IN THE MATTER OF

MS & B INC., DOING BUSINESS AS GREAT PLAINS CHINCHILLA CO. ET AL.

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

Docket C-1422. Complaint, Sept. 6, 1968—Decision, Sept. 6, 1968

Consent order requiring a Wichita, Kansas, seller of chinchilla breeding stock to cease making exaggerated earning claims, misrepresenting the quality of its stock, deceptively guaranteeing the fertility of its stock, and misrepresenting its service to purchasers.

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 MS & B Inc., a corporation, doing business as Great Plains Chinchilla Co., and James L. Stockett, Kenneth L. Mason and Robert L. Berry, individually and as officers of said corporation, sometimes hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent MS & B Inc., doing business as Great Plains Chinchilla Co., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Kansas, with its principal office and place of business located at 2914 Ida, Wichita, Kansas 67216.

Respondents James L. Stockett, Kenneth L. Mason and Robert L. Berry are individuals and officers of MS & B Inc. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. The address of respondent James L. Stockett is the same as that of the corporate respondent. The address of respondent Kenneth L. Mason is 8027 Morningside, Wichita, Kansas. The address of respondent Robert L. Berry is 9413 Shade, Wichita, Kansas.

PAR. 2. Respondents are now, and for some time last past, have been engaged in the advertising, offering for sale, sale and distribution of chinchilla breeding stock to the public.

PAR. 3. In the course and conduct of their aforesaid business, respondents now cause, and for some time last past have caused,

their said chinchillas, when sold, to be shipped from their place of business in the State of Kansas to purchasers thereof located in various other States of the United States, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said chinchillas in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, as aforesaid, and for the purpose of inducing the sale of their chinchillas, respondents have made numerous statements and representations by means of television broadcasts, direct mail advertising and through the oral statements and display of promotional material to prospective purchasers by salesmen, with respect to the breeding, raising and rate of reproduction of chinchillas, the expected rate of return from their pelts, earnings, quality of pelts and warranty.

Typical and illustrative, but not all inclusive, of the said statements and representations made in respondents' advertising and promotional material are the following:

We provide the following services:

1. Guarantee Chinchillas to live.
2. Guarantee Chinchillas to litter***.

Q. How many babies in a litter?

A. There may be anywhere from 1 to 6. The national average is just slightly under 2 babies per litter.

This is our problem, we've got markets and haven't got enough animals in production to satisfy the market***. We have a problem today, I guess we can be envied for, because we have a demand for more pelts than we have pelts available for market.

We have over 25 years experience in this business***.

Our pelt markets have been rather steady. The last five years we've practically no fluctuation whatever and this year $28.60 was our Empress average ***.

We have ranch inspectors***that actually go into the operations and work with the ranchers. In other words, we are able to teach a rancher today in a short period of time what it has taken the old timers years to learn of this business. So with all the guarantees and the assistance***it is not a question of making money, it's a question of how well you will do.

All of our chinchillas are pedigreed.

PAR. 5. By and through the use of the aforesaid statements and representations in advertising and promotional material and others of similar import and meaning, but not expressly set out

herein, separately and in connection with oral statements and representations made by their salesmen, respondents represent, and have represented, directly or by implication, that:

1. It is commercially feasible to breed and raise chinchillas in homes, basements, garages or spare buildings and large profits can be made in this manner.

2. The breeding of chinchillas for profit requires no previous experience.

3. Chinchillas are hardy animals, and are not susceptible to diseases.

4. Purchasers of respondents' breeding stock receive high or pedigreed quality chinchillas.

5. Each female chinchilla purchased from respondents and each female offspring will produce at least four live offspring per year.

6. Each female chinchilla purchased from respondents and each female offspring will produce several successive litters of from one to six live offspring at 111-day intervals.

7. Pelts from the offspring of respondents' breeding stock sell for an average price of $28.60 per pelt.

8. Chinchilla breeding stock purchased from respondents is unconditionally warranted to live and reproduce.

9. Respondents will promptly fulfill all of their obligations and requirements set forth in or represented, directly or by implication, to be contained in the guarantee or warranty applicable to each and every chinchilla.

10. Respondents, doing business as Great Plains Chinchilla Co., have been in the chinchilla business for more than 25 years.

11. Purchasers of respondents' breeding stock can expect a great demand for the offspring and for the pelts of the offspring of respondents' chinchillas.

12. A purchaser starting with six females and one male of respondents' chinchilla breeding stock will have an income of $300 a month from the sale of pelts at the end of the third year.

13. Respondents will purchase all female chinchilla offspring raised by purchasers of respondents' chinchilla breeding stock.

14. Purchasers of respondents' breeding stock would be given guidance in the care and breeding of chinchillas.

PAR. 6. In truth and in fact:

1. It is not commercially feasible to breed or raise chinchillas in homes, basements, garages or spare buildings and large profits cannot be made in this manner. Such quarters or buildings, unless they have adequate space and the requisite temperature, humidity,

ventilation and other necessary environmental conditions are not adaptable to or suitable for the breeding or raising of chinchillas on a commercial basis.

2. The breeding of chinchillas for profit requires specialized knowledge in the feeding, care and breeding of said animals much of which must be acquired through actual experience.

3. Chinchillas are not hardy animals and are susceptible to pneumonia, and other diseases.

4. Chinchilla breeding stock sold by respondents are not of high or pedigreed quality.

5. Each female chinchilla purchased from respondents and each female offspring will not produce at least four live offspring per year, but generally less than that number.

6. Each female chinchilla purchased from respondents and each female offspring will not produce several successive litters of from one to six live offspring at 111-day intervals, but generally less than that number.

7. Pelts from the offspring of respondents' breeding stock do not sell for an average price of $28.60 for each pelt, but substantially less than that amount.

8. Chinchilla breeding stock purchased from respondents is not unconditionally warranted to live and reproduce but said warranty is subject to numerous terms, conditions and limitations.

9. Respondents do not in fact fulfill all of their obligations and requirements set forth in or represented, directly or by implication, to be contained in the guarantee or warranty applicable to each and every chinchilla.

10. Respondents doing business as Great Plains Chinchilla have not been in the chinchilla business for more than 25 years. The corporate respondent has been in the chinchilla business for less than 2 years. The individual respondents have been in the chinchilla business for less than six years.

11. Purchasers of respondents' breeding stock cannot expect a great demand for the offspring or the pelts of the offspring of respondents' chinchillas.

12. A purchaser starting with six females and one male of respondents' chinchilla breeding stock will not have an income of $300 a month from the sale of pelts at the end of the third year but substantially less than that amount.

13. Respondents seldom, if ever, purchase all, if any, of the chinchilla offspring raised by purchasers of respondents' chinchilla breeding stock.

14. Purchasers of respondents' breeding stock are given little

if any guidance in the care and breeding of chinchillas.

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

PAR. 7. In the course and conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms, and individuals in the sale of chinchilla breeding stock.

PAR. 8. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the tendency and capacity to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' chinchillas by reason of said erroneous and mistaken belief.

PAR. 9. The aforesaid acts and practices of the respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods in competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon

accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in § 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent MS & B Inc., doing business as Great Plains Chinchilla Co., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Kansas, with its office and principal place of business located at 2914 Ida, Wichita, Kansas 67216.

Respondents James L. Stockett, Kenneth L. Mason and Robert L. Berry are officers of said corporation. Respondent James L. Stockett's business address is the same as the corporate respondent. Respondent Kenneth L. Mason's residence address is 8027 Morningside, Wichita, Kansas. Respondent Robert L. Berry's residence address is 9413 Shade, Wichita, Kansas.

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

ORDER

It is ordered, That respondents MS & B Inc., a corporation, and its officers, doing business as Great Plains Chinchilla Co., or under any other trade name or names and James L. Stockett, Kenneth L. Mason and Robert L. Berry, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of chinchilla breeding stock or any other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing, directly or by implication, that:

1. It is commercially feasible to breed or raise chinchillas in homes, basements, garages, or spare buildings, or other quarters or buildings or that large profits can be made in this manner: *Provided, however,* That it shall be a defense in any enforcement proceeding instituted hereunder for respondents to establish that the represented quarters or buildings have the requisite space, temperature, humidity, ventilation and other environmental conditions which would make them adaptable to

and suitable for the breeding and raising of chinchillas on a commercial basis and that large profits can be made in this manner.

2. Breeding chinchillas for profit can be achieved without previous knowledge or experience in the feeding, care and breeding of such animals.

3. Chinchillas are hardy animals or are not susceptible to disease.

4. Purchasers of respondents' chinchilla breeding stock will receive high or pedigreed quality chinchillas or any other grade or quality of chinchillas: *Provided, however*, That it shall be a defense in any enforcement proceeding instituted hereunder for respondents to establish that purchasers do actually receive chinchillas of the represented grade or quality.

5. Each female chinchilla purchased from respondents and each female offspring produce at least four live young per year.

6. Each female chinchilla purchased from respondents and each female offspring will produce successive litters of one to six live offspring at 111-day intervals.

7. The number of live offspring or litters and sizes thereof produced per female by respondents' chinchilla breeding stock is any number or range thereof: *Provided, however*, That it shall be a defense in any enforcement proceeding instituted hereunder for respondents to establish that the represented number or range of live offspring or litters and sizes thereof are actually and usually produced by chinchillas purchased from respondents or the offspring of said chinchillas.

8. Offspring of chinchilla breeding stock purchased from respondents will produce pelts selling for the average price of $28.60 each.

9. Purchasers of respondents' breeding stock will receive for chinchilla pelts any price or range of prices: *Provided, however*, That it shall be a defense in any enforcement proceeding instituted hereunder for respondents to establish that the represented price or range of prices per pelt are actually and usually received for pelts produced by chinchillas purchased from respondents, or by the offspring of said chinchillas.

10. Breeding stock purchased from respondents is warranted or guaranteed without clearly and conspicu-

ously disclosing the nature and extent of the guarantee, the manner in which the guarantor will perform and the identity of the guarantor.

11. Respondents' chinchillas are guaranteed unless respondents do in fact promptly fulfill all of their obligations and requirements set forth in or represented, directly or by implication, to be contained in any guarantee or warranty applicable to each and every chinchilla.

12. Respondents, doing business as Great Plains Chinchilla Co., or under any other trade or corporate name, or as individuals have been in the chinchilla business for more than 25 years; or misrepresenting, in any manner, the length of time respondents individually or through any corporate or other device have been in business.

13. Chinchillas or chinchilla pelts are in great demand; or that purchasers of respondents' breeding stock can expect to be able to sell the offspring or the pelts of the offspring of respondents' chinchillas because said chinchillas or pelts are in great demand.

14. A purchaser starting with six females and one male will have, from the sale of pelts, an income of $300 a month in the fourth year after purchase.

15. Purchasers of respondents' breeding stock will realize earnings, profits or income in any amount or range of amounts: *Provided, however,* That it shall be a defense in any enforcement proceeding instituted hereunder for respondents to establish that the represented amount or range of amounts of earnings, profits or income are actually and usually realized by purchasers of respondents' breeding stock.

16. Respondents will purchase all or any of the chinchilla offspring raised by purchasers of respondents' breeding stock: *Provided, however,* That it shall be a defense in any enforcement proceeding instituted hereunder for respondents to establish that they do, in fact, purchase, as represented, the offspring offered by said purchasers.

17. Purchasers of respondents' chinchilla breeding stock are given guidance in the care and breeding of chinchillas or are furnished advice by respondents as to the breeding of chinchillas: *Provided, however,* That it shall be a defense in any enforcement proceeding

instituted hereunder for respondents to establish that purchasers are actually given the represented guidance in the care and breeding of chinchillas and are furnished the represented advice by respondents as to the breeding of chinchillas.

B. 1. Misrepresenting, in any manner, the assistance, training, services or advice supplied by respondents to purchasers of their chinchilla breeding stock.

2. Misrepresenting, in any manner, the earnings or profits of purchasers of respondents' chinchilla breeding stock.

C. Failing to deliver a copy of this order to cease and desist to all present and future salesmen or other persons engaged in the sale of the respondents' products or services and failing to secure from each such salesman or other person a signed statement.

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

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

DISTRICT TELEVISION AND APPLIANCE COMPANY, INC., ET AL.

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

Docket C-1423. Complaint, Sept. 6, 1968—Decision, Sept. 6, 1968

Consent order requiring a Washington, D.C., furniture and appliance store to cease using bait tactics and deceptive offers of free home demonstrations in the sale of its merchandise.

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 District

Television and Appliance Company, Inc., a corporation, and James J. Melmer and Richard J. Melmer, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent District Television and Appliance Company, Inc., is a corporation organized and existing under and by virtue of the laws of the District of Columbia, with its principal office and place of business formerly located at 906 H Street, NE., Washington, D.C., and presently with its office and present address in care of James J. Melmer, 2746 Welcome Drive, Falls Church, Virginia.

Respondents James J. Melmer and Richard J. Melmer are officers of the corporate respondent. They formulated, directed and controlled the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address was the same as that of the corporate respondent. Individual respondent James J. Melmer is presently residing at 2746 Welcome Drive, Falls Church, Virginia and individual respondent Richard J. Melmer is presently located at 212 Emerald Hill Drive, Oxon Hill, Maryland.

PAR. 2. Respondents were for some time last past engaged in the advertising, offering for sale, sale and distribution of electrical appliances, television sets, radios, stoves, refrigerators, and household furniture to the public.

PAR. 3. In the course and conduct of their business as aforesaid, respondents maintained their place of business wholly within the geographical confines of the District of Columbia and for some time last past caused their said products, when sold, to be shipped from their said place of business in the District of Columbia to purchasers thereof located within the District of Columbia and in various States of the United States, and respondents maintained a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, and for the purpose of inducing the purchase of their products, respondents have made various statements and representations in classified advertisements in newspapers of general circulation, of which the following is typical and illustrative, but not all inclusive thereof:

TV COLOR–PHILCO
$259—FREE DEMO $4 WK.
DIST. TV, 906 H NE., LI 3-8500

PAR. 5. By and through the use of the aforesaid statements and representations, and others of similar import and meaning not specifically set out herein separately and in connection with the oral statements and representations of their salesmen, respondents have represented, directly or by implication that:

1. Respondents are making a *bona fide* offer to sell the advertised television sets on the terms and conditions stated.

2. Upon request, respondent will give a free home demonstration of the product advertised.

PAR. 6. In truth and in fact:

1. The offer set forth in said advertisement was not a *bona fide* offer to sell the advertised television set at the price and on the terms and conditions stated. Respondents' salesmen who called upon persons responding to the advertisements did not display the advertised color television set. Instead, respondents' salesmen showed and attempted to sell a black and white television at a higher price. By disparaging the advertised television set, and by other tactics, purchase of the advertised set was discouraged and respondents frequently sold the higher priced black and white television set.

2. In a number of instances, upon request respondents did not give free home demonstration of the product advertised.

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

PAR. 7. In the course and conduct of their aforesaid business respondents were in substantial competition, in commerce, with corporations, firms and individuals engaged in the sale of television sets and other products of the same general kind and nature as those sold by respondents.

PAR. 8. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken beliefs.

PAR. 9. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the

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

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in § 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent District Television and Appliance Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the District of Columbia, with its office and principal place of business formerly located at 906 H Street, NE., Washington, D.C., and presently with its office and present address in care of James J. Melmer, 2746 Welcome Drive, Falls Church, Virginia.

Respondents James J. Melmer and Richard J. Melmer are officers of said corporation. The address of James J. Melmer is as listed above. The address of Richard J. Melmer is 212 Emerald Hill Drive, Oxon Hill, Maryland.

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

ORDER

It is ordered, That respondents District Television and Appliance Company, Inc., a corporation, and its officers, and James J. Melmer and Richard J. Melmer, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of television sets, or other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

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

2. Discouraging the purchase of, or disparaging, any products which are advertised or offered for sale.

3. Representing, directly or by implication, that any products are offered for sale when such offer is not a bona fide offer to sell such products.

4. Representing, directly or by implication, that any product will be delivered to prospective customers for a free home demonstration, unless such products are demonstrated without charge or obligation to prospective customers in their homes in every instance where the prospective customer so requests.

5. Failing to deliver a copy of this order to cease and desist to all present and future salesmen or other persons engaged in the sale of the respondents' products, and failing to secure from each such salesman or other person a signed statement acknowledging receipt of said order.

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

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

SAM J. BELSKY, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION, THE WOOL PRODUCTS LABELING AND THE FUR PRODUCTS LABELING ACTS

Docket C–1424. Complaint, Sept. 16, 1968—Decision, Sept. 16, 1968

Consent order requiring a Springfield, Mass., manufacturer of women's coats to cease misbranding its wool products and falsely invoicing its fur products.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, the Wool Products Labeling Act of 1939 and the Fur Products Labeling Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Sam J. Belsky, Inc., a corporation, and Jerry Belsky, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Wool Products Labeling Act of 1939 and the Fur Products Labeling 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 Sam J. Belsky, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts.

Individual respondent Jerry Belsky is an officer of said corporation. He formulates, directs and controls the acts, practices and policies of the corporate respondent including those hereinafter referred to.

Respondents are engaged in the manufacturing of women's coats. Distribution is to retail stores throughout the eastern United States and the gross annual sales are approximately $1,500,000. The office and principal place of business of respondents is located at 367 Worthington Street, Springfield, Massachusetts.

PAR. 2. Respondents, now and for some time last past, have manufactured for introduction into commerce, introduced into commerce, sold, transported, distributed, delivered for shipment, shipped and offered for sale, in commerce, as "commerce" is defined in said Wool Products Labeling Act of 1939, wool products as "wool product" is defined therein.

PAR 3. Certain of said wool products were misbranded by the respondents within the intent and meaning of Section 4(a)(1) of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, in that they were falsely and deceptively stamped, tagged, labeled, or otherwise identified with respect to the character and amount of the constituent fibers contained therein.

Among such misbranded wool products, but not limited thereto, were women's coats stamped, tagged, labeled, or otherwise identified as containing "100% Wool," whereas in truth and in fact, said products contained substantially different fibers and amounts of fibers than as represented.

PAR. 4. Certain of said wool products were further misbranded by respondents in that they were not stamped, tagged, labeled, or otherwise identified as required under the provisions of Section 4(a)(2) of the Wool Products Labeling Act of 1939 and in the manner and form as prescribed by the Rules and Regulations promulgated under said Act.

Among such misbranded wool products, but not limited thereto, were women's coats with labels on or affixed thereto, which failed to disclose the percentage of the total fiber weight of the said wool product, exclusive of ornamentation not exceeding 5 per centum of said total fiber weight, of (1) wool fibers; (2) reprocessed wool; (3) reused wool; (4) each fiber other than wool, when said percentage by weight of such fiber was 5 per centum or more; and (5) the aggregate of all other fibers.

PAR. 5. Certain of said wool products were misbranded in violation of the Wool Products Labeling Act of 1939, in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder, in that information on labels attached to wool products consisting of two or more sections of different fiber composition, failed to set forth required information in such a manner as to show the fiber content of each section in all instances where such marking is necessary to avoid deception, in violation of Rule 23 of the Rules and Regulations under the Wool Products Labeling Act of 1939.

PAR. 6. The acts and practices of the respondents as set forth above were, and are, in violation of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, and constituted, and now constitute, unfair methods of competition and unfair and deceptive acts and practices, in commerce, within the intent and meaning of the Federal Trade Commission Act.

PAR. 7. Respondents are now and for some time last past have been engaged in the introduction into commerce, and in the manufacture for introduction into commerce, and in the sale, advertising, and offering for sale in commerce, and in the transportation and distribution in commerce, of fur products; and have manufactured for sale, sold, advertised, offered for sale, transported and distributed fur products which have been shipped and received in commerce, as the terms "fur" and "fur product" are defined in the Fur Products Labeling Act.

PAR. 8. Certain of said fur products were falsely and deceptively invoiced by the respondents in that they were no invoiced as required by Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated under such Act.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were fur products covered by invoices in which no disclosure of fur content was made.

PAR. 9. Certain of said fur products were falsely and deceptively invoiced in violation of the Fur Products Labeling Act in that they were not invoiced in accordance with the Rules and Regulations promulgated thereunder in the respect that required item numbers were not set forth on invoices, in violation of Rule 40 of said Rules and Regulations.

PAR. 10. The aforesaid acts and practices of the respondents, as set forth in Paragraphs Eight and Nine above, were and are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce under the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Textiles and Furs proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act, the Wool Products Labeling Act of 1939 and the Fur Products Labeling Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the

signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in § 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Sam J. Belsky, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its office and principal place of business located at 367 Worthington Street, Springfield, Massachusetts.

Respondent Jerry Belsky is an officer of said corporation and his address is the same as that of said corporation.

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

ORDER

It is ordered, That respondents Sam J. Belsky, Inc., a corporation, and its officers, and Jerry Belsky, 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 manufacture for introduction into commerce, introduction into commerce, or offering for sale, sale, transportation, distribution, delivery for shipment or shipment, in commerce, of wool products, as "commerce" and "wool product" are defined in the Wool Products Labeling Act of 1939, do forthwith cease and desist from misbranding wool products by:

1. Falsely and deceptively stamping, tagging, labeling, or otherwise identifying such products as to the character or amount of the constituent fibers contained therein.

2. Failing to securely affix to or place on, each such product a stamp, tag, label, or other means of identification showing in a clear and conspicuous manner each element of information required to be disclosed by Section 4(a)(2) of the Wool Products Labeling Act of 1939.

3. Failing to set forth required information on labels attached to wool products consisting of two or more sections of different fiber composition, in such a manner as to show the fiber content of each section in all instances where such marking is necessary to avoid deception.

It is further ordered, That respondents Sam J. Belsky, Inc., a corporation, and its officers, and Jerry Belsky, 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 introduction or manufacture for introduction, into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce, of any fur products; or in connection with the manufacture for sale, sale, advertising, offering for sale, transportation or distribution, of any fur product which is made in whole or in part of fur which has been shipped and received in commerce, as the terms "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 failing to furnish invoices to purchasers of fur products showing in words and figures plainly legible all of the information required to be disclosed in each of the subsections of Section 5(b) (1) of the Fur Products Labeling Act.

2. Failing to set forth on invoices the item number or mark assigned to fur products.

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

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

GENUINE SPORTSWEAR CORP. ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND THE WOOL PRODUCTS LABELING ACTS

Docket C-1425. Complaint, Sept. 16, 1968—Decision, Sept. 16, 1968

Consent order requiring a New York City manufacturer of outerwear sports garments to cease misbranding its wool products.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Genuine Sportswear Corp., a corporation, and Andor Gestetner, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Wool Products Labeling Act of 1939, 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 Genuine Sportswear Corp. is a corportion organized, existing and doing business under and by virtue of the laws of the State of New York.

Individual respondent Andor Gestetner is an officer of said corporation. He formulates, directs and controls the acts, practices and policies of the corporate respondent including the acts and practices hereinafter referred to.

Respondents are engaged in the manufacture and distribution of outerwear sports garments. Their office and principal place of business is located at 514 Broadway, New York, New York.

PAR. 2. Respondents, now and for some time last past, have introduced into commerce, sold, transported, distributed, delivered for shipment, shipped, and offered for sale, in commerce, as "commerce" is defined in said Wool Products Labeling Act of 1939, wool products as "wool product" is defined therein.

PAR. 3. Certain of said wool products were misbranded by the respondents within the intent and meaning of Section 4(a)(1) of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, in that they were falsely and deceptively stamped, tagged, labeled, or otherwise identified with respect to the character and amount of the constituent fibers contained therein.

Among such misbranded wool products, but not limited thereto, were boys' jackets stamped, tagged, labeled, or otherwise identified as containing "90% wool, 10% unknown fibers," whereas in truth and in fact, such jackets contained substantially different fibers and amounts of fibers than represented.

PAR. 4. Certain of said wool products were further mis-

branded by respondents in that they were not stamped, tagged, labeled, or otherwise identified as required under the provisions of Section 4(a)(2) of the Wool Products Labeling Act of 1939 and in the manner and form as prescribed by the Rules and Regulations promulgated under said Act.

Among such misbranded wool products, but not limited thereto, were boys' jackets with labels on or affixed thereto, which failed to disclose the percentage of the total fiber weight of the said wool product, exclusive of ornamentation not exceeding five per centum of said total fiber weight of (1) wool fibers; (2) reprocessed wool; (3) reused wool; (4) each fiber other than wool when said percentage by weight of such fiber was five per centum or more; and (5) the aggregate of all other fibers.

PAR. 5. The acts and practices of the respondents as set forth above were, and are, in violation of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, and constituted, and now constitute, unfair methods of competition and unfair and deceptive acts and practices in commerce, within the intent and meaning of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Textiles and Furs proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement

on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in § 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Genuine Sportswear Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 514 Broadway, New York, New York.

Respondent Andor Gestetner is an officer of said corporation and his address is the same as that of said corporation.

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

ORDER

It is ordered, That respondents Genuine Sportswear Corp., a corporation, and its officers, and Andor Gestetner, 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 manufacture for introduction into commerce, the introduction into commerce or the offering for sale, sale, transportation, distribution, delivery for shipment or shipment, in commerce, of wool products, as "commerce" and "wool product" are defined in the Wool Products Labeling Act of 1939, do forthwith cease and desist from misbranding wool products by:

1. Falsely and deceptively stamping, tagging, labeling, or otherwise identifying such products as to the character or amount of the constituent fibers contained therein.

2. Failing to securely affix to, or place on, each such product a stamp, tag, label, or other means of identification showing in a clear and conspicuous manner, each element of information required to be disclosed by Section 4(a)(2) of the Wool Products Labeling Act of 1939.

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

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

PACHTER GARMENT COMPANY, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION, THE WOOL PRODUCTS LABELING, THE FUR PRODUCTS LABELING AND THE TEXTILE FIBER PRODUCTS IDENTIFICATION ACTS

Docket C-1426. Complaint, Sept. 16, 1968—Decision, Sept. 16, 1968

Consent order requiring a Kansas City, Mo., manufacturer of ladies' coats and suits to cease misbranding its wool, fur, and textile fiber products and falsely invoicing its fur products.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, the Wool Products Labeling Act of 1939, the Fur Products Labeling Act and the Textile Fiber Products Identification Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Pachter Garment Company, Inc., a corporation, and Meyer J. Pachter, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Wool Products Labeling Act of 1939, the Fur Products Labeling Act and the Textile Fiber Products Identification Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Pachter Garment Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri. Individual respondent Meyer J. Pachter is an officer of said corporate respondent and formulates, directs and controls the acts, policies and practices of said corporate respondent, including the acts and practices hereinafter referred to. The respondents are engaged in the manufacture and distribution of ladies' coats and suits with their office and principal place of business formerly located at 412 West 8th Street, Kansas City, Missouri. Current address of said respondents is 641 West Dartmouth Road, Kansas City, Missouri.

PAR. 2. Respondents, now and for some time last past, have manufactured for introduction into commerce, introduced into commerce, sold, transported, distributed, delivered for shipment, shipped, and offered for sale, in commerce, as "commerce" is

defined in the Wool Products Labeling Act of 1939, wool products as "wool product" is defined therein.

PAR. 3. Certain of said wool products were misbranded by the respondents within the intent and meaning of Section 4(a)(1) of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, in that they were falsely and deceptively stamped, tagged, labeled, or otherwise identified with respect to the character and amount of the constituent fibers contained therein.

Among such misbranded wool products were ladies' coats labeled or tagged by respondents as containing Mohair whereas, in truth, and in fact, said products contained no Mohair.

PAR. 4. Certain of said wool products were further misbranded by respondents in that they were not stamped, tagged, labeled, or otherwise identified as required under the provisions of Section 4(a)(2) of the Wool Products Labeling Act of 1939 and in the manner and form prescribed by the Rules and Regulations promulgated under the said Act.

Among such misbranded wool products, but not limited thereto, were ladies' sample coats, without labels.

PAR. 5. Certain of said wool products were misbranded in violation of the Wool Products Labeling Act of 1939 in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder in the following respects:

1. Generic names of fibers were set forth on labels when such fibers were present in amounts of less than five per centum of the total fiber weight in violation of Rule 3(b) of the aforesaid Rules and Regulations.

2. The generic names of manufactured fibers established in Rule 7 of the Regulations promulgated under the Textile Fiber Products Identification Act were not used in naming such fibers in required information, in violation of Rule 8(b) of the aforesaid Rules and Regulations.

3. The term "Mohair" was used in lieu of the word "wool" in setting forth the required fiber content information on labels affixed to wool products when certain of the fibers so described were not entitled to such designation, in violation of Rule 19 of the aforesaid Rules and Regulations.

PAR. 6. The acts and practices of respondents as set forth above in Paragraphs Three, Four and Five, were and are in violation of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, and constituted, and now constitute unfair or deceptive acts and practices and unfair methods

of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act.

PAR. 7. Respondents are now, and for some time last past have been, engaged in the introduction into commerce, and in the manufacture for introduction into commerce, and in the sale, advertising, and offering for sale in commerce, and in the transportation and distribution in commerce, of fur products; and have manufactured for sale, sold, advertised, offered for sale, transported, and distributed fur products which have been made in whole or in part of furs which have been shipped and received in commerce, as the terms "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act.

PAR. 8. Certain of said fur products were misbranded in that they were not labeled as required under the provisions of Section 4(2) of the Fur Products Labeling Act and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

Among such misbranded fur products, but not limited thereto, were fur products with labels which failed:

1. To show the true animal name of the fur used in the fur product.

2. To disclose that the fur contained in the fur product was bleached, dyed, or otherwise artificially colored when such was not the fact.

PAR. 9. Certain of said fur products were misbranded in that labels attached thereto, set forth the name of an animal other than the name of the animal that produced the fur from which the said fur product had been manufactured, in violation of Section 4(3) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder.

PAR. 10. Certain of said fur products were misbranded in violation of the Fur products Labeling Act in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder in that the term "natural" was not used on labels to describe fur products which were not pointed, bleached, dyed, tip-dyed, or otherwise artificially colored, in violation of Rule 19(g) of said Rules and Regulations.

PAR. 11. Certain of said fur products were falsely and deceptively invoiced by the respondents in that they were not invoiced as required by Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated under such Act.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were fur products covered by invoices which

failed:

1. To show the true animal name of the fur used in the fur product.

2. To disclose that the fur contained in the fur product was bleached, dyed, or otherwise artificially colored, when such was the fact.

PAR. 12. Certain of said fur products were falsely and deceptively invoiced in violation of the Fur Products Labeling Act in that they were not invoiced in accordance with the Rules and Regulations promulgated thereunder in the following respects:

1. The term "natural" was not used on invoices to describe fur products which were not pointed, bleached, dyed, tip-dyed, or otherwise artificially colored, in violation of Rule 19(g) of said Rules and Regulations.

2. Required item numbers were not set forth on invoices, in violation of Rule 40 of said Rules and Regulations.

PAR. 13. The aforesaid acts and practices of the respondents, as herein alleged in Paragraphs Eight through Twelve, are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce under the Federal Trade Commission Act.

PAR. 14. Respondents are now and for some time last past have been engaged in the introduction, delivery for introduction, manufacture for introduction, sale, advertising, and offering for sale, in commerce, and in the transportation or causing to be transported in commerce, and in the importation into the United States, of textile fiber products; and have sold, offered for sale, advertised, delivered, transported and caused to be transported, textile fiber products, which have been advertised or offered for sale, in commerce; and have sold, offered for sale, advertised, delivered, transported and caused to be transported, after shipment in commerce, textile fiber products, either in their original state or contained in other textile fiber products; as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act.

PAR. 15. Certain of such textile fiber products were misbranded by respondents in that they were not stamped, tagged, labeled, or otherwise identified as required under the provisions of Section 4(b) of the Textile Fiber Products Identification Act, and in the manner and form prescribed by the Rules and Regulations promulgated under said Act.

Among such misbranded textile fiber products, but not limited

thereto were textile fiber products with labels which failed to disclose the true generic names of the fibers present.

PAR. 16. The acts and practices of respondents, as set forth above, in Paragraph Fifteen, were and are in violation of the Textile Fiber Products Identification Act and the Rules and Regulations promulgated thereunder, and constituted, and now constitute unfair methods of competition and unfair and deceptive acts or practices in commerce, under the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Textiles and Furs proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act, the Fur Products Labeling Act, the Textile Fiber Products Identification Act and the Wool Products Labeling Act of 1939; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in § 2.34(b), of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Pachter Garment Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri, with its office and principal place of business located formerly at 412 West 8th Street, Kansas

City, Missouri, and with current mailing address at 641 West Dartmouth Road, Kansas City, Missouri.

Respondent Meyer J. Pachter is an officer of said corporation and his current address is 641 West Dartmouth Road, Kansas City, Missouri.

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

ORDER

It is ordered, That respondents Pachter Garment Company, Inc., a corporation, and its officers, and Meyer J. Pachter, 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 introduction, manufacture for introduction, into commerce, or the offering for sale, sale, transportation, distribution, delivery for shipment or shipment, in commerce, of wool products, as "commerce" and "wool product" are defined in the Wool Products Labeling Act of 1939, do forthwith cease and desist from misbranding such products by:

1. Falsely and deceptively stamping, tagging, labeling, or otherwise identifying such products as to the character or amount of the constituent fibers contained therein.

2. Failing to securely affix to, or place on, each such product a stamp, tag, label, or other means of identification showing in a clear and conspicuous manner each element of information required to be disclosed by Section 4(a)(2) of the Wool Products Labeling Act of 1939.

3. Failing to designate on stamps, tags, labels or other means of identification affixed to such wool products, fibers present in the amount of less than 5 per centum, by the term "other fibers" instead of the generic names or fiber trademarks of such fibers.

4. Failing to set forth the common generic names of natural fibers or the generic names of manufactured fibers established in Rule 7 of the Regulations promulgated under the Textile Fiber Products Identification Act, in naming such fibers in required information on stamps, tags, labels or other means of identification attached to wool products.

5. Using the term "mohair" in lieu of the word "wool" in setting forth the required information on labels affixed to wool products unless the fibers described as mohair are en-

titled to such designation and are present in at least the amount stated.

It is further ordered, That respondents Pachter Garment Company, Inc., a corporation, and its officers, and Meyer J. Pachter, 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 introduction, or manufacture for introduction, into commerce, or the sale, advertising, or offering for sale in commerce, or the transportation or distribution in commerce of any fur product; or in connection with the manufacture for sale, sale, advertising, offering for sale, transportation or distribution of any fur product which is made in whole or in part of fur which has been shipped and received in commerce, as the terms "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act do forthwith cease and desist from:

A. Misbranding fur products by:

1. Failing to affix labels to fur products showing in words and in figures plainly legible all of the information required to be disclosed by each of the subsections of Section 4(2) of the Fur Products Labeling Act.

2. Setting forth on labels attached to fur products the name or names of any animal or animals other than the names of the animals producing the fur contained in the fur products as specified in the Fur Products Name Guide, and as prescribed by the Rules and Regulations.

3. Failing to set forth the term "natural" as part of the information required to be disclosed on labels under the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder to describe such fur products which are not pointed, bleached, tip-dyed, dyed, or otherwise artificially colored.

B. Falsely or deceptively invoicing any fur product by:

1. Failing to furnish an invoice, as the term "invoice" is defined in the Fur Products Labeling Act, 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.

2. Failing to set forth the term "natural" as part of the information required to be disclosed on an invoice under the Fur Products Labeling Act and Rules and Regulations promulgated thereunder to describe such fur prod-

uct which is not pointed, bleached, dyed, tip-dyed, or otherwise artificially colored.

3. Failing to set forth on an invoice the item number or mark assigned to such fur product.

It is further ordered, That respondents Pachter Garment Company, Inc., a corporation, and its officers, and Meyer J. Pachter, 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 introduction, delivery for introduction, manufacture for introduction, sale, advertising, or offering for sale in commerce, or the importation into the United States of any textile fiber product; or in connection with the sale, offering for sale, advertising, delivery, transportation, or causing to be transported, of any textile fiber product, which has been advertised or offered for sale in commerce; or in connection with the sale, offering for sale, advertising, delivery, transportation or causing to be transported, after shipment in commerce of any textile fiber product, whether in its original state or contained in other textile fiber products, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act, do forthwith cease and desist from misbranding textile fiber products by failing to affix labels to such textile fiber products showing in a clear, legible and conspicuous manner each element of information required to be disclosed by Section 4(b) of the Textile Fiber Products Identification Act.

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this Order to each of its operating divisions.

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

BERRY'S ON MAIN, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND THE FUR PRODUCTS LABELING ACTS

Docket C-1427. Complaint, Sept. 16, 1968—Decision, Sept. 16, 1968

Consent order requiring a Columbia, S.C., retail furrier to cease misbranding, deceptively invoicing and falsely advertising its fur products.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Berry's on Main, Inc., a corporation, and Joe B. Berry, individually and as an officer of said corporation, and Roy B. Mitchell, individually and as general manager of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling 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 Berry's on Main, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of South Carolina.

Respondent Joe B. Berry is an officer of the corporate respondent and Roy B. Mitchell is general manager of the said corporate respondent. They formulate, direct and control the acts, practices and policies of the said corporate respondent including those hereinafter set forth.

Respondents are retailers of fur products with their office and principal place of business located at 1608 Main Street, Columbia, South Carolina.

PAR. 2. Respondents are now and for some time last past have been engaged in the introduction into commerce, and in the sale, advertising, and offering for sale in commerce, and in the transportation and distribution in commerce, of fur products; and have sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of furs which have been shipped and received in commerce as the terms "commerce," "fur" and "fur product" are defined in the

Fur Products Labeling Act.

PAR. 3. Certain of said fur products were misbranded in that they were not labeled as required under the provisions of Section 4(2) of the Fur Products Labeling Act and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

Among such misbranded fur products, but not limited thereto, were fur products with labels which failed to show the true animal name of the fur used in any such fur product.

PAR. 4. Certain of said fur products were misbranded in violation of the Fur Products Labeling Act in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder in the following respects:

(a) The term "natural" was not used on labels to describe fur products which were not pointed, bleached, dyed, tip-dyed, or otherwise artificially colored, in violation of Rule 19(g) of said Rules and Regulations.

(b) Required item numbers were not set forth on labels, in violation of Rule 40 of said Rules and Regulations.

PAR. 5. Certain of said fur products were falsely and deceptively invoiced by the respondents in that they were not invoiced as required by Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated under such Act.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were fur products covered by invoices which failed to show the true animal name of the fur used in any such fur product.

PAR. 6. Certain of said fur products were falsely and deceptively invoiced in violation of the Fur Products Labeling Act in that they were not invoiced in accordance with the Rules and Regulations promulgated thereunder in the following respects:

(a) The term "natural" was not used on invoices to describe fur products which were not pointed, bleached, dyed, tip-dyed, or otherwise artificially colored, in violation of Rule 19(g) of said Rules and Regulations.

(b) Required item numbers were not set forth on invoices, in violation of Rule 40 of said Rules and Regulations.

PAR. 7. Certain of said fur products were falsely and deceptively advertised in violation of the Fur Products Labeling Act in that certain advertisements intended to aid, promote and assist, directly or indirectly, in the sale and offering for sale of such fur products were not in accordance with the provisions of Section 5(a) of the said Act.

Among and included in the aforesaid advertisements but not limited thereto, were advertisements of respondents which appeared in issues of The State and The Columbia Record, a newspaper published in the city of Columbia, State of South Carolina and having a wide circulation in South Carolina and other States of the United States.

By means of the aforesaid advertisements and other advertisements of similar import and meaning not specifically referred to herein, respondents falsely and deceptively advertised fur products, in violation of Section 5(a)(5) of the Fur Products Labeling Act and Rule 44(a) of the Rules and Regulations promulgated thereunder by representing, directly or by implication, through statements appearing in newspapers such as "Sale of Natural Mink Jackets $444 to $666 Original prices $699 to $1099" that the prices of such fur products were reduced from respondents' former prices and the amount of such purported reductions constituted savings to purchasers of respondents' fur products. In truth and in fact, the alleged former prices were fictitious in that they were not the actual, bona fide prices at which respondents offered the products to the public on a regular basis for a reasonably substantial period of time in the recent regular course of business and the said fur products were not reduced in price as represented and savings were not afforded purchasers of respondents' said fur products, as represented.

PAR. 8. In advertising fur products for sale, as aforesaid, respondents made pricing claims and representations of the types covered by subsections (a), (b), (c) and (d) of Rule 44 of the Regulations under the Fur Products Labeling Act. Respondents in making such claims and representations failed to maintain full and adequate records disclosing the facts upon which such claims and representations were based, in violation of Rule 44(e) of said Rules and Regulations.

PAR. 9. The aforesaid acts and practices of respondents, as herein alleged, are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and constitute unfair methods of competition and unfair and deceptive acts and practices in commerce under the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished there-

after with a copy of a draft of complaint which the Bureau of Textiles and Furs proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act and the Fur Products Labeling Act; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in § 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Berry's on Main, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of South Carolina, with its office and principal place of business located at 1608 Main Street, Columbia, South Carolina.

Respondent Joe B. Berry is an officer of said corporation and Roy B. Mitchell is general manager of said corporation and their address is the same as that of said corporation.

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

ORDER

It is ordered, That respondents Berry's on Main, Inc., a corporation, and its officers, and Joe B. Berry, individually and as an officer of said corporation, and Roy B. Mitchell, individually and as general manager of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, into commerce, or the sale, advertising or offering for sale in commerce, or

the transportation or distribution in commerce, of any fur product; or in connection with the sale, advertising, offering for sale, transportation or distribution, of any fur product which is made in whole or in part of fur which has been shipped and received in commerce, as the terms "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Misbranding any fur product by:

1. Failing to affix a label to such fur product showing in words and in figures plainly legible all of the information required to be disclosed by each of the subsections of Section 4(2) of the Fur Products Labeling Act.

2. Failing to set forth the term "natural" as part of the information required to be disclosed on a label under the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder to describe such fur product which is not pointed, bleached, dyed, tip-dyed, or otherwise artificially colored.

3. Failing to set forth on a label the item number or mark assigned to such fur product.

B. Falsely or deceptively invoicing any fur product by:

1. Failing to furnish an invoice, as the term "invoice" is defined in the Fur Products Labeling Act, 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.

2. Failing to set forth the term "natural" as part of the information required to be disclosed on an invoice under the Fur Products Labeling Act and Rules and Regulations promulgated thereunder to describe such fur product which is not pointed, bleached, dyed, tip-dyed, or otherwise artificially colored.

3. Failing to set forth on an invoice the item number or mark assigned to such fur product.

C. Falsely or deceptively advertising any fur product through the use of any advertisement, representation, public announcement or notice which is intended to aid, promote or assist, directly or indirectly, in the sale, or offering for sale of any such fur product, and which:

1. Represents, directly or by implication, that any

price, whether accompanied or not by descriptive terminology is the respondents' former price of such fur product when such price is in excess of the price at which such fur product has been sold or offered for sale in good faith by the respondents in the recent regular course of business, or otherwise misrepresents the price at which any such fur product has been sold or offered for sale by respondents.

2. Falsely or deceptively represents that savings are afforded to the purchaser of any such fur product or misrepresents in any manner the amount of savings afforded to the purchaser of such fur product.

3. Falsely or deceptively represents that the price of any such fur product is reduced.

D. Failing to maintain full and adequate records disclosing the facts upon which pricing claims and representations of the types described in subsections (a), (b), (c) and (d) of Rule 44 of the Rules and Regulations promulgated under the Fur Products Labeling Act, are based.

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this Order to each of its operating divisions.

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

BLAIR FASHIONS, INCORPORATED, ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMSISION AND THE TEXTILE FIBER PRODUCTS IDENTIFICATION ACTS

Docket C-1428. Complaint, Sept. 18, 1968—Decision, Sept. 18, 1968

Consent order requiring a Chicago, Ill., manufacturer of ladies' foundation garments to cease misbranding, falsely advertising and deceptively guaranteeing its textile fiber products.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Textile Fiber Products Identification Act, and by

virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Blair Fashions, Inc., a corporation trading as fashion hour., and Ronald L. Blair, Francis A. O'Neill, and Irving Schell, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Textile Fiber Products Identification Act and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Blair Fashions, Incorporated, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois. It trades under its own name and under the name fashion hour.

Respondent Ronald L. Blair, Francis A. O'Neill, and Irving Schell are officers of said corporate respondent. They formulate, direct and control the acts, practices and policies of said corporate respondent, including the acts, practices and policies hereinafter set forth.

Respondents are engaged in the manufacture and sale of textile fiber products (ladies foundation garments which include bras, girdles, and corselettes), with their office and principal place of business located at 2650 West Belden Avenue, Chicago, Illinois.

PAR. 2. Respondents are now and for some time last past have been, engaged in the introduction, delivery for introduction, manufacture for introduction, sale, advertising, and offering for sale, in commerce, and in the transportation or causing to be transported in commerce, and in the importation into the United States, of textile fiber products; and have sold, offered for sale, advertised, delivered, transported and caused to be transported, textile fiber products, which have been advertised or offered for sale in commerce; and have sold, offered for sale, advertised, delivered, transported and caused to be transported, after shipment in commerce, textile fiber products, either in their original state or contained in other textile fiber products; as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act.

PAR. 3. Certain of said textile fiber products were misbranded by the respondent within the intent and meaning of Section 4(a) of the Textile Fiber Products Identification Act and the Rules and Regulations promulgated thereunder, in that they were falsely and deceptively stamped, tagged, labeled, invoiced, advertised, or otherwise identified as to the name or amount of constitutent

fibers contained therein.

Among such misbranded textile fiber products, but not limited thereto, were textile fiber products which were falsely and deceptively advertised in buyers guides and catalogues sent to customers. These Guides and catalogues had interstate circulation and contained advertisements using such terms as "Halenca" waistband and also "made of the finest Dupont Lycra Spandex," which represented either directly or by implication that the products were made entirely of either Halenca Nylon or Lycra Spandex when other fibers were present in said products.

PAR. 4. Certain of said textile fiber products were further misbranded by respondents in that they were not stamped, tagged, labeled or otherwise identified as required under the provisions of Section 4(b) of the Textile Fiber Products Identification Act, and in the manner and form as prescribed by the Rules and Regulations promulgated under said Act.

Among such misbranded textile fiber products, but not limited thereto, were textile fiber products with labels which failed:

1. To disclose the true generic name of the fiber present; and

2. To disclose the percentage of such fibers.

PAR. 5. Certain of said textile fiber products were falsely and deceptively advertised in that respondents in making disclosures or implications as to the fiber content of such textile fiber products in written advertisements used to aid, promote and to assist, directly or indirectly, in the sale or offering for sale of said products, failed to set forth the required information as to fiber content as specified by Section 4(c) of the Textile Fiber Products Identification Act and in the manner and form prescribed by the Rules and Regulations promulgated under said Act.

Among and included in the aforesaid advertisements, but not limited thereto, were advertisements of respondents which appeared in buyers guides and catalogues sent to customers in various States of the United States.

Among such falsely and deceptively advertised textile fiber products, but not limited thereto, were articles of wearing apparel which were advertised by means of fiber implying terms and fiber trademarks such as "Halenca," "Kodel," "Dacron," "Lycra," "Lastex," among others but not limited thereto, without setting forth the true generic names of the fibers present in said textile fiber products.

PAR. 6. By means of the aforesaid advertisements respondents have falsely and deceptively advertised textile fiber products in violation of the Textile Fiber Products Identification Act in that

said textile fiber products were not advertised in accordance with the Rules and Regulations promulgated thereunder in the following respects:

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

(b) Fiber trademarks were used in advertising textile fiber products, containing more than one fiber, other than permissive ornamentation, and such fiber trademarks did not appear in the required fiber content information in immediate proximity and conjunction with the generic name of the fiber in plainly legible type or lettering of equal size and conspicuousness, in violation of Rule 41(b) of the aforesaid Rules and Regulations.

(c) The generic name of a fiber was used in advertising textile fiber products, in such a manner as to be false, deceptive, and misleading as to fiber content and to indicate, directly or indirectly, that such textile product was composed wholly or in part of such fiber when such was not the case, in violation of Rule 41(d) of the aforesaid Rules and Regulations.

Among such products, but not limited thereto, were textile fiber products, namely ladies foundation garments, advertised as "made of lightweight spandex" thus implying that such products were composed wholly of spandex when in fact such was not the case.

PAR. 7. Respondents have furnished their customers with false guarantees that certain of the textile fiber products were not misbranded or falsely invoiced by falsely representing in writing on invoices that respondents have filed a continuing guaranty under the Textile Fiber Products Identification Act with the Federal Trade Commission in violation of Rule 38(d) of the Rules and Regulations under said Act and Section 10(b) of such Act.

PAR. 8. The acts and practices of respondents as set forth above were, and are, in violation of the Textile Fiber Products Identification Act and the Rules and Regulations promulgated thereunder, and constituted, and now constitute, unfair and deceptive acts and practices, in commerce, under the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investiga-

tion of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereunder with a copy of a draft of complaint which the Bureau of Textiles and Furs proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act and the Textile Fiber Products Identification Act; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in § 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Blair Fashions, Incorporated, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 2650 West Belden Avenue, Chicago, Illinois. Said corporation trades under its own name and under the name of fashion hour.

Respondents Ronald L. Blair, Francis A. O'Neill and Irving Schell are officers of said corporation and their address is the same as that of said corporation.

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

ORDER

It is ordered, That respondents Blair Fashions, Incorporated, a corporation trading as fashion hour or any other name, and its officers, and Ronald L. Blair, Francis A. O'Neill and Irving Schell,

individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, delivery for introduction, manufacture for introduction, sale, advertising, or offering for sale, in commerce, or the transportation or causing to be transported, in commerce, or the importation into the United States of any textile fiber product; or in connection with the sale, offering for sale, advertising, delivery, transportation or causing to be transported, of any textile fiber product which has been advertised or offered for sale in commerce; or in connection with the sale, offering for sale, advertising, delivery, transportation, or causing to be transported, after shipment in commerce, of any textile fiber product, whether in its original state or contained in other textile fiber products, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act, do forthwith cease and desist from:

A. Misbranding textile fiber products by:

1. Falsely or deceptively stamping, tagging, labeling, invoicing, advertising, or otherwise identifying such products as to the name or amount of the constituent fibers contained therein.

2. Failing to affix a stamp, tag, label, or other means of identification to each such product showing in a clear, legible and conspicuous manner each element of information required to be disclosed by Section 4(b) of the Textile Fiber Products Identification Act.

B. Falsely and deceptively advertising textile fiber products by:

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

2. Using a fiber trademark in advertisements without

Syllabus

a full disclosure of the required content information in at least one instance in the said advertisement.

3. Using a fiber trademark in advertising textile fiber products containing more than one fiber without such fiber trademark appearing in the required fiber content information in immediate proximity and conjunction with the generic name of the fiber in plainly legible type or lettering of equal size and conspicuousness.

4. Using a generic name of a fiber in advertising textile fiber products in such a manner as to be false, deceptive or misleading as to fiber content or to indicate, directly or indirectly, that such textile fiber products are composed wholly or in part of such fiber when such is not the case.

It is further ordered, That respondents Blair Fashions, Incorporated, a corporation trading as fashion hour or any other name, and its officers, and Ronald L. Blair, Francis A. O'Neill, and Irving Schell, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from furnishing a false guaranty that any textile fiber product is not misbranded or falsely invoiced.

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

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

TILLIE LEWIS FOODS, INC., ET AL. FORMERLY FLOTILL PRODUCTS, INC.

MODIFIED ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2(c) OF THE CLAYTON ACT

Docket 7226. Complaint, Aug. 6, 1958—Decision, Sept. 20, 1968

Order modifying a cease and desist order against a Stockton, Calif., canner of fruits and vegetables, issued June 26, 1964, 65 F.T.C. 1099, pursuant to a decree of the U.S. Supreme Court, 389 U.S. 179, dated December 4, 1967, by setting aside prohibitions against violating Section 2(c) of the Clayton Act.

OPINION OF THE COMMISSION

SEPTEMBER 20, 1968

The Commission, in its decision in this matter, issued June 26, 1964 [65 F.T.C. 1099], found that respondent Flotill Products, Inc., had violated both § 2(c) and § 2(d) of the amended Clayton Act. On appeal from this decision, the Court of Appeals for the Ninth Circuit, on March 16, 1966, ordered enforcement of the order to cease and desist to the extent that the order related to § 2(d) violations but denied enforcement of that part of the order which related to § 2(c) violations and remanded the matter for further proceedings to determine whether a majority of the Commission would join in the findings on which the § 2(c) order was predicated. The Supreme Court, on December 4, 1967 [8 S.&D. 596], reversed this ruling and remanded the matter to the Ninth Circuit with the direction that it proceed to judgment on the merits of respondent's petition to review and set aside the § 2(c) order.

For the reasons set forth below, the Commission has joined with respondent in a motion filed with the Court of Appeals to set aside the § 2(c) portion of the order to cease and desist.

The § 2(c) order issued by the Commission in this matter was based on the finding that Flotill, a seller of canned goods, had made a disguised payment of brokerage to Nash-Finch Company, a large wholesale grocer. The Commission specifically found, in this connection, that during 1955 and 1956 Flotill had made payments to Nash-Finch in the amount of 2½ percent of the latter's gross sales. It further found that such payment reflected a savings in brokerage expenses which Flotill had theretofore incurred in selling to Nash-Finch and held that such payment, designated as a "special promotional allowance," was in fact a payment in lieu of brokerage and therefore unlawful under § 2(c).

The same 1955–1956 transactions between Flotill and Nash-Finch were also considered by the Commission in an investigational hearing initiated on February 1, 1963, for the purpose of determining whether Nash-Finch had violated an order to cease and desist entered against it in 1947.[1] This 1947 case had involved the receipt of brokerage by the respondent-buyer, Nash-Finch, through a wholly owned subsidiary acting as a broker in transactions between the various sellers, including Flotill, and Nash-Finch. The order prohibited Nash-Finch, *inter alia*, from

[1] *In the Matter of C. H. Robinson Co. and Nash-Finch Co.*, 43 F.T.C. 297.

"receiving or accepting from any seller, directly or indirectly, anything of value as a commission or brokerage, or any compensation, allowance, or discount in lieu thereof, on or in connection with purchases made for respondent's own account, either directly or by or through [the subsidiary corporation]." Compliance with this order had been achieved by the dissolution of the subsidiary which had been functioning as a broker, and Nash-Finch was so advised by the Commission's general counsel.

Although the Commission had concluded in the proceeding against Flotill that the 1955–1956 transactions between Flotill and Nash-Finch constituted a violation of § 2(c), it nevertheless decided not to proceed against Nash-Finch under the 1947 order for its participation in those transactions. The 1947 order, quoted in part above, prohibits Nash-Finch from receiving brokerage or any compensation in lieu thereof, either directly or through an intermediary, and is, therefore, sufficiently broad to encompass the illegal transmission of brokerage by the means utilized in the 1955–1956 transactions. But because of the substantial differences between the 1955–1956 transactions and those upon which the 1947 order against Nash-Finch had been based, and because the Commission's general counsel had previously indicated to Nash-Finch that compliance with this order had been achieved by the elimination of the buyer-owned broker, we were of the opinion that Nash-Finch would have little reason to believe that the Commission might consider so-called "promotional" payments received directly from a seller, and not through a controlled intermediary, to be in violation of the order to cease and desist. We, therefore, closed the investigation of Nash-Finch by order of February 27, 1967.

This order terminating the Nash-Finch investigation failed to set forth the reasons for the Commission's action, however. Thus, insofar as the public record shows, there is nothing to indicate why the Commission did not find that Nash-Finch violated the order against it by *receiving* illegal brokerage on the same transactions that formed the basis for the finding that Flotill had violated Sec. 2(c) by *granting* such brokerage. In view of the seeming inconsistency between the conclusions reached in the compliance investigation of Nash-Finch and in the proceeding against Flotill, due primarily to the absence of a record statement of the basis for closing the Nash-Finch investigation, and because we now have ample reason to believe that the practice found to be illegal in the Flotill matter has been discontinued, we joined with respondent's counsel in the Flotill proceeding in filing the

motion in the United States Court of Appeals for the Ninth Circuit to set aside the Sec. 2(c) portion of the order to cease and desist.

The court, upon consideration of this joint motion, on May 24, 1968, issued its final decree setting aside that part of the Commission's order relating to Sec. 2(c) of the Clayton Act. Our modified order to cease and desist in conformity with that decree is being issued herewith.

Commissioner Nicholson did not participate, and Commissioner Elman dissented.

MODIFIED ORDER TO CEASE AND DESIST

Respondent having filed in the United States Court of Appeals for the Ninth Circuit a petition to review and set aside the order to cease and desist issued herein on June 26, 1964 [65 F.T.C. 1099]; and the court having rendered its decision on March 16, 1966, and having entered its final decree on April 1, 1966, modifying said order in part and remanding to the Commission the Section 2(c) provision of the order for further hearings to determine whether a majority of the full Commission desired to enter such an order; and the Supreme Court of the United States, on December 4, 1967 [8 S.&D. 596], having issued its opinion and rendered its judgment reversing the judgment of the Court of Appeals insofar as the Section 2(c) provision of the Commission's order was concerned and remanding that matter to the Court of Appeals for the Ninth Circuit with direction to proceed to judgment on the merits; and the Court of Appeals, on May 24, 1968, upon consideration of a joint motion of the parties, and with the consent of both parties, having issued its final decree setting aside the first numbered paragraph of the Commission's order issued on June 26, 1964, relating to Section 2(c) of the Clayton Act, as amended by the Robinson-Patman Act:

Now, therefore, it is hereby ordered, That in accordance with the said final decrees of the Court of Appeals, said order to cease and desist be, and it hereby is, modified to read as follows:

> *It is ordered,* That respondent Tillie Lewis Foods, Inc. (formerly Flotill Products, Inc.), a corporation, its officers, agents, representatives and employees, directly or indirectly, through any corporate or other device, in or in connection with the sale of canned fruits and vegetables in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from:

1. Paying or contracting for the payment of anything of value to or for the benefit of any customer of respondent as compensation or in consideration for any services or facilities furnished by or through such customer, in connection with the offering for sale, sale or distribution of any of respondent's products, unless such payment or consideration is made available on proportionally equal terms to all other customers competing in the distribution of such products with the favored customer.

It is further ordered, That respondent, Tillie Lewis (formerly Flotill Products, Inc.) shall, within 60 days after entry 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 set forth herein.

Commissioner Nicholson did not participate.

IN THE MATTER OF

BRISTOL-MYERS COMPANY

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

Docket 8726. Complaint, Jan. 17, 1967—Decision, Sept. 23, 1968

Order vacating the initial decision and dismissing for lack of public interest the complaint which charged a large manufacturing drug firm with deceptively advertising a pain relieving drug, Bufferin, through the use of a medical journal article that reported the results of clinical tests conducted on patients suffering from rheumatoid arthritis.

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 Bristol-Myers Company, a corporation, hereinafter referred to as the respondent, has violated the provisions 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 Bristol-Myers Company is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal office

and place of business located at 630 Fifth Avenue, New York, New York.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the sale and distribution of a product designated "Bufferin," which comes within the classification of a drug as the term "drug" is defined in the Federal Trade Commission Act.

PAR. 3. Respondent causes the said product, when sold, to be transported from its places of business in the State of New York, and elsewhere, to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondent maintains, and at all times mentioned herein has maintained, a course of trade in said product in commerce, as "commerce" is defined in the Federal Trade Commission Act. The volume of business in such commerce has been and is substantial.

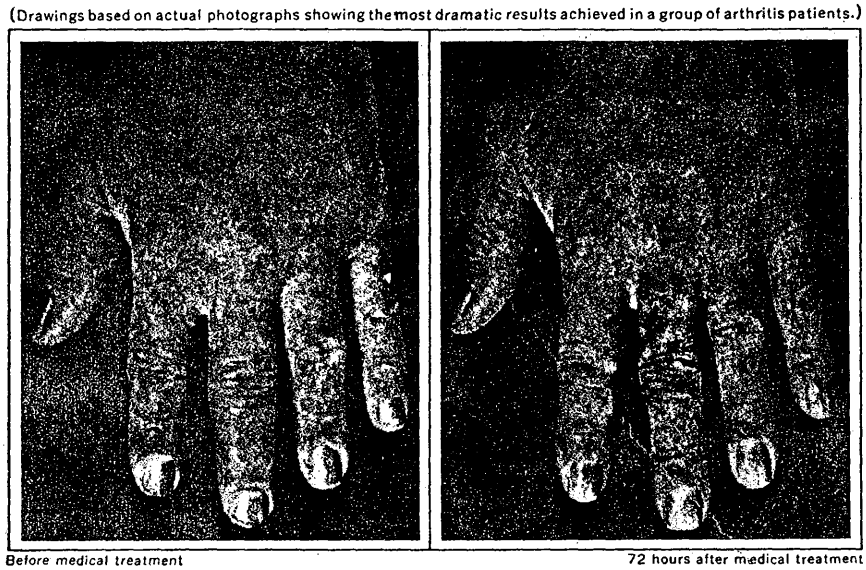
PAR. 4. In the course and conduct of its said business, respondent has disseminated, and caused the dissemination of, certain advertisements concerning the said drug preparation by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, advertisements inserted in newspapers, magazines and other advertising media, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said preparation; and has disseminated, and caused the dissemination of, advertisements concerning said preparation by various means, including, but not limited to, the aforesaid media, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of said preparation in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Among and typical of said advertisements, and of the statements and representations contained in said advertisements disseminated as hereinabove set forth, are the following:

Reported in The Journal of The American Medical Association

Swelling and inflammation of arthritis reduced

(Drawings based on actual photographs showing the most dramatic results achieved in a group of arthritis patients.)



Before medical treatment

72 hours after medical treatment

The June 28, 1965 issue of the leading medical publication carries a report on a special study, made under doctors' care, of a group of men and women with active arthritis. The salicylate chosen for this study was one long used for the temporary relief of minor arthritis pain.

Results of the tests showed that doctors using a particular treatment achieved true remission in 87% of the cases. The drug used was Bufferin®. Swelling and inflammation were reduced, joint movement increased, grip-strength improved.

If you have arthritis you should be under a doctor's care, even in the early stages. If your doctor prescribes Bufferin, it's good to know you can take it without the stomach upset other drugs often cause.

Bufferin: A leader in arthritis research.

PAR. 6. Through the use of said advertisements, and others similar thereto not specifically set out herein, and the statements and representations therein contained, respondent has represented, and is now representing, directly, and by implication, with reference to a report of a clinical test or study entitled "Salicylate Therapy in Rheumatoid Arthritis," appearing in the June 28, 1965, issue of the *Journal of the American Medical Association,* that:

1. "Bufferin" did not cause stomach upset to any of the patients participating in said clinical tests or study, according to said report;

2. Respondent is a "leader" in arthritic research, *viz,* that the said respondent is included within, or numbered among, the individuals, corporations, groups, or bodies eminent in, or prominently concerned with, the advancement of the state of medical and scientific knowledge of the disease known as arthritis.

PAR. 7. In truth and in fact:

1. Bufferin caused stomach upset to some of the patients participating in said clinical test or study, according to said report;

2. The respondent is not a "leader" in arthritic research, *viz,* the said respondent is not included within or numbered among the individuals, corporations, groups, or bodies eminent in, or prominently concerned with, the advancement of the state of medical and scientific knowledge of the disease known as arthritis.

Therefore, the advertisements referred to in Paragraph Five were and are misleading in material respects and constituted, and now constitute, "false advertisements" as that term is defined in the Federal Trade Commission Act.

PAR. 8. Furthermore, the statements and representations contained in said advertisements, including, but not limited to, the words and phrases "true remission in 87% of the cases," "swelling and inflammation were reduced," "joint movement increased," and "grip-strength improved," have the capacity and tendency to suggest, and do suggest, that said published report concluded that the use of "Bufferin" resulted in permanent or long-lasting beneficial effects upon arthritis with true remission in 87% of the cases, permanent or long-lasting reduction in swelling and inflammation, permanent or long-lasting improvement in grip-strength. In truth and in fact the said published article did not report that any benefits resulting from the treat-

ment including the use of "Bufferin" were permanent or long-lasting or that true remission resulted in any of the cases.

Therefore, the advertisements referred to in Paragraph Five were and are additionally misleading in material respects and constituted, and now constitute, "false advertisements" as that term is defined in the Federal Trade Commission Act.

PAR. 9. Furthermore, the statements and representations contained in said advertisements referring only to the use of "Bufferin" as discussed in said report have the capacity and tendency to suggest, and do suggest, that "Bufferin" is the only drug reported to have been used in the study referred to and that no other medication or therapeutic measures were used in said study. In the light of such statements and representations, said advertisements are further misleading in a material respect and therefore constitute "false advertisements," as that term is defined in the Federal Trade Commission Act, because they fail to reveal the material fact that some of the patients who were subjects of the study received, in addition to the drug preparation "Bufferin," one or more other medications commonly employed in the treatment of arthritis, together with other therapeutic measures such as physiotherapy, exercise and rest.

PAR. 10. Furthermore, the statements, representations and "before and after" drawings of photographs in said advertisements have the capacity and tendency to suggest, and do suggest, to readers thereof, that according to said report, the said "before and after" photographs depict results of the study and demonstrate that "Bufferin" achieved beneficial results. In the light of such statements, representations and "before and after" drawings, said advertisements are further misleading in a material respect and therefore constitute "false advertisements," as that term is defined in the Federal Trade Commission Act, because in truth and in fact, according to the published report, "before and after" photographs were relatively insensitive and usually showed no unequivocal change.

PAR. 11. Furthermore, the statements and representations contained in said advertisements have the capacity and tendency to suggest, and do suggest, to readers thereof, that the results described and referred to in the report were accomplished safely by use of the drug "Bufferin" adminstered in accordance with the dosage directions specified in the labeling thereof. In the light of such statements and representations, said advertisements are further misleading in a material respect and therefore constitute "false advertisements," as that term is defined in the

Federal Trade Commission Act, because they fail to reveal the material fact that "Bufferin," according to the published report, was administered to most of the patients in doses exceeding the maximum daily dosage set forth in the labeling of said drug, and that "Bufferin" in the dosages actually administered not only caused stomach upset (as reflected by nausea) but also produced other typical side effects of aspirin such as tinnitus (ringing, buzzing, roaring, or clicking sounds in the ears), deafness, and perspiration; and because the advertisements also fail to reveal the additional material fact that the report expressly states that "peptic ulcer and allergic reactions" are "obvious contraindications" to the use of "Bufferin."

PAR. 12. The dissemination by the respondent of the false advertisements, as aforesaid, constituted, and now constitute, unfair and deceptive acts and practices in commerce as "commerce" is defined in the Federal Trade Commission Act, in violation of Sections 5 and 12 of the Federal Trade Commission Act.

Mr. William E. McMahon, II, and *Mr. Thomas H. Link,* supporting the complaint.

Weil and Lee, New York, N.Y., by *Mr. Gilbert H. Weil* and *Mr. James A. Kirkman, III,* for respondent.

INITIAL DECISION BY DONALD R. MOORE, HEARING EXAMINER

NOVEMBER 16, 1967

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PRELIMINARY STATEMENT

The complaint in this proceeding was issued by the Federal Trade Commission on January 17, 1967, and was duly served on respondent, Bristol-Myers Company. It charges respondent with false advertising in violation of Sections 5 and 12 of the Federal Trade Commission Act (15 U.S.C. §§ 45, 52). Specifically, the complaint alleges (1) that respondent, in an advertisement of its product "Bufferin," distorted and misrepresented a published

report of a clinical study of arthritis patients and (2) that this advertisement misrepresented respondent as being "A leader in arthritis research."

Respondent filed its answer through counsel on February 21, 1967, in which it admitted certain factual allegations of the complaint but denied any violation of law. The answer affirmatively alleges (1) that, because the subject matter of the challenged advertising "was an item of public importance and interest," any restraint on respondent's "right" to publish "its interpretation and views" concerning the subject is in violation of the First and Fifth Amendments to the Federal Constitution; and (2) that, because the advertisement in question encourages arthritis sufferers to seek medical advice in the early stages of the disease and educates them regarding the usefulness of salicylates (such as Bufferin) in the treatment of arthritis, this proceeding, instead of being "in the public interest," as set forth in the complaint, is "contrary to the public interest." The answer defends the advertisement as constituting a "true, fair and accurate" description of the published report and charges that the allegations of the complaint involve "strained, artificial and distorted interpretations" and "other hyper-technical, legalistic devices."

This proceeding involves Section 5(a)(1) of the Federal Trade Commission Act, in which "* * * unfair or deceptive acts or practices in commerce" are declared unlawful (15 U.S.C. § 45(a)(1), and Section 12, which makes unlawful the dissemination of "any false advertisement" for the purpose of inducing, or which is likely to induce, the purchase of certain commodities, including drugs, and which also specifies that the dessimation of a false advertisement shall constitute "an unfair or deceptive act or practice" within the meaning of Section 5. (15 U.S.C. § 52 (a) and (b).)

The term "false advertisement" is defined in Section 15 as meaning "an advertisement . . . which is misleading in a material respect." Section 15 specifies:

***in determining whether any advertisement is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual." (15 U.S.C. § 55(a)(1).)

This case was assigned to this hearing examiner by order dated February 8, 1967.

Following prehearing conferences on April 26, 1967, in Washington, D.C., and on May 22, 1967, in New York, New York, there were five days of hearings in Washington and New York between June 23 and July 12, 1967. Two days of hearings were devoted to the case-in-chief in support of the complaint and two days to the defense case. The fifth hearing was for the presentation of rebuttal testimony.

At the hearings testimony and other evidence were offered in support of and in opposition to the allegations of the complaint. Such testimony and other evidence were duly recorded and filed in the office of the Commission.

The evidentiary record comprises 749 pages of transcript, together with nearly 50 documentary exhibits, most of which were offered by respondent.

The parties were represented by counsel and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues.

After the presentation of evidence, proposed findings of fact and conclusions of law and a proposed form of order, as well as supporting briefs, were filed by counsel supporting the complaint and by counsel for respondent. Reply briefs also were filed by counsel for both parties. The examiner heard oral argument on October 4, 1967. Under the provisions of Rule 3.51(a), the time for filing this initial decision was extended to November 16, 1967.

Proposed findings not adopted, either in the form proposed or in substance, are rejected as lacking support in the record or as involving immaterial matters.

After carefully reviewing the entire record in this proceeding, together with the proposed findings, conclusions, and order filed by both parties, as well as their respective replies, the hearing examiner finds that this proceeding is in the interest of the public; and on the basis of such review and his observation of the witnesses, he makes the following findings of fact, enters his resulting conclusions, and issues an appropriate order.

As required by Section 3.51(b)(1) of the Commission's Rules of Practice (effective July 1, 1967), the findings of fact include references to principal supporting items in the record. Such references to testimony and exhibits are thus intended to comply with that Rule and to serve as convenient guides to the principal items of evidence supporting the findings of fact, but these record references do not necessarily represent complete sum-

maries of the evidence considered in arriving at such findings. Where reference is made to proposed findings submitted by the parties, such references are ordinarily intended to include their citations to the record.

References to the record are made in parentheses, and certain abbreviations are used:

CB ____	Brief of Complaint Counsel in Support of Proposed Findings.
CPF ___	Proposed Findings, Conclusions and Order of Complaint Counsel.
CRB ___	Reply Brief of Complaint Counsel.
CX ____	Commission Exhibit.
RB ____	Respondent's Brief (Respondent's Memorandum on Initial Decision).
RPF ___	Respondent's Proposed Findings and Conclusions.
RRB ___	Respondent's Reply Brief (Respondent's Reply Memorandum on Initial Decision).
RX ____	Respondent's Exhibit.
Tr. ____	Transcript.

References to proposed findings and other submittals of counsel are ordinarily to page numbers—for example, CPF 18. Sometimes references to testimony cite the name of the witness and the transcript page number without the abbreviation Tr.—for example, Calkins 318.

Counsel supporting the complaint may be variously referred to as complaint counsel, Government counsel, or the Government, and witnesses called by Government counsel may be referred to as Government witnesses.

As far as the principal issue in the case in concerned—the question whether respondent misrepresented in advertising the purport of an article published in the Journal of the American Medical Association—no testimony was presented, so that this issue is to be resolved by means of the relatively simple procedure of comparing the published article with the advertising representations concerning it. There is one exception to this generalization. There was extensive testimony concerning the meaning of the term "true remission," as used in the advertising, and the word "remission," as used in the Journal article. (The Journal article in question may be referred to hereafter as the JAMA report or the JAMA article.) The rest of the testimony related to the validity of respondent's claim that it is "A leader in arthritis research."

To support the allegation that this representation is false and

misleading, and also to testify regarding "remission," counsel supporting the complaint called two witnesses: Dr. Ronald William Lamont-Havers, Associate Director for Extramural Programs, National Institute of Arthritis and Metabolic Diseases, formerly Medical Director of the Arthritis Foundation, and Dr. Evan Calkins, Chairman, Department of Medicine, State University of New York at Buffalo, and President of the American Rheumatism Association.

Similarly, respondent called two witnesses, both of whom testified respecting respondent's status in the field of arthritis research: Dr. George L. Wolcott, formerly Medical Director of Bristol-Myers Products Division, and Dr. Peter D. Orahovats, Vice President and Scientific Director of Bristol-Myers Products Division.

Dr. Lamont-Havers was recalled by complaint counsel to testify in rebuttal to the testimony and other evidence offered by respondent.

FINDINGS OF FACT

I. Respondent and Its Business

Respondent Bristol-Myers Company is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 630 Fifth Avenue, New York, New York. Respondent is now, and for some time has been, engaged in the sale and distribution of a product designated "Bufferin," which comes within the classification of a drug, as the term "drug" is defined in the Federal Trade Commission Act. Respondent causes such product, when sold, to be transported from its places of business in the State of New York and elsewhere to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondent maintains and at all times mentioned herein has maintained a course of trade in such product in commerce, as "commerce" is defined in the Federal Trade Commission Act. The volume of business in such commerce has been and is substantial. (Complaint, Pars. One, Two, and Three; Answer, Par. 1.)

In the course and conduct of its business, respondent has disseminated, and has caused the dissemination of, certain advertisements concerning the drug preparation "Bufferin" by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act,

including, but not limited to, advertisements inserted in newspapers, magazines, and other advertising media, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of such preparation; and has disseminated, and has caused the dissemination of, advertisements concerning such preparation by various means, including, but not limited to, the aforesaid media, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of such preparation in commerce, as "commerce" is defined in the Federal Trade Commission Act. (Complaint, Par. Four; Answer, Par. 1.)

II. The Challenged Advertisement

The complaint incorporates the text of an advertisement (substantially similar to CX 1) and alleges it to be "[a]mong and typical" of the advertisements disseminated as set forth in the preceding paragraph, but, as far as this record shows, the challenged advertisement was published only in the Reader's Digest (July 1966) and in McCall's (June 1966). (Complaint, Par. Five; Answer, Par. 2; CX 1; Tr. 7, 14.) There is no evidence that it is or was "typical" of respondent's advertising. (Compare CPF 3–5 with RB 45–46; see Tr. 15.)

The advertisement contains a headline in large boldface type proclaiming "Swelling & inflammation of arthritis reduced." An overline in smaller, lightface type contains the words: "Reported in The Journal of The American Medical Association."

Between the headline and the text of the advertisement are two drawings depicting hands, one described as "Before medical treatment" and the other described as "72 hours after medical treatment." The depictions are identified parenthetically in small type as "Drawings based on actual photographs showing the most dramatic results achieved in a group of arthritis patients."

The remainder of the advertisement consist of the following text:

> The June 28, 1965 issue of the leading medical publication carries a report on a special study, made under doctors' care, of a group of men and women with active arthritis. The salicylate chosen for this study was one long used for the temporary relief of minor arthritis pain.
>
> Results of the tests showed that doctors using a particular treatment achieved true remission in 87% of the cases. The drug used was Bufferin®. Swelling and inflammation were reduced, joint movement increased, grip-strength improved.
>
> If you have arthritis you should be under a doctor's care, even in the

early stages. If your doctor prescribes Bufferin, it's good to know you can take it without the stomach upset other drugs often cause.

Bufferin: A leader in arthritis research. Bufferin analgesic © 1966 Bristol-Myers Co.

The "report on a special study," referred to in the advertisement (CX 1), is an article entitled "Salicylate Therapy in Rheumatoid Arthritis," by Kenneth Fremont-Smith, M.D., and Theodore B. Bayles, M.D., which was published in the *Journal of the American Medical Association*, Vol. 192, pp. 1133-36, June 28, 1965. (Answer, Attachment 1; CX 2 A–D; Tr. 7–8.) (The report may be hereafter referred to as the JAMA report or the JAMA article.)

III. Public Interest Aspects

Arthritis is one of the most serious and most prevalent diseases afflicting the American public. The Public Health Service has estimated that arthritis afflicts 13 million persons, causing 186 million days of restricted activity a year, 57 million days of bed disability a year, 12 million days of workloss a year, 1½ million days of hospitalization a year, and 30 million visits to a doctor a year. The total annual cost attributed to arthritis is almost $2 billion. (RX 1, p. 30.)

The Public Health Service has reported that "Arthritis is an illness that affects more people and causes more crippling than and other chronic disease. * * * With the exception of heart disease, arthritis leads all chronic diseases in activity limitation. * * * As a cause of days of restricted activity and bed disability, arthritis is topped only by heart disease. As a workloss cause, it is exceeded by heart disease and ulcers * * *." (RX 1, pp. 1, 12.) Although arthritis is one of man's oldest maladies, its cause and its cure remain a mystery. (RX 1, p. 1; Lamont-Havers 258,270; Calkins 204–03, 214.)

Despite the absence of definite knowledge as to the cause or causes of arthritis, or a cure for it, the sufferer's condition can be ameliorated by certain medical regimens, including medication. The earlier in the course of the disease that such treatment is initiated, the more fruitful it is likely to be. Dr. Glen W. McDonald, Chief, Diabetes and Arthritis Program, Division of Chronic Diseases, United States Public Health Service, has written: "If arthritis is diagnosed early, and if prompt, individualized treatment is instituted as soon after diagnosis as possible, it is generally agreed that severe crippling can be

prevented in seven out of ten cases. The fact, then, that so many hundreds of thousands of Americans are, nevertheless, severely crippled with arthritis indicates how little adequate treatment they received when it counted—early in the disease process, when appreciation of the value of prompt treatment and care was of vital importance." (RX 1, p. iii.) The Public Health Service has estimated that 2,084,000 arthritis sufferers, or 18 percent of the total number of persons with arthritis, never saw a doctor for arthritis. (RX 1, Table 15, p. 32.)

Against this background, and on the basis of a stipulation between counsel, there is no doubt (1) that arthritis is a subject of public importance and interest; (2) that a substantial number of Americans suffer from active arthritis; and (3) that it is in the public interest to encourage these people to seek professional medical attention in the early stages of arthritis. (Tr. 117–78.)

The advertisement in issue (CX 1) urges persons with arthritis to seek early medical attention. It states: "If you have arthritis you should be under a doctor's care, even in the early stages." It refers to "a special study, made under doctors' care, of a group of men and women with active arthritis." It states that significantly beneficial results were achieved by "doctors using a particular treatment"—namely, Bufferin. The last sentence of the advertisement begins with the clause, "If your doctor prescribes Bufferin."

Salicylates, and particularly aspirin (that is, acetylsalicylic acid or ASA), are among the major types of drugs utilized in the treatment of arthritis, the others being the cortical steroids, the gold salts, and antimalarial drugs. These latter medications, however, have permanent toxicity. (Orahovats 531, 535; Lamont-Havers 269, 587; CX 2 A, D.)

Despite the widespread use of aspirin in treating arthritis, there was, as late as 1960, a marked cleavage of opinion among the authorities in the field as to whether aspirin exercised a true anti-inflammatory action against arthritis or whether it merely gave a false appearance of such activity by masking the manifestations of inflammation through its analgesic properties. Although many rheumatologists were convinced that aspirin does have a significant therapeutic effect in arthritis over and above its analgesic effect, there was little or no published evidence to support or to deny this postulate. (Orahovats 530–32, 534–35; (CX 2 A, Col. 1; Lamont-Havers 282, 303–04.) In an effort to provide such evidence, respondent's medical director (Dr. Orahovats) played a major role in designing two studies of the

effects of aspirin on arthritis and commissioned competent experts to perform them. The JAMA article (CX 2) describes the results of one of those studies. (Orahovats 530–36.)

Respondent's product, Bufferin, contains aspirin as its active ingredient. (CX 5.)

As indicated in the preliminary statement (*supra*, p. 789), the gravamen of the complaint is limited. With one exception (respondent's claim of leadership in arthritis research), all of the advertising representations are tested, not against their objective accuracy, but against the text of the JAMA report. Respondent is not charged with misrepresenting the quality, characteristics, or performance capabilities of Bufferin, but is charged only with misrepresenting the contents of the JAMA article and respondent's status as a "leader in arthritis research."

The findings that follow will deal first with the alleged misrepresentation of the JAMA report and then with the "leadership" claim. To set the stage for the representations that are related to the JAMA report, it will be useful to first set forth certain excerpts from the report that synthesize its findings and conclusions.

IV. Excerpts from JAMA Report

Following are pertinent excerpts from the JAMA article:

> Salicylates are relatively safe and inexpensive analgesic agents, and it is for analgesia that they are usually given to patients with rheumatoid arthritis. * * * Some rheumatologists have concluded from clinical experience that salicylates may also exert a therapeutically signicant anti-inflammatory effect in rheumatoid arthritis, but there is little published evidence to support or deny this postulate. The answer to this question is of obvious importance for the clinical management of patients with rheumatoid arthritis.
>
> * * * * * * *
>
> This study was therefore designed to answer the question, "Do salicylates have a clinically significant anti-inflammatory effect in the treatment of rheumatoid arthritis?" [CX 2 A; footnotes omitted.]
>
> * * * * * * *
>
> To date, twelve patients with active rheumatoid disease have been studied on a metabolic ward. * * *
>
> Periods of intensive therapy with oral acetylsalicylic acid (ASA), five or more days in duration, were alternated with approximately equal periods of salicylate withdrawal. * * * During salicylate withdrawal, an attempt was made to provide equal or greater analgesia by giving large doses of [other analgesics] * * *; thus it was hoped that any differences between salicylate and nonsalicylate periods would not be attributable to the analgesic properties of ASA [acetylsalicylic acid]. [CX 2 A.]

* * * * * * *

Figure 2 shows [for one patient] the effects of salicylate withdrawal and resumption on the range of motion of the wrists, on grip strength, and on the volume of the middle finger of each hand. In each instance, an obvious change denoting increased inflammation followed quite promptly the sudden withdrawal of ASA, with a somewhat more gradual recovery following its readministration. [CX 2 B.]

* * * * * * *

* * * 11 of the 12 subjects have shown objective evidence of exacerbation after salicylate withdrawal by at least one of the criteria used. The results obtained by each criterion in all 12 studies are presented in Fig. 6. * * * The criteria of ring size, range of motion, and grip strength show a fairly consistent trend of exacerbation after salicylate withdrawal and of remission following resumption of therapy. * * * [CX 2 B.]

* * * * * * *

Acetylsalicylic acid has been shown to exert an objectively demonstrable anti-inflammatory effect when given in large regular doses to patients with active rheumatoid disease. This anti-inflammatory action of ASA seems to be of greater therapeutic significance in the treatment of rheumatoid arthritis and related diseases than its concurrent analgesic effect.

Therefore it is recommended that all patients with active rheumatoid arthritis, whether mild or severe, receive salicylates regularly in the largest tolerated dosage (in the absence of obvious contraindications such as peptic ulcer and allergic reactions). This is at variance with the usual practice of administering ASA as merely an analgesic drug to be taken as needed, and requires considerable attention to educating the patient to the merits of salicylates. This recommendation is not to be taken to imply that other drugs are not of equal or greater importance in the treatment of rheumatoid arthritis, but rather, that such drugs (*e.g.*, antimalarials, gold salts) should be used in addition to, rather than instead of, regular salicylate therapy. [CX 2C–D.]

* * * * * * *

Studies in 12 patients with early active rheumatoid disease demonstrated a clinically significant anti-inflammatory effect from the intensive administration of buffered acetylsalicylic acid (Bufferin), completely separate from its analgesic action. This effect was documented by objective evidence of increased rheumatoid inflammation induced by the abrupt withdrawal of salicylate therapy, despite the substitution of drugs of equal or greater analgesic potency, and by the prompt disappearance of this exacerbation upon the reinstitution of such treatment. [CX 2 D.]

V. "Permanent" Effects and "True Remission"

Paragraph Eight of the complaint attacks as false and misleading the representations contained in the second paragraph of the advertisement (CX 1), as follows:

Results of the tests showed that doctors using a particular treatment achieved true remission in 87% of the cases. The drug used was Bufferin®. Swelling and inflammation were reduced, joint movement increased, grip-strength improved.

A. *The Issues*

The issues here posed are:

(1) Whether the quoted statements and representations "have the capacity and tendency to suggest, and do suggest," that the JAMA report "concluded that the use of 'Bufferin' resulted in permanent or long-lasting beneficial effects upon arthritis with true remission in 87% of the cases, permanent or long-lasting reduction in swelling and inflammation, permanent or long-lasting improvement in grip-strength"; and if so,

(2) Whether the JAMA article reported that any benefits resulting from the use of Bufferin were "permanent or long-lasting";

(3) Whether (a) the JAMA article reported that "true remission" resulted in any of the cases, and (b) what meaning is properly attributed to the term "true remission."

B. *Summary Findings*

After reviewing the advertisement (CX 1) and the JAMA article (CX 2), as well as the testimony, the examiner makes the following summary findings:

1. Respondent obviously represented that "true remission" was achieved "in 87% of the cases."

2. The "true remission" representation is the only language relied on to support the allegation of a "suggestion" in the advertisement that, according to the report, the use of Bufferin resulted:

(a) in "permanent or long-lasting beneficial effects upon arthritis,"

(b) in "permanent or long-lasting reduction in swelling and inflammation," and

(c) in "permanent or long-lasting improvement in grip-strength."

No other language in the advertisement is open to such an interpretation.

3. The reliable, probative, and substantial evidence does not support a finding that the claim of "true remission" constitutes a representation or "suggestion" of "permanent or long-lasting beneficial effects upon arthritis" or upon swelling, inflammation, or grip-strength. Neither does it support a finding that the term "true remission" is likely to be so understood by readers of respondent's advertisement, nor a finding that it is likely to be understood by such readers as meaning "complete" or "absolute"

remission of a disease and all of its manifestations—in short, a cure.

4. Although the Government's expert medical witnesses initially testified in effect that they attributed such meaning to the term, their testimony as a whole, in the light of dictionary definitions, affords no valid basis for a finding that the public would so interpret the term. Even if their testimony were accepted at face value, it cannot be extrapolated into an inference that the lay public—or even any substantial segment of the medical profession—would so interpret the term. On this record, neither of the Government's witnesses was qualified to testify to what the term would mean to his patients or to the public generally. Their interpretations of the term "true remission" are contrary to accepted usage as reported in dictionaries, both general and medical.

5. There is no other evidence to support the suggestion, explicit and implicit, that in medical literature or among specialists in the field of arthritis, the term "true remission" is synonomous with "complete remission," "absolute remission," or "cure," and thus signifies that all evidence of the disease and of its symptoms has gone away.

6. Even if the evidence were to support a finding that the meaning attributed to "true remission" by the Government and its witnesses prevailed in medical circles or among arthritis specialists, this would be no indication of such an understanding among members of the lay public in general or among readers of the Bufferin advertisement in particular.

7. In any event, the claim in the advertisement regarding the achievement of "true remission" is a valid translation of the results reported in the JAMA article. The advertisement reflects the purport of the JAMA article to the effect that the study it describes demonstrated that Bufferin does exercise a genuine anti-inflammatory action, separate and distinct from its analgesic effect, and thereby actually produces a "true" remission of such symptoms as stiffness, swelling, impaired grip-strength, and limited mobility, rather than merely giving a false appearance of doing so through analgesia. Despite the rejection by the Government's medical witnesses of the term "true remission" for this purpose, their testimony emerges, in the last analysis, as virtual vindication of the use of that term in the advertisement.

C. *"Permanent or Long-Lasting" Effects*

Examination of the JAMA report (CX 2 A–D) demonstrates

that, as stated in respondent's advertisement (CX 1), "Swelling and inflammation were reduced, joint movement increased, grip-strength improved." The article reports:

> * * * 11 of the 12 subjects have shown objective evidence of exacerbation after salicylate withdrawal by at least one of the criteria used. * * * The criteria of ring size [swelling], range of motion, and grip strength show[ed] a fairly consistent trend of exacerbation after salicylate withdrawal and of remission following resumption of [salicylate] therapy. * * * (CX 2 B, col. 2.)
>
> * * * * * * *
>
> Acetylsalicylic acid has been shown to exert an objectively demonstrable anti-inflammatory effect when given in large regular doses to patients with active rheumatoid disease. This anti-inflammatory action of ASA [acetylsalicylic acid] seems to be of greater therapeutic significance in the treatment of rheumatoid arthritis and related diseases than its concurrent analgesic effect. (CX 2 C–D.)

Respondent's advertisement makes no claim of "permanent or long-lasting" effects unless this is "suggested" by the "true remission" representation. Complaint counsel have pointed to no other basis for the allegation regarding "permanent or long-lasting" effects (CPF 9–10), except to suggest belatedly in oral argument that there was "no language of limitation on the claims" —no disclosure in the advertisement that the symptoms that underwent remission returned when the administration of Bufferin was stopped so that the specific beneficial effects continued only while Bufferin was being administered. (Tr. 754–57.) This contention is rejected. It is doubtful that it is properly in issue. Paragraph Eight contains no charge of deceptive failure to reveal such limitations.

At any rate, in stating that "Swelling and inflammation were reduced, joint movement increased, grip-strength improved," the advertisement does no more than reflect the test results reported in the JAMA article—results that, according to the article, could be expected to stem from the proper administration of salicylates such as Bufferin.

Aside from the possible impact of the "true remission" claim, the Bufferin advertisement does not make *any* representation regarding the duration of the beneficial effects reported. Standing alone, the description in the advertisement of the specific results reported in the JAMA article, lacks the capacity or tendency to suggest that the reduction in swelling and inflammation, the increase in joint movement, and the improvement in grip-strength were either permanent or long-lasting. Unless the term "true remission" were found to be deceptive, the failure of the advertise-

ment to point out specifically that the beneficial results were noted during the administration of Bufferin, can hardly support the allegation that these effects were misrepresented to be "permanent or long-lasting."

In any event, the JAMA article does not report any conclusion that the beneficial effects described would not continue for as long as the "particular treatment" was maintained. As a matter of fact, the implications are that they would continue; the JAMA article recommends a change in arthritis therapy so that patients might realize the beneficial effects that the authors say would result from the administration of salicylates. In its conclusions, the report states:

> Therefore it is recommended that all patients with active rheumatoid arthritis, whether mild or severe, receive salicylates regularly in the largest tolerated dosage * * *. This is at variance with the usual practice of administering ASA [acetylsalicylic acid] as merely an analgesic drug to be taken as needed * * *. * * * [O]ther drugs * * * should be used in addition to, rather than instead of, regular salicylate therapy. (CX 2 D.)

Thus, with the possible exception of the insertion of the word "true" before the word "remission," the advertisement neither states nor implies more than the JAMA report contains on the subject. Moreover, the use in the advertisement of the word "remission" (connoting diminution rather than total elimination, and temporariness rather than permanence; *infra,* pp. 800–802) tends to negate the meanings alleged in the complaint.

D. *"True Remission"*

It is apparent, therefore, that the crucial issue is the meaning to be attached to the term "true remission." This is the purport of the testimony of the Government's witnesses, Dr. Calkins and Dr. Lamont-Havers, and this is the thrust of complaint counsel's Tenth Proposed Finding (CPF 9–10; but see Tr. 754–57; *supra,* p. 798).

The term "true remission" must be considered in two aspects: (1) Its probable meaning to readers of the advertisement and (2) its validity as a shorthand summary, in lay language, of the JAMA report. Within the framework of the complaint, and also under the Government's apparent theory of the case, the second aspect is the primary issue.

As presented, the Government's case was essentially designed to prove that the JAMA article does not report the achievement of "true remission." Only secondarily, if at all, was an effort made to prove *public* understanding of the term. Government

counsel asked their medical experts only what "true remission meant to them as arthritis specialists, not what it meant to their patients or to arthritis sufferers or to any other segment of the public.

The only basis for the present claim regarding public understanding, other than complaint counsel's speculation (Tr. 764–65), is the opinion volunteered by Dr. Lamont-Havers, during cross-examination, indicating that arthritis patients would interpret "true remission" as he did. (Tr. 285; CPF 19; CB 3–4; but see Tr. 308–09, *infra,* pp. 809–810.)

Whatever the Government's theory may be, complaint counsel attempt to dispose of this troublesome question with a sweeping generalization:

> It takes no legerdemain to reach the facts encompassed in this [tenth] proposed finding. The language is clear, and unmistakably the thrust is that the JAMA report concluded that Bufferin produced permanent or long-lasting benefits for the patients in the study. (CPF 10.)

Complaint counsel's position represents a gross over-simplification. In support of this sweeping conclusory statement, they cite a few pages of transcript (Tr. 402, 283–85, and 267), ignoring the qualifications and inconsistencies disclosed by the searching cross-examination conducted by respondent's counsel. The record citations are far from complete, and the net effect of the testimony is far different from the impression created by the brief excerpts relied on by complaint counsel.

In assessing, in the light of the JAMA report, the validity of the term "true remission," as used in the advertisement, we begin with the undisputed proposition that the JAMA article reported that the apparent effect of aspirin upon such symptoms as swelling, mobility, and grip-strength—in short, upon inflammation itself—was a true action and not merely a false appearance of such effect occasioned by analgesia. (CX 2 A–D.)

The temporary abatement or lessening of such symptoms is accurately described as a remission, not only according to medical dictionaries, but also according to general dictionaries as well. And, as conceded by Dr. Calkins, dictionaries "are written to express accepted usage." (Tr. 370–71.) Let us sample the dictionary definitions, some of which were brought to the attention of the Government witnesses in the course of their cross-examination.

1. *Definitions of "Remission"*

First, some general dictionaries:

Funk & Wagnalls New Standard Dictionary of the English Language, Funk & Wagnalls (1963).

> remission * * * *Med.* Temporary diminution of a disease; as, *remission* of a fever. * * * (RPF 21.)

The New Century Dictionary of the English Language, Vol. II Appleton-Century-Crofts, Inc. (1959).

> remission * * * a temporary decrease or subsidence as of the violence of a disease or of pain. * * * (RPF 21.)

The Oxford English Dictionary, Vol. VIII, p. 429 The Clarendon Press (1933).

> Remission * * * *Path.* A decrease or subsidence (esp. a temporary one) in the violence of a disease or pain. * * * (RPF 21.)

Webster's New International Dictionary of the English Language, Second Edition, Unabridged (1947).

> remission * * * 6. *Med.* A temporary and incomplete subsidence of the force or violence of a disease or of pain.

Webster's New World Dictionary of the American Language, College Edition, The World Publishing Company (1960).

> remission * * * a temporary lessening of a disease or of pain * * *. (RPF 21.)

Webster's Third New International Dictionary of the English Language, Unabridged, Vol. II, G. & C. Merriam Company (1966).

> remission * * * a temporary abatement of the symptoms of a disease * * *. (RPF 21.)

Next, some medical dictionaries:

Blakiston's New Gould Medical Dictionary (2nd Ed.) McGraw-Hill Book Company, Inc. (1956).

> remission * * * 1. abatement or subsidence of the symptoms of disease * * *. (RPF 21.)

Dorland's Illustrated Medical Dictionary (24th Ed.) W. B. Saunders Company (1965).

> remission * * * A diminution or abatement of the symptoms of a disease * * *. (RPF 21.)

Stedman's Medical Dictionary (21st Ed.) The Williams & Wilkins Company (1966).

> remission * * * A lessening in severity; a temporary abatement of the symptoms of a disease. (RPF 20.)

Several court decisions have recognized that the word "remission" means "a diminution or abatement of the symptoms of a disease" or the absence of the symptoms of illness; *Dougherty* v. *Waterman Steamship Corp.,* 265 F. 2d 284, 286 (3rd Cir. 1959); *In re Meyers,* 410 Pa. 455, 189 A. 2d 852, 862 (1963); *Vanden Heuvel* v. *Vanden Heuvel,* 254 Iowa 1391, 121 N.W. 2d 216, 222 (1963). (The *Vanden Heuvel* opinion added, however, that the term "in remission" was often used by the profession instead of "cured.") The U.S. District Court for the District of Columbia has emphasized the temporary and partial nature of "remission" (*In re Rosenfield,* 157 F. Supp. 18, 22 (D.D.C. 1957): "The term 'remission' at best means a temporary recovery, perhaps a temporary, partial recovery.").

It is significant that the JAMA article expressly uses the word "remission" in reporting that finger-joint size (or swelling), range of joint motion, and grip-strength showed "a fairly consistent trend of exacerbation after salicylate withdrawal and of remission following resumption of [salicylate] therapy." (CX 2 B, col. 2.) Thus, respondent's use of the word "remission" in the advertisement accords with its use in the report.

In the last analysis, therefore, the crux of this issue is the propriety of respondent's use in the advertisement of the word "true" to modify the word "remission." The term "true remission" was not used in the JAMA report.

A review of the dictionary definitions of the word "true" demonstrates that its use as an adjective to modify the word "remission" is semantically valid to denote the actuality of the remissive effect upon certain arthritic manifestations, as distinguished from an illusory appearance of such a remissive effect. (Orahovats 535; and note the frequent use by Dr. Calkins of "true" in this sense (Tr. 365, 367, 373–74, 414; compare Tr. 368); see also Lamont-Havers 309–10.)

2. *Definitions of "True"*

Again, let us review some dictionary definitions:

Funk & Wagnalls New Standard Dictionary of the English Language, Funk & Wagnalls, New York.

> true * * * 1. Faithful to fact or reality; conformable to the actual state of things; not false or erroneous; as, a *true* judgment or proposition. * * * 2. Faithful to appearances; conformable to what it seems or claims to be; genuine, not counterfeit; as, a *true* specimen; *true* gold. * * * (RPF 23.)

The New Century Dictionary of the English Language, Vol. II, Appleton-Century-Crofts, Inc. (1959).

> true * * * being in accordance with the actual state of things (as, a *true* story); conforming to fact; not false; * * * (RPF 23.)

The Oxford English Dictionary, Vol. XI, pp. 417, 418. The Clarendon Press (1933).

> True * * * 3. Of a statement or belief: Consistent with fact; agreeing with the reality; representing the thing as it is. * * * 5. Real, genuine; rightly answering to the description; properly so called; not counterfeit, spurious, or imaginary; * * * b. In scientific use: Conformable to the type, or to the accepted idea or character of the genus, class, or kind; properly or strictly so called. * * *" (RPF 22.)

Webster's Third New International Dictionary of the English Language, Unabridged, Vol. II, G. & C. Merriam Company (1966).

> true * * * not false or perfidious * * * conformable to fact: in accordance with the actual state of affairs: not false or erroneous: not inaccuate. * * * (RPF 23.)

Webster's New International Dictionary of the English Language, Second Edition, Unabridged, G. & C. Merriam Company (1961).

> true * * * 3. To be relied upon; certain; as, a *true* indication. 4. Conformable to fact; in accordance with the actual state of things; correct: not false, erroneous, inaccurate, or the like; * * * 7. Properly so called; ideally or typically such; not counterfeit or adulterated; genuine; as, *true* balsam; a *true* Christian; *true* justice. * * * (RPF 23.)

Webster's New World Dictionary of the American Language, College Edition, The World Publishing Company (1960).

> true * * * 2. reliable; certain: as, a *true* indication. 3. in accordance with fact; that agrees with reality; not false. * * * (RPF 23.)

The Winston Simplified Dictionary, Comprehensive Edition (1937).

> true * * * adj. 1. in accord with fact or reality; not false; * * * 3. genuine; being what it seems to be; * * *

Medical dictionaries are in accord:

Blakiston's New Gould Medical Dictionary (2nd Ed.) McGraw Hill Book Company, Inc. (1956).

> true * * * Real; not false. (RPF 22.)

Dorland's Illustrated Medical Dictionary (24th Ed.) W. B. Saunders Company (1965).

true * * * Actually existing; not false; real; meeting all the criteria establishing its identity. (RPF 22.)

It is worth noting, moreover, that in immediate conjunction with the advertising claim that the use of Bufferin had produced "true remission" in most of the cases involved in the study, the meaning was defined and elaborated: "Swelling and inflammation were reduced, joint movement increased, grip-strength improved." (CX 1.)

Thus, in the context of the advertisement, the usual and natural meaning of the term "true remission" emerges as a temporary lessening, abatement, diminution, or subsidence of specified symptoms—a "remission" that was actual, real, genuine, and authentic. A "true remission" was thereby distinguished from an apparent but false remission occasioned by analgesia. And this was the nature of the results and conclusions reported in the JAMA article.

3. *Conclusions as to Meaning of "True Remission"*

However, the Government witnesses testified that to them, "true remission" has a meaning different from the meaning that results from combining the applicable definitions of "true" and "remission." In general, these witnesses took the position that "true remission" means a "complete remission"—a complete elimination of all symptoms—a subsidence of the disease—a return of the patient to a normal state—a going away of the disease—a "cure." (See, for example, Lamont-Havers 266–67, 283; Calkins 344, 347–53, 362–63, 369, 400–03.)

In arriving at a definition for "true remission" that conflicts with the meaning resulting from combining the meaning generally ascribed to each word separately, the Government witnesses have substituted for "true" the word "complete" and for "remission" the word "cure." But neither in common parlance nor in medical usage, as reflected by medical dictionaries, are these acceptable equivalents. "True" is a qualitative term, "complete" a quantitative term. "Remission" described gradation and temporariness; "cure" denotes totality and finality of results.

Furthermore, the record shows that Dr. Lamont Havers' definition was a personalized rationalization and that Dr. Calkins' definition was also highly personalized, if not unique.

Thus, to find that respondent's use of the term "true remission" has the capacity and tendency to deceive would require us to twist the ordinary meaning of words into one of special import to two witnesses and of marked variance from common usage. However impressive their qualifications and however expert they

may be in the field of arthritis, Dr. Lamont-Havers and Dr. Calkins cannot provide the sole standard for judging the truth or falsity of the advertisement in issue here. See *Panat Jewelry Co., Inc.*, D. 8660 (Final Order, Feb. 8, 1967) [71 F.T.C. 99], in which the Commission held that the uncontradicted testimony of two experts regarding the proper definition of "perfume" did not afford a substantial basis for establishing an industry standard or for finding deceptive misuse of the term by respondent.

Contrary to the position taken by the Commission and the courts in numerous cases, complaint counsel scoff at dictionary definitions as a basis for determining the interpretation of language by the lay public. (CB 5; see CCH Trade Reg. Rep. Par. 7539.15.) But nowhere in the evidence or in their submittals do complaint counsel establish any reasonable basis for accepting as an indication of public understanding the technical definitions espoused by Dr. Lamont-Havers and by Dr. Calkins. (Compare Calkins 370–71.)

Dictionaries are the indispensable tools we use for hacking our way through the semantic jungle of lay understanding of medical terminology. But Government counsel complain that respondent's counsel "attempted to discredit Dr. Lamont-Havers' definition by offering a number of detailed and technical dictionary definitions of the two words." (CB 4.) Counsel fail, however, to explain the vice in "detailed" definitions or to make clear what is "technical" about them. Complaint counsel also state in their brief:

> The failure of this effort is evident on the record. Upon careful analysis it becomes clear that the Doctor's definition of the term is more than adequately supported by the thrust and intent of the proffered quotations from dictionaries, even though his definition may not employ precisely the same words. (CB 4.)

However, complaint counsel neglected to furnish the careful analysis to support this contention, and retreated from it in the course of oral argument. (Tr. 759–60, 763–64, 768.) The examiner fails to recognize any consistency between Dr. Lamont-Havers' initial definition of the term "true remission" and the dictionary definitions of its constituent words. (Compare Tr. 266–67 with Tr. 309–10.)

Obviously, "words mean what people understand them to mean, and dictionaries are only one source * * * (*Benton Announcements, Inc.* v. *F.T.C.* 130 F. 2d 254, 255 (2nd Cir. 1942)), but it is certainly the general rule to look to the lexicographer for definitions of words—such definitions being based upon the use which the public has given particular words. (*James S. Kirk & Co.* v.

F.T.C., 59 F. 2d 179, 181 (7th Cir. 1932), *cert. denied*, 287 U.S. 663.) The examiner recognizes, as did the Court, in the *Kirk* case, that "there are many words whose meanings, once correctly and definitely defined, have subsequently through usage acquired different or additional meanings * * *." But such a change in usage of the crucial words involved in this proceeding has not been established. At most, this record presents only the testimony of two eminent doctors in the field of arthritis research to the effect that their personal reaction to the term "true remission" is contrary to the meaning arrived at by combining the dictionary definitions of the two words constituting the term. There is no acceptable showing that the personal reaction of these two witnesses represents a change in usage of the pertinent words, either among the general public or within the medical profession.

The evidence does not bring this case within the principle under which advertising representations may be held to be deceptive even though the constituent words may be literally or technically construed so as not to constitute a misrepresentation. (Compare *Kalwajtys* v. *F.T.C.*, 237 F. 2d 654 (7th Cir. 1956), *cert. denied*, 352 U.S. 1025 (1957).) At any rate, this principle must be coupled with the further principle that "Words mean what they are intended and understood to mean." (*Bennett* v. *F.T.C.*, 200 F. 2d 362, 363 (D.C. Cir. 1952).) And see *DeForest's Training* v. *F.T.C.*, 134 F. 2d 819, 821 (7th Cir. 1943) to the effect that statements made in advertising "must be taken with and accepted in their ordinary sense."

This is the unusual case in which the questioned advertising representation must be "carefully dissected with a dictionary at hand" in order to determine the "ultimate impression upon the mind of the reader" because the testimony adduced by the Government is not competent for that purpose. (Compare *Aronberg* v. *F.T.C.*, 132 F. 2d 165, 167 (7th Cir. 1943).) Moreover, the primary issue here is the validity of the advertising language used for a summary translation of a scientific article. (See Tr. 345–46; CB 1.)

The position of Government counsel seems to be that, because of the eminence of Dr. Lamont-Havers and Dr. Calkins in the field of arthritis research, their personal reaction to the term "true remission" and their opinions of its meaning "to them" are sufficient to convict respondent of deceptive misuse of the term. The Government frankly stands on the "*ipse dixit*" of Dr. Lamont-Havers in which he equated (at least in reading CX 1) "true remission" to "complete remission." (See Tr. 296, 753–54, 757–59, 763, 768.)

Oral argument also exposed the tenuous basis for the claim that the doctor-witnesses were qualified to report on the understanding their patients had of "true remission." (Tr. 753–54, 759, 763–64.)

The absence of any real foundation for the Government's case is demonstrated by the objection, in oral argument, that the "professional sound" of "true remission" would suggest to laymen that Bufferin offered something "more than simple, temporary relief of minor aches and pains." (Tr. 764–65.) But that is exactly what the advertisement claimed, and that is exactly what the JAMA article reported. And the JAMA article was chosen by the Government as the touchstone for testing the advertisement.

In that connection, it is ironic that in a proceeding that challenges the distortion of a scientific article, Government counsel themselves have mischaracterized the purport of the same article by suggesting that the beneficial results reported were no more than "fleeting episodes of minor improvement" and were only of a "transitory nature." (CPF 9–10, 11.) Even a casual reading of the JAMA article makes clear that these terms constitute a misdescription of the article. The Government's principal witness, Dr. Lamont-Havers, not only recognized that the JAMA report was of considerable significance—although not of "major" significance—in the field of arthritis research but also virtually confirmed its conclusions. (Tr. 282, 303–04.) Nevertheless, the Government's dissatisfaction seems to be directed to the conclusions of the JAMA report, not just to the Bufferin advertisement. The Government, it seems, is now disenchanted with the touchstone it selected. The Government might have challenged the advertisement for misrepresentation generally, rather than just misrepresentation of the JAMA report, but this it did not do.

To summarize: the examiner cannot interpolate into the advertisement words or meanings that are not there and then find the respondent guilty of misrepresentation because the JAMA article does not accord with the revised representations.

The words "permanent" and "long-lasting" are the words of the complaint, not the words of respondent's advertisement. And the terms "complete remission," "absolute remission," and "cure" are the words of the Government witnesses, not those of the advertisement.

The words "true" and "remission" are words of common understanding, and the common acceptation of the combination of these

words carries no denotation or connotation of permanency, long-lasting effects, or cure. Respondent must be presumed to have used the term in its ordinary and common accepted meaning, and this presumption has not been overcome by the testimony adduced. (See *supra*, pp. 804–806.)

Disregarding as unfounded the interpolation of the complaint's words, "permanent" and "long-lasting," and discounting the *ispe dixit* of each of the Government's witnesses, the examiner finds no misrepresentation.

4. *Evaluation of Testimony*

Because of the importance of the question presented, and in view of the earnestness of Government counsel and their witnesses, let us explore further the basis for the Government's somewhat remarkable stance on this issue, even at the risk of unduly extending this initial decision.

Dr. Lamont-Havers was asked this question on direct examination by Government counsel:

> As a physician who has spent many years working with arthritis patients and in the field of arthritis generally, what does the term "true remission" mean to you as it is used here [in CX 1], Doctor? (Tr. 266.)

After some preliminary explanation, the witness answered:

> So, therefore, a true remission to me would mean a complete remission, an absolute remission in which case it would imply that the patient had indeed gone into a state in which all evidence of the disease had receded and that they were now in a relatively normal state. (Tr. 266–67; but see Tr. 268, 309–10, *infra*, p. 810.)

Despite the preamble to the question ("As a physician," etc.) both the question and the answer emphasize the personal, individualized character of the understanding expressed by Dr. Lamont-Havers. His testimony indicates a process of subjective rationalization by which he arrived at the interpretation he expressed (Tr. 266–67; see also Tr. 283), thus demonstrating that he had no accepted, external body of usage or authority to refer to for such definition but had to construct it for himself. Moreover, in equating "true remission" to "complete remission" (Tr. 267), Dr. Lamont-Havers cautiously but belatedly limited the applicability of his equation to the "context * * * of this sentence" in the advertisement (Tr. 268).

After explaining that "a remission of a disease usually means a subsidence of signs and symptoms or a return of the patient to * * * a more normal state," he pointed out that "The adjective 'true' is usually not applied to a remission except maybe in a col-

loquial fashion, in which case it is more likely to be in the same context as complete * * * because if something is a true remission, something else obviously must be a false remission or a [pseudo] remission." (Tr. 266–67.)

Dr. Lamont-Havers had difficulty rationalizing what a true remission is and would find it even more difficult trying to rationalize what a false remission is. He indicated that he did not know what a false remission would be—that "if the patient has remitted [he has] remitted. It isn't either false or true. * * * It is either complete or not complete." (Tr. 283.)

The doctor testified: "A remission can be a complete remission or a partial remission or any way in between so * * * it is necesary to modify remission and so therefore a true remission, *if you are substituting true* [*for*] *complete* [has] great meaning * * *." (Tr. 284–85; emphasis added.)

According to Dr. Lamont-Havers, the "remission" described in the JAMA report did not constitute a "complete remission" or a "true remission." (Tr. 305–06.)

In giving his definition of "complete remission" or "true remission," Dr. Lamont-Havers had in mind certain criteria for "complete remission," as set forth in Hollander's work on *Arthritis and Allied Conditions,* but these criteria do not refer to "true remission." (Tr. 310–12.)

Based on his equation of "true remission" to "complete remission," Dr. Lamont-Havers was of the view that the term would indicate the remission was one of substantial duration. (Tr. 267.)

Dr. Lamont-Havers was not testifying as an expert in lexicography or in advertising or from the viewpoint of an arthritic patient but as a physician specializing in the field of arthritis. (Tr. 308, 625–26.)

Nevertheless, in urging a finding that "To a patient suffering from rheumatoid arthritis the advertisement's * * * claim for 'true remission in 87% of the cases' would mean 'complete remission,' " complaint counsel say that this is supported by the "uncontroverted testimony" of Dr. Lamont-Havers. (CPF. 19; Tr. 283–85.)

It is true that Dr. Lamont-Havers undertook, on cross-examination, to ascribe to patients the same understanding he had:

> Well, surprisingly enough, it is my opinion that—having seen many, many patients with rheumatoid arthritis that they know very well what a remission is, and whether it is complete or partial. So that I would say that this would be their interpretation. (Tr. 285.)

A reading of the testimony preceding this statement leaves uncer-

tain just what "would be their interpretation." But assuming it was "true remission" that he meant, further cross-examination demonstrated that he could not have had any communications with patients on this particular subject because he himself "never used the term 'true remission.'" He could not recall any instance in which he inquired of a patient what was meant or understood by the words "true remission." (Tr. 308–09.)

This testimony serves to distinguish the instant case from *Charles of the Ritz Dist. Corp.* v. *F.T.C.*, 143 F. 2d 676 (2nd Cir. 1944), which is relied on by counsel supporting the complaint to support their contention that Dr. Lamont-Havers' testimony evidences how respondent's advertisement would be interpreted by patients. But in the *Ritz* case, the expert witness had discussed the word in question with his patients, and his and their interpretation coincided with dictionary definitions.

As stated by respondent, the testimony of Dr. Lamont-Havers "does not constitute substantial, reliable and probative evidence as to the meaning of a term, which he had never used, to people with whom he had never discussed it." (RPF 27.) Accordingly, the examiner rejects the Twenty-Fourth Proposed Finding of Government counsel.

Dr. Lamont-Havers conceded that his interpretation of the term did not accord with the ordinary meaning of its constituent words. When faced with dictionary definition such as those quoted *supra*, he admitted that he could find no meaning ascribed to the word "true" that would accord with his definition of "complete" or of "long duration." (Tr. 297, 299, 301, 302.) He agreed with definitions of the word "true" that accord with the sense respondent claims for its use in the challenged advertisement—that is, "to be relied upon; certain; as, a true indication"; "real, not false." (Tr. 295–302.)

Similarly, Dr. Lamont–Havers agreed with a medical dictionary definition of "remission" as a "lessening in severity; a temporary abatement of the symptoms of a disease." (Tr. 309.) Then, on the basis of his embrace of a definition of "true" as "meeting all the criteria establishing its identity" (Tr. 306), he was asked, "Then would not a true remission be one which meets those standards of identity?" to which he answered: "A true remission could be so-considered." (Tr. 309–10.)

The direct examination of Dr. Calkins, like that of Dr. Lamont-Havers, was limited to his opinion as an arthritis specialist. Concerning "true remission" as a term of art in the medical profession, he was asked whether it properly or accurately reflected the

use of the word "remission" in the JAMA article. He believed that it did not. (Tr. 338–40, 345–46.) When he was asked for his opinion of the meaning of "true remission," it is obvious that he gave a definition based on the criteria for "complete remission." (Tr. 344; compare Tr. 310–11 in the light of Tr. 347–48, 350, 377–79, 413.) This answer is consistent with his personal equation of "true remission" to "complete remission." (Tr. 347; but see Tr. 350–51.)

Dr. Calkins' viewpoint is epitomized in his "personal reaction to the advertisement" (CB 5): " 'My glory be, this is not right, because it said'—they gave the drug—'that it produced a true remission—they are claiming it is a cure.' " (Tr. 402.) And, of course, there is no known "cure" for arthritis. (Calkins 402–03, 412.)

It is significant, however, that when Dr. Calkins was asked whether the use of "true remission" in the advertisement would have deceived him, his answer was that he would have been misled by the "before and after" drawings—albeit on a basis not challenged by the complaint. (Tr. 433–45; see Tr. 375–77.)

On cross-examination, Dr. Calkins ultimately admitted, after some equivocation, that he could cite no "accepted medical dictionary which defines the phrase 'true remission' in any manner different from the definition at which one would arrive by combining the word 'true' in its ordinary meaning with the word 'remission' in its ordinary meaning." (Tr. 369–71.) In the course of his answer Dr. Calkins twice commented that "Dictionaries are written to express accepted usage." (Tr. 370–71.) However, after indicating that the medical profession had been attempting to define "true remission," he said: "* * * I wouldn't expect to find the definition of true remission in the dictionary, and I haven't read a dictionary to find it." (Tr. 371.)

Dr. Calkins indicated that the phrase "true remission" was one of common usage and understanding among scientists in the field of rheumatology. (See, for example, Tr. 344, 347–51, 353–54, 401.) He said that he would expect to find scientific consideration of the term "true remission" in scientific treatises or papers on the subject. (Tr. 372, 377–79.) He agreed to furnish by mail to the parties and to the examiner references to and copies of writings that manifested such scientific understanding of the term. (Tr. 381–82.) However, although he produced writings concerning the terms "remission" and "complete remission," he utterly failed to produce any evidence respecting the term "true remission." (Tr. 719–23.) This confirms that "true remission" is not a

term of art in the medical profession. (See Lamont-Havers 266, 283, 309.)

As a matter of fact, the record indicates that in the scientific community, and particularly in the field of rheumatology, the term used to convey the idea of total remission is "complete remission," not "true remission." (Tr. 310–12, 377–79.) "Complete remission" appears to constitute a correct and normal use of words to express such a quantitative concept and is readily distinguishable from "true remission."

The admitted use of the term "complete remission" to describe total suppression of the "signs of rheumatoid activity," etc. (Tr. 311), tends to substantiate the accuracy of the dictionary definitions of the term "remission" and to contradict Dr. Lamont-Havers' suggestion and Dr. Calkins' insistence that the unqualified word "remission" means total suppression of the evidence of active arthritic disease. If "remission" alone means more than a degree of temporary abatement, why would precise scientists need to add the redundant adjective "complete" to describe the absolute result?

Even if it could be found that rheumatologists agreed on the definition of "true remission" contended for by the Government and its witnesses, this would be irrelevant and nonprobative respecting the understanding of the lay public to whom the advertisement is directed. To that public, such specialized meaning is unknown, according to the unrebutted evidence of every dictionary the examiner has consulted, whether general or medical.

Not only were there inconsistencies between the definitions of "true remission" advanced by Dr. Lamont-Havers and Dr. Calkins but also contradictions within their individual testimony.

The Government witnesses entertained conflicting views on the fundamental matter of the meaning of "remission" when standing alone, unmodified by "true." To Dr. Lamont-Havers, "A remission can be a complete remission or a partial remission or any way in between so that * * * it is necessary to modify remission * * *." (Tr. 284; see Tr. 309; compare Tr. 266.) To Dr. Calkins, however, "remission * * * means the disease has gone away." (Tr. 348, 351, 401, 409.) Although Dr. Calkins recognized that the manifestations of a disease may show a remission and that the JAMA article used the term in that sense (Tr. 402–03), he insisted that remission means "a true subsidence of the disease" (Tr. 402) and that it may not properly be used to refer to "the suppression of symptoms" (Tr. 403; but see Tr. 410).

Dr. Calkins would not agree with Dr. Lamont-Havers that the

word "true" in the phrase "true remission" is synonymous with "complete." He referred to a "slight difference," but his answer indicated a wide variance between the meanings of "complete" and "true" (Tr. 350–51), as indeed there is.

In Dr. Calkins' lexicon, therefore, there is no difference between "remission" and "true remission." If his testimony on this subject were considered in a vacuum and thus given full credence, it would necessarily follow that respondent could not properly use even the single word "remission" in describing the JAMA report. In the final analysis, Dr. Calkins' objection to respondent's use of the term "true remission" arises from his objection to the word "remission" rather than the addition of the adjective "true." (The analogy that he drew between "death" and "true death" at Tr. 372–74 is revealing.)

But on this record, that result is untenable since the JAMA report itself uses the word "remission" to describe the effects of renewed Bufferin administration after withdrawal. Whereas to complaint counsel and to Dr. Lamont-Havers, respondent erred in applying the word "true" to the word "remission," to Dr. Calkins, the vice lies in respondent's adoption from the report of the word "remission." In short, the thrust of his entire testimony—despite some inconsistencies—rests on his belief that, contrary to all the dictionaries—and contrary also to Dr. Lamont-Havers—"remission" is the absolute and total elimination of a disease (loosely, a "cure"), rather than a gradation or temporary abatement of symptoms.

The positions taken by Dr. Lamont-Havers and Dr. Calkins undoubtedly stemmed in part from their reservations concerning the report itself, even though Dr. Lamont-Havers was inclined to accept its basic conclusion (Tr. 282, 303–04). These Government witnesses critically suggested that the researchers had studied the effects of salicylate administration only upon an artificially induced or artificially exaggerated exacerbation of arthritic symptoms. (Lamont-Havers 290–94; Calkins 341–44, 352–56, 405–08, 412–14; and see the question of Government counsel at Tr. 416 to which objection was sustained.) And Dr. Lamont-Havers, although apparently convinced that the report's conclusion is correct, feels, nevertheless, that it is not yet "actually proven." (Tr. 303, 282.)

The doctors not only objected to the language in the advertisement but also questioned the language in the JAMA report. It is fairly clear that they thought the *authors*—not just the Bufferin copywriters—had misused the word "remission." (Lamont-Havers 291–93; Calkins 363, 403, 411, 413–14.) Dr. Lamont-

Havers thought the JAMA report should have said that Bufferin was "controlling . . . the inflammatory response" instead of reporting a "remission." (Tr. 291–93.)

Dr. Calkins acknowledged that he had trouble dislodging from his mind (1) the distinction between (a) what *he felt* the authors of the JAMA article may actually have proved and (b) what *they believed* they had proved; and (2) the distinction between (a) *his* opinion concerning the soundness of the research techniques and conclusions of the researchers and (b) the *researchers'* actual opinion as expressed in the article. He ultimately agreed, however, that he could keep these distinctions in mind. (Tr. 354–57.)

The quarrel that these witnesses may have with the report or its terminology or its conclusions is not relevant to the issues raised by this complaint. The scientific validity of the JAMA study is not the question before us. Regardless of the doubts expressed by the Government witnesses, there is really no doubt that the JAMA article presents the results of the study as being applicable to typical conditions of arthritis. This is emphasized by the fact that, based upon their reported study, the authors recommend changes in the clinical handling of arthritis patients. (CX 2 D, col. 1; and see the quoted excerpts, *supra,* pp. 794, 795.) Moreover, despite their reservations and their semantic difficulties, Dr. Lamont-Havers and Dr. Calkins ultimately agreed, perforce, that the purport of the report was substantially as represented in the advertisement. (Lamont-Havers 293–94, 309–10; Calkins 352, 354, 359–74, 403, 415–16.)

Lest the validity of the last statement be doubted, it is worth tracing the manner in which Dr. Calkins finally agreed in effect that the JAMA report had indicated that "true remission" resulted from the use of Bufferin in the circumstances described. Accepting *arguendo* that the word "remission" may be applied to symptoms or manifestations of the disease, Dr. Calkins stated: "And that is what the authors say, the symptoms and manifestations produced by stopping the Bufferin * * * were put into remission by resuming the Bufferin." (Tr. 352.)

In the context of his entire testimony, this reflects a recognition by Dr. Calkins (despite his ambivalence regarding the word "true") that the authors viewed their study as demonstrating that Bufferin produced a true remission of inflammation, swelling, etc., as distinguished from mere analgesia. Ultimately, Dr. Calkins explicitly recognized this. He testified that the JAMA report was presented by the authors as evidence to suggest that Bufferin had a true anti–inflammatory action, not merely an analgesic action,

on the underlying condition of rheumatoid arthritis, not merely on the artificially-induced exacerbation. (Tr. 414.)

In the course of this discussion, Dr. Calkins made it clear that his basic difficulty, as indicated previously, was with the breadth of the conclusions drawn by the authors. In Dr. Calkins' opinion, "the underlying condition" on which Bufferin acted "was the artificially-induced exacerbation, the withdrawal phenomenon, following withdrawal of the Bufferin * * *." It was "that withdrawal phenomenon [that] went away when the Bufferin was restored." Thus, he concluded: "That, you might say, was a true remission of that peculiar disease—drug-withdrawal disease." (Tr. 414.)

Nevertheless, Dr. Calkins did agree in effect that the "true remission of that * * * drug–withdrawal disease" was viewed by the authors of the report as evidence of what the same drug could be expected to do for active rheumatoid arthritis. (Tr. 414–16.) Dr. Calkins conceded that on the basis of the observation by the authors of the "remission" of certain arthritis symptoms when salicylate medication was resumed after a period of temporary withdrawal, they concluded that the drug would have a significant clinical anti-inflammatory action on rheumatoid arthritis itself. (Tr. 415–16.) However, he still adhered to his view that the JAMA article does not justify the advertising claim that the use of Bufferin produced "true remission." (Tr. 417.)

Anomalous though it may be, the net effect of Dr. Calkins' testimony emerges as a grudging concession that the JAMA report does conclude, as claimed in the challenged advertising, that Bufferin produced a true remission in the cases studied. The fact that Dr. Calkins disputes the validity of this conclusion because (1) he uses the term "remission" in a different sense, and because (2) he believes that the remission reported was not a typical arthritic manifestations but of symptoms that had been artificially induced, is irrelevant to the issues in this case. The issue here is the accuracy with which the respondent in its advertising has described the JAMA article—not the scientific validity of the study or of its interpretation by the authors.

Finally, as we have already observed (*supra,* p. 810), Dr. Lamont-Havers also tended to vindicate the "true remission" term when he ultimately conceded that a "true remission" could be simply a temporary abatement of the symptoms of a disease. (Tr. 309–10; see also Tr. 293–94.)

Thus, the examiner rejects complaint counsel's Eleventh Proposed Finding (CPF 10–11). The examiner also rejects the sug-

gestion of counsel supporting the complaint that an inference adverse to respondent should be drawn because respondent did not call as defense witnesses the authors of the JAMA article. (CB 11.) Actually, in view of all the circumstances, and considering that the burden of proof rests on the Government, the examiner is inclined to agree with respondent that the failure of the authors to appear and protest the alleged distortion of their article might well give rise to an inference adverse to the Government. (RRB 6–9.)

Although one may wonder why such informative testimony was not adduced, the resolution of the issue need not turn on a balancing of the adverse inferences that might be drawn from failure to call witnesses equally available to both parties.

E. *Percentage of Cases Showing Remission*

One other question remains to be considered concerning "true remission." In their brief and in oral argument, complaint counsel attacked the figure of 87 percent in the "true remission" claim, but agreed that the arithmetic accuracy was not specifically in issue (CB 6, Tr. 756, 765, 815–16)—a concession reinforced by the absence of any proposed finding on the point.

Although Paragraph Eight of the complaint specifically cites the representation of "true remission in 87% of the cases," it challenges that claim by alleging that there was no case of true remission; it does not otherwise question the percentage figure. (See also CPF 10–12.)

Respondent's counsel admitted that the 87 percent figure was erroneous but explained that it was an understatement rather than an overstatement. He said that the correct figure should have been 91½ percent, since beneficial results from the administration of Bufferin were reported in 11 out of 12 cases. (Tr. 773.)

Although the percentage figure might properly be subject to challenge, its accuracy is not the real issue posed by the complaint, and the examiner's disposition of the basic question concerning the "true remission" representation makes largely academic the percentage claim. The examiner, therefore, makes no finding respecting it.

If the Commission should conclude differently, the examiner would simply observe that there is a colorable basis for the figure, inasmuch as the JAMA report considers the changes in symptomology of 11 of the 12 subjects (91½ percent) as evidence of Bufferin's remissive effects on inflammation.

F. *Summary Conclusion*

Considering the record as a whole, it was not misleading or deceptive for respondent to use the term "true remission" to describe the conclusion reported in the JAMA article that Bufferin had been found capable of producing an actual or real or "true" remission of inflammation, swelling, joint immobility, and impaired grip-strength rather than mere analgesia resulting in a false or illusory appearance of such remission. There is no other substantial basis for the allegations in Paragraph Eight of the complaint to the effect that the advertisement misrepresented the report as concluding that the use of Bufferin resulted in permanent or long-lasting beneficial effects upon arthritis.

The allegations of Paragraph Eight of the complaint must be dismissed for failure of proof.

VI. Failure to Reveal the Use of Other Medications

In Paragraph Nine of the complaint respondent's advertisement (CX 1) is challenged for suggesting that Bufferin was the only drug used in the JAMA study, and the advertisement is alleged to be "misleading in a material respect" because of failure "to reveal the material fact that some of the patients who were subjects of the study receive, in addition to the drug preparation 'Bufferin,' one or more other medications commonly employed in the treatment of arthritis, together with other therapeutic measures such as physiotherapy, exercise and rest."

The advertisement does have the capacity and tendency to suggest, and does suggest, that Bufferin was the only drug used in the study. The advertisement describes the research as "a special study, made under doctors' care," with the doctors "using a particular treatment," and identifies Bufferin as *the* "salicylate chosen" and *the* "drug used." No mention of other medication or therapy is made or even implied.

The report (CX 2 A–D) discloses that other medication was administered to the 12 patients involved in the study. Three patients were given steroids ("physiologic" doses only); five, hydroxychloroquine sulfate; and six, gold sodium thiomalate—some being given more than one drug. Also, other analgesics were substituted when Bufferin was withdrawn. (CX 2 A, col. 2.)

After describing the administration and withdrawal and renewed administration of Bufferin, as well as the substitution of other analgesics during salicylate withdrawal "to provide equal or greater analgesia" (CX 2 A, col. 2), the report states:

All other drug therapy was kept constant throughout the study period. An attempt was also made to keep activity, rest, physiotherapy, etc., constant for each patient, but this proved impossible in some instances. (CX 2 B, col. 1.)

Moreover, in describing the results in the case of one patient, the report states: "He had received steroid therapy previously, but had been gradually weaned to a 'maintenance' dosage of hydrocortisone * * *, which was continued throughout the study." (CX 2 B, col. 1.)

Referring to the increase in symptoms during the period of salicylate withdrawal, the report states: "Maintaining the same degree of exercise, physiotherapy, etc., as during the ASA [acetylsalicylic acid] periods was often impossible * * *." (CX 2 C, col. 2.)

In recommending, in its conclusions, that sufferers from rheumatoid arthritis receive salicylates regularly in the largest tolerated doses for their anti-inflammatory effect, and not merely for analgesic purposes, the report states:

* * * This recommendation is not to be taken to imply that other drugs are not of equal or greater importance in the treatment of rheumatoid arthritis, but rather, that such drugs * * * should be used in addition to, rather than instead of, regular salicylate therapy. (CX 2 D, cols. 1 and 2.)

Thus, although it is true that the advertisement is open to the interpretation, contrary to fact, that Bufferin was the only drug used in the study, the question arises whether failure to reveal the use of other medications and treatments constitutes a material misrepresentation.

In view of the fact that Paragraph Nine of the complaint does not charge respondent with misrepresenting the therapeutic efficacy of Bufferin, the examiner finds that no material misrepresentation was made. The study referred to in the advertisement was designed to test, and did test, the anti-inflammatory effects of Bufferin. It was not designed to test the effects of the other medications and measures used. Bufferin, and Bufferin alone, was used to achieve the therapeutic results reported in the JAMA article and in the advertisement. The report specifically states that all other aspects of the regimen were kept as constant as possible as controls during the study, that is, during the periods of Bufferin withdrawal and Bufferin administration. The results reported in the JAMA report and in the advertisement were attributed to the use of Bufferin, not to the use of the other medications and measures employed. The test was of Bufferin as an adjunct to other medications and measures. To that extent,

Bufferin was the only drug used as a subject for study and testing.

The complaint does not raise a question concerning the validity of the JAMA study or of the results and conclusions set forth therein, nor does it challenge in any respect material here the therapeutic efficacy of Bufferin as reported in the JAMA article and in respondent's advertisement. In this setting, the examiner cannot find that respondent is guilty of a failure to disclose facts of such significance as to constitute a material misrepresentation. The facts omitted from the advertisement were of a background nature only. The other medications and measures involved in the study were used as "controls." And within the framework of the JAMA report, they were not of such significance to the results or to the conclusions as to require respondent to disclose such use in its advertisement summarizing the study.

The failure to make such a disclosure in the advertisement does not distort or otherwise do violence to the conclusion set forth in the report that "acetylsalicylic acid has been shown to exert an objectively demonstrable anti-inflammatory effect when given in large regular doses to patients with active rheumatoid disease" (CX 2 C, col. 2) or to the summary statement that "studies in 12 patients with early active rheumatoid disease demonstrated a clinically significant anti-inflammatory effect from the intensive administration of buffered acetylsalicylic acid (Bufferin), completely separate from its analgesic action." (CX 2 D, col. 2.)

In the opinion of the examiner, the nondisclosure in the advertisement of the use in the study of other medications and measures, is not misleading in a material respect, and the advertisement does not constitute false advertising. The allegations of Paragraph Nine are dismissed.

VII. "Before and After" Drawings

Paragraph Ten of the complaint must be dismissed because of a fatal deficiency in both pleading and proof. The first allegation is that the statements, representations, and "before and after" drawings of photographs in the advertisement have the capacity and tendency to suggest, and do suggest, that according to the JAMA report, the "before and after" photographs "depict results of the study and demonstrate that 'Bufferin' achieved beneficial results." However, the complaint does not attack these "suggestions" head-on. Instead of alleging that the photographs do *not* depict results of the study and do *not* demonstrate that Bufferin achieved beneficial results, the second allegation, in charging false and mis-

leading advertising, merely states that, according to the JAMA report, "before and after" photographs "were relatively insensitive and usually showed no unequivocal change." (Complaint, Par. Ten.)

Both of the factual allegations of Paragraph Ten are literally true, but so are the "suggestions" that the photographs depict results of the study and demonstrate that Bufferin achieved beneficial results.[1] There is neither allegation nor proof that such "suggestions" are false and misleading.

The advertisement contains two panels depicting the hand of a patient "Before medical treatment" and "72 hours after medical treatment." A line over the depictions describes them as "Drawings based on actual photographs showing the most dramatic results achieved in a group of arthritis patients."

Although, as alleged in Paragraph Ten, the JAMA report does state as a generalization that "serial photographs proved relatively insensitive, and usually showed no unequivocal change" (CX 2 B–C), the fact is that the JAMA article contains nearly a full page of "before and after" photographs of the hands of one patient and the text of the report describes them as follows:

> * * * These photographs document the fairly obvious nature of the exacerbation induced in this subject by withholding ASA; this exacerbation was most marked in the proximal interphalangeal joints of the left hand and of the right middle finger, but by no means confined to these joints. * * *
> The increase of disease activity precipitated by ASA withdrawal was more marked in this instance than in any of the other patients studied to date * * *. (CX 2 B, col. 2.)

At another point in the JAMA report, reference is made to "serial comparative photographs (Polaroid) of selected involved joints" (CX 2 B, col. 1) as among the "relatively objective methods of assessing disease activity" (CX 2 A, col. 2).

Thus, the JAMA report confirms the "suggestion" in the advertisement that the "before and after" photographs *do* depict results of the study and *do* demonstrate that Bufferin achieved beneficial results. Although *other* "before and after" photographs were "relatively insensitive, and usually showed no unequivocal change," the published photographs, according to the report, showed "fairly obvious" exacerbation resulting from Bufferin withdrawal, and this was "more marked" in the case pictured than in any other patient.

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[1] Brief reference may be made to the testimony of Dr. Calkins in which he objected to the legends that identified the drawings in the advertisement (Tr. 345). Since Dr. Calkins' objections raised an issue not embraced within the allegations of the complaint, this testimony must be disregarded. (See Tr. 375–77, 807–08.)

Thus, to say, as does the advertisement, that the photographs show "the most dramatic results achieved" is not false and misleading.

There is no suggestion in either pleading or proof that the drawings are not based on actual photographs or that they misrepresent in any way the results depicted. Although complaint counsel, in oral argument, suggested that respondent had misrepresented such pictures as being typical for all the patients in the test (Tr. 805–11), this was neither alleged nor established by the evidence.

As far as the "before and after" pictures and drawings are concerned, the advertisement does no more than accurately describe the use of the photographs in the JAMA report to illustrate the results achieved by the use of Bufferin in the case depicted. Therefore, the allegations of Paragraph Ten are dismissed.

VIII. Dosage and Saftey

Paragraph Eleven of the complaint alleges that the statements and representations contained in respondent's advertisement "have the capacity and tendency to suggest, and do suggest * * * that the results described and referred to in the report were accomplished safely by use of the drug 'Bufferin' administered in accordance with the dosage directions specified in the labeling thereof." The complaint does not identify the "statements and representations" that allegedly so suggest, and instead of directly alleging that such a "suggestion" is false, the complaint attacks it obliquely. It says that "In the light of such statements and representations," the advertisement is misleading in a material respect and therefore constitutes a false advertisement because it fails to reveal certain material facts, listed as follows:

(1) That according to the published report, Bufferin was administered to most of the patients in doses exceeding the maximum daily dosage set forth in its labeling, and

(2) That Bufferin in the dosages actually administered not only caused stomach upset (as reflected by nausea) but also produced other typical side-effects of aspirin such as tinnitus (ringing, buzzing, roaring, or clicking sounds in the ears), deafness, and perspiration.

Paragraph Eleven also brands the advertisement as misleading in a material respect and therefore false because it fails to reveal the additional material fact that the report expressly states that "peptic ulcer and allergic reactions" are "obvious contraindications" to the use of Bufferin.

According to complaint counsel, "The only reasonable assumption the reader could make from reading the advertisement" is that the results described in the JAMA report "were accomplished safely by use of the drug 'Bufferin' administered in accordance with the dosage directions specified in the 'Bufferin' labeling." Complaint counsel do not—they cannot—claim any affirmative representation to that effect, but rely on "what was *not* said in the advertisement rather than what was stated there." (CPF 14–15.) Perhaps this accounts for the oblique attack. But it raises a question as to the identity of the statements and representations "[i]n the light of" which nondisclosure of dosage levels is allegedly misleading in a material respect. No other basis for the challenged "suggestion" regarding dosage is found in this record.

In any event, the facts regarding dosage, side–effects, and contraindications are simple enough:

The maximum daily dosage of Bufferin set forth in the labeling of the product (CX 5) calls for two tablets, each containing five grains of aspirin, six times daily, or a total of 60 grains of aspirin per day.

According to the JAMA report, the maximum dosages of Bufferin administered to the patients in the study ranged from 55.5 grains to 115.74 grains in 24 hours, with an average dosage of 80.2 grains. (These figures were arrived at by converting to grains the dosages in grams, as set forth in the JAMA report, on the basis that one gram equals 15.432 grains, a formula which was the subject of official notice by the hearing examiner (Tr. 14).) The report states that Bufferin "was given in increasing dosage around the clock * * * until the largest tolerated dose was reached * * *." The figures cited above as the maximum dosages are referred to in the report as "the final dose." (CX 2 A, col. 2.)

Side–effects resulting from the administration of Bufferin are referred to in the JAMA report as follows:

> * * * In most cases dosage increase was stopped because of tinnitus or deafness. * * *
>
> * * * [T]ypical side–effects of tinnitus, deafness, perspiration, or nausea were obvious to both patient and observer whenever ASA [Bufferin] was given in full dosage. (CX 2 A, col. 2.)

In the case of one subject, the report states: "The dosage of acetylsalicylic acid was gradually increased to 6.0 gm/day [92.6 grains], which resulted in mild nausea (controlled by belladonna) * * * ." (CX 2 B, col. 1.)

In its conclusions, the JAMA report recommends "that all patients with active rheumatoid arthritis, whether mild or severe, receive salicylates regularly in the largest tolerated dosage (in the absence of obvious contraindications such as peptic ulcer and allergic reactions)." (CX 2 D, col. 1.)

In the examiner's opinion, it cannot reasonably be found that the absence of information concerning the Bufferin dosage administered to produce the results described in the JAMA report and in the advertisement gives rise to a representation that the dosage was that directed in the Bufferin labeling. Conceivably, perhaps, some readers might jump to such a conclusion. But the whole tenor of the advertisement is such as to negate the reasonableness of any such conclusion. (See *Heinz W. Kirchner*, D. 8538 (Nov. 7, 1963) [63 F.T.C. 1282].) The advertisement emphasizes that this was "a special study, made under doctors' care" and that the results reported were achieved by "doctors using a particular treatment." The advertisement counsels the reader: "If you have arthritis you should be under a doctor's care, even in the early stages." Its concluding sentence contains the preamble: "If your doctor prescribes Bufferin."

In this context, the examiner cannot find that respondent has represented that the beneficial effects described in the JAMA report and in the advertisement may be achieved by self-medication in the dosages directed in the Bufferin labeling. Instead of suggesting that the results were accomplished by the use of Bufferin so administered, the advertisement clearly suggests that the dosage and the mode of administration were under doctors' supervision. (Compare *F.T.C.* v. *Sterling Drug, Inc.*, 317 F. 2d 669, 675 (2nd Cir. 1963.)

Additional inconsistencies and deficiencies are encountered in connection with the "safety" issue raised by Paragraph Eleven.

If it were to be found, as alleged, that the advertisement "suggests" that the reported results were accomplished safely by the use of Bufferin administered in accordance with the dosage directions in the labeling, it would not be unreasonable to find the advertisement misleading because of failure to reveal the higher dosages actually administered. But it is a *non sequitur* to say that such an advertisement is misleading because it fails to reveal that the greater dosages caused certain side-effects and are contraindicated in certain conditions. Nevertheless, the thrust of the complaint and the proposed order (Pars. I–E and I–F) would require respondent to disclose not only the dosages used in the study but also the fact that such dosages caused certain side-

effects and are contraindicated in cases of peptic ulcer or allergic reaction.

The complaint affords no proper basis for such an order. In both pleading and proof, the allegations of Paragraph Eleven regarding safety and contraindications are deficient. Neither the complaint nor the evidence adduced establishes that it was a material misrepresentation for respondent to fail to reveal in its advertisement the side-effects experienced by patients in the study.

What Paragraph Eleven challenges is the "suggestion" allegedly made in the advertisement that the results reported in the JAMA article "were accomplished safely" by the use of Bufferin in the dosages prescribed in the labeling. But there is no corresponding allegation that the use of Bufferin, either in that dosage or in the dosages actually administered in the study, is unsafe. Neither the side-effects nor the contraindicated conditions are alleged to be dangerous. Yet the proposed order (Par. I–F) would prohibit any advertisement that misrepresents the results of the study "with respect to safety."

Even if this pleading deficiency were overlooked, the finding must be that neither the text of the JAMA report nor any other evidence adduced establishes that the results described in the report and in the advertisement were accomplished other than "safely." Although the report says that certain side-effects were encountered in the course of a pilot test, the dosages administered in the study were "tolerated" dosages.

Moreover, there is no evidence in the JAMA report or otherwise in the record that any of the side-effects referred to were dangerous or unsafe. The JAMA report affords no basis for an inference that the use of Buffrin in the manner described involved hazardous procedures.

A similar finding must be made respecting the allegation of deceptive failure to reveal that the report states that peptic ulcer and allergic reactions are obvious contraindications to the use of Bufferin. There is neither allegation nor proof that the advertisement represented that, according to the JAMA report or otherwise, Bufferin may be freely used in all circumstances or particularly in the presence of peptic ulcer or allergic reactions.

It is important to take note here of the provisions of Section 15(a)(1) of the Federal Trade Commission Act which defines "false advertisement" to mean an advertisement which is misleading in a material respect and provides further that:

* * * in determining whether any advertisement is misleading, there shall be taken into account (among other things) not only representations made

or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual.

Here, there has been no showing of any representations in the light of which the affirmative disclosure of the side-effects and of the contraindications is made material or any showing, or even any argument to support, much less to require, a finding that such nondisclosure was materially misleading.

Applying the statutory test of facts "material with respect to consequences which may result from the use of the commodity . . . under the conditions prescribed" in the advertisement, the examiner has previously noted that the "conditions prescribed" in the advertisement are "under doctors' care," and in circumstances where Bufferin is prescribed by a doctor. (See CX 1; see also *supra*, pp. 822–823.)

Without exploring all the complications involved in the legal requirements for affirmative disclosure in the advertising of drug products, suffice it to say that the examiner understands that affirmative disclosure of dangers, side-effects, or contraindications is not required in the advertising of drugs sold over the counter except under certain circumstances that have not been shown to exist here.

For many years, the Commission's policy regarding advertisements of drugs and related products that are alleged to be false because of failure to reveal facts material with respect to the consequences that may result from the use of the commodity, seems to have been to proceed only when the resulting danger was serious or the public health was impaired. (See CCH Trade Reg. Rep., ¶7549.351.) No such showing has been made in this record.

Neither in the course of hearing nor in their posthearing submittals have counsel supporting the complaint furnished the examiner with facts or arguments constituting a valid basis to support the allegations of Paragraph Eleven of the complaint or those portions of the proposed order (Pars. I–E and I–F) that would require respondent, in any future advertisement concerning the JAMA report, (1) to reveal the Bufferin dosages administered to the subjects of the study; (2) to reveal that such dosages caused specified side-effects; and (3) to reveal that, according to the report, peptic ulcer and allergic reactions are obvious contra-

indications to the use of Bufferin.

Complaint counsel have cited no cases, and the examiner has found none, in which advertisers of aspirin have been required to disclose affirmatively the possible side-effects of its use or the fact that its use is contraindicated in the presence of peptic ulcer or allergic reaction. The Bufferin labeling in evidence (CX 5) contains no such affirmative disclosures, and this record affords no basis for requiring them in advertising.

Furthermore, to require respondent to specify the dosage of Bufferin used to obtain the results reported in the JAMA article and in the advertisement, would unnecessarily create numerous practical and regulatory problems for respondent. It would subject respondent to charges of encouraging self-medication in dosages exceeding that prescribed in the labeling of the product. It would subject respondent to a requirement that it make affirmative disclosure of the side-effects and contraindications attendant upon such dosages.

On this record there is merit in respondent's contentions that "There is no discernible public interest to be served, or material misrepresentation which requires counteraction, by compelling an advertiser affirmatively to incorporate scare copy into an advertisement which can serve only to offset its calculated beneficial effect of persuading readers to seek medical attention for a disease which very much requires it." (RPF 43.)

For pleading deficiencies, for failure of proof, and for lack of public interest, the allegations of Paragraph Eleven are dismissed.

IX. Stomach Upset

The complaint alleges (Par. Six (1)) that respondent represented (not just "suggested") that, according to the JAMA report, Bufferin did not cause stomach upset to any of the patients participating in the clinical test or study described in the JAMA report. The basis for this allegation is a statement in the third and last paragraph of the advertisement that reads as follows:

> If you have arthritis you should be under a doctor's care, even in the early stages. If your doctor prescribes Bufferin, it's good to know you can take it without the stomach upset other drugs often cause. (CX 1.)

Since neither of the sentences in this paragraph makes any specific reference to the JAMA report, it is literally true, as respondent contends (RPF 15), that the advertisement does not attribute the stomach upset statement to the JAMA report. Only

the first two paragraphs of the advertisement clearly purport to describe what appeared in the JAMA report.

On this basis, respondent contends:

> It is clear that these are respondent's own declarations, and not purported quotations from or paraphrasings of the JAMA article. Nowhere in its advertisement does respondent claim that the JAMA report stated anything, one way or the other, on the subject of upset stomachs. (RPF 15–16.)

Contrariwise, complaint counsel contends that the assurance in the advertisement regarding stomach upset, when "taken in the full context of the advertisement, clearly represents and implies that patients participating in the study reported in the JAMA article did not experience stomach upset from taking Bufferin. The language taken in this light lends itself to no other interpretation." (CPF 6.)

The resolution of the issue concerning this representation is not as simple or as clear-cut as counsel suggest in these diametrically opposed contentions. On the one hand, there is no clear, direct representation that the study demonstrated that Bufferin did not cause "stomach upset." On the other hand, when this assurance regarding "stomach upset" is read in the context of the entire advertisement, under the headline: "Reported in The Journal of The American Medical Association," there is no doubt that it is open to the interpretation alleged.

Under well-established principles relating to the interpretation of ambiguous advertising and to the necessity to consider an advertisement in its entirety, the examiner finds that the "stomach upset" representation has the capacity and tendency to lead a substantial portion of the consuming public to believe that, according to the JAMA report, Bufferin did not cause stomach upset to any of the patients participating in the clinical study.

This implied representation is misleading and deceptive. In truth and in fact (as found in Section VIII of this decision), the text of the JAMA report shows that Bufferin did cause stomach upset to some patients. The report says that "typical side-effects," including nausea, "were obvious to both patient and observer whenever ASA was given in full dosage."[2] (CX 2 A, col. 2.) For one patient, "The dosage of acetylsalicylic acid was gradually increased to 6.0 gm/day, which resulted in mild

[2] In describing the methodology of the study, the report states: "Periods of intensive therapy with oral acetylsalicylic acid (ASA), five or more days in duration, were alternated with approximately equal periods of salicylate withdrawal. . . . During ASA periods, a buffered preparation (Bufferin) was given in increasing dosage around the clock . . . until the largest tolerated dose was reached. . . ." (CX 2 A, col. 2.)

nausea (controlled by belladonna) * * *." (CX 2 B, col. 1.) Finally, in recommending that all patients with active rheumatoid arthritis, whether mild or severe, receive salicylates regularly, the report specifies that this be "in the largest tolerated dosage." (CX 2 D, col. 1.)

These quoted excerpts thus demonstrate that the use of Bufferin in the clinical study did result in nausea, among other side-effects, when "given in full dosage." The fact that ultimately a level of toleration was achieved, does not vindicate the implied advertising claim that, according to the JAMA report, arthritis patients "can take it [Bufferin] without the stomach upset other drugs often cause."

By torturing the language of both the advertisement and the report respondent makes an ingenious but fallacious argument (RPF 16–17) that the JAMA article does, in fact, indicate that Bufferin did not cause stomach upset. The reasoning runs approximately as follows:

The advertising representation that arthritis sufferers can take Bufferin, if prescribed by their doctor, "without the stomach upset other drugs often cause," must be read within the context of other representations in the advertisement that the study was "made under doctors' care" and involved "doctors using a particular treatment." Assuming *arguendo* that the "without stomach upset" claim does relate to the JAMA report, then the representation is simply that when used "under doctors' care" as a part of "a particular treatment," Bufferin did not cause stomach upset.

Concerning the nausea and other side-effects that resulted "whenever ASA was given in full dosage," respondent points out that these results were observed in "a pilot study" preceding the actual clinical test and contends that the advertisement does not purport to describe this pilot study.

According to respondent, in the actual clinical test that the advertisement does refer to, a different design was employed—one that tested the patients by using "the largest tolerated dose" (CX 2 A, 2 D). This was the dosage regimen used in the "special study" referred to in the advertisement, and it was this dosage regimen that produced the benefits described in the advertisement. Thus, respondent argues that "The characterization of the BUFFERIN administration as 'tolerated' in the JAMA article does not support the complaint's allegations that it reported BUFFERIN had 'caused stomach upset to some patients.'" (RPF 16.)

Respondent further argues that, according to the JAMA report, "there was but a single incident . . . of 'mild nausea,' which was 'controlled by belladonna.'" Actually, the JAMA report does not clearly identify this incident as the lone instance of mild nausea; it is the only such instance specifically described, and it may or may not have been the only such instance observed. At any rate, since the situation was described, as "controlled," respondent argues that even this patient, according to the JAMA report, participated without stomach upset in the test while undergoing "a particular treatment" under "doctors' care."

The verbiage required to arrive at respondent's proposed conclusory finding that, according to the JAMA report, Bufferin did not cause stomach upset under the conditions described, is itself an answer to respondent's contention. There is logic in respondent's defensive analysis, but here, such logical analysis must be dismissed as "fine spun distinctions and arguments * * * made in excuse * * *." (*P. Lorillard Company* v. *F.T.C.*, 186 F. 2d 52, 58 (4th Cir. 1950).)

Although the examiner thus finds that the allegations of Paragraph Six(1) are substantiated by the evidence, it is his opinion that no order is required in connection with this single violation. (See Conclusions, *infra*, p. 848.)

X. Leadership in Arthritis Research

The only representation not directly connected with the JAMA report, or at least not tested for accuracy against its content, is the representation "Bufferin: A leader in arthritis research."

The complaint does allege that the representation regarding respondent's leadership was made "with reference to" the JAMA report (Par. Six (2)), and the Seventh Proposed Finding of complaint counsel (CPF 6) is to the same effect. Since there is neither allegation nor proof of any other use of the leadership representation, it is especially appropriate to take into account the context in which the claim is made. (RPF 47–48, 72; RRB 48.)

There is no doubt, of course, that respondent called itself a "leader in arthritis research," but a question does arise regarding the meaning of this terminology. The complaint (Par. Six (2)) alleges that the claim means respondent "is included within, or numbered among, the individuals, corporations, groups, or bodies eminent in, or prominently concerned with, the advancement of the state of medical and scientific knowledge of the disease known as arthritis," and complaint counsel propose a finding to that effect

(CPF 6). In support of that proposed finding, complaint counsel cite no testimony or other evidence; they merely quote the language of the advertisement and, by *ipse dixit,* proclaim "This clear, unmistakable language can lead the reader to no other conclusion than that expressed in the proposed finding." (CPF 7.)

Unfortunately, the resolution of this issue is not that simple. Although respondent, in its answer, admitted that it had used the signature line: "Bufferin: A leader in arthritis research," it denied the meaning attributed to this representation by the complaint. Thus, the burden of proof remains with complaint counsel to establish not simply that respondent fails to qualify under this definition but also that this definition accords with public understanding—that is, the understanding of the public in general, and perhaps, more particularly, those members of the public concerned with arthritis, either as victims of the disease or as relatives or friends of such sufferers.

Without directly saying so, complaint counsel rely entirely on inference to satisfy this burden of proof. They called no witnesses and offered no evidence regarding public understanding of the representation. However, contrary to respondent's contentions (RPF 45–47), this omission is not necessarily fatal. Although the meaning is not so inescapably conclusive as complaint counsel contend, the challenged leadership claim is of such a nature that the fact-finder may, without evidence, draw the inference that it has the capacity and tendency to lead a substantial segment of the public to interpret it as does the complaint. As far as Commission proceedings are concerned, the principle is firmly established that no sampling of public opinion is necessary to determine the meaning of advertising. (See cases collected in CCH Trade Reg. Rep., Par. 7536.05–7536.10.)

A. The Issue

The issue then is whether respondent is among those "eminent in, or prominently concerned with," the advancement of medical and scientific knowledge of arthritis.

Obviously (despite Government doubts that will be considered *infra*), respondent has been engaged in that kind of activity, and the only question for decision is whether respondent has been "eminent" in doing so or "prominently concerned with" such activity.

However, in inferring without proof that the public would understand the leadership representation in those terms, the fact-finder must take into account not only the context in which it

appears but also the reader's interests and mental attitudes that may affect his approach to, and thus his derivation of meaning from, the advertisement.

It is doubtless true, as respondent contends (RPF 47–48), that the readers of this advertisement constitute a specialized class, comprising primarily arthritics whose disease is active and is causing them discomforts such as those described in the advertisement. Their primary interest is to obtain competent treatment and relief. This is the very subject of the advertisement, and this constitutes, therefore, the controlling context in which the claim is made that respondent is a leader in arthritis research. (See Lamont-Havers 622, 626–28.)

With those considerations in mind, we consider whether respondent meets the qualifications of the leadership representation as it is interpreted by the complaint.

B. Analysis of the Evidence

Interestingly enough, the Government's case, as presented through its two medical experts, was not so much designed to prove that Bristol-Myers was not a leader but to show that whatever leadership it might claim was not in the field of arthritis research, as that field was narrowly defined. Although the evidence indicates that Bristol-Myers may very well be a leader in salicylate research, and although the record establishes that salicylate research bears an important relationship to arthritis research, the Government contends that Bristol-Meyers is not a leader in arthritis research. This is a distinction that requires further scrutiny.

The Government's case rests on the testimony of two doctors who are eminent in the field of arthritis research: Dr. Ronald William Lamont-Havers, Associate Director for Extramural Programs, National Institute of Arthritis and Metabolic Diseases, formerly Medical Director of the Arthritis Foundation, and Dr. Evan Calkins, Chairman, Department of Medicine, State University of New York at Buffalo, and President of the American Rheumatism Association. They testified that, in their opinions, respondent does not qualify as a "leader in arthritis research." They did not embrace the complaint's definition of this term—they were not asked to—but they did offer definitions of their own. (Lamont-Havers 258, 263; Calkins 331, 391–92, 403–04.)

Even though the definitions advanced by these doctors have some similarity to the complaint's definition, their concept of what it takes to be a "leader in arthritis research" establishes a

standard materially different from that alleged in the complaint. This was specifically recognized by complaint counsel and by Dr. Lamont-Havers. (Tr. 264–65; compare complaint counsel's Seventh and Ninth Proposed Findings with their Twenty-Second, CPF 6, 8, 18.)

Before examining the leadership concept espoused by the Government witnesses, it is desirable first to establish what is meant by "arthritis research"—the field of endeavor in which respondent claims to be a leader.

Government counsel propose a definition (CPF 17) that the examiner adopts with one modification:

> Arthritis research may be defined as the advancement of the state of medical and scientific knowledge by investigation into the nature, cause, prevention, treatment, [or] cure of the various arthritic diseases.

The modification is to make disjunctive the subjects of investigation by changing "and" to "or," as indicated by the brackets. Investigation into any one of these subjects may reasonably be viewed as part of arthritis research.

This definition is a refinement of the testimony of the two Government witnesses:

> *Dr. Lamont-Havers.*—[A]rthritis research would be all manners of investigation into the cause and treatment and understanding of the various arthritic diseases. (Tr. 258.)

> *Dr. Evan Calkins.*—The heart of the problem, in my view, is to learn more about the nature and cause of rheumatoid arthritis and on that basis to develop a prevention and cure, and any knowledge in any part of that would be a great advance. (Tr. 404.)

For testing leadership, however, both witnesses apply criteria that have the effect of excluding from "arthritis research" investigations relating to medications used in the treatment of arthritis. This is consistent with Dr. Calkins' omission of treatment from the "heart of the problem," but it is inconsistent with, if not a repudiation of, Dr. Lamont-Havers' inclusion in "arthritis research" of "*all manners* of investigation into the . . . treatment" of arthritic diseases (emphasis added). (Tr. 258.)

1. *Testimony of Dr. Calkins*

Turning now to the testimony regarding leadership in arthritis research, we find that in the questioning of Dr. Calkins, the emphasis was on the leadership "reputation" of Bristol-Myers "in the scientific medical community." (Tr. 335.) And Dr. Calkins' answer not only confirms his acknowledgment that

"leader" is "a subjective word" (Tr. 404), but also points up the fuzziness encountered in testing a representation like "leader." For when he was asked whether Bristol-Myers has any reputation in the scientific medical community for leadership in arthritis research, Dr. Calkins first said that he "wouldn't say that it did," but he quickly added: "I should say, more accurately, that I don't think of it as a leader in arthritis research. To say somebody might, that would be their view * * *." (Tr. 335.)

Pressed for his knowledge concerning the reputation of Bristol-Myers, he said his "feeling would be no." Finally, he stated that in conferences he has attended having to do with arthritis research, he has never heard Bristol-Myers mentioned. His own opinion "is that they are not leaders in arthritis research." He was not making any comments about respondent's honesty or the nature of its contribution, but he did not "feel they are leaders in arthritis research." Nor did he know of anyone connected with the company whom he considered eminent in or prominently identified with the subject. (Tr. 335–37; but see Tr. 386–88.)

Dr. Calkins had made no special effort to ascertain what Bristol-Myers had done or was doing in the field of arthritis research; all he was saying was that he was not aware of any "fundamental contributions * * * by Bristol-Myers that are parallel" to those he had attributed to leaders in the field. The extent of his effort was to "look at" an outline of some of the research carried on by Bristol-Myers. He did not pursue it "in depth." (Tr. 398–400.)

Further questioning made clear the basis on which Dr. Calkins excluded Bristol-Myers from his list of leaders in arthritis research. To qualify a researcher as a leader in arthritis research, in the opinion of Dr. Calkins, the research must involve getting to "the heart of the problem"—"to learn more about the nature and cause of rheumatoid arthritis and on that basis to develop a prevention and cure * * *." To be of leadership caliber, in Dr. Calkins' view, the research engaged in must be broadly based and not limited to some narrow segment of the problem. (Tr. 404, 391–92.)

Consistent with his "feeling" regarding leadership, Dr. Calkins knew of *no* pharmaceutical companies that he would include as leaders in arthritis research. Although he acknowledged the "important role" played by Merck and Schering in the development of corticosteroids, he would not say that they were leaders

in arthritis research. This was on the basis that their research was in steroid chemistry, with the fruits of their research having application to many other fields besides arthritis. Dr. Calkins explained his belief that a leader in arthritis research must be "involved in broad problems relating to arthritis," so that, in his view, a research team primarily interested in steroid chemistry is disqualified as a "leader in arthritis research" even though it develops a "by-product" that is "very important" to arthritis. (Tr. 334–35, 390–91; see also Tr. 331.)

Although he stated that he did not believe that leadership is lessened by participation in other fields but depends on the nature of the contribution to arthritis research, Dr. Calkins, somewhat inconsistently, would rule out areas of pharmaceutical investigation and development as arthritis research unless "they are undertaken in a broad context resulting in broad contributions to a knowledge of arthritis * * * ." (Tr. 391.)

Significantly, Dr. Calkins would not dismiss as "unimportant," research dealing with the effects of salicylate administration, but his opinion was that a contribution to the mode of administration or to the pattern of absorption or to the metabolism of salicylates would not constitute grounds for being leaders in arthritis research. The development of more effective and more tolerable forms of salicylates for use in arthritis therapy "would make some contribution," but it "does not get to the heart of the problem * * * ." And getting to the "heart of the problem" is one of the crucial criteria that Dr. Calkins uses in judging leadership in arthritis research. (Tr. 392.)

For our purposes, it is noteworthy that Dr. Calkins conceded that research very important to the field of arthritis can emanate from work originally done in other fields, so that the exclusion of particular people or organizations from the category of leaders in arthritis research does not necessarily mean that they are not doing research of considerable importance to the field of arthritis. (Tr. 397–98.)

On the question whether it is only "knowledge of arthritis that counts" or whether he would also include as being important to arthritis research the subject of treatment and medication of arthritis, Dr. Calkins replied that for leadership purposes, "what counts * * * is the broad pursuit of rheumatic disease * * * ." This "might include anti-rheumatic agents," but his answer indicates that research in that field alone is not sufficient for leadership. (Tr. 391–92.)

2. *Testimony of Dr. Lamont-Havers*

Like Dr. Calkins, Dr. Lamont-Havers also erected formidable barriers against entry into the leadership class. After defining arthritis research as "all manners of investigation into the cause and treatment and understanding of the various arthritic diseases" (Tr. 258), he gave his definition of leadership in that field: "To me, * * * a leader in arthritis research is one who is actively pushing forward the horizons of knowledge concerning arthritis." (Tr. 263.) But this does not require that the research produce "world-shaking advances." There have been few such advances, but people working in the field and slowly producing new knowledge may still be considered leaders, according to the witness. (Tr. 277–79.) An institution or an agency "which is merely supporting" research is not a leader. (Tr. 263.)

According to Dr. Lamont-Havers, leaders must publish their findings—"Leadership implies that those who are being led [know] what the leader is doing." Dr. Lamont-Havers' concept of leadership depends upon a public image—an "acceptance by one's peers." Envisioning "much more to leadership than doing the research," he stated that "One has to impress * * * or influence the thought of the community in which one is directing one's activities." (Tr. 279–81, 304.)

When asked to name those he considered "leaders," he listed more than a dozen "leading * * * research groups in arthritis"—a list from which respondent was omitted. All were universities or hospitals. (Tr. 258–61.) Like Dr. Calkins, Dr. Lamont-Havers has "never" considered any pharmaceutical manufacturers to be among such leaders, except possibly Merck for its development of the steroids, such as cortisone and hydrocortisone. Specifically, he does not consider Bufferin or Bristol-Myers to be such a leader. (Tr. 261–63.)

Dr. Lamont-Havers disclaimed knowledge of the amount of money spent by respondent for research. His knowledge regarding respondent was essentially limited to a list of publications, together with reprints of some of those publications, furnished to him by counsel supporting the complaint. (Tr. 274.)

Although he did not adopt the definition in the complaint—he was not asked to—he testified that in the framework of that definition, his opinion regarding the identity of the leaders in arthritis research would not be any different from that previously (Tr. 261–63.)

It was not until he was recalled as a rebuttal witness that Dr. Lamont-Havers fully articulated the basis of his exclusion of

respondent from the leaders in arthritis research. Let us consider next, then, the defense evidence and Dr. Lamont-Havers' testimony concerning it.

3. *Defense Evidence and Rebuttal Testimony*

After respondent, in defense, presented evidence concerning its research activities, including 39 published research reports (most of them authored by Bristol-Myers personnel), complaint counsel recalled Dr. Lamont-Havers to testify that this evidence did not alter his opinion concerning respondent's leadership status.

This evidence was in substance as follows:

Respondent Bristol-Myers has for many years maintained an active program of scientific research related to the improvement of medication for arthritis, as well as for other disorders. The fact that such research has been commercially motivated does not lessen its significance.

Respondent's research activities have been headed by Dr. George L. Wolcott, who was, during 1946–1959, successively, Associate Medical Director and Medical Director; and by Dr. Peter D. Orahovats, who has been, progressively, Medical Director, Vice President and Director of the Research and Development Division, and finally (at the time of hearing) Scientific Director of Bristol-Myers Products. (Tr. 427–29; RX 2 A–C; Tr. 469–78; RX 8 A–B.)

The Scientific Division of Bristol-Myers Products employs approximately 250 persons and engages in a broad spectrum of research and development, including research regarding analgesics, and anti-inflammatory agents, as well as the development of new drugs and the improvement of existing drugs related to arthritis and other diseases. (Orahovats 479–81.) Much of the research done by Bristol-Myers' Scientific Division has resulted in publications on subjects that are related to arthritis. (Orahovats 482–526, 545–68; RXs 9–38.)

Bristol-Myers is equipped to engage in the necessary chemical, pharmacological, and toxicological research but lacks clinical facilities and staff for tests involving patients. (Orahovats 527–28.)

In addition to its intramural research activities and in view of its lack of clinical facilities and staff, respondent has also worked with outside researchers in areas related to arthritis and has participated actively in the conception, generation, design, and

evaluation of such studies.[3] (Wolcott 437–50; Orahovats 527–41; RXs 3–7, 39–42; CX 2.) Such outside researchers were highly qualified. (Orahovats 529, 533; Lamont-Havers 259, 274–75; Calkins 386–87.)

Neither of the Government's medical witnesses undertook to disqualify respondent as a leader in arthritis research on grounds of inadequacy, incompetency, insufficiency, or unimportance of its research work. (Lamont-Havers 670, 259–60, 277–79, 587, 604, 607, 610, 649, 663, 666; Calkins 337, 391–92, 397–98; see also Lamont-Havers 648, 617–18, 639, 269–70, 282, 629, 631–33; compare CB 10, 18.) When viewed in the context of the whole record, the fact that respondent contracts with outside researchers for clinical studies does not have the "great significance" that complaint counsel claim for it—at least, not for the purpose they intend. (Compare CB 10, 18, with RB 48; see also CPF 8–9 and RPF 62–63, 72–73.) Similarly, the effort of complaint counsel to minimize the qualifications of Dr. Wolcott and Dr. Orahovats (CB 12–19), contributes little or nothing to the resolution of the issue before us. (Compare RPF 61.) On this record, their lack of expertise as practitioners in the specialty of arthritic diseases affords no basis for disqualifying respondent as a "leader in arthritis research."

Dr. Wolcott and Dr. Orahovats testified in effect that aside from some companies in the prescription drug field (like Merck and Geigy) they knew of no pharmaceutical company that has done anywhere near the extent and quality of work related to arthritis that Bristol-Myers has done. In the specific field of salicylates in connection with arthritis, neither knew of any company, either in the prescription drug field or in the proprietary drug field, that has done the nature and extent of the research work that has been performed by Bristol-Myers. (Wolcott 434–36, 454–56, 463–64; Orahovats 541–43.) Even if this testimony were to be discounted for possible bias on the part of these witnesses because of their relationship to respondent and for perhaps some infirmity in the factual foundation for their opinions (CB 12–14, 17–19), it nevertheless represents evidence that cannot be ignored of respondent's "eminence" or "prominence" among pharmaceutical companies in connection with arthritis-related research—in "the advancement of * * * medical and scientific knowledge of * * * arthritis." (Complaint, Par.

[3] Complaint counsel emphasize that the published reports do not credit Dr. Wolcott, Dr. Orahovats, or other Bristol-Myers personnel for their role in these studies. (CB 14, 17.) But this fact without more does not require, or even warrant, rejection of the sworn testimony regarding such participation.

Six (1).) Considering the burden of proof, the examiner finds that such testimony is not overcome by the vague, inclusive opinion-testimony of Dr. Lamont-Havers on substantially the same subject (Tr. 670–74).

In reviewing the research reports submitted by Bristol-Myers, Dr. Lamont-Havers did not see any studies that in his opinion would qualify as leaders in arthritis research either the individual researchers of Bristol-Myers. This did not negate or downgrade the research, but only its relationship to arthritis. (Tr. 670.)

Of the 39 published reports presented by respondent in substantiation of its leadership claim, Dr. Lamont-Havers recognized 6 as constituting arthritis research; identified 25 as related to arthritis research but not as constituing arthritis research; and qualifiedly dismissed 8 as unrelated.

All 6 of the studies that were conceded to represent arthritis research (RXs 5 A–D, 6 A–D, 39 A–N, 40 A–Z1, 41 A–V, 42 A–F; Tr. 595, 605, 669), plus the JAMA report (CX 2 A–D) to make 7 in that category, were by outside researchers, with varying degrees of financial support by Bristol-Myers and participation by Bristol-Myers personnel. (Wolcott 446–49, 458–60; Orahovats 530–41, 559–64; compare CB 14, 17, Lamont-Havers 618–19, 666–69, 583–84, 273–74.)

Some of the studies thus engaged in by respondent in collaboration with outside researchers were of sufficient scientific caliber to be supported, at least in part, by grants from the National Institutes of Health and from the National Institute of Arthritis and Metabolic Diseases, the U.S. Public Health Service, and the Arthritis and Rheumatism Foundation (CX 2 D; RXs 39 A–N, 41 A–V, 42 A–F). Before the National Institutes of Health (including its subdivisions) makes such a grant, the proposed study must be approved by a group of scientists from the academic community (Lamont-Havers 247–48).

The 25 research studies that were found to be "related to arthritis research" are listed below by exhibit number, with pertinent transcript references:

RX 3A–D—Lamont Havers 585–87; Wolcott 437–39, 441, 443–44, 457–58.
RX 4 A–D—Lamont-Havers 587–89; Wolcott 445, 458.
RXs 7 A–I, 10, 13, 16, 17, 20, 21, 26, 28—Lamont-Havers 592–96; Wolcott 450, 460; Orahovats 487, 491, 497–98, 546–47, 503, 508–10, 517, 550–52.
RXs 14 A–F, 15, 24, 25—Lamont-Havers 603–05, 664–66; Orahovats 499–500, 547–48, 501–02, 548, 513–15, 551–52.
RX 18—Lamont-Havers 601–11; Orahovats 504–05, 548–49.
RX 30—Lamont-Havers 611–13, 666; Orahovats 517.
RXs 29 A–D, 31, 32 A–W—Lamont-Havers 606; Orahovats 517, 552–55.
RX 38—Lamont-Havers 615–16; Orahovats 525–26, 558–59.

RXs 34, 35, 36 A–C, 37 A–B—Lamont-Havers 596–99, 659; Orahovats 521–22, 555–58, 566–67.

The 8 reports initially characterized as unrelated to arthritis research bear exhibit numbers as follows, accompanied by references to the testimony:

RXs 12, 19 A–B, 22—Lamont-Havers 599–602, 661–63; Orahovats 495, 546, 507, 549–51, 510–11.
RX 27—Lamont-Havers 602–03, 661–63; Orahovats 515–17, 552.
RXs 9 A–H—Lamont-Havers 608–09; Orahovats 482–86, 545–46.
RX 11—Lamont-Havers 616–17, 661–63; Orahovats 492–94.
RX 23—Lamont-Havers 606–08, 661–63; Orahovats 512.
RX 33—Lamont-Havers 614–15, 700–06; Orahovats 517–19, 555.

All but one of the exhibits dismissed by Dr. Lamont-Havers as unrelated to arthritis research involved research concerning the development of more effective but nonaddicting analgesics (RXs 9, 11, 12, 19, 22, 23, 27). Although, initially, Dr. Lamont-Havers testified that the development of such an analgesic was not "an important necessity" in arthritis, on cross-examination he acknowledged that the development of a new analgesic that did not produce undesirable side-effects could be classified as an important development for use in the treatment of arthritis. (Tr. 600–01, 607, 661–63.)

Of the 25 reports that he acknowledged to be related to arthritis research, Dr. Lamont-Havers described most of them as salicylate research rather than arthritis research.

His basic rationale for excluding salicylate research from the category of arthritis research, no matter how important to arthritis it might turn out to be, is that arthritis is but one of many diseases treated with salicylates. Unless the research is specifically oriented in the field of arthritis, and so shows on the face of the report, he does not rate it as arthritis research. (Tr. 604, 609–13, 634–35, 639–40, 648–49; see also Tr. 685–91, 704–05.)

Thus, even though he recognizes as "very important" the subject of analgesics in general and acetylsalicylic acid in particular, research in these fields is not arthritis research in his opinion. Since aspirin is used as a nonspecific type of therapy in arthritis in line with its use as nonspecific therapy in many other conditions, this would be "a peripheral type of thing" as far as arthritis research is concerned. (Tr. 587.)

On this basis, he excluded research on such subjects as the absorption, the metabolism, and the gastric tolerance of salicylates. Such research, he explained, is related to arthritis in the

same manner in which it is related to all of the other conditions for which aspirin is used for the relief of pain. (Tr. 585–86.)

For the most part, he found respondent's published research papers do not represent investigations into the cause, treatment, or understanding of any of the various arthritic diseases —except that "arthritis happens to be one of the many disease entities * * * treated by aspirin." (See, for example, Tr. 588, 593–97.)

Neither do the reports or articles, show, as a general rule, that they are specifically for arthritis treatment or clinical use or application to arthritic patients, nor do the reported results alter arthritis therapy. (For example, Tr. 588–89, 603.)

Dr. Lamont-Havers characterized research aimed at improving the use of salicylates as medication for human patients as "peripherally-related" to research in arthritis." (Tr. 269–70.)

The distinction so frequently and rigidly drawn by Dr. Lamont-Havers between salicylate research and arthritis research loses much of its force when considered in the light of his further testimony to the effect that:

1. "[R]esearch on salicylates, just because it is of value in many other diseases, would not decrease its value as far as the field of arthritis is concerned." (Tr. 649.)

2. There has been established a direct connection between the use of salicylates and arthritic diseases. (Tr. 653, 618.) "Salicylates are an extremely valuable part of therapy in most of the rheumatic diseases," and "research which would lead to a better understanding of how salicylates work would certainly be of interest to those in the rheumatic disease field" and would therefore be classified as arthritis research. (Tr. 269.)

3. There has been established a direct connection between the use of analgesic preparations and arthritis. (Tr. 654.)

4. There has been established a direct connection between anti-inflammatory drugs and arthritis. (Tr. 654.) The "basis of many of the arthritis diseases is an inflammatory process * * * which we know very little about. So anything which would try to unravel the mysteries of inflammation would be of interest" and "of importance in arthritis research." (Tr. 270, 282.)

5. Research devoted to an attempt to develop a more effective medication for treating arthritis is important to the field of arthritis. (Tr. 629.) The "ability of a drug to be more effectively administered to a patient would be of great interest to those having to treat patients with the drug." (Tr. 269–70.)

6. Research devoted to an attempt to develop medications

which can be used more safely or which can be better tolerated for treating arthritis bears an important relationship to the field of arthritis. (Tr. 629.)

7. The quest for an effective and safe anti-inflammatory agent for use in the rheumatic diseases has centered in recent years chiefly around salicylates and corticoids,[4] and this quest constitutes arthritis research. (Tr. 631.)

8. Investigation into the absorption of salicylates is related to their effectiveness as medications. (Tr. 633.)

9. Studies of the gastric tolerance of aspirin are also related to the subject matter of the usefulness and value of that drug as medication for arthritis. (Tr. 633–34.)

Regarding the significance of research establishing that salicylates exercise an actual anti-inflammatory effect in rheumatoid arthritis, Dr. Lamont-Havers testified:

> It has long been considered by [r]heumatologists that salicylates indeed did something more than just analgesia, that they did have an effect, either an anti-rheumatic or anti-inflammatory effect and while everybody felt this * * * it has been very difficult to prove that this is so. (Tr. 282; see Tr. 303.)

He agreed that research designed to prove or disprove that concept and to otherwise explore the effect of salicylates upon inflammation is of importance in arthritis research. He would not classify the JAMA report dealing with that subject as "of *major* significance in arthritis research," although he said, "It is of interest in that it, with other evidence . . . tended to confirm what most rheumatologists believed." Despite the JAMA report, his opinion is that the anti-inflammatory effect of salicylates has not yet been "actually proven." (Tr. 282, 303.) Nevertheless, in a somewhat equivocal statement, he suggested that the JAMA article was a factor in the position of the authors as leaders in arthritis research.[5] (Tr. 303–04; see also Calkins 386–87.)

Furthermore, Dr. Lamont-Havers' recognition of the anti-inflammatory effect of salicylates vitiates the stated rationale for his repudiation of general salicylate research as "arthritis research"—that salicylates are simply used in arthritis in the same manner that they are used for other conditions, such as headache.

Even as to those research reports relating specifically to a clinical investigation of the use of salicylates for arthritis patients (RXs 5 A–D, 39 A–N, 40 A–Z–1, 41 A–V, 42 A–F), Dr. Lamont-Havers declined to give any credit to Bristol-Myers, com-

[4] This is excerpted from a published statement of Dr. Calkins. (Tr. 629–31.)

[5] See Tr. 530–36 for testimony relating to Dr. Orahovats' role in the generation of this study and two companion studies.

menting that there was no evidence that anyone else other than the authors had been involved in the research reported. (Tr. 618–19, 666–69.) In stating that there was "no indication otherwise," he ignored the testimony of Dr. Wolcott and Dr. Orahovats concerning their participation in those studies (*supra*, p. 836). And he said he had read that testimony. (Tr. 583–84.) In any event, such support of research work does not in his opinion mean leadership in arthritis research. (Tr. 618–19; compare Tr. 273–74; see footnote 3, *supra*, p. 837.)

The direct examination of Dr. Lamont-Havers as a rebuttal witness concluded with an answer to the effect that *none* of the reports submitted by respondent reflect work that "actively pushed forward the horizons of knowledge concerning arthritis." (Tr. 620.) This, of course, is Dr. Lamont-Havers' standard for testing leadership, not the standard established by the complaint.

C. *Summary and Conclusions*

Since "public interest" is an essential element in this proceeding, it may be desirable to consider initially the public interest in an inquiry as to whether respondent may properly call itself a "leader in arthritis research." Even in the absence of any evidence concerning the claimant's qualifications, this representation, if not actually in the category of "puffing" (permissible exaggeration), approaches "puffing" so closely as to raise the question whether this is a representation of fact or an expression of opinion in the nature of "sales talk." Respondent suggests that "if the statement is without definite and objective meaning" —if, as Dr. Calkins testified, leadership is a "subjective word"— then it lacks the essential element of a material representation —the *sine qua non* of a charge of misrepresentation—and may be dismissed as "puffing." (RPF 47; CCH Trade Reg. Rep., Par. 7533.35–7533.379; see Calkins 335, 404.)

Obviously, dismissal on such a ground at this stage is inappropriate. But, in the circumstances presented by this record, the "puffing" aspects of the representation must be taken into account in resolving the issue now before us. The fact that respondent has at least a colorable basis for the claim by virtue of its research relating to arthritis—research that the Government's own witnesses recognized as not insignificant—necessarily raises serious doubts about the public interest in this challenge of the leadership representation. And these doubts are not dispelled in a proceeding in which public understanding of the challenged terminology is left to inference and in which the appropriateness

of the representation is tested against the "subjective" opinions of two arthritis experts (Tr. 404, 263) whose highly specialized scientific environment colors their concept of leadership in arthritis research in such a way as to make it irrelevant to the real issue presented. Against this background, we turn to an evaluation of the evidence presented.

In summary, the Government witnesses were of the opinion that the subject matter of respondent's research was not of such a nature as to be capable of supporting a claim of leadership in arthritis research. But for purposes of this proceeding, the validity of the rationale underlying their opinion is dubious. No identity has been established between their somewhat narrow and esoteric views regarding "arthritis research" and the viewpoint that may properly be attributed to lay readers of respondent's advertisement. The reasons given by Dr. Lamont-Havers and by Dr. Calkins for disqualifying respondent's research as evidence of leadership in "arthritis research" bear no discernible relationship to the inferred understanding of the relevant public as to the meaning of "arthritis research" as used in the advertisement.

Dr. Calkins' test of arthritis research and leadership requires "a broad approach to arthritis"—dealing with "the heart of the problem"—dealing with the nature and cause of rheumatoid arthritis and its prevention and cure. Research must be broadly based, not limited to some narrow segment of the problem. (Tr. 331, 403–04.) No matter how valid this concept might be in another setting, the question remains whether it conforms to *public* understanding of the leadership claim.

Complaint counsel's case rests primarily, however, on the testimony of Dr. Lamont-Havers, who, as a rebuttal witness dealt with the specifics of respondent's published studies. (Tr. 583–706.) Dr. Lamont-Havers' basic rationale is that, although a particular study (and this involves nearly all of respondent's research studies) is related—and often importantly related—to arthritis, it does not represent *his* concept of arthritis research.

The examiner finds that Dr. Lamont-Havers' distinction between research that is *related to* arthritis (or bears upon or affects arthritis), on the one hand, and research that *represents* arthritis research, on the other, is, from the viewpont of the readers of respondent's advertisement, tenuous, if not totally imperceptible. (Tr. 595–97, 603–04, 610–12, 686–88.) Although this distinction may have significance in the doctor's frame of

reference (Tr. 688–89), it does not have any such significance for the lay public reading respondent's advertisement.

For example, although Dr. Lamont-Havers expressed the opinion that research which has a broader application than simply arthritis "specifically," "primarily," or "directly," cannot *represent* arthritis research, he admitted at the same time that the *relationship* of such research to arthritis (especially in the area of clinical treatment and handling) is of undeniable importance. (See, for example, Tr. 585–87, 611–12, 618, 622, 629–34, 639–40, 648–49, 686–88, 268–70.)

From the standpoint of the arthritis sufferer, and for the purpose of this proceeding, Dr. Lamont-Havers' distinction is artificial and unacceptable. In view of the admitted importance of the role of salicylates in arthritis therapy—for their anti-inflammatory effect, as well as for their analgesic effect—the exclusion of "salicylate research" from the realm of "arthritis research" is, in the examiner's opinion, impermissible for purposes of this proceeding. Accordingly, the Twenty-Sixth and Twenty-Seventh Proposed Findings of complaint counsel (CPF 19–20) are rejected.

To question the relevance of the opinions of the Government's expert witnesses to the issue presented in this proceeding, is not in derogation of their "impeccable" qualifications. (CB 7–9; Tr. 759; compare RPF 29, 73.) The fact that these doctors would not rate Bristol-Myers a "leader" in the scientific community in the light of the standard they apply, does not necessarily mean that respondent violates the law when it advertises itself in vernacular language as a "leader."

The question before us is not simply whether Bristol-Myers is a "leader" under the standards applied by Dr. Lamont-Havers and by Dr. Calkins. We must inquire first whether their concepts of leadership and of arthritis research coincide with the concept of the arthritis sufferer. And the ultimate question is whether the Government has proved that Bristol-Myers is not a "leader" in the sense that this claim would be understood by readers of the advertisement.

There is no showing in this record of any identity between the inferred interpretation of arthritis sufferers regarding respondent's claim to leadership in arthritis research and the esoteric concept of Dr. Lamont-Havers and Dr. Calkins defining arthritis research and leadership therein in terms of pure science or abstract research. Significantly, the medical witnesses presented by complaint counsel, properly dedicated as they are to

finding the cause and nature and cure of arthritis, demonstrated a condescending attitude toward research, especially by pharmaceutical companies, that is pragmatically concerned with producing more effective and better tolerated drugs by improving the old and developing new ones. (Lamont-Havers 261; Calkins 334, 390–92.) Their interests and hence their perceptions of importance are oriented toward "the broad approach," "the heart of the problem," and "acceptance by one's peers." (Calkins 331, 403–04; Lamont-Havers 280–81, 304.)

Those who suffer from arthritis, however, are more likely to understand meaningful arthritis research (and leadership therein) as involving effective clinical treatment and relief of their condition than they are to interpret it in terms of abstract explorations and "acceptance by one's peers." Similarly, arthritis sufferers—and they are the ones whose definition must control the decision herein—are unlike Dr. Lamont-Havers, more likely to attach importance to the "conduct and participation in the research itself" than to the subsequent process of impressing or influencing the thought of the scientific community. (Lamont-Havers 280–81.) Such sufferers are not likely to agree that research aimed at improving the use of salicylates as medication for human being is only peripherally related to research in arthritis. (Lamont-Havers 269–70.)

By Dr. Lamont-Havers' own admission, the subject of treatment of arthritic disease would be "of the most direct importance" to the arthritic patient and, correspondingly, research dealing with more effective medications would likewise be "of direct importance" to such a patient. (Tr. 622.)

Similarly, whereas, according to Dr. Lamont-Havers, exactly the same research might or might not represent arthritis research depending solely upon the subjective intent of the researcher (Tr. 685–91; 704–05), this concept is a factor wholly lacking significance to the reader of respondent's advertisement, whose interest would be only in the nature and outcome of the research rather than the subjective intent of the investigator.

Despite the personal opinions of the Government's medical witnesses, the record establishes recognition on their part that the branch of arthritis research in which, realistically, readers of respondent's advertisement would be most immediately interested (and to which the entire context of the advertisement relates) is the perfecting of medications for better treatment of the disease. At the least, this aspect of arthritis research is undoubtedly of high importance to arthritis sufferers and to those

who are engaged in treating them. (Lamont-Havers 622, 648, 617–18, 638–40, 268–70, 282, 629–33; Calkins 391–92, 397–98.)

Under the complaint's definition (Par. Six (2)), respondent might qualify as a leader in arthritis research if, in advancing the state of medical and scientific knowledge of arthritis, it was "eminent" or "prominent." Under this definition, respondent might qualify for leadership if it "eminently" or "prominently" contributed to advancing arthritis knowledge in one or more of its aspects, including, for example, the development or improvement of arthritis therapy. And such "eminence" or "prominence" might be in relation to pharmaceutical companies, not the "universe" of arthritis researchers.

However, in their Proposed Findings, Government counsel have modified the definition in the complaint to accord with the definitions of their medical witnesses, particularly Dr. Lamont-Havers. Instead of defining leadership in terms of "eminence" or "prominence," Government counsel now view a "leader in arthritis research" as an individual or group "actively pushing forward the horizons of knowledge of arthritis" and making public any resulting discoveries. And complaint counsel would disqualify as leaders any institutions or agencies "which merely provide support for arthritis research". (CPF 18; compare Lamont-Havers 263, 273–74, 279–81; compare also CPF 6, 8.)

Presumably, under the standards that complaint counsel would now apply, respondent must have addressed itself to broad-gauged research designed to get to "the heart of the problem"—that is, the nature and cause of arthritis and its prevention and cure—not just its treatment. (CPF 17; Calkins 404.)

In oral argument, as a matter of fact, Government counsel contended for an even broader approach than did the medical experts. To be a leader in arthritis research, in the view of Government counsel, it is not enough to deal with treatment of the disease; the research must encompass "a complete study of the disease process * * * [and] of every aspect and phase of arthritis." Government counsel insisted that the public would interpret respondent's advertising claim as representing involvement in an "across-the-board investigation" of arthritis. (Tr. 798–99, 804–05.)

To the contrary, the finding must be that within the framework of the definition in the complaint, the public, or the arthritic segment thereof, would understand that when Bristol-Myers claimed to be a "leader in arthritis research", it meant no more than that

it was somehow "eminent" or "prominent" in research related to that disease—that it was somehow making a significant contribution to research dealing with arthritis. It is doubtful that the public would interpret the claim to mean that the company had a status (or an outlook) comparable to Government entities such as the National Institutes of Health or, more particularly, the National Institute of Arthritis and Metabolic Diseases, or various medical schools, hospitals, or other nonprofit organizations concerned with research of this character. At least, such a finding cannot be made here. (Compare Tr. 803.) The leadership claim might very well be accepted as a representation that Bristol-Myers' research activities related to arthritis were outstanding ("eminent" or "prominent") in comparison with such activities of other companies engaged in the manufacture and sale of drug products. In sum, it is fair to say that the representation would simply be understood as a claim that Bristol-Myers was engaged in some phase of arthritis research and that its contributions in that field were noteworthy, especially when considered in relation to other commercially-based research.

The Government has failed to prove that respondent does not qualify as a "leader in arthritis research" by such a standard as that. And, it has failed to establish that the representation is otherwise materially false or misleading. Even under the restrictive standards that Dr. Lamont-Havers and complaint counsel would impose (Tr. 263, 279–81; CPF 18), the record clearly establishes that respondent's studies are calculated to advance the state of medical knowledge with respect to the treatment of arthritis. Respondent may not have pushed "forward the horizons of knowledge of arthritis," but "has made its * * * discoveries public" and has done more than "merely provide support for arthritis research." (CPF 18.)

In its proposed findings (RPF 74–75), respondent urges the examiner to conclude as follows:

> Considering that important results of research, even by leaders in arthritis research, come slowly and smally, and that no other researcher, with the possible exceptions of Merck and Geigy (which are prescription drug manufacturers), has been shown to have done as much by way of research directed toward safer, more effective, or better tolerated medications and medication forms for use in treating arthritis, and none at all rivals respondent in its salicylate research, those seven studies [RXs 5, 6, 39–42; CX 2] are persuasive evidence that respondent is a leader, at least in that branch of arthritis research, by any standard; and it is that field of arthritis research which is most closely related to the subject and context of the advertisement in which respondent's claim to be such a leader is * * * read

and understand by potential purchasers of BUFFERIN. [Record citations omitted.]

Without necessarily adopting this proposed conclusory finding unreservedly, the factors there cited and others set forth in the foregoing findings do provide a basis for concluding that complaint counsel have failed to carry their burden of proof.

On this record, as the examiner reads it, the conclusory finding must be that the Government has failed to prove by a preponderance of the reliable, probative, and substantial evidence that respondent is not a "leader in arthritis research," as that term would be understood by readers of respondent's advertisement—that is, a company "eminent in" or "prominently concerned with" the "advancement of the state of medical and scientific knowledge of the disease known as arthritis." For failure of proof and for want of public interest, the allegation of misrepresentation in Paragraph Seven (2) is dismissed.

CONCLUSIONS

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

2. The complaint herein states a cause of action, and this proceeding is in the public interest.

3. Only the representation regarding "stomach upset" (Section IX herein, pp. 826–829; Complaint, Pars. Six (1) and Seven (1)) is found to be false, misleading, and deceptive.

4. The reliable, probative, and substantial evidence in the record fails to support the other allegations of the complaint.

5. The dissemination by the respondent of the false representation regarding "stomach upset" constituted unfair and deceptive acts and practices in commerce, as commerce is defined in the Federal Trade Commission Act, in violation of Sections 5 and 12 of the Federal Trade Commission Act.

6. The finding (Section IX herein, pp. 826–829) that the challenged advertisement (CX 1) impliedly represented, contrary to fact, that Bufferin did not cause stomach upset in the tests reported in the JAMA article would authorize the entry of an order against the repetition of such a misrepresentation, but in the circumstances presented here, the public interest does not require such an order. If the findings respecting the other charges were such as to support an order, it might be appropriate to include a provision dealing with the "stomach upset" representation. However, since the examiner has found that the evidence does not support an order relating to the other representations, no useful

purpose would be served, in the opinion of the examiner, by entering an order dealing solely with the matter of stomach upset.

This determination is essentially pragmatic. The specific order proposed (Par. I.A.) would simply prohibit any future advertisement *that makes reference to the JAMA article* (CX 2) and in which a representation is made that Bufferin did not cause stomach upset.

The likelihood of a repetition of this misrepresentation, or even of any advertisement that refers specifically to the JAMA report, seems remote. The JAMA report was published in June 1965, and, as far as this record shows, the advertising campaign based on the report (if one insertion in each of two mass-circulation magazines may properly be so denominated) was a one-shot or, more accurately, a two-shot campaign in mid-1966.

More important, the examiner questions whether any useful purpose would be served by such a limited order—forbidding only a representation that Bufferin did not cause stomach upset in a particular clinical study.

The obvious answer to this question would be another question: "Why not issue a different order?", coupled with the observation that the examiner is not necessarily bound to issue exactly the order proposed.

Conceivably, a more realistic and effective order might be tailored, but there are two main reasons why this course of action may not be followed here:

First, the evidentiary record affords no basis for an order dealing specifically with the "stomach upset" claim that would be materially broader than that proposed. It must be borne in mind that in this proceeding no question is raised concerning any general representation by respondent that Bufferin, taken according to the directions on the label, will not cause stomach upset. And the examiner notes that the Bufferin label contains, apparently without challenge by any Government agency, the representation that Bufferin "Helps prevent the stomach upset often caused by aspirin." (CX 5.)

Second, although it is now clear that the proposed order accompanying the complaint is "very tentative" (*Grove Laboratories, Incorporated,* Docket 8643, Final Order, June 13, 1967 (Opinion, p. 33, n. 36) [71 F.T.C. 822, 830, 852]; compare Tr. 86, 218–19), the Government in this proceeding has specifically committed itself, for reasons that need not be stated here, to seek no broader order than the proposed order appended to the complaint. And the examiner adopted this understanding in his prehearing

order. (Tr. 217–219; see Tr. 77–97, 195–216.)

Under these circumstances, the examiner finds no satisfactory basis for entering any order specifically relating to stomach upset.

The examiner further concludes that the finding of implied misrepresentation regarding stomach upset is not of such nature, scope, or significance as to warrant a broad order forbidding respondent to disseminate "any advertisement which makes reference to any report of a scientific study or test, and which misrepresents, misstates or distorts, by affirmative statement or failure to reveal, material facts set forth in such report." This is the text to a supplemental provision of the order urged by complaint counsel in accordance with the proposed order contained in the complaint. But, the single violation found does not in the examiner's opinion warrant the entry of this order or, in fact, any order.

In summary, it is the examiner's opinion that, on the one hand, it would be empty formalism to enter the narrow specific order proposed and, on the other hand, it would be an unwarranted restraint, on the basis of this record, to enter the broad order proposed and thus to require respondent to publish at its peril any future advertisement referring to scientific studies or tests.

7. In view of the dismissal of all but one of the charges in the complaint, the examiner does not reach the constitutional issue raised by respondent—that the advertisement is protected by the First Amendment to the Constitution. (RB 14–44, RPF 43–44, 75; compare CRB 2–13.) Without otherwise passing on the validity of the constitutional defense, the examiner holds that it is not applicable to the single violation found. And, in any event, the question is academic in the present state of the record since the examiner has recommended that no cease and desist order be issued.

The public interest aspects that respondent contends should lead to dismissal of the complaint as a matter of discretion (RB 413, RPF 43–44, 75) have been taken into account in considering all of the charges, including the single charge that the examiner found was proved by the evidence. And, as noted *supra*, it is on the basis of public interest that the examiner recommends against entry of any cease and desist order.

ORDER

It is ordered, That the allegations of the complaint be, and they hereby are, dismissed on grounds of failure of proof or lack of public interest, or on both of these grounds.

OPINION OF THE COMMISSION

SEPTEMBER 28, 1968

BY ELMAN, *Commissioner*:

This matter is before the Commission on cross-appeals of the parties from the hearing examiner's initial decision, filed November 16, 1967, rejecting all but one of the charges in the complaint on the "grounds of failure of proof or lack of public interest, or on both of these grounds," and ordering that the complaint be dismissed.

I

All the issues in this case arise out of an advertisement [1] which appeared in *McCall's* magazine in June 1966 and in the *Reader's Digest* of July 1966. Under the heading "Reported in *The Journal of the American Medical Association*," it purports to summarize in lay terminology the results of a clinical study reported in an article, "Salicylate Therapy in Rheumatoid Arthritis," [2] published in the *Journal of the American Medical Association* [JAMA] on June 28, 1965.

The study was undertaken to clarify the effects of salicylate (aspirin) therapy upon tests subjects suffering from active rheumatoid arthritis. Aspirin is known to provide symptomatic relief from the pain associated with arthritis. Its effect in this regard has been understood to derive from its action as an analgesic, *i.e.*, pain-killing, drug. Less clear has been the ability of aspirin to achieve an effect upon the stiffness, swelling and other painful symptoms of arthritis itself, that is, its ability to effect a remission of these symptoms, rather than merely to mask the discomfort with which they are associated. It was to cast light upon this question that clinical research was undertaken leading to the published findings and conclusions of the JAMA article.

Under the supervision of two physicians acetylsalicylic acid (ASA) [3] was administered to twelve patients suffering from active rheumatoid arthritis. All patients were hospitalized and received intensive care during the test period. All were given increasing doses of Bufferin around the clock until the largest tolerated dosage was reached and serious side effects, such as tinnitus, deafness or nausea, occurred. Periods of continuous administration of these large doses of ASA, five or more days in

[1] Exhibit A attached.
[2] Exhibit B attached.
[3] The ASA preparation used was respondent's product, Bufferin.

duration, were alternated with approximately equal periods during which ASA was totally withdrawn. According to the authors of the study, "during salicylate withdrawal an attempt was made to provide equal or greater analgesia by giving large doses of [other analgesics] * * *; thus it was hoped that any differences between salicylate and nonsalicylate periods would not be attributable to the analgesic properties of ASA." [4] In 11 of the 12 patients exacerbation of arthritis symptoms followed withdrawal of Bufferin.[5] The symptoms showed a "fairly consistent trend * * * of remission following resumption of therapy." [6]

The challenged advertisement features the prominent headline "Swelling & inflammation of arthritis reduced," and two putative before and after illustrations of a human hand. After mentioning the study, the text summarizes the clinical findings as follows:

> Results of the tests showed that doctors using a particular treatment achieved true remission in 87% of the cases. The drug used was Bufferin. Swelling and inflammation were reduced, joint movement increased, grip-strength improved.
>
> If you have arthritis you should be under a doctor's care, even in the early stages. If your doctor prescribes Bufferin, it's good to know you can take it without the stomach upset other drugs often cause. Bufferin: A leader in arthritis research.

II

In the present case a possibily innocent desire to inform the public about the findings reported in the JAMA article has found expression in an advertisement that may in fact be misleading and misinform those it was intended to serve.

As the record makes abundantly clear, arthritis is a widespread debilitating disease, afflicting some 13,000,000 persons in the United States, and causes more crippling than any other chronic disease.[7] Despite the absence of definite knowledge as to the cause of the disease or a cure for it, medical treatment can ameliorate the sufferer's condition. The earlier in the course of the disease that treatment is begun, the more effective it is likely to be.

> If arthritis is diagnosed early, and if prompt, individualized treatment is instituted as soon after diagnosis as possible, it is generally agreed that severe crippling can be prevented in seven out of ten cases. The fact, then,

[4] See exhibit B, p. 1133.

[5] For medical reasons "an objectively demonstrable exacerbation of the disease process at * * * [the time of withdrawal], not attributable to the withdrawal of analgesia *per se*, was thought to have greater significance than a period of improvement occurring coincident with the onset or resumption of salicylate therapy." *Id.* at 1134.

[6] *Ibid.*

[7] See RX 1, pp. 1, 3; initial decision —.

that so many hundreds of thousands of Americans are, nevertheless, severely crippled with arthritis indicates how little adequate treatment they received when it counted—early in the disease process, when appreciation of the value of prompt treatment and care was of vital importance.[8]

Nevertheless, possibly because among those most often afflicted by arthritis are the elderly, the poor and persons from rural areas, over 2 million arthritis sufferers, or 18 percent of the total number of persons with arthritis, have never consulted a doctor concerning their disease.[9] We therefore conclude that arthritis is a subject of public importance and interest, that a substantial number of people suffer from active arthritis, and that it is in the public interest to encourage these people to seek professional medical attention during the early stages of the disease.[10]

As an attempt to meet this public problem, the challenged Bufferin advertisement falls well short of its objective. True it is that the advertisement purports to summarize the results reported in the JAMA article thus bringing the study to the attention of the general public; included too is the admonition, "if you have arthritis you should be under a doctor's care, even in the early stages." Yet despite its carefully hedged language, there can be little doubt that this advertisement was not intended solely to report the conclusions of the JAMA article concerning ASA but was also intended, or at least would tend, to induce arthritis sufferers to purchase Bufferin—that is, to encourage arthritics to engage in self-medication. The advertisement was not addressed to members of the medical profession but to laymen; it was published in two magazines of general circulation; and, despite its studied ambiguity, its principal impact is to suggest that costly treatment for arthritis may be unnecessary since Bufferin, a product available over the counter, is useful in treating the disease.

Under the circumstances respondent would have better served its own as well as the public interest by disclosing pertinent information concerning the "particular treatment" that was used to obtain the reported results. That the "doctor's care" referred to included hospitalization and constant attention, that Bufferin was administered not in accordance with instructions on the label but in near-toxic doses, approaching a dosage at which serious side effects would be encountered, and that the consumer purchasing Bufferin over the counter for use in accordance with instructions on the label would not achieve such results, all are highly

[8] RX 1, p. iii.
[9] RX 1, table 15, p. 32.
[10] See initial decision p. 793.

material facts which should have been disclosed in the advertisement. In short, taken as a whole and ignoring problems raised by the pleadings in this case, the advertisement does not meet the standard of full truthfulness to which advertising of this sort must conform if it is to serve its function. We have only recently had occasion to define the large responsibility undertaken by a drug advertiser who directs his appeal to a lay rather than a medical or professional audience:

> If self-medication is to be encouraged, it is important that there not be a wrong diagnosis. If each of us is invited to become his own doctor and to choose among the various remedies offered for sale to the public, a clear obligation rests on the seller to disclose all the relevant facts concerning his product, including its dangers if any and the limits of its efficacy. This need is illustrated by the present case, where respondents admit that among the principal groups to whom their advertising is directed are the urban and rural poor—who are less likely to get the medical attention they need, who are more likely to be uneducated and uninformed, and who are thus most likely to be victimized by improper self-medication resulting from false and misleading advertising.
>
> Where a seller of a proprietary drug, or any other product, confines himself to * * * [truthful and honest] advertising, he serves his own as well as the public interest. *S.S.S. Company*, Docket No. 8646, p. 16 (June 26, 1968) [73 F.T.C. 1058, 1092, 1093].

These guidelines are admittedly general and do not purport to anticipate every situation that may conceivably arise. But we believe that advertisers, particularly those selling over-the-counter preparations to the sick and the elderly, would do well to heed the advice of Mr. Louis D. Brandeis given before this Commission shortly prior to his appointment to the bench:

> Now, I do not believe * * * that the difficulty for the businessman is nearly as great as he imagines it to be. * * * If you ask me how near you can walk to the edge of a precipice without going over, I can't tell you, for you may walk on the edge, and all of a sudden you may step on a smooth stone, or strike against a little bit of a root sticking out, and you may go over that precipice. But if you ask me, how near you can go to that precipice and still be safe, I can tell you, and I can guarantee that whatever mishap comes to you, you will not fall over that precipice. * * * You must not expect that you can go to the verge of [the] law without running any risks. Why should you? You do not in any other relation of life that I know of.[11]

[11] Statement of Louis D. Brandeis Before the Federal Trade Commission (April 30, 1915), p. 7. This statement was given during a series of conferences held by th Commission with businessmen and members of the bar as part of an effort to define the functions and useful role of this agency, then in its infancy. A record of this conference can be found in the National Archives, F.T.C. File No. 8006—5—1. See also, MacIntyre & Dixon, *The Federal Trade Commission After 50 Years*, 24 Fed. B. J. 377, 388—89 (1964).

III

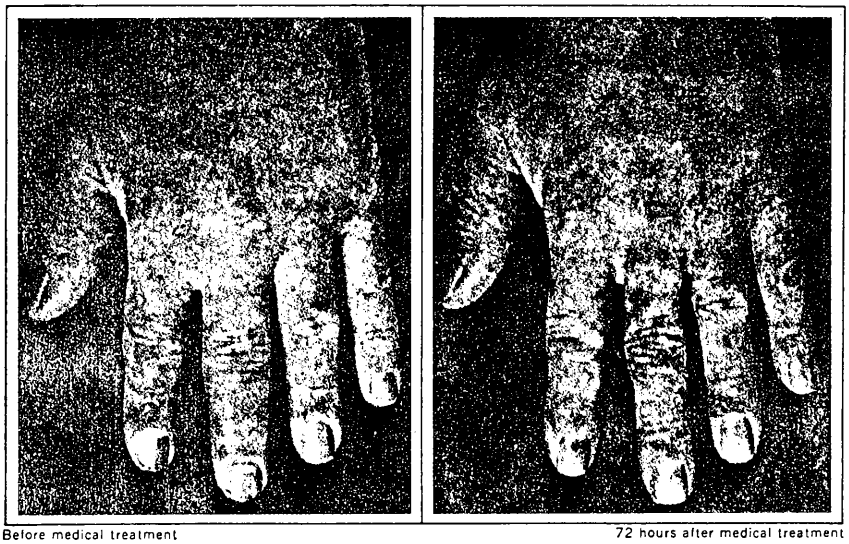
While issuance of an order to cease and desist would be supportable on the record before us, we have decided to terminate this proceeding without entry of an order. The principal reason is that issuance of an order would give rise to certain questions, relating to asserted deficiencies in the pleadings, which it would serve no further purpose to litigate. We are hopeful, also, that in the light of the guidance contained in this opinion, respondent will comply with the full requirements of the law and not again disseminate advertising of this character that may be misleading to the consuming public. We have noted that the advertisement here involved was published but twice, both exposures coming within the space of a few weeks in 1966, and has not been repeated. All in all, therefore, we believe the public interest will be adequately served by the issuance of this opinion without any accompanying order to cease and desist.

EXHIBIT A

Reported in The Journal of The American Medical Association

Swelling and inflammation of arthritis reduced

(Drawings based on actual photographs showing the most dramatic results achieved in a group of arthritis patients.)



Before medical treatment 72 hours after medical treatment

The June 28, 1965 issue of the leading medical publication carries a report on a special study, made under doctors' care, of a group of men and women with active arthritis. The salicylate chosen for this study was one long used for the temporary relief of minor arthritis pain.

Results of the tests showed that doctors using a particular treatment achieved true remission in 87% of the cases. The drug used was Bufferin®. Swelling and inflammation were reduced, joint movement increased, grip-strength improved.

If you have arthritis you should be under a doctor's care, even in the early stages. If your doctor prescribes Bufferin, it's good to know you can take it without the stomach upset other drugs often cause.

Bufferin: A leader in arthritis research.

EXHIBIT B

Reprinted From the Journal of the American Medical Association
June 28, 1965, Vol. 192, pp. 1131-1136

Exhibit displayed at the clinical convention, Miami Beach, Fla, Nov 29 to Dec 2, 1964.

Salicylate Therapy in Rheumatoid Arthritis

Kenneth Fremont-Smith, MD, and Theodore B. Bayles, MD

Salicylates are relatively safe and inexpensive analgesic agents, and it is for analgesia that they are usually given to patients with rheumatoid arthritis. However, it has been demonstrated in the laboratory that these same drugs exert an anti-inflammatory effect in certain types of experimental inflammation.[1] The antirheumatic action of salicylate therapy in rheumatic fever has been accepted for many years.[2] Some rheumatologists have concluded from clinical experience that salicylates may also exert a therapeutically significant anti-inflammatory effect in rheumatoid arthritis,[3] but there is little published evidence to support or deny this postulate. The answer to this question is of obvious importance for the clinical management of patients with rheumatoid arthritis. It also has significance for the planning of clinical trials designed to evaluate the efficacy of other drugs in the treatment of rheumatoid arthritis; for one of the established criteria frequently used to assess activity of this disease is "aspirin need,"[4] and salicylate dosage during such trials is therefore often variable and uncontrolled, dependent entirely upon subjective discomfort. However, if salicylates themselves affect the activity of rheumatoid disease, aspirin need cannot readily be used to quantitate such activity.

This study was therefore designed to answer the question, "Do salicylates have a clinically significant anti-inflammatory effect in the treatment of rheumatoid arthritis?"

Methods

To date, twelve patients with active rheumatoid disease have been studied on a metabolic ward. An attempt was made to select patients with early disease, as it was felt that joints with advanced anatomical damage would be less likely to reflect acute changes in therapy. Diagnoses and other pertinent clinical features were as follows:

Age: 29 to 78 years (average, 50)
Sex: males, 6; females, 6

Diagnoses and anatomical classification
Rheumatoid arthritis: 11
Probable, stage I: 1
Definite or classical, stage I: 6
Classical, stage II: 3
Classical, stage III: 1
Disseminated lupus erythematosus: 1

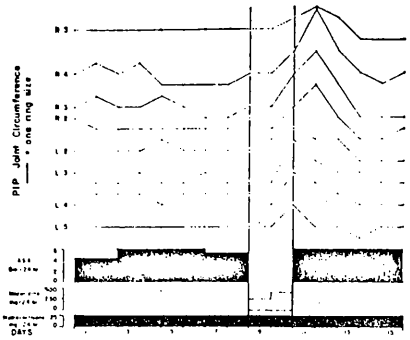
Other medication (some given more than one)
Steroids ("physiologic" doses only): 3
Hydroxychloroquine sulfate: 5
Gold sodium thiomalate: 6

Periods of intensive therapy with oral acetylsalicylic acid (ASA), five or more days in duration, were alternated with approximately equal periods of salicylate withdrawal. (Nine of the 12 patients had been receiving salicylates in variable dosage for many weeks or longer prior to study.) During ASA periods, a buffered preparation (Bufferin) was given in increasing dosage around the clock (three times a day after meals, at 10 PM, and at 3 AM) until the largest tolerated dose was reached; the final dose ranged from 3.6 to 7.5 gm/24 hours, with an average of 5.2 gm. In most cases dosage increase was stopped because of tinnitus or deafness. During salicylate withdrawal, an attempt was made to provide equal or greater analgesia by giving large doses of propoxyphene hydrochloride (three patients) or narcotics (codeine in four patients, meperidine hydrochloride in five) on the same round-the-clock schedule; thus it was hoped that any differences between salicylate and nonsalicylate periods would not be attributable to the analgesic properties of ASA.

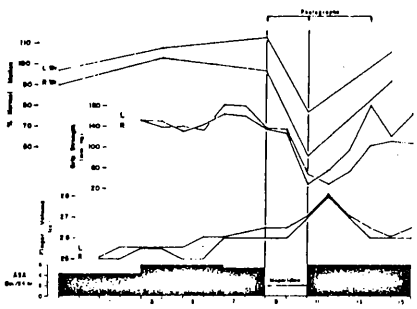
A pilot study convinced us that a "blind" experimental design was not feasible at these doses; typical side-effects of tinnitus, deafness, perspiration, or nausea were obvious to both patient and observer whenever ASA was given in full dosage. Therefore, only relatively objective methods of assessing disease activity were used: measurement of finger-joint size (jeweler's rings), range of joint motion (goniometer), grip strength (sphygmomanometer cuff), finger volume (water displacement),

From the Department of Medicine, Harvard Medical School, and the Robert Breck Brigham Hospital, Boston.
Presented as a scientific exhibit at the 18th clinical convention of the American Medical Association, Miami Beach, Fla, Nov 29-Dec 2, 1964.
Reprint requests to 125 Parker Hill Ave, Boston 02120 (Dr. Fremont-Smith).

EXHIBIT B--CONTINUED



1. Effect of salicylate withdrawal on size of proximal interphalangeal (PIP) joints.



2. Effect of salicylate withdrawal on range of joint motion, grip strength, and middle-finger volume.

and serial comparative photographs (Polaroid) of selected involved joints. Because of the well-known propensity of patients with rheumatoid arthritis to show improvement to some degree during periods of hospitalization and intensive care, regardless of drug therapy, particular attention was paid to the effect of sudden withdrawal of salicylate therapy. An objectively demonstrable exacerbation of the disease process at this time, not attributable to the withdrawal of analgesia per se, was thought to have greater significance than a period of improvement occurring coincident with the onset or resumption of salicylate therapy.

All other drug therapy was kept constant throughout the study period. An attempt was also made to keep activity, rest, physiotherapy, etc, constant for each patient, but this proved impossible in some instances.

Results

Figure 1 shows the changes in proximal interphalangeal joint size observed in a 35-year-old mechanic with active rheumatoid arthritis (stage I) of one year's duration. He had received steroid therapy previously, but had been gradually weaned to a "maintenance" dosage of hydrocortisone (25 mg/day), which was continued throughout the study. The dosage of acetylsalicylic acid was gradually increased to 6.0 gm/day, which resulted in mild nausea (controlled by belladonna); serum salicylate levels ranged between 15 and 20 mg/100 cc at this dosage. On the ninth day, ASA was abruptly stopped and meperidine (Demerol) hydrochloride, a drug of greater analgesic potency,[5] was substituted at a dosage of 50 mg five times a day. Within 48 hours there was an obvious exacerbation of the rheumatoid inflammation, as documented by an increasing ring size of every proximal interphalangeal joint (Fig 1). The patient complained of severe malaise and stiffness; despite even larger doses of meperidine hydrochloride, up to 75 mg five times a day, maintaining the previous level of physiotherapy and general activity became impossible. It was necessary to reinstitute ASA therapy on the 11th day, several days earlier than planned. By the 14th day, 72 hours later, the exacerbation had completely subsided.

Figure 2 shows the effects of salicylate withdrawal and resumption on the range of motion of the wrists, on grip strength, and on the volume of the middle finger of each hand. In each instance, an obvious change denoting increased inflammation followed quite promptly the sudden withdrawal of ASA, with a somewhat more gradual recovery following its readministration.

Photographs of this patient's hands were taken on the ninth day, the end of the salicylate period (Fig 3); on the 11th day, 48 hours after salicylate withdrawal (Fig 4); and on the 14th day, 72 hours after salicylate reinstitution (Fig 5). These photographs document the fairly obvious nature of the exacerbation induced in this subject by withholding ASA; this exacerbation was most marked in the proximal interphalangeal joints of the left hand and of the right middle finger, but by no means confined to these joints. (Compare Fig 4 with Fig 3 and 5.)

The increase of disease activity precipitated by ASA withdrawal was more marked in this instance than in any of the other patients studied to date; but 11 of the 12 subjects have shown objective evidence of exacerbation after salicylate withdrawal by at least one of the criteria used. The results obtained by each criterion in all 12 studies are presented in Fig 6. The bars on the left show the changes resulting from withdrawing ASA; those on the right show the changes following ASA readministration. The criteria of ring size, range of motion, and grip strength show a fairly consistent trend of exacerbation after salicylate withdrawal and of remission following resumption of therapy. Finger-volume measurements and serial photo-

EXHIBIT B--CONTINUED

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[Photograph of patient's hands]

3. Ninth day, at termination of the salicylate period.

[Photograph of patient's hands]

4. Eleventh day, 48 hours after withdrawal of salicylates.

[Photograph of patient's hands]

5. Fourteenth day, 72 hours after resumption of salicylate therapy.

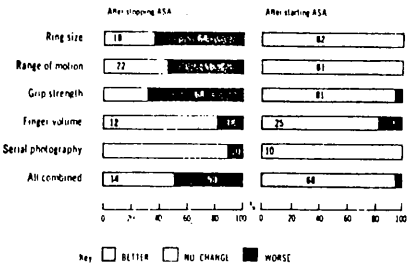
graphs proved relatively insensitive, and usually showed no unequivocal change. The lowest bar in Fig 6 depicts the result of combining all five criteria.

Because it was found impossible to conduct the study using "blind" techniques, and because objective changes alone were therefore considered valuable, no attempt was made to quantitate changes in subjective symptomatology. Nevertheless, it must be recorded that 9 of the 12 subjects had such an obvious increase in symptoms (particularly in stiffness) during the period of salicylate withdrawal that they spontaneously curtailed their daily activities. Maintaining the same degree of exercise, physiotherapy, etc, as during the ASA periods was often impossible, despite the administration of analgesic drugs of equal or greater potency.

Conclusions

Acetylsalicylic acid has been shown to exert an objectively demonstrable anti-inflammatory effect when given in large regular doses to patients with active rheumatoid disease. This anti-inflammatory

EXHIBIT B--CONTINUED



6. Summary of results in all 12 studies.

action of ASA seems to be of greater therapeutic significance in the treatment of rheumatoid arthritis and related diseases than its concurrent analgesic effect.

Therefore it is recommended that all patients with active rheumatoid arthritis, whether mild or severe, receive salicylates regularly in the largest tolerated dosage (in the absence of obvious contraindications such as peptic ulcer and allergic reactions). This is at variance with the usual practice of administering ASA as merely an analgesic drug to be taken as needed, and requires considerable attention to educating the patient to the merits of salicylates. This recommendation is not to be taken to imply that other drugs are not of equal or greater importance in the treatment of rheumatoid arthritis, but rather, that such drugs (eg, antimalarials, gold salts) should be used in addition to, rather than instead of, regular salicylate therapy.

Summary

Studies in 12 patients with early active rheumatoid disease demonstrated a clinically significant anti-inflammatory effect from the intensive administration of buffered acetylsalicylic acid (Bufferin), completely separate from its analgesic action. This effect was documented by objective evidence of increased rheumatoid inflammation induced by the abrupt withdrawal of salicylate therapy, despite the substitution of drugs of equal or greater analgesic potency, and by the prompt disappearance of this exacerbation upon the reinstitution of such treatment.

This study was supported in part by Public Health Service research grant AM 05577 from the National Institutes of Health.

The buffered acetylsalicylic acid used in this study was supplied as Bufferin by Bristol-Myers Co., New York.

Robert G. Godfrey, MD, carried out the pilot study. Nancy Pease carried out the majority of the daily measurements. Range of motion measurements were performed by Betty Robinson, OTR.

Generic and Trade Names of Drugs

Hydrocortisone--*Cortef, Cortifan, Cortril, Hycortole, Hydrocortone.*
Hydroxychloroquine sulfate--*Plaquenil Sulfate.*
Gold sodium thiomalate--*Myochrysine.*
Propoxyphene hydrochloride--*Darvon.*

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ORDER VACATING INITIAL DECISION AND TERMINATING PROCEEDING

Upon consideration of the appeals of complaint counsel and respondent from the initial decision filed on November 16, 1967, and for the reasons stated in the opinion accompanying this order,

It is ordered, That the initial decision of the hearing examiner be, and it hereby is, vacated, and the proceeding be, and it hereby is, terminated.