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## Brighter Smiles for the Masses – Colgate vs. P&G

In August 2000, the Procter & Gamble Company (P&G) introduced a revolutionary new product in the oral-care market, *Crest Whitestrips*. Whitestrips was the first effective over-the-counter tooth-whitening product that allowed consumers to whiten their teeth at home. P&G advertised the strips as being 10 times as effective as the leading toothpaste, Colgate Tartar Control Whitening.<sup>1</sup> Whitestrips proved to be a huge success, making the strips P&G's most successful product introduction in two decades.<sup>2</sup> With Whitestrips, the company had created an entire new category in oral care, globally worth \$310 million in 2001, \$460 million in 2002, and \$590 million in 2003. In August 2002, P&G's share of the at-home tooth-whitening market in the United States stood at more than 80%.<sup>3</sup> Ayman Ismail, general manager for global oral care at P&G with profit-and-loss responsibility for Whitestrips, commented:

Before Whitestrips entered the market, the market almost did not exist. It was very, very small. Through great technology and communication with the consumer, the market exploded, became 10 times bigger than what it used to be. As I always say, it makes you feel good that you come to work every day to bring whiter, beautiful teeth to people.<sup>4</sup>

Whitestrips left P&G's main competitor in the oral-care business, Colgate-Palmolive Company, scrambling because several patents protected the strips, making it difficult for Colgate to copy the invention. But in September 2002, the tables turned. Colgate introduced *Simply White*, a favorably priced whitening product that consumers could simply paint on their teeth. One month after its introduction, Simply White had captured half of the market, and Crest Whitestrips lost more than 50% of its share (**Exhibit 1**).<sup>5</sup> P&G's scientists obtained a sample of Simply White prior to its launch, and they feverishly worked to test the competing whitener.<sup>6</sup> Paul Sagel, the inventor of Whitestrips and a principal engineer at P&G, explained:

We took volunteers, we had them use Simply White, and then we would swab the teeth to look for the whitening agent after they applied it. . . . We did it 30 seconds, one minute, two minutes, three minutes to see if there was any peroxide [the whitening agent] on the surface of the tooth. What we found is that most of it was gone in 30 seconds to a minute, and it was completely gone in five minutes. . . . My expectation was that Colgate would have developed something that stayed on the tooth a little longer, and I was actually quite surprised that it washed off the teeth as fast as it did.<sup>7</sup>

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Ismail shared Sagel's surprise: "We expected Colgate, a major competitor, to come up with a better whitener."<sup>8</sup>

To be effective, P&G's scientists believed that a whitening agent needed to be in contact with teeth for an extended period of time.<sup>9</sup> Whitestrips, for instance, was to be applied for a full 30 minutes.<sup>10</sup> Had Colgate just committed a major strategic blunder by introducing an ineffective product? And if so, how could P&G best take advantage of the situation?

## The Oral-Care Market

The oral-care market comprised the sales of toothbrushes and toothpaste, dental floss, mouthwashes and fresheners, and denture care. The major players in this market were multinational companies such as Colgate, P&G, Pfizer Inc., and Unilever, all of which offered a wide array of products. However, as one Unilever representative put it, "Crest and Colgate dominate the oral-care market. It's just a fact of life."<sup>11</sup> In 2003 the U.S. market reached a value of \$4.5 billion, but significant growth seemed elusive. From 1999 to 2003, the market had actually contracted (CAGR of -0.6%). Analysts attributed the stagnation to the limited opportunities to expand the usage of oral-hygiene products and to adverse economic conditions.<sup>12</sup> With \$1.9 billion in revenues, the sale of toothpaste was key to market success (41.4% of total category spending), followed by toothbrushes, which accounted for an additional 28.7%.<sup>13</sup> Business prospects appeared brighter outside the North American market. The Asia-Pacific region was the principal driver of global growth, expanding 19.8% from 1999 to 2003. Europe had the largest market share for oral care in 2003, generating 35.4% of global revenues compared with 25.5% by the U.S. and 26% by Asia-Pacific.

### *Colgate-Palmolive*

Colgate-Palmolive, founded in 1806 and headquartered in New York City, was a \$9.3 billion global consumer products company that ranked among the top five in this category worldwide.<sup>14</sup> The company was focused on two product segments: oral, personal, and home care and pet nutrition.<sup>15</sup> In oral care, which represented approximately one-third of company sales, Colgate had built an impressive global brand. Toothpaste was the company's strongest product, followed by toothbrushes and dental accessories.<sup>16</sup> Operationally, Colgate was organized along geographic lines, with North America, Latin America, Europe, and Asia/Africa each generating about a fifth of company sales. Colgate's operating margins hovered around 20% (see **Exhibit 2** for financial results). Forty percent of the company's sales came from new products launched within the past five years.<sup>17</sup> In March 2001, Colgate was the leader in the U.S. oral-care market with a 32.5% share, ahead of P&G with 27.3%.<sup>18</sup>

### *Procter & Gamble*

With \$40 billion in sales in 2002, P&G was the world's largest consumer products company. P&G's business consisted of five segments: baby, feminine, and family care was the largest unit (30% of sales), followed by fabric and home care (29%); beauty care (20%); health care, which included oral care (12%); and food (9%).<sup>19</sup> The company marketed its oral-care products under brands such as Crest (brushes and toothpastes), Glide (dental floss), and Scope (mouthwash). In 2002, Crest joined the ranks of P&G's billion-dollar brands. While the oral-care sector led significant volume growth in health care in 2002, the segment's contribution to net earnings was slightly less than proportional (12% of sales and 10% of net earnings). Fabric and home care remained P&G's most profitable group of products (36% of net earnings). For the company overall, the 2002 operating margin was 16.6% (see **Exhibit 3** for financial results).

## Whiter Teeth – A Primer

The appearance of teeth depended on the color of the enamel and the underlying dentin. Sagel explained:

If you were to take your central tooth and cut it in half, you would see your tooth looks like a tree. It has very defined rings, with the innermost part of the tooth being the pulp chamber, the living part of the tooth. The next layer out is the dentin, and the outermost layer of the tooth is the enamel.<sup>20</sup>

Although enamel was white, most teeth appeared yellow because the enamel was translucent, letting the color of the naturally yellow dentin shine through. Dentin darkened with age and could be stained by coffee, wine, and acidic drinks if the protective enamel was thinned or damaged.<sup>21</sup> As a result, simply brushing the surface of teeth, the enamel, did not prevent them from looking yellow. To whiten teeth, one needed a substance that would diffuse through the enamel and sink into the porous dentin. Hydrogen peroxide, a bleaching agent with these properties, was first used in 1884 to lighten the appearance of teeth.<sup>22</sup> One hundred years later, gel containing this substance was still considered the most effective method to bleach teeth.

Prior to the invention of Whitestrips, consumers could choose between three methods to whiten their teeth. Power bleaching was available at dentist offices. The procedure took about an hour and involved the application of a light-activated bleaching formula containing 35% hydrogen peroxide. Power bleaching cost up to \$1,000. Dentist-made trays, worn at home for a few weeks, were considered equally effective but cost only \$300 to \$450. The main disadvantage to using trays was that the teeth could become fairly sensitive during treatment.<sup>23</sup> In 1993, Unilever introduced a third option, the Mentadent whitening toothpaste. Consumer reaction was highly favorable, and many oral-care companies introduced toothpastes with mild abrasives or enzymes to help dissolve stains from red wine, tea, coffee, or smoking. The category was so successful that eight years later, Colgate had 12 types of whitening toothpaste and P&G had five.<sup>24</sup> Unlike power bleaching or trays, the whitening agents contained in toothpaste came in contact with teeth for a very limited time, making toothpaste significantly less effective than the more expensive methods offered by dentists.<sup>25</sup>

### *Whitestrips*

Sagel conceived of Whitestrips in early 1997.<sup>26</sup> He recalled:

The idea just hit me. You don't have to hold the gel [in a tray]. You only need to protect it. And I thought if I can just put a piece of film over the gel, that will do it. Sure enough, it was a Eureka moment. We took the first piece of film, put gel on it, put it on, and we knew we had it right there.<sup>27</sup>

In June of 1997, P&G applied for patents for “a delivery system for an oral-care substance.” The patents also covered the strip, a super flexible material that provided adhesive attachment to teeth and gums.<sup>a</sup>

By the time P&G launched Whitestrips in September 2000, the company had spent \$130 million on research and development (R&D) and initial marketing.<sup>28</sup> The advertising campaign supporting Whitestrips compared the whitener to the product most consumers were familiar with, whitening

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<sup>a</sup> The strips had a flexural stiffness of less than 50 grams centimeter. Flexural stiffness was defined as the force couple required to bend a rigid structure to a unit curvature.

toothpaste. P&G claimed that Whitestrips was 10 times as effective as the leading product in this category, Colgate Tartar Control Whitening. To support this claim, P&G had developed a proprietary method of documenting tooth-color changes using digital imaging.<sup>29</sup> A specially designed \$100,000 camera measured the amount of red, green, and blue light that was reflected from the teeth of patients, both before and after they had used Whitestrips.<sup>30</sup> These RGB numbers were then translated into CIELAB values, a three-dimensional system to characterize color.<sup>b</sup> In CIELAB,  $L^*$  values represented the brightness of colors,  $a^*$  determined how red a color was, and  $b^*$  measured its yellowness. Although bleached teeth were brighter, less red, and less yellow, P&G measured the effectiveness of Whitestrips relying on changes in  $b^*$  alone.<sup>31</sup> The  $b^*$  values were considered critical because P&G scientists had found that patients' satisfaction with the gain in whiteness was correlated with  $b^*$ .<sup>32</sup>

While some color experts approved of P&G's method of measuring changes in tooth color,<sup>33</sup> others were more critical.<sup>34</sup> Stephen Westland, professor of color science and technology at Leeds University, believed that it was a mistake to rely only on  $b^*$  values to measure the effectiveness of whitening products:

Almost always when color changes, it changes in all three dimensions of color space. . . . In order to look at changes in color, you need to look at changes in all three dimensions of color space, and that is particularly true for whiteness because it is known that all three dimensions, that is,  $a^*$ ,  $b^*$ , and  $L^*$ , can contribute towards the whiteness of an object.<sup>35</sup>

P&G started marketing Whitestrips with a \$75 million advertising campaign in August 2000, initially selling the product only on the Internet ([www.whitestrips.com](http://www.whitestrips.com)) and through dentists' offices.<sup>36</sup> Consumers were instructed to cover their teeth with the clear hydrogen peroxide-coated plastic strips for 30 minutes, two times a day for two weeks. Priced at \$40, the strips were an instant success. By May 2001, P&G had generated \$10 million in Whitestrips sales.<sup>37</sup> In May 2001, Whitestrips became widely available in retail outlets, including food and drug stores and mass discounters.<sup>38</sup>

Seeing the success of the new product, Den-Mat Corporation, best known for its Rembrandt whitening toothpaste, challenged P&G's advertising claim that the strips were 10 times as effective as whitening toothpaste at the National Advertising Division (NAD) of the Council of Better Business Bureaus (see **Exhibit 4** for a description of the NAD). Den-Mat asserted that the 10-times claim was necessarily false and misleading because the American Dental Association had awarded its Seal of Acceptance to the best whitening toothpastes, implying they whitened teeth by at least two shades as measured by the commonly used Vita Shade Guides (see **Exhibit 5** for a picture of a shade guide). For P&G's claim to be true, Den-Mat argued, Whitestrips needed to whiten teeth by 20 shades, but the typical shade guides used by the dental industry had only 16 shades. However, P&G won the challenge before the NAD.<sup>39</sup>

## Simply White

It took P&G's competition almost two years to offer a rival product. But in August 2002, Colgate was ready. The company launched Simply White, a gel that consumers painted on their teeth. In competing with Whitestrips, Colgate stressed convenience and a lower price point. Seamus McBride, president of Colgate-Palmolive USA, was confident his company had a winning product:

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<sup>b</sup> CIELAB was designed to represent color in a way that resembled the human perception of color. A color converter from RGB to CIELAB values is available at [www.colopro.com/info/tools/convert.htm](http://www.colopro.com/info/tools/convert.htm).

We felt our product had advantages over Crest Whitestrips. We felt very confident in the mode of action, the way you use the product. Wiping gel onto your teeth is something consumers are already familiar with, rather than putting a sticky tape over your teeth. Finally, the competitive product was selling for nearly \$40. Coming in under \$15, we felt we had a very strong product to market.<sup>40</sup>

McBride was not disappointed. Simply White did spectacularly well. Priced at \$15 with a contribution margin of 45%, “It was one of the most successful new product launches we have ever had in Colgate US history,” boasted McBride.<sup>41</sup> And Reuben Mark, CEO of Colgate-Palmolive, praised Simply White as a “new high margin, truly innovative product.”<sup>c</sup> After US expansion, [Simply White] will expand around the world.”<sup>42</sup> In early consumer tests comparing purchasing intentions for Whitestrips and Simply White, two-thirds of consumers said they intended to buy the Colgate product.<sup>43</sup> Dramatic changes in market share confirmed the early consumer studies. Whitestrips dropped from a share of more than 80% to 37% in October 2002, while Simply White achieved a value share of slightly less than 50%.

In its marketing, Colgate emphasized that Simply White bleached teeth as effectively as Whitestrips and was easier to use. Consumers used a brush to paint Simply White on their teeth. Having applied the gel, they needed to keep their mouth open for 30 seconds to let the whitener dry. After this brief period, the active ingredients in Simply White would do the rest to produce a brighter smile. P&G ran concept tests to see if Colgate’s messages reached the intended audience. Ismail explained:

When a competitor comes to the market, we go to the consumer and present to them what the competitor is promising and what we are promising and ask them to tell us their opinion. We call this a concept test. So we ran a concept test and what came out is that consumers’ takeaway from the Colgate communication is, one, that Colgate Simply White would whiten teeth as much as Crest Whitestrips. So on a whitening level, we were equal in the consumer perception. . . . Secondly, [consumers] took away that the product is very easy to use; in fact, it was as easy as one, two, three.<sup>44</sup>

The perception of similar effectiveness stood in stark contrast to P&G’s internal data, which showed that changes in the b\* value attained by using Whitestrips were at least five times as large as the changes patients achieved with Simply White. P&G scientists discovered that saliva tended to wash away much of the Simply White gel in 30 seconds, allowing the hydrogen peroxide only a brief period to penetrate the enamel.<sup>45</sup> Consumers, however, appeared to be satisfied with Simply White. Ismail explained:

Most users claim to have noticed a difference after using Simply White. When you buy a product and you pay \$14, there will be a group of people who come back and claim it worked. The satisfied Colgate users don’t want to acknowledge that Simply White washes away. They believe . . . that it stays long enough [on the teeth] to deliver a benefit.<sup>46</sup>

About 50% of the consumers who had tried Simply White thought the product worked.<sup>47</sup> Pressure on P&G further increased when Colgate introduced *Simply White Night* in April 2003. The new product was identical in its price, packaging, and mode of application but could be used at night, a convenience factor Colgate believed would be important for many consumers.<sup>48</sup> P&G’s managers were astonished. Ismail commented:

I was very surprised from the way they executed the launch. . . . When you have two products and you have a new product coming to the market, you normally try to

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<sup>c</sup> Analysts believed P&G and Colgate had similar variable cost producing their respective products.

differentiate it a little bit. . . . If you look at the two [Colgate] products, they have the same name, they look exactly the same, it is only a slight color difference between both of them, and they were priced the same.<sup>49</sup>

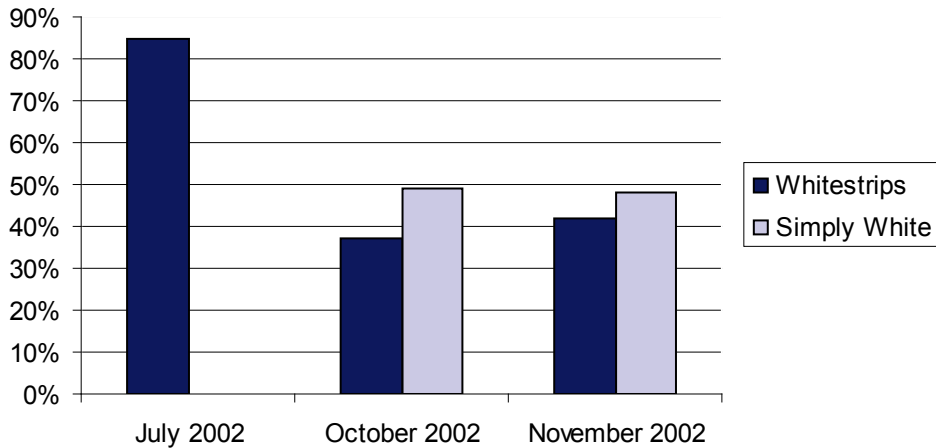
Other competitors also operated on the fringe of the market. Unilever introduced its own whitening system, Mentadent, in the summer of 2002 with a \$20 million marketing budget. Sold at a price point of \$19-\$22, the kit contained peroxide gel that was applied to teeth in dental trays for fifteen minutes each day. Unilever claimed Mentadent whitened teeth in the course of seven days, rather than the fourteen required by the products created by Colgate and P&G. By January 2003, it was clear that Mentadent was not doing well in retail.<sup>50</sup>

## Moves and Countermoves

Faced with significant new competition in the market for at-home tooth whitening, Ismail's team at P&G needed to decide how to counter Colgate's recent advance. At the same time, McBride's group sought to anticipate P&G's moves and studied possible countermoves. P&G had many options. These included:

- Attempts to block Colgate's advertising or force the company to change its message. To achieve this P&G could approach the television networks and demand the withdrawal of the advertisements it believed to be false. Alternatively, it could file a complaint with the NAD or even sue Colgate for false advertisement under Section 43(a) of the Lanham Act (see **Exhibit 6** for an explanation of the rules concerning comparative advertising).
- Increases in the media weights for P&G's current ad campaign.
- The development of a comparative advertising campaign directed at Simply White. In fact, there existed a suggestion for a new commercial that would directly compare the effectiveness of Whitestrips and Simply White (see **Exhibit 7** for a description of the proposed copy).
- A drop in price.
- An increased use of coupons.
- An introduction of a new product.

For each of these actions, McBride would have to decide how to respond. Analysts expected the "business in brighter smiles" to become a \$4 billion opportunity by 2010.<sup>51</sup> Would Colgate or P&G become the dominant player? Much depended on the next steps.

**Exhibit 1** Market Shares for P&G Whitestrips and Colgate Simply White

Source: Suzan Harrison, court testimony in Colgate-Palmolive v. The Procter & Gamble Company, United States District Court, Southern District of New York (03CV9348).

Note: The market shares are in value terms.

**Exhibit 2** Colgate-Palmolive Income Statement and Balance Sheet

## CONSOLIDATED STATEMENTS OF INCOME

(Dollars in millions except per share amounts)	2002	2001	2000
<b>Net sales</b>	9,294.3	9,084.3	9,004.4
<b>Cost of sales</b>	4,224.2	4,234.9	4,257.0
<b>Gross profit</b>	5,070.1	4,849.4	4,747.4
<b>Selling, general and administrative expenses</b>	3,034.0	2,920.1	2,954.6
<b>Other expense, net</b>	23.0	94.5	52.3
<b>Operating profit</b>	2,013.1	1,834.8	1,740.5
<b>Interest expense, net</b>	142.8	166.1	173.3
<b>Income before income taxes</b>	1,870.3	1,668.7	1,567.2
<b>Provision for income taxes</b>	582.0	522.1	503.4
<b>Net income</b>	1,288.3	1,146.6	1,063.8

Source: Colgate-Palmolive 2003 Annual Report.

**Exhibit 2 (continued)**

## CONSOLIDATED BALANCE SHEETS AS OF DECEMBER 31

(Dollars in millions)	2002	2001
<b>Assets</b>		
Current Assets		
Cash and cash equivalents	\$ 167.9	\$ 172.7
Receivables <sup>a</sup>	1,145.4	1,124.9
Inventories	671.7	677.0
Other current assets	243.1	228.8
<b>Total current assets</b>	<b>\$2,228.1</b>	<b>\$2,203.4</b>
Property, plant and equipment, net	2,491.3	2,513.5
Goodwill, net	1,182.8	1,284.2
Other intangible assets, net	608.5	619.8
Other assets	576.5	363.9
<b>Total assets</b>	<b>\$7,087.2</b>	<b>\$6,984.8</b>
<b>Liabilities</b>		
Current Liabilities		
Notes and loans payable	\$ 94.6	\$ 101.6
Current portion of long-term debt	298.5	325.5
Accounts payable	728.3	678.1
Accrued income taxes	121.7	195.0
Other accruals	905.6	823.3
<b>Total current liabilities</b>	<b>\$2,148.7</b>	<b>\$2,123.5</b>
Long-term debt	\$3,210.8	\$2,812.0
Deferred income taxes	488.8	480.6
Other liabilities	888.6	722.3
<b>Total Liabilities and Shareholders' Equity</b>	<b>\$7,087.2</b>	<b>\$6,984.8</b>

Source: Colgate-Palmolive 2003 Annual Report.

<sup>a</sup>Less allowances of \$45.9 and \$45.6, respectively.



**Exhibit 3** P&G Financial Results, 2002

## CONSOLIDATED STATEMENT OF EARNINGS

(Amounts in millions except per share amounts)	Years Ended June 30		
	2002	2001	2000
<b>Net Sales</b>	\$40,238	\$39,244	\$39,951
Cost of products sold	20,989	22,102	21,514
Marketing, research, administrative and other expense	12,571	12,406	12,483
<b>Operating Income</b>	6,678	4,736	5,954
Interest expense	603	794	722
Other non-operating income, net	308	674	304
<b>Earnings Before Income Taxes</b>	6,383	4,616	5,536
Income Taxes	2,031	1,694	1,994
<b>Net Earnings</b>	\$4,352	\$2,922	\$3,542

Source: P&amp;G Annual Report 2002.

**Exhibit 3 (continued)**

## CONSOLIDATED BALANCE SHEET

(Amounts in millions)	June 30	
	2002	2001
<b>ASSETS</b>		
<b>Current Assets</b>		
Cash and cash equivalents	\$ 3,427	\$ 2,306
Investment securities	196	212
Accounts receivable	3,090	2,931
<b>Inventories</b>		
Materials and supplies	1,031	1,096
Work in progress	323	373
Finished Goods	2,102	1,915
<b>Total Inventories</b>	3,456	3,384
Deferred income taxes	521	397
Prepaid expenses and other receivables	1,476	1,659
<b>Total Current Assets</b>	12,166	10,889
<b>Property, Plant and Equipment</b>		
Buildings	4,532	4,148
Machinery and equipment	17,963	18,165
Land	575	508
Accumulated depreciation	(9,721)	(9,726)
<b>Net Property, Plant and Equipment</b>	13,349	13,095
<b>Goodwill and Other Intangible Assets</b>		
Goodwill	10,966	7,429
Trademarks and other intangible assets, net	2,464	871
<b>Net Goodwill and Other intangible assets, net</b>	13,430	8,300
<b>Other Non-Current Assets</b>	1,831	2,103
<b>Total Assets</b>	<u>\$40,776</u>	<u>\$34,387</u>
<b>LIABILITIES AND SHAREHOLDERS' EQUITY</b>		
<b>Current Liabilities</b>		
Accounts payable	\$ 2,205	\$ 2,075
Accrued and other liabilities	5,330	4,631
Taxes payable	1,438	907
Debt due within one year	3,731	2,233
<b>Total Current Liabilities</b>	<u>\$12,704</u>	<u>\$ 9,846</u>
<b>Long-Term Debt</b>	11,201	9,792
<b>Deferred Income Taxes</b>	1,077	894
<b>Other Non-Current Liabilities</b>	2,088	1,845
<b>Total Liabilities and Shareholders' Equity</b>	<u>\$27,070</u>	<u>\$22,377</u>

Source: P&amp;G Annual Report 2002.

**Exhibit 4** Industry Self-Regulation and the National Advertising Division

The National Advertising Division (NAD) of the Council of Better Business Bureaus sought to “foster truth and accuracy in national advertising through voluntary self-regulation.” Companies used the NAD to challenge competitors’ national advertisements if they thought these advertisements to be false or inaccurate. To file a complaint, challengers wrote a brief memorandum outlining the issues and paid a fee of \$2,500.<sup>a</sup> The NAD forwarded the memorandum to the advertiser for comment. The advertiser then had two weeks to substantiate the claims made in the ads. If the advertiser did not reply, the NAD would release a public notice, “summarizing the advertising claims challenged in the complaint and noting the advertiser’s failure to substantively respond.” If the advertiser replied, the NAD would use both sides’ documents to decide whether or not the disputed advertising messages were truthful and accurate.

NAD proceedings were confidential, and the organization’s decisions were normally made within 60 business days of the filing of the initial complaint. Advertisers were entitled to appeal NAD decisions and await a panel review by the National Advertising Review Board (NARB). NARB panels consisted of members representing national advertisers, advertising agencies, academics, and former public sector officials.

If an advertiser failed to comply with an NAD or an NARB decision that asked him to modify or discontinue an ad, the NAD had the right to “refer the case to the appropriate government agency and release information regarding the referral to the press, the public, and to the media in which the advertising at issue had appeared.”

Source: The National Advertising Review Council, “The Advertising Industry’s Process of Voluntary Self-Regulation,” August 23, 2005, at <http://www.nadreview.org/Procedures>.

<sup>a</sup>Nonmembers paid \$6,000.

**Exhibit 5** Shade Guide

Source: DENTSPLY DeTrey Iberia, at <http://www.dentsply-iberia.com/clinical%20guide.pdf>.

**Exhibit 6** Legal Restrictions on Advertising

Section 43(a) of the U.S. Lanham Act allowed competitors to bring legal actions against an advertiser for false or misleading advertising. Successful legal actions under Section 43(a) had led to injunctions against the advertising in question and, sometimes, to damage awards. In a Lanham Act suit the court determined what claims were made and whether these claims had been substantiated. To find a violation, it was not necessary to prove that the advertiser had intended to mislead consumers. However, a lack of intent to mislead did not imply the advertiser was off the hook. An advertisement that was literally true could still be misleading under the Lanham Act because the ad may have implied claims that had insufficient substantiation. Most courts relied on consumer surveys to establish implied claims. For example, a television advertisement for Maximum Strength Anacin (MSA) had stated:

New Maximum Strength is here in the pain reliever most doctors recommend. Maximum Strength goes beyond regular strength, beyond extra strength to Maximum Strength. Get Maximum Strength Anacin. Maximum Strength is allowed without prescription.

This advertisement was literally true because most doctors recommended aspirin, the key ingredient in MSA, and the pain reliever contained the maximum nonprescription dose allowed by law. However, in *McNeilab, Inc. v. American Home Products Corporation*, the court found the message to be misleading.<sup>52</sup> Survey evidence had shown that consumers saw an implied claim in the advertisement, which they interpreted as stating that MSA was “a more powerful analgesic than Extra Strength Tylenol.” Apparently, a not insignificant number of viewers connected the “extra strength” statement to Extra Strength Tylenol. Although Tylenol was made of acetaminophen and not aspirin, both substances were equally potent, and the court found the MSA claim to be unsubstantiated.

The Lanham Act was used by many firms in the United States to challenge advertisements. This was especially true for comparative claims. Internationally, the legal standards for false and misleading advertising differed considerably across nations. In part, these differences depended on the willingness to protect a minority of consumers who believed a particular claim. In the United States, the law only restricted advertisements if a “substantial segment” (in one case more than 15%) or a “not insubstantial” number of consumers were misled. Australia, on the other hand, had a much tougher standard. Courts in Australia considered advertisements misleading if they deceived persons other than the “extraordinarily stupid” or the “fools in a hurry.” In China, any disparagement of another company’s products was illegal.

Source: Dennis A. Yao and Christa Van Anh Vecchi, “Information and Decision-making at the Federal Trade Commission,” *Journal of Public Policy and Marketing* 11 (Fall 1992): 1–11.

**Exhibit 7** Proposed “Mumbles” Commercial

The “Mumbles” commercial begins with some music playing in the background. The copy then shows an attractive woman applying a liquid tooth whitener, dubbed Simply Gel, to her teeth. When she is done, the woman keeps her mouth open to let the gel dry. She starts speaking, but the viewers cannot understand her because she cannot move her lips. The subtitles read:

“I can’t talk.

I am using that paint-on teeth whitener.

If I move my lips, my saliva will wash most of it away in two minutes.

Washes away? (She looks desperate).

How can it whiten?”

(Snort!)

After she snorts, the woman walks away. The following scene shows a side-by-side of yellow teeth with the Simply Gel package and white teeth with Crest Whitestrips.

Voice-over: “With Crest Whitestrips the strip stays for 30 minutes and whitens five times better.”

In the next scene, the woman is back with whiter teeth and states:

“Now we are talking.”

The camera focuses on a package of Crest Whitestrips.

Voice-over: “Crest Whitestrips, the secret to a whiter smile is in the strip.”

Source: Colgate-Palmolive v. The Procter & Gamble Company, United States District Court, Southern District of New York (03CV9348).

## Endnotes

<sup>1</sup> National Advertising Division, “Procter & Gamble, Crest Whitestrips,” case #3918, June 4, 2002, 10. Paul Sagel, court testimony in *Colgate-Palmolive v. The Procter & Gamble Company*, United States District Court, Southern District of New York (03CV9348), 1123.

<sup>2</sup> Ayman Ismail, court testimony in *Colgate-Palmolive v. The Procter & Gamble Company*, United States District Court, Southern District of New York (03CV9348), 1438.

<sup>3</sup> Ismail, 463; Suzan Harrison, court testimony in *Colgate-Palmolive v. The Procter & Gamble Company*, United States District Court, Southern District of New York (03CV9348), 116–117.

<sup>4</sup> Ismail, 1440.

<sup>5</sup> Harrison, 92–94.

<sup>6</sup> Sagel, 1126.

<sup>7</sup> Sagel, 1126–1127.

<sup>8</sup> Ismail, 1508.

<sup>9</sup> Enamel was about one millimeter thick, and P&G estimated that it would take the peroxide about 10 minutes to get into the dentin. Sagel, 1096.

<sup>10</sup> Instructions can be found at [http://www.whitestrips.com/en\\_US/whitestrips\\_premium/index.jsp](http://www.whitestrips.com/en_US/whitestrips_premium/index.jsp), accessed November 14, 2005.

<sup>11</sup> Christine Bittar, “Colgate War,” *Brandweek*, May 13, 2002.

<sup>12</sup> Datamonitor Company Profiles, “Colgate-Palmolive Company – SWOT Analysis,” May 18, 2004.

<sup>13</sup> Datamonitor, September 2004, p. 8.

<sup>14</sup> Datamonitor, “Oral Hygiene in the United States, Industry Profile,” 0072-0706, September 2004, p. 13.

<sup>15</sup> Colgate-Palmolive Annual Report 2004, p. 18.

<sup>16</sup> Jim Gingrich, “Bernstein Research Call – U.S. Household & Personal Products,” April 19, 2002, p. 11.

<sup>17</sup> Colgate-Palmolive Annual Report 2004, p. 3.

<sup>18</sup> “Oral care companies fight for mouth space,” *Reuters*, March 22, 2001.

<sup>19</sup> The Procter & Gamble Company Annual Report 2002, p. 20.

<sup>20</sup> Sagel, 1095.

<sup>21</sup> “Oral Care: Why teeth stain,” *Chemist & Druggist*, August 6, 2005.

<sup>22</sup> Martin Spiller, “Bleaching,” at <http://www.doctorspiller.com/bleaching.htm>, accessed November 18, 2005.

<sup>23</sup> Spiller and “How to Get Whiter Teeth,” at [http://www.ehow.com/how\\_110067\\_whiter-teeth.html](http://www.ehow.com/how_110067_whiter-teeth.html), accessed November 17, 2005.

<sup>24</sup> Ameet Sachdev, “Dazzling results: The rising quest for brighter teeth has created a big market, big sales for makers of whitening products,” *Chicago Tribune*, May 13, 2002.

<sup>25</sup> “OTC: All White Now,” *Chemist & Druggist*, August 6, 2005.

<sup>26</sup> Sagel, 1101.

<sup>27</sup> Sagel, 1096.

<sup>28</sup> Sagel, 1123.

<sup>29</sup> Stephen Westland, court testimony in Colgate-Palmolive v. The Procter & Gamble Company, United States District Court, Southern District of New York (03CV9348), 276. Sagel, 1230.

<sup>30</sup> Proskauer Rose LLP, Memorandum of Law in Support of Motion for Preliminary Injunction and Expedited Discovery, United States District Court, Southern District of New York (03CV9348), November 24, 2003, 11. Sagel, 1140.

<sup>31</sup> Westland, 285.

<sup>32</sup> Westland, 314; Sagel, 1173 and 1175.

<sup>33</sup> See court testimony of Ronald Marks, Colgate-Palmolive v. The Procter & Gamble Company, United States District Court, Southern District of New York (03CV9348).

<sup>34</sup> Sagel, 1192.

<sup>35</sup> Westland, 310–311.

<sup>36</sup> Ismail, 1397.

<sup>37</sup> Bette Popovich, “Whitening Agents Give Dental Care Market More Bite,” *Chemical Market Reporter*, May 14, 2001; Ismail, 1417.

<sup>38</sup> Ismail, 1588.

<sup>39</sup> National Advertising Division, “Procter & Gamble, Crest Whitestrips,” case #3918, June 4, 2002.

<sup>40</sup> Seamus McBride, court testimony in Colgate-Palmolive v. The Procter & Gamble Company, United States District Court, Southern District of New York (03CV9348), 814.

<sup>41</sup> McBride, 821.

<sup>42</sup> Fair Disclosure Financial Network, “Colgate-Palmolive Company (CL) – Prudential Securities’ 11th Annual Back to School Consumer Conference,” September 4, 2002.

<sup>43</sup> Dominique Hanssens, court testimony in Colgate-Palmolive v. The Procter & Gamble Company, United States District Court, Southern District of New York (03CV9348), 917.

<sup>44</sup> Ismail, 1431.

<sup>45</sup> Sagel, 1126–1127.

<sup>46</sup> Ismail, 1539–1542.

<sup>47</sup> Ismail, 1545–1546.

<sup>48</sup> Harrison, 189.

<sup>49</sup> Ismail, 1464.

<sup>50</sup> Christine Battar, “P&G Sinks Its Teeth into ‘Smile’ War with Move to Repel Colgate’s Foray,” *Brandweek*, January 20, 2003.

<sup>51</sup> Lauren Chambliss, “Bleaching puts a \$1.3 BN Smile on America’s Face,” *Evening Standard*, December 2001.

<sup>52</sup> McNeilab, Inc. v. American Home Products Corporation, 501 F. Supp. 517 (SDNY 1980).