

FEDERAL TRADE COMMISSION DECISIONS

Findings, Opinions and Orders

IN THE MATTER OF

OGILVY & MATHER INTERNATIONAL INC.

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

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

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

Appearances

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

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

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Thompson Medical Company, a corporation, (hereinafter "Thompson"), and Ogilvy & Mather, Inc., a corporation, (hereinafter "Ogilvy"), hereinafter sometimes referred to as respondents, have violated the provisions of the Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Thompson is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York with its offices and principal place of business located at 919 Third Ave., New York, New York.

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

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

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

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

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

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

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

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Complaint

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

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

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

- a. Aspercreme contains aspirin.
- b. Aspercreme is a recently discovered or developed drug product.
- c. Valid studies have scientifically proven that Aspercreme is more effective than orally-ingested aspirin for the relief of arthritis, rheumatic conditions, and their symptoms.

PAR. 11. In truth and in fact:

- a. Aspercreme does not contain aspirin.
- b. Aspercreme is not a recently discovered or developed drug product; it has been available for purchase since at least 1971 and its active ingredient has been in existence since at least 1954.
- c. No valid studies have scientifically proven that Aspercreme is more effective than orally-ingested aspirin for the relief of arthritis, rheumatism, and their symptoms.

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

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

- a. Aspercreme is an effective drug for the relief of minor arthritis and its symptoms.
- b. Aspercreme is as effective a drug as orally-ingested aspirin for the relief of minor arthritis and its symptoms.
- c. Aspercreme is a more effective drug than orally-ingested aspirin for the relief of minor arthritis and its symptoms.
- d. Aspercreme is an effective drug for the relief of rheumatic conditions and their symptoms.
- e. Aspercreme acts by directly penetrating through the skin to the site of the arthritic disorder.

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

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

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

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

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

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

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

PAR. 19. The acts and practices of respondents, as herein alleged, including the dissemination of the aforesaid false advertisements, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce in violation of Sections 5 and 12 of the Federal Trade Commission Act, as amended.

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Complaint

OGILVY & MATHER INC.

1 EAST 48 STREET, NEW YORK 10017
MURRAY HILL 6 6100

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



1. PRESENTER: (OC) When you suffer from arthritis,



2. imagine being able to put ...the strong relief of aspirin



3. right where you hurt most.



4. Now, with amazing Aspercreme,



5. you can get the strong relief...of aspirin directly at the point.



6. of minor arthritis pain.



7. (OC) Strong, penetrating relief which lasts for hours



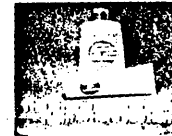
8. ...with none of aspirin's possible side effects.



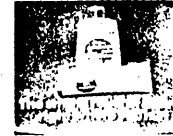
9. Aspercreme. Fast-acting.



10 No embarrassing odor.



11. (VO) The strong relief of aspirin right...



12. where you hurt. Remarkable.

Exhibit A

Complaint

101 F.T.C.

OGILVY & MATHER INC.

1 EAST 48 STREET, NEW YORK 10017
MURRAY HILL 8-8100

Client:
Product:
Title:
Commercial No.:
Date Approved:

THOMPSON MEDICAL
ASPERCREME
"VISIBLE MEN"
QTAI 9033
3/20/79



1. PRESENTER: (OC) When you suffer from arthritis,



2. Imagine putting the strong relief of aspirin right where you hurt.



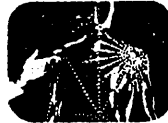
3. Aspircreme is an odorless rub



4. which concentrates the relief of aspirin.



5. When you take regular aspirin,



6. It goes throughout your body like this.



7. But, in seconds,



8. Aspircreme starts concentrating all the temporary relief of two aspirin



9. directly at the point of minor arthritis pain.



10. Strong, concentrated relief.



11. VO: Aspircreme..



12. The strong relief of aspirin right where you hurt.

Exhibit B

Complaint

Radio TV Reports

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

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

REVISION OF COMMERCIAL # 7V9635-



1. WOMAN: When you suffer from arthritis,



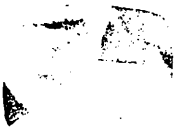
2. imagine being able to put the strong relief of aspirin right where you hurt most.



3. Now with amazing Aspercreme,



4. you can get the strong relief of aspirin



5. Directly at the point of minor arthritis pain.



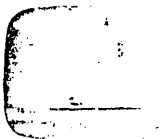
6. Strong penetrating relief which lasts for hours.



7. With none of aspirin's possible side effects.



8. Aspercreme. Fast acting, no embarrassing odor.



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

"contains no aspirin"
super

Exhibit C

ALSO AVAILABLE IN COLOR VIDEO-TAPE CASSETTE

OGILVY & MATHER INC.

1 EAST 48 STREET, NEW YORK 10017
MURRAY HILL 6-8100

Client:
Product:
Title:
Commercial No.:
Date Approved:

THOMPSON MEDICAL
ASPERCREME
"VISIBLE MEN"
QT AI 9033
3/30/79



1. PRESENTER: (OC) When you suffer from arthritis,



2. Imagines putting the strong relief of aspirin right where you hurt.



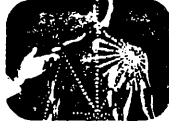
3. Aspircreme is an odorless rub



4. which concentrates the relief of aspirin.



5. When you take regular aspirin,



6. It goes throughout your body like this.



7. But, in seconds,



8. Aspircreme starts concentrating all the temporary relief of two aspirin



9. directly at the point of minor arthritis pain.



10. Strong, concentrated relief.



11. VO: Aspircreme.



12. The strong relief of aspirin right where you hurt.

"relief without aspirin" super

OGILVY & MATHER INTERNATIONAL INC.

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Complaint

Radio TV Reports

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

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



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



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



3. ANNCR: Aspercreme.



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



5. ANNCR: Aspercreme is free.



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



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



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



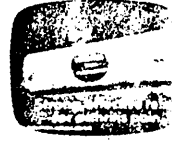
9. ANNCR: Aspercreme.



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



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



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

ALSO AVAILABLE IN COLOR VIDEO-TAPE CASSETTE

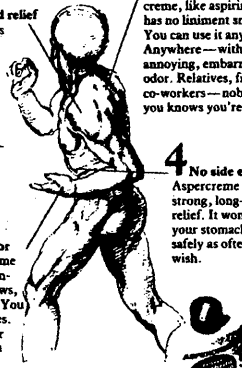
Exhibit E

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

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

1 Strong concentrated relief
Aspercreme™ pinpoints relief where you hurt. Aspirin tablets go throughout your body. But Aspercreme concentrates the relief of an analgesic like aspirin directly at the point of arthritis pain—where you need it the most.

2 Fast relief for minor arthritis pain. Aspercreme penetrates deep into painful areas—fingers, elbows, knees, back, shoulders. You get deep relief in minutes. Aspercreme works faster than aspirin because you rub it in right where you hurt.



3 No embarrassing liniment odor. Aspercreme, like aspirin itself, has no liniment smell. You can use it any time. Anywhere—without any annoying, embarrassing odor. Relatives, friends, co-workers—nobody but you knows you're using it!

4 No side effects. Aspercreme gives you strong, long-lasting relief. It won't upset your stomach. Use it safely as often as you wish.

Available in creme and lotion

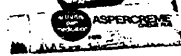


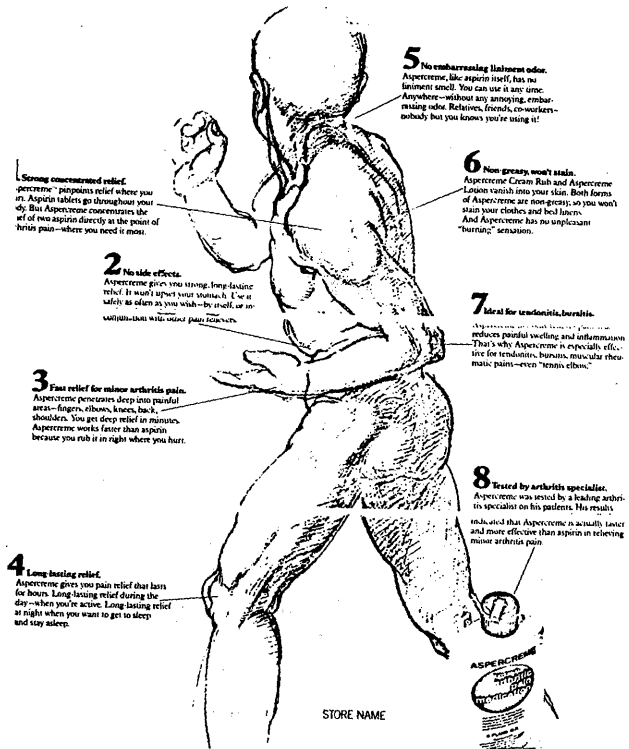
Exhibit F

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Complaint

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

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



1 Strong concentrated relief.
Aspercreme[®] penetrates relief where you are. Aspirin tablets go throughout your body. But Aspercreme concentrates the relief of two aspirin directly at the point of your pain—where you need it most.

2 No side effects.
Aspercreme gives you strong, long-lasting relief. It won't upset your stomach. It's as safe as often as you wish—by itself, or as a supplement with other pain relievers.

3 Fast relief for minor arthritis pain.
Aspercreme penetrates deep into painful joints—fingers, elbows, knees, back, shoulders. You get deep relief in minutes. Aspercreme works faster than aspirin because you rub it in right where you hurt.

4 Long lasting relief.
Aspercreme gives you pain relief that lasts for hours. Long lasting relief during the day—when you're active. Long lasting relief at night when you want to get to sleep and stay asleep.

5 No embarrassing halitosis odor.
Aspercreme, like aspirin itself, has no halitosis smell. You can use it any time. Anywhere—without any annoying, embarrassing odor. Relatives, friends, co-workers—nobody but you knows you're using it!

6 Non greasy, won't stain.
Aspercreme Cream Rub and Aspercreme Lotion vanish into your skin. Both forms of Aspercreme are non-greasy, so you won't stain your clothes and bed linen. And Aspercreme has no unpleasant "burning" sensation.

7 Ideal for tendonitis, bursitis.
Aspercreme reduces painful swelling and inflammation. That's why Aspercreme is especially effective for tendonitis, bursitis, muscular rheumatic pain—even "tennis elbow."

8 Tested by arthritis specialists.
Aspercreme was tested by a leading arthritis specialist on his patients. His results indicated that Aspercreme is actually faster and more effective than aspirin in relieving minor arthritis pain.

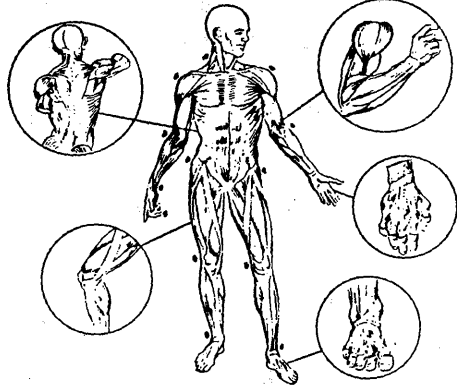
STORE NAME



Aspirin is a non-steroidal anti-inflammatory drug (NSAID). Avoid it in case you're taking...

Exhibit G

Minor Arthritis Pain?



There's always been aspirin...
Now there's ASPERCREME
 Works faster, safer than aspirin—relieves pain in minutes

ALL YOU NEED TO DO IS RUB ASPERCREME INTO THE PAINFUL AREA. ASPERCREME'S ACTIVE INGREDIENTS GO TO WORK IMMEDIATELY TO RELIEVE PAIN AND SWELLING. NO OTHER MEDICINE WORKS THIS WAY.

RUB ASPERCREME INTO YOUR PAIN BUT NOT ASPERCREME IN WATER OR MILK. ASPERCREME'S ACTIVE INGREDIENTS GO TO WORK IMMEDIATELY TO RELIEVE PAIN AND SWELLING. NO OTHER MEDICINE WORKS THIS WAY.

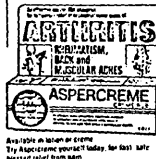
TESTED BY A LEADING DOCTOR
 A leading doctor in arthritis and rheumatism tested ASPERCREME on his own patients. Many experienced remarkable relief. Results of his extensive clinical test are shown in the ASPERCREME advertisement.

NO ILLUSTRATED SWELL
 ASPERCREME has no harmful side effects. You can use ASPERCREME on your joints and any other area where you feel pain. ASPERCREME'S ACTIVE INGREDIENTS GO TO WORK IMMEDIATELY TO RELIEVE PAIN AND SWELLING. NO OTHER MEDICINE WORKS THIS WAY.

SOME REPORT ASPERCREME BETTER THAN ANYTHING ELSE BEFORE FOR JOINT PAIN.
 "I am a 100% disabled veteran of World War II and ASPERCREME is a miracle. I have found the relief that I have been looking for for years." — J.B. — Boston, MA

Nothing compares to ASPERCREME.
 "My husband has been getting wonderful relief from ASPERCREME." — Mrs. R.C. — Baton Rouge, LA

MA—Rising D



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

Exhibit H

DECISION AND ORDER

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

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

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

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

1. Respondent Ogilvy & Mather International Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal offices and place of business located at 2 East 48th St., New York, New York.

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

ORDER

Part I

It is ordered, That respondent Ogilvy & Mather International Inc., its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any "drug", as that term is defined in the Federal Trade Commission Act, in or affecting commerce, as "com-

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

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

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

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

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

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

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

Part II

It is further ordered, That respondent Ogilvy & Mather International Inc., its successors and assigns, and its officers, representatives, agents and employees directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any topically applied drug in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act, cease and desist from:

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

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

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

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Decision and Order

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

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

Part III

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

Part IV

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

Part V

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

Part VI

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

Part VII

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

BOISE CASCADE CORP.

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Interlocutory Order

IN THE MATTER OF

BOISE CASCADE CORPORATION

Docket 9133. Interlocutory Order, Jan. 12, 1983

ORDER DENYING RESPONDENT'S APPLICATION
FOR INTERLOCUTORY APPEAL

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

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

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

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

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

Interlocutory Order

101 F.T.C.

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

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

