IN THE MATTER OF

OGILVY & MATHER INTERNATIONAL INC.

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

Docket 9149. Complaint, Feb. 5, 1981—Decision, Jan. 4, 1983

This consent order requires a New York City advertising agency to cease, among other things, employing the name Aspercreme or any other tradename which erroneously implies that aspirin is an active ingredient of the product. The order also bars misrepresentations concerning the validity, conclusions, interpretations or results of any test or study; as well as unsubstantiated claims regarding the mode of action by which a drug treats, eases or cures a symptom, condition or disease. Respondent is further prohibited from representing without reasonable substantiation that any topically applied drug is faster or more effective than aspirin in the treatment of arthritis, tendonitis, bursitis or rheumatism, or that it involves a new scientific or mechanical principle. Additionally, the order requires the company to retain all data that substantiates or contradicts advertised product claims for a period of three years following dissemination of any advertisement subject to the order.

Appearances

For the Commission: *Randell C. Ogg, Teresa A. Hennessy, Mark L. Winerman,* and *Roberta L. Gross.*

For the respondent: *Leonard Orkin, Davis & Gilbert,* New York City.

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 Thompson Medical Company, a corporation, (hereinafter "Thompson"), and Ogilvy & Mather, Inc., a corporation, (hereinafter "Ogilvy"), hereinafter sometimes referred to as respondents, have violated the provisions of the 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. Thompson is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York with its offices and principal place of business located at 919 Third Ave., New York, New York.

PAR. 2. Ogilvy is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located at 2 East 48th St., New York, New York.

PAR. 3. Thompson is now and has been engaged in the business of manufacturing, advertising, offering for sale, sale, and distribution of various over-the-counter health care products, including the products Aspercreme Creme Rub and Aspercreme Lotion Rub (hereinafter "Aspercreme"), products advertised to treat various disorders. In connection with the manufacture and marketing of Aspercreme, Thompson is now and has been engaged in the dissemination, publication, and distribution of advertisements and promotional material for the purpose of promoting the sale of Aspercreme for human use. As advertised, Aspercreme is a "drug" within the meaning of Section 12 of the Federal Trade Commission Act.

PAR. 4. Thompson causes said products when sold to be transported from its places of business in various states to purchasers located in various other states. Thompson maintains, and at all times mentioned herein has maintained, a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Ogilvy is now, and for some time past has been, an advertising agency of Thompson. Ogilvy has prepared and placed for publication, advertising material to promote the sale of Aspercreme for human use.

PAR. 6. In the course and conduct of its business, and at all times mentioned herein, Thompson has been and now is in substantial competition in or affecting commerce with corporations, firms, and individuals representing or engaged in the manufacture or marketing of health care products.

PAR. 7. Ogilvy at all times mentioned herein has been and now is, in substantial competition in or affecting commerce with other advertising agencies.

PAR. 8. In the course and conduct of their businesses, respondents have disseminated and caused the dissemination of certain advertisements concerning Aspercreme through the United States mail and by various means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, including the insertion of advertisements in magazines with national circulations and the placement

of advertisements with television stations with sufficient power to broadcast across state lines and into the District of Columbia.

PAR. 9. Typical statements and representations in said advertisements, disseminated as previously described, but not necessarily all-inclusive, are the advertisements attached hereto as Exhibits A through H.

PAR. 10. Through the use of the advertisements referred to in Paragraphs Eight and Nine and others not specifically set forth herein, respondents represented and now represent, directly or by implication that:

a. Aspercreme contains aspirin.

b. Aspercreme is a recently discovered or developed drug product.

c. Valid studies have scientifically proven that Aspercreme is more effective than orally-ingested aspirin for the relief of arthritis, rheumatic conditions, and their symptoms.

PAR. 11. In truth and in fact:

a. Aspercreme does not contain aspirin.

b. Aspercreme is not a recently discovered or developed drug product; it has been available for purchase since at least 1971 and its active ingredient has been in existence since at least 1954.

c. No valid studies have scientifically proven that Aspercreme is more effective than orally-ingested aspirin for the relief of arthritis, rheumatism, and their symptoms.

Therefore, the representations set forth in Paragraph Ten were and are false, misleading, or deceptive; and the advertisements referred to in Paragraphs Eight and Nine were and are misleading in material respects, and constituted and now constitute false advertisements.

PAR. 12. Through the use of the advertisements referred to in Paragraphs Eight and Nine and others not specifically set forth herein, respondents represented, and now represent, directly or by implication that:

a. Aspercreme is an effective drug for the relief of minor arthritis and its symptoms.

b. Aspercreme is as effective a drug as orally-ingested aspirin for the relief of minor arthritis and its symptoms.

c. Aspercreme is a more effective drug than orally-ingested aspirin for the relief of minor arthritis and its symptoms.

d. Aspercreme is an effective drug for the relief of rheumatic conditions and their symptoms.

e. Aspercreme acts by directly penetrating through the skin to the site of the arthritic disorder.

f. The use of Aspercreme will result in no side effects.

PAR. 13. At the time of the first and subsequent disseminations of the representations contained in Paragraph Twelve respondents did not possess and rely upon a reasonable basis for making those representations. Therefore, the dissemination of the said representations as alleged constituted, and now constitutes, unfair or deceptive acts or practices in or affecting commerce.

PAR. 14. Through the use of the advertisements referred to in Paragraphs Eight and Nine and others not specifically set forth herein respondents have represented and now represent directly or by implication that they possessed and relied upon a reasonable basis for the representations set forth in Paragraph Twelve at the time such representations were made.

PAR. 15. In truth and in fact, respondents did not possess and rely upon a reasonable basis for the representations set forth in Paragraph Twelve at the time such representations were made. Therefore, the representations set forth in Paragraph Fourteen were and are false, misleading or deceptive.

PAR. 16. Through the use of the trade name "Aspercreme" in advertising, labels and promotional materials, respondents have represented and now represent that the product "Aspercreme" contains aspirin.

PAR. 17. In truth and in fact, "Aspercreme" contains no aspirin. Therefore, the representation in Paragraph Sixteen was and is false, misleading, deceptive or unfair, and the use of the trade name "Aspercreme" to describe a product which contains no aspirin constituted and now constitutes an unfair or deceptive act or practice in or affecting commerce.

PAR. 18. The use by respondents of the aforesaid unfair or deceptive representations and the dissemination of the aforesaid false advertisements has had, and now has, the capacity and tendency to mislead members of the consuming public into the erroneous and mistaken belief that said representations were and are true.

PAR. 19. The acts and practices of respondents, as herein alleged, including the dissemination of the aforesaid false advertisements, 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 or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce in violation of Sections 5 and 12 of the Federal Trade Commission Act, as amended.

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

Client: THOMPSON MEDICAL
Product: ASPERCREME
Title: "RUB VERSION/NO MORTICE"
Commercial No.: QTAI 9013
Date Approved: 10/26/78

Exhibit A

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

Client: THOMPSON MEDICAL
Product: ASPERCREME
Title: "VISIBLE MEN"
Commercial No.: QTAI 9033
Date Approved: 3/30/79

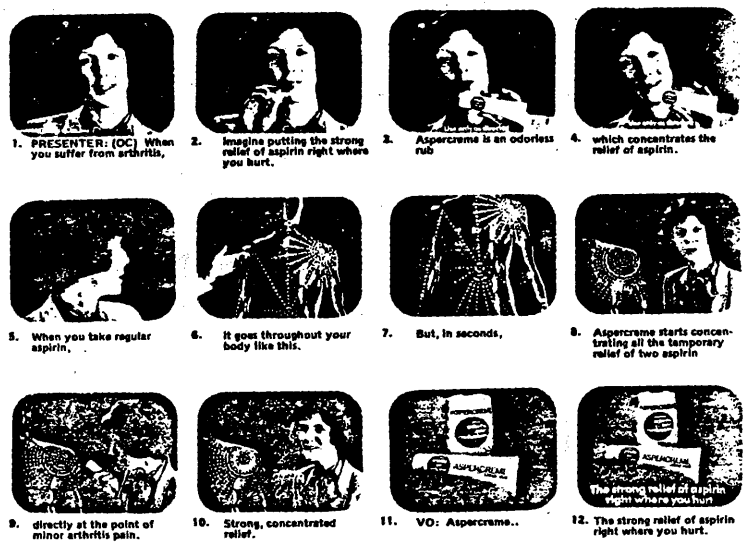


Exhibit B

Radio TV Reports

41 East 42nd Street New York N.Y. 10017
(212) 697-5100

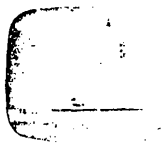
PRODUCT: ASPERCREME — 80-01116
PROGRAM: NEWS — 1/23/80 — 30 SEC.
WNBC-TV — (NEW YORK) — 7:24PM

REVISION OF COMMERCIAL • 7V9635 -

1. WOMAN: When you suffer from arthritis,
2. imagine being able to put the strong relief of aspirin right where you hurt most.
3. Now with amazing Aspercreme,
4. you can get the strong relief of aspirin

5. directly at the point of minor arthritis pain.
6. Strong penetrating relief which lasts for hours.
7. With none of aspirin's possible side effects.
8. Aspercreme. Fast acting, no embarrassing odor.

"contains no aspirin" super



9. The strong relief of aspirin right where you hurt. Remarkable.

Exhibit C

ALSO AVAILABLE IN COLOR VIDEO-TAPE CASSETTE

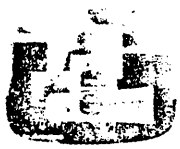

OGILVY & MATHER INC.
2 EAST 48 STREET, NEW YORK 10017
MURRAY HILL 8-8100
Client: THOMPSON MEDICAL
Product: ASPERCREME
Title: "VISIBLE MEN"
Commercial No.: QTAI 9033
Date Approved: 3/30/79
1. PRESENTER: (OC) When you suffer from arthritis,
2. Imagine putting the strong relief of aspirin right where you hurt.
3. Aspercreme is an odorless rub
4. which concentrates the relief of aspirin.
5. When you take regular aspirin,
6. It goes throughout your body like this.
7. But, in seconds,
8. Aspercreme starts concentrating all the temporary relief of two aspirin
9. directly at the point of minor arthritis pain.
10. Strong, concentrated relief.
11. VO: Aspercreme.
12. The strong relief of aspirin right where you hurt.
"relief without aspirin" super

Exhibit D

Radio TV Reports

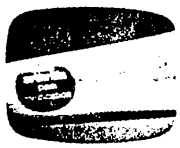
41 East 42nd Street New York N.Y. 10017
(212) 697-5100

PRODUCT: ASPERCREME CREME RUB OH80-08742
PROGRAM: STATION BREAK 5/14/80 30 SEC.
WYKW-TV (L (CLEVELAND) 10:59 AM



ANNCR: Listen to what these people say about Aspercreme for temporary relief of minor arthritis pain.

2. 1ST WOMAN: I really felt like I was rubbing the pain away.



3. ANNCR: Aspercreme.

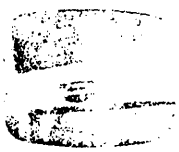
4. 1ST MAN: The Aspercreme gives me relief without upsetting my stomach.

Aspercreme.

6. 2ND WOMAN: It doesn't stain my clothes.

7. 3RD WOMAN: There's no odor.

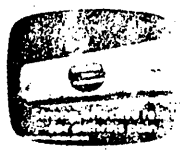
8. 4TH WOMAN: And look, it's greaseless.



9. Aspercreme.

10. 2ND MAN: I'm saying that I am really pleased with the relief I got from Aspercreme.

11. 5TH WOMAN: The relief lasts for hours.



12. ANNCR: Aspercreme. Strong, effective relief for arthritis pain. 6TH WOMAN: It really works.

ALSO AVAILABLE IN COLOR VIDEO-TAPE CASSETTE

Exhibit E

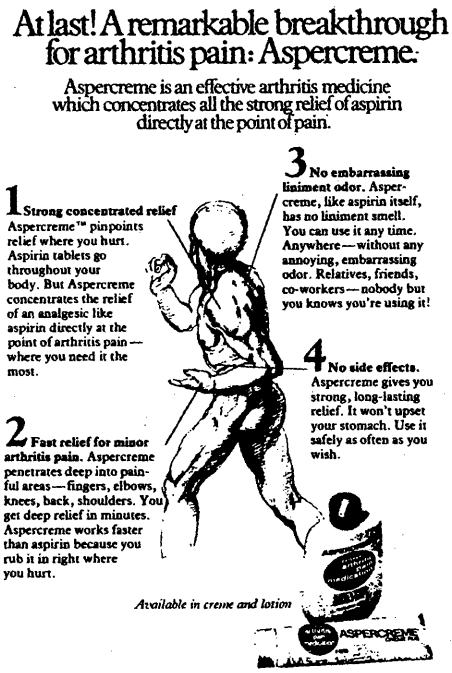

At last! A remarkable breakthrough for arthritis pain: Aspercreme.
Aspercreme is an effective arthritis medicine which concentrates all the strong relief of aspirin directly at the point of pain.
1 Strong concentrated relief Aspercreme™ pinpoints relief where you hurt. Aspirin tablets go throughout your body. But Aspercreme concentrates the relief of an analgesic like aspirin directly at the point of arthritis pain — where you need it the most.
2 Fast relief for minor arthritis pain. Aspercreme penetrates deep into painful areas — fingers, elbows, knees, back, shoulders. You get deep relief in minutes. Aspercreme works faster than aspirin because you rub it in right where you hurt.
3 No embarrassing liniment odor. Aspercreme, like aspirin itself, has no liniment smell. You can use it any time. Anywhere — without any annoying, embarrassing odor. Relatives, friends, co-workers — nobody but you knows you're using it!
4 No side effects. Aspercreme gives you strong, long-lasting relief. It won't upset your stomach. Use it safely as often as you wish.
Available in creme and lotion
ASPERCREME

Exhibit F

At last! A remarkable breakthrough for arthritis pain: Aspercreme.

Aspercreme is an effective arthritis medicine which concentrates all the strong relief of aspirin directly at the point of pain.

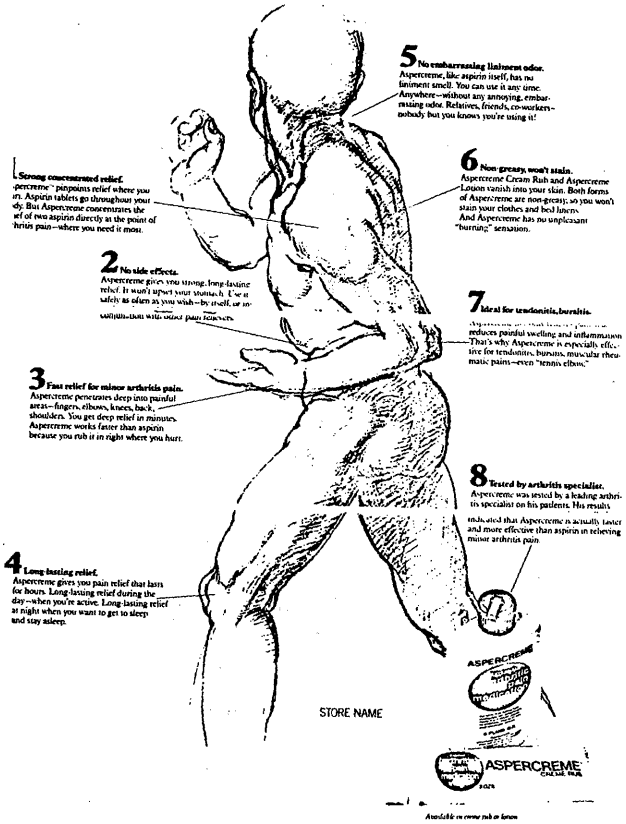
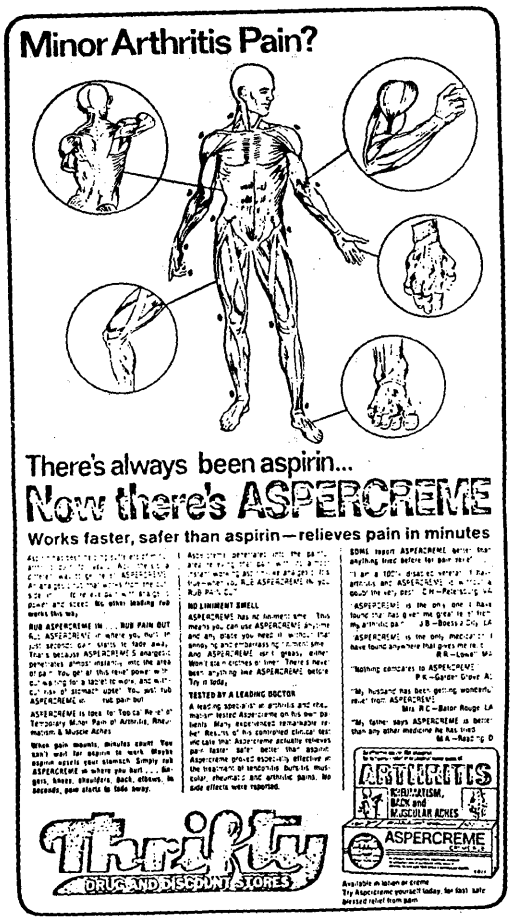


Exhibit G



AP 8/22/78 4Col. 672 Li. (THRIFTY)

Exhibit H

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondent named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondent having been served with a copy of that complaint, together with a notice of contemplated relief; and

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

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Ogilvy & Mather International 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 offices and place of business located at 2 East 48th St., New York, New York.

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

ORDER

Part I

It is ordered, That respondent Ogilvy & Mather International Inc., its successors and assigns, and its 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 any "drug", as that term is defined in the Federal Trade Commission Act, in or affecting commerce, as "com-

merce" is defined in the Federal Trade Commission Act, do cease and desist from:

A. Employing the trade name "Aspercreme" for any such drug or any other tradename or terms that represents, directly or by implication, that an active ingredient of such drug is aspirin, unless such drug contains aspirin in therapeutically significant quantities.

B. Employing any trade name for any such drug which represents, directly or by implication, that such drug contains an active ingredient which it in fact does not.

C. Representing, directly or by implication, that any such drug is new, or involves a new mechanical or scientific principle, when such drug or one involving such principle has been nationally available for purchase in the United States for more than one year.

D. Representing, directly or by implication, that any such drug has an ingredient when in fact it does not have that ingredient.

E. Misrepresenting the contents, validity, results, conclusions or interpretations of any test or study.

F. Representing, directly or by implication, the mode of action by which any such drug treats, mitigates, or cures any symptom, disease, or condition unless respondent possesses and relies upon a reasonable basis substantiating the representation.

Part II

It is further ordered, That respondent Ogilvy & Mather International Inc., its successors and assigns, and its 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 any topically applied drug in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, cease and desist from:

A. Representing, directly or by implication, that any such topically applied drug is effective for the treatment or relief of the symptoms of any musculoskeletal disorder (such as arthritis, tendonitis, bursitis, or rheumatic disorders) or any other disease or condition;

B. Representing, directly or by implication, that any such topically applied drug is as fast or faster, or is as effective or more effective, than aspirin in the treatment or relief of the symptoms of any musculoskeletal disorder (such as arthritis, tendonitis, bursitis, or rheumatic disorder) or any other disease or condition;

C. Representing, directly or by implication, that any such topically applied drug will not result in any side effect;

D. Representing, directly or by implication, that any such topically applied drug will result in fewer side effects than any other drug or device;

unless at the time of the dissemination of any such representation respondent possesses and relies upon a reasonable basis consisting of competent and reliable scientific or medical evidence substantiating that representation. For the purposes of this Order, competent and reliable scientific or medical evidence shall include at least two well-controlled, double blinded clinical studies which meet the requirements set forth in 21 C.F.R. 314.111(a)(5)(ii) and 21 C.F.R. 330.10(a)(4)(ii), and are conducted by different persons, independently of each other. Such persons shall be qualified by training and experience to conduct such studies. *Provided, however,* with respect to any representation covered by this Part, if the Food and Drug Administration promulgates any final standard which establishes conditions under which such product is safe and effective, then in lieu of the above, respondent may possess and rely upon scientific evidence which fully conforms to such final standards as a reasonable basis for said representation. *Provided further, however,* where the evidence relied upon by respondent was not directly or indirectly conducted or controlled by respondent, it shall be an affirmative defense to an alleged violation of this Part for respondent to prove that it reasonably relied on the expert judgment of its client or of an independent third party in concluding that a reasonable basis exists which meets the requirements of this Part. Such expert judgment shall be in writing signed by a person qualified by education or experience to render the opinion. The written opinion shall describe the contents of the evidence upon which the opinion is based and shall set forth the qualifications of the person to render the opinion.

Part III

It is further ordered, That respondent Ogilvy & Mather International Inc., its successors and assigns, and its officers, representatives, agents and employees, for a period of three years after respondent last disseminates the advertisements for products covered by this Order, shall retain all test results, data, and other documents or information on which it relied for its representations or any documentation which contradicts, qualifies or calls into serious question any claim included in such advertisements which were in its possession during either their creation or dissemination. Such records may be inspected by the staff of the Commission upon reasonable notice.

Part IV

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to the effective date of 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.

Part V

It is further ordered, That respondent shall distribute a copy of this Order to each of its operating divisions, and to each of its officers who are engaged in the preparation and placement of advertisements for products covered by this Order.

Part VI

It is further ordered, That the provisions of this Order shall not apply to Scali, McCabe, Sloves, Inc.; Cole & Weber, Inc.; and Rogers, Weiss/Cole & Weber Advertising, three subsidiary corporations wholly owned by respondent, unless a product otherwise covered by this Order is assigned or transferred from respondent to one of those corporations. However, respondent shall distribute a copy of this Order to the officers of the aforementioned corporations.

Part VII

It is further ordered, That the respondent shall, within sixty (60) days after this Order becomes final and annually thereafter for three (3) years, file with the Commission a report, in writing, signed by a responsible officer for respondent, setting forth in detail the manner and form in which it has complied with this Order.

IN THE MATTER OF

BOISE CASCADE CORPORATION

Docket 9133. Interlocutory Order, Jan. 12, 1983

ORDER DENYING RESPONDENT'S APPLICATION FOR INTERLOCUTORY APPEAL

At the conclusion of the presentation of complaint counsel's case in this proceeding, respondent filed with the ALJ a motion to dismiss the complaint. On November 23, 1982, the ALJ issued an order declaring his decision to defer ruling on the motion until after the presentation of respondent's defense and the filing of proposed findings and conclusions of law by the parties. On December 9, respondent filed with the Commission a motion requesting an order directing the ALJ to rule *now* on respondent's motion to dismiss.

Respondent's motion is not permitted by either Commission Rule 3.22(e), which provides specifically for the treatment of motions for dismissal, or by Rule 3.23, which governs interlocutory appeals. The Commission, of course, retains the authority to grant review of an interlocutory ruling where the requirements of Rule 3.23 are not met, but it has said that it will consider doing so only on a showing of a clear abuse of discretion by the ALJ and irreparable harm to the appealing party. *E.g., American Home Products Corp.*, 90 F.T.C. 148 (1977); *General Motors Corp.*, 90 F.T.C. 172 (1977). This occasion does not present such a case.

Even when its standards for review were less stringent, the Commission repeatedly declined to review ALJ determinations denying motions to dismiss or for summary decision. *E.g., Vulcanized Rubber and Plastics Co.*, 52 F.T.C. 533 (1955); *School Services, Inc.*, 72 F.T.C. 1003 (1967); *The Hearst Corp.*, 80 F.T.C. 1011 (1972).[1] As the Commission noted in those cases, denial of such motions does not affect the ultimate outcome of a case. Moreover, a decision whether to continue a proceeding with the presentation of respondent's defense is peculiarly within the grasp of the ALJ.

The ALJ's discretion in ruling on motions to dismiss is broad. Indeed, Rule 3.22(e) expressly provides that the ALJ may defer ruling until the close of the case. Like interlocutory appeals from discovery rulings, appeals from determinations under Rule 3.22(e) merit a par-

[1] These decisions were issued under rules permitting review "upon a showing that the ruling complained o involves substantial rights and will materially affect the final decision, and that a determination of its correctnes before conclusion of the hearing is essential to serve the interests of justice." The current rules provide for revie only upon certification by the ALJ under Rule 3.23(b) or in narrow circumstances, clearly not applicable her delineated in Rule 3.23(a).

ticularly skeptical reception. *See, Bristol-Myers Co.,* 90 F.T.C. 273 (1977). It is inappropriate for the Commission to entertain an appeal of such a determination when the factual record is clearly in dispute and the ALJ has concluded that the proceeding should continue.

Accordingly, *it is ordered* that respondent's application for review is denied.

IN THE MATTER OF

SOUTHERN MARYLAND CREDIT BUREAU, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5(a) OF THE FEDERAL TRADE COMMISSION ACT AND THE FAIR CREDIT REPORTING ACT

Docket C-3101. Complaint, Jan. 26, 1983—Decision, Jan. 26, 1983

This consent order requires a La Plata, Md. consumer reporting agency, among other things, to cease failing to require customers, such as private investigative agencies, detectives or attorneys, who do not extend credit in the normal course of their business, to certify the purpose for which information is sought; that use of the data will be restricted to that purpose; and that the customer understands that anyone obtaining credit information under false pretenses is subject to a fine and/or imprisonment under Federal law. Respondent is further required to compile a list of detectives and attorneys from the yellow pages of the telephone book in the area where the requesting party does business, and to consult the list to determine whether certification must be provided. Additionally, the firm must require prospective customers to identify themselves and comply with certification requirements; and to withhold credit reports from parties it has reason to believe would use the information for improper purposes.

Appearances

For the Commission: *Charlyn J. Buss.*

For the respondent: *Robert T. Barbour, Barbour, Zverina & Myer,* La Plata, Md.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, 15 U.S.C. 41, *et seq.*, as amended, the Fair Credit Reporting Act, Public Law 91-508, 15 U.S.C. 1681 *et seq.*, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, hereinafter referred to as the "Commission," having reason to believe that Southern Maryland Credit Bureau, Inc., a corporation, hereinafter referred to as "respondent," has violated the provisions of said Acts, 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 as follows:

PARAGRAPH 1. For the purposes of this Complaint and the accompanying Consent Order to cease and desist, the terms *consumer, consumer report,* and *consumer reporting agency* are defined as set forth in Section 603 of the Fair Credit Reporting Act.

PAR. 2. Respondent is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its sole office and place of business located at 211 North U.S. Route 301, P.O. Box 220, La Plata, Maryland.

PAR. 3. Respondent, in the ordinary course and conduct of business, is and has been regularly engaged in the practice of assembling or evaluating information bearing on consumers' creditworthiness, credit standing, and credit capacity for the purpose of furnishing, for monetary fees, consumer reports to third parties. These reports contain information including but not limited to credit histories obtained from creditors and consumer reporting agencies, public record information, and employment information and records. Creditors and others use the information contained in these reports for the purpose of establishing the consumer's eligibility for credit and other business transactions to be used primarily for personal, family, or household purposes. Respondent is thus a consumer reporting agency, as defined by the Fair Credit Reporting Act.

PAR. 4. Respondent, from its office in La Plata, Maryland, causes consumer reports to be distributed through the mail to its customers located in other States of the United States, and in the ordinary course and conduct of its business regularly sends and receives substantial numbers of communications including consumer reports across state lines through the means and facilities of interstate commerce. Respondent thus maintains a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act. Accordingly, the Commission has jurisdiction over the subject matter of this proceeding and over respondent, as provided by Section 621 of the Fair Credit Reporting Act and by the Federal Trade Commission Act.

PAR. 5. All of the acts and practices alleged herein took place in the ordinary course and conduct of respondent's business and have occurred subsequent to April 25, 1971, the effective date of the Fair Credit Reporting Act.

PAR. 6. Subsequent to April 25, 1971,

1. With respect to one or more users of its reporting service as of April 25, 1971, respondent failed to require such user or users to certify the purposes for which the information about consumers was sought and that the information would be used for no other purposes; and

2. With respect to each new prospective user of its reporting service, respondent failed to make reasonable efforts to verify the identity of and the uses certified by each such new user prior to furnishing consumer reports to the user. By and through these practices respond-

ent failed to maintain procedures required by Section 607(a) of the Fair Credit Reporting Act.

PAR. 7. Subsequent to April 25, 1971,

1. Respondent contracted to provide consumer reports to one or more private investigators, who do not, in the ordinary course of business, regularly extend credit or provide insurance for personal, family or household purposes;

2. Respondent through investigation would have had reasonable grounds for believing that such user or users in such instances may not have had a permissible purpose for receiving consumer reports pursuant to Section 604 of the Fair Credit Reporting Act;

3. Respondent furnished consumer reports to such user or users without obtaining, at the time of each request for a consumer report, a written or oral certification of the specific purpose(s) for which each report was sought and that the report would be used for no other purpose; and

4. In a number of instances, respondent provided consumer reports to a private investigative agency which obtained the information as part of investigations of individuals in connection with divorce cases, child custody proceedings, personal injury litigation, or other circumstances where furnishing consumer reports is impermissible under Section 604 of the Fair Credit Reporting Act.

PAR. 8. Respondent's failures to comply with the provisions of the Fair Credit Reporting Act listed in Paragraphs Six and Seven above constitute violations of that Act and, by virtue of Section 621 of that Act, constitute violations of Section 5(a) of the Federal Trade Commission Act.

DECISION AND ORDER

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

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in

such complaint, and waivers and other provisions as required by the Commission's Rules; and

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

1. Respondent Southern Maryland Credit Bureau, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its office and principal place of business located at 211 North U.S. Route 301, P.O. Box 220, in the City of La Plata, State of Maryland.

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

ORDER

Definitions: For the purpose of this order the terms *consumer, consumer report,* and *consumer reporting agency* are defined as set forth in Section 603 of the Fair Credit Reporting Act, Public Law 91–508, 15 U.S.C. 1681a (1976).

It is ordered, That Southern Maryland Credit Bureau, Inc., a corporation, its successors, assigns, officers, agents, representatives, and employees shall forthwith cease and desist from failing to maintain reasonable procedures required by Section 607(a) of the Fair Credit Reporting Act designed to limit the furnishing of consumer reports to the purposes specified under Section 604 of the Fair Credit Reporting Act. Such procedures shall include but are not limited to those set forth below.

Respondent shall cease and desist from:

1. Failing to require any user such as a private investigative agency or detective, who does not, in the ordinary course of business, regularly extend credit or insurance for personal, family, or household use, to certify either in writing at the time of each request or orally at the time of the request, confirming in writing within ten business days after each oral request:

(a) the specific purpose or purposes for which the reports are sought;

(b) that the information will be used for no other purpose; and

(c) that the user understands that Federal law provides that a person who obtains information from a consumer reporting agency under false pretenses shall be fined not more than $5,000 or imprisoned not more than one year, or both.

2. Failing to consult a listing of all detectives, private investigative agencies, and attorneys found in the current yellow pages of the telephone book of the area where the user conducts business or a similar listing of detectives, private investigative agencies and attorneys, to determine whether a user should comply with the requirements of Paragraph 1.

3. Failing to require all prospective users of information to identify themselves, and certify the purposes for which the information is sought and that the information will be used for no other purpose.

4. Furnishing a consumer report to any person if the respondent has reasonable grounds for believing that the consumer report will not be used for a purpose listed in Section 604.

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

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

It is further ordered, That the respondent shall forthwith distribute a copy of this order to each of its officers, agents, representatives and employees.

IN THE MATTER OF

HEATCOOL, INCORPORATED

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

Docket C-3102. Complaint, Feb. 1, 1983—Decision, Feb. 1, 1983

This consent order requires a Eugene, Oregon manufacturer and seller of plastic storm windows, among other things, to cease making false or unsubstantiated representations concerning the insulating properties of Heatcool plastic storm windows or any insulating or energy savings device. Further, the company must: (1) notify its distributors that Heatcool plastic storm windows do not insulate better than comparable glass windows and that the window's insulating value is R-1.93; and, (2) include this information in all advertising and promotional literature for a period of one year. The company must also recall promotional and advertising materials which misrepresent the insulating value of Heatcool storm window systems.

Appearances

For the Commission: *Donald Cooper* and *Randall Brook.*

For the respondent: *T.R. Russell, Butler, Hush, Gleaves & Swearinger,* Eugene, Ore.

COMPLAINT

The Federal Trade Commission, having reason to believe that Heatcool, Incorporated ("Heatcool") violated Section 5 of the Federal Trade Commission Act, as amended, issues this complaint and alleges:

PARAGRAPH 1. This action is brought in the public interest.

PAR. 2. Heatcool is an Oregon corporation with its principal office and place of business located at Box 2196, Eugene, Oregon.

PAR. 3. Heatcool manufactures and sells storm windows made from a plastic film, LLumar. Sales of the windows are either made directly or through distributors. Heatcool's business is in and affects interstate commerce.

PAR. 4. Heatcool sells its storm windows based on their thermal insulating value, or "R-value." The R-value is a measure of resistence to heat flows, with higher R-values indicating greater insulating power. A value of R–1 means that the material insulates as well as one inch of wood. A value of R–9 means that the material insulates as well as 9 inches of wood. Standard scientific references indicate that a system of a glass window together with a glass storm window has an insulating value of R–1.93.

COUNT I—*Misrepresentations*

PAR. 5. From October of 1979 until the present, Heatcool has advertised its storm windows as a superior energy saving device. Heatcool has claimed: that its magnetic sealing windows have an insulating value of R–9.17; that its storm windows are approximately four times more effective than glass storm windows; and that its storm windows can reduce heat loss of single glaze windows by a factor of 10.

PAR. 6. Heatcool's representations concerning the insulation value and effectiveness of its storm windows are false. In April 1981, Dynatherm Engineering tested Heatcool's storm windows. Dynatherm is an independent testing laboratory which is accredited for the purpose of testing the insulating value of plastic storm windows. 45 FR 75542, 75544–47 (1980). It found the insulating value of the system consisting of a window and a Heatcool storm window to be R–1.93. A copy of Dynatherm's test result is attached to this complaint as Exhibit A.

PAR. 7. Respondents' false claims have the capacity and tendency to mislead members of the public into believing the claims are true and into purchasing substantial quantities of Heatcool products. The claims are false and deceptive and violate Section 5 of the Federal Trade Commission Act.

COUNT II—*Lack of Substantial Basis*

PAR. 8. Heatcool purchases the basic component of its storm windows—LLumar—from Martin Processing, Incorporated. Martin Processing makes LLumar by impregnating plastic film with an ultraviolet resisting substance. It rates the insulating value of LLumar at R–0.9. By a letter dated June 27, 1979, Martin Processing informed Heatcool that its tests found the insulating value of LLumar to be R–0.9. By applying standard engineering formulae, the expected value for a LLumar storm window plus a regular window would be less than R–2.

PAR. 9. Heatcool refused to accept Martin Processing's insulating value or standard engineering formulae. Instead, it determined to conduct its own tests. For this purpose, Heatcool contracted with Northwest Testing Laboratories, an independent testing lab located in Portland, Oregon. Northwest Testing Laboratories is not accredited for purposes of testing the thermal insulation value of storm windows. *See* 45 FR 75542, 75544–47 (1980).

PAR. 10. Northwest Testing Laboratories tested Heatcool's storm windows in October 1979. It found the insulating value of a window *and* a Heatcool storm window to be R–9.17. Although Northwest Testing Laboratories released this result to Heatcool, it advised the

company that the result could not be used to advertise the storm windows under normal conditions because the test conditions were abnormal.

PAR. 11. The test result of R–9.17 obtained by Northwest Testing conflicted with earlier studies of plastic storm windows conducted by the Department of Energy. The DOE studies found the insulating value of glass window together with a storm window similar to Heatcool's could not be greater than R–2. These test results were published and were available to the general public as of October 1, 1979.

PAR. 12. By March of 1980, Heatcool possessed persuasive evidence that its LLumar storm windows were not superior to comparable glass storm windows. As part of an attempt to sell Heatcool storm windows to the Salt Lake School District, Heatcool had its windows tested by a second testing laboratory, Terralab. Terralab found Heatcool's storm windows did *not* insulate better than comparable glass storm windows. It released the test result to Heatcool in March 1980.

PAR. 13. Heatcool's representations concerning the insulating value and effectiveness of its storm windows were made without a reasonable basis in competent scientific tests. Moreover, respondents knew that the single Northwest Testing Laboratories' test was unreliable, for the reasons stated in Paragraphs 10–12. The practice of making energy savings claims without a reasonable basis in competent scientific tests is unfair and deceptive and violates Section 5 of the Federal Trade Commission Act.

COUNT III—*False Demonstrations*

PAR. 14. In conjunction with its false and unsubstantiated claims, Heatcool put on, or encouraged its distributors to put on, phony demonstrations ostensibly showing that its plastic storm windows were superior to conventional glass storm windows. Appearing at home shows throughout the United States, Heatcool's representatives covered one-half of an open refrigerator with LLumar and the other half with glass. They then invited potential purchasers to touch both the glass and the LLumar. When potential customers found the glass colder to the touch, Heatcool's representatives claimed that this proved that LLumar insulated better than glass. In actuality, the demonstration illustrated that glass has a higher specific heat than LLumar but does not prove anything about the insulating properties of the two materials. Therefore, Heatcool's practice of using, or encouraging the use of, this demonstration is false and deceptive in violation of Section 5 of the Federal Trade Commission Act.

ATTACHMENT A

DYNATHERM ENGINEERING

595 MARSHAN LANE LINO LAKES, MINNESOTA 55014 612 / 786-1853

NVLAP Accredited by the Department of Commerce, National Voluntary Laboratory Accreditation Program for Performance of ASTM C-236 Guarded Hotbox Tests

PROJECT: 5 mil Clear Film and 2x2 Aluminum Window

DATE: April 9, 1981

LABORATORY NO. 412

REPORTED TO: Metropolitan Denver DA
Consumer and Economic Clime
625 South Broadway
Denver, Colorado 80209
Attention: Energy Fraud Project

COPIES TO:

THERMAL TRANSMITTANCE TEST OF WINDOW WITH INTERIOR FILM

GENERAL:

This report presents the results of one thermal transmittance test made upon nominal 2'x2' single glazed aluminum window unit with 5 mil clear film installed about 4½" interior to the window. It was the purpose of the testing to measure the thermal resistance ("R" value) of the entire system. The window unit and film materials were submitted to the laboratory by CFH Enterprises of Denver, Colorado.

TEST PANEL DESCRIPTION:

Window unit - Nominal 2'x2' single glazed aluminum window unit which was actually about 23-7/16" wide and 23-7/8" high. The unit was manufactured by Croft Metals, Inc. and was Series 10 horizontal sliding window with 2020 mill finish. As seen from the window interior, the left sash was single glazed and fixed, with the right sash also single glazed and moveable horizontally. The sash contained sashlock which was kept in the locked position during the testing. A screen was present on the exterior side of the moveable sash only. The moveable sash was weatherstripped. Both fixed and moveable sash were single glazed, and the frame appeared not to contain any thermal break.

Interior film - The film used was identified as 5 mil clear film by HeatCool Weather Windows of General Purpose Dyed and Weatherized Polyester Films. The actual thickness of a typical section was measured as 4.9 mil and the film had a very slight smoky color. The film was mounted 4½" away from the interior face of the aluminum window unit. Magnetic tape was used to secure the film in place. The film was installed by representative of CFH Enterprises.

As a mutual protection to clients, the public and ourselves, all reports are submitted as the confidential property of clients and our written authorization is necessary to publish any statements, conclusions or extracts from or regarding our reports.

This laboratory is accredited by NVLAP of the U.S. Department of Commerce as having the competence to perform ASTM C-236 guarded hotbox tests in accordance with prescribed test methods and [illegible]

DYNATHERM ENGINEERING

595 MARSHAN LANE
LINO LAKES, MINNESOTA 55014
612 / 786-1853

page 2 (2x2 alum. window w/interior film)
April 9, 1981
Laboratory No. 412

TEST METHOD:

The thermal transmittance testing was performed using the ASTM C-236 guarded hotbox equipment. The equipment can accept test assemblies up to 7'-2" high and 6'-0" wide and has a centrally located metered area with dimensions of 48" wide and 60" high. Since the test window was smaller than the metered area it was necessary to perform a preliminary test upon a nominal 5" thick expanded polystyrene filler board. The preliminary testing was made under about the same temperature conditions as the testing of the window. The preliminary test was necessary to determine the thermal transmission properties of the filler board. After completion of the preliminary test, a hole was cut in the board just sufficient to install the aluminum window into the opening. Caulking was used to seal the window to the exterior face of the board, and duct tape was also applied to further assure an airtight installation. Representative of CFH Enterprises then installed the magnetic tape and film to the interior face of the filler at the opening. A 4½" space existed between the film and interior face of the window unit.

The testing was performed with the above described test assembly in the vertical orientation, with heat flow horizontal. Very slow moving airflow was used on the interior side with the velocity being about 60 fpm and applied in a downward direction as would occur with natural convection conditions. A nominal 15 mph wind was applied to the exterior side of the window, in an upward direction.

30 gage copper-constantan thermocouples were affixed to various sections on the exterior side of the window, and to various sections of the interior surface of the window. Airspace thermocouples were also used to measure the airspace temperature during test. Surface thermocouples were also installed on the interior side of the film.

After construction of the assembly and attachment of the thermocouples, the assembly was allowed to condition under selected warm and cold air temperatures until steady state heat flow and temperature conditions were achieved. Test data were then taken.

Thermocouple locations were those agreed upon by laboratory personnel and representatives of CFH Enterprises.

As a mutual protection to clients, the public and ourselves, all reports are submitted as the confidential property of clients and our written authorization is necessary to publish any statements, conclusions or extracts from or regarding our reports.

This laboratory is accredited by NVLAP of the U.S. Department of Commerce as having the competence to perform ASTM C-236 guarded hotbox tests in accordance with prescribed test methods and accreditation criteria.

DYNATHERM ENGINEERING

595 MARSHAN LANE
LINO LAKES, MINNESOTA 55014
612 / 786-1853

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April 9, 1981
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TEST RESULTS:

Following is a summary of the test results obtained:

Item	Test Results
Heat flow rate, Btu/hr.-sq. ft.	33.78
Warm air temperature, F	102.1
Cold air temperature, F	47.8
Thermal transmittance, U as tested, Btu/hr.-sq. ft.-F	0.622
Overall thermal resistance R_t = 1/U as tested	1.61
Average warm surface temperature, F (film)	86.2
Average cold surface temperature, F	50.7
Mean temperature, F	68.45
Inside surface conductance coefficient, f_i	2.12
Outside surface conductance coefficient, f_o	11.6
Panel conductance, C, Btu/hr.-sq. ft.-F	0.952
Panel resistance, R = 1/C (window-airspace-film only)	1.05
Thermal transmittance corrected to ASHRAE design with 15 mph wind outside, still air inside	0.526
Overall thermal resistance corrected to above ASHRAE conditions	1.9

Sketches showing the locations of surface thermocouples, and the airspace thermocouples are attached. The average measured temperature at each location is also presented.

REMARKS:

The average warm and cold surface temperatures reported above were calculated by "weighting" the measured surface temperatures with the area each represented. The average outside temperature is the outside of the window, and the average warm surface temperature is that of the film interior surface. The mean temperature, inside and outside surface conductance, panel conductance and resistance values were calculated using these average surface temperatures. The overall thermal resistance as tested is the overall thermal resistance, including air films actually developed during testing. The panel resistance is the measured thermal resistance only of the window, airspace, and film without any air films included. The overall thermal resistance corrected to ASHRAE conditions with still air inside and 15 mph wind outside is calculated using the above reported and measured panel

As a mutual protection to clients, the public and ourselves, all reports are submitted as the confidential property of clients and our written authorization is necessary to publish any statements, conclusions or extracts from or regarding our reports.

This laboratory is accredited by NVLAP of the U.S. Department of Commerce as having the competence to perform ASTM C-236 guarded hotbox tests in accordance with prescribed test methods and accreditation criteria.

DYNATHERM ENGINEERING

895 MARSHAN LANE
LINO LAKES, MINNESOTA 55014
612/786-1853

page 4 (2x2 alum. window w/interior film)
April 9, 1981
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REMARKS (cont'd):

conductance (resistance) and published surface resistances for a vertical, nonreflective surface with heat flow horizontal. A surface resistance of 0.17 was used for the 15 mph wind condition, and a surface resistance of 0.68 was used for the still air condition. The actual surface conductances were higher than the nominal ASHRAE values resulting in a lower overall measured thermal resistance.

The warm and cold air temperatures used in testing, and the application of the exterior 15 mph wind were specified to be used in testing. A nominal 3½" airspace between film and window was desired, but a space of 4½" was used due to availability of 5" beadboard material in the laboratory and to the lack of immediate availability of a 4" filler which would have provided the requested airspace. From various published sources, the difference in thermal resistance between a 3½" airspace and a 4½" airspace would be negligible.

The test results presented are for the window-airspace-film combination, with allowance already made for heat loss through the filler from the results of the preliminary testing. Heat loss through the window alone was calculated as the difference between the total measured with window and that calculated as passing through the filler.

DYNATHERM ENGINEERING

by James E. Hudelson

As a mutual protection to clients, the public and ourselves, all reports are submitted as the confidential property of clients and our written authorization is necessary to publish any statements, conclusions or extracts from or regarding our reports.

This laboratory is accredited by NVLAP of the U.S. Department of Commerce as having the competence to perform ASTM C-236 guarded hotbox tests in accordance with prescribed test methods and accreditation criteria.

DECISION AND ORDER

The Federal Trade Commission initiated an investigation of certain acts and practices of the respondent named in the caption above. The Seattle Regional Office furnished the respondent with a draft complaint that, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act.

The respondent, its attorney, and counsel for the Commission then signed an agreement containing a consent order. In this agreement, respondent admitted all the jurisdictional facts set forth in the draft complaint described above. The agreement states that its signing is for settlement purposes only and does not constitute an admission that the law has been violated as alleged in the complaint. The agreement also contains waivers and other provisions required by the Commission's Rules.

The Commission determined that it has reason to believe that the respondent has violated the Federal Trade Commission Act and that the complaint should be issued. The Commission then accepted the consent agreement and placed it on the public record for 60 days. Pursuant to Section 2.34 of its Rules, the Commission now issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Heatcool, Inc. is an Oregon corporation with its office and principal business address at P.O. Box 2196, Eugene, Oregon.

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

ORDER

Applicability of the Order

References in this order to Heatcool apply to any of Heatcool's successors, assigns, officers, agents or employees. The order applies to any subsidiary, division, or other entity related to Heatcool and to Heatcool's advertising, displaying, offering for sale, sale or distribution of Heatcool plastic storm windows or other insulating or energy saving device.

Order Provisions

I. *It is ordered,* That Heatcool cease and desist from representing, directly or by implication, that:

A. Heatcool's plastic storm windows have an insulating value of R–9.17.

B. Heatcool's plastic storm windows insulate approximately four times better than comparable glass storm windows.

C. Demonstrations relating to specific heats show relative insulating values.

II. *It is further ordered,* That Heatcool cease and desist from: making any representation, directly or by implication, regarding the insulating properties of its plastic storm windows or other insulating or energy saving device, unless, at the time the representation is made, it has a reasonable basis in competent scientific tests to believe that the representation is true. For purposes of testing storm windows, a reasonable basis shall consist of tests performed by an accredited lab and shall take into account any information that contradicts or qualifies the tests.

III. *It is further ordered,* That Heatcool immediately recall from all persons or entities that have engaged in advertising, promotion, sale or distribution of its storm windows in the last six months all advertising and promotional materials which represent that Heatcool storm window systems have a total insulating value in excess of R–1.93 or that represent that Heatcool storm windows insulate better than comparable glass storm windows.

IV. *It is further ordered,* That Heatcool prepare and send to all distributors who may reasonably be expected to have purchased Heatcool storm windows within the last six months a clear statement that Heatcool storm windows have an insulating value of R–1.93 and that the windows do not insulate better than comparable glass storm windows.

V. *It is further ordered,* That Heatcool include in its advertising and promotional materials, for the twelve month period after the order becomes effective, a clear and conspicuous statement that Heatcool storm window systems have an insulating value of R–1.93 and do not insulate better than comparable glass storm windows.

VI. *It is further ordered,* That Heatcool maintain complete business records of its compliance with this order. Heatcool shall retain each record for at least three years. Records which provide a reasonable basis for representations of the insulating or energy saving properties of Heatcool products shall be retained for at least two years after the last dissemination of any representation which relies on the records. Heatcool shall make these records, or a photocopy of these records, available to any authorized representative of the Federal Trade Commission within fourteen days after the representative requests the documents.

VII. *It is further ordered,* That Heatcool deliver a copy of this order

to each of its distributors, operating divisions, and affiliated businesses.

VIII. *It is further ordered,* That Heatcool notify the Commission at least thirty days prior to any change in its corporate structure or in its ownership which may affect compliance obligations under this order.

IX. *It is further ordered,* That Heatcool, within 60 days after service of this order, file with the Commission written reports setting forth in detail the manner of its compliance with this order.

IN THE MATTER OF

AMERICAN DENTAL ASSOCIATION

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

Docket 9093. Final Order, Sept. 6, 1979—Modifying Order, Feb. 7, 1983

This order reopens the proceeding and modifies the Commission order issued on Sept. 6, 1979 (94 F.T.C. 403), *modified* Aug. 3, 1982 (100 F.T.C. 448), by relieving respondent of its obligation under Paragraph III(A) of the order, to send by first-class mail a copy of Appendix A to the Final Order to each of its current members, and by reducing the number of years that Paragraphs III(A), IV(C), and IV(D) require the association to provide new members with notice of the order; make particular records available to the Commission; and file compliance reports.

MODIFICATION OF DECISION AND ORDER

The American Dental Association ("ADA") has requested that the Commission modify its Final Order in Docket No. 9093 to (1) relieve ADA of its obligation under Paragraph III(A) of the order to send by first-class mail a copy of a letter, Appendix A to the Final Order, to each of its present members, and (2) reduce the number of years ADA is required by Paragraphs III(B), IV(C), and IV(D) to provide new members with notice of the Final Order, make certain records available to Commission staff, and file reports of compliance.

As an alternative to the requirement of Paragraph III(A) that it send separate notice of the Final Order to each of its present members, ADA has proposed that it include an explanatory article when, as required by Paragraph IV(A) of the Final Order, it publishes a copy of the Final Order in the *Journal of the American Dental Association* and *ADA News*. Because under a temporary order ADA provided separate notice to each of its members that it was subject to a Commission order that, except under certain circumstances, prohibited ADA from restricting the advertising of dentists' services, and because with respect to individual members of ADA the Final Order prohibits essentially the same conduct, the Commission has determined that the alternative to separate notice ADA has proposed is in the public interest. The Commission has also determined that it is in the public interest to modify the Final Order to reduce the number of years ADA is required to provide new members with notice of the Final Order, make records available to the Commission, and file compliance reports. Accordingly,

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

It is further ordered, That the Final Order be, and it hereby is,

modified by substituting for Paragraphs III(A), III(B), IV(C), and IV(D) of the Final Order, the following:

III.

It is further ordered, That respondent American Dental Association:

A. Send by first class mail a copy of a letter in the form shown in Appendix A to this Order to each constituent and component organization of respondent, within sixty (60) days after this Order becomes final.

B. For a period of two years, provide each new member of respondent and each constituent and component organization of respondent with a copy of this Order at the time the member is accepted into membership.

IV.

It is further ordered, That respondent American Dental Association:

C. For a period of two years after this Order becomes final, maintain and make available to the Commission staff for inspection and copying upon reasonable notice, records adequate to describe in detail any action taken in connection with the activities covered by Part I of this Order, including but not limited to any advice or interpretations rendered with respect to advertising or solicitation involving any of its members.

D. Within one year after this Order becomes final, and annually thereafter, for a period of one year, file a written report with the Federal Trade Commission setting forth in detail any action taken in connection with the activities covered by Part I of this Order, including but not limited to any advice or interpretations rendered with respect to advertising or solicitation involving any of its members.

Commissioner Pertschuk dissented.

SEPARATE STATEMENT OF CHAIRMAN MILLER

The petition of the ADA to modify the compliance burdens in its order boils down to two issues, both of which lead me to clear and obvious answers. The first issue arises from the settlement the ADA reached with the Commission in 1979. The Commission agreed with the ADA that it would be treated on equal terms with the order

ultimately reached with the AMA. Then for three years, the ADA operated under a temporary order that imposed essentially the same burdens as the final order. But the final order does not recognize the three years of compliance that the ADA performed while the *AMA* case was pending. I have no trouble deciding that the ADA should not incur three extra years of expensive compliance because it settled with the Commission.

The second issue concerns the purpose of reporting and record-keeping under Commission orders. Unlike the provisions relating to lawful conduct, which are perpetual in this order, the compliance requirements run for a term of several years. The ADA was required, for example, to provide copies of the order to all new members for ten years. Such compliance procedures are typically held to a limited term for an economic reason: the balance between the costs of the procedure and the probability of harm from noncompliance. While the Commission may expect that a respondent will comply immediately, there remains a chance that it will not. As the respondent gains experience in complying with an order over time however, the likelihood of future problems diminishes. The Commission limits the term for such expensive procedures as reporting, notifying and record-keeping because at some point the probability of a problem arising will no longer justify the extra expense of special monitoring for it.

The Commission originally determined that it would take ten years before the notice to new members had served its remedial purpose. However, the developments in the market for dental services and ADA's past compliance with its order demonstrate to my satisfaction that we can revise this assessment. The likelihood that future dental school graduates will violate the Commission order is sufficiently remote that the expense of continuing to mail it beyond five years does not appear justified. Therefore, I support the Commission's decision to reduce the notice requirement from ten years to five.

DISSENTING STATEMENT OF COMMISSIONER PERTSCHUK

I dissent from the decision of the Commission to reduce the period for which ADA is obligated to inform new members of the order, to make compliance reports available, and to make records available to the Commission. As I understand it, ADA's principal grounds for modification are: 1) ADA is obligated to carry out these obligations longer than the AMA even though the ADA settled and the AMA litigated its case to the Supreme Court; 2) ADA has complied with the order faithfully during the interim period (before the AMA order was finalized) and should get credit for this period; and 3) there is less need to give notice to new members since the legal standard for advertising

has changed and new members will, therefore, be less likely to reintroduce restrictions. While the Commission, in granting the petition, appears to place reliance on all three of these factors, none actually meet the standard of Rule 2.51—that changed conditions of law or fact or the public interest "requires" the order to be modified.

ADA agreed at the time the interim order was entered to be bound by an order identical—with one exception—to any final order in the AMA case. This eventual identity of orders meant ADA would have to comply with notice and reporting requirements for the period required by the interim order *plus* the period required by the AMA order.[1] Consequently, the period required for notice and reporting can hardly be called unfair or unanticipated. As for the supposed change in advertising law, the antitrust and constitutional problems in restricting advertising were well known before the ADA order was entered and, in fact, the cases ADA cites in support of its petition—except for the AMA case itself—were decided before the interim order issued.

The Commission appears to shorten ADA's requirements principally on theory that it has made a quicker than expected transition to full compliance with the order. Chairman Miller's statement, in fact, suggests that the Commission thought in 1979 that it would take an extended period for the ADA to undergo a total transition to compliance. This idea is troubling in two respects. First, the ADA order includes at least one substantive provision concerning disciplining member societies which was not in the interim order and for which we have no compliance record. More importantly, the idea that we should shorten the period of notice and reporting obligations as a reward for a rapid *transition* to compliance does not strike me as satisfying the "changed conditions of law or fact" or "public interest" requirement within the meaning of Rule 2.51. We expect immediate compliance with orders (subject to any express grace periods) and bringing an organization into conformity with order obligations in a short period of time has, heretofore at least, not been grounds to shorten compliance requirements. While the low probability of ADA violating the order is all to the good, that is precisely what we expected when the order was issued. Consequently, I would have agreed with the Bureau of Competition that the period for notice and reporting be left unchanged.

[1] The ADA not only wants to cut back the period for giving notice to take into account the three year period of the interim order but also to cut back the total notice period to five years, instead of the ten now required in both the AMA and the ADA orders.

IN THE MATTER OF

G C SERVICES CORP., ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND FAIR DEBT COLLECTION PRACTICES ACTS

Docket C-2511. Consent Order, April 16, 1974—Modifying Order, Feb. 8, 1983

This order reopens the proceeding and modifies the Commission's order issued on April 16, 1974 (83 F.T.C. 1521), *modified* June 21, 1978 (91 F.T.C. 1150), by deleting Paragraph Six from the order and substituting a new Paragraph Six, which incorporates restrictions concerning the use of post-dated checks contained in Section 808(2), (3) and (4) of the Fair Debt Collection Practices Act.

ORDER REOPENING PROCEEDING AND MODIFYING ORDER TO CEASE AND DESIST

By petition filed September 21, 1982, pursuant to Rule 2.51, petitioners G C Services Corporation and Jerold B. Katz, William A. Inglehart and Martin M. Katz, ("GCSC"), request the Commission to reopen this proceeding and modify Paragraph 6 of the Order to Cease and Desist issued on April 16, 1974, and amended on June 21, 1978.

Paragraph 6, as written in the original 1974 Order, prohibited GCSC from receiving from debtors post-dated checks which would not be deposited immediately or which would be held for more than 15 business days after their receipt. On June 21, 1978, the Commission modified this Order Paragraph to permit GCSC to hold debtor's checks up to 60 days provided GCSC complied with certain conditions, including the requirement that GCSC make a good faith effort to reach debtors by attempting to contact them by telephone three times to obtain their permission to deposit any post-dated checks.

The present petition seeks modification of Paragraph 6 by eliminating, 1) the 60 day period limitation for GCSC's holding of post-dated checks and 2) the telephone contact requirement. In place of the current Paragraph 6, GCSC requests that the Section 808(2), (3) and (4), of the FDCPA, as well as other requirements, be incorporated into the Order. In addition to being bound by the FDCPA requirements, GCSC requests that the Order prohibit respondents for a period of 5 years from accepting a check post-dated by more than 60 days unless the debtor is given, along with the notice required by Section 808(2) of the FDCPA, a notice, a) of the date and amount of each additional post-dated check that GCSC holds and intends to cash and b) that advises the debtor to contact GCSC in the event the debtor is unable to cover the check to arrange a revised payment schedule. Additional-

ly, GCSC would be required to return to the debtor, when so asked, any post-dated check that the debtor is unable to cover.

In support of their request, petitioners assert that the current restrictions in Paragraph 6 are unnecessary in view of the requirements and restrictions set forth in Section 808 of the FDCPA which are binding on GCSC as a debt collector. The current Order restrictions on GCSC, petitioners argue, places them at a competitive disadvantage. Further, the telephone debtor contact required by the current Paragraph 6 is not only burdensome to GCSC but bothersome to consumers as well.

The Commission, having considered the petition, is of the opinion that petitioners have made a sufficient showing of changed conditions of law and fact to reopen the proceeding, and have decided to grant their request. However, the Commission is persuaded that incorporation of Section 808(2), (3) and (4) into the Order would provide adequate protection for consumers and that the additional restrictions proposed by petitioners are not necessary. Petitioners have agreed to this change.

Accordingly, *it is ordered* that the proceeding be, and it hereby is reopened.

It is further ordered, That the Order to Cease and Desist be, and it hereby is, modified by striking Paragraph Six, amended on June 21, 1978, and substituting therefor the following:

6. (a) Accepting from any person a check or other payment instrument post-dated by more than five days unless such person is notified in writing of the intent to deposit such check or instrument not more than ten nor less than three business days prior to such deposit;

(b) Soliciting any post-dated check or other post-dated payment instrument for the purpose of threatening or instituting criminal prosecution;

(c) Depositing or threatening to deposit any post-dated check or other post-dated payment instrument prior to the date on such check or instrument.

IN THE MATTER OF

AHC PHARMACAL, INC., ET AL.

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

Docket C-3017. Consent Order, April 28, 1980—Modifying Order, Feb. 8, 1983

This order reopens the proceeding and modifies the Commission's order issued on April 28, 1980 (95 F.T.C. 528), by relieving respondent of the obligation of disseminating corrective advertisements which state that "no product can cure acne" prior to disseminating advertisements for "AHC Gel" or any acne product or regimen. In addition to the two well-controlled, double-blind clinical studies previously required for all superiority claims, the modified order now permits respondents to rely on FDA Panel recommendations as a reasonable basis for substantiating superiority claims.

ORDER REOPENING THE PROCEEDING AND MODIFYING CEASE AND DESIST ORDER

AHC Pharmacal, Inc., and James E. Fulton, M.D., (hereinafter "Petitioners") have filed, pursuant to Rule 2.51 of the Commission's Rules of Practice, a Request for Modification of Order, including a request to vacate (hereinafter "Petition").

Petitioners seek the modification or elimination of two provisions of the Commission's Order of April 28, 1980. Petitioners also ask that the action be dismissed and the Order vacated.

The Order concerns Petitioners' representations as advertisers of an acne product and a regimen, and requires them to disseminate corrective advertisements that "no product can cure acne" before engaging in any advertising.

The initial request of July 7, 1982, seeks the modification of the Order in two respects: (1) Petitioners seek to change the format and the media of the corrective advertising required under the Order, and (2) presumably as an alternative, they allege that the basis of the Commission's Complaint is now moot in view of a recent report by a panel of FDA experts and argue that the Commission action should be dismissed and the Order vacated.

Additional issues raised by Petitioners' letter of August 27, 1982, include (3) a charge that their constitutional rights of due process and equal protection are being violated by the Order requirement of double-blind clinical studies to support efficacy claims, and (4) an allegation that a new acne product on the market may, in fact, cure acne, which renders the requirement of the corrective message "no product can cure acne" factually and legally erroneous.

The first issue raised by Petitioners concerns the breadth and frequency of the corrective advertising and the advertising media to be used. Petitioners seek to change the requirement of the Order to disseminate corrective advertising in Sunday newspaper supplements and on radio and to substitute therefor a brochure soliciting mail orders to be sent to at least 20,000 consumers who are potential purchasers of the product.

In support of this portion of the request Petitioners have shown that changed financial conditions of the corporate respondent now prevent it from being able to pay for the cost of such advertising. They further submit that the direct mailing of a less expensive brochure bearing the corrective message to the very consumers who may have been previously exposed to the now prohibited advertising would be more in keeping with the spirit of the Order.

However, Petitioners also argue that the passage of time supports their contention that the corrective advertising requirement be eliminated. There is no evidence before us as to what, if anything, the public recalls of the original advertising, and whether the public perception of the product is still tainted by the claims of "cure" and "superiority." Respondents argue that during the four years when they chose not to advertise at all whatever "lingering effect" the previous claims may have had was dissipated and, therefore, lessened the need for corrective advertising.

Additionally, an argument is made by the Petitioners that a new drug, Accutane, recently approved by FDA for acne treatment, "may, in fact, cure acne." Therefore, the argument continues, the Commission should no longer require the respondents to disseminate a statement ("no product can cure acne") that may be "factually and legally erroneous."

The Commission is persuaded by the evidence of changed financial circumstances and the argument about the passage of time that modification of the Order is warranted. Moreover, without reaching the question as to whether any product may, in fact, cure acne, the Commission is of the opinion that under the facts of this case it will not be against the public interest to relieve Petitioners from the requirement of the corrective message. 15 U.S.C. 45(b) and 16 C.F.R. 2.51.

The second issue raised by Petitioners is the publication by the Food and Drug Administration ("FDA") of advance notice of proposed rulemaking for Topical Acne Drug Products for Over-the-Counter Human Use, 47 FR 12430, (March 23, 1982) (to be codified at 21 C.F.R. 333), and the recommendation of an Advisory Review Panel contained therein. Petitioners assert that since certain labeling representations regarding products containing benzoyl are now acceptable to the Pan-

el, and since benzoyl is the active ingredient of Petitioners' products, the basis for the Commission's original Complaint is now moot and that consideration should be given to dismissal of the action and the vacating of the Order.

The Panel report referred to by the Petitioners is a part of a proposed rulemaking by the Food and Drug Administration that would establish conditions under which over-the-counter (OTC) acne drug products are generally recognized as safe and effective and not misbranded. FDA published an advance notice of the proposed rulemaking on March 23, 1982. The notice is based on the recommendations of the Advisory Review Panel on OTC Antimicrobial (II) Drug Products.

The Panel has reviewed the literature and data submissions and has listened to testimony of interested persons. Numerous manufacturers of acne preparations submitted their products. AHC Pharmacal submitted "bp Gel Medication" and "bp Gel Medication Strong."

The Panel recommends three category conditions. Category I Conditions are those under which OTC acne drug products are generally recognized as safe and effective and are not misbranded. Category II Conditions are those under which OTC acne drug products are *not* generally recognized as safe and effective or are misbranded. Category III encompasses products for which insufficient data precludes final classification at this time.

The Panel concluded that benzoyl peroxide in concentrations of 2.5 to 10 percent is one of the two active ingredients that are generally recognized as safe and effective (Category I) in treatment and prevention of acne.

The Panel recommends numerous acceptable phrases to be used in labeling for products effective in the treatment of acne, in the prevention of new acne lesions, and in antibacterial claims.

The Commission finds insufficient basis in the Panel's report to support Petitioners' contention that the basis for the Commission's original action is now moot and that the Order should be vacated.

The gravamen of the Commission's Complaint is the allegation concerning the unqualified claim for the effectiveness of Petitioners' product and regimen. The Complaint alleges that the advertisements claim, directly or by implication, that the respondents' product or regimen will cure acne and is superior to other products on the market.

The Panel's recommendations of acceptable language are carefully drawn. Absolute claims are not recommended. The Panel's recommendations do not support the Petitioners' contention that "the basis of the Commission's original complaint is now moot. . . ." The Panel's recommendations do not directly contradict Parts I.A. and B.1. of the

Order that clearly prohibit "cure" claims by Petitioners. Given the claims alleged in the Complaint, the Commission believes the Panel's recommendations provide no basis to support Petitioners' argument that the Order should be vacated.

The Commission is willing to vacate an order upon a showing that changes in fact or law or the public interest make the continuation of an order unnecessary. Petitioners have failed to show such changes in the instant case. For example, they have not demonstrated that the Commission would interpret their advertisements any differently today than when the order was issued, nor have they provided copy tests or other extrinsic evidence demonstrating that the advertisements do not make the claims the Commission prohibited. Moreover, the Commission finds no basis in the public interest for vacating this order.

Petitioners finally argue that the requirement of the double-blind clinical studies for claims that the product results in a skin free of pimples, blackheads, etc., is a violation of "due process and equal protection" since the Panel concluded that products containing benzoyl peroxide "can be represented . . . without any testing whatsoever."

None of the recommended representations in the Panel's list permits a sweeping, unqualified claim of "skin free of pimples, blackheads, etc." The Panel recommends as acceptable such qualified labeling claims as "Clears up most acne pimples", "Clears up most acne blackheads", and similar qualified representations if descriptive of products effective in the treatment or prevention of acne.

Moreover, having signed the Consent Order in this matter, Petitioners waived any right to seek judicial review or otherwise to challenge or contest the validity of the order. 16 C.F.R. 2.32. Accordingly, we do not reach the argument of the denial of due process and equal protection, advanced by the Petitioners.

Nevertheless, it is in the public interest that Petitioners should be permitted to make claims about their products that their competitors may make, if supported by a reasonable basis; including superiority claims, if properly supported by such an authority as the recommendation of the Panel. For example, whatever implications of superiority there may be in a claim that benzoyl peroxide has been found safe and effective by the Panel while an ingredient classified by the Panel as Category II has been found unsafe or ineffective, those implications are adequately substantiated by the findings and conclusions of the Panel. The Order will be modified accordingly. In continuing to require two well controlled double-blind clinical studies for all superiority claims not supported by the FDA or its Panel, the Commission, of course, expresses no view on the broader question of whether that

level of substantiation would be an appropriate requirement for all comparative claims for all drugs or other products.

Petitioners have failed to show other changes in fact to warrant any other modification of the Order.

It is therefore ordered, That the proceeding is hereby reopened and the Decision and Order issued April 28, 1980, in Docket No. C–3017 is hereby modified to read as follows:

ORDER

I

It is ordered, That respondents AHC Pharmacal, Inc., a corporation, and James E. Fulton, individually and as a corporate officer, their successors and assigns, either jointly or individually, and the corporate respondent's officers, agents, representatives, and employees, directly or through any corporation, division or other device, in connection with the advertising, offering for sale, sale or distribution of all products do forthwith cease and desist from:

A. Disseminating or causing the dissemination of any advertisement by means of the United States mail or by any means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, which directly or indirectly:

1. Represents that use of a product variously known as AHC Gel, AHC Pharmacal's benzoyl peroxide gel medication and b.p. gel medication (hereinafter "AHC Gel") either alone or as part of "Dr. Fulton's Acne Control Regimen" (hereinafter "the Acne Control Regimen") or any other acne product or regimen will cure acne or any skin condition associated with acne;

2. Misrepresents the extent to which any product has been tested or the results of any such test(s);

B. Disseminating or causing the dissemination of any advertisement by means of the United States mail or by any means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, which directly or indirectly:

1. Represents that use of "AHC Gel", either alone or as part of "the Acne Control Regimen", or use of any other acne product or regimen by persons with acne, will result in skin free of pimples, blackheads, whiteheads, other acne blemishes, or scarring;

2. Represents that "AHC Gel", either alone or as part of "the Acne Control Regimen", or any other acne product or regimen, is superior to other over-the-counter acne preparations for the treat-

ment of acne, including but not limited to other benzoyl peroxide products,

unless, at the time of each dissemination of such representation(s) respondents possess and rely upon competent and reliable scientific or medical evidence as a reasonable basis for such representation(s). ("Competent and reliable scientific or medical evidence" shall be defined as evidence in the form of at least two well-controlled double-blind clinical studies which are conducted by different persons, independently of each other. Such persons shall be dermatologists who are qualified by scientific training and experience to treat acne and conduct the aforementioned studies. *Provided, however,* That the findings and conclusions of the FDA Advisory Review Panel on OTC Antimicrobial (II) drugs as published in 47 FR 12430 *et seq.* (March 23, 1982), unless and until any such finding or conclusion shall be modified by the FDA, and in that event, such finding or conclusion as modified, shall also constitute "competent and reliable scientific or medical evidence.");

C. Disseminating or causing the dissemination of any advertisement by means of the United States mail or by any means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, which directly or indirectly makes representations referring or relating to the performance or efficacy of any product or refers or relates to any characteristic, property or result of the use of any product, unless, at the time of each dissemination of such representation(s) respondents possess and rely upon a reasonable basis for such representation(s).

II.

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

III.

It is further ordered, That each respondent 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 this order.

IV.

It is further ordered, That such respondent shall, within sixty (60) days after this order becomes final, and annually thereafter for three (3) years, file with the Commission a report, in writing, signed by respondent, setting forth in detail the manner and form of its compliance with this order.

V.

It is further ordered, That each respondent shall maintain files and records of all substantiation related to the requirements of Parts IB and IC of this order for a period of three (3) years after the dissemination of any advertisement which relates to that portion of the order. Additionally, such materials shall be made available to the Federal Trade Commission or its staff within fifteen (15) days of a written request for such materials.

Petitioners' request for other modification of the Order and for dismissal of the action and vacating of the Order is hereby denied.

It is further ordered, That the foregoing modification shall become effective upon service of this Order.

Commissioners Pertschuk and Bailey voted in the negative.

SEPARATE STATEMENT OF COMMISSIONER DAVID A. CLANTON ON ORDER MODIFICATION IN AHC PHARMACAL, INC.

The Commission today issued an order modifying the corrective advertising and substantiation requirements of a 1980 Consent Order entered into with AHC Pharmacal, Inc. In a separate statement, Commissioner Pertschuk expresses concern that the newly modified order might give the respondent room to make claims for which there is little or no scientific basis.

In point of fact, the modified order does no such thing. As Commissioner Pertschuk's statement might suggest to the respondent that it is free to make certain claims that are still prohibited, I have taken this opportunity to correct that misimpression.

The original order, entered in 1980, prohibited the respondent from making certain claims unless they were supported by "competent and reliable scientific or medical evidence." No FDA panel had examined the efficacy of acne remedies at that time, so scientific or medical evidence was defined to require two well-controlled clinical studies.

Recently, however, an FDA Advisory Review Panel concluded an investigation and published its findings on the safety and efficacy of various acne remedies. The sole effect of our order modification is to

provide that those findings would also be considered "competent and reliable scientific or medical evidence." The FDA panel was composed of leading experts in the field of antimicrobial drugs, and there has been no suggestion anywhere in these proceedings that the panel's findings were incompetent or unreliable. Thus, the respondent may now make a claim if it is supported either by two well-controlled clinical studies *or* by the findings of the FDA panel.

However, it is important to point out that claims which are *not* supported by such evidence are still prohibited. The order should not be read as providing the respondent with a "zone of play," permitting any claim which even looks as though it might be supported by the panel's findings, any more than the original order would have permitted a claim which only looked as though it might be supported by two clinical tests. Unless a claim is in fact confirmed, either by the conclusions of the FDA panel or by two independent clinical tests, that claim is still prohibited.

Thus, I cannot share Commissioner Pertschuk's concern (at p. 2 of his statement) about advertisements which might imply that a 10% benzoyl peroxide solution was generally more effective than a product containing only a 2.5% solution. As Commissioner Pertschuk correctly points out, the FDA panel did *not* find that a 10% solution was more effective than a 2.5% solution for most acne sufferers, so any implied claim to the contrary would not be supported by the panel's findings. Accordingly, any advertisement which made such an implied claim would still violate the order.

The same answer applies to the concern (again at p. 2) that the respondent could argue that the panel's findings would support a claim that the product would result in a skin "free of pimples." The truth is that nothing in the panel's conclusions would support such an unqualified claim. Indeed, this was one of the claims involved in the original complaint, and the Commission's modifying order explicitly states that "the panel's recommendations do *not* support the petitioner's contention" that such a claim would now be permissible. (Order at p. 4; emphasis added). If this were not clear enough, the modifying order later repeats that "none of the recommended representations in the panel's list permits a sweeping, unqualified claim of 'skin free of pimples, blackheads, etc.' " (*Id.*) There thus is no basis for even suggesting that such claims would now be permitted under the modified order.

In short, Commissioner Pertschuk is simply incorrect to the extent that he implies that the modified order might permit any claims, express or implied, that were not directly supported by the panel's findings and conclusions (or by two clinical tests). The petitioner would be well advised not to place any reliance on such suggestions.

DISSENTING STATEMENT OF COMMISSIONER MICHAEL PERTSCHUK ON ORDER MODIFICATION IN AHC PHARMACAL

The modified order adopted today by the Commission ostensibly retains the order's provision requiring the petitioner to have clinical tests to prove claims that its product would give buyers a "skin free of blemishes" or that its product is superior to other OTC acne medications. But the Commission now has introduced a large area of uncertainty about which claims require clinical testing by AHC and which claims do not.

Under the proposed modification, petitioner can make any superiority claim which is based on the "findings and conclusions" of the FDA panel. Instead of limiting therapeutic superiority claims to a narrow class of claims which are adequately supported by scientific proof, this order modification threatens to enlarge the "zone of play" in which a seller can make a spurious claim and effectively protect itself from prosecution by cloaking itself in the protective mantle of the FDA panel's findings. It allows advertisers to lift the FDA panel's "findings" out of the narrow specific context in which they were made and use them to make comparisons between products—comparisons which the FDA itself does not allow.

Let me just provide one example. When the FDA finishes its OTC acne drug review, only those products which are found by FDA to be "safe and effective" can be sold. How then is the poor marketer to convince consumers to buy its product rather than its competitors'? Based on the history of OTC drug advertising, I confidently predict that advertisers will resort to spurious differentiations, all of which will imply that their products are actually better than the others. The proposed modification will certainly invite such claims. Take, for example, the following cautiously phrased "finding" of the FDA panel:

> The Panel recognizes that acne represents a spectrum of severity . . . The Panel feels that higher concentrations of benzoyl peroxide may be suitable for severe acne or for mila [*sic*] acne lesions that have not responded to lower concentrations. [2]

What kinds of superiority claims does that "finding" support? How about:

> Forget those sissy 2.5% benzoyl peroxide solutions! When you're really *serious* about acne, try "Big 10"—the acne medication with more than 3 times as much benzoyl peroxide as the best seller!

Most sufferers of acne would clearly interpret that to mean that the 10% solution is much more effective than a 2.5% solution. Yet the

studies reviewed by the FDA panel found that for most acne sufferers, the 2.5% solution of benzoyl peroxide was *just as effective* as the 10% solution, while causing less severe and less frequent side effects. But is the claim also supported by the FDA panel's "findings" cited above?

Nor is this concern altogether theoretical. The petition itself states that the requirement to conduct clinical tests to support claims that its product will result "in a skin free of pimples, blackheads, etc, is totally out of touch with the FDA's expert panel's conclusion that benzoyl peroxide containing products can be represented for such results without any testing whatsoever," and "it appears that the very advertising which the Commission complained of in 1978 is now acceptable labeling claims to the FDA's expert panel."

I would support a modification which spells out exactly the types of claims which are supported by the FDA panel's findings. For example, the FDA panel's findings do provide a scientific basis for petitioner—or any other OTC acne drug seller—to claim that products with benzoyl peroxide or sulfur (the only two ingredients found by the FDA to be safe and effective) are therapeutically superior to products with only those ingredients found by the FDA generally not to be safe and effective. The principal deficiency in the Commission's modification is its failure to make clear which claims are supported by the FDA panel and which claims are not. The result is to invite the spurious differentiations discussed above, or, at the least, to leave ourselves open to future disputes which can only be resolved by enforcement proceedings.

In my view, the Commission, in adopting this modification, simply begins to unravel what has been a useful, understandable, and justifiable standard for substantiation of OTC drug comparison claims.

IN THE MATTER OF

CONAGRA, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket C-3103. Complaint, Feb. 16, 1983—Decision, Feb. 16, 1983

This consent order requires an Omaha, Neb. manufacturer and seller of bakery and hard wheat flour, among other things, to timely divest seven specified flour production facilities to a Commission-approved buyer(s), capable of maintaining the facilities as competitive entities. Additionally, the order prohibits the company from acquiring, for a period of ten years, any interest in any flour milling plant in eleven western states without prior Commission approval.

Appearances

For the Commission: *John Peterson.*

For the respondent: *Bertram M. Kantor, Wachtell, Lipton, Rosen & Katz,* New York City.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named Respondent, subject to the jurisdiction of the Commission, has acquired stock and assets of Peavey Company in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, pursuant to Section 11 of the Clayton Act, 15 U.S.C. 21, and Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), stating its charges as follows:

Definitions

For purposes of this complaint the following definitions shall apply:

Bakery Flour means hard wheat flour, soft wheat flour and whole wheat flour sold generally to bakeries and institutional users.

Hard Wheat Bakery Flour means flour milled from hard wheat, which is sold generally to bakeries and institutional users to make white pan bread.

ConAgra Incorporated

1. Respondent ConAgra, Inc. (ConAgra) is a corporation organized under the laws of the State of Delaware, with its principal place of business at 200 Kiewit Plaza, Omaha, Nebraska.

2. ConAgra manufactures and sells bakery flour and hard wheat bakery flour from 15 mills located throughout the United States.

3. In its fiscal year ended May 31, 1981, ConAgra had total sales of approximately $1,376,808,000. Its sales of bakery flour for 1981 totaled $280,375,338.

Peavey Company

4. Prior to the merger, Peavey Company was a corporation organized under the laws of the State of Minnesota, with its principal place of business at Peavey Building, 730 Second Avenue South, Minneapolis, Minnesota.

5. Prior to the merger, Peavey manufactured and sold bakery flour from eight mills located throughout the United States.

6. In its fiscal year ended July 31, 1981, Peavey had total sales of approximately $820,884,000. Its 1981 sales of bakery flour were $301,735,606.

Jurisdiction

7. At all times relevant herein ConAgra and Peavey were engaged in the manufacture and sale of bakery flour in interstate commerce and were engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and each was a corporation whose business was in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

The Merger Agreement

8. On or about April 18, 1982, ConAgra and Peavey entered into an agreement in principle which provides, *inter alia,* for the acquisition by ConAgra of the stock and assets of Peavey. The transaction was consummated on or about July 20, 1982.

Trade and Commerce

9. A relevant line of commerce is the manufacture and sale of bakery flour.

10. A relevant line of commerce is the manufacture and sale of hard wheat bakery flour.

11. A relevant section of the country or geographic market is the Western States market, divided by the Eastern border of the States of Montana, Wyoming, Colorado and New Mexico and consisting of the States of Montana, Wyoming, Colorado, New Mexico, Idaho, Utah, Arizona, Nevada, California, Oregon and Washington.

12. The manufacture and sale of bakery flour in the Western States market is highly concentrated, with the combined market share of the four largest manufacturers estimated to be approximately 65%. Peavey is the largest firm with approximately 24.3% of the market. ConAgra ranks fourth with approximately an 8.5% share of the market. Subsequent to the acquisition, the Herfindahl-Hirschman Index will be approximately 1794.4, having increased as a result of the merger by 413.

13. The manufacture and sale of hard wheat bakery flour in the Western States market is highly concentrated, with the combined market share of the four largest manufacturers estimated to be approximately 64.3%. Peavey is the largest firm with approximately 23.1% of the market. ConAgra ranks third with approximately an 11.1% share of the market. Subsequent to the acquisition, the Herfindahl-Hirschman Index will be approximately 1845.0, having increased as a result of the merger by 512.8.

14. There are barriers to entry into the manufacture and sale of bakery flour and hard wheat bakery flour.

Actual Competition

15. Prior to the merger, ConAgra and Peavey were for many years actual competitors of each other in the manufacture and sale of bakery flour and hard wheat bakery flour and actual competitors of others engaged in the manufacture and sale of bakery flour and hard wheat bakery flour throughout the Western States market.

Effects; Violations Charged

16. The effects of the acquisition may be to substantially lessen competition or tend to create a monopoly in the relevant market in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, in the following ways, among others:

(a) actual competition between ConAgra and Peavey in the manufacture and sale of bakery flour and hard wheat bakery flour has been eliminated;

(b) actual competition between competitors generally in the manufacture and sale of bakery flour and hard wheat bakery flour may be lessened;

(c) Peavey has been eliminated as an actual substantial independent competitor in the manufacture and sale of bakery flour and hard wheat bakery flour.

Commissioner Bailey voted in the negative. Commissioner Douglas did not participate.

Decision and Order

The Federal Trade Commission ("Commission") having initiated an investigation of the acquisition of the stock and assets of Peavey Company ("Peavey") by ConAgra, Inc. ("ConAgra"), and ConAgra having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge ConAgra with violations of the Federal Trade Commission Act and the Clayton Act; and

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

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

1. ConAgra is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal offices at One Central Plaza, Omaha, Nebraska.

2. The Federal Trade Commission has jurisdiction of the subject

matter of this proceeding and of ConAgra and the proceeding is in the public interest.

ORDER

For purposes of this Order,

(a) *ConAgra* means ConAgra, Inc., its subsidiaries, affiliates, divisions, successors and assigns, together with any of their officers, directors and employees;

(b) *Peavey* means Peavey Company, its subsidiaries, affiliates, divisions, successors and assigns, together with any of their officers, directors and employees;

(c) *Salt Lake City Plant* means the assets acquired by ConAgra from Peavey that are located in Salt Lake City, Utah, and that are used in the production of wheat flour;

(d) *Ogden Plant* means the assets acquired by ConAgra from Peavey that are located in Ogden, Utah, and that are used in the production of wheat flour;

(e) *Billings Plant* means the assets acquired by ConAgra from Peavey that are located in Billings, Montana, and that are used in the production of wheat flour;

(f) *Great Falls Plant* means the assets of ConAgra that are located in Great Falls, Montana, and that are used in the production of wheat flour;

(g) *San Francisco Terminal* means the bulk flour terminal, acquired by ConAgra from Peavey that is located at 790 Pennsylvania Street, San Francisco, California;

(h) *Standard Flour* means the flour distribution plant known as Standard Flour, acquired by ConAgra from Peavey, that is located at 6414 Gayhart Street, City of Commerce, California;

(i) *Coast-Dakota* means the baking mix plant and flour distribution plant, acquired by ConAgra from Peavey, that are located at 2430 Union Street, Oakland, California, and 400 Oak Street, Oakland, California;

(j) *Facilities* means the Salt Lake City Plant, the Ogden Plant, the Billings Plant, the Great Falls Plant, the San Francisco Terminal, Standard Flour and Coast-Dakota; and

(k) *Western Region* means the States of Oregon, Washington, California, Arizona, New Mexico, Nevada, Utah, Wyoming, Colorado, Idaho and Montana.

I

It is ordered, That within fifteen (15) months of the date on which this Order becomes final and subject to the prior approval of the Federal Trade Commission, ConAgra shall divest the Facilities absolutely and in good faith to one or more third parties that represent that they intend to use the Facilities in the production of wheat flour. Pending divestiture, ConAgra shall neither make nor permit any deterioration of the Facilities, except for normal wear and tear, that might impair their operating abilities, competitive viability or market value.

II

It is further ordered, That, for a period of ten (10) years from the date on which this Order becomes final, ConAgra shall not acquire, without the prior approval of the Federal Trade Commission, directly or indirectly, any stock, assets, or interest in any flour milling plant located in the Western Region; *provided, however,* that nothing in this Paragraph II shall prohibit ConAgra from acquiring in the ordinary course of business used equipment for the milling of wheat flour.

III

It is further ordered, That within sixty (60) days after the date this Order becomes final, and every sixty (60) days thereafter until ConAgra has fully complied with the provisions of Paragraph I of this Order, ConAgra shall submit to the Federal Trade Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying with, or has complied with that provision. All compliance reports shall include, among other things that are required from time to time, a full description of contacts or negotiations with any party for the sale of plants pursuant to Paragraph I of this order, and the identity of all such parties. ConAgra shall furnish to the Federal Trade Commission copies of all written communications to and from such parties, and all internal memoranda, reports, and recommendations concerning divestiture.

On the first anniversary of the date this Order becomes final and on every anniversary date thereafter for the following nine (9) years, ConAgra shall submit to the Federal Trade Commission a verified written report setting forth the manner and form in which it has complied or is complying with Paragraph II of this Order.

IV

It is further ordered, That ConAgra notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in ConAgra, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, or any other proposed change in the corporation, which may affect compliance obligations arising out of this Order.

Commissioner Bailey voted in the negative; Commissioner Douglas did not participate.