

stone Tire and Rubber Company, directly or indirectly, pays or contributes anything of value to any such marketing oil company in connection with the sale of TBA products by The Firestone Tire and Rubber Company or any distributor of Firestone products to any wholesaler or retailer of petroleum products of such marketing oil company;

2. Paying, granting or allowing, or offering to pay, grant or allow, anything of value to Shell Oil Company or to any other marketing oil company for acting as sales agent or for otherwise sponsoring, recommending, urging, inducing or promoting the sale of TBA products, directly or indirectly, by The Firestone Tire and Rubber Company or any distributor of Firestone products to any wholesaler or retailer of petroleum products of such marketing oil company;

3. Reporting or participating in the reporting to Shell Oil Company or to any other marketing oil company concerning sales of TBA products to wholesalers or retailers of petroleum products, individually or by groups, of any such marketing oil company.

It is further ordered. That the initial decision as so modified and supplemented be, and it hereby is, adopted as the decision of the Commission.

It is further ordered. That respondents Shell Oil Company and The Firestone Tire and Rubber Company, corporations, shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the aforesaid order to cease and desist.

IN THE MATTER OF

COLGATE-PALMOLIVE COMPANY

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

Docket 7660. Complaint, Nov. 19, 1959—Decision, Mar. 9, 1961

Order requiring a manufacturer of a dentifrice, among other products, with headquarters in New York City, to cease representing falsely in advertisements and television commercials that its "Colgate Dental Cream with Gardol" formed a "protective shield" around teeth, thereby affording users complete protection against tooth decay or the development of cavities in their teeth.

Edward F. Downs, Esq. and *Anthony J. Kennedy, Esq.* supporting the complaint.

Cahill, Gordon, Reindel & Ohl, by *Mathias F. Correa, Esq.*, and *Corydon B. Dunham, Jr., Esq.*, of New York, N. Y., for respondent.

INITIAL DECISION BY LEON R. GROSS, HEARING EXAMINER

PRELIMINARY STATEMENTS

The complaint issued in this proceeding on November 19, 1959, charges respondent with violating the Federal Trade Commission Act by using false, misleading and deceptive representations in advertising a dentifrice, Colgate Dental Cream with Gardol, sold by it in interstate commerce. Respondent answered the complaint; prehearing conferences were held; and hearings were had in Washington, D.C. and New York, New York. Proposed findings of fact, conclusions of law, and proposed orders were filed by the parties and orally argued on June 17, 1960. On February 4, 1960, a ruling was issued granting the motion of counsel supporting the complaint to strike portions of respondent's answer. On February 26, 1960, a ruling was issued denying respondent's motion to dismiss the proceedings on the grounds that the initial complaint failed to inform the respondent adequately of the charges it would have to meet, and on the further grounds that counsel supporting the complaint had failed to sustain the burden of proof imposed upon them by law.

This is one of the first proceedings under the Federal Trade Commission Act against allegedly deceptive *television* advertising.

There is no substantial controversy over the legally operative facts. Respondent contends (1) its advertising was not false, misleading and deceptive; and (2) should this fact be found against it, that it has, nevertheless, voluntarily abandoned the condemned practices; and that this proceeding should be dismissed because all that could be accomplished by a cease and desist order has already been achieved by respondent's voluntary abandonment of the practices.

Two categories of respondent's advertising are assailed in this proceeding: "print" advertising and television advertising. The print advertising in evidence in this case does not require the application of any criteria different from that which has been applied in countless prior print advertising cases where the charges are that such advertising is false, misleading and deceptive. The precedents for judging such print advertising are legion.

Television advertising, on the other hand, has in it an element which the examiner has designated "visual innuendo." An example of visual innuendo in television advertising is those advertisements in which men in white coats, similar to those worn by doctors and dentists, advertise pharmaceuticals. The television advertisement

does not state that the person in the white coat is a doctor or dentist but such innuendo is intended, and usually is drawn by the viewer, even though neither expressed nor directly implied.

Although the visual innuendo of a television advertisement may be a bit empirical, television advertising, as all other forms of advertising, can be subjected to a disinterested, objective, dispassionate judgment whether it is, with its visual innuendo, false, misleading and deceptive.

The hearing examiner finds that counsel supporting the complaint have proven in this proceeding the legally essential allegations of the complaint by a preponderance of material, relevant and probative evidence and enters an order granting counsel supporting the complaint the relief requested.

On the basis of the entire record, the examiner makes the findings of fact hereinafter set forth. Findings requested by counsel which are not specifically adopted and incorporated in this initial decision are rejected. The fact that the examiner has not incorporated in this decision, nor rejected, nor dismissed specifically, evidence which is in the record, should not be construed as indicating that such evidence has not been fully considered by the examiner in preparing this initial decision. It indicates merely that the evidence which the examiner has specifically incorporated in his findings of fact is sufficiently preponderant, relevant, probative and substantial for a proper adjudication of the issues.

The hearing examiner has excluded two offers of evidence by the respondent which merit comment:

A series of articles written by various persons relating to tooth decay in general and the alleged properties of Colgate Dental Cream with Gardol, (exhibits RX 3A through RX 3Z 58) was excluded because (a) no evidence was introduced as to the qualifications of the persons who wrote the articles; (b) the authors of the articles were not tendered for cross-examination by counsel supporting the complaint; and (c) to have received such hearsay evidence into the record without affording counsel supporting the complaint an opportunity to cross-examine the authors of the articles, would have deprived counsel supporting the complaint of a very fundamental and basic legal right.

A series of advertisements of dentifrices by respondent's competitors was excluded because it is irrelevant and immaterial. *Moog Industries v. FTC*, 355, U.S. 411. A respondent to Federal Trade Commission proceedings may not escape the penalties of its own wrong doing, by showing or attempting to show similar wrong doing of that respondent's competitors. The advertising of respondent-

ent's competitors is not relevant to determining whether respondent Colgate's advertising was false, misleading and deceptive.

The examiner makes the following

FINDINGS OF FACT

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

The complaint filed herein states a good cause of action against respondent, and counsel supporting the complaint have proven the essential allegations of the complaint by preponderant, relevant, probative evidence in the record.

Respondent is engaged in commerce as "commerce" is defined in the Federal Trade Commission Act.

Colgate-Palmolive Company, a Delaware corporation, whose consolidated income account for the year ended December 31, 1959, was \$581,981,689 has its principal office and place of business located at 300 Park Avenue, New York, New York. It manufactures, advertises, offers for sale, sells, and distributes, in interstate and foreign commerce, a dentifrice designated "Colgate Dental Cream with Gardol" and various other products to distributors and retailers for resale to the public. Respondent's domestic sales of Colgate Dental Cream with Gardol for the six months ended June 30, 1958, were \$30,764,764.

In promoting the sale of its products respondent advertised and does advertise extensively in magazines of national circulation, in newspapers of interstate circulation, and by means of television programs and commercials broadcast over nation-wide networks.

In the conduct of its business, at all times material to this proceeding, respondent has been in substantial competition, in commerce, with corporations, firms, and individuals in the sale of dental cream. At the time the complaint issued in this proceeding respondent was representing in both its print advertising and its television advertising that brushing with Colgate Dental Cream with Gardol would put a "protective shield" around teeth, and prevent tooth decay. The manner in which this theme is developed in the print advertising is accurately shown in CX 15, CX 16, CX 17, CX 18, CX 19, CX 20, CX 21, CX 22, CX 23, CX 24, and CX 26. The treatment of this theme in respondent's television advertisements is accurately shown in CX 3, CX 4, CX 5, CX 6, CX 7, CX 8, CX 9, CX 10, CX 11, CX 12, CX 13, and CX 14.

It is stipulated in this record that neither Colgate Dental Cream with Gardol nor any other dentifrice on the market at the time this

complaint issued, or now, affords the users thereof complete protection against tooth decay or the development of cavities in their mouth.

The word "audio" as used in these findings refers to that portion of respondent's television advertisements which communicates by means of the auditory sense. The word "video" refers to that portion of the television presentation which communicates by means of the visual sense. In addition to the audio and video portions of the advertisement, considered separately, there is a "visual innuendo" in television advertising which was briefly alluded to and characterized above in the Preliminary Statements.

Respondent's print advertising and its television advertising at the time the complaint issued herein in November, 1959, sought to convey, and did convey, the impression to the prospective purchasers of Colgate Dental Cream with Gardol, (the television advertisement by means of visual innuendo) that persons who brushed their teeth with that toothpaste would thereby prevent decay from *getting to* their teeth; that "Gardol forms an invisible protective shield around your teeth."

The video portion of respondent's television advertisements depicted objects being propelled toward, *but not hitting*, a person because of an invisible shield. The visual innuendo was intended, and was conveyed to the viewer, that decay cannot *get to* the teeth of a person brushing with Colgate Dental Cream with Gardol. This representation was and is false, misleading and deceptive. It deceives and misleads the public concerning the properties and the caries-prevention value, if any, of Colgate Dental Cream with Gardol.

Respondent's specimen television advertisements in evidence (CX 3, CX 5, CX 7, CX 9, and CX 11) have the following audio sequence: In CX 3 as Mighty Mouse in the video sequence takes the top off a Colgate with Gardol tube and points to the Happy Tooth standing near by, the audio portion says,

Now to put up the *invisible protective shield* around our Happy Tooth with Colgate Dental Cream with GARDOL. (Emphasis supplied.)

At this point in the video portion of the advertisement, Mighty Mouse spreads Colgate Dental Cream on a toothbrush, flies around the tooth and puts up a "gardol shield."

In the video portion of CX 5, CX 7, CX 9, and CX 11, a coconut, tennis ball, and lariat are thrown or hit toward a person in the foreground of the scene. The coconut, tennis ball, and lariat bounce off an unseen transparent glass shield which is, invisibly, between the person propelling the objects, and the person toward whom the object is propelled. The coconut, tennis ball, and lariat do not reach

the person at whom they are thrown because they cannot *get to* them. The audio portion accompanying this action (CX 6A, CX 8B, CX 10B, CX 12B) says,

And here's how Gardol works. Now just as I was protected by this (man knocks on shield) invisible shield, Colgate's with Gardol forms an invisible, protective shield around your teeth. Fights tooth decay . . . *and bad breath all day!* Yes, for most people, just *one brushing* stops mouth odor *all day*.

Respondent's print advertising in the record actually shows a transparent protective shield in front of the teeth of a person whose face appears in the advertisement.

The invisible shield theme in respondent's advertising had the tendency to and did deceive prospective purchasers of Colgate Dental Cream with Gardol insofar as it represented the true nature of the properties of Colgate Dental Cream with Gardol, and the manner in which Colgate Dental Cream with Gardol inhibits tooth decay.

Respondent's print advertising and the visual innuendo of its television advertising were intended to convey the impression, and did convey the impression, that decay could not get to the teeth of a person brushing with Colgate Dental Cream with Gardol, just as the coconut, tennis ball, and lariat could not get to the person at whom they were thrown, because of the "invisible shield." This was, and is, a false, misleading and deceptive portrayal of the true properties of Colgate Dental Cream with Gardol.

Such false, misleading and deceptive advertising is proscribed by the Federal Trade Commission Act.

When the complaint in this proceeding was served upon respondent, alerting respondent to the Commission's objection to the "invisible shield" theme, respondent, at a cost in excess of \$100,000, promptly took steps to eliminate, and eliminated, the invisible shield theme from its print and television advertising. It has not been used since.

The invisible shield theme has not been reinserted in respondent's advertising since it was eliminated for the purpose of meeting the objections thereto stated in the instant complaint issued November 19, 1959. The evidence in this record does not support a finding that respondent will not, in the future, unless restrained by this Commission, misrepresent the true properties, and caries-inhibiting value, if any, of Colgate Dental Cream with Gardol.

DISCUSSION

It is in the public interest to prevent the sale of commodities by the use of false and misleading statements and representations.¹

¹ *Parke Austin & Lipscomb v. FTC*, 142 F. 2d 437 [4 S. & D. 168] citing *L. & C. Mayers Co., Inc. v. Federal Trade Commission*, 97 F. 2d 365, 367 [2 S. & D. 460].

