fur which has been shipped and received in commerce as "commerce", "fur" and "fur product" are defined in the Fur Products Labeling Act do forthwith cease and desist from:

1. Falsely or deceptively invoicing fur products by:

A. Failing to furnish invoices to purchasers of fur products showing in words and figures plainly legible all the information required to be disclosed by each of the subsections of Section 5(b)(1) of the Fur Products Labeling Act.

B. Setting forth information required under Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder in abbreviated form.

2. Making claims and representations of the types covered by subsections (a), (b), (c) and (d) of Rule 44 of the Rules and Regulations promulgated under the Fur Products Labeling Act unless there are maintained by respondents full and adequate records disclosing the facts upon which such claims and representations are based.

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

IN THE MATTER OF

COLGATE-PALMOLIVE COMPANY ET AL.

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

Docket 7736. Complaint, Jan. 8, 1960—Decision, Dec. 29, 1961

Order requiring a well-known manufacturer of shaving cream, among other products, and its advertising agency, to cease representing falsely in television advertising of its "Palmolive Rapid Shave"—by use of a "mock up" composed of glass or plexiglass to which sand had been applied so as to simulate sandpaper—that the "moisturizing" action of its said shaving cream was such as to make it possible to apply it to coarse sandpaper and forthwith shave off the rough surface, and that such demonstration proved the "moisturizing" properties of the product.

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 Colgate-Palmolive Company, a corporation, and Ted Bates & Company, Inc., a corporation, hereinafter referred to as respondents, have violated the provi-

sions of the said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Colgate-Palmolive Company is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Deleware, with its principal office and place of business located at 300 Park Avenue, New York, New York.

Respondent Ted Bates & Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 666 Fifth Avenue, New York, New York.

PAR. 2. Respondent Colgate-Palmolive Company is now, and for some time last past has been, engaged in the manufacture, advertising, offering for sale, sale and distribution of a shaving cream designated "Palmolive Rapid Shave", and various other products, to distributors and to retailers for resale to the public.

Respondent Ted Bates & Company, Inc., is now, and for some time last past has been, the advertising agency of the respondent Colgate-Palmolive Company, and now prepares and places, and for some time last past has prepared and placed, for publication advertising material, including television commercials but not limited to that hereinafter set forth, to promote the sale of the aforesaid "Palmolive Rapid Shave" and other products.

PAR. 3. In the course and conduct of its business, respondent Colgate-Palmolive Company now causes, and for some time last past has caused, its said "Palmolive Rapid Shave", when sold, to be shipped from its factories or plants in the various states of the United States to purchasers thereof located in various other states of the United States and in the Ditsrict of Columbia, and maintains, and at all times mentioned herein has maintained, a substantial course of trade in said product, in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the conduct of its business at all times mentioned herein, respondent Colgate-Palmolive Company has been in substantial competition, in commerce, with corporations, firms and individuals in the sale of shaving cream.

In the conduct of its business, at all times mentioned herein, respondent Ted Bates & Company, Inc., has been in substantial competition, in commerce, with other corporations, firms and individuals in the advertising business.

PAR. 5. Respondents, by means of the aforesaid television commercials, which include a visual demonstration of a hand holding a razor

and shaving what is purported to be a piece of dry sandpaper to which Palmolive Rapid Shave has been applied, have represented, directly or by implication, that the "moisturizing" action of Palmolive Rapid Shave is such that by the application of said product to the surface of dry sandpaper it is possible to forthwith shave off the rough surface of said sandpaper and that such demonstration proves the "moisturizing" properties of said product, in actual use, for shaving purposes.

PAR. 6. The aforesaid representations, including the visual demonstration, are false, misleading and deceptive. In truth and in fact, that which is represented to be sandpaper in the aforesaid visual demonstration was a "mock up", composed of glass or plexiglass to which sand had been applied, especially made for use in said demonstration and was not, in fact, sandpaper. Said demonstration does not prove the "moisturizing" properties of Palmolive Rapid Shave, in actual use, for shaving purposes.

PAR. 7. The use by respondents of the aforesaid false, misleading and deceptive representations, depictions and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that the said representations were, and are, true and into the purchase of substantial quantities of the respondents' product by reason of said erroneous and mistaken belief. As a consequence thereof, substantial trade in commerce has been, and is being, unfairly diverted to respondents from their competitors and substantial injury has thereby been, and is being, done to competition in commerce.

PAR. 8. The aforesaid acts and practices of respondents, as herein alleged, were, and are, all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act.

Mr. Edward F. Downs and *Mr. Anthony J. Kennedy, Jr.*, for the Commission.

Cahill, Gordon, Reindel & Ohl, New York, N.Y., by *Mr. Mathias F. Correa* and *Mr. Corydon B. Dunham*, for Colgate-Palmolive Company.

Coudert Brothers, New York, N.Y., by *Mr. Joseph A. McManus* and *Mr. Donald H. Shaw*, for Ted Bates & Company, Inc.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

1. Respondents are charged with violation of the Federal Trade Commission Act through the use of certain allegedly misleading television commercials in advertising a shaving cream. Hearings have

been held at which evidence both in support of and in opposition to the complaint was introduced. Proposed findings and conclusions have been submitted (respondents' proposals being in the form of briefs in support of a motion to dismiss the complaint), and the matter has been argued orally before the hearing examiner. The case is now before the examiner for final consideration. Any proposed findings or conclusions not included herein have been rejected.

2. Respondent Colgate-Palmolive Company is the manufacturer and seller of the shaving cream involved, the cream being known as "Palmolive Rapid Shave." Respondent Ted Bates & Company, Inc., is the advertising agency which prepared and placed the advertising in question. The advertising is in the form of three 60-second commercials which were used as part of a television program carried over a nationwide network during the latter part of 1959, the program being sponsored by Colgate-Palmolive Company.

3. The television commercials included both visual demonstrations and oral statements. In one of the visual demonstrations, a hand applies Palmolive Rapid Shave to what is purported to be a piece of sandpaper. The announcer says, "To prove Rapid Shave's super-moisturizing power, we put it right from the can onto this tough, dry sandpaper." Then a hand holding a razor cuts a clean path through the lather and purported sandpaper surface. The announcer at the same time says, "It was apply . . . soak . . . and off in a stroke."

4. In the next sequence, the technique of a split screen is employed, the purported sandpaper being on the left side of the screen, and either a professional football player or an actor on the right side of the screen. As the individual applies Palmolive Rapid Shave to his face, a hand applies the cream to the purported sandpaper. Immediately thereafter the hand, now holding a razor, cuts a clean path through the lather and purported sandpaper surface, while the individual simultaneously makes a similar stroke to shave a portion of his face. During this demonstration the announcer says, "In this sandpaper test or on your sandpaper beard, you just apply Rapid Shave, then take your razor and shave clean with a fast, smooth stroke."

5. Actually, no sandpaper was employed in the commercials. What was represented as sandpaper was in fact a mock-up made of plexiglass to which sand had been applied. There appear to be several reasons why it was not feasible to use sandpaper. One reason doubtless was that the length of the commercials—60-seconds—was not adequate for sandpaper to be soaked to the point where it could be shaved cleanly. Aside from this, however, there were technical difficulties peculiar to television. When placed under a television camera, sandpaper appears to be nothing more than plain, colored paper; the texture or

grain of the sandpaper is not shown. Thus it is necessary to improvise—use a mock-up—if what is seen by the television audience is to have the appearance of sandpaper.

6. There is no doubt that sandpaper can be shaved through use of the cream, provided adequate time is allowed after the application of the cream for the sandpaper to become soaked. This is established by evidence introduced both by Commission counsel and by respondents. In fact, the adequancy of the cream as a "moisturizing" or wetting agent seems to be recognized by all parties; certainly the matter is not in issue in the present proceeding.

7. The precise issue raised by the complaint is not clear. It appears however, both from the complaint and the Commission's order of May 19, 1960, denying a motion of Commission counsel to amend it, that probably the complaint intended to charge only that through the use of the television commercials, and particularly the visual demonstrations, respondents have unduly exaggerated the moistening or wetting properties of the cream. The complaint (Paragraph Five) alleges that through the use of the commercials respondents have falsely represented:

> * * * that the "moisturizing" action of Palmolive Rapid Shave is such that by the application of said product to the surface of dry sandpaper it is possible to *forthwith* shave off the rough surface of said sandpaper and that such demonstration proves the "moisturizing" properties of said product, in actual use, for shaving purposes. (Emphasis added.)

8. The key word here seems to be "forthwith". The charge seems to be that the commercials exaggerate the ease and celerity with which sandpaper can be shaved through use of the cream. In this connection it should be borne in mind that although the visual portion of the commercials indicates that the purported sandpaper is being shaved easily and quickly with one stroke of the razor, one of the oral portions of the commercials does contain the word "soak", the exact language being, "It was apply . . . soak . . . and off in a stroke."

While the word "soak" is not repeated in the split screen sequence, this would seem not to be necessary, in view of the fact that it was used only a few seconds before. As already stated, the entire commercial lasts only 60 seconds.

9. Fundamentally, the question presented here, as in any case charging false advertising, is: Has there been any material misrepresentation of the product? In the present case it seems clear that there has not. The shaving cream does possess at least adequate moistening or wetting properties, and sandpaper can be shaved through use of the product, provided adequate time for soaking is allowed.

10. Essentially, what is presented here would appear to be little or nothing more than a case of harmless exaggeration or puffing. Obviously the sandpaper sequences were employed simply for the purpose of emphasizing and dramatizing the recognized moistening or wetting properties of the cream. It is difficult to believe that anyone could have been misled as to the properties or qualities of the product.

11. As for the use in the commercials of the plexiglass mock-up instead of sandpaper, this would appear not to be misleading in a material respect inasmuch as the shaving cream does possess adequate wetting properties, and sandpaper can be shaved through use of the cream if sufficient time is allowed for soaking. In view of the technical problems peculiar to television, reasonable latitude in the use of mock-ups or props should be permitted, provided, of course, such use is not misleading in a material respect as to the actual properties or qualities of the product advertised. On this subject, former Chairman Kintner stated:

> We realize that it is often difficult to impart true life quality to a product when it is photographed for television.
>
> Where the use of props does not result in a material deception, the Federal Trade Commission would have no reason to complain.
>
> Obviously, we recognize that it is impossible to photograph ice cream properly under hot lights. If you have to use shaving cream to get the kind of head which is normal on a glass of beer, this probably would not represent a material deception unless, of course, it was carried beyond a reasonable point. If a glass goblet glistens too much, we still aren't likely to be alarmed. (Advertising Age, November 23, 1959.)

12. In summary, it is concluded that the advertising here in question was not misleading in any material respect, and that the complaint therefore has not been sustained.

13. The conclusion reached on the merits renders unnecessary any consideration of other issues raised by respondents.

ORDER

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

OPINION OF THE COMMISSION

By Commissioner ELMAN:

This is an appeal from the hearing examiner's initial decision dismissing a complaint charging respondents Colgate-Palmolive Company and Ted Bates & Company, Inc., with having violated Section 5 of the Federal Trade Commission Act[1] by using false, misleading,

[1] 38 Stat. 719, as amended, 15 U.S.C. § 45.

and deceptive television commercials in advertising Colgate-Palmolive's shaving cream, "Rapid Shave."

We hold that the initial decision was erroneous; that the allegations of fact in the complaint have been fully substantiated; that respondents, by using these commercials, engaged in unfair and deceptive acts and practices, and unfair methods of competition, in interstate commerce, in violation of Section 5; and that, to protect the public against recurrence of such unlawful conduct, an appropriate cease and desist order should be entered against both respondents.

I.

Respondent Colgate-Palmolive Company makes and sells a shaving cream called "Rapid Shave." Respondent Ted Bates & Company, Inc., is an advertising agency which prepared and placed for publication the three 60-second television commercials advertising "Rapid Shave" which are involved in this proceeding. These commercials were presented on programs sponsored by Colgate-Palmolive that were broadcast on a national network in the latter part of 1959. The scripts of these commercials, detailing their "video" and "audio" content, appear as exhibits in the record. In addition, the films of the commercials, as actually broadcast, were shown to the Commission during the oral argument of the appeal.

The first of these (Commission Exhibit 2, entitled "Sandpaper Mask—Gifford") opens by showing a football being place-kicked, with the ball zooming toward the viewer. The picture then "cuts" to a football player whose face is hidden behind a mask that appears to be made of coarse, gritty sandpaper. The voice of an unseen announcer asks: "Who is the man behind the sandpaper mask?" The football player strips off the sandpaper mask, revealing a heavy growth of whiskers. As the player rubs his cheek ruefully, the announcer says: "It's triple-threat man, Frank Gifford—backfield sensation of the New York Giants . . . a man with a problem just like yours . . . a beard as tough as sandpaper . . . a beard that needs . . . PALMOLIVE RAPID SHAVE . . . super-moisturized for the fastest, smoothest shaves possible."

As the announcer says "a beard as tough as sandpaper," the picture shifts to the sandpaper mask, and a hand brings a can of "Rapid Shave" into view in front of the sandpaper, with the words "Super-Moisturized" and "Fastest Smoothest Shaves" appearing on the film under the shaving cream. The announcer's voice continues: "To prove RAPID SHAVE'S super-moisturizing power, we put it right from the can . . ." As this is being said, we see one hand pressing

the top of the "Rapid Shave" can so as to dispense a small amount of lather into the other hand. The lather is then spread in one continuous motion upon the surface of the sandpaper, and the first hand reappears with a razor and shaves a clean path through the lather and the gritty surface of the sandpaper. While this is taking place, the voice of the announcer continues ". . . onto this tough, dry sandpaper. It was apply . . . soak . . . and off in a stroke." These words are spoken at a normal conversational pace, and there is no "fade," "dissolve," or other pictorial indication of any lapse of time between "apply," "soak," and "off in a stroke"; the intervals preceding and following the word "soak" last no more than a second.

The picture then shifts to Frank Gifford lathering his face as the announcer continues: "And super-moisturized PALMOLIVE RAPID SHAVE can do the same for you."

At this point the "split screen" technique is introduced. On one side of the screen a hand is seen applying "Rapid Shave" to sandpaper in an action that parallels Gifford's on the other side of the screen. As Gifford makes a razor stroke down his check, the hand makes a similar stroke down the lathered strip of sandpaper. Again the shaving, on both sides of the screen, is begun directly after the lather is applied. And, again, there is no "fade," "dissolve" or other visual indication of any lapse of time between the lathering and the shaving of the sandpaper, on one side of the screen, and Gifford's face, on the other. While this is being seen, the announcer says: "In this sandpaper test . . . or on your sandpaper beard, you just apply RAPID SHAVE . . . then . . . take your razor . . . and shave clean with a fast, smooth stroke."

We then see Gifford, stroking his clean-shaven face with a look of satisfied approval. The picture at this point shifts to cans of "Rapid Shave" surrounded by the words "Super-Moisturized" and "Fastest, Smoothest Shaves," while the announcer continues: "Try RAPID SHAVE . . . or cooling, soothing RAPID SHAVE-MENTHOL . . . both super-moisturized . . . for the fastest, smoothest shaves possible. They both outshave the tube . . . outshave the brush." In a concluding jingle, to a tune reminiscent of "Here we go 'round the mulberry bush," an unseen male chorus sings lustily: "RAPID SHAVE outshaves them all. Use RAPID SHAVE in the morning."

The sights and sounds we have described proceed in a rapid sequence, the whole commercial lasting 60 seconds.

The second commercial here involved (Commission Exhibit 3) is exactly the same except that the football player with the "sandpaper"

beard is Kyle Rote, also of the New York Giants. The third commercial (Commission Exhibit 4) differs from the other two in not showing a celebrity. Quick dramatic effect is attained by likening the feel of a razor stroke to the striking of a match on sandpaper. After a brief recitation of the shaving comfort to be derived from using "Rapid Shave," with appropriate pictorial accompaniment, the same "sandpaper test" described in the other commercials is repeated.

II.

In one basic respect, the case is free from factual controversy. Respondents concede that the televised "sandpaper" demonstrations were conducted not on real sandpaper but on what is known in the industry as a "mockup," or simulated prop. As the examiner found, "Actually no sandpaper was employed in the commercials. What was represented as sandpaper was in fact a mock-up made of plexiglass to which sand had been applied."

In dismissing the complaint, the examiner went on to explain, and to justify, respondents' use of a mock-up rather than actual sandpaper:

> There appear to be several reasons why it was not feasible to use sandpaper. One reason doubtless was that the length of the commercials—60-seconds—was not adequate for sandpaper to be soaked to the point where it could be shaved cleanly. Aside from this, however, there were technical difficulties peculiar to television. When placed under a television camera, sandpaper appears to be nothing more than plain, colored paper; the texture or grain of the sandpaper is not shown. Thus it is necessary to improvise—use a mock-up—if what is seen by the television audience is to have the appearance of sandpaper.

III.

The examiner considered that the facts of the case raised only one question: "Has there been any material misrepresentation of the product?" To that question, the examiner answered:

> In the present case it seems clear that there has not. The shaving cream does possess at least adequate moistening or wetting properties, and sandpaper can be shaved through use of the product, provided adequate time for soaking is allowed.
>
> Essentially, what is presented here would appear to be little or nothing more than a case of harmless exaggeration or puffing. Obviously the sandpaper sequences were employed simply for the purpose of emphasizing and dramatizing the recognized moistening or wetting properties of the cream. It is difficult to believe that anyone could have been misled as to the properties or qualities of the product.

We believe the examiner erred, his answers being wrong essentially because he asked the wrong questions.

IV.

Initially, we put to one side any question as to the truthfulness of the factual premise stated in the commercials, namely, that a shaving cream which enables sandpaper to be shaved cleanly and quickly is equally effective in shaving a man's beard. Respondents, who have spent many thousands of dollars in advertising this product to millions of viewers, apparently believed that the public would accept an equivalence of whiskers and sandpaper in this respect. Accordingly, giving respondents the benefit of any doubts we might otherwise have in the matter, we will assume the truthfulness of the commercials in so far as they represented that if "Rapid Shave" can shave sandpaper, it "can do the same for you."

As the Commission saw and heard the television commercials here involved, they contain two other basic representations:

(1) When applied to coarse, gritty sandpaper, "Rapid Shave" will so moisturize the sandpaper that, immediately upon lathering, it can be cleanly shaved.

(2) As proof of that fact, the viewers need not take respondents' word for it; they can see with their own eyes a test or demonstration of how "Rapid Shave" actually shaves such sandpaper.

Despite respondents' contentions to the contrary, we are satisfied that the complaint was sufficiently clear and specific to bring both of these representations into issue. Thus, the record presents two questions, not one:

(1) Was there a misrepresentation as to the moisturizing qualities claimed for "Rapid Shave"? Specifically, can it "shave" sandpaper in the manner described in the commercials?

(2) Assuming that there was no misrepresentation as to the effectiveness of "Rapid Shave" in shaving sandpaper, was there nonetheless a misrepresentation in the visual demonstration offered as proof of such effectiveness? Specifically, was it deceptive to the public and an unfair advertising practice for respondents to conduct a "sandpaper" test before the viewers' eyes to prove the product's "supermoisturizing power" on what was represented as sandpaper, and what the viewers had every reason to suppose was sandpaper, but was actually a plexiglass mock-up?

We now proceed to consider both these questions.

1. On the premises—which we have assumed to be true—that there is an equivalence in this respect between sandpaper and "a beard as tough as sandpaper," if respondents misrepresented the extent to which "Rapid Shave," when applied to sandpaper, permits it to be shaved quickly and cleanly, they undoubtedly engaged in a form of

conduct proscribed by the statute. Advertisers may not make claims for the efficacy of their products which exceed the bounds of truth and reality.[2] The Commission is obligated to prevent "false advertising of a product, process or method which misleads, or has the capacity or tendency to mislead, the purchasing public into buying such product, process or method in the belief it is acquiring one essentially different." *Ford Motor Co.* v. *Federal Trade Commission*, 120 F. 2d 175, 181 (C.A. 6), cert. denied, 314 U.S. 668. If the public is to be induced to purchase a shaving cream by representations as to its effect on sandpaper, those representations must be true.

It was the uncontradicated testimony of an expert in coated abrasives and an official of respondent Bates that the plexiglass mock-up most closely resembled the grade of sandpaper commonly known as "extra-coarse." It is apparent to the Commission from its observation of the three commercials that this characterization in no way exaggerates the heavy, coarse appearance of the surface of the mock-up.

We find, upon review of the testimony, in conjunction with the sandpaper exhibits in the record, that:

(a) Sandpaper of the coarse, heavy variety depicted in the "Rapid Shave" commercials cannot successfully be shaved in the abbreviated time available during the commercials even by employing a number of strokes under heavy pressure;

(b) Sandpaper of the coarse, heavy variety depicted in these commercials cannot successfully be shaved within one to three minutes after application of "Rapid Shave," even by employing a number of strokes under heavy pressure;

(c) No piece of sandpaper of the coarse, heavy variety depicted in these commercials that appears in the record has been shaved genuinely clean, as the television mock-up was, despite the allowance of up to an hour for soaking in "Rapid Shave"; and

(d) One reason why real sandpaper was not used in the "Rapid Shave" commercials was that it required too long a soaking period before effective shaving was possible.

The Commission's conclusion on this issue, therefore, is that sandpaper cannot be shaved by applying "Rapid Shave" in the manner, and for the length of time, depicted in the commercials, and that respondents' representations and demonstrations to that effect were false, misleading, and deceptive.

This is not to deny that, as the examiner found, some types of sand-

[2] See, *e.g.*, *Carter Products, Inc.* v. *Federal Trade Commission*, 268 F. 2d 461 (C.A. 9), cert. denied, 361 U.S. 884; *Rhodes Pharmacal Co.* v. *Federal Trade Commission*, 208 F. 2d 382 (C.A. 7), modified, 348 U.S. 940; *Koch* v. *Federal Trade Commission*, 206 F. 2d 311 (C.A. 6); *American Medicinal Products, Inc.* v. *Federal Trade Commission*, 136 F. 2d 426 (C.A. 9); *Consolidated Book Publishers, Inc.* v. *Federal Trade Commission*, 53 F. 2d 942 (C.A. 7), cert. denied, 286 U.S. 553.

paper can, in some circumstances, be shaved with "Rapid Shave," "provided adequate time for soaking is allowed." But that is beside the point. There is a public interest in protecting the consumer from deception,[3] and in furthering that interest the Commission is guided by the "net impression which the advertisement is likely to make upon the general populace," *Charles of the Ritz Distributors Corp.* v. *Federal Trade Commission*, 143 F. 2d 676, 679 (C.A. 2), rather than "fine spun distinctions and arguments that may be made in excuse." *P. Lorillard Co.* v. *Federal Trade Commission*, 186 F. 2d 52, 58 (C.A. 4). These commercials clearly conveyed the impression that very coarse grades of sandpaper could be shaved immediately after "Rapid Shave" was applied. As our brief summary of the evidence of record indicates, this is simply not possible. Every effort in the hearing room to shave heavy sandpaper shortly after it received a coating of "Rapid Shave" ended in total failure. And the pre-hearing experiments of witness Joseph R. O'Neil, an expert in the field of coated abrasives, involving soaking period of one to three minutes, met with no more success.

Nor was the visual impact of respondents' "sandpaper" demonstration—an impact that was plainly the main object of each commercial—softened by the single unobtrusive utterance of the word "soak." According to respondents, that word "necessarily implies the passage of time," and its inclusion in the "audio" part of the commercial cancelled out any representation otherwise made as to the speed with which "Rapid Shave" could be used in shaving sandpaper. However, the viewer is almost unaware that the word has been spoken, and the action that accomplishes it flows rhythmically along without discernible pause. The Commission observed these commercials with an educated eye, forwarned that, from respondents' standpoint, "soak" was a key word in the announcer's spiel. Even so, the word failed to convey to us the impression that respondents' counsel urged for it. How much less a flag of caution must it have been to the uninitiate, gazing at their sets perhaps casually or distracted by other household activities. In these television commercials the pictorial demonstration was the thing,[4] and the net effect of the spoken commentary was to accentuate rather than detract from it.

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[3] See *e.g.*, *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U.S. 67; *Mohawk Refining Corp.* v. *Federal Trade Commission*, 263 F. 2d 818 (C.A. 3), cert. denied, 361 U.S. 814; *Parke, Austin & Lipscomb, Inc.* v. *Federal Trade Commission*, 142 F. 2d 437 (C.A. 2), cert. denied, 323 U.S. 753; *Federal Trade Commission* v. *Balme*, 23 F. 2d 615 (C.A. 2), cert. denied, 277 U.S. 598.

[4] S. Watson Dunn, "Advertising—Its Role in Modern Marketing" (1961), p. 408: "Demonstration is so important it should be considered for every commercial. In many commercials demonstration of the product or service is the dominant theme. Since people are interested in what products will do for them, demonstration is usually good communication."

Respondents' arguments to the contrary are no more than technical quibbles over the breadth of the genus "sandpaper" and the dictionary definition of the word "soak." But the Commission is charged with the high duty of preventing public deception, and it must consider representations in actual context, not abstractly or in isolation, for "A statement may be deceptive even if the constituent words may be literally or technically construed so as to not constitute a misrepresentation." *Kalwajtys* v. *Federal Trade Commission*, 237 F. 2d 654, 656 (C.A. 7), cert. denied, 352 U.S. 1025.[5] The Commission is concerned with protecting the trusting as well as the suspicious, the casual as well as the vigilant, the naive as well as the sophisticated.[6] "It is for this reason that the Commission may 'insist upon the most literal truthfulness' in advertisements, *Moretrench Corp.* v. *Federal Trade Commission*, 2 Cir. 127 F. 2d 792, 795, and should have the discretion, undisturbed by the courts, to insist if it chooses 'upon a form of advertising clear enough so that, in the words of the prophet Isaiah, "wayfaring men, though fools, shall not err therein."' *General Motors Corp.* v. *Federal Trade Commission*, 2 Cir., 114 F. 2d 33, 36, certiorari denied, 312 U.S. 682. . . ." *Charles of the Ritz Distributors Corp.* v. *Federal Trade Commission*, 143 F. 2d 676, 680 (C.A. 2).

2. We turn, next, to the contention mainly pressed on this appeal, namely, that use of the mock-up instead of real sandpaper in the demonstrations was not deceptive or misleading because it claimed no quality for "Rapid Shave" which it did not actually possess; and that in any event, this was "little or nothing more than a case of harmless exaggeration or puffing" of the product's moistening properties.

This argument assumes, contrary to our findings of fact, that the commercials did fairly and truthfully describe "Rapid Shave's" effectiveness in shaving sandpaper. Even if that were so, the commercials would be deceptive, within the meaning of the statute, in the manner in which they deliberately misinform the viewer that what he sees being shaved is genuine "tough, dry sandpaper," rather than a plexiglass mock-up. There is no dispute that this is untrue. Did it tend to mislead the public, and was it an unfair advertising practice? We hold that it did, and it was.

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[5] And see, *Koch* v. *Federal Trade Commission*, 206 F. 2d 311, 317 (C.A. 6); *Bennett* v. *Federal Trade Commission*, 200 F. 2d 362, 363 (C.A. D.C.); *Rothschild* v. *Federal Trade Commission*, 200 U.S. 39, 42 (C.A. 7), cert. denied, 345 U.S. 941; *Bockenstette* v. *Federal Trade Commission*, 134 F. 2d 369, 371 (C.A. 10). *Cf., Donaldson* v. *Read Magazine, Inc.*, 333 U.S. 178, 188.

[6] See *Niresk Industries, Inc.* v. *Federal Trade Commission*, 278 F. 2d 337 (C.A. 7); *Parker Pen Co.* v. *Federal Trade Commission*, 159 F. 2d 509 (C.A. 7); *Progress Tailoring Co.* v. *Federal Trade Commission*, 153 F. 2d 103 (C.A. 7); *A.P.W. Paper Co.* v. *Federal Trade Commission*, 149 F. 2d 424 (C.A. 2), affirmed, 328 U.S. 193. *Cf., Donaldson* v. *Read Magazine, Inc.*, 333 U.S. 178.

If false advertising tends unfairly to divert business from competitors or to induce consumers to make purchases they might not otherwise make, it is certainly unlawful. The manner in which the mock-up was employed in the "Rapid Shave" commercials had the capacity to do both. Their entire sales pitch can be readily summarized:

If you have a tough "sandpaper" beard, you need a shaving cream with super-moisturizing power. A shaving cream that is effective in quickly and cleanly shaving rough, dry sandpaper can do the same for your beard. RAPID SHAVE has such super-moisturizing power, *and we will prove it to you before your very eyes.*

The heart of these commercials was the visual "sandpaper test"—a test that was, in reality, not taking place. This would be deceptive and unfair advertising even if "Rapid Shave" was as effective in shaving sandpaper as respondents represented. A likely result of such an illegal practice is that "purchasers are deceived into purchasing an article which they do not wish or intend to buy, and which they might or might not buy if correctly informed. . . ." *Federal Trade Commission* v. *Royal Milling Co.*, 288 U.S. 212, 217. "We are of opinion that the purchasing public is entitled to be protected against that species of deception, and that its interest in such protection is specific and substantial." *Ibid.*

Respondents urge, however, that if (assuming the fact to be true) their product will do to real sandpaper all that the mock-up demonstration claims for it, the consumer has not been induced to buy a product less valuable or meritorious than what he thought he was buying, and therefore he has not been hurt in any substantial way. But this has never been the test of what constitutes a material misrepresentation under the statute. "It is sufficient to find that the natural and probable result of the challenged practices is to cause one to do that which he would not otherwise do . . . and that the matter is of specific public interest." *Bockenstette* v. *Federal Trade Commisison*, 134 F. 2d 369, 371 (C.A. 10). "It is not necessary that the product so misrepresented be inferior or harmful to the public; it is sufficient that the sale of the product be other than as represented." *L. & C. Mayers Co.* v. *Federal Trade Commission*, 97 F. 2d 365, 367 (C.A. 2).[7]

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[7] And see *C. Howard Hunt Pen. Co.* v. *Federal Trade Commission*, 197 F. 2d 273, 280 (C.A. 3), in which petitioner represented that its pen points were tipped with iridium, an unusually hard element of the platinum family:

"It is of no moment, in this proceeding in the public interest, that what the purchaser gets in the tipping material used on petitioner's pen points may be as serviceable as or almost as serviceable as iridium."

The court also pointed out that other manufacturers who tipped their pen points with the same hard material petitioner used and did not falsely claim that it was iridium were prejudiced by petitioner's misrepresentations.

Respondent would have us hold that a television demonstration purporting to prove the qualities claimed for a product, where the public is told it is seeing one thing when it is actually seeing something different, is nonetheless lawful and not deceptive if in fact the product involved has the qualities claimed for it. This would flout the principle implicit in the multitude of cases which hold that one may not advertise so-called "phony" or dishonest testimonials; [8] or imply an erroneous source or origin for a product; [9] or fail to disclose that a product, although as good as a new one, has in fact, been reprocessed; [10] or deceive the public into believing that one is in a certain line of business when this is not so.[11] The vice assailed in these cases is the use of a falsification of fact, extrinsic to the objective value of the product, to sell that product, whether or not it may deserve to be bought on its own merits. "[T]he public is entitled to get what it chooses," and, "substitution would be unfair though equivalence were shown." *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U.S. 67, 77–78.

Suppose, for example, that an advertisement for an obesity remedy shows the usual "before" and "after" pictures of users of the product. If those photographs are "faked," it would obviously be no defense that the product is an effective appetite-depressant and could in fact bring about reduction in weight as represented in the "faked" pictures. The point is that the "proof" offered was a material element of the advertising; without it, the advertising might not have succeeded in selling the product; and, in fact, the "proof" was not proof at all. The short of the matter is that the public and honest competitors are entitled to the protection which the law gives against such unfair and deceptive advertising practices.

In this case the pictorial test of "Rapid Shave," proving to any doubting Thomas in the vast audience that "By golly, it really *can* shave sandpaper!" was the clinching argument made by the commercials. The "sandpaper test" was conducted, as the announcer said, "[t]o prove RAPID SHAVE'S supermoisturizing power . . . ." Without this visible proof of its qualities, some viewers might not have

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[8] See, *e.g.*, *Niresk Industries, Inc.*, v. *Federal Trade Commission*, 278 F. 2d 337 (C.A. 7) (unauthorized use of "Good Housekeeping Guaranty Seal"); *Federal Trade Commission* v. *Standard Education Soc'y*, 86 F. 2d 692 (C.A. 2), modified, 302 U.S. 112 (Encyclopedia testimonials); *Guarantee Veterinary Co.* v. *Federal Trade Commission*, 285 Fed. 853 (C.A. 2) (U.S. Army endorsement and military testimonial for a livestock salt block).

[9] *E.g.*, *United States Navy Weekly, Inc.*, *v. Federal Trade Commission*, 207 F. 2d 17 (C.A.D.C.); *El Moro Cigar Co.* v. *Federal Trade Commission*, 107 F. 2d 429 (C.A. 4); *Federal Trade Commission* v. *Army and Navy Trading Co.*, 88 F. 2d 776 (C.A.D.C.).

[10] *E.g.*, *Mohawk Refining Corp.* v. *Federal Trade Commission*, 263 F. 2d 818 (C.A. 3), cert. denied, 361 U.S. 814; *Royal Oil Corp.* v. *Federal Trade Commission*, 262 F. 2d 741 (C.A. 4).

[11] *E.g.*, *Federal Trade Commission* v. *Royal Milling Co.*, 288 U.S. 212; *L. & C. Mayers Co.* v. *Federal Trade Commission*, 97 F. 2d 365 (C.A. 2); *Federal Trade Commission* v. *Mid West Mills, Inc.*, 90 F. 2d 723 (C.A. 7).

been persuaded to buy the product. At least, respondents must have thought so, or else they would not have emphasized the pictorial "sandpaper test" in the expensive television advertisements of their product. One need only consider the differences in the impact of these commercials on viewers had they been told, honestly and truthfully, that what they were seeing tested was a plexiglass mock-up, rather than what they thought and were told they were seeing, namely, actual sandpaper. The difference betwen telling and not telling the truth could, in this instance at least, have been the difference between an effective and ineffective "sell." In such circumstances, the claim of "harmless exaggeration" is rather hollow.

Perhaps some consumers will be content with a product purchased in response to such a receptive "come-on," but that is hardly legal justification for it. It could not atone, for example, for the injury to a competing shaving cream manufacturer whose product might have fared better in the marketplace had respondents adhered to honest and fair advertising practices. "The law is violated if the first contact or interview is secured by deception. . . ." *Carter Products* v. *Federal Trade Commission*, 186 F. 2d 821, 824 (C.A. 7).

V.

Respondents raise a number of specific defenses.

1. They suggest, first, that use of a plexiglass mock-up was justified because television's technical limitations cause sandpaper to look unreal when televised. We are told by respondents that the use of mock-ups or simulated props in television advertising is by no means unique to this case, and is a widespread practice in the industry. Thus, while the particular facts of this case may seem trivial, it raises the broad question whether mock-ups or simulated props may lawfully be used in television commercials to demonstrate qualities claimed for products, where the audience is told that it is seeing one thing being demonstrated while actually it is seeing something different.

As to the asserted technical limitations of the medium, the Commission is inclined to be somewhat skeptical. We doubt that the skills and resources available in television photography, in an industry which has made such striking technological advances in recent years, are as inadequate as they have ben portrayed to us by counsel for respondents. However, assuming it to be the fact that there are indeed such limitations in television photography, the Commisison can appreciate that these "technical" difficulties could give rise to problems for sponsors and agencies in determining how most effectively to use television in advertising their products. The limitations of the medium may present a challenge to the creative ingenuity and resourcefulness of copy-

writers; but surely they could not constitute lawful justification for resort to falsehoods and deception of the public. The argument to the contrary would seem to be based on the wholly untenable assumption that the primary or dominant function of television is to sell goods, and that the Commission should not make any ruling which would impair the ability of sponsors and agencies to use television wih maximum effectiveness as a sales or advertising medium.

Stripped of polite verbiage, the argument boils down to this: Where truth and television salesmanship collide, the former must give way to the latter. This is obviously an indefensible proposition. The notion that a sponsor may take liberties with the truth in its television advertising, while advertisers using other media must continue to be truthful, is patent nonsense. The statutory requirements of truth in advertising apply to television no less than to other media of communication. Adherence to the truth should be no more of an impediment to effective advertising in television than in any other medium. But if, though we are inclined to doubt it, respondents do not believe they can effectively market their product on television within the legal requirements of truthful advertising, it does not follow that the Commission should relax those requirements. As was said in another case, if respondents "do not choose to advertise truthfully, they may, and should, discontinue advertising." *American Medicinal Products, Inc.* v. *Federal Trade Commission*, 136 F. 2d 426, 427 (C.A. 9). Only by disregarding this basic and salutary principle of the law could we give approval to respondents' advertising practices. "To fail to prohibit such evil practices would be to elevate deception in business and to give to it the standing and dignity of truth." *Federal Trade Commission* v. *Standard Education Soc'y*, 302 U.S. 112, 116.

2. A kindred argument, of the "parade of horribles" variety, is that a decision against respondents in this case will disrupt the entire television industry by prohibiting all future use, in all circumstances, of props to simulate reality. This is, of course, absurd. No one objects to the use of papier mâché sets to represent western saloons or an actor's drinking iced tea instead of the alcoholic beverage called for by the script. The distinction between these situations and the one before us is obvious. The set designer is not attempting, through his depiction of the saloon, to sell us a saloon, nor is the actor, sipping at his drink, peddling bourbon. There is a world of difference between a casual display of steaming "coffee" that is really heated red wine (again, because of television's "technical difficulties"), and a commercial showing a closeup of what is actually red wine to the accompaniment of a claim that the high quality of the sponsor's coffee is proved by its rich, dark appearance—which the viewer can

verify for himself simply by looking at the "coffee" on the screen. Similarly, an announcer may wear a blue shirt that photographs white; but he may not advertise a soap or detergent's "whitening" qualities by pointing to the "whiteness" of his blue shirt. The difference in all these cases is the time-honored distinction between a misstatement of truth that is material to the inducement of a sale and one that is not.

3. Respondents further contend, and the hearing examiner agreed, that, even if exaggerated, the claims for "Rapid Shave's" moistening ability, as asserted through the "sandpaper" demonstration, amount to no more than harmless "puffing." We cannot agree. Puffing "is considered to be offered and understood as an expression of the seller's opinion only, which is to be discounted as such by the buyer, and on which no reasonable man would rely." *Prosser, Torts*, § 90, p. 557 (2d ed. 1955). Thus, sellers may generally, though not universally, assert that their products are "good," "wonderful," "dandy," and the like,[12] but only because the use of these adjectives is "not designed to affect the intellect" but is "merely an accepted technique for urging the prospect to close the deal." Harper and McNeely, *A Synthesis of the Law of Misrepresentation*, 22 Minn. L. Rev. 939, 1004–1005 (1938). The corollary of this proposition is that "puffing" does not embrace misstatements of material fact. At this point the law steps in to protect the buyer.[13]

> "Puffing" refers, generally, to an expression of opinion not made as a representation of fact. . . . While a seller has some latitude in "puffing" his goods, he is not authorized to misrepresent them or to assign to them benefits or virtues they do not possess. *Gulf Oil Corp. v. Federal Trade Commission*, 150 F. 2d 106, 109 (C.A. 5).[14]

In this context, the argument that respondents only indulged in a little harmless puffing is obviously out of place. They represented, unqualifiedly, that "Rapid Shave" will dramatically facilitate the shaving of sandpaper and that they were demonstrating this fact before a television audience to prove it. Both of these were factual representations; neither is true.[15]

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[12] See, *e.g.*, *Carlay* v. *Federal Trade Commission*, 153 F. 2d 493 (C.A. 7); *Prosser, Torts*, § 90, pp. 557–558 (2d ed., 1955); *Williston, Contracts*, § 1491 (1937 rev. ed., Williston and Thompson).

[13] See, *e.g.*, *Hogan* v. *McCombs Bros.*, 190 Ia. 640, 180 N.W. 770; *Foote* v. *Wilson*, 104 Kans. 191, 178 P. 430; *Cheetham* v. *Ferreira*, 73 R.I. 425, 56 A. 2d 861.

[14] See also, *Goodman* v. *Federal Trade Commission*, 244 F. 2d 584 (C.A. 9); *Steelco Stainless Steel, Inc.* v. *Federal Trade Commission*, 187 F. 2d 693 (C.A. 7).

[15] Respondents rely on *Carlay Co.* v. *Federal Trade Commission*, 153 F. 2d 493 (C.A. 7); *Kidder Oil Co.* v. *Federal Trade Commission*, 117 F. 2d 892 (C.A. 7); and *Ostermoor & Co.* v. *Federal Trade Commission*, 16 F. 2d 962 (C.A. 2). None is in point. In *Carlay* the court found that petitioner's weight-reducing plan actually was relatively "easy," as claimed. In *Kidder* the court concluded that it was permissible puffing to advertise that a lubricant was "perfect" and would permit a car to run an "amazing distance" without

VI.

1. Respondent Bates raises several defenses pertaining to it alone. It suggests, first, that the Commission is without authority to enter an order against it because it is not engaged in commerce within the meaning of the statute. There is no dispute that Bates prepared and placed for showing, over national network television, these commercials for "Palmolive Rapid Shave," a product distributed in interstate commerce.[16] In light of the precedents, one can hardly doubt the Commission's jurisdiction over an enterprise so basic to the flow of goods into the national market. It has been held, to cite a few representative examples, that Commission jurisdiction extends to businesses selling exclusively in intrastate commerce when they become participants in a combination to restrain interstate trade,[17] to regulations adopted by a local tobacco board of trade for the allotment of selling time to tobacco warehouses, since tobacco auctions are an integral part of interstate commerce in tobacco;[18] to false and misleading representations made in an effort to obtain salesmen, because such representations constituted a part of the preliminary negotiations leading up to sales in interstate commerce and could not be separated from those sales;[19] and to a widely advertised automobile sales financing plan, even though it related solely to financing intrastate transactions between local dealers and their customers, because the plan and its advertising were an integral part of a national scheme of mass production and distribution.[20] The relation of Bates to the movement of goods in interstate commerce is no more tenuous

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additional lubricants. These cases do not involve the kind of factual distortion presented here.

Nor are respondents aided by the language in *Ostermoor* concerning puffing.. The court's remarks on puffing were only general observations as to the framing of an order, while reversal of the Commission's order was based on insufficiency of the evidence. Respondents thus err in construing *Ostermoor's* value as a precedent for this case. Furthermore, the interpretation which respondents urge for that case, and the result for which they contend here, are inconsistent with the prevalent judicial and administrative policy of restricting, rather than expanding, so-called puffing. See, *e.g., Kabatchnick* v. *Hanover-Elm Bldg., Corp.*, 328 Mass. 341, 103 N.E. 2d 692; *Prosser, Torts*, § 90, p. 559 (2d ed., 1955); *Williston, Contracts*, § 1494, p. 4169 (1937 rev. ed., Williston and Thompson).

[16] Bates has, with commendable forthrightness, long since admitted these facts. See, *e.g.*, "Motion by Respondent Ted Bates & Company, Inc. to Dismiss the Complaint as to It Upon the Ground That the Evidence Adduced Fails To Support the Charges Made in the Complaint," at p. 15.

[17] *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 695–696.

[18] *Asheville Tobacco Board of Trade, Inc.* v. *Federal Trade Commission*, 263 F. 2d 502, 507–508 (C.A. 4).

[19] *Progress Tailoring Co.* v. *Federal Trade Commission*, 153 F. 2d 103, 105 (C.A. 7).

[20] *Ford Motor Co.* v. *Federal Trade Commission*, 120 F. 2d 175, 183 (C.A. 6), cert. denied, 314 U.S. 668.

or less direct than was the corresponding relation in any of the situations mentioned above.[21]

2. Bates argues additionally that it should not be held responsible for the illegality of the "Rapid Shave" commercials, since it acted merely as an agent for Colgate-Palmolive in preparing and placing them. We find this a curious contention. Bates not only carried these commercials to the television network; it originated the idea for the "sandpaper tests" in the first place.[22] We know of no doctrine that permits one to evade liability for actions for which he is as directly responsible as this, regardless of whether he acted solely in his own interest or also for the benefit of another.[23] Bates' argument is merely another variation of the oft-repeated effort to avoid responsibility for a violation of the statute by shifting it to another. These attempts are uniformly unsucessful. Thus, even though a respondent does not directly engage in unlawful activity, it may be held to have violated the Act if it has provided others with the means of doing so.[24] Even on an interpretation of the facts highly favorable to Bates, it has done at least this much. Or, to cite another instance, if a corporate officer has participated in the planning or execution of unfair trade practices by his corporate master, the status of the corporation as an indepedent legal entity is no barrier to an order running against him as an individual.[25] All that is necessary to establish liability in this type of case is that the corporate officer "be shown to have had such connection with the wrong as would have made him an accomplice were it a crime, or a joint tortfeasor, were the corporation an individual." *Federal Trade Commission* v. *Standard Education Soc'y*, 86 F. 2d 692, 695 (C.A. 2), modified, 302 U.S. 112. The facts leave no doubt that Bates' part in the creation and dissemination of the "Rapid Shave" commercials satisfies this test.

3. Bates has suggested that these principles are inapplicable to it because it did not know its "sandpaper test" commercials would be held to be false and misleading, and it therefore did not intentionally violate the Act. It is so well settled that there is no necessity to

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[21] Bates' reliance on *Federal Trade Commission* v. *Bunte Brothers, Inc.*, 312 U.S. 349, is misplaced. There the sole activity involved was the marketing of a product exclusively within the borders of a single state. Here respondent has prepared and placed advertisements knowing that they would be shown nationwide in the promotion of a product sold in interstate commerce. The *Bunte* case is thus not in point.

[22] See "Motion by Respondent Ted Bates & Company, Inc.," *supra* note 16, at p. 18.

[23] In fact, the general rule seems quite to the contrary. See, *e.g.*, *American Law Institute, Restatement of Agency, Second*, §§ 343, 348, 350 (1958).

[24] See, *e.g.*, *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U.S. 483; *C. Howard Hunt Pen Co.* v. *Federal Trade Commission*, 197 F. 2d 273 (C.A. 3).

[25] See, *e.g.*, *Federal Trade Commission* v. *Standard Education Soc'y*, 302 U.S. 112; *Consumer Sales Corp.* v. *Federal Trade Commission*, 198 F. 2d 404 (C.A. 2), cert. denied, 344 U.S. 912; *Gelb* v. *Federal Trade Commission*, 144 F. 2d 580 (C.A. 2); *Guarantee Veterinary Co.* v. *Federal Trade Commission*, 285 Fed. 853 (C.A. 2).

prove intent to deceive in establishing a violation of the Act [26] that this contention can only be regarded as frivolous.

VII.

We arrive finally at the question of the scope and content of the order to be issued against Colgate-Palmolive and Ted Bates. Respondents were apprised of the order proposed by counsel supporting the complaint as early as March 20, 1961, when it was filed with the Secretary of the Commission. The question was raised and discussed on April 6, 1961, in oral argument before the hearing examiner. Counsel for all parties argued the matter in their briefs on appeal, and the subject was considered again in oral argument before the Commission. Respondents have thus not only had fair notice and ample opportunity to make known their views concerning the breadth of the order; they have done so. The Commission has carefully considered all of respondents' views and objections to the form, content, and scope of the proposed order and is fully justified in promulgating its order without further delay.

The appropriate scope of the order must be determined in the context of the statute and the authoritative precedents. Section 5 of the Act states that "Unfair *methods* of competition in commerce, and unfair or deceptive acts or *practices* in commerce, are declared unlawful" (emphasis added). 15 U.S.C. § 45(a)(1). It empowers the Commission to prevent parties within its jurisdiction "from using unfair *methods* of competition in commerce and unfair or deceptive acts or *practices* in commerce" (emphasis added). 15 U.S.C. § 45(a)(6). It further declares that, if the Commission finds that the method of competition or act or practice in question is of the prohibited sort, it shall issue an order requiring the respondent "to cease and desist from using such *method* of competition or such act or *practice*" (emphasis added). 15 U.S.C. § 45(b). The clear implication of this language—especially in its differentiation between "acts" and "practices"—is that the Commission's authority to ascertain and prevent violations of the statute extends beyond the unique facts of a given case to the more general and significant problem of the "method" of competition or trade "practice" involved.

The cases bear out this interpretation. The courts have given the Commission broad authority to tailor the remedy to the violation

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[26] See, *e.g.*, *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U.S. 67; *Koch* v. *Federal Trade Commission*, 206 F. 2d 311 (C.A. 6); *Gimbel Bros., Inc.* v. *Federal Trade Commission*, 116 F. 2d 578 (C.A. 2); *L. & C. Mayers Co.* v. *Federal Trade Commission*, 97 F. 2d 365 (C.A. 2).

found.[27] The language of the cases, like the statute, has always employed the generic term "practices," and it has frequently been made clear that the Commission's authority—indeed, its obligation—in framing an order extends to the prevention of unfair types or forms of conduct rather than merely isolated acts.[28] For the reasons set forth below, we think the public interest compels the entry of an appropriately broad order here.

This case did not come to us vacuum-packed. The violations of law found here cannot be treated as isolated, discrete phenomena. As has already been noted, the problem of deceptive television advertising, although recent in origin, is making its appearance on the Commission's docket with increasing frequency. Although most of the cases have ended in orders based on consent agreements [29] reciting, as is customary, that respondents in no way admit illegality, they nonetheless indicate the prevalence and growing seriousness of the problem. It is a problem with which both respondents have had prior experience.[30] Against this factual background, the Commission would be derelict in its duty to protect the public if the order were confined merely to advertisements for "Rapid Shave" or to the use of mock-ups made of

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[27] For example:

"If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity. Moreover, '[t]he Commission has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices' disclosed. *Jacob Siegel Co.* v. *Federal Trade Comm'n*, 327 U.S. 608, 611 (1946). Congress placed the primary responsibility for fashioning such orders upon the Commission, and Congress expected the Commission to exercise a special competence in fomulating remedies to deal with problems in the general sphere of competitive practices. Therefore we have said that 'the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist.' Id., at 613." *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473.

[28] For example:

"[T]he Commission's power would be limited indeed if it were restricted to enjoining unfair acts of competitors only as evidenced in the past. To be of any value the order must proscribe the method of unfair competition as well as the specific acts by which it has been manifested. In no other way could the Commission fulfill its remedial function." *Hershey Chocolate Corp.* v. *Federal Trade Commission*, 121 F. 2d 968, 971–972 (C.A. 3).

"Commission orders are not designed to punish for past transgressions, but are designed as a means for preventing 'illegal practices in the future.' Federal Trade Commission v. Ruberoid Co., supra, 343 U.S. at page 473. . . . To the end that the Commission may achieve that purpose, its orders may prohibit not only the further use of the precice practice found to have existed in the past, but also the future use of related and similar practices." *Niresk Industries, Inc.* v. *Federal Trade Commission*, 278 F. 2d 337, 343 (C.A. 7).

[29] *Mennen Co.*, D. 8146, May 4, 1961; *Aluminum Company of America*, D. 7735, March 4, 1961; *Eversharp, Inc.*, D. 7811, Sept. 30, 1960; *Standard Brands, Inc.*, D. 7737, June 1, 1960; *Brown & Williamson Tobacco Co.*, D. 7688, Feb. 24, 1960; *Max Factor & Co.*, 55 F.T.C. 1328; *Adell Chem. Co.*, 54 F.T.C. 1801; *American Chicle Co.*, 54 F.T.C. 1625; *Lanolin Plus, Inc.*, 54 F.T.C. 446.

Two cases, *Colgate-Palmolive Co.*, D. 7660, March 9, 1961; and *Hutchinson Chemical Corp.*, 55 F.T.C. 1942, have been fully litigated before the Commission.

[30] As to Colgate-Palmolive, see *Colgate-Palmolive Co.*, D. 7660, March 9, 1961. As to Ted Bates, see *Standard Brands, Inc.*, D. 7737, June 1, 1960; *Brown & Williamson Tobacco Co.*, D. 7688, Feb. 24, 1960.

plexiglass and sand. So narrow a conception of the appropriate scope of the remedy in this type of case would necessitate a separate suit to terminate each of the myriad subtly distinct forms that deceptive depictions and demonstrations may take—an intolerable result from the standpoint of the public interest. Rather, in the face of widespread and increasing use of deceptive and unfair advertising practices in television,[31] we are "obliged not only to suppress the unlawful practice but to take such reasonable action as is calculated to preclude the revival of the illegal practices." *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 430. We can achieve this end simply by following the words of the statute and banning repetition of the "practice" found unlawful. That is a narrower and more limited prohibition than the Supreme Court has already upheld in affirming the Commission's authority, "as a prophylactic and preventive measure," to enjoin not only the practices found to be violations but also other "like and related" practices. *Federal Trade Commission* v. *Mandel Bros., Inc.*, 359 U.S. 385, 393.

We conclude that the order cannot be confined to a single product or a single means of deception. We think, however, that counsel supporting the complaint ask for too much when they seek, in addition to a ban against false and deceptive depictions and demonstrations, a prohibition against "[m]isrepresenting in any manner the quality or merits of any . . . product." [32] So broad and indefinite a command would be most difficult to obey, even in the best of faith, and it will be omitted from the order. We think a more narrow and specific prohibition should suffice here. Accordingly, our order will—in addition to the provisions already discussed—prohibit, in general, the misrepresentation of the quality or merits of "Rapid Shave," or any other shaving cream.

In sum, we have carefully considered the form, scope, and content of the order and are fully satisfied that it is fair and reasonable, necessary and appropriate to prevent recurrence of the illegal practices found, sufficiently specific and concrete to permit ready compliance, and no broader than protection of the public requires.

In addition to the findings of fact and conclusions stated in its opinion, the Commission adopts the following:

FINDINGS OF FACT

1. Respondent Colgate-Palmolive Company is a corporation, organized, existing, and doing business under and by virtue of the laws

[31] Besides the many that have come to our attention as the result of applications for complaints and our own investigations, we are informed by counsel for respondents that use of mock-ups in television commercials, apparently indiscriminately, is common practice.

[32] "Proposed Findings, Conclusions and Order" of Counsel Supporting the Complaint.

of the State of Delaware, with its principal office and place of business located at 300 Park Avenue, New York, New York.

2. Respondent Ted Bates & Company, Inc., is a corporation, organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 666 Fifth Avenue, New York, New York.

3. Respondent Colgate-Palmolive Company is now, and for some time last past has been, engaged in the manufacture, advertising, offering for sale, sale, and distribution of a shaving cream designated "Palmolive Rapid Shave," and various other products, to distributors and to retailers for resale to the public.

4. In the course and conduct of its business, respondent Colgate-Palmolive Company now causes, and for some time last past has caused, its "Palmolive Rapid Shave" when sold, to be shipped from its factories or plants in the various states of the United States to purchasers located in various other states of the United States and in the District of Columbia, and maintains, and at all times relevant has maintained a substantial course of trade in "Palmolive Rapid Shave," in commerce, as "commerce" is defined in the Federal Trade Commission Act.

5. In the course and conduct of its business, at all times relevant, respondent Colgate-Palmolive Company has been in substantial competition in commerce with corporations, firms, and individuals in the sale of shaving cream.

6. Respondent Ted Bates & Company, Inc., is now, and for some time last past has been, an advertising agency of respondent Colgate-Palmolive Company, and now prepares and places, for some time last past has prepared and placed, for publication, advertising material, including television commercials but not limited to those described below, to promote the sale of "Palmolive Rapid Shave" and other products.

7. On behalf of respondent Colgate-Palmolive Company, respondent Ted Bates & Company, Inc., originated, prepared, and placed, for showing over national network television, television commercials dealing with "Palmolive Rapid Shave," which commercials were shown over a nationwide television network during the latter part of 1959 and also over a number of local television stations throughout the United States, in connection with the advertising, offering for sale, sale, and distribution of "Palmolive Rapid Shave" in commerce.

8. Respondents, by means of these television commercials, have represented directly or by implication, that the "moisturizing" action of "Palmolive Rapid Shave" is such that by application of that product to the surface of very coarse, dry sandpaper it is possible

immediately thereafter to shave off the rough surface of the sandpaper with a single stroke, and that this demonstration proves the "moisturizing" properties of "Palmolive Rapid Shave."

9. What was represented to be sandpaper in these television commercials was in reality a "mock-up" composed of plexiglass to which sand had been applied, especially made for use in the demonstrations depicted in these commercials, and was not in fact sandpaper.

10. The visual appearance of the purported sandpaper, which was actually a "mock-up," as well as the accompanying commentary, in these "Palmolive Rapid Shave" commercials create the impression that the viewer is observing the shaving of a very coarsely textured sandpaper, most closely resembling the type of sandpaper commonly denominated "extra coarse."

11. These commercials clearly convey the impression that very coarse pieces of sandpaper are actually being shaved with a single stroke, during the demonstrations depicted, immediately after application of "Palmolive Rapid Shave" to their dry surfaces.

12. Sandpaper of the variety apparently depicted in these commercials cannot successfully be shaved immediately after application of "Palmolive Rapid Shave" to its surface, even with a number of strokes under heavy pressure; sandpaper of the variety apparently depicted in these commercials cannot successfully be shaved within one to three minutes after application of "Palmolive Rapid Shave," even with a number of strokes under heavy pressure; no piece of sandpaper of the variety apparently depicted in these commercials that appears in the record has been shaved genuinely clean, as the television "mock-up" was, regardless of the interval allowed after application of "Palmolive Rapid Shave;" one reason why real sandpaper was not used in the "Palmolive Rapid Shave" commercials was that it required too long a soaking period before effective shaving was possible.

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents.

2. The television commercials described above are false, misleading, and deceptive, within the meaning of the Federal Trade Commission Act, in that they represent that the "moisturizing" properties of "Palmolive Rapid Shave" are such that it is possible immediately after application of "Palmolive Rapid Shave" to very coarse, dry sandpaper to shave off the rough surface of that sandpaper with a single stroke, when this is not in fact possible, and that sandpaper of the variety depicted is actually being shaved in the manner depicted in the televised demonstrations, when in reality the thing being shaved

is a "mock-up" composed of plexiglass to which sand has been applied, especially made for use in the demonstrations depicted in these commercials.

3. The use by respondents of the aforesaid false, misleading, and deceptive representations has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that those representations were and are true, and into the purchase of substantial quantities of "Palmolive Rapid Shave" by reason of such erroneous and mistaken belief. As a consequence, substantial trade in commerce has been, and may be, unfairly diverted to respondent Colgate-Palmolive Company from its competitors, and substantial injury has thereby been done, and may be done, to competition in commerce.

4. The aforesaid acts and practices of the respondents have been, and may be, to the prejudice and injury of the public and of respondent Colgate-Palmolive's competitors, and constituted, and continue to constitute, unfair and deceptive acts and practices and unfair methods of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act.

5. In the discharge of the Commission's obligation to preserve competition and protect the public against false, deceptive, or unfair advertising practices of the type here found to be unlawful, it is necessary to prohibit respondents, in advertising not only "Palmolive Rapid Shave" but any other product, from further use of representations, by pictures, depictions, or demonstrations, either alone or accompanied by oral or written statements, that do not genuinely represent what they purport to represent and do not prove what they purport to prove above the quality or merits of a product.

In accordance with is findings of fact, opinion, and conclusions of law, the Commission hereby promulgates the following:

FINAL ORDER

It is ordered, That respondents Colgate-Palmolive Company, a corporation, and its officers, and Ted Bates & Company, Inc., a corporation, and its officers, and the agents, representatives, and employees of respondents, directly or through any corporate or other device, in the advertising, offering for sale, sale, or distribution of shaving cream or any other product, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Representing, directly or by implication, in describing, explaining, or purporting to prove the quality or merits of any product, that pictures, depictions, or demonstrations, either alone or accompanied by oral or written statements, are genuine or accurate representations,

depictions, or demonstrations of, or prove the quality or merits of, any product, when such pictures, depictions, or demonstrations are not in fact genuine or accurate representations, depictions, or demonstrations of, or do not prove the quality or merits of, any such product.

And further, in the advertising, offering for sale, sale, or distribution of "Palmolive Rapid Shave," or any other shaving cream, in commerce, as "commerce" is defined in the Federal Trade Commission Act, from:

Misrepresenting, in any manner, directly or by implication, the quality or merits of any such product.

It is further ordered, That respondents, Colgate-Palmolive Company and Ted Bates & Company, Inc., shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist.

INTERLOCUTORY ORDERS, ETC.

UNION CARBIDE CORPORATION

Docket 6826. Order, July 3, 1961

Order denying respondent's motion to file brief in reply to answering brief of complaint counsel.

Counsel for respondent by oral motion to the Commission on June 28, 1961, having requested leave to file a brief in reply to the answering brief of counsel supporting the complaint; and

The Commission having duly considered said request:

It is ordered, That the motion of respondent for leave to file a reply brief be, and it hereby is, denied.

Commissioner Elman dissents from the decision of the Commission and is of the opinion that respondent should be granted leave to file a reply brief with leave to counsel supporting the complaint to file an answer thereto.

SIDNEY J. KREISS, INC., ET AL.

Docket 7264. Order and Opinion, July 10, 1961

Order, with opinion, denying motion for modification of desist order of May 19, 1960, 56 F.T.C. 1421, to permit use of trade names of fashion designers in connection with sale of hosiery.

OPINION OF THE COMMISSION

In a petition filed March 22, 1961, respondents in this proceeding request that the Commission add a provision to its order to cease and desist permitting respondents under circumstances designated in such motion to use the trademarks or trade names of certain fashion designers in connection with their sale of hosiery or, in the alternative, that the order be set aside and that respondents be given an opportunity to be heard on this issue. Counsel supporting the complaint has filed an answer in opposition thereto.

As grounds for their motion, respondents contend, in substance, (1) that there was no express finding nor is there any evidence to support a finding that the use of said trademarks or trade names, alone and without further wording, constitutes a representation which is in violation of the Federal Trade Commission Act, and (2) that industry practice demonstrates that the use of said trademarks or trade names

does not, by implication, represent that the hosiery bearing these trademarks was designed and created by the persons whose names constitute the trademarks.

The Commission's decision issued in this proceeding on May 19, 1960, and the order to cease and desist has become final by operation of Section 5(g)(1) of that Act. Such order requires respondents to cease representing directly and by implication that their hosiery has been created, designed, styled or manufactured by anyone other than the respondents or the person who actually did create, design, style or manufacture such hosiery. This order is based on evidence which shows that respondents engaged in the practices of representing that their hosiery was created, designed or styled by certain fashion designers and that such representations are false and misleading.

It is well settled that the Commission may frame its order broadly enough to prohibit an unfair practice in any form. The requirement of the order, among other things, that respondents cease using the trademarks of fashion designers in the sale of their hosiery without appropriate qualification or disclosure, is necessary to achieve that purpose.

Respondents, in the motion presently before us, do not contend that their hosiery is now designed, created or styled by the fashion designers whose trademarks they desire to use nor have they made any attempt to show that the use of said trademarks without further wording would not have a tendency and capacity to deceive. Their principal argument in this connection, that it is the practice in the hosiery industry to use the trademarks of fashion designers, provides no justification for modification of an order so as to permit respondents to engage in a sales practice shown to be unlawful. Moreover, respondents make no showing that hosiery sold by other members of the industry which bears the trademarks of fashion designers, is not in fact designed, created or styled by said designers.

Under the circumstances, we conclude that the respondents have not made the requisite showing of a change in condition of fact or of law nor have they demonstrated a probability that the public interest requires the action requested.

Respondents have made a request for oral argument, but it appears that the briefs are entirely adequate to fully advise the Commission as to the matters in issue and that no useful purpose would be served thereby.

The Commission having determined that respondents' motion provides no basis for reopening the proceeding, said motion must therefore be denied.

ORDER

This matter having been heard on respondents' motion filed on March 22, 1961, requesting modification of the order to cease and desist contained in the initial decision, as adopted by the Commission on May 19, 1960, and requesting oral argument, and upon the answer in opposition to the motion filed by counsel supporting the complaint; and

The Commission having concluded, for the reasons stated in its accompanying opinion, that respondents' motion does not constitute a sufficient showing as contemplated under Section 5 of the Federal Trade Commission Act that conditions of fact or law may have so changed as to justify the action requested, or that the public interest so requires:

It is ordered, That respondents' motion filed on March 22, 1961, and request for oral argument be, and they hereby are, denied.

DIAMOND CRYSTAL SALT CO.

Docket 7323. Order, July 11, 1961

Order modifying desist order of Feb. 4, 1960, 56 F.T.C. 818.

The respondent having filed a petition on June 7, 1961, which requests that the Commission approve the respondent's proposed purchase of certain package manufacturing machinery and patents attendant thereto, the land and building housing such machinery, and the existing inventory now owned by three affiliated companies known as Unit-Packet Corporation, Packet Products Corporation and Hoag-Russell Company, which concerns have been engaged in the sale of salt in small packets designed for use as individual servings; and

The Commission having issued its decision in this proceeding on February 4, 1960, containing its order to divest and to cease and desist, which order, among other things, prohibits the respondent from acquiring any time during the succeeding ten years the assets or share capital of any corporation in commerce and engaged in the business of producing and/or distributing salt; and the Commission having accordingly determined that respondent's petition should be treated as a request that the order be duly modified to exclude the above purchase from its purview; and

It appearing from the facts stated in the petition and in the answer filed by counsel supporting the complaint, which joins in the request that the petition be granted, that there is no reasonable probability that any of the anticompetitive effects proscribed by the relevant statute will result from the proposed purchase, and the Commission having further determined that the public interest now requires that this

proceeding be reopened solely for the purpose of altering and modifying the order so that it shall not prohibit the respondent from effectuating such acquisition:

It is ordered, That this proceeding be, and it hereby is, reopened and that paragraph 4 of the order to divest and to cease and desist be, and it hereby is, modified to read as follows:

(4) *It is further ordered*, That for a period of ten years from February 4, 1960, the respondent shall cease and desist from acquiring, directly or indirectly, through subsidiaries or otherwise, by merger, consolidation, or purchase, the physical assets, stock, share capital of, or any other interest in any corporation, in commerce, engaged in the business of producing and/or distributing salt in any form, specifically including salt in a dry state produced by any dry mining method, or produced by any evaporation method, and salt in brine; provided, however, that the respondent shall not be prohibited hereby from effectuating the proposed purchase of the assets referred to in the first paragraph of the Commission's order ruling on the petition filed by the respondent on June 7, 1961.

J. & H. STOLOW, INC., ET AL.

Docket 7569. Order, Aug. 8, 1961

Order on recommendation of hearing examiner, granting respondents' request to amend desist order of Dec. 19, 1959, 56 F.T.C. 674, and substituting modified order.

This proceeding having been reopened and the matter referred to a hearing examiner for the purpose of receiving evidence in support of and in opposition to the respondents' request for modification of the consent order to cease and desist contained in the hearing examiner's initial decision, filed November 5, 1959, which decision became the decision of the Commission on December 19, 1959; and

The Commission having considered the evidence received and having determined that the recommendation of the hearing examiner to grant respondents' request to amend the cease and desist order is justified and should be adopted and that respondents' alternative request to rescind the order should be denied:

It is ordered, That respondents' request for a modified order made in their motion of October 12, 1960, be, and it hereby is, granted.

It is further ordered, That respondents' alternative request that the Consent Order be rescinded made in their motion of October 12, 1960, be, and it hereby is, denied.

It is further ordered, That the hearing examiner's initial decision, filed November 5, 1959, and the Commission's decision adopting it, issued December 18, 1959, be, and they hereby are, modified by striking

the order contained in such initial decision and substituting therefor the following:

ORDER

It is ordered, That respondents, J. & H. Stolow, Inc., a corporation, and its officers, and Julius Stolow, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the sale of postage or other stamps or of adhesive labels having the appearance of postage stamps, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing that stamps and adhesive labels having the appearance of postage stamps are valid stamps, unless such stamps and labels are, or were, valid for the payment of some type of internal or external mail service, or were produced under the authority of authorized officials of a recognized or existing government.

2. In connection with the advertising and offering for sale of specific stamps or adhesive labels failing to reveal:

(a) That such stamps or labels are not valid for or were not issued for postal use, or were not issued by a government recognized by the United States, when such are the facts.

(b) Clearly and conspicuously in advertising that nothing therein is to be construed as a representation that the stamps offered are presently valid for postal use, or that they are stamps issued by a government recognized by the United States.

This order shall not apply to institutional or other advertising which does not offer for sale any specific stamp or stamps.

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

KEEN FRUIT CORPORATION

Docket 7918. Order, Aug. 10, 1961

Order reopening the record and modifying the consent agreement and initial decision by inclusion therein of the "stipulation" below set forth.

Counsel for respondent by motion filed July 25, 1961, having requested that certain material included in said motion and referred to as a "Stipulation" be made a part of the record in this proceeding, and counsel supporting the complaint having, in effect, joined in said motion by urging that it receive prompt and considerate attention; and

The Commission having heard and considered said request and hav-

ing determined that the public interest requires alteration of the record in the manner requested:

It is ordered, That this proceeding be, and it hereby is, reopened and that the record be, and it hereby is, altered and modified by the inclusion therein of the following "Stipulation" as a part of the consent agreement and initial decision.

PARAGRAPH 1. Respondent has expressed its willingness to enter into a consent agreement directed toward the entry by the Commission of a cease and desist order herein, provided: (a) that the present stipulation is incorporated in and made a part of said consent agreement; (b) that it is agreed that the intent of the parties hereto is that said cease and desist order shall be limited in its application to the specific act and practices set forth in paragraph two, below, and construed to cover only said acts and practices.

PAR. 2. The specific acts and practices complained of by the Commission in its complaint issued herein on June 3, 1960, are as follows:

First: Sales of fresh citrus fruit by respondent to direct buyers, other than brokers, and the allowance or payment of a brokerage or commission, or a discount in lieu thereof, on such sales.

Second: Sales of fresh citrus fruit by respondent to brokers and the allowance or payment of a brokerage or commission, or a discount in lieu thereof, on such sales. These practices include:

(a) Instances where such allowances or payments are separately made by check, or otherwise; or

(b) Instances where the broker deducts said brokerage, commission, or allowance from the invoice price before remitting payment therefor; or

(c) Instances where such allowances or payments are deducted from the sale price and the broker is given a net billing reflecting such brokerage or commission.

PAR. 3. Nothing herein contained shall be construed as prohibiting the industry trade practice custom and usage of respondent giving or allowing other bona fide Florida fresh citrus fruit packers and shippers inter-packing house discounts or making inter-changes of fruit with such packers and shippers. This paragraph is intended to be applicable only to those packers and shippers who are regularly engaged in the business of packing fresh citrus fruit.

PAR. 4. The present stipulation shall (a) become a part of the consent agreement herein, and shall be and remain a part thereof and (b) shall be conclusive and binding upon the parties hereto for all purposes to the same extent and effect as the consent agreement entered into herein.

It is further ordered, That 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 the order to cease and desist.

BERNARD LOWE ENTERPRISES, INC., ET AL.

Docket 7673

ATLANTIC RECORDING CORPORATION, ET AL.

Docket 7711

VEE-JAY RECORDS, INC., ET AL.

Docket 7767

AM-PAR RECORD CORP., ET AL.

Docket 7778

CARLTON RECORD CORPORATION, ET AL.

Docket 7825

Order, December 5, 1961

Order denying request by trade association for leave to intervene as *amicus curiae* in payola cases.

American Record Manufacturers and Distributors Association, by petition filed November 13, 1961, having requested leave to intervene as *amicus curiae* in the above proceedings and to file a brief and participate in oral argument in the petitions to reopen the proceedings and set aside the decisions and orders filed therein; and

The Commission having determined that in all the circumstances the request for leave to intervene as *amicus curiae* in this matter has not been justified:

It is ordered, That the petition of American Record Manufacturers and Distributors Association for leave to intervene in these proceedings as *amicus curiae* be, and it hereby is, denied.

By the Commission, Commissioner Elman dissenting.

Orders, with opinions, denying respondents' petitions to reopen and set aside desist orders of June 1, 1960, in payola cases, 56 F.T.C. 1115, 1341, 1523; 57 F.T.C. 316, 458.

Counsel for respondents by petitions filed [on dates given in footnote] . . . having requested the Commission to reopen these proceed-

ings and set aside the orders to cease and desist issued March 24, 1960, and the opportunity to orally argue said requests,* and

The Commission having duly considered said requests and the opposition thereto filed by counsel supporting the complaint, and having determined that there has been no showing made from which the Commission might conclude that changed conditions of fact or law or the public interest require reopening these matters for the purpose of setting aside the orders to cease and desist:

It is ordered, That respondents' petitions and requests for oral argument be, and they hereby are, denied.

By the Commission, Commissioner Elman dissenting.

Commissioner ELMAN, dissenting:

I find myself unable to concur in the disposition of these five "payola" cases.

In 1959 and 1960 the Commission issued over 100 "payola" complaints, the great majority of which—including these five—were disposed of by entry of consent orders. A small number, however, were contested. On September 13, 1960, Congress enacted Public Law 86–752 (74 Stat. 895, 47 U.S.C. 317) which amended the Communications Act of 1934 so as make failure to disclose the facts of such "payola" transactions a criminal offense. Since that amendment constituted an effective and sufficient deterrent against future violations, the Commission concluded that further prosecution of "payola" cases was unnecessary and not in the public interest. Accordingly, it dismissed the contested "payola" complaints that were still pending.

By their requests here the respondents are merely asking to be put on the same basis as their competitors, with respect to whom the Commission dismissed charges, without resolving their merits, solely because of the intervening enactment of Public Law 86–752. These respondents, also, have never been found to have violated the law as alleged in the complaints. The consent orders to which they agreed contain the standard recitals that they are "for settlement purposes only and do not constitute admissions that the law has been violated." These respondents have filed compliance reports and, so far as appears, are obeying the law. If, as to their competitors, the statute is a sufficient restraint against resumption of "payola" practices, as the Commission has already decided, it is also a sufficient restraint as to these respondents. Refusal to vacate the consent orders against the respondents penalizes them, in effect, for having cooperated with the

*Petitions were filed by the various respondents on the following dates: Bernard Lowe Enterprises, Inc., et al., D. 7673, on Oct. 31; Atlantic Recording Corp., et al., D. 7711, and Vee-Jay Records, Inc., et al., D. 7767, on Nov. 2, and Am-Par Record Corp., et al., D. 7778, on Sept. 27. Carlton Record Corp., et al., D. 7825, filed a letter on Sept. 27 which was treated as a motion.

Requests for oral argument were made by the first three respondents.

Commission. The denial of relief here brings about a disparate and inequitable treatment of competitors which, in my opinion, is neither required by law nor justifiable in the public interest.

THE QUAKER OATS COMPANY

Docket 8112 Order, December 11, 1961

Interlocutory order directing issuance of supplemental complaint

This matter having been heard upon an interlocutory appeal filed by counsel supporting the complaint, alleging error by the hearing examiner in refusing to certify to the Commission a request that the complaint be amended by the addition of an allegation that the respondent has violated Section 5 of the Federal Trade Commission Act, and upon the respondent's answer in opposition thereto; and

It appearing that the complaint now charges the respondent with having violated Section 2(a) of the amended Clayton Act and that the proposed amendment is thus not within the scope of the proceeding initiated by the original complaint; and

It further appearing that in the circumstances the request for amendment presented a matter wholly outside the authority of the hearing examiner to consider but peculiarly within the administrative discretion of the Commission to determine, and that the hearing examiner's refusal to certify it to the Commission for such determination was clearly erroneous; and

The Commission having treated the matter as though it had been properly certified and having found upon its consideration of all information available to it that it has "reason to believe" that the respondent has violated Section 5 of the Federal Trade Commission Act by selling oat flour at below cost or unreasonably low prices, and having determined that the issuance of an amended and supplemental complaint incorporating an appropriate charge in this respect is required in the public interest; and having given due consideration to the form of such complaint:

It is ordered, That the appeal of counsel supporting the complaint from the hearing examiner's ruling be, and it hereby is, granted.

It is further ordered, That the amended and supplemental complaint of the Commission issue herewith and be served upon the respondent, The Quaker Oats Company.

It is further ordered, That the evidence heretofore introduced in support of and in opposition to the original complaint shall have the same force and effect as though received at hearings under the complaint, as amended and supplemented, this action being without prejudice to the hearing examiner's authority and duty to rule upon the merits of any motion which may be filed requesting opportunity to further cross-examine witnesses heretofore appearing in the pro-

ceeding or to take such further action as may be appropriate to protect any of the respondent's rights.

By the Commission, Commissioner Elman dissenting to the promulgation of the order in its present form.

AMERICAN CYANAMID COMPANY ET AL.

Docket 7211. Order, Dec. 20, 1961

Interlocutory order denying motions to disqualify Commissioner from participating in appeal from initial decision.

All of the respondents in this proceeding have individually presented motions requesting the Commission to disqualify Commissioner Dixon from participating in the appeal from the Initial Decision of the hearing examiner. These motions, filed under Section 7(a) of the Administrative Procedure Act, 5 U.S.C. § 1006(a), are based on an alleged prejudgment of the issues of fact and law to be presented in the appeal.

Section 7(a) of the Administrative Procedure Act clearly empowers the Commission to determine whether a presiding officer conducting a "hearing" on behalf of the Commission is subject to "personal bias or disqualification." It is less clear that it was meant to apply to participation of individual agency members in final or appellate determinations. The inquiry called for by a motion for disqualification is necessarily subjective in nature. It is extremely difficult and delicate for a tribunal to assume the responsibility of weighing, objectively, the ability of one of its own members to make an objective judgment in a case. Further, the existence of such a power to disqualify carries with it an inherent danger of abuse, as a potential instrument for suppression of dissent.

Under the Commission's practice, disqualification is treated as a matter primarily for determination by the individual member concerned, resting within the exercise of his sound and responsible discretion. The Commission believes this practice to be proper and consistent with the law. In the instant proceeding, no basis for departing from the normal practice has been shown.

It is ordered, therefore, that respondents' motions be, and they hereby are, denied.

By the Commission, Commissioner Dixon not participating.

STIPULATIONS

DIGEST OF STIPULATIONS EFFECTED AND HANDLED THROUGH THE COMMISSION'S DIVISION OF STIPULATIONS

9452. **Books—Collection Forms Simulating Legal Process.**—The Publishers Agency, Inc., a Pennsylvania corporation with principal place of business in Philadelphia, Pa., agreed that in connection with the collection of accounts in commerce, it will forthwith cease and desist from:

(1) Using forms or other materials entitled "Notice of Draft for Judgment" or "Notice of Draft for Suit" or which otherwise simulate legal process; or representing in any other manner the legal proceedings have been instituted when such is not the fact.

(2) Representing, directly or by implication, that forms or other material emanate from any source other than the aforesaid corporation when such is not the fact. (6123683, July 6, 1961.)

9453. **"Filter-Matic" Water Conditioning Device—Unique Nature, Effectiveness and Guarantees.**—Techno Engineering and Mfg. Co., and Imperial Water Softener Mfg. Co., Illinois corporations with offices at Cicero, Ill., Sverre Moeller an officer of both and John P. O'Brien officer of Imperial agreed that in connection with the offer for sale, sale and distribution in commerce of the device now designated the "Filter-Matic" or any other product of substantially the same construction, they, and each of them, will forthwith cease and desist from representing, directly or by implication:

(1) Through use of the words "purifier," "purification" or any other words or phrases of similar import to describe the effect of treatment by such device or in any other manner that such device has any effect in the removal or destruction of bacteria in water;

(2) That the device operates as an electric catalyst or otherwise representing that the device operates in any manner not in accordance with the facts; or

(3) That the device is guaranteed unless the nature and extent of the guarantee and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed. (5923711, July 13, 1961.)

9459. **Clocks—"Jeweled" Guarantees, "Chrome", Value.**—M. Low, Inc., a New York corporation with its principal place of business located

in New York, N.Y., and Jack Low and Charles L. Low, its officers, agreed that in connection with the offer and sale of clocks, or any other products, in commerce, they, and each of them, will forthwith cease and desist from:

(1) Representing, directly or by implication, that clocks or other timing devices are jeweled or contain jeweled movements, unless said devices contain at least seven jewels each of which serves a mechanical purpose as a frictional bearing;

(2) Representing, directly or by implication, that any product is guaranteed unless the nature and extent of the guarantee and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed;

(3) Using the term "chrome" or "brass" to designate chromium-plated or brass-plated articles unless the term is qualified to show that the articles are plated;

(4) Representing, directly or by implication, that an article compares in value to merchandise selling at higher prices when the article used for comparison is not of like grade and quality in all material respects. (6023158, July 13, 1961.)

9455. **Automatic Poultry Equipment—Dealer Being Manufacturer; Size of Business.**—Automatic Poultry Feeder, a Michigan corporation with place of business at Zeeland, Mich., and Jack H. De Witt, Richard A. De Witt and Robert Formsma, its officers, agreed that, in connection with the offer and sale of automatic poultry equipment or any other product in commerce they, and each of them, will forthwith cease and desist from representing directly or by implication:

(1) Through use of the word "manufacturers" or any other word of similar import, or in any other manner that said corporation is the manufacturer of any products sold by it unless and until it actually owns and operates or directly and absolutely controls the manufacturing plant wherein said products are manufactured;

(2) That said corporation is the largest manufacturer of automatic poultry equipment in the world, or otherwise representing the corporation's size of volume of business in any manner not in accordance with the facts. (6023809, July 13, 1961.)

9456. **Men's Suits—"Direct From Factory", "Hand Tailored".**—Cranes-Mayos Clothes, Inc., a Delaware corporation with place of business in New York City, and Jules Cohen, its officer, agreed that in connection with the offer and sale in commerce of men's suits or other products, they, and each of them, will forthwith cease and desist from:

(1) Representing, through use of the words "Direct from Factory to You" or in any other manner, that they or either of them, manufacture the merchandise sold by them, provided however, that nothing herein contained shall prohibit a representation that the men's suits

and other products sold by them are cut to their own specifications on their own premises, when such is the fact.

(2) Representing that suits sold by them are hand tailored, or otherwise representing the work performed thereon in any manner not in accordance with the facts. (6023978, July 13, 1961.)

9457. **Lubricating Oil—Nondisclosure of Prior Use and Standards Conformance.**—Royal Manufacturing Co., an Oklahoma corporation trading as Tulsa Refined Oil Co., with principal place of business in Tulsa, Okla., and W. Richard Mallory, Sr., W. Richard Mallory, Jr., Leland W. Mallory and Sallie F. Mallory, its officers, agreed that in connection with the offer and sale of previously used lubricating oils in commerce, they, and each of them, will forthwith cease and desist, directly or through any corporate or other device, from:

(1) Representing, directly or by implication, that such lubricating oil is processed from other than previously used oil;

(2) Advertising, offering for sale or selling any lubrciating oil which is composed in whole or in part of oil which has been previously used, without disclosing such prior use in advertising, in sales promotional material, and by a clear and conspicuous statement to that effect on the container;

(3) Representing, directly or by implication, through use of numerical designations or in any other manner that lubricating oil is of a certain weight or that it corresponds in viscosity to the standards of the Society of Automotive Engineers, when such is not the fact. (6123054, July 13, 1961.)

9458. **Gas and Electric Water Heaters—Guarantees.**—D. W. Whitehead Manufacturing Corp., and L. O. Koven & Brother, Inc., New Jersey corporations with place of business in Dover, N.J., and Donald W. Whitehead, an officer of D. W. Whitehead Manufacturing Corp., and Theodore G. Koven and Gustav H. Koven, officers of both corporations, agreed that in connection with the offer and sale of water heaters or other products in commerce, they, and each of them, will forthwith cease and desist from representing, directly or by implication, that a product is guaranteed unless the nature and extent of the guarantee and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed.

9459. **Triumph Automobiles—Gasoline Economy.**—Standard-Triumph Motor Co., Inc., a Delaware corporation with place of business in New York, N.Y., agreed that, in connection with the offer or sale of Triumph automobiles in commerce, it will forthwith cease and desist from representing that:

The Triumph Herald will deliver up to 40 miles per gallon while being driven at speeds of 70 or 80 miles per hour, or representing the gasoline mileage of any Triumph automobile in a manner not in accordance with the facts. (6123375, July 13, 1961.)

9460. **Bicycles With Imported Parts—"Made in America" and Deceptive Guarantees.**—Standard Cycle Company, Inc., an Illinois corporation with place of business at Chicago, Ill., and Max Lipski and Arthur Z. Lipski, its officers, agreed that, in connection with the offer and sale of bicycles or any other product in commerce, they, and each of them, will forthwith cease and desist from:

(1) Representing, directly or by implication, that a bicycle or any other product containing a substantial part or parts of foreign origin is "Made in America," "American Made" or is made or manufactured in the United States, unless the product is in fact made in the United States and the country of origin of each imported part is clearly and conspicuously disclosed; or

(2) Representing that a bicycle or any other product is guaranteed unless the nature and extent of the guarantee and the manner in which the guarantor will perform thereunder are clearly disclosed. (61233-80, July 13, 1961.)

9461. **Medicinal Preparation—Arthritis Treatment.**—Naturade Products Co., a California corporation with place of business at Long Beach, Calif., and Nathan Schulman, Allan Schulman and Samuel Becker, its officers, agreed that they, and each of them, will forthwith cease and desist from disseminating, or causing to be disseminated, any advertisement for the product now designated "ALPHA-C-PLUC" or any other product of substantially the same composition or possessing substantially the same properties, which represents directly or by implication that:

(1) The product is of any value in the relief or treatment of arthritis or rheumatism unless limited to the temporary relief of the minor aches or pains thereof; or

(2) The product will afford relief of the severe or agonizing pains of arthritis or rheumatism or of any other arthritic or rheumatic condition or have any therapeutic effect upon any of the symptoms or manifestations of any such condition in excess of affording temporary relief of minor aches or pains. (6023986, July 18, 1961.)

9462. **Phonograph Needles—Nondisclosure of Synthetic Nature, Deceptive Guarantees.**—Pfanstiehl Chemical Corp., an Illinois corporation with place of business at Waukegan, Ill., agreed that in connection with the offer and sale of phonograph needles or any other product in commerce, it will forthwith cease and desist from:

(1) Using the word "sapphire" or the name of any other precious stone or the word "jewel" to describe or designate phonograph needle tips or points made of synthetic sapphire or other synthetic precious stones unless such word or name is immediately preceded with equal conspicuousness by the word "synthetic"; or otherwise representing the composition of phonograph needle tips or points in any manner not in accordance with the facts; or

(2) Representing that any product is guaranteed unless the nature and extent of the guarantee and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed. (6024121, July 18, 1961.)

9463. **Phonograph Needles—Nondisclosure of Synthetic Nature.**—Electro-Voice, Inc., an Indiana corporation with place of business at Buchanan, Mich., agreed that in connection with the offer and sale of phonograph needles in commerce, it will forthwith cease and desist from:

Using the word "sapphire" or the name of any other precious stone or the word "jewel" to describe or designate phonograph needle tips or points made of synthetic sapphire or other synthetic precious stones unless such word or name is immediately preceded with equal conspicuousness by the word "synthetic"; or otherwise representing the composition of phonograph needle tips or points in any manner not in accordance with the facts. (6024122, July 18, 1961.)

9464. **Lubricating Oil—Nondisclosure of Prior Use.**—Evans G. Graham, an individual trading as Graham-Penn Oil Co., with place of business in Houston, Tex., agreed that in connection with the offer and sale of previously used lubricating oil in commerce, he will forthwith cease and desist from:

(1) Representing, directly or by implication, that such lubricating oil is processed from other than previously used oil;

(2) Advertising, offering for sale or selling any lubricating oil which is composed in whole or in part of oil which has been previously used, without disclosing such prior use in advertising, in sales promotional material, and by a clear and conspicuous statement to that effect on the container. (6123053, July 18, 1961.)

9465. **"Photo Murals", Reproductions—Nondisclosure.**—Montgomery Ward & Co., Inc., an Illinois corporation with place of business at Chicago, Ill., agreed that in connection with the offer or sale of mechanical reproductions of photographs in commerce, it will forthwith cease and desist from representing directly or by implication:

Through use of the words "photo mural" or any other words or phrases of similar import to describe or designate mechanical reproductions of photographs, or in any other manner, that such products are other than mechanical reproductions of photographs. (6123668, July 18, 1961.)

9466. **Rebuilt Automotive Clutches—Nondisclosure of Prior Use.**—B & E Clutch Co., a Michigan corporation with place of business in Detroit, Mich., and William Wright, Esther Wright and Hyrum Chambers, its officers, agreed that in connection with the offer and sale of rebuilt automotive parts in commerce they, and each of them, will forthwith cease and desist from:

(1) Offering for sale, selling or delivering to others for sale or resale to the public any product containing parts which have been previously used without a clear and conspicuous disclosure of such prior use made on the product with sufficient permanency to remain thereon after installation, as well as in advertising and on the container in which the product is packed;

(2) Representing that any product is guaranteed unless the nature and extent of the guarantee and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed. (6123513, July 27, 1961.)

9467. **Commodity Futures Management Services—Exaggerated Profits.**—Titan Futures Management, Inc., a New York corporation with place of business located in Hicksville, Long Island, N.Y., and Leonard S. Kolins, Aline Marceau, Morton Greenspan, F. J. Fredericks and Stanley A. Spano, its officers, and Frank Musumeci, a Commodity Investment Consultant, agreed that in connection with the advertising, offer and sale in commerce of management services incident to the purchase or sale of commodity futures, they and each of them, will forthwith cease and desist from:

(1) Representing that customers realized profits or earnings of a specified percentage or amount unless it is clearly and conspicuously disclosed in immediate conjunction therewith, if such is a fact, that such profits or earnings are exceptional and are not realized or to be expected by customers generally; or otherwise representing profits or earnings in any manner not in accordance with the facts;

(2) Representing that customers realized profits or earnings of a specified percentage or amount unless such profits or earnings were achieved in recent regular course of business, or unless the time period during which the profits or earnings were achieved is clearly and conspicuously disclosed in immediate conjunction therewith. (6123560, July 25, 1961.)

9468. **Travel Service—Connection With Sorbonne, etc.**—Michael A. Otero, an individual trading as "The Sorbonne American Institute," "The Richelieu Institute" and "The Institutes," with place of business in Los Angeles, Calif., agreed that, in connection with the offer or sale in commerce of services in connection with arranging foreign travel, he will forthwith cease and desist from representing, directly or by implication:

(1) Through use of the name "Sorbonne American Institute" or in any other manner that he is connected with the University of Paris or otherwise representing that he has any connection with any educational institution when such is not the fact; or

(2) Through use of the word "institute" or any other word or phrase of similar import as part of a trade name or otherwise that the business conducted is that of an organization devoted to the promo-

tion of learning or representing in any manner that it is other than a private enterprise conducted for profit (6123821, July 25, 1961.)

9470. **"New Illustrated Encyclopedia of Gardening"—Private Business as "Society," Prices as Reduced.**—The National Garden Society, a New York corporation with its offices in New York City, and Milo J. Sutliff its officer, agreed that in connection with the offer and sale of books or any other merchandise in commerce, they, and each of them, will forthwith cease and desist, directly or through any corporate or other device, from:

(1) Using the word "Society" or any other word or words of similar import as part of their trade or corporate name, or otherwise representing the nature of their business in any manner not in accordance with the facts;

(2) Representing that a stated price is a reduction or constitutes a saving from the usual price of the product when such is not the fact, or otherwise representing prices or savings in any manner not in accordance with the facts. (6123376, Aug. 3, 1961.)

9471. **Lubricating Oil—Nondisclosure of Prior Use.**—Ralph E. Moore, Sr., and Ralph E. Moore, Jr., copartners trading as R. E. Moore Company, with place of business in Tyler, Tex., agreed that in connection with the offer and sale of previously used lubricating oil in commerce, they, and each of them, will forthwith cease and desist from:

(1) Representing, directly or by implication, that such lubricating oil is processed from other than previously used oil;

(2) Advertising, offering for sale or selling any lubricating oil which is composed in whole or in part of oil which has been previously used, without disclosing such prior use in advertising, in sales promotional material, and by a clear and conspicuous statement to that effect on the container. (6123808, Aug. 3, 1961.)

9472. **Machines for Inspecting and Cleaning Motion Picture Film—Operation and Manufacture.**—Paulmar, Inc., an Illinois corporation with place of business in Chicago, Ill., agreed that in connection with the offer and sale in commerce of machines for inspecting and cleaning motion picture film, it will forthwith cease and desist from representing that:

(1) Such machines detect flaws purely by electrical or electro-magnetic action;

(2) Such machines are pre-set and never require adjustment during operation;

(3) With the use of said machines, all possibility of damage to film is eliminated;

(4) All of the components are of the plug-in type;

(5) All of the controls are flush-mounted. (6123771, Aug. 28, 1961.)

9473. Lubricating Oil—Nondisclosure of Prior Use.—Jackson Oil Products Co., a Mississippi corporation with place of business in Rankin County, Miss., and W. N. Robertson, R. D. Minks and Elizabeth Robertson, its officers, and Herbert K. Robertson, its General Manager, agreed that in connection with the offer and sale of previously used lubricating oil in commerce, they, and each of them, will forthwith cease and desist from:

(1) Representing, directly or by implication, that such lubricating oil is processed from other than previously used oil;

(2) Advertising, offering for sale or selling any lubricating oil which is composed in whole or in part of oil which has been previously used, without disclosing such prior use in advertising, in sales promotional material, and by clear and conspicuous statement to that effect on the container. (6123443, Aug. 23, 1961.)

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