In *Colgate* the Commission in deciding the scope of product coverage noted that "respondents are already subject to a number of outstanding orders

and stipulations containing similar prohibitions with respect to other products." Two consent orders and two stipulations were then cited.

It is well established that past violations have a bearing on the remedy to be invoked. In addition to the foregoing *ITT Continental* and *Colgate* cases, the Commission considered past orders in the recent *Firestone* proceeding. There the Commission specifically stated (CCH Trade Reg. Rep., 1970-73 Transfer Binder at pp. 22084-85 [*supra*]):

> Past conduct, in fact, must determine to some extent what the proper scope of relief should be.

As stated, Bristol-Myers has been the subject of three (3) past litigated orders and a fourth litigated matter where the Commission found an order "supportable" on the record, but did not issue it because to do so would give rise to certain questions relating to asserted deficiencies in the pleadings "which it would serve no further purpose to litigate," and on the hope that Bristol-Myers would "comply with the full requirements of the law and not again disseminate advertising of this character that may be misleading to the consuming public," 74 F.T.C. at 855. In view of this record the statement of the Court of Appeals in *Carter Products*, *supra*, rejecting an objection that a broad order should not have been entered by the Commission is material (323 F.2d at 532):

> Twice before this suit, Carter has litigated orders dealing with similar offenses.

In *Federal Trade Commission* v. *National Lead Co.*, *supra*, 352 U.S. at 429, the Supreme Court in deciding the propriety of a Commission order, affirmed it as having a "reasonable relation the unlawful practices found to exist." Three reasons were cited including the fact that National Lead "had been previously adjudged a violator of the antitrust laws." The past record of respondent Bristol-Myers, therefore, may properly be considered in determining the order to be entered herein, and the undersigned has considered that record as additional justification for the order issued.

ORDER

I

It is ordered, That respondent Bristol-Myers Company, a corporation, and Ogilvy & Mather, Inc., a corporation, their successors and assigns, and respondents' officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of Dry Ban spray anti-perspirant or any other product in commerce, as "commerce" is defined in the Federal Trade Commission Act, forthwith cease and desist from:

Advertising any such product by presenting evidence, including

tests, experiments or demonstrations or parts thereof, that is presented as actual proof (a) of any fact or product feature that is material to inducing the sale of such product, or (b) of such product's superiority over brands in competition with such product, but which evidence does not actually prove such fact, product feature or product superiority.

II

It is ordered, That respondent Bristol-Myers Company, a corporation, its successors and assigns, and respondent's officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of Dry Ban spray anti-perspirant or any other product applied to the body, in commerce, as "commerce" is defined in the Federal Trade Commission Act, forthwith cease and desist from:

Misrepresenting, directly or by implication, any physical characteristic or other feature or features of such product.

It is ordered, That respondent Ogilvy & Mather, Inc., a corporation, its successors and assigns, and respondent's officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of Dry Ban spray anti-perspirant or any other anti-perspirant or deodorant in commerce, as "commerce" is defined in the Federal Trade Commission Act, forthwith cease and desist from:

Misrepresenting, directly or by implication, any physical characteristic or other feature or features of such product.

III

It is further ordered, That respondents shall forthwith distribute a copy of this order to each of their operating divisions.

It is further ordered, That respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, merger, assignment or sale, resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or of any other changes in the corporation which may affect compliance obligations arising out of the order.

OPINION OF THE COMMISSION

APRIL 22, 1975

BY HANFORD, *Commissioner:*

This case is before the Commission on appeal of respondents Bristol-

Myers and Ogilvy & Mather and the cross-appeal of complaint counsel from the initial decision issued on Nov. 28, 1973 by Administrative Law Judge Daniel H. Hanscom. Judge Hanscom found that five television commercials which formed respondents' advertising campaign for "Dry Ban" anti-perspirant spray falsely represented that Dry Ban is a dry spray that is not wet when applied to the body, that it leaves no visible residue after application to the body, and that it is superior to competing sprays because of these characteristics.[1] He ordered both respondents to cease advertising by presenting evidence which does not prove that which it purports to prove. He also ordered Bristol-Myers to cease misrepresenting physical attributes of products applied to the body and Ogilvy & Mather to cease misrepresenting physical attributes of deodorants and anti-perspirants.

Respondent Bristol-Myers, a maker of over-the-counter pharmaceuticals, cosmetics, and household products, and its advertising agency, respondent Ogilvy & Mather, developed the advertising campaign for Bristol-Myers' "Dry Ban" anti-perspirant which formed the basis for the complaint.[2] This campaign ran from July 21, 1969 until Sept. 11, 1970.[3]

Each of the commercials contains a humorous sequence and a demonstration in which Dry Ban is compared to a "leading spray."[4] Judge Hanscom's findings that the commercials represented Dry Ban to be a non-wet spray leaving no residue when applied to the body were based both on the Judge's personal observation of the commercials[5] and on his analysis of a series of test marketing reports prepared at the request of Ogilvy & Mather.[6]

Judge Hanscom's finding that these representations were false is based primarily on an experiment which was performed by complaint counsel in his presence and replicated on videotape.[7] In this experiment, Dry Ban was sprayed on glass and on a human forearm and was found both to be "wet, runny, liquid, and watery" and to leave an "obvious residue."[8] Respondents, however, object to a finding of wetness based on this demonstrative evidence because of the fact that

---

[1] FF 12, 48, 51, 52.

[2] FF 46.

[3] CX 81.

[4] CX 1-10. In four of the five commercials ("Rusty," "Show-Up," "Dry Manhattan," and "Spotty Performance"), the demonstration is identical. The demonstration in the fifth, "Glasses," is conceptually similar, but differs in execution (FF 9).

These demonstrations, as viewed by the ALJ, tended to show Dry Ban to be "clear" and "clean" as contrasted with the "oily," "opaque," "creamy," and "whitish" appearance of the competing product. FF 7, 8, 10, 14.

[5] FF 12-13.

[6] I.D. 46.

[7] Tr. 790-96, 845-46, CX (Physical Exhibit) 8.

[8] FF 52.

in the experiment the product was sprayed downward, contrary to ordinary usage.

After exhaustive review of this record, we find that it fails to establish a violation of Section 5. While it is within our purview to remand for further proceedings, we have determined instead to dismiss this complaint.

The Representation

Like the administrative law judge, the Commission has viewed filmed versions of the challenged commercials.[9] Unlike the law judge, the Commission perceives them as representing only Dry Ban's superior qualities of dryness as compared to a leading competitive spray, and not that respondents' product was dry by some absolute standard. Indeed, we noted that the commercials themselves show Dry Ban to be somewhat wet.[10]

Our viewing of the filmed versions of the commercials also fails to convince us that they contain the message that Dry Ban leaves no visible residue after application to the body. Although no residue appeared in the demonstration portion of the commercials, this phase consumes but a matter of seconds. We are therefore unable to conclude from our viewing that the commercials represent that no residue or deposit will remain when the product dries.[11]

Turning to the test marketing reports in this record, we must dismiss any contention that the F.T.C. is bound to reject these consumer surveys as inadmissible hearsay.[12] The Commission has on numerous occasions considered the question of the admissibility of surveys which are obviously hearsay, and it is well settled that such surveys will be

[9] In determining the meaning of an advertisement, the Commission may rely upon its own inherent expertise, *FTC* v. *Colgate Palmolive*, 380 U.S. 374, 391-92 (1965); Firestone Tire & Rubber Co., 81 F.T.C. 398, 454 (1972), *aff'd*, 481 F.2d 246 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973); *Niresk Industries, Inc.* v. *FTC*, 278 F.2d 337, 342 (7th Cir.), *cert. denied*, 364 U.S. 883 (1960); *Kalwajtys* v. *FTC*, 237 F.2d 654, 656 (7th Cir. 1956), *cert. denied*, 352 U.S. 1025 (1957); it may supplement its expertise, if it so chooses, by electing to adopt the results of consumer surveys found to be methodologically sound, ITT Continental Baking Co., Inc., D. 8860 (1973); Firestone Tire & Rubber Co., 81 F.T.C. 398, 454 (1972), *aff'd*, 481 F.2d 246 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973); Benrus Watch Co., Inc. 64 F.T.C. 1018, 1044-45 (1964), *aff'd*, 352 F.2d 313 (8th Cir. 1965), *cert. denied*, 384 U.S. 939 (1966); Rhodes Pharmacal Co., Inc., 49 F.T.C. 263, 283 (1952), *order modified*, 208 F.2d 382 (7th Cir. 1953), *modification of order rev'd, order reinstated in toto*, 348 U.S. 940 (1955); Arrow Metal Products Corp., 53 F.T.C. 721, 727, *aff'd per curiam*, 249 F.2d 83 (3rd Cir. 1957).

[10] *See, e.g.*, the comments of Chairman Engman, transcript of oral argument 30-31.

We note, however, that the wetness might or might not be as obvious on a television screen as it was on film and that normal distractions associated with television viewing in the home might cause the viewer to miss the wetness which was portrayed. It should also be noted that we watched the commercials knowing that the key issue was whether Dry Ban was represented as being dry; thus we were looking for wetness. Additionally, our attention was directed to the area of wetness by a pointer. In one commercial, "Glasses" (CX 5), the wetness was sufficiently inconspicious that a substantial number of consumers might reasonably be expected not to notice it. The critical issue here is not whether the Commission, under the circumstances, was misled by the commercials, but whether the general viewing public, including its credulous and gullible members, might be misled. *FTC* v. *Standard Education Society*, 302 U.S. 112, 116 (1937); *Aronberg* v. *FTC*, 132 F.2d 165, 167 (7th Cir. 1942).

[11] We do not, however, reject the possibility that consumers might infer from Dry Ban's admitted clarity that it does, in fact dry without residue.

[12] *Buchwalter* v. *FTC*, 235 F.2d 344 (2nd Cir. 1956); *Phelps Dodge Ref. Corp.* v. *FTC*, 139 F.2d 393 (2nd Cir. 1943).

admitted for the truth of the matters asserted when it is demonstrated that they are reasonably reliable and probative.[13] Upon thorough and independent examination of the record in this proceeding, we find that the surveys in question readily meet these standards;[14] thus, they were properly admitted by the administrative law judge. Respondents' contentions to the contrary are without merit.[15]

The administrative law judge examined the surveys in detail to determine whether consumers thought the challenged commercials conveyed the "dryness" and "no residue" messages.[16] He concluded that "a substantial portion of the public" perceived the message that Dry Ban was dry upon application to the body.[17] Our reading of the surveys differs from that of the law judge. While we agree that a substantial number of consumers surveyed (probably somewhere between 14 percent and 33 percent) understood Dry Ban to be "dry,"[18] we do not agree that they meant "dry" in the sense of total non-liquidity. After a careful examination of the verbatim responses which formed the basis of the judge's findings,[19] we conclude that the vast majority of these consumers intended by the word "dry" a looser, more colloquial meaning.[20] We believe that most of these consumers understood the commercials' message to be that Dry Ban was drier than the

[13] Pillsbury Mills, Inc., 57 F.T.C. 1274, 1397 (1960); Crown Zellerbach Corp., 51 F.T.C. 1105 (1955); ITT Continental Baking Co., Inc., D. 8860 (Oct. 19, 1973). *See V Wigmore on Evidence* 202-06 (3rd Ed. 1940). *Cf. John Bene & Sons, Inc. v. FTC*, 299 F. 468, 471 (2nd Cir. 1924).

[14] In reaching this decision, we refer generally to finding of fact 47 of the initial decision and specifically rely on the following factors:

1. The three research organizations running the surveys were all experienced at taking such surveys, Tr. 10-14, 211-15, 264, 309-13.

2. The witnesses who managed the three research organizations, Dr. Henry Ostberg, Dr. Donald Schrader, and Mr. Charles Rosen, were all highly experienced, with excellent academic credentials for survey work, Tr. 9-10, 211-12, 308-09.

3. Both respondents dealt with these companies for years regarding this kind of work, Tr. 14, 213-15, 313.

4. The surveys appeared to have been performed in the usual manner for surveys of this type.

5. Those conducting the interviews were experienced and trained, Tr. 219, 257, 327-28.

6. The surveys employed controls and validation procedures, Tr. 34, 36, 255-57, 270-71, 330.

7. While the samples were not scientifically drawn utilizing probability sampling procedures, those interviewed probably reasonably represented the class of anti-perspirant users or female anti-perspirant users (this differed from survey to survey), Tr. 27-28, 38, 247-49, 323-26.

8. The research was conducted at the instance of, for the benefit of, and often with the participation of both respondents, Tr. 21-22, 45, 143-44, 246, 314-15, 321-22, 326, 334, 658.

9. There was no incentive for the research organizations to be biased.

10. The surveys are from independent sources and tend to confirm one another.

[15] In addition to the hearsay argument, Bristol-Myers contends that an insufficient foundation was laid and that the surveys were not projectable to the relevant population. Both of these contentions go to weight rather than to admissibility and we treat them accordingly.

[16] FF 23-34, 39-45.

[17] FF 48.

[18] The Commission's expert witness, Dr. Wells, testified that one-quarter to one-third of consumers so perceived the commercials. Tr. 947. Fourteen percent of consumers surveyed stated that the message of the "Glasses" commercial (CX 5) was "Ban sprays on dry." (CX 60 (18).

[19] CX 99.

[20] We note, in passing, that the word "dry," in general parlance, has more than one meaning. Thus *Webster's Third New International Dictionary of the English Language* 696 (1961) defines "dry" as "free or relatively free from water or liquid."

comparison product or that Dry Ban was relatively dry as compared to spray deodorants and anti-perspirants in general. The number of verbatims which we believe indicate a perception that Dry Ban was wholly lacking in liquidity in the sense litigated in this case is too few on which to base a finding that the commercials contained this message.

The administrative law judge also found that "a substantial portion of the viewing public equated 'clear' and 'clean' with a representation that Dry Ban left no visible residue after application."[21] An examination of the verbatim responses shows, however, that the vast majority of those who perceived Dry Ban as "clear" or "clean" merely perceived it as clear on application, distinguishing it from the opaqueness of the competing brand. We do not believe we can infer from a consumer's use of the word "clear" in this context that he believed Dry Ban would leave no visible residue. While a few verbatims indicate a definite perception that no visible residue would be left, that figure is on the order of 2-4%, a percentage which we find patently insubstantial in this context. In a word, we reject the finding that the commercials promised "no residue."

Proof of Falsity

The theory on which this case was tried was that respondents falsely represented that Dry Ban was dry and clear and therefore superior to competing sprays when in fact the product was wet and left a visible residue after application - an absolute claim. The case was not tried on the additional theory that respondents misrepresented that Dry Ban was superior because it was drier or clearer than the leading spray depicted in the commercial - a relative claim.

On the first day of the presentation of the case-in-chief, complaint counsel stated her case to be:

> The charges in paragraph 5 of the complaint are that by means of a demonstration comparing Dry Ban with an unidentified spray respondents misrepresented that Dry Ban is a dry spray that is not wet when it is applied;[22]

In stating what she intended to prove, complaint counsel said that "[w]e will then demonstrate that these representations are, in fact, false in that Dry Ban is not dry at the moment it is applied, but is wet* * *"[23] Believing, however, that the complaint alleged also that commercials misrepresented that Dry Ban was drier than the leading spray, counsel for Bristol-Myers requested discovery of the physical characteristics of competing sprays including the leading spray depicted in the commercials. The administrative law judge responded:

> [A]s I see it the issues raised by the complaint concern the quality and characteristics

[21] FF 45.
[22] Tr. 2.
[23] Tr. 3-4.

of Dry Ban and whether or not the demonstrations described in paragraph 4 of the complaint were false and misleading or had the capacity to mislead or deceive the public as to the qualities and characteristics of Dry Ban.

Hence, the characteristics and qualities . . . of competing spray anti-perspirants are not material to the issues raised in the complaint, and that is the position that I have formulated in my mind having given careful consideration to the depositions before we came in here today.[24]

The law judge's perception that the case was based upon only one theory of liability remained the same throughout.

[T]he focus of the entire proceeding is on the characteristics of Dry Ban, not the other spray* * *

I think this has come up several times previously in this proceeding. On each occasion I believe I have taken the position that the complaint relates to the characteristics of Dry Ban and whatever was presented to the public by virtue of the Dry Ban advertising.[25]

When respondents offered evidence of the physical characteristics of the leading spray depicted in the commercials (Arrid Extra Dry), complaint counsel objected. The law judge again noted that:

* * * the entire focus is on Dry Ban and whether it is dry or not dry or leaves a visible residue or not, not in comparison with Arrid* * * [W]hy obfuscate the issue or confuse the record if we're not really concerned with the characteristics of* * * Arrid Extra Dry.[26]

Thereafter he emphasized that "I don't intend to base anything I may write on this case on the characteristics of Arrid. I do not see this as a comparative between 'A' and 'B,' I see it as a complaint alleging that certain representations were made as to the product Dry Ban."[27]

As we have indicated, our view of the commercials suggests that relative rather than absolute claims were made.[28] Evidence, however, was accepted only on an absolute claim theory. Thus, to find a violation here a remand would be necessary. Such a remand would require a broad-scoped refocusing, perhaps including the additional discovery disallowed initially by the administrative law judge.

In the instant case, the public interest would be ill served by such a remand. A number of factors, when taken together, lead us to this determination. Those persons affected do not constitute a particularly vulnerable group. There is no health or safety consideration which might legitimately demand further expenditure of public funds; nor is there significant economic harm to a consumer who purchased the product and found it "less dry" than anticipated.[29] The advertising in question was terminated over four years ago. There is no indication on this record that competition was adversely affected by whatever

[24] Prehearing transcript at 8.

[25] Tr. 1106.

[26] Tr. 1107-08.

[27] Tr. 1114.

[28] Since we do not view the Commercials as claiming absolute dryness, it is unnecessary for us to determine the admissibility of the demonstration of Dry Ban's alleged absolute wetness.

[29] A can of Dry Ban retailed for about $1. Moreover, even those who bought the product for its dryness would likely not find it wholly worthless.

deception might be proved on remand; nor are we dealing here with intentional wrongdoers.

In the past, when constrained by failure of proof to choose between remand and dismissal, we have not hesitated to terminate proceedings when the public interest so required.[30] This, we conclude, is the posture of the case before us.

An appropriate order will be entered vacating the order issued by the administrative law judge and dismissing the complaint.

Commissioner Nye not participating.

CONCURRING OPINION OF COMMISSIONER MAYO J. THOMPSON

APRIL 22, 1975

BY THOMPSON, *Commissioner:*

If the American consumer has no more serious problem than the possibility of being deceived as to the relative "dryness" of his underarm deodorant, he is in much better shape than I had been led to suppose at the time I joined this agency.

Bristol-Myers, a manufacturer of various drug, cosmetic, and other products, introduced an underarm deodorant called "Dry Ban" in 1968. Competing for an overall anti-perspirant and deodorant market estimated at more than $300 million per year, respondent and its advertising agency naturally sought to develop an advertising theme or "story" that would distinguish this new product from such competing deodorants as "Arrid," "Right Guard," "Secret," and others. Its principal mark of distinction, it seems——this record is silent as to whether it is better or worse than the others in doing what a deodorant is supposed to do——is the fact that, because it is formulated with an alcohol rather than an oil base, it looks "clear" when sprayed on a surface rather than having the kind of "oily," "opaque," or "creamy" ("whitish") appearance that is supposed to be characteristic of those competing deodorants.[1] A total of five (5) commercials prepared by the company's advertising agency, Ogilvy & Mather, were broadcast on television during the 14-month period between July 21, 1969 and Sept. 11, 1970, at a total cost of $5.8 million.[2] The product's sales amounted to some $7.4 million in 1969 and $7.9 million in 1970.[3] These advertisements, having failed to significantly increase respondent's share of the

[30] Pfizer, Inc. 81 F.T.C. 23, 73 (1972). *See* Modern Methods, Inc., *et al.* 60 F.T.C. 309 (1962). *Cf. Dr. W. B. Caldwell Inc.* v. *FTC*, 111 F.2d 889 (7th Cir. 1940); *Exposition Press* v. *F.C.T*, 295 F.2d 869 (2nd Cir. 1961), *cert. denied*, 370 U.S. 917 (1962).

[1] Initial decision of the administrative law judge (Nov. 28, 1973), p. 5 [pp. 692-693, herein].

[2] *Id.*

[3] *Id.*

deodorant market-the product now has, we are told, some 1 percent of that market[4]-was withdrawn in Sept. 1970 and have not been used since.

The Commission's complaint, issued on Sept. 12, 1972, alleged that these 5 TV commercials falsely and deceptively represented to consumers that "Dry Ban" is (1) a "dry" spray, *i.e.*, one that is "not wet" when applied to the body, and that it (2) leaves no "visible residue" when applied to the body. "In truth and in fact," the complaint alleged:

1. Dry Ban is not a dry spray and it is wet when applied to the body, and
2. After application to the body, Dry Ban dries out leaving a visible residue.[5]

The evidence offered by complaint counsel in support of this alleged deception is in three parts, (a) the 5 advertisements themselves; (b) a series of test reports prepared by certain marketing research organizations at the request of respondent's advertising agency, Ogilvy & Mather; and (c) a demonstration of the product's actual use in the hearing room and as prerecorded on videotape. From the first we learn what the ads *said* (and showed); from the second we learn, according to complaint counsel, what the ads *meant* to the consuming public; and from the last we learn that the product is "wet," "runny," "watery," and leaves an "obvious residue."[6]

There is, as discussed below, only a minor evidentiary dispute on the first point.[7] The advertisements in question focus on a purported demonstration of the relative merits of "Dry Ban," on the one hand, versus a "leading" brand (unidentified) of anti-perspirant spray, on the other. In one sequence, the two products are sprayed on adjacent surfaces to the accompaniment of an announcer's voice saying, "the leading spray goes on like this" and "Dry Ban goes on like this." The area sprayed with the "leading" brand appears in the film as a "whitish, creamy, and thick deposit," while the area sprayed with "Dry Ban" is shown as an "apparently clear and dry area.* * *"[8] A finger is pictured running through the two areas, the former appearing "thick and wet" while the other shows "no apparent effect, or one so slight as to probably escape notice. The announcer states, 'Which do you prefer?' A close-up of a can of Dry Ban is then shown and the label 'Dry Ban' virtually fills the television screen. Each commercial concludes with a scene of the characters shown initially singing or stating, 'How dry I am.' "[9]

The second sequence, one used in a commercial called "Glasses," involves a scene with two girls and a man in an elevator. The two girls

[4] Transcript of oral argument (Apr. 24, 1974), p. 22.

[5] Complaint (Sept. 12, 1972), paragraphs 5 and 6, p. 3 [p. 690, herein].

[6] Initial decision, *supra*, p. 43 [p. 723, herein].

[7] The films of these 5 TV commercials are included in the record as CX 1-5 and were viewed, as noted, by both the law judge and the Commission.

[8] Initial decision, *supra*, p. 6 [p. 694, herein].

[9] *Id.*, p. 6 [p. 694, herein].

are discussing their respective anti-perspirant sprays, both claiming theirs "helps keep you dry." One of the girls, to prove that hers is better, "reaches up and takes off the man's glasses, to his surprise, and sprays the first girl's anti-perspirant on one of the lenses saying, 'Yours goes on * * * like this.' A whitish, creamy, and thick deposit is shown covering most of the lens where the 'leading anti-perspirant' has been sprayed. The second girl then sprays Dry Ban on the other lens saying, 'My Dry Ban goes on . . . like this.' The camera shows a close-up of the lens where Dry Ban has been sprayed revealing it to be clear and apparently dry, without a visible deposit. The first girl then says, 'Uh * * * hmm * * * I see the difference.' "[10]

The learned law judge found from these commercials that they "all collectively had the tendency and capacity to represent to the viewing public that Dry Ban was dry, went on dry and left no discernible or visible residue on application, and that a real demonstration was taking place actually proving those characteristics, and the superiority of Dry Ban because of them."[11] Considerable emphasis was placed here on a series of test marketing reports received in evidence and involving, to use one example, the technique of asking a group of shoppers in a shopping center to view the ads on videotape (a mobile "van" was taken to the shopping center and used as a studio) and then respond to a series of questions designed to find out what "message" those viewers got from the commercials. The message received, according to these test reports, was that "Dry Ban" was "clear and dry" while the competing products were "creamy" and "greasy."[12] Having learned from these marketing research reports "that a substantial portion of the viewing public interpreted the challenged commercials as conveying those [false] representations," and having nonetheless continued to run those ads, respondents should not be heard to argue, in the law judge's view, that they really meant something else.[13]

The judge's findings on the *actual* characteristics of the product involved here are persuasive enough, *i.e.*, a "*live* comparative demonstration in which Dry Ban and an oil base competing spray anti-perspirant are sprayed in juxtaposition results in the perception of Dry Ban as watery, wet, and runny."[14] And his finding that these characteristics are equally apparent in uncut and continuous videotape presentations are, in our view, also adequately supported.[15] His further finding that the commercials themselves fail to reveal these features of

[10] *Id.*, p. 9 [p. 698, herein].

[11] *Id.*

[12] *Id.*, pp. 12-41 [pp. 700-721, herein].

[13] *Id.*, pp. 41-56 [pp. 722-733, herein], particularly p. 55 [p. 732, herein].

[14] *Id.*, p. 11 [p. 699, herein].

[15] "A videotape showing the spraying of Dry Ban on flat glass and the forearm of a person, and the results thereafter continuously over a five (5) minute period (tr. 790-96), was introduced into the record by complaint counsel

(*Continued*)

the product, however, rests on a much shakier foundation. In the film clips shown to the Commission on oral argument, for example, "pools" or puddles of liquid were readily visible and indeed appeared to have been *emphasized* in those ads by the action of the moving finger as it pushed through the areas sprayed with "Dry Ban."[16] Even if one assumes-as complaint counsel argue-that this liquid is considerably less apparent to the viewer on the *home* TV screen than on the larger projection equipment used in our hearing room,[17] it is hard to believe that an advertiser who was really intent on convincing a TV audience of the non-liquid character of his product would be unable to make a better showing of "dryness" than this.

Indeed, the learned law judge had similar problems with the purpose of the ads before him. On the one hand, he thought respondents had used the TV medium precisely because of its capacity to make the wet appear dry.[18] On the other hand, however, he declined to make a finding, as urged by complaint counsel, that respondents had shown a "specific intent" to deceive the public. First, a series of internal documents on the "dryness" issue[19] prepared by the advertising agency or its researchers suggested that the ads were designed to convince the viewer that the product was "clear" and "clean" only, *i.e.*, that, unlike competing products, it was "non-oily" and "non-greasy," characteristics that the public associates with anti-perspirants that are "sticky" and that stain clothing.[20] Secondly, the law judge thought it interesting that, if respondents were indeed intent on deceiving consumers as to the

(CX Physical Exhibit 8)." Contrary to the demonstrations in respondent's 5 commercials exhibited on television, "this *uncut* and *continuous* portrayal clearly reveals to the viewer the wet, runny, liquid, and watery nature of Dry Ban when sprayed on the body or on a surface, as well as the plain and obvious residue deposited on the body or on a surface by such spraying. The residue left after spraying consists of the solid ingredients suspended in the liquid in the can (Sandland, tr. 1678, 1701-09). In sum, Dry Ban is wet and watery when applied to the body and remains wet for several minutes before drying, and upon drying leaves a substantial and visible residue." Initial decision, *supra*, p. 43 [p.723, herein]. (Emphasis in original.) Respondents' argument that all this "wetness" and "residue" would have been avoided if those holding the spray cans in these demonstrations had only held them at the proper angle is, to say the least, something less than compelling. If Dry Ban can in fact be sprayed on in such a way as to avoid causing the sprayed area to become wet or, after drying, to display a conspicuous residue, respondent could have easily instructed the law judge in the proper technique. Trials before administrative agencies are investigational inquiries, not sporting events staged by opposing counsel to test their litigative skills.

[16] Transcript of oral argument, *supra*, pp. 17-19, 30-31.

[17] *Id.*, p. 31.

[18] "The difference in appearance between Dry Ban and competing spray anti-perspirants formulated with an oil base was uniquely subject to a comparative demonstration *on film* which had the capacity to convey a false, misleading, and deceptive impression of the true physical characteristics of Dry Ban. A *live* comparative demonstration in which Dry Ban and an oil base competing spray anti-perspirant are sprayed in juxtaposition results in the perception of Dry Ban as watery, wet, and runny (CX 76; tr. 845-849)." *Id.*, p. 11. [p. 699 herein] (Emphasis in original.)

[19] *Id.*, p. 49, [p. 728 herein] *et seq.* While such an intent is of course not an essential ingredient of the offense charged here, it can be, as the law judge noted, highly relevant in interpreting the advertisements and in framing the necessary order, if any.

[20] *Id.*, pp. 49-53 [pp. 728-730 herein], especially p. 52 [p. 729 herein].

"dryness" of their product, they had neglected to include any questions along that line in their marketing test questionnaires.[21] Finally, he thought it strange that respondents, if they were really zeroing in on how "dry" their product was, would let their competition off so lightly in these commercials: "If respondents had a specific intent to misrepresent Dry Ban as dry and non-wet, it seems probable that the leading spray would have been shown wetter and runnier than it was."[22] Having gotten to the water's edge, however, the learned law judge declined to drink. He decided that respondents were guilty of "negligence, carelessness, and lack of judgment in use of the word 'dry' rather than a specific and calculated intent to mislead."[23]

Whatever the shortcomings of advertising agencies of the size and experience of this one-and there are those who believe they are many-negligence, carelessness, and lack of judgment in the choice of words have not been widely suspected. If there is any group of people anywhere that is thought to have a special expertise in using words that will convey precisely the message intended, it is the men who write advertisements for the country's major producers of highly-promoted consumer products. As counsel for Ogilvy & Mather argued before the Commission, "the intention [of these 5 ads] was to illustrate a readily observable product difference, that Dry Ban went on *clear*, while the leading competition went on with an *oily*, opaque appearance."[24] This product, with a relatively fast-drying alcoholic base, would naturally look clear-and therefore non-greasy and non-staining, the prime characteristics apparently desired by users of underarm deodorants-in any visual comparison with an *oil*-based deodorant. The leading competitive product, "Arrid," had such an oil-based formula and was therefore ideally suited to play the role of a brand X "heavy" in the campaign respondents had in mind, one designed to capitalize on the public's presumed preference for "clear" anti-perspirants rather than "oily" ones. The word "dry" was selected, in other words, to mean "non-greasy" (and thus non-staining) rather than anything so literal as "non-wet" or "non-liquid."[25]

This is also the common sense of the matter. Even if one believes in the power of television to convince the consumer that wet is really dry the first time around and thus in its power to sell each potential customer *one* can of the product in question, it would presumably strain the credulity of even the most enthusiastic of TV supporters to believe

[21] *Id.*, p. 53: [p. 730 herein]. If respondents intended to convey these representations, one would have thought that they would have been looking to see whether the demonstration in fact communicated them."

[22] *Id.*, p. 54. [p. 731 herein]

[23] *Id.*

[24] Transcript of oral argument, *supra*, p. 13.

[25] "All the contemporaneous documents, the research reports, the marketing plan presented to the client to gain its approval for the expenditures, all stated that the objective of the campaign was simply clarity." *Id.*, p. 13.

that *repeat* sales could be won-and market share thus maintained-through the instrument of any such self-evidently false claim. A "Dry Ban" customer standing in front of his TV set with a dripping armpit is not likely, one supposes, to go out and buy a second can of the stuff *if*, as complaint counsel seem to argue, it is a *literally* dry (non-liquid) anti-perspirant that he wants. Put another way, even a confirmed knave does not lie to the customer if (a) the lie is bound to be discovered and (b) one has to have repeat sales in order to survive. Both conditions being amply satisfied here-"Dry Ban" apparently foundered for a lack of new customers rather than a failure to keep old ones-the kind of misrepresentation challenged in this complaint would simply make no economic sense.

It is always possible, of course, that an advertiser or his agency will be so obtuse as to try the impossible, *e.g.*, insist on trying to persuade the regular customer with a dripping armpit that it is really as dry as the Sahara. If so, however, the market itself is likely to administer a punishment that eminently fits the crime. Trying to keep repeat customers through the use of nonconcealable misrepresentations in regard to a product characteristic considered important by those customers is again not a sustainable practice and hence will be "voluntarily" abandoned without any assistance from the Federal Trade Commission. If these respondents have been quilty of this kind of economic folly, then, the most they could be reasonably charged with would be a brief and highly ineffective experiment in consumer deception, one that, in my view, was doomed at the start. Since there is obviously no public interest in spending the taxpayer's money to stop something that the market itself can be expected to kill before we can get it into court, I agree that the complaint should be dismissed.

I also believe, however, that this case was improvidently brought in the first place and that we ought to have the candor to say so publicly. Suppose, for example, that this record had fully supported complaint counsel's contention that these respondents had in fact entertained a "specific intent" to deceive the TV viewing public into believing that "Dry Ban" is dry in the literal sense of the word, *i.e.*, non-liquid. The fact would still remain, as noted above, that this industry lives on *repeat* business and hence that the commercials in question were inherently lacking in the *capacity* to mislead the consumer on this point beyond the point of the first purchase. This is not a case where a fly-by-night operator is attempting to gouge a thousand people out of a thousand dollars each (or a million people out of a dollar each) and then disappear into the economic woodwork. Had we given this industry even the most casual kind of *economic* diagnosis at the outset here, we would surely have spotted the basic unsoundness of this case.

But there is more. Having once issued this ill-advised complaint, why did we pursue the matter so doggedly? I recognize and fully support the sound principle of law that a "voluntary" abandonment of an unlawful practice after the Commission's hand is already on the offender's shoulder is not a valid reason for dismissing a case. But the rationale underlying that rule-that the practice, if profitable, will probably be resumed as soon as the law's hand is removed-has no application where, as here, the practice in question has proven itself unprofitable. These challenged advertisements were broadcast, as noted, during a 14-month period between July 21, 1969 and Sept. 11, 1970. Since those commercials cost Bristol-Myers $5.8 million and its sales of the product amounted to only $7.4 million and $7.9 million in 1969 and 1970, respectively, the firm undoubtedly lost money on "Dry Ban" during at least those two years. Its market share, we are told, has dropped from 3 percent to 1 percent over the entire period. The F.T.C. staff, having apparently been engaged in continuous investigation or negotiation of the case since early 1970, presumably knew that (a) the ads in question had not been broadcast since Sept. 1970 and (b) had been unsuccessful in increasing or even maintaining the product's share of the relevant economic market. We were nonetheless persuaded to issue a proposed complaint in, apparently, 1971. A year was then spent in an effort to get a "consent" order and, when that failed, we issued the instant complaint on Sept. 12, 1972, a full two years after the complained-of advertisements had been removed from the air. Now, nearly two *more* years later, we are finally about to stop spending the public's money on an effort that has never promised, so far as I can determine, public benefits of any kind.

I have grown weary of the kind of literal-minded legalisms we are confronted with in this matter. I don't believe there was any actionable consumer deception here and, if there was, I think it was too trivial to be worth pursuing by this agency. Surely we can find more important work for our legal staff than litigating the question of whether somebody's underarm deodorant is "dry" in the "non-liquid" sense or in the "non-oily" sense. I would dismiss all such cases as having been improvidently brought and direct our lawyers to get on with the serious business of stopping practices that are artificially inflating the prices and/or debasing the quality of the goods and services bought by our 200 million American consumers.

FINAL ORDER

This matter having been heard by the Commission upon the appeal of respondents from the administrative law judge's initial decision, and upon briefs and oral argument in support thereof and in opposition

thereto, and the Commission, for the reasons stated in the accompanying opinion, having concluded that the administrative law judge's initial decision should be set aside and that the complaint should be dismissed:

It is ordered, That the Administrative Law Judge's initial decision be, and it hereby is, set aside.

It is further ordered, That the complaint be, and it hereby is, dismissed.

Commissioner Nye not participating.

IN THE MATTER OF

MARYLAND CARPET OUTLET, INCORPORATED, ET AL.

ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION, TEXTILE FIBER PRODUCTS IDENTIFICATION AND TRUTH IN LENDING ACTS

Docket No. 8943. Complaint, Dec. 7, 1973-Decision, Apr. 22, 1975

Order requiring a Brooklyn Park, Md., seller, distributor, and installer of carpeting and floor coverings, among other things to cease using bait and switch tactics and other deceptive selling practices. Further, the order requires respondents to cease violating the Truth in Lending Act by failing to disclose to customers, in the extension of consumer credit, such information as is required by Regulation Z of the said Act and to cease violating the Textile Fiber Products Identification Act.

Appearances

For the Commission: *Everette E. Thomas, Richard C. Donohue*, and *Thomas J. Keary*.

For the respondents: *Jacob A. Stein, Stein, Mitchell and Mezines*, Wash., D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, the Textile Fiber Products Identification Act, the Truth in Lending Act and the implementing Regulation promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Maryland Carpet Outlet, Incorporated, a corporation, and Allen R. Tepper, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts, the implementing Regulation, and the Rules and Regulations promulgated under the Textile Fiber

Products Identification 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 Maryland Carpet Outlet, Incorporated, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its principal office and place of business located at 4328 Ritchie Hwy., Brooklyn Park, Md.

Respondent Allen R. Tepper is an individual and is the principal officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His business address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale, distribution and installation of carpeting and floor coverings to the public.

COUNT I

Alleging violation of Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One and Two hereof are incorporated by reference in Count I as if fully set forth verbatim.

PAR. 3. In the course and conduct of their business as aforesaid, respondents now cause, and for some time last past have caused, their said merchandise, when sold, to be shipped from their places of business located in the State of Maryland, to purchasers thereof located in various other States of the United States and the District of Columbia, and maintain and at all times mentioned herein have maintained, a substantial course of trade in said merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their aforesaid business, and for the purpose of inducing the purchase of their carpeting and floor coverings, the respondents have made, and are now making, numerous statements and representations by repeated advertisements inserted in newspapers of interstate circulation, by advertisements transmitted over television and radio, and by oral statements and representations of their salesmen to prospective purchasers with respect to their products and services.

Typical and illustrative of said statements and representations, but not all inclusive thereof, are the following:

PRE-HOLIDAY SALE
3 ROOMS
FIRST QUALITY

NYLON
WALL TO WALL
CARPET
$139

* * * * * * *

SALE
3 ROOMS OF LUXURIOUS
WALL TO WALL
NYLON CARPET
$159
INCLUDES INSTALLATION AND
SEPARATE HEAVY DUTY WAFFLE PADDING

* * * * * * *

SALE
3 ROOMS
FIRST QUALITY
NYLON
WALL TO WALL
CARPET
$139

* * * * * * *

FREE!
HOOVER VACUUM CLEANER
WITH PURCHASE OF OUR
DELUXE 501 CARPET.
OVER 100 COLORS AND PATTERNS
IN STOCK FOR

IMMEDIATE INSTALLATION

* * * * * * *

FREE
KITCHEN CARPET
OR
VACUUM CLEANER
Up to 90 sq. ft. when
you purchase 3 rooms of
our deluxe 501 nylon carpet

* * * * * * *

OUR DECORATOR WILL BRING SAMPLES
DAY OR EVENING

* * * * * * *

PAR. 5. By and through the use of the above-quoted statements and

representations, and others of similar import and meaning but not expressly set out herein, separately and in connection with the oral statements and representations of respondents' salesmen to customers and prospective customers, the respondents have represented, and are now representing, directly or by implication, that:

1. Respondents are making a bona fide offer to sell the advertised carpeting and floor coverings at the price and on the terms and conditions stated in the advertisements.

2. By and through the use of the words "SALE," "CLEARANCE," and other words of similar import and meaning not set out specifically herein, said respondents' carpeting and floor coverings may be purchased at special or reduced prices, and purchasers are thereby afforded savings from respondents' regular selling prices.

3. Purchasers of the said DeLuxe 501 Carpet receive a "free" vacuum cleaner or kitchen carpet.

4. By and through the use of the words "Over 100 colors and patterns in stock" and other words of similar import and meaning not set out specifically herein, the advertised carpeting is available in 100 different colors and patterns from which the prospective purchaser may choose.

5. By and through the use of the words "INCLUDING PADDING, INSTALLATION AND LABOR" and other words of similar import and meaning not set out specifically herein, all of the carpeting mentioned in such advertisements is installed with separate padding included at the advertised price.

6. By and through the use of the words "our decorator", and other words of similar import and meaning not set out specifically herein, respondents offer to the prospective customer the services of a trained and qualified interior decorator.

7. Certain of respondents' products are unconditionally guaranteed for various periods of time such as fifteen (15) years.

PAR. 6. In truth and in fact:

1. Respondents' offers are not bona fide offers to sell said carpeting and floor coverings at the price and on the terms and conditions stated in the advertisements. To the contrary, said offers are made for the purpose of obtaining leads to persons interested in the purchase of carpeting. Members of the purchasing public who respond to said advertisements are called upon in their homes by respondents or their salesmen, who make no effort to sell to the prospective customer the advertised carpeting. Instead, they exhibit what they represent to be the advertised carpeting which, because of its poor appearance and condition, is frequently rejected on sight by the prospective customer. Higher priced carpeting or floor coverings of superior quality and

texture are thereupon exhibited, which by comparison disparages and demeans the advertised carpeting. By these and other tactics, purchase of the advertised carpeting is discouraged, and respondents, through their salesmen, attempt to sell and frequently do sell the higher priced carpeting.

2. Respondents' products are not being offered for sale at special or reduced prices. To the contrary, the price respondents regularly advertise and their so-called advertised "sale" price are identical and are used to mislead prospective customers into believing there is a saving from a bona fide regular selling price. In fact, seldom, if ever, are the advertised items sold, because the offer is designed to act as the inducement for the practices set forth in Paragraph Six 1., hereof.

3. Purchasers of respondents' DeLuxe 501 Carpet do not receive a free vacuum cleaner or free kitchen carpet. To the contrary, the cost of the "free" gift is added to and regularly included in the selling price of the merchandise sold to the customer.

4. The advertised carpeting is not available in 100 different colors and patterns from which the customer may choose. To the contrary, respondents have available only a very limited selection of colors and patterns.

5. A substantial portion of the carpeting advertised by the respondents is not installed with separate padding which is included in the advertised price. To the contrary, a substantial portion of the advertised carpeting has rubberized backing which is bonded to the carpeting.

6. Respondents do not employ or have available for their prospective customers a trained, qualified interior decorator. To the contrary, respondents' regularly employed salesmen, who do not have any special training in the art of decorating, are utilized as "decorators" by respondents.

7. Respondents' carpeting and floor coverings are not unconditionally guaranteed for the period of time orally represented by the respondents' salesmen. To the contrary, such written guarantees as they have provided to their customers were subject to conditions and limitations not disclosed in respondents' representatives' oral representations, and in a substantial number of instances customers did not receive a written guarantee.

Therefore, the statements and representations as set forth in Paragraphs Four and Five hereof were and are false, misleading and deceptive.

PAR. 7. In the further course and conduct of their business, and in furtherance of a sales program for inducing the purchase of their carpeting and floor coverings, respondents and their salesmen or

representatives have engaged in the following additional unfair, false, misleading and deceptive acts and practices:

In substantial number of instances, through the use of the false, misleading and deceptive statements, representations and practices set forth in Paragraphs Four through Six above, respondents or their representatives have been able to induce customers into signing a contract upon initial contact without giving the customer sufficient time to carefully consider the purchase and consequences thereof.

Therefore, the acts and practices as set forth in Paragraph Seven hereof were and are unfair and false, misleading and deceptive acts and practices.

PAR. 8. In the course and conduct of their business, and for the purpose of inducing the purchase of their products, respondents use the term "up to 270 sq. ft." to indicate the quantity of carpeting available at the advertised price.

PAR. 9. The unit of measurement usually and customarily employed in the retail advertising of carpet is square yards. Consumers are accustomed to comparing the price of carpet in terms of price per square yard, therefore, respondents' use of the square foot unit of measurement confuses consumers who compare respondents' prices with competitors' prices advertised on a square yard basis.

Furthermore, respondents use of square foot measurements exaggerates the size or quantity of carpeting being offered, and therefore has the capacity and tendency to mislead consumers into the mistaken belief they are being offered a greater quantity of carpet than is the fact.

Therefore, the acts and practices as set forth in Paragraph Eight hereof were and are unfair, false, misleading and deceptive.

PAR. 10. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents have been, and now are, in substantial competition in commerce, with corporations, firms and individuals in the sale and distribution of rugs, carpeting and floor coverings and services of the same general kind and nature as those sold by respondents.

PAR. 11. The use by respondents of the aforesaid false, misleading and deceptive statements, representations, acts and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and complete and into the purchase of substantial quantities of respondents' products and services by reason of said erroneous and mistaken belief.

PAR. 12. 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 methods of competition in commerce and unfair and deceptive acts and

practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

COUNT II

Alleging violation of the Textile Fiber Products Identification Act and the implementing rules and regulations promulgated thereunder, and of the Federal Trade Commission Act, the allegations of Paragraphs One and Two hereof are incorporated by reference in Count II as if fully set forth verbatim.

PAR. 13. Respondents are now, and for some time last past have been, engaged in the introduction, delivery for introduction, sale, advertising, and offering for sale, in commerce, and in the transportation or causing to be transported in commerce, of textile fiber products including carpeting and floor coverings and have sold, offered for sale, advertised, delivered, transported and caused to be transported, after shipment in commerce, textile fiber products, either in their original state or contained in other textile fiber products, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act.

PAR. 14. Certain of said textile fiber products were misbranded by respondents within the intent and meaning of Section 4(a) of the Textile Fiber Products Identification Act and of the rules and regulations promulgated thereunder, in that they were falsely and deceptively advertised, or otherwise identified as to the name or amount of constituent fibers contained therein.

PAR. 15. Certain of said textile fiber products were falsely and deceptively advertised in that respondents in making disclosures or implications as to the fiber content of such textile fiber products in written advertisements used to aid, promote, and to assist, directly or indirectly, in the sale or offering for sale of said products, failed to set forth the required information as to fiber content as specified by Section 4(c) of the Textile Fiber Products Identification Act, and in the manner and form prescribed by the rules and regulations promulgated under said Act.

PAR. 16. Among such textile fiber products, but not limited thereto, was carpeting which was falsely and deceptively advertised in *The Washington Post* and *The Evening Star*, newspapers published in the District of Columbia, and having a wide circulation in the District of Columbia and various other States of the United States, in that said carpeting was described by such fiber connoting terms among which, but not limited thereto, was "Acrilan," and the true generic name of the fiber contained in such carpeting was not set forth.

PAR. 17. By means of the aforesaid advertisements and others of

similar import and meaning not specifically referred to herein, respondents have falsely and deceptively advertised textile fiber products in violation of the Textile Fiber Products Identification Act in that said textile fiber products were not advertised in accordance with the rules and regulations promulgated thereunder in the following respects:

1. In disclosing the fiber content information as to floor coverings containing exempted backings, fillings, or paddings, such disclosure was not made in such a manner as to indicate that such fiber content information related only to the face, pile or outer surface of the floor covering and not to the backing, filling or padding, in violation of Rule 11 of the aforesaid rules and regulations.

2. A fiber trademark was used in advertising textile fiber products, without a full disclosure of the fiber content information required by said Act, and the regulations promulgated thereunder, in at least one instance in said advertisement, in violation of Rule 41(a) of the aforesaid rules and regulations.

3. A fiber trademark was used in advertising textile fiber products, containing only one fiber and such fiber trademark did not appear, at least once in the said advertisement, in immediate proximity and conjunction with the generic name of the fiber, in plainly legible and conspicuous type, in violation of Rule 41(c) of the aforesaid rules and regulations.

PAR. 18. The acts and practices of respondents as set forth above were, and are, in violation of the Textile Fiber Products Identification Act and the rules and regulations promulgated thereunder, and constituted, and now constitute, unfair and deceptive acts and practices, in commerce, and unfair methods of competition, in commerce, under the Federal Trade Commission Act.

COUNT III

Alleging violation of the Truth in Lending Act and the implementing regulation promulgated thereunder, and of the Federal Trade Commission Act, the allegations of Paragraphs One and Two hereof are incorporated by reference in Count III as if fully set forth verbatim.

PAR. 19. In the ordinary course and conduct of their business, as aforesaid, respondents regularly extend consumer credit, as "consumer credit" is defined in Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 20. Subsequent to July 1, 1969, respondents, in the ordinary course of business as aforesaid, and in connection with their credit sales, as "credit sale" is defined in Regulation Z, have caused, and are

589-799 O - 76 - 49

causing, customers to execute binding retail installment contracts, hereinafter referred to as the "contract".

PAR. 21. By and through the use of the contract, respondents:

Fail to use the term "amount financed" to describe the amount of credit extended as required by Section 226.8(c)(7) of Regulation Z.

PAR. 22. In the ordinary course of their business as aforesaid, respondents have caused to be published, subsequent to July 1, 1969, advertisements of their goods and services, as "advertisement" is defined in Regulation Z. In the aforesaid advertisements respondents made and for some time last past have made, certain statements which aid, promote, or assist directly or indirectly in the extension of consumer credit and credit sales as "consumer credit" and "credit sales" are defined in Regulation Z, of which the following statements are illustrative, but not all inclusive:

NO MONEY DOWN
NO PAYMENT FOR 3 MONTHS

PAR. 23. By and through the use of the advertisements referred to in Paragraph 22 hereof, respondents represent, and have represented, directly or by implication, that no downpayment is necessary in connection with the extension of credit.

In truth and in fact, respondents usually and customarily require a downpayment, in violation of Section 226.10(a)(2) of Regulation Z.

PAR. 24. In the ordinary course of their business as aforesaid, respondents cause to be published advertisements of their goods and services, as "advertisement" is defined in Regulation Z. These advertisements aid, promote, or assist directly or indirectly extensions of consumer credit in connection with the sale of these goods and services. By and through the use of the advertisements, respondents:

Use the term "no money down," thereby implying no downpayment is required in connection with a consumer credit transaction, without also stating all of the following items in terminology prescribed under Section 226.8 of Regulation Z, as required by Section 226.10(d)(2) thereof:

(i) the cash price;

(ii) the number, amount and due dates or period of payments scheduled to repay the indebtedness if the credit is extended;

(iii) the amount of the finance charge expressed as an annual percentage rate; and

(iv) the deferred payment price.

PAR. 25. Pursuant to Section 103(q) of the Truth in Lending Act, respondents' aforesaid failures to comply with the provisions of Regulation Z constitute violations of that Act and, pursuant to Section

108 thereof, respondents have thereby violated the Federal Trade Commission Act.

INITIAL DECISION BY RAYMOND J. LYNCH, ADMINISTRATIVE LAW JUDGE

DECEMBER 23, 1974

PRELIMINARY STATEMENT

On Dec. 7, 1973, the Federal Trade Commission issued a complaint in this proceeding alleging that the respondents Maryland Carpet Outlet, Incorporated, a corporation, and Allen R. Tepper, individually and as an officer of said corporation, violated the provisions of the Federal Trade Commission Act, the Textile Fiber Products Identification Act, the Truth in Lending Act and the implementing regulations promulgated thereunder.

Respondents filed an answer to the complaint on Jan. 2, 1974, and subsequent thereto several prehearing conferences were held. The matter finally came on for hearing before the undersigned on Sept. 9, 10, 11 and 12, 1974. The parties filed their respective proposed findings of fact, conclusions of law and proposed order.

Any motions not heretofore or herein ruled on specifically are hereby denied.

The proposed findings, conclusions and briefs of the parties have been given careful consideration and to the extent not adopted in this initial decision in the form proposed, they are rejected as either not being supported by the evidence or as immaterial for determination of the issues in this proceeding.

Having considered the entire record in this proceeding, and having observed the witnesses who testified herein, together with the proposed findings, conclusions and orders submitted by the parties, the undersigned makes the following findings of fact.

FINDINGS OF FACT

1. Respondent Maryland Carpet Outlet, Incorporated is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its principal office and place of business located at 4328 Ritchie Highway, Brooklyn Park, Md. (Admitted in Answer, Par. 1; Tr. 350-381).*

2. Respondent Allen R. Tepper is an individual and is the principal

* References to the record are made in parentheses, and certain abbreviations are used as follows:
CX - Commission Exhibit
Tr. - Transcript page

(Continued)

officer of the corporate respondent. He formulates, directs and controls the acts and practices hereinafter set forth. His business address is the same as that of the corporate respondent (Admitted in Answer, Par. 1). Allen R. Tepper testified that he is vice president of the corporation (Tr. 350) and then he later testified that he may be president of the corporation (Tr. 378-379).

3. Mr. Tepper testified that he owned all the stock of the corporation (Tr. 350), and his duties and responsibilities as vice president of Maryland Carpet Outlet included taking care of the administrative work as well as the hiring and training of salesmen (Tr. 382). From 1966 through 1973, Maryland Carpet Outlet was managed on a day-to-day basis by Allen R. Tepper (Tr. 382-383).

4. Mr. Tepper testified that he employed an advertising agency at various times to do the advertising for Maryland Carpet Outlet (Tr. 89, 388).

5. Mr. Tepper also testified that he participated with the advertising agency in formulating the advertisements for Maryland Carpet Outlet, Inc. (Tr. 92, 388). In Respondents' Answer to Request for Admissions, Par. 1, Allen R. Tepper admits that the 212 representative samples of newspaper advertisements (CX A1-CX A106 and CX A109-CX A204) were placed in newspapers at his direction or with his knowledge. These aforementioned 212 newspaper advertisements encompass a period of time from July 1968 through June 1973.

6. Mr. Tepper further testified that he purchased carpet from various mills and suppliers (Tr. 392), and that he employed various different installers to install the carpet for Maryland Carpet (Tr. 390). In addition, Mr. Tepper testified that he trained the salesmen employed by Maryland Carpet, that he had a lot of contact with his salesmen, participated in sales meetings with his salesmen, and discussed sales techniques with them (Tr. 394-395). Mr. Tepper also stated in his testimony that either Mr. Tepper or whoever was the manager at the time would give final approval to all contracts negotiated by his salesmen (Tr. 398-399).

7. Maryland Carpet Outlet, Inc. was originally incorporated in 1959, but did not operate under the name Maryland Carpet Outlet until 1964 or 1965 (Tr. 351). Mr. Tepper testified that up until 1971, Maryland Carpet Outlet had branch offices (Tr. 351-352). One of the branch offices was located at 5648 Annapolis Road, Bladensburg, Md. (Tr. 352; CX A22-52, 75-106, 109-147, 150, 153-205, 206-216). This branch office is now a separate corporation called Maryland Virginia Carpet (Tr. 352).

References to testimony sometimes cite the name of the witness and the transcript page number without the abbreviation "Tr."

Upon questioning, Mr. Tepper attempted to explain the business connection between the two corporations (Maryland Carpet Outlet and Maryland Virginia Carpet) in this manner:

Q. Is Maryland Virginia Carpet in any way related to Maryland Carpet Outlet?
A. No.
Q. How does Maryland Virginia Carpet advertise?
A. How do they advertise?
Q. Yes, under what name?
A. In the newspapers.
Q. Under what name?
A. Maryland Carpet.

JUDGE LYNCH: You just advertise as Maryland Carpet and use the Bladensburg Road address?

THE WITNESS: Yes.

JUDGE LYNCH: How does that square with the fact you say Maryland Virginia has nothing to do with Maryland Carpet?

THE WITNESS: It once did, sir. It was one of our branches at one time, and we were advertising over there as Maryland Carpet. Then, Mr. Baron, who was working for me, at the time - we had an arrangement - I gave him 50 percent of the business if he would run it so we started a new corporation - we called it Maryland Virginia Corporation. The advertising just went on like that because we had been advertising as Maryland Carpet, but there was no other connection. The 2 companies are separate corporations. (Tr. 357-359).

8. Although Mr. Tepper tried to establish in his testimony that the branch office was now a separate corporation entity, it became apparent through not only his testimony, but the testimony of former salesmen and employees that Allen R. Tepper controlled all of the acts and practices of his branch office, Maryland Virginia Carpet, even after the corporate changeover (Tr. 352-353, 360-361).

9. Allen R. Tepper's responsibility for and control of the Maryland Virginia Carpet company can be further substantiated when viewed in relation to his control over the internal affairs of Maryland Virginia Carpet even after the corporate changeover. From Mar. 1970 to Jan. 1974, the general manager of the store at 5648 Annapolis Road in Bladensburg, Md., was Ann Marie Gittings (Tr. 123-124). During the time she worked there, Allen R. Tepper was the acknowledged owner (Tr. 129). During the time she worked there, Allen R. Tepper participated in the internal affairs of this corporation by hiring and firing people, exercising power over the determination of employees' salaries, and by having access to the financial accounts of the corporation. Mrs. Gittings testified as to these activities of Mr. Tepper as follows:

Q. Who was the owner of the company you worked for?
A. Allen R. Tepper. (Tr. 129)

10. When Maryland Virginia Carpet, Incorporated advertised, they did so under the name Maryland Carpet Outlet, Inc. (CX A109-147, 150, 154-205, 206-216). This even continued up until the present time, as can

be noted when viewing CX A206-216 which advertisements cover a time period up until Aug. 11, 1974. In these recent advertisements, nowhere can the name Maryland Virginia be found, only the name Maryland Carpet.

11. Maryland Carpet Outlet also functioned under the trade name Baltimore Carpet. Baltimore Carpet became a separate corporation on Dec. 7, 1973 (Tr. 375). Before that time, it was a subsidiary of Maryland Carpet Outlet, Inc. Allen R. Tepper testified as to the relationship between Maryland Carpet Outlet and Baltimore Carpet as follows:

Q. What is the relation of Baltimore Carpet to Maryland Carpet Outlet?

A. At the moment it is a corporation which is not being used at all. (Tr. 375)

12. The fact that Baltimore Carpet was nothing more than just a trade name for Maryland Carpet Outlet is further substantiated upon inspection of the financing documents of a consumer transaction between Baltimore Carpet and Mrs. Henry C. Prince. Although Mrs. Prince thought that she and her husband were entering into a transaction with Baltimore Carpet (Tr. 270), and the sales contract states that the contract is with Baltimore Carpet (CX B43), the receipt from the finance company, U.S. Life Credit Corporation (CX H27, p. 2), clearly shows that the assignor of the retail installment sales contract was Maryland Carpet Outlet, Inc. In summary, it is apparent that although Allen R. Tepper operated Maryland Carpet Outlet under various trade names and endeavored to set up separate corporations, he still directed and controlled all the retail carpet operations of these various companies for the benefit of himself and Maryland Carpet Outlet, Inc.

13. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale, distribution and installation of carpeting and floor coverings to the public (Admitted in Answer, Par. 1; see also Tr. 381).

14. In the course and conduct of their business as aforesaid, respondents now cause, and for some time last past have caused, their said merchandise, when sold, to be shipped from their places of business located in the State of Maryland, to purchasers thereof located in various other States of the United States and the District of Columbia, and maintains and at all times mentioned herein have maintained, a substantial course of trade in said merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act (Admitted in Answer, Par. 1).

15. In 1968, respondents conducted quite a substantial course of trade in commerce, with gross sales of approximately $1.1 million (CX C2). Allen R. Tepper testified concerning the amount of sales generated by Maryland Carpet Outlet during 1973, and 1972 as follows:

Q. Could you give me an estimate then of your total sales volume for 1969, 1970, 1972 and 1973, if it is possible?

A. Last year was somewhere around $400,000 to $500,000. (Tr. 384)

16. Respondents are also in commerce by virtue of their advertising in Washington, D.C., area newspapers (CX G1-7; Respondents' Answer to Requests for Admissions, Par. 1). This newspaper advertising in papers of interstate circulation is further substantiated by the former advertising agent of Maryland Carpet Outlet, Inc., Bernard Sandler (Tr. 89-91).

17. Further, respondents are in commerce by virtue of the fact that they advertised on radio (CX G8; see also Respondents' Answer to Requests for Admissions, Par. 1) and television (Tr. 90; see also Respondents' Answer to Requests for Admissions, Par. 1; and also CX A108, pp. 1-25).

18. In the course and conduct of their aforesaid business, and for the purpose of inducing the purchase of their carpeting and floor coverings, the respondents have made, and are now making, numerous statements and representations by repeated advertisements inserted in newspapers of interstate circulation, by advertisements transmitted over television and radio, and by oral statements and representations of their salesmen to prospective purchasers with respect to their products and services.

Typical and illustrative of said statements and representations, but not all inclusive thereof, are the following:

PRE-HOLIDAY SALE
3 ROOMS
FIRST QUALITY
NYLON
WALL TO WALL
CARPET
$139
(CX A12, 60, 62, 64)

* * * * * * *

SALE
3 ROOMS OF LUXURIOUS
WALL TO WALL
NYLON CARPET
$159
INCLUDES INSTALLATION AND
SEPARATE HEAVY DUTY WAFFLE PADDING
(CX A51)

* * * * * * *

SALE
3 ROOMS

FIRST QUALITY
NYLON
WALL TO WALL
CARPET
$139
(CX 8, 9, 11, 37, 40, 95, 97)

* * * * * * *

FREE!
HOOVER VACUUM CLEANER
WITH PURCHASE OF OUR
DELUXE 501 CARPET.
OVER 100 COLORS AND PATTERNS
IN STOCK FOR
IMMEDIATE INSTALLATION
(CX A1, 3, 4, 6, 11, 13, 20)

* * * * * * *

FREE
KITCHEN CARPET
OR
VACUUM CLEANER
Up to 90 sq. ft. when
you purchase 3 rooms of
our deluxe 501 nylon carpet
(CX A109, 110, 111, 112, 122, 123)

* * * * * * *

OUR DECORATOR WILL BRING SAMPLES
DAY OR EVENING

(CX A1, 3, 4, 6, 12, 13, 15, 17, 23, 24, 25, 117, 140)

19. Respondents admit placing advertisements such as the above in newspapers (*on behalf of Maryland Carpet*) for the purpose of inducing the purchase of their carpet and floor coverings (Request for Admissions, Pars. 2, 3; admitted in Answer to Requests for Admissions, Par. 1). Respondents also admit that advertisements CX A1-106 and CX A109-204, from which the above have been taken are *representative samples* of newspaper advertisements caused to be published by Maryland Carpet during the time period July 1968 through June 1973 (Request for Admissions, Par. 1; admitted in Respondents' Answer to Requests for Admissions, Par. 1). Counsel supporting the complaint took notice of the fact that these advertisements were representative of the newspaper advertisements for the time period July 1968 to June 1973 in order to explain what the consumer witnesses had seen and had attracted them to Maryland Carpet's advertisements (Tr. 338-339).

20. By and through the use of the above-quoted statements and representations, and others of similar import and meaning, but not expressly set out herein, separately and in connection with the oral statements and representations of respondents' salesmen to customers and prospective customers, the respondents have represented, and are now representing, directly or by implication, that:

a. Respondents are making a bona fide offer to sell the advertised carpeting and floor coverings at the price and on the terms and conditions stated in the advertisements.

b. By and through the use of the words "SALE," "CLEARANCE," and other words of similar import or meaning not set out specifically herein, said respondents' carpeting and floor coverings may be purchased at special or reduced prices, and purchasers are thereby afforded savings from respondents' regular selling prices.

c. Purchasers of the said DeLuxe 501 Carpet receive a "free" vacuum cleaner or kitchen carpet.

d. By and through the use of the words "Over 100 colors and patterns in stock" and other words of similar import and meaning not set out specifically herein, the advertised carpeting is available in 100 different colors and patterns from which the prospective purchaser may choose.

e. By and through the use of the words "INCLUDING PADDING, INSTALLATION AND LABOR" and other words of similar import and meaning not set out specifically herein, all of the carpeting mentioned in such advertisements is installed with separate padding included at the advertised price.

f. By and through the use of the words "our decorator" and other words of similar import and meaning not set out specifically herein, respondents offer to the prospective customer the services of a trained and qualified interior decorator.

During the trial, the testimony of the consumers revealed the reasons for which they contacted the respondents after seeing respondents' advertisements (Jones 64-65; Earle 174, 176; Wyre 195; Bonge 293-294; Maslin 185; Tait 331; Blythe 308).

The interpretation of the statements contained in respondents' advertisements is left to the expertise of the administrative law judge. However, the fact that so many customers responded to the advertisement is evidence that these statements appeared to be bona fide offers.

g. Certain of respondents' products are unconditionally guaranteed for various periods of time such as fifteen (15) years.

21. Respondents' offers are not bona fide offers to sell said carpeting and floor coverings at the price and on the terms and conditions stated in the advertisements. To the contrary, said offers are

made for the purpose of obtaining leads to persons interested in the purchase of carpeting. Members of the purchasing public who respond to said advertisements are called upon in their homes by respondents or their salesmen, who make little or no effort to sell the prospective customer the advertised carpeting. Instead, they exhibit what they represent to be the advertised carpeting which, because of its poor appearance and condition, is frequently rejected on sight by the prospective customer. Higher priced carpeting or floor coverings of superior quality and texture are thereupon exhibited, which by comparison disparages and demeans the advertised carpeting. By these and other tactics, purchase of the advertised carpeting is discouraged, and respondents, through their salesmen, attempt to sell the higher priced carpeting (Jackson 106, 110-111; Gittings 151; Smith 162-163; Maslin 186; Owens 224; Harris 281; Blythe 309; Thomas 324; Tait 332).

22. Not only was the appearance of the advertised carpet poor, but in many instances it was disparaged by the salesmen, either through comparison with more expensive carpeting or verbally (Earle 177; Maslin 187; Wyre 196; Harris 281; Thomas 324; Tait 333).

Upon cross examination by counsel for respondents, Mr. Earle testified:

Q. You have told us what Mr. Vincenti told you about the comparison between the advertised carpet and the carpets that he had with him. Is that correct?

A. Yes, that is correct. He immediately disparaged, after identifying it as the advertised carpeting, disparaged it, as to color, and said it would wear out very quickly. (Tr. 184)

Former salesman George Gittings stated in court:

Q. Would you describe the color of the advertised carpeting?

A. I carried Gold and Green.

Q. Did you make any statements about the availability of colors of the advertised carpet?

A. If a particular customer wanted red, I would say we didn't have that in stock.

Q. This would be any color you did not carry, you did not have in stock?

A. Right.

Q. Once you had received the lead, would you describe what you would do next, at that point?

A. I would call and verify that both the husband and wife would be home because you couldn't make a sale without both of their signatures or get it financed. I would go into the house, not bring any good carpeting with me, go in with the adv. sample, measure, draw the diagram, and I would say —— 9 times out of 10, it was more than the 270 feet advertised, which is a very short space, and the additional yardage over 30 yards, I would add that up and tell them how many square feet they had. Then, I would go in and show them the advertised carpet, and naturally, just to look at it would turn the customer off.

Q. Would you describe the advertised carpeting?

A. It was very flimsy, had no life to it.

Q. Would you make a statement about durability of the advertised carpet?

A. I would tell them there was no guarantee with it, none whatsoever, which there wasn't. It was a good buy for the amount of money, but there was no guarantee. I would state to them that mostly people who were in the Government, that were here on

temporary assignment, anywhere from 6 months to a year, buy this carpet, the purpose being they have no intention of becoming permanent residents. In their case, they was going to be permanent, and I was sure they would want something better.

Q. Did you ever make any sales of the advertised carpet?

A. The first year and a half or year, I was with them, I made one sale.

Q. Could you estimate the total number of sales you made during the period of your employment?

A. Of the advertised carpet?

Q. Of all carpeting?

A. I would have no idea. It was——maybe 3 or 4 hundred sales——I don't know. (Tr. 152-153)

23. Respondents' products are not being offered for sale at special or reduced prices. To the contrary, the price respondents regularly advertise and their so-called advertised "sale" price are identical and are used to mislead prospective customers into believing there is a saving from a bona fide regular selling price. In fact, seldom, if ever, are the advertised items sold, because the offer is designed to act as the inducement for the practices set forth above.

24. In Request for Admissions, Par. 16 (admitted by respondents in Answer to Request for Admissions, Par. 1), it is stated that the specific carpet advertised by Maryland Carpet in 1968 for "$139 for 3 rooms can be identified by the fiber trademark, El Camino." For the week of Oct. 27, 1968, 3 rooms of El Camino were advertised for $139 (CX A7). El Camino was also offered for $139 for the week of Nov. 3, 1968 (CX A8), likewise for the week of Nov. 10, 1968 (CX A10), and the week of Dec. 8, 1968 (CX A12). Yet for the week of Dec. 1, 1968 (CX A11), Maryland Carpet Outlet announced a "Sale" in which the sale carpeting (El Camino) was still offered for $139 for 3 rooms. There was no reduction in price at all during the week (CX A11) when Maryland Carpet was supposedly having a "sale."

This lack of reduction in price is further confirmed by the testimony of Allen R. Tepper. He testified as follows:

Q. Referring back to the advertisements, specifically Commission Exhibit A-11, you use the term, sale - December 1, 1968 advertisement - you advertise 3 rooms of carpeting for $139. You have already stated, in the admissions, during 1968, the sale carpeting was El Camino. Now, in the 2 months before that, you advertised El Camino for 3 rooms for $139, also, the same price. The week after your sale, you also offered El Camino for $139, and then for the month after that you offered El Camino for $139, and you used the term, clearance, for it. What do you mean by, sale, exactly?

A. To me, the term was used by the advertising agency because of what existed in the trade - everybody used the word, sale. To me it was just a word you use in advertising. I have been told since you are not supposed to do that and we don't do it.

Q. Did it constitute a reduction in your ordinary and customary selling price?

A. No. (Tr. 415-416)

A further example of this is that from the week of Jan. 19, 1969 to the week of June 1, 1969, Maryland Carpet Outlet advertised 3 rooms of carpet for $139 (CX A14 through 33), yet during the week of Jan. 26,

1969 (CX A15), they used the term "Clearance" to describe the 3 rooms for $139. During the week of Feb. 16, 1969 (CX A18), respondents used the term "Washington's Birthday Special" to describe the 3 rooms for $139. The same goes of the week of May 4, 1969, when the term "Spring Special" was used (CX A29) and the week of May 25, 1969 (CX A32), when the term "Memorial Day Special" was used to describe the 3 rooms for $139.

25. Purchasers of respondents' DeLuxe 501 Carpet do not receive a free vacuum cleaner or free kitchen carpet. To the contrary, the cost of the "free" gift is added to and regularly included in the selling price of the merchandise sold to the customer.

In CX A109, 110, 111, 112, 122, 123, for example, respondents advertise "Free Kitchen Carpet * * *." Yet, in CX D6, p. 1, a Commission and Par Sheet, Sept. 1, 1969, the instructions to the salesmen state:

Monarch "Nice N' Easy" kitchen carpet will be our give-away up to 90 square feet or 10 square yards. You will be charged $8.00 per square yard off of the top or up to $80.00. Make sure this is reflected in the contract price. Any yardage the customer might need in addition to this, charge her $12.95 a square yard. You will always be charged at $8.00 per square yard, so if the customer needs more than 10 square yards, you can defer some of the cost of the give-away by selling her the additional yardage at $12.95 per square yard.

There will never be a commission paid on Nice N' Easy that is sold as a give-away as $8.00 is our cost. If Nice N' Easy is sold as a separate job, it will be commissioned at the usual 3-5 or 10% as listed in the store selling prices.

Former salesman George Gittings testified concerning the giving of a free vacuum cleaner to customers who purchased the 501 carpet.

Q. Who would pay for the vacuum, actually?

A. It was the same vacuum you could buy for $23, and we were charging them $30. You added the $30 before you gave them the price of the carpet. (Tr. 157)

26. The advertised carpeting is not available in 100 different colors and patterns from which the customer may choose. To the contrary, respondents have available only a very limited selection of colors and patterns (Jackson 111; Gittings 152; Earle 177; Owens 230-231; Bonge 299-300; Tepper 407-408).

When former salesman James Smith was questioned concerning the availability of colors for the advertised carpeting, he testified as follows:

Q. Would you tell me how many colors of the advertised carpet you carried?

A. I believe it was about 4 at that time. (Tr. 163)

27. A substantial portion of the carpeting advertised by the respondents is not installed with separate padding which is included in the advertised price. To the contrary, a substantial portion of the advertised carpeting has rubberized backing which is bonded to the carpeting (Jackson 110; Smith 161; Tait 332; Blythe 309; Thomas 324; Tepper 409).

28. Respondents do not employ or have available for their prospective customers a trained, qualified interior decorator. To the contrary, respondents' regularly employed salesmen, who do not have any special training in the art of decorating, are utilized as "decorators" by respondents. Mr. Tepper admitted that there was no decorator training given the salesmen (Tr. 394).

29. Respondents' carpeting and floor coverings are not unconditionally guaranteed for the period of time orally represented by the respondents' salesmen. To the contrary, such written guarantees as they have provided to their customers were subject to conditions and limitations not disclosed in respondents' representatives' oral representations, and in a substantial number of instances customers did not receive a written guarantee (Tepper 414).

30. Although the guarantee was subject to conditions and limitations, in many cases this was not disclosed to the consumer by respondents' sales representatives in their oral presentation. This was especially true regarding disclosure of prorated condition of the guarantee (Jones 67; Wyre 197; Schaber 249; Prince 274; Harris 283; Thomas 327; Tait 335). The guarantee only applied to the nonsale carpeting (Tepper 415).

31. In the further course and conduct of their business, and in furtherance of a sales program for inducing the purchase of their carpeting and floor coverings, respondents and their salesmen or representatives have engaged in the following additional unfair, false, misleading and deceptive acts and practices:

In substantial number of instances, through the use of the false, misleading and deceptive statements, representations and practices, respondents or their representatives have been able to induce customers into signing a contract upon initial contact without giving the customer sufficient time to carefully consider the purchase and consequences thereof.

32. All of the former salesmen called by the Commission testified that their sales were customarily made upon the first visit and that their sales presentations were directed to induce a customer to make their purchase upon the salesman's initial visit to the customer's home (Smith 166-167; Owens 233).

Salesman Jack K. Jackson testified:

Q. Did you make any sales on the first visit to the customer?

A. You didn't have to make a sale. It was a one shot deal. You walk in - if you can't go in and close it, then you are not much of a salesman. If you can't close it the first time, you won't close it the second or third.

Q. Was your presentation directed to induce a customer to make a purchase on the first visit?

A. Yes. You went to the presentation and after the presentation you tried your best to close it* * *.(Tr. 112-113)

Salesman George Gittings testified:

Q. Did you ever make a sale upon the first visit to the customer?

A. Yes, that was the whole idea.

Q. What percentage of your sales were made on the first visit?

A. Of my sales?

Q. Yes.

A. 99 percent.

Q. Was your sales presentation then directed to inducing a purchase upon your first visit to the customer?

A. That is correct. (Tr. 153-154)

33. Evidence of the pressure by salesmen to secure a signed contract without giving the customer sufficient time to consider the purchase is further seen in consumer testimony such as that of Mrs. Henry C. Prince.

Q. Did you sign your contract for sale the same night the salesman was in your home?

A. Yes.

Q. Why did you sign it that night?

A. I didn't want to sign it that night because I figured he was there in our home and he knew what kind my husband and I liked, and I figured we would talk it over the next day and call him and let him know if that is the carpet we really wanted. I disagreed that night and that is when he completely ignored me. It was 20 after 9, and it was getting late, and he said he had another appointment, and he wanted us to sign it then.

Q. And the contract was signed that night?

A. Yes. (Tr. 274-275)

34. In the course and conduct of their business and for the purpose of inducing the purchase of their products, respondents use the term "up to 270 sq. ft." to indicate the quantity of carpeting available at the advertised price (see CX A3; CX A46; CX A51; CX A145; CX A204).

35. The unit of measurement usually and customarily employed in the retail advertising of carpet is square yards. Consumers are accustomed to comparing the price of carpet in terms of price per square yard, therefore, respondents' use of the square foot unit of measurement confuses consumers who compare respondents' prices with competitors' prices advertised on a square yard basis. Furthermore, respondents' use of square foot measurements exaggerates the size or quantity of carpeting being offered, and therefore has the capacity and tendency to mislead consumers into the mistaken belief they are being offered a greater quantity of carpet than is the fact.

Respondents admitted that the unit of measurement most commonly employed in the retail carpet trade is square yards in Answer to Request for Admissions, Par. 1. Respondents went on in Answer to Requests for Admissions, Par. 1, to admit that manufacturers or suppliers from whom Maryland Carpet purchases carpet, sell such carpet by the square yard.

36. The use by respondents of the aforesaid false, misleading and

deceptive statements, representations, acts and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and complete and into the purchase of substantial quantities of respondents' products and services by reason of said erroneous and mistaken belief (see Findings 1 - 35).

37. Respondents are now, and for some time last past have been, engaged in the introduction, delivery for introduction, sale, advertising, and offering for sale, in commerce, and in the transportation or causing to be transported in commerce, of textile fiber products including carpeting and floor covering and have sold, offered for sale, advertised, delivered, transported and caused to be transported, after shipment in commerce, textile fiber products, either in their original state or contained in other textile fiber products, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act.

In Respondents' Answer to the Complaint, Par. 1, respondents have admitted to having been engaged in "commerce" as defined in the Federal Trade Commission Act (52 Stat. 111; 15 U.S.C. 44, Section 4) and, by virtue of Section 7(b) of the Textile Fiber Products Identification Act (72 Stat. 1721; 15 U.S.C. 70 e), having been engaged in "commerce" as defined by Section 2(k) of the same Act (72 Stat. 1717; 15 U.S.C. 70). Further, in Respondents' Answer to the Complaint, Par. 1, respondents did admit to the offering for sale, sale, distribution and installation of carpeting and floor covering to the public. It is manifest with regard to representation of respondents in their advertising of carpeting and floor covering that respondents merchandise is a "textile fiber product" as defined by Section 2(g) and (h) of the Textile Fiber Products Identification Act (72 Stat. 1717, 15 U.S.C. 70). See CX A1 through CX A204 for copies of respondents' advertising.

38. Certain of said textile fiber products were misbranded by respondents within the intent and meaning of Section 4(a) of the Textile Fiber Products Identification Act and of the rules and regulations promulgated thereunder, in that they were falsely and deceptively advertised, or otherwise identified as to the name or amount of constituent fibers contained therein (Admitted in Answer, Par. 6).

39. Certain of said textile fiber products were falsely and deceptively advertised in that respondents in making disclosures or implications as to the fiber content of such textile fiber products in written advertisements used to aid, promote, and to assist, directly or indirectly, in the sale or offering for sale of said products, failed to set

forth the required information as to fiber content as specified by Section 4(c) of the Textile Fiber Products Identification Act, and in the manner and form prescribed by the rules and regulations promulgated under said Act (Admitted in Answer, Par. 6).

40. Among such textile fiber products, but not limited thereto, was carpeting which was falsely and deceptively advertised in *The Washington Post* and *The Evening Star*, newspapers published in the District of Columbia, and having a wide circulation in the District of Columbia and various other States of the United States, in that said carpeting was described by such fiber connoting terms among which, but not limited thereto, was "Acrilan," and the true generic name of the fiber contained in such carpeting was not set forth (Admitted in Answer, Par. 6).

41. By means of the aforesaid advertisements and others of similar import and meaning not specifically referred to herein, respondents have falsely and deceptively advertised textile fiber products in violation of the Textile Fiber Products Identification Act in that said textile fiber products were not advertised in accordance with the rules and regulations promulgated thereunder in the following respects:

a. Failure to disclose the fiber content information as to floor coverings containing exempted backings, fillings, or paddings, such disclosure was not made in such a manner as to indicate that such fiber content information related only to the face, pile or outer surface of the floor covering and not to the backing, filling or padding, in violation of Rule 11 of the aforesaid rules and regulations.

b. A fiber trademark was used in advertising textile fiber products, without a full disclosure of the fiber content information required by said Act, and the regulations promulgated thereunder, in at least one instance in said advertisement, in violation of Rule 41(a) of the aforesaid rules and regulations.

c. A fiber trademark was used in advertising textile fiber products containing only one fiber and such fiber trademark did not appear, at least once in the said advertisement, in immediate proximity and conjunction with the generic name of the fiber, in plainly legible and conspicuous type, in violation of Rule 41(c) of the aforesaid rules and regulations.

(Admitted in Answer, Par. 6)

42. Moreover, certain of the advertising of respondents regarding carpeting or floor covering set forth information as to fiber content of the floor covering or carpeting, which carpeting contained a backing, filling or padding. Such information was incomplete in that it failed to indicate that the information related only to the face, pile or outer surface of the floor covering and not to the backing, filling or padding,

as is required by the Commission's Rules and Regulations under the Textile Fiber Products Identification Act (Title 16 C.F.R. Section 303.11). Statements in advertising constituting violations of the aforesaid Rule and thereby constituting a misbranding within the intent and meaning of Section 4(a) of the Textile Fiber Products Identification Act (72 Stat. 1719; 79 Stat. 124; 15 U.S.C. 70 b), include but are not limited to "First Quality Wall-to-Wall Nylon Carpet" (see CX A37 through CX A47 and CX A57 through CX A101).

43. In certain of the advertisements of respondents, the term "Acrilan" was used in reference to carpeting advertised therein without setting forth the generic name of the fiber, as required by Section 4(c) of the Textile Fiber Products Identification Act (see CX A46 through CX A49 and CX A100 through CX A103).

44. In the ordinary course and conduct of their business, as aforesaid, respondents regularly extend consumer credit, as "consumer credit" is defined in Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System (Admitted in Answer, Par. 7; Tepper 404).

45. Subsequent to July 1, 1969, respondents, in the ordinary course of business as aforesaid, and in connection with their credit sales, as "credit sale" is defined in Regulation Z, have caused, and are causing, customers to execute binding retail installment contracts, hereinafter referred to as the "contract" (Admitted in Answer, Par. 7).

46. The fact that respondents use retail installment contracts in the financing of carpeting was further admitted in the testimony of respondent Allen Tepper (Tr. 404) and copies of unexecuted retail installment contracts used by respondents were introduced in evidence (CX F2, CX F3, CX F4, CX F5, CX F6, CX F7, CX F8; Tr. 404).

47. By and through the use of contract, respondents failed to use the term "amount financed" to describe the amount of the credit extended as required by Section 226.8(c)(7) of Regulation Z (Admitted in Answer, Par. 7; see also CX H14, CX H15, CX H18, CX H19, CX H20, CX H23, which are copies of executed conditional sales contracts (Tr. 405-406)).

48. In the ordinary course of their business as aforesaid, respondents have caused to be published, subsequent to July 1, 1969, advertisements of their goods and services as "advertisement" is defined in Regulation Z. In the aforesaid advertisements respondents made, and for some time last past have made, certain statements which aid, promote, or assist, directly or indirectly, in the extension of consumer credit and credit sales as "consumer credit" and "credit sales" are defined in Regulation Z, of which the following statements are illustrative, but not all inclusive:

589-799 O - 76 - 50

NO MONEY DOWN
NO PAYMENT FOR 3 MONTHS

(Admitted in Answer, Par. 7)

49. By and through the use of the advertisements referred to herein, respondents represent, and have represented, directly or by implication, that no downpayment is necessary in connection with the extension of credit.

In truth and in fact, respondents usually and customarily require a downpayment, in violation of Section 226.10(a)(2) of Regulation Z (Admitted in Answer, Par. 7).

50. In the ordinary course of their business as aforesaid, respondents cause to be published advertisements of their goods and services, as "advertisement" is defined in Regulation Z. These advertisements aid, promote, or assist, directly or indirectly, extensions of consumer credit in connection with the sale of these goods and services. By and through the use of the advertisements, respondents: use the term "no money down," thereby implying no downpayment is required in connection with a consumer credit transaction, without also stating all of the following items in terminology prescribed under Section 226.8 of Regulation Z, as required by Section 226.10(d)(2) thereof:

(i) the cash price;

(ii) the number, amount and due dates or period of payments scheduled to repay the indebtedness if the credit is extended;

(iii) the amount of the finance charge expressed as an annual percentage rate; and

(iv) the deferred payment price.

(Admitted in Answer, Par. 7)

See also CX A48, CX A49, CX A102, CX A103 for examples of the advertising of respondents (Tr. 386).

For evidence of the fact that respondents usually and customarily require a downpayment, see copies of executed retail installment contracts CX H3 through CX H26 (Tr. 405-406).

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of respondents Maryland Carpet Outlet, Inc., a corporation, and Allen R. Tepper, individually and as an officer of said corporation.

2. Said respondents have at all times relevant hereto been engaged in interstate commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

3. The aforesaid acts and practices of respondents, as herein found, were and are, all to the prejudice and injury of the public and of

respondents' competitors, and constituted, and now constitute, unfair methods of competition in commerce, and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

4. Pursuant to Section 7(a) and (b) of the Textile Fiber Products Identification Act, respondents' failure to comply with the Textile Fiber Products Identification Act and the rules and regulations promulgated thereunder, constituted, and now constitutes, unfair and deceptive acts and practices, in commerce, and unfair methods of competition in commerce, under the Federal Trade Commission Act.

5. Pursuant to Section 103(q) of the Truth in Lending act, respondents' failures to comply with the provisions of Regulation Z constitute violations of that Act, and pursuant to Section 108 thereof, respondents thereby violated the Federal Trade Commission Act.

LEGAL FINDINGS

Under the *Crowell-Collier* test for interstate commerce jurisdiction (*Crowell-Collier Publishing Company, et al.*, 75 F.T.C. 291 (1969)), corporate respondent qualifies because of the shipments of merchandise from the Maryland Carpet Outlet warehouse in the State of Maryland to customers located in Virginia and the District of Columbia.

In addition to interstate shipments of merchandise, Maryland Carpet Outlet, Inc. has advertised in several newspapers of interstate circulation and television and radio stations having sufficient power to broadcast across state lines. In *Ford Motor Company* v. *FTC*, 120 F.2d 175 (1941), the interstate distribution of advertising by an intrastate credit corporation was sufficient to support Section 5 jurisdiction. Similarly, in *Guziak* v. *FTC*, 1966 Trade Cases ¶ 71,794, the Court held that it did not appear to be necessary for jurisdictional purposes that there be any sales attributable to the interstate advertising. The Court noted that, while involved in defining Federal Trade Commission powers under Section 5, a Senate Committee had stated, "Since the powers of the Commission in this respect are injunctive rather than punitive, (it) should have the power to restrain an unfair act before it becomes a method of practice * * *." S. Rep. No. 221, 75th Cong., 1st Sess., 3-4 (1937). This view is in accord with that taken by the Court in *Morton, Inc.* v. *FTC*, 286 F.2d 158 (1961), a Fur Products Labeling Act case also dealing with the "in commerce" question in which it was held that interstate advertising would give the Commission jurisdiction despite the fact that all sales were intrastate.

If the customer pays for the "free" merchandise or service because it is included in the total price, then it is not free. In other words, if the cost of the "free" item is regularly included in the price of the

merchandise, the use of the term is deceptive *Sunshine Art Studios, Inc., et al., aff'd* 481 F.2d 1171 (1st Cir. 1973).

In determining the impression created by an advertisement, the Commission need not look to the technical interpretation of each phrase but must look to the overall impression likely to be made on the consuming public. *Murray Space Shoe Corporation* v. *FTC*, 304 F.2d 270 (2d Cir. 1962). In *National Bakers Services, Inc.* v. *FTC*, 329 F.2d 365 (7th Cir. 1964), the Court said "The important criterion in determining the meaning of an advertisement is the net impression that it is likely to make on the general populace."

It is not essential that the Commission find actual deception to support its complaint when the representations have the capacity to deceive. *Charles of the Ritz Dist. Corp.* v. *FTC*, 143 F.2d 676 (2d Cir. 1944). In *FTC* v. *Standard Education Society, et al.*, 302 U.S. 112 (1937), the Court said the fact that a representation "may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced."

The Commission's expertise to interpret representations and determine their capacity to deceive the consuming public has long been upheld. *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374 (1965).

The use of deceptive advertising to obtain prospects for the sale of merchandise other than that advertised has perhaps been one of the most frequently challenged practices violative of Section 5 of the Federal Trade Commission Act. "Guides Against Bait Advertising" issued in 1959, 4 CCH Trade Reg. Rep., ¶ 39,011.

It is not essential to show evidence of disparagement of the advertised product to find "bait and switch". The Commission may infer that customers were "switched from the advertised product by evidence of bait advertising and minimal sales of the advertised product." *Tashof* v. *FTC*, 437 F.2d 707 (D.C. Cir. 1970); *Giant Food Inc.* v. *FTC*, 322 F.2d 977 (1963), *cert. denied*, 376 U.S. 967 (1964).

In this instance, the purchase and sale of the advertised product in minimal. This fact in combination with the poor appearance of the product, disparagement of the product by the salesmen, lack of economic feasibility of sale, and the lack of incentive to sell the advertised product, as well as the advertisements themselves, evidence a bait and switch selling scheme.

The erroneous implication created by respondents that their advertised prices constitute a drastic reduction from their regular prices is in practice similar to that condemned by the Commission in *Giant Food, Inc.* v. *FTC*, 61 F.T.C. 326 (1962). In that case, the Commission found that respondents were making savings claims by comparing their "Super Giant Low Price" which was actually their

regular selling price with a fictitious "Manufacturers Suggested Price" or "Regular Price." The Commission ordered Giant to refrain from:

> Representing in any manner that, by purchasing any of its merchandise, customers are afforded savings amounting to the difference between respondent's stated selling price and any other price used for comparison with that selling price, unless the comparative price used represents the price at which the merchandise is usually and customarily sold at retail in the trade area involved, or is the price at which such merchandise has been usually and regularly sold by respondent at retail in the recent, regular course of its business. (p. 362)

Although the practice of the respondents in the instant case differs from that of *Giant*, the effect on consumers is the same in that they are led to believe that substantial savings from the regular price are available if they purchase carpet during respondents' "sale" or "jubilee" or "carnival," when, in fact, there is no saving.

It is an unfair trade practice to offer an unconditional guarantee in an advertisement or on a customer contract or by oral statement when, in fact, there are undisclosed conditions on the terms of the actual guarantee. The Commission's "Guides Against Deceptive Advertising of Guarantees", 16 C.F.R. 429 (promulgated 4/26/60), apply to guarantees "however made, i.e., in advertising or otherwise." The same disclosures have been required when offering guarantees which have conditions or limitations. *Coro, Inc.* v. *FTC*, 338 F.2d 149 (1st Cir. 1964), *cert. denied*, 380 U.S. 954 (1965); *Benrus Watch Co.* v. *FTC*, 352 F.2d 313 (8th Cir. 1965), *cert. denied*, 384 U.S. 939 (1966).

The Commission has determined that its orders should prevent not only the initial deceptive contact through a bait and switch scheme, but should go further to prevent the subsequent manipulation of a customer by high-pressure tactics which preclude a careful consideration of the entire transaction, free from the influence of deceptive sales techniques. *Household Sewing Machine Co., Inc., et al.*, 76 F.T.C. 207 (1956). *FTC* v. *National Lead Co.*, 352 U.S. 419 (1956).

The Remedy

As previously stated herein, the parties filed briefs and recommended the nature of the sanction to be imposed. It is the contention of counsel supporting the complaint that in order to protect the public interest, corrective advertising such as that set forth in the complaint must be issued:

> The Federal Trade Commission has found that we engage in bait and switch advertising; that is, the salesman makes it difficult to buy the advertised product and he attempts to switch you to a higher priced item.

The respondents, on the other hand, contends that Section 5 of the Federal Trade Commission Act in no way gives the Commission the power to issue an order requiring "the respondents [to] devote a

certain portion of their future advertising to a confession and admission that they have been found by the Federal Trade Commission to have engaged in 'Bait and Switch' tactics." The respondents argue that the recommended remedy is unconstitutional and the taking of property without just compensation. Furthermore, that the public interest does not require an order of such broad scope.

The Commission is vested with broad discretion in determining the type of order necessary to ensure discontinuance of the unlawful practices found. *FTC* v. *Colgate-Palmolive Co.*, *supra* at 392. The Commission's discretion is limited only by the requirement that the remedy be reasonably related to the unlawful practices found. *Jacob Siegel Co.* v. *FTC*, 327 U.S. 608, 613 (1946); *Niresk Industries, Inc.* v. *FTC*, 278 F.2d 337 (7th Cir. 1960), *cert. denied*, 364 U.S. 883. It is well settled that the Commission may require affirmative statements in advertising where failure to make such statements leaves the prospective consumer without all the material facts on which to base his choice as to whether to do business with the advertiser or purchase the product advertised. *FTC* v. *Algoma Lumber Co.*, 291 U.S. 67, 78 (1934).

The position of the Commission with respect to corrective advertising has been set forth very clearly in *Firestone Tire and Rubber Co.*, 81 F.T.C. 398, 471, where the Commission held that:

> An order requiring corrective advertising is well within the arsenal of relief provisions which the Commission may draw upon in fashioning effective remedial measures to bring about a termination of the acts or practices found to have been unfair or deceptive. If such relief is warranted to prevent continuing injury to the public, it is neither punitive nor retrospective.
>
> Corrective advertising orders where necessary and appropriate will violate neither the letter nor the spirit of the First Amendment guarantees of free speech and press and are clearly within the remedial authority of the Commission.

Subsequently, the Commission had occasion to reiterate the theories in *ITT Continental Baking Co. Inc.*, F.T.C. Docket No. 8860, wherein it stated:

> We have further evidence that many months after conclusion of the advertising campaign a small percentage of consumers recall the nutritional advertising of respondents though it is not clear from this evidence to what extent those consumers continued to believe that Wonder Bread is an extraordinary food (the misrepresentation found to have been made * * * we cannot find in the record a sufficient basis upon which to conclude that corrective advertising is needed to eliminate the misrepresentation found.

In addition, the Commission has also set forth its position with respect to the imposition of sanctions in both the *Curtis Publishing Company* case, Docket No. 8800, and the *Universal Credit Acceptance Company* case, Docket No. 8821, wherein they very emphatically decided that even in a case of what was deemed restitution, they had the power to, and indeed did in *Universal Credit*, *supra*, impose an

order which was referred to throughout as restitutionary relief. The Commission was reversed in *Universal Credit* by the Ninth Circuit Court of Appeals. However, in *Holiday Magic, Inc.*, Docket No. 8834 [84 F.T.C. 748], the Commission continues to claim the power to order relief as set forth in *Universal Credit.*

Taking into consideration all of the cases that have come before, and the Commission's repeatedly stated position, the undersigned is of the opinion that he is bound by the precedent that has already been established by the Commission.

Therefore, the undersigned concludes that as a result of the respondents' activities, the request of counsel supporting the complaint for corrective advertising is not beyond the scope of the Commission's power, and that in order to stop the respondents and deter others from engaging in acts and practices as set forth herein, the corrective advertising provision of the Commission's order should be imposed. The facts in this case, in the opinion of the administrative law judge, constitute fraud to such a degree that respondents should be stopped by whatever means possible from defrauding the public. Therefore, an order will issue as recommended by counsel supporting the complaint even though the Commission took a different view in *Wilbanks Carpet Specialists, Inc., et al.*, Docket No. 8933 [84 F.T.C. 510]

ORDER

I

It is ordered, That respondents Maryland Carpet Outlet, Incorporated, a corporation, its successors and assigns, and its officers, and Allen R. Tepper, individually and as an officer of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of carpeting and floor coverings, or any other article of merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using, in any manner, a sales plan, scheme, or device wherein false, misleading, or deceptive statements or representations are made in order to obtain leads or prospects for the sale of carpeting or other merchandise or services.

2. Making representations, directly or indirectly, orally or in writing, purporting to offer merchandise or services for sale when the purpose of the representation is not to sell the offered merchandise or services but to obtain leads or prospects for the sale of other merchandise or services at higher prices.

3. Advertising or offering merchandise or services for sale when the advertised merchandise or services is inadequate for the purposes for which it is offered.

4. Discouraging or disparaging in any manner the purchase of any merchandise or services which are advertised or offered for sale.

5. Failing to maintain and produce for inspection and copying for a period of three years adequate records to document for the entire period during which each advertisement was run and for a period of six weeks after the termination of its publication in press or broadcast media:

a. the cost of publishing each advertisement including the preparation and dissemination thereof;

b. the volume of sales made of the advertised product or service at the advertised price; and

c. a computation of the net profit from the sales of each advertised product or service at the advertised price.

6. Advertising the price of carpet, either separately or with padding and installation included, for specified areas of coverage without disclosing in immediate conjunction and with equal prominence the square yard price for additional quantities of such carpet with padding and installation needed.

7. Representing, directly or indirectly, orally or in writing, that any merchandise or services are offered for sale when such offer is not a bona fide offer to sell such merchandise or services.

8. Using the words "Sale," "Clearance," "Pre-Holiday Sale," or any other word or words of similar import or meaning not set forth specifically herein, unless the price of such merchandise or service being offered for sale constitutes a reduction, in an amount not so insignificant as to be meaningless, from the actual bona fide price at which such merchandise or service was sold or offered for sale to the public on a regular basis by respondents for a reasonably substantial period of time in the recent, regular course of their business.

9. (a) Representing, directly or indirectly, orally or in writing, that by purchasing any of said merchandise or services, customers are afforded savings amounting to the difference between respondents' stated price and respondents' former price unless such merchandise or services have been sold or offered for sale in good faith at the former price by respondents for a reasonably substantial period of time in the recent, regular course of their business.

(b) Representing, directly or indirectly, orally or in writing, that by purchasing any of said merchandise or services, customers are afforded savings amounting to the difference between respondents' stated price and a compared price for said merchandise or services in respondents'

trade area unless a substantial number of the principal retail outlets in the trade area regularly sell said merchandise or services at the compared price or some higher price.

(c) Representing, directly or indirectly, orally or in writing, that by purchasing any of said merchandise or services, customers are afforded savings amounting to the difference between respondents' stated price and a compared value price for comparable merchandise or services, unless substantial sales of merchandise of like grade and quality are being made in the trade area at the compared price or a higher price and unless respondents have in good faith conducted a market survey or obtained a similar representative sample of prices in their trade area which establishes the validity of said compared price and it is clearly and conspicuously disclosed that the comparison is with merchandise or services of like grade and quality.

10. Failing to maintain and produce for inspection or copying, for a period of three years, adequate records (a) which disclose the facts upon which any savings claims, sale claims and other similar representations as set forth in Paragraphs Eight and Nine of this order are based, and (b) from which the validity of any savings claims, sale claims and similar representations can be determined.

11. Representing, directly or indirectly, orally or in writing, that any price amount is respondents' regular price for any article of merchandise or service unless said amount is the price at which such merchandise or service has been sold or offered for sale by respondents for a reasonably substantial period of time in the recent, regular course of their business and not for the purpose of establishing fictitious higher prices upon which a deceptive comparison or a "free" or similar offer might be based.

12. Representing, directly or indirectly, orally or in writing, that a purchaser of respondents' merchandise or services will receive a "free" vacuum cleaner or kitchen carpeting or any other "free" merchandise, service, prize or award unless all conditions, obligations, or other prerequisites to the receipt and retention of such merchandise, services, gifts, prizes or awards are clearly and conspicuously disclosed at the outset in close conjunction with the word "free" wherever it first appears in each advertisement or offer.

13. Representing, directly or indirectly, orally or in writing, that any merchandise or service is furnished "free" or at no cost to the purchaser of advertised merchandise or services, when, in fact, the cost of such merchandise or service is regularly included in the selling price of the advertised merchandise or service.

14. Representing, directly or indirectly, orally or in writing, that a "free" offer is being made in connection with the introduction of new

merchandise or services offered for sale at a specified price unless the respondents expect, in good faith, to discontinue the offer after a limited time and commence selling such merchandise or service, separately, at the same price at which it was sold with a "free" offer.

15. Representing, directly or indirectly, orally or in writing, that merchandise or service is being offered "free" with the sale of merchandise or service which is usually sold at a price arrived at through bargaining, rather than at a regular price, or where there may be a regular price, but where other material factors such as quantity, quality, or size are arrived at through bargaining.

16. Representing, directly or indirectly, orally or in writing, that a "free" offer is available in a trade area for more than six (6) months in any twelve (12) month period. At least thirty (30) days shall elapse before another such "free" offer is made in the same trade area. No more than three such "free" offers shall be made in the same area in any twelve (12) month period. In such period, respondents' sale in that area of the product or service in the amount, size or quality promoted with the "free" offer shall not exceed 50 percent of the total volume of its sales of the product or service, in the same amount, size or quality, in the area.

17. Representing, directly or indirectly, orally or in writing, that a product or service is being offered as a "gift," "without charge," "bonus," or by other words or terms which tend to convey the impression to the consuming public that the article of merchandise or service is free, when the use of the term "free" in relation thereto is prohibited by the provisions of this order.

18. Representing, directly or indirectly, orally or in writing, that respondents have "over 100" or any other number of patterns and colors of carpeting in stock unless respondents have the stated number of patterns or colors in stock and available for immediate sale and delivery; or misrepresenting, in any manner, the colors, patterns, size, kind or quantity of carpeting in stock and available for sale, delivery or installation.

19. Representing, directly or indirectly, orally or in writing, that a stated price for carpeting or floor coverings includes the cost of a separate padding and the installation thereof, unless in every instance where it is so represented the stated price for floor covering does, in fact, include the cost of such separate padding and installation thereof; or misrepresenting in any manner, the prices, terms or conditions under which respondents supply separate padding in connection with the sale of floor covering products.

20. Representing, directly or indirectly, orally or in writing, that respondents employ or have available for their prospective customers a

trained, qualified interior decorator; or misrepresenting in any manner, the training or qualifications of any of respondents' employees, agents, or representatives.

21. Representing, directly or indirectly, orally or in writing, that any product or service is guaranteed unless the nature and extent of the guarantee, the identity of the guarantor, and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed; and respondents deliver to each purchaser a written guarantee clearly setting forth all of the terms, conditions and limitations of the guarantee fully equal to the representations, directly or indirectly, orally or in writing, made to each such purchaser, and unless respondents promptly and fully perform all of their obligations and requirements under the terms of each such guarantee.

22. Contracting for any sale whether in the form of trade acceptance, conditional sales contract, promissory note, or otherwise which shall become binding on the buyer prior to midnight of the third day, excluding Sundays and legal holidays, after the date of execution.

23. Failing to furnish the buyer with a fully completed receipt or copy of any contract pertaining to such sale at the time of its execution, which is in the same language, *e.g.*, Spanish, as that principally used in the oral sales presentation and which shows the date of the transaction and contains the name and address of the seller, and in immediate proximity to the space reserved in the contract for the signature of the buyer or on the front page of the receipt if a contract is not used and in bold face type of a minimum size of 10 points, a statement in substantially the following form:

YOU, THE BUYER, MAY CANCEL THIS TRANSACTION AT ANY TIME PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY AFTER THE DATE OF THIS TRANSACTION. SEE THE ATTACHED NOTICE OF CANCELLATION FORM FOR AN EXPLANATION OF THIS RIGHT.

24. Failing to furnish each buyer, at the time he signs the sales contract or otherwise agrees to buy consumer goods or services from the seller, a completed form in duplicate, captioned "NOTICE OF CANCELLATION," which shall be attached to the contract or receipt and easily detachable, and which shall contain in ten point bold face type the following information and statements in the same language, *e.g.*, Spanish, as that used in the contract:

NOTICE OF CANCELLATION

[enter date of transaction]

(date)

YOU MAY CANCEL THIS TRANSACTION, WITHOUT ANY PENALTY OR OBLIGATION, WITHIN THREE BUSINESS DAYS FROM THE ABOVE DATE.

IF YOU CANCEL, ANY PROPERTY TRADED IN, ANY PAYMENTS MADE BY YOU UNDER THE CONTRACT OR SALE, AND ANY NEGOTIABLE INSTRUMENT EXECUTED BY YOU WILL BE RETURNED WITHIN 10 BUSINESS DAYS FOLLOWING RECEIPT BY THE SELLER OF YOUR CANCELLATION NOTICE, AND ANY SECURITY INTEREST ARISING OUT OF THE TRANSACTION WILL BE CANCELLED.

IF YOU CANCEL, YOU MUST MAKE AVAILABLE TO THE SELLER AT YOUR RESIDENCE, IN SUBSTANTIALLY AS GOOD CONDITION AS WHEN RECEIVED, ANY GOODS DELIVERED TO YOU UNDER THIS CONTRACT OR SALE; OR YOU MAY IF YOU WISH, COMPLY WITH THE INSTRUCTIONS OF THE SELLER REGARDING THE RETURN SHIPMENT OF THE GOODS AT THE SELLER'S EXPENSE AND RISK.

IF YOU DO MAKE THE GOODS AVAILABLE TO THE SELLER AND THE SELLER DOES NOT PICK THEM UP WITHIN 20 DAYS OF THE DATE OF YOUR NOTICE OF CANCELLATION, YOU MAY RETAIN OR DISPOSE OF THE GOODS WITHOUT ANY FURTHER OBLIGATION. IF YOU FAIL TO MAKE THE GOODS AVAILABLE TO THE SELLER, OR IF YOU AGREE TO RETURN THE GOODS TO THE SELLER AND FAIL TO DO SO, THEN YOU REMAIN LIABLE FOR PERFORMANCE OF ALL OBLIGATIONS UNDER THE CONTRACT.

TO CANCEL THIS TRANSACTION, MAIL OR DELIVER A SIGNED AND DATED COPY OF THIS CANCELLATION NOTICE OR ANY OTHER WRITTEN NOTICE, OR SEND A TELEGRAM, TO [*Name of seller*], AT [*address of seller's place of business*], NOT LATER THAN MIDNIGHT OF [*date*].

I HEREBY CANCEL THIS TRANSACTION.

(Date)

(Buyer's signature)

25. Failing, before furnishing copies of the "Notice of Cancellation" to the buyer, to complete both copies by entering the name of the seller, the address of the seller's place of business, the date of the transaction, and the date, not earlier than the third business day following the date of the transaction, by which the buyer may give notice of cancellation.

26. Including in any sales contract or receipt any confession of judgment or any waiver of any of the rights to which the buyer is entitled under this order including specifically his right to cancel the sale in accordance with the provisions of this order.

27. Failing to inform each buyer orally, at the time he signs the contract or purchases the goods or services, of his right to cancel.

28. Misrepresenting, directly or indirectly, orally or in writing, the buyer's right to cancel.

29. Failing or refusing to honor any valid notice of cancellation by a buyer and within 10 business days after the receipt of such notice, to (i) refund all payments made under the contract or sale; (ii) return any goods or property traded in, in substantially as good condition as when received by the seller; (iii) cancel and return any negotiable instrument executed by the buyer in connection with the contract or sale and take any action necessary or appropriate to terminate promptly any security interest created in the transaction.

30. Negotiating, transferring, selling, or assigning any note or other evidence of indebtedness to a finance company or other third party prior to midnight of the fifth business day following the day the contract was signed or the goods or services were purchased.

31. Failing, within 10 business days of receipt of the buyer's notice of cancellation, to notify him whether the seller intends to repossess or to abandon any shipped or delivered goods.

32. Advertising any carpeting or floor covering using a unit of measurement not usually and customarily employed in the retail advertising of carpeting or which tends to exaggerate the size or quantity of carpeting or floor covering being offered at the advertised price.

Provided, however, That nothing contained in Part I of this order shall relieve respondents of any additional obligations respecting contracts required by federal law or the law of the state in which the contract is made. When such obligations are inconsistent, respondents can apply to the Commission for relief from this provision with respect to contracts executed in the state in which such different obligations are required. The Commission, upon proper showing, shall make such modifications as may be warranted in the premises.

II

It is further ordered, That respondents Maryland Carpet Outlet, Incorporated, a corporation, its successors and assigns, and its officers, and Allen R. Tepper, individually and as an officer of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the introduction, sale, advertising, or offering for sale, in commerce, or the transportation or causing to be transported in commerce of any textile fiber product; or in connection with the sale, offering for sale, advertising, delivery, transportation or causing to be transported, of any textile fiber product which has been advertised or offered for sale, in commerce; or in connection with the sale, offering

for sale, advertising, delivery, transportation, or causing to be transported, after shipment in commerce, of any textile fiber product, whether in its original state or contained in other textile fiber products, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act, do forthwith cease and desist from:

A. Misbranding textile fiber products by falsely or deceptively stamping, tagging, labeling, invoicing, advertising or otherwise identifying such products as to the name or amount of the constituent fibers contained therein.

B. Falsely and deceptively advertising textile products by:

1. Making any representations by disclosure or by implication, as to fiber content of any textile fiber product in any written advertisement which is used to aid, promote or assist, directly or indirectly, in the sale, or offering for sale, of such textile fiber product unless the same information required to be shown on the stamp, tag, label or other means of identification under Sections 4(b)(1) and (2) of the Textile Fiber Products Identification Act is contained in the said advertisement, except that the percentages of the fibers present in the textile fiber product need not be stated.

2. Failing to set forth in advertising the fiber content of floor covering containing exempted backings, fillings or paddings, that such disclosure relates only to the face, pile or outer surface of such textile fiber products and not to the exempted backings, fillings or paddings.

3. Using a fiber trademark in advertising textile fiber products without a full disclosure of the required fiber content information in at least one instance in said advertisement.

4. Using a fiber trademark in advertising textile fiber products containing only one fiber without such fiber trademark appearing at least once in the advertisement, in immediate proximity and conjunction with the generic name of the fiber, in plainly legible and conspicuous type.

III

It is further ordered, That respondents Maryland Carpet Outlet, Incorporated, a corporation, its successors and assigns, and its officers, and Allen R. Tepper, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device in connection with any extension of consumer credit or advertisement to aid, promote, or assist directly or indirectly any extension of consumer credit, as "consumer credit" and "advertisement" are defined in

Regulation Z (12 CFR §226) of the Truth in Lending Act (Pub.L. 90-321, 15 U.S.C. 1601, *et seq.*), do forthwith cease and desist from:

1. Failing to use the term "amount financed" to describe the amount of credit extended, as required by Section 226.8(c)(7) of Regulation Z.

2. Representing, directly or indirectly, orally or in writing, that no downpayment will be required unless respondents usually and customarily accept no downpayment, in accordance with Section 226.10(a)(2) of Regulation Z.

3. Representing, directly or indirectly, in any advertisement as "advertisement" is defined in Regulation Z, the amount of the downpayment required or that no downpayment is required, the amount of any installment payment, the dollar amount of any finance charge, the number of installments or the period of repayment, or that there is no charge for credit, unless all of the following terms are stated in terminology prescribed under Section 226.8 of Regulation Z:

(i) the cash price;

(ii) the amount of the downpayment required or that no downpayment is required, as applicable;

(iii) the number, amount, and due dates or period of payments scheduled to repay the indebtedness if the credit is extended;

(iv) the amount of the finance charge expressed as an annual percentage rate; and

(v) the deferred payment price.

4. Failing in any consumer credit transaction or advertisement to make all disclosures determined in accordance with Sections 226.4 and 226.5 of Regulation Z at the time and in the manner, form and amount required by Sections 226.6, 226.8 and 226.10 of Regulation Z.

It is further ordered, That each of respondents do forthwith cease and desist from disseminating, or causing the dissemination of, any advertisement of merchandise by means of newspapers, or other printed media, television or radio, or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, unless respondents clearly and conspicuously disclose in each advertisement the following notice set off from the text of the advertisement by a black border:

The Federal Trade Commission has found that we engage in bait and switch advertising; that is, the salesman makes it difficult to buy the advertised product and he attempts to switch you to a higher priced item.

One year from the date this order becomes final or any time thereafter, respondents upon showing that they have discontinued the practices prohibited by this order and that the notice provision is no longer necessary to prevent the continuance of such practices may petition the Commission to waive compliance with this order provision.

It is further ordered, That respondents shall maintain for at least a

one (1) year period, following the effective date of this order, copies of all advertisements, including newspaper, radio and television advertisements, direct mail and in-store solicitation literature, and any other such promotional material utilized for the purpose of obtaining leads for the sale of carpeting or floor coverings, or utilized in the advertising, promotion or sale of carpeting or floor coverings and other merchandise.

It is further ordered, That respondents, for a period of one (1) year from the effective date of this order, shall provide each advertising agency utilized by respondents and each newspaper publishing company, television or radio station or other advertising media which is utilized by the respondents to obtain leads for the sale of carpeting or floor coverings, or to advertise, promote, or sell carpeting or floor coverings and other merchandise, with a copy of the Commission's news release setting forth the terms of this order.

It is further ordered, That respondents shall forthwith distribute a copy of this order to each of their operating divisions.

It is further ordered, That respondents deliver a copy of this order to cease and desist to all present and future personnel of respondents engaged in the offering for sale, sale of any product, consummation of any extension of consumer credit or in any aspect of preparation, creation, or placing of advertising, and that respondents secure a signed statement acknowledging receipt of said order from each such person.

It is further ordered, That respondents notify the Commission at least thirty (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 individual respondent, Allen R. Tepper, promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

OPINION OF THE COMMISSION

APRIL 22, 1975

BY HANFORD, *Commissioner*

Respondents appeal from that part of the order entered by the administrative law judge constituting a "consumer warning" requirement, which provides that respondents must include the following disclosure in all of their advertisement:

The Federal Trade Commission has found that we engage in bait and switch advertising; that is, the salesman makes it difficult to buy the advertised product and he attempts to switch you to a higher priced item.

This is the sixth time within the past year that we have been faced with the question of whether such a warning is justified in a contested carpet bait and switch case. In each of the five earlier instances, we determined that the record did not support such a requirement.[1] In framing his order, Administrative Law Judge Lynch took into account this Commission position, but nevertheless ordered consumer warning relief here because he believed that "the facts in this case* * * constitute fraud to such a degree that respondents should be stopped by whatever means possible from defrauding the public."[2] We have reviewed the record in this proceeding with care and find nothing exceptional about the conduct of these respondents when compared with the conduct of respondents in the five earlier proceedings. Fraud is the essence of bait and switch. To the extent that it was present here, it was also present in the earlier cases in which we declined to order consumer warning relief. Therefore we find it necessary to delete Judge Lynch's "consumer warning" from the order. This determination is, of course, without prejudice to the Commission's right to reopen this proceeding to consider the imposition of a "consumer warning" requirement, or to seek imposition of such relief in a civil penalty action against respondents,[3] should their future conduct warrant either course of action.

In all other respects, the order of the administrative law judge is affirmed.

FINAL ORDER

This matter has come before the Commission on the motion of

[1] Wilbanks Carpet Specialists, Inc., *et al.*, Docket 8933 (Sept. 24, 1974 [84 F.T.C. 510]), Tri-State Carpets, Inc., *et al.*, Docket 8945 (October 15, 1974 [84 F.T.C. 1078]), Theodore Stephen Co., Inc., *et al.*, Docket 8944 (Jan. 28, 1975 [85 F.T.C. 152]), Sir Carpet, Inc., *et al.*, Docket 8981 (Feb. 6, 1975 [85 F.T.C. 190]), Freight Liquidators, Inc., *et al.*, Docket 8937 (Feb. 25, 1975 [85 F.T.C. 274]).

[2] Initial decision at 31 [p. 783, herein].

[3] Section 5(1) of the Federal Trade Commission Act (15 U.S.C. Sec. 45(1)) empowers district courts hearing civil penalty actions "to grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of * * * final orders of the Commission."

589-799 O - 76 - 51

respondents for consideration of the question whether the consumer warning provision ordered by the administrative law judge should be adopted as part of the Commission's cease and desist order. The Commission has determined that this matter is indistinguishable from the matters of *Wilbanks Carpet Specialists, Inc., et al.*, Docket 8933 [84 F.T.C. 510], *Tri-State Carpets, Inc., et al.*, Docket 8945 [84 F.T.C. 1078], *Theodore Stephen Co., Inc., et al.*, Docket 8944 [85 F.T.C. 152], *Sir Carpet, Inc., et al.*, Docket 8981 [85 F.T.C. 190], and *Freight Liquidators, Inc., et al.*, Docket 8937 [85 F.T.C. 274], inasmuch as the record presents insufficient evidence that a consumer warning is a necessary or appropriate means for the termination of the acts or practices complained of or for the prevention of their recurrence. Having declined to order a consumer warning in the five earlier matters, the Commission has concluded that the same disposition is warranted herein.

Accordingly, the initial decision issued by the judge should be modified in accordance with the foregoing views of the Commission, and as so modified, adopted as the decision of the Commission.

It is ordered, That the initial decision issued by the administrative law judge be modified by striking therefrom the following:

Those portions of the conclusions of law which concern "consumer warning" relief (at pp. 29-31 *sub nom. "THE REMEDY"*); and the first "FURTHER ORDERED" paragraph of Part III of the order to cease and desist issued by the judge (at pp. 51-52).

As so modified, the initial decision is hereby adopted.

IN THE MATTER OF

SOUNDTRACK CHEVELL INDUSTRIES, INC., ET AL.*

Docket 8998. Order, Apr. 22, 1975

Dismissal of complaint as to respondent Tommie Tubb; denial of motions of three other individual respondents for dismissal of complaint as to them; and denial of law judge's recommendation that matter be withdrawn from adjudication for consent negotiations.

ORDER DISMISSING COMPLAINT AS TO RESPONDENT TUBB AND DENYING MOTIONS TO DISMISS AS TO OTHER RESPONDENTS

On Mar. 4, 1975, the Commission *sua sponte* issued an order directing complaint counsel to show cause why this complaint should not be dismissed as to respondent Tommie Tubb. Recently, the administrative law judge certified to the Commission handwritten letters from

* For appearances, see p. 405, herein.

respondents William, Helen, and Lonnie Temple, and from the corporate respondent, which he construed as motions to dismiss the complaint as to them for lack of public interest. The law judge recommended that these motions be denied, but that this matter be withdrawn from adjudication for thirty days for the purpose of pursuing settlement proposals contained in the letters.

Complaint counsel have responded to the Show Cause order and motions to dismiss, and respondent William Temple has filed handwritten replies.

With respect to the Show Cause order, complaint counsel have offered no information tending to suggest Tubb exercised meaningful control over the acts or practices of the corporate respondent. Accordingly, the Commission now believes the public interest would not be served by litigating the charges alleged against him.

With respect to the motions to dismiss, nothing raised in regard to the remaining respondents has altered the Commission's original reason to believe a proceeding as to them would be in the public interest.

Concerning the law judge's suggestion that this matter be withdrawn from adjudication to consider the settlement proposals of certain of these respondents, two of them have asked that we appoint counsel to represent them on grounds of indigency and, until the law judge makes his recommendation on that issue, we believe such settlement negotiations would be inappropriate. Accordingly,

It is ordered, That as to respondent Tommie Tubb, the complaint in the above-captioned matter be, and it hereby is, dismissed;

It is further ordered, That the motions of respondents William F. Temple, Helen Temple, and Lonnie Temple, requesting that this complaint be dismissed as to them be, and they hereby are, denied:

It is further ordered, That the law judge's recommendation that this matter be withdrawn from adjudication for consent negotiations be, and it hereby is, denied.

Commissioners Hanford and Nye dissent from the dismissal of this complaint as to respondent Tommie Tubb for the reasons set forth in their dissenting statement of Mar. 4, 1975, [p 405 herein] to the Order to Show Cause.