

IN THE MATTER OF
KENNEBEC MILLS CORPORATION, ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION AND THE WOOL PRODUCTS LABELING ACTS

Docket 7353. Complaint, Jan. 9, 1959—Decision, June 27, 1959

Consent order requiring two affiliated manufacturers with offices in Fairfield, Maine, and New York City, respectively to cease violating the Wool Products Labeling Act by tagging as "50% reprocessed wool, 50% wool," fabrics which contained a substantial quantity of fibers other than wool, and by failing to label certain wool products as required.

Mr. Garland S. Ferguson for the Commission.

Mr. Frederick E. M. Ballou, of New York, N.Y., for respondents.

INITIAL DECISION BY WALTER R. JOHNSON, HEARING EXAMINER

In the complaint dated January 9, 1959, the respondents are charged with violating the provisions of the Federal Trade Commission Act and the Wool Products Labeling Act and the Rules and Regulations made pursuant thereto.

On May 7, 1959, the respondents and their attorney entered into an agreement with counsel in support of the complaint for a consent order.

Under the foregoing agreement, the respondents admit the jurisdictional facts alleged in the complaint. The parties agree, among other things, that the cease and desist order there set forth may be entered without further notice and have the same force and effect as if entered after a full hearing and the document includes a waiver by the respondents of all rights to challenge or contest the validity of the order issuing in accordance therewith. The agreement further recites that it is for settlement purposes only and does not constitute an admission by the respondents that they have violated the law as alleged on the complaint.

The hearing examiner finds that the content of the agreement meets all of the requirements of Section 3.25(b) of the Rules of the Commission.

The hearing examiner being of the opinion that the agreement and the proposed order provide an appropriate basis for disposition of this proceeding as to all of the parties, the agreement is hereby accepted and it is ordered that the agreement shall not become a part of the official record of the proceeding

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unless and until it becomes a part of the decision of the Commission. The following jurisdictional findings are made and the following order issued.

1. Respondent Kennebec Mills Corporation is a corporation existing and doing business under and by virtue of the laws of the State of Maine, with its office and principal place of business located at Fairfield, Maine.

Respondent R. G. Fromkin Co., Inc. is a corporation 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 450 Seventh Avenue, New York, N.Y.

Respondent Robert G. Fromkin is an individual and an officer of said corporations. He formulates, directs and controls the policies and practices of the corporate respondents. The address of the individual respondent is the same as that of the corporate respondent R. G. Fromkin Co., Inc.

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

ORDER

It is ordered, That respondents Kennebec Mills Corporation, a corporation, and its officers, and R. G. Fromkin Co., Inc., a corporation, and its officers, and Robert G. Fromkin, individually and as an officer of said corporations, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the introduction or manufacture for introduction into commerce, or the offering for sale, sale, transportation, or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act and the Wool Products Labeling Act of 1939 of woolen fabrics or other "wool products" as such products are defined in, and subject to the said Wool Products Labeling Act, do forthwith cease and desist from misbranding such products by:

1. Falsely or deceptively stamping, tagging, labeling or otherwise identifying such products as to the character or amounts of the constituent fibers contained therein.

2. Failing to securely affix to or place on each such product a stamp, tag, label, or other means of identification showing in a clear and conspicuous manner:

(a) The percentage of the total weight of such wool product, exclusive of ornamentation not exceeding five percentum of said

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total fiber weight, of (1) wool, (2) reprocessed wool, (3) reused wool, (4) each fiber other than wool where said percentage, by weight of such fiber, is five percentum or more, and (5) the aggregate of all other fibers;

(b) The maximum percentage of the total weight of such wool product of any nonfibrous loading, filling, or adulterating matter;

(c) The name or the registered identification number of the manufacturer of such wool product or of one or more persons engaged in introducing such wool product into commerce, or in the offering for sale, sale, transportation, distribution or delivery for shipment thereof in commerce, as "commerce" is defined in the Wool Products Labeling Act of 1939.

It is further ordered, That respondents Kennebec Mills Corporation, a corporation, and its officers, and R. G. Fromkin Co., Inc., a corporation, and its officers, and Robert G. Fromkin, individually and as an officer of said corporations, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of woolen fabrics or any other products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting the constituent fibers of which their products are composed or the percentages or amounts thereof, in sales invoices, shipping memoranda, or in any other manner.

DECISION OF THE COMMISSION AND ORDER TO FILE
REPORT OF COMPLIANCE

Pursuant to section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 27th day of June 1959, become the decision of the Commission; and, accordingly:

It is 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 the order to cease and desist.

INTERLOCUTORY ORDERS, ETC.

SHEFFIELD MERCHANDISE, INC., ET AL. Docket 6627.
Order and opinion, July 7, 1958.

Order vacating hearing examiner's dismissal, based on abandonment of challenged practices prior to complaint, and remanding case for further proceedings.

OPINION OF THE COMMISSION

By ANDERSON, Commissioner :

Complaint in this proceeding issued September 11, 1956, charging respondents with violation of the Federal Trade Commission Act in two respects. One was the deceptive use of the word "jeweled" on the faces of one-jewel watches and in advertising material, it being alleged that a jeweled watch is generally understood to be one containing at least seven jewels serving as frictional bearings. The other was misrepresentation through use of the term "guaranteed for one year" without adequate disclosure of the terms, conditions and limitations of the guarantee. The hearing examiner in an initial decision dated May 5, 1958, granted respondents' motion to dismiss and found that respondents abandoned the practices about five months prior to issuance of the complaint; that there is no likelihood that the practices will be resumed; and that everything which could be accomplished by a cease and desist order has already been accomplished by the voluntary act of respondents.

The Commission is of the opinion that the hearing examiner was in error in dismissing the complaint. The initial decision is, therefore, being vacated and the case remanded for further proceedings for the following reasons:

The Commission disagrees with the hearing examiner's application of the principles heretofore announced in the *Argus Cameras, Inc.* (D. 6199), *Wildroot Company, Inc.* (D. 5928), and *Bell & Howell Co.* (D. 6729) cases. In the *Argus Cameras* case, Chairman Gwynne, speaking for the Commission, stated:

"Dismissal of a complaint in cases of this general character is not the usual procedure. It should not be done unless there is a clear showing of unusual circumstances which in the interest of justice require it. Those circumstances exist in this case."

What are the circumstances in the instant case? Respondents admittedly engaged in the practices questioned in this proceeding and had done so over a considerable period. The practices were widespread in the industry and apparently were adopted by respondents for business and competitive reasons. Investigation of respondents was commenced in 1953 and respondents certainly were aware of the Commission's "hand upon their shoulders" and the reasons therefor. Assuming that discontinuance occurred as contended, respondents have never unequivocally receded from their position that use of the practices involved did not result in deception of confiding buyers. Furthermore, there is not present in the situation surrounding the abandonment the "unusual circumstances" which obtained in the *Argus Cameras* and other cases referred to in the initial decision upon which dismissal of the complaint here can be justified. In those cases, the Commission had definite assurances, by reason of existing industry-wide business conditions and other circumstances, that the practices involved surely would not be resumed. In the instant case, we have the promise of respondents that certain practices will not be engaged in again. That promise, though given in good faith, must be weighed in the light of attending facts, including the continued existence in the industry of the practices that led respondents initially to employ the questioned representations. In such setting, respondents for compelling competitive reasons would be free again to adopt the same or similar practices, absent some effective legal restraint. Clearly, in such a situation, the Commission would be remiss in its duty to prevent deceptive and misleading practices in their incipiency if in reliance on a mere promise not to resume questioned acts, it dismissed the complaint.¹ As the court stated in *C. Howard Hunt Pen Co. v. Federal Trade Commission*, 197 F. 2d 273 (C.A. 3, 1952), where discontinuance had been effected two years before issuance of the complaint:

"Petitioner's sole objection * * * is that its former practice * * * was discontinued in 1941, 2 years before the Commission's complaint was filed in this proceeding. Petitioner alleged in its answer to the complaint that it has no intention of resuming that practice but there is no specific testimony to that effect. We see no reason why even if there had been the Commission

¹ *Sears Roebuck & Co. v. Federal Trade Commission*, 258 Fed. 307 (C.A. 7, 1919); *Moir, et al. v. Federal Trade Commission*, 12 F.2d 22 (C.A. 1, 1926); *Perma-Maid, Inc. v. Federal Trade Commission*, 121 F.2d 232 (C.A. 6, 1941).

would have been bound simply by the promise of the petitioner."²

In a situation where practices were discontinued shortly before complaint issued, the Commission's cease and desist order was affirmed in *Hershey Chocolate Corp. v. Federal Trade Commission*, cited n. 2, where the Court said:

"The Commission would have no power at all if it lost jurisdiction every time a competitor halted an unfair practice just as the Commission was about to act. The practice may have been discontinued but without the Commission's order it could be immediately resumed." [at page 971]

Let it be clearly understood that we are not adjudicating here the merits of this case. The Commission, "having reason to believe" that respondents' practices were violative of the Federal Trade Commission Act, issued its complaint pursuant to that Act. Respondents answered, stating that the purchasing public understands a jeweled movement to be one that contains one or more jewels serving a functional purpose and denied that through their use of the word "jeweled" they represented, directly or by implication, that their watches contained at least seven jewels, as alleged in the complaint. There is no evidence of record to permit determination of the issue. Nor has there been any determination by the hearing examiner of the adequacy of disclosure of the terms and conditions of respondents' guarantee; and none is intended to be made here.

As indicated above, the Commission through issuance of its complaint made its administrative determination that the public-interest requires the disposition of this matter by adversary proceedings. By its order of July 23, 1957, denying respondents' motion to refer the proceeding to the Division of Stipulations, the Commission reaffirmed that decision and it is still of the opinion that the issues as to "jeweled" and the use of the term "guarantee," still remaining unlitigated, should be resolved on the basis of available evidence.

Respondents in advancing their motion to dismiss before the hearing examiner rely upon *Stokely Van Camp, Inc. v. Federal Trade Commission*, 246 F. 2d 458 (C.A. 7, 1957). We think that case is readily distinguishable from the circumstances presented

² See also *Federal Trade Commission v. Goodyear Tire & Rubber Co.*, 304 U.S. 257, 260 (1938); *Hershey Chocolate Corp. v. Federal Trade Commission*, 121 F.2d 968, 971 (C.A. 3, 1941); *Consumer Sales Corp v. Federal Trade Commission*, 198 F.2d 404, 407 (C.A. 2, 1952), cert. denied 344 U.S. 912 (1953); *Consolidated Royal Chemical Corp. v. Federal Trade Commission*, 191 F.2d 896, 900 (C.A. 7, 1951); *Keaseby and Mattison Co. v. Federal Trade Commission*, 159 F.2d 940, 952 (C.A. 6, 1947).

in the instant proceeding and that it applies recognized legal principles to an entirely different situation than we have here.

In the order to accompany this opinion, the initial decision will be vacated and set aside and the case remanded to the hearing examiner for further proceedings consistent with this opinion.

ORDER VACATING INITIAL DECISION AND REMANDING
CASE TO HEARING EXAMINER

It appearing that the hearing examiner filed, on May 5, 1958, an initial decision dismissing the complaint in this proceeding; and

The Commission, for the reasons stated in the accompanying opinion, having determined that the hearing examiner was in error in dismissing the complaint:

It is ordered, That the aforesaid initial decision be, and it hereby is, vacated and set aside.

It is further ordered, That this case be, and it hereby is, remanded to the hearing examiner for further proceedings.

GULF OIL CORPORATION. Docket 6689. Order and opinion, July 8, 1958.

Interlocutory order remanding respondent's motion alleging undue delay in presenting case-in-chief, transmitted by hearing examiner to Commission as raising issues beyond his authority to rule upon.

OPINION OF THE COMMISSION

By TAIT, Commissioner:

The respondent filed a motion alleging undue delay by staff counsel in presenting the case-in-chief and requesting that the hearing examiner order that submission of proof in support of the complaint be closed, or, alternatively, that an early date for termination of evidence be fixed by him. Counsel supporting the complaint then filed their answer in opposition denying various of the motion's averments. Under the order filed by him on May 19, 1958, the hearing examiner transmitted the motion to the Commission for its disposition as one raising issues and asking relief beyond his authority to rule upon.

Section 3.8 of the Commission's Rules prescribes that during pendency of proceedings before hearing examiners, all motions, except for one category not here material, shall be addressed to and ruled upon by the hearing examiner. A companion rule, §3.15, confers authority on such officers to regulate the course of

hearings and to rule upon procedural motions. The hearing examiner, therefore, erred in concluding that he lacked power to rule upon the merits of the respondent's motion. The motion accordingly is being remanded to the hearing examiner for disposition.

We note that this proceeding has been marked by the filing of an unusually large number of requests for us to consider various aspects of the case prior to final decision. The considerations of public policy militating against piecemeal adjudications are obvious and require no further comment. The Commission's Rules accordingly contemplate that rulings within the jurisdiction of the hearing examiner be made by him and that such rulings be accepted by the parties as governing except in unusual circumstances. Illustrating this is the fact that the category of interlocutory appeals qualifying to be granted under §3.20 of the Rules is a limited one. Hence, routine recourse to the Commission by interlocutory appeal or similarly authorized procedures prior to presentation of cases for final determination departs from the spirit of the rules.

ORDER REMANDING MOTION TO HEARING EXAMINER

The Commission having determined, for reasons stated in the accompanying opinion, that the hearing examiner erred in holding that he lacked authority to rule on the motion transmitted to the Commission for its consideration under his order filed on May 19, 1958:

It is ordered, That such motion be, and it hereby is, remanded to the hearing examiner.

MYTINGER & CASSELBERRY, INC., ET AL. Docket 6962.
Order and opinion, July 15, 1958.

Interlocutory order denying respondents' appeal from hearing examiner's order granting complaint counsel's motion for modification of order directing compliance with modified subpoena duces tecum.

ON INTERLOCUTORY APPEAL

By the COMMISSION:

Counsel for respondents have appealed from the hearing examiner's order of May 22, 1958, granting the motion of counsel supporting the complaint for reconsideration and modification of an order directing compliance by respondents with a modified subpoena duces tecum. Counsel supporting the complaint answered and respondent filed a reply thereto. The order appealed from directs compliance with a previously modified subpoena

