

Complaint

59 F.T.C.

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

1. Falsely or deceptively invoicing fur products by:

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

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

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

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

IN THE MATTER OF

COLGATE-PALMOLIVE COMPANY ET AL.

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

Docket 7786. Complaint, Jan. 8, 1960—Decision, Dec. 29, 1961

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

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Colgate-Palmolive Company, a corporation, and Ted Bates & Company, Inc., a corporation, hereinafter referred to as respondents, have violated the provi-

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

We realize that it is often difficult to impart true life quality to a product when it is photographed for television.

Where the use of props does not result in a material deception, the Federal Trade Commission would have no reason to complain.

Obviously, we recognize that it is impossible to photograph ice cream properly under hot lights. If you have to use shaving cream to get the kind of head which is normal on a glass of beer, this probably would not represent a material deception unless, of course, it was carried beyond a reasonable point. If a glass goblet glistens too much, we still aren't likely to be alarmed. (Advertising Age, November 23, 1959.)

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

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

ORDER

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

OPINION OF THE COMMISSION

By Commissioner ELMAN:

This is an appeal from the hearing examiner's initial decision dismissing a complaint charging respondents Colgate-Palmolive Company and Ted Bates & Company, Inc., with having violated Section 5 of the Federal Trade Commission Act¹ by using false, misleading,

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

