

It is further ordered, That respondents deliver a copy of this order to cease and desist to each operating division and to all present and future personnel of respondents engaged in the consummation of any extension of consumer credit or in any aspect of preparation, creation or placing of advertising, and that respondents secure a signed statement acknowledging receipt of said order from each such person.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents 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 corporations which may affect compliance obligations arising out of the order.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

It is further ordered, That no provision of this order shall be construed in any way to annul, invalidate, repeal, terminate, modify or exempt respondents from complying with agreements, orders or directives of any kind obtained by any other agency or act as a defense to actions instituted by municipal or State regulatory agencies. No provisions of this order shall be construed to imply that any past or future conduct of respondents complies with the rules and regulations of, or the statutes administered by the Federal Trade Commission.

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

BRISTOL-MYERS COMPANY, ET AL.

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

Docket 8897. Complaint, Sept. 12, 1972 - Decision, Apr. 22, 1975

Order setting aside the initial decision of the administrative law judge and dismissing the complaint against a New York City seller and distributor of aerosol spray

688

Complaint

anti-perspirants and its advertising agency for alleged false television demonstrations.

Appearances

For the Commission: *Lynne C. McCoy, William S. Busker and Charles E. Ludlam.*

For the respondents: *Gilbert H. Weil and Jay Sands Davis, Weil, Lee & Bergin, New York City, for Bristol-Myers Company. Leonard Orkin and Patricia Hatry, Davis, Gilbert, Levine & Schwartz, New York City, for Ogilvy & Mather, Inc.*

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 the Bristol-Myers Company, a corporation, and Ogilvy & Mather, Inc., a 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 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 345 Park Ave., in the city of New York, State of New York.

Respondent Ogilvy & Mather, 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 2 E. 48th St., in the city of New York, State of New York.

PAR. 2. Respondent Bristol-Myers Company now and for some time last past, has been engaged in the sale and distribution of Dry Ban spray anti-perspirants, which when sold, are shipped to purchasers located in various states of the United States. Thus respondent Bristol-Myers maintains, and at all times mentioned herein has maintained, a substantial course of trade in said spray anti-perspirants in commerce, as "commerce" is defined in the Federal Trade Commission Act.

Respondent Ogilvy and Mather, Inc., now and for some time last past, has been the advertising agency for Bristol-Myers Company and now, and for some time last past, has prepared and placed for publication advertising material, including but not limited to the advertising referred to herein, to promote the sale of Bristol-Myers' Dry Ban spray anti-perspirant.

PAR. 3. Respondent Bristol-Myers Company at all times mentioned herein has been, and now is, in substantial competition in commerce

with individuals, firms and corporations engaged in the sale and distribution of spray anti-perspirants of the same general kind and nature as those sold by respondent Bristol-Myers Company.

PAR. 4. In the course and conduct of its business and for the purpose of inducing the sale of the said Dry Ban spray anti-perspirant, respondents have advertised Dry Ban by means of demonstrations, and various statements used in connection therewith, in television broadcasts transmitted by television stations located in various States of the United States and in the District of Columbia having sufficient power to carry such broadcasts across state lines.

Said demonstrations and the statements used in connection therewith are contained in the following commercials, entitled "Rusty Rev," "Show-Up," "Dry Manhattan," "Spotty Performance," and "Glasses."

In the first four commercials, the same demonstration is used, whereby the "leading spray" and Dry Ban both are sprayed on a dark surface. The other spray appears white and thick; whereas, the Dry Ban appears completely clear and dry. At the conclusion of the demonstration, the voice-over asks, "Which do you prefer?"

In the commercial entitled "Glasses," two girls in an elevator spray Dry Ban and "a leading anti-perspirant spray" on separate eyeglass lenses. The "leading anti-perspirant spray" appears white and thick; whereas, the Dry Ban spray appears completely clear and dry. At this point, Girl #1 states, "I see the difference." The voice-over later announces, "Clear Dry Ban helps keep you feeling clean and dry."

PAR. 5. Through the use of the aforesaid demonstrations and the statements and representations used in connection therewith, respondents represent, directly or by implication, that said demonstrations are evidence which actually proves that Dry Ban is superior to competing anti-perspirant sprays because it is a dry spray that is not wet when applied to the body and because it leaves no visible residue when applied to the body.

PAR. 6. In truth and in fact:

1. Dry Ban is not a dry spray and it is wet when applied to the body, and
2. After application to the body, Dry Ban dries out leaving a visible residue.

The aforesaid demonstrations, including the statements and representations used in connection therewith, are not evidence which actually proves that Dry Ban is superior to competing anti-perspirant sprays. Therefore, the advertisements containing said demonstrations are false, misleading and deceptive.

PAR. 7. The use by the respondents of the aforesaid false, misleading and deceptive advertising and representations used in connection

therewith has had, and now has, the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that said advertising and representations were and are true, and into the purchase of a substantial quantity of respondent Bristol-Myers' spray anti-perspirant because of such erroneous and mistaken belief.

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 respondent Bristol-Myers' competitors, and constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition in commerce, in violation of Section 5 of the Federal Trade Commission Act.

INITIAL DECISION BY DANIEL H. HANSCOM, ADMINISTRATIVE
LAW JUDGE

NOVEMBER 28, 1973

ALLEGATIONS OF COMPLAINT

In a complaint served on Sept. 20, 1972, the Commission charged Bristol-Myers Company (hereinafter "Bristol-Myers") and its advertising agency, Ogilvy & Mather, Inc. (hereinafter "Ogilvy & Mather") with utilizing false, misleading, and deceptive practices in the advertising and sale of Bristol-Myers' Dry Ban spray anti-perspirant in violation of Section 5 of the Federal Trade Commission Act.

The complaint alleged that respondents promoted Dry Ban through a series of television commercials "Rusty Rev," "Show-Up," "Dry Manhattan," "Spotty Performance," and "Glasses," each of which compared Dry Ban with a "leading" competitive spray by means of a demonstration. In the first four commercials, the "leading spray" and Dry Ban were both sprayed on a surface. According to the complaint, the "leading spray" appeared white and thick, whereas Dry Ban appeared completely clear and dry. A voice asked, "Which do you prefer?" In "Glasses," two girls in an elevator sprayed Dry Ban and "a leading anti-perspirant spray" on separate eyeglass lenses. The "leading anti-perspirant spray" appeared white and thick, whereas Dry Ban appeared completely clear and dry. One of the girls then said, "I see the difference." According to the complaint, the demonstration in each of the commercials represented to the consuming public that it was evidence actually proving that Dry Ban was superior to competing anti-perspirant sprays because it was a dry spray that was not wet when applied to the body, and because it left no visible residue.

The complaint charged, however, that Dry Ban was not in truth a dry

spray, that it was wet when applied to the body, that after application it left a visible residue, and that the demonstration in each commercial was not evidence actually proving the contrary. Accordingly, the commercials and the demonstrations in each were challenged as being false, misleading and deceptive.

Bristol-Myers and Ogilvy & Mather denied these allegations in answers filed Oct. 10, 1972, and Oct. 18, 1972, respectively. After pretrial proceedings, including discovery by each side and the disposition of a number of motions and other matters, hearings on the merits were completed and the record was closed on July 5, 1973. As a result of certain contentions relating to the product coverage of the notice order advanced by complaint counsel for the first time in their proposed findings, proceedings were reopened by the undersigned on Aug. 31, 1973, on motion of respondent Bristol-Myers to permit the offer of evidence limited to the product coverage of the order proposed by complaint counsel. A hearing was held on Oct. 9, 1973, and the record was again closed on Oct. 10, 1973.

This matter is now before the undersigned for initial decision based on the allegations of the complaint, answers, evidence, and the proposed findings of fact, conclusions, and briefs filed by counsel for respondents and complaint counsel. All proposed findings of fact, conclusions and arguments not specifically found or accepted herein are rejected. The undersigned, having considered the entire record, makes the following findings and conclusions and issues the order set out at the end hereof:

FINDINGS OF FACT

Respondents

1. Respondent Bristol-Myers 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 at 345 Park Avenue, New York, N.Y. Bristol-Myers markets a wide variety of over-the-counter pharmaceuticals, cosmetics, and household products, including such well-known items as Bufferin, Excedrin, Bromo Quinine, Sal Hepatica, Vitalis, Clairol, and many others (CX 84; BMRX 2; Edmondson, Tr. 1627).¹ Respondent Bristol-Myers has since 1968 been engaged in the sale and distribution of Dry Ban spray anti-perspirant (CX 86(1)). Annual sales volume of all products by Bristol-Myers is over \$1,000,000,000, and total advertising expenditures are approximately \$225,000,000 (Edmondson, Tr. 1630).

2. Respondent Ogilvy & Mather is a corporation organized, existing and doing business under and by virtue of the laws of the State of New

¹ "CX" - Complaint Counsel's Exhibit; "BMRX" - Bristol - Myers' Exhibit; "OMRX" - Ogilvy & Mather's Exhibit; "Tr." - Transcript Page.

York, with its principal office and place of business at 2 E. 48th St., N.Y., N.Y. Ogilvy & Mather is one of the nation's largest advertising agencies with billings in the United States alone of \$200,000,000 annually, and has handled the promotion of consumer products for many of the nation's major corporations including respondent Bristol-Myers.

3. Bristol-Myers for a considerable period has sold and shipped Dry Ban to purchasers located throughout the United States, and has maintained a substantial course of trade and commerce in Dry Ban as "commerce" is defined in the Federal Trade Commission Act. At all times mentioned in the complaint, Bristol-Myers has been, and now is, in substantial competition in commerce with individuals, firms and corporations engaged in the sale and distribution of spray anti-perspirants of the same general kind and nature as sold by respondent Bristol-Myers.

4. Ogilvy & Mather for a substantial period prepared and placed for dissemination advertising materials to promote the sale of Bristol-Myers' Dry Ban, and was the advertising agency which prepared and disseminated the commercials challenged in the complaint (CX 12, 14, 18). Ogilvy & Mather, at all times mentioned in the complaint, has been, and now is, in substantial competition in commerce with other individuals, firms and corporations engaged in the advertising business.

5. Respondents Bristol-Myers and Ogilvy & Mather have advertised Dry Ban by means of demonstrations and various statements used in connection therewith, as set out later herein, in television broadcasts transmitted by stations located in various States of the United States and in the District of Columbia having sufficient power to carry such broadcasts across state lines.

Dry Ban

6. When Dry Ban was introduced by Bristol-Myers late in 1968, it was promoted as a superior aerosol deodorant competing with such brands as Arrid, Right Guard, Secret, Avon, Mum, Mennen, and others (CX 86, 47 (18)). Spray anti-perspirant products are heavily utilized by the consuming public, and constitute the most important of all aerosol product categories (CX 85). Production of aerosol spray anti-perspirants and deodorants in 1970 amounted to 482,000,000 units obviously involving enormous consumer expenditures (CX 85(13)). Sales of Dry Ban in 1969 amounted to \$7,385,000, and grew to \$7,891,000 in 1970 (CX 83).

7. Dry Ban aerosol spray anti-perspirant was formulated with an alcohol base (CX 12) which looked clear when sprayed on a surface, whereas major competing brands of aerosol spray anti-perspirants then on the market were formulated with an oil base which, when sprayed

on a surface, produced an oily, opaque and whitish or creamy appearance (Mayers, Tr. 1151-1154; CX 86(6)(13); CX 75(2)).

The Challenged Commercials

8. Shortly after the introduction of Dry Ban it was determined by respondent Bristol-Myers and its advertising agency, Ogilvy & Mather, to exploit the difference between the "clear, clean" and "quick drying formula" of Dry Ban and the "oily, opaque" formula of competing brands (CX 86 (2-6); Mayers, Tr. 1150). A number of commercials were prepared for broadcast over television containing comparative demonstrations utilizing the foregoing strategy (CX 14, 17, 23-24). The five commercials listed earlier herein were ultimately selected for broadcast and were disseminated over network or spot television during the approximately 14-month period between July 28, 1969, and September 11, 1970, at a cost of \$5,800,000 (CX 81). "Rusty" was broadcast over network television, "Show-Up," "Glasses," and "Dry Manhattan" were broadcast over both network and on "spot" television, and "Spotty Performance" was utilized only for "spot" broadcast (CX 82). Each contained a comparative demonstration dramatizing the difference between Dry Ban's "clear, clean" appearance and the "oily, opaque" appearance of the "leading" competing spray anti-perspirant (CX 1-5, 6-10).

9. "Rusty," "Show-Up," "Dry Manhattan," and "Spotty Performance" all contain the same demonstration. The demonstration in "Glasses" is somewhat different, although employing essentially the same concept. A film of these five commercials is contained in the record (CX 1-5), and may be viewed with a suitable projector. The commercials on CX 1-5 are identical to those disseminated by respondents for actual broadcast purposes. The "storyboards" for these commercials are also in the record (CX 6-10). "Storyboards" are utilized in the advertising industry for conveying the basic idea and theme for commercials in use or under consideration, but are not fully representative of the actual commercial broadcast (CX 12). The storyboards for "Rusty" (CX 6) and "Glasses" (CX 10) are reproduced herein. The significance of these commercials cannot be fully appreciated, however, without viewing the entire commercial as broadcast over television (CX 1-5).

10. "Rusty," "Show-Up," "Dry Manhattan," and "Spotty Performance" all contain the following sequence: After a preliminary filming of two persons in a scene meant to be humorous, the camera shows a close-up of two cans of spray anti-perspirants, the "leading" brand which is not identified and a can of Dry Ban, and the announcer states, "Compare Dry Ban to the leading anti-perspirant spray." A sequence is then shown in which the "leading" brand is sprayed on a surface over

the words "OTHER SPRAY" and the announcer states, "the leading spray goes on like this." The camera shows a whitish, creamy, and thick deposit where the "leading" brand has been sprayed. Dry Ban is sprayed on an adjacent surface over the words "DRY BAN" and the announcer states, "Dry Ban goes on like this." An apparently clear and dry area is shown where Dry Ban has been sprayed. A finger is pictured running through the deposit of the "leading" brand demonstrating it to be thick and wet. A finger is then run through the area where Dry Ban has been sprayed with no apparent effect, or one so slight as to probably escape notice. The announcer states, "Which do you prefer?" A close-up of a can of Dry Ban is then shown and the label "Dry Ban" virtually fills the television screen. Each commercial concludes with a scene of the characters shown initially singing or stating, "How dry I am" (CX 1-4, 6-9).

11. The commercial identified as "Glasses" commences with a scene of two girls and a man in an elevator. The first girl states she has a "leading anti-perspirant spray" and the second rejoins, "Me too." The second girl then adds, "But mine's Dry Ban." The first girl replies, "Mine helps you keep dry" and the second girl says, "So does my Dry Ban." The second girl then reaches up and takes off the man's glasses, to his surprise, and sprays the first

OGILVY & MATHER INC.

2 EAST 48 STREET, NEW YORK 10017
MURRAY HILL 2-8100

Client: BRISTOL-MYERS
Product: DRY BAN
Title: "RUSTY REV."
Commercial No.: OMO7-02224-30C
Date Approved: 8/14/69



1. GIRL: Dance?



2. MAN: Oh no, I'm a little rusty.



3. GIRL: 'C'mom...
MAN: No-no.



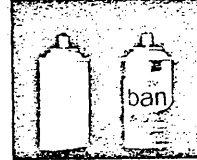
4. I forgot to use Dry Ban Anti-perspirant -



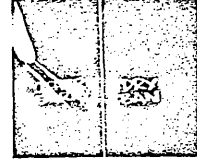
5. and (SFX) I'm a little rusty. (LAUGHS) (MUSIC)



6. ANNCR: (VO) Compare Dry Ban to the leading anti-perspirant spray.



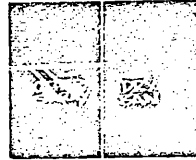
7. Both help keep you dry.



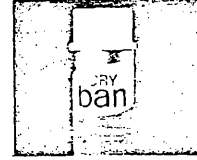
8. but the leading spray goes on like this.



9. Dry Ban goes on like this.



10. Which do you prefer?



11. Dry Ban helps keep you feeling clean and dry.



12. MAN AND GIRL: How dry I am.

Initial Decision

OGILVY & MATHER INC.

2 EAST 48 STREET, NEW YORK 10017
MURRAY HILL 8-4100

Client: BRISTOL-MYERS
Product: DRY BAN
Title: "GLASSES"
Commercial No.: OMO7-02226-30C
Date Approved: 8/69



1. (SFX)



2. GIRL #1: Guess what I just happen to have?
GIRL #2: What?



3. GIRL #1: A leading anti-perspirant spray.



4. GIRL #2: Me too.



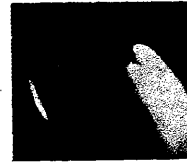
5. But mine's Dry Ban.



6. GIRL #1: Mine helps keep you dry.



7. GIRL #2: So does my Dry Ban. Watch. Yours goes on - (SFX) like this.



8. My Dry Ban goes on - (SFX) like this.



9. GIRL #1: Uhh...hmm... I see the difference.



10. I...I'll try it on my boss' glasses.



11. ANNCR: (VO) Clear Dry Ban helps keep you feeling clean and dry.

girl's anti-perspirant on one of the lenses saying, "Yours goes on * * * like this." A whitish, creamy, and thick deposit is shown covering most of the lens where the "leading anti-perspirant" has been sprayed. The second girl then sprays Dry Ban on the other lens saying, "My Dry Ban goes on * * * like this." The camera shows a close-up of the lens where Dry Ban has been sprayed revealing it to be clear and apparently dry, without a visible deposit. The first girl then says, "Uhh * * * hmm * * * I see the difference (CX 5, 10).

Representations Inherent in Challenged Commercials

12. "Rusty," "Show-Up," "Dry Manhattan," "Spotty Performance," and "Glasses" had the capacity to convey to members of the viewing public the net impression (1) that Dry Ban was a dry spray that was not wet when applied to the body; (2) that it left no discernible or visible residue after application to the body; (3) that viewers were seeing a comparative demonstration proving that Dry Ban in fact possessed those physical characteristics; and (4) that Dry Ban was superior to competing anti-perspirant sprays because of them.

13. The spraying of the "leading" spray in "Rusty," "Show-Up," "Dry Manhattan," and "Spotty Performance" onto a surface labeled in the center "OTHER SPRAY," the thick and whitish spray deposited thereon, the spraying of Dry Ban on an adjacent surface labeled conspicuously in the center "DRY BAN," the clear and transparent look resulting, the absence of apparent wetness where Dry Ban was sprayed, the name of the product "Dry" Ban, the presentation of the can itself conspicuously on the television screen in a close-up emphasizing the label "Dry Ban," the repeated use of the word "dry" in both audio and visual portions of the commercials, the running of a finger through the deposit left by the "leading" spray proving its thick, wet, and creamy quality, the running of a finger across the surface where Dry Ban had been sprayed showing virtually no visible result, all collectively had the tendency and capacity to represent to the viewing public that Dry Ban was dry, went on dry and left no discernible or visible residue on application, and that a real demonstration was taking place actually proving those characteristics, and the superiority of Dry Ban because of them. "Glasses" likewise had the foregoing tendency and capacity. In "Glasses," the "leading" spray was shown to be thick, wet, and creamy, with a heavy residue. In contrast, Dry Ban was seen to be clear and transparent, in fact, practically invisible with little or no sign at all of wetness or of any deposit on the glasses' lens. As in the foregoing four commercials, the word "dry" was repeated many times in the voice accompaniment, and the can showing "Dry" Ban was held up prominently at the end. Holding the pair of glasses up after spraying them revealed to the television audience that it was impossible to see

through the glasses' lens which had been sprayed with the "leading" spray, although the lens which had been sprayed with Dry Ban was clear and without a deposit.

The fact that the statements and representations in the commercials may also have had the ability to communicate the message that Dry Ban was "clear" or "non-greasy," or helped "keep you dry," did not in any way negate the fact that the representations were communicated that Dry Ban was superior to competing products because it was *in itself* dry and went on dry, and left no visible residue on application to the body. It is possible for a commercial to be subject to several different interpretations by the public. The conclusion that the challenged commercials had the tendency and the capacity to convey the foregoing representations, and that viewers were being shown demonstrations actually proving those representations, is made on the basis of the contents of the commercials themselves, and the viewing thereof by the administrative law judge. There is, however, an abundance of confirming evidence in the record.

Concept of Demonstration in Challenged Commercials Exploiting Differences in Formula of Dry Ban and Competing Anti-perspirants

14. The basic alcohol formula for Dry Ban, as stated, differed from competing anti-perspirant deodorants at the time of the introduction of Dry Ban, and during the period when the commercials challenged in the complaint were broadcast over network and spot television, or otherwise disseminated. A contemporary memorandum from Ogilvy & Mather to an official of Bristol-Myers stated:

* * * the basic formula of DRY BAN differs from other leading anti-perspirant sprays, (Secret excepted) the DRY BAN spray appears quite different when applied to a clean surface (CX 23).

Dry Ban appeared to be "clear, clean" while the others appeared "oily, opaque" and "creamy" (CX 15, 17, 74, 75, 86 (6-14); BMRX-6; Mayers, Tr. 1150-54). The "clear, clean" appearance of Dry Ban in contrast to the "oily, opaque" and "creamy" appearance of competing spray anti-perspirants formulated with an oil base held true whether the surface on which such deodorants were sprayed was plastic, skin, or something else (CX 17).

15. The difference in appearance between Dry Ban and competing spray anti-perspirants formulated with an oil base was uniquely subject to a comparative demonstration *on film* which had the capacity to convey a false, misleading, and deceptive impression of the true physical characteristics of Dry Ban. A *live* comparative demonstration in which Dry Ban and an oil base competing spray anti-perspirant are sprayed in juxtaposition results in the perception of Dry Ban as watery, wet, and runny (CX 76; Tr. 845-849).

16. Respondent Bristol-Myers and its advertising agency, Ogilvy &

Mather, concluded that television commercials incorporating a demonstration of the "clear, clean" characteristic of Dry Ban due to its alcohol base in contrast to the "oily, opaque" and "creamy" appearance of a competitive brand might prove an effective advertising device to persuade members of the public to purchase Dry Ban (Mayers, Tr. 1150-56; CX 86(2)). It was determined by respondents to replace the prior advertising strategy by a filmed demonstration of the difference between Dry Ban's "clear, clean" appearance and the "oily, opaque" and "creamy" appearance of a leading competitive brand (CX 56, 57, 86(7)). The president of Bristol-Myers Products Division testified:

The idea of the demonstration was my concept. I had final approval of the commercials before they were put on the air (Mayers, Tr. 1150).

17. Although the basic concept and the representations made in "Rusty," "Show-Up," "Dry Manhattan," "Spotty Performance," and "Glasses" exploiting Dry Ban's appearance versus that of a leading competitive brand of spray anti-perspirant was developed by respondent Bristol-Myers, the senior vice-president of Ogilvy & Mather wrote that his organization:

* * * took the concept from its earliest stages to the finished production in an effort to dramatize the Bristol-Myers supplied product difference (CX 18).

Preliminary Testing by Respondents of Demonstration Exploiting "Clear, Clean" Formula of Dry Ban Versus "Oily, Opaque" And "Creamy" Formula of Competing Anti-perspirants and Results Disclosed

18. The concept of a television commercial utilizing a demonstration exploiting the "clear, clean" appearance of Dry Ban and contrasting it to the "oily, opaque" and "creamy" appearance of a leading competitive brand was initially tested with members of the consuming public. In a letter from a member of the Ogilvy & Mather organization to the Dry Ban "Product Manager" of respondent Bristol-Myers, it was reported that on Apr. 9 and 10, 1969, forty persons had been interviewed in a mobile van placed in a shopping center in Manhasset, N.Y. (CX 23, 75(3), 105). These consumers had been individually shown a videotape demonstrating the effect of spraying unidentified Dry Ban and another unidentified spray anti-perspirant on a flat piece of glass. The videotape demonstration (CX 75(23-24)), similar in essential respects to the demonstration contained in the challenged commercials, was reported by Ogilvy & Mather to Bristol-Myers in a research report entitled "A Communication Test Of The Dry Ban 'Greasy' Demonstration" to constitute in advertising an effective "reason why" consumers should purchase Dry Ban (CX 75(2)). A significant proportion of viewers preferred Dry Ban because it was perceived from the demonstration to be "Cleaner/Clearer/Invisible" and "Leaves No Film/Residue" (CX 75(9)).

19. On May 15 and 16, 1969, another test, this time by Schrader Research and Rating Service (Schrader, Tr. 217-19, 230), was conducted of a videotape demonstration of the clear formula of Dry Ban, labeled for the purpose of the test "Clear and Dry" and the competitive "creamy" or "greasy" formula. The test was conducted in a mobile van parked in a shopping center in the vicinity of New Brunswick, N.J. (CX 74(3-4)). The van was staffed by interviewers recruited by the Schrader organization for the purpose (Tr. 257). A questionnaire, previously prepared by the research department of Ogilvy & Mather (Tr. 230-31), was provided these interviewers who were briefed on the project. Women shoppers at the center were individually invited into the van to view the videotape and, immediately after seeing the film, were asked the questions contained in the questionnaire and their answers were recorded. A second and related test utilizing a pictured demonstration in a printed advertisement was conducted on May 22 and 23, 1969. The printed advertisement was shown to each woman volunteer and she was permitted to examine it for as long as she wished. It was then removed from sight, the woman volunteer was asked the questions in the questionnaire and her answers were recorded. Approximately 100 women were included in the test utilizing the videotape, and approximately 100 were shown the printed advertisement (CX 74(3-5)). Upon the conclusion of the test utilizing the videotape and the test with the printed advertisement, the responses of the two hundred women were noted, and the results were transmitted to Ogilvy & Mather (Tr. 263-64).

20. On receipt of the results from the Schrader organization, the Research Department of Ogilvy & Mather in June 1969 prepared a report for Bristol-Myers (CX 74; Tr. 425-27, 518) advising that, after seeing the videotape demonstration, the biggest advantages of "Clear and Dry" (Dry Ban) named by the women were that "it is clear and it is dry" (CX 74(8)). Table 3 of this report shows that a significant number of the women who viewed the videotape demonstration liked "Clear and Dry" (Dry Ban) because, among other things, they perceived the representation conveyed by the demonstration to be "It's dry" (CX 74(14)). Ogilvy & Mather likewise reported to respondent Bristol-Myers that a significant number of the women who were shown the printed advertisement picturing the demonstration also perceived the message conveyed about "Clear and Dry" (Dry Ban) to be "It's dry" (CX 74(14)).

21. Thereafter, still another van test was conducted on July 2, 1969, in a Philadelphia shopping center. It was reported in the letter, mentioned earlier, reviewing "DRY BAN Copy Research" from Ogilvy & Mather to Bristol-Myers that interviews had been conducted with 50

