DECISIONS OF THE COURTS

CONSUMER SALES CORP. v. FEDERAL TRADE COMMISSION*

No. 175, Docket 22123—F. T. C. Docket 5680

(Court of Appeals, Second Circuit. July 15, 1952)

CEASE AND DESIST ORDERS—AIDING AND ABETTING UNFAIR OR UNLAWFUL ACT OR PRACTICE—SALESMEN'S MISREPRESENTATIONS

Finding that petitioners actively encouraged and participated in making alleged false representations of salesmen of their products by allegedly offering a reduced price if purchasers would collect and send in soap box tops of other manufacturers was supported by evidence justifying a cease and desist order.

EVIDENCE—ADEQUACY—DE MINIMUS CONCEPT—IF TESTIMONY OF FEW, OTHERWISE SUPPORTED

Finding of Federal Trade Commission that a substantial portion of public was induced to purchase petitioners' merchandise because of their salesmen's false representations justifying a cease and desist order was not unsupported because only 14 housewives testified before the Commission, although thousands of sales were made, where evidence indicated that the 14 witnesses were but a few of the many deceived.

CEASE AND DESIST ORDERS—DISCONTINUANCE OF PRACTICE PRECEDING—IF ABANDONMENT NOT PROVED

That practice of solicitation of soap box tops allegedly used in order to sell petitioners' merchandise based on false representations was discontinued prior to issuance of complaint by the Trade Commission would not preclude a cease and desist order on the ground that it was not in the public interest, where there was no proof of abandonment.

CEASE AND DESIST ORDERS—DISCONTINUANCE OF PRACTICE PRECEDING—IF ORDER NECESSARY TO PREVENT RESUMPTION

Even if illegal practices have been discontinued, such does not deprive Federal Trade Commission of power to enter such order as it determines necessary to prevent their revival, absent a showing of abuse of discretion.

CEASE AND DESIST ORDERS—PARTIES—WHEN CORPORATION RESPONDENT—IF INDIVIDUALS INCLUDED ALSO

Individual petitioners were properly included in cease and desist order of the Federal Trade Commission with respect to alleged illegal practices in sale of petitioners' products where they organized corporate petitioner and were its officers and guided it in matters of policy.

*Reported in 198 F. (2d) 404. For case before Commission see 47 F. T. C. 1429.

CEASE AND DESIST ORDERS—PARTIES—WHEN CORPORATION RESPONDENT—IF INDIVIDUALS INCLUDED ALSO—IF INDIVIDUAL, THERETOFORE OFFICER, DIRECTOR AND STOCKHOLDER, TERMINATED STATUS AS OFFICER, ETC., PRECEDING

That individual petitioner resigned as an officer and director of corporation and disposed of his stock before a cease and desist order was entered by the Trade Commission with respect to alleged illegal practices, did not make erroneous his inclusion in the order, where he was included because he himself had participated in the alleged deceptive practices.

CEASE AND DESIST ORDERS—SCOPE—WHETHER UNDULY BROAD—IF SIMILAR, AS WELL AS SPECIFIC, CHALLENGED CONDUCT AND METHODS INCLUDED IN

An order of the Federal Trade Commission ordering petitioners to cease and desist from certain deceptive practices in the sale of their products was not improper on the ground that it employed unduly broad and indefinite language, proscribing conduct other than that forming a basis of the complaint, where a large part of the language objected to properly sought to prevent the petitioners from continuing their illegal sale methods in a slightly different manner.

CEASE AND DESIST ORDERS—SCOPE—WHETHER UNDULY BROAD—MISREPRESENTATION—IF ORDER NOT LIMITED TO PARTICULAR SCHEME USED IN PAST

The Federal Trade Commission's power in entering a cease and desist order against deceptive practices in the sales of products is not limited to proscribing only the particular scheme used in the past, but it may also prohibit variations on the basic scheme.

CEASE AND DESIST ORDERS—SCOPE—WHETHER UNDULY BROAD—MISREPRESENTATION—PARTIES AND PRODUCTS

Where petitioners allegedly engaged in deceptive practices in selling their products, cease and desist order properly prevented them from using another legal entity to accomplish their purpose and properly prohibited them from selling different merchandise while using the same deceptive approach.

APPELLATE PROCEDURE AND PROCEEDINGS—CEASE AND DESIST ORDERS—MISREPRESENTATION—MODIFICATION

The power of the Court of Appeals to modify a cease and desist order of the Federal Trade Commission with respect to deceptive practices in the sale of products once an illegal trade practice has been found, is severely circumscribed.

CEASE AND DESIST ORDERS—SCOPE—WHETHER UNDULY BROAD—MISREPRESENTATION—PRICE AND VALUE—IF "SPECIAL PRICE" NOT MENTIONED IN COMPLAINT

Cease and desist order of the Federal Trade Commission ordering cessation of deceptive practices in sale of petitioners' products was not objectionable because the words "special price" were not mentioned in the complaint, which alleged that petitioners were offering their wares at what was allegedly said to be less than their real sale value when such was not the fact.

CEASE AND DESIST ORDERS—SCOPE—WHETHER UNDULY BROAD—MISREPRESENTATION—IF "UNLESS SUCH IS THE FACT" NOT INCLUDED

Cease and desist order of the Federal Trade Commission with respect to alleged deceptive practices in the sale of petitioners' products was not incomplete because of the absence of the words "unless such is a fact" under the evidence.

CEASE AND DESIST ORDERS—SCOPE—WHETHER UNDULY BROAD—MISREPRESENTATION—RELIEF AND MODIFICATION

Where Federal Trade Commission entered a cease and desist order against petitioners in connection with deceptive practices in sale of their products, petitioners could apply to the Commission for a modification of the order if and when they decided to do so.

CEASE AND DESIST ORDERS—SCOPE—WHETHER UNDULY BROAD—MISREPRESENTATION—RELIEF AND MODIFICATION—IF IN FUTURE, REPRESENTATIONS MIGHT BE TRUTHFULLY MADE

A cease and desist order of the Federal Trade Commission forbidding the making of representations in the sale of petitioners' products which are deceptive, need not be qualified by a provision permitting them if, in the future, they can truthfully be made.

(The syllabus, with substituted captions, is taken from 198 F. (2d) 404)

On petition to review order of Commission, petition dismissed and order enforced.

Mr. Murray M. Segal, of New York City, for petitioners.

Mr. W. T. Kelley, General Counsel, *Mr. James W. Cassedy*, Asst. General Counsel, and *Mr. James E. Corkey*, Sp. Atty., of Washington, D. C., for respondent.

Before SWAN, *Chief Judge*, and CHASE and FRANK, *Circuit Judges*.

SWAN, *Chief Judge:*

The proceedings culminating in the order of which the petitioners seek review were **[406]** commenced on July 13, 1949 by the issuance of a complaint by the Federal Trade Commission alleging the commission by Consumer Sales Corporation and Julius J. Blumenfeld and Myron J. Colin individually and as officers of said Corporation of unfair and deceptive acts and practices in commerce in violation of section 5 of the Federal Trade Commission Act, 15 U. S. C. A. § 45(a). Testimony and other evidence was taken before a trial examiner, and, on final hearing, the Commission made its findings of facts and concluded that the acts and practices so found were injurious to the public and violative of the Act. The material parts of the Commission's order, issued June 27, 1951, are set forth in the margin.[1]

[1] "It is ordered that the respondent, Consumer Sales Corporation, a corporation, and its officers, agents, representatives, and employees, and the individual respondents, Julius J. Blumenfeld and Myron J. Colin, and their respective agents, representatives, and employees, directly *or through any corporate or other device,* in connection with the offering for sale, sale or distribution of aluminum cookware, dinnerware, silverware, *or other merchandise,* in commerce, as 'commerce' is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication:

(1) That the respondents or any of them are connected with or represent in any manner any soap manufacturer *or any other company or organization* unless such is the fact.

The facts as reflected in the findings may be summarized as follows: Consumer Sales Corporation was engaged in the sale of aluminum cookware, dinnerware, silver plate and glassware through the medium of door-to-door salesmen. Certain of these salesmen have falsely represented to prospective customers that they were making a survey for prominent soap manufacturers who desired to obtain from housewives soap box tops, and if the prospective customer would collect and send to the corporate petitioner a certain number of box tops from said soap manufacturers' products, they were authorized to offer petitioners' merchandise at a special low price which was twenty to fifty dollars less than the regular price. In fact, the prices represented as constituting a special offer were the same as those at which the merchandise was customarily and regularly sold by the corporate petitioner. The Corporation furnished such salesmen order blanks entitled "Special Offer," and a certificate of authority to solicit and accept orders and collect deposits. Upon delivery of the merchandise to a purchaser the petitioners' truck-driver obtained the purchaser's signature to a note for the balance due and left with the purchaser an addressed envelope in which the soap box tops were to be mailed to the corporate petitioner. The individual petitioners were respectively president and secretary-treasurer of the Corporation and owned all its stock.[2] They directed its activities and formulated and controlled its policies.

The petitioners contend that they cannot be held responsible for misrepresentations by the salesmen, who were independent contractors; that the Commission's order is not in the public interest; that the individual petitioners, and particularly Blumenfeld, should not have been included in it; and that in any event it is too broad. These points will be considered seriatim.

The petitioners argue that they had no knowledge of the salesmen's false state-[407]ments and neither authorized nor participated in their making. The Commission, however, found that "by furnishing the salesmen with order forms falsely representing that they were making a special offer, by permitting the salesmen to request pur-

(2) That the respondents or any of them are making or conducting a survey.

(3) That the purchasers of the said merchandise are being given a reduced price for such merchandise *or any other valuable consideration* as a premium or reward for their collection of box tops, *cooperation in furnishing information or participation in any other similar project or activity.*

(4) That said merchandise is being sold at a special price when the price at which it is sold is the usual and customary price at which respondents sell such merchandise in the ordinary course of their business."

The order uses no italics. Italics have been added to indicate the terms of which the petitioners complain, as discussed in the final point of the opinion.

[2] Petitioner Blumenfeld resigned his office and disposed of his stock on March 21, 1950. This was eight months after the complaint was filed and about one month after hearings before the trial examiner were closed.

chasers to collect box tops and by furnishing self-addressed envelopes for the handling of the box tops, respondents actively encouraged and participated in making the said false representations." The petitioners' argument that having box tops sent to them was merely an innocuous scheme to preserve contact with a customer in order to be able to approach him again in the hope of making another sale is wholly unconvincing. Obviously the petitioners intended the salesmen to give some reason for asking the purchaser to collect soap box tops, and it would necessarily have to be a fictitious reason. The Commission found that "The evidence shows that the above-described sales approach was the usual and typical sales method, of salesmen selling respondents' products." It is also obvious that the petitioners knew that the "Special Offer" order blanks supplied to the salesmen would deceive customers since the prices stated thereon were the customary and regular prices for the merchandise offered. Since the finding that the petitioners "actively encouraged and participated in making" the false representations is amply supported by the evidence, it is unnecessary to consider whether or not the salesmen's relation to the petitioners was that of independent contractors.[3]

The contention is made that there is no evidence to support the Commission's finding that a substantial portion of the public was induced to purchase petitioners' merchandise on the strength of these false representations, and therefore the Commission's action was not in the public interest. The argument is based on the *de minimus* concept: only fourteen housewives testified before the Commission although thousands of sales were made. We are not persuaded by this reasoning, however. There is no indication that these were the only housewives to whom false representations were made. On the contrary, the evidence shows that all salesmen carried order blanks marked "Special Offer," and the brown envelopes were distributed to all buyers indicating that these fourteen witnesses were but a few of the many deceived.[4] Substantial amounts of merchandise having been sold by false and misleading representations, the interest of the public in the proceeding was well established.[5] It is also said that the practice of solicitation of soap box tops was discontinued prior to the issuance of the complaint, therefore the order was not in the public interest. Aside from one

[3] *Parke, Austin & Lipscomb, Inc.* v. *Federal Trade Com.*, 2 Cir., 142 F. (2d) 437, 440 [38 F. T. C. 881; 4 S. & D. 168].

[4] See *Steelco Stainless Steel, Inc.* v. *Federal Trade Commission*, 7 Cir., 187 F. (2d) 693, 696 [47 F. T. C. 1809].

[5] See, e. g., *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U. S. 483, 493 [4 F. T. C. 610; 1 S. & D. 198]; *Parke, Austin & Lipscomb, Inc.* v. *Federal Trade Commission*, 2 Cir., 142 F. (2d) 437, 441 [38 F. T. C. 881; 4 S. & D. 168]; *International Art Co.* v. *Federal Trade Commission*, 7 Cir., 109 F. 2d 393, 397 [30 F. T. C. 1635; 3 S. & D. 188]. cert. den. 310 U. S. 632.

statement in the answer, however, there is no proof of abandonment and certain statements at the hearing point to an opposite conclusion. But even if the practice had been discontinued, that did not deprive the Commission of power to enter such order as it determined necessary to prevent their revival, absent a showing of abuse of discretion.[6] No abuse can be shown here. The soap box top approach was but a part of the whole scheme to delude purchasers into believing they were obtaining something for less than its real value, and there is no indication that petitioners have abandoned their misleading offer to sell goods at a special low price.

Little need be said in answer to the contention that the individual petitioners should not have been included in the order. They had organized the corporate petitioner approximately two years before this proceeding was commenced. They were its officers, they owned all its capi-[408]tal stock and they and their wives constituted its board of directors. It was admitted in the answer to the complaint, as well as in their testimony, that they directed and guided the corporation in matters of policy. Under these circumstances they cannot escape individual responsibility on the "flimsy pretext" that they were acting on behalf of the corporation and not as individuals.[7] The fact that Blumenfeld resigned as an officer and director and disposed of his stock before the order was entered does not make erroneous his inclusion in it. He was included not because he was still an officer or stockholder of the offending corporation but because he himself had participated in the use of unfair and deceptive acts or practices in commerce. Consumer Sales Corporation is not the only vehicle through which such acts may be accomplished in the future. We think the Commission was warranted in not dismissing the complaint against him.

Lastly petitioners argue that the order employs unduly broad and indefinite language which proscribes conduct other than that which forms the basis of the complaint. The order with the alleged objectionable portions in italics, is printed in the margin.[8] It will be noted that in large part the language objected to seeks to prevent petitioners from continuing their illegal sales methods in a slightly different manner. So much of the order as seeks to accomplish this end is proper. The Commission's power is not limited to proscribing

[6] *Hillman Periodicals, Inc.* v. *Federal Trade Commission,* 2 Cir., 174 F. (2d) 122 [45 F. T. C. 1103].

[7] *Steelco Stainless Steel, Inc.* v. *Federal Trade Commission,* 7 Cir., 187 F. (2d) 693, 697 [47 F. T. C. 1809], Cf. *Federal Trade Commission* v. *Standard Education Society,* 302 U. S. 112, 119–120 [25 F. T. C. 1715; 2 S. & D. 429], *Sebrone Co.* v. *Federal Trade Commission,* 7 Cir., 135 F. (2d) 676, 678 [36 F. T. C. 1142, 3 S. & D. 570].

[8] See note 1, supra.

only the particular scheme used in the past. It may also prohibit variations on the basic theme.[9] Thus it was proper to prevent petitioners from using another legal entity to accomplish their illegal purpose, to prohibit them from selling different merchandise while using the same approach, and to enjoin representations that they were connected with large manufacturers who did not make soap or that the buyer was receiving a valuable consideration other than a reduced price for participating in a similar project or activity. Our power to modify an order such as this, once an illegal trade practice has been found, is severely circumscribed,[10] but even if it were not we could find nothing improper about the Commission's efforts to prevent this scheme from reappearing in a slightly altered garb. Petitioners also object to paragraph (4), asserting that the words "special price" were not mentioned in the complaint. There is no merit in the argument; the complaint adequately alleged petitioners were offering their wares at what was said to be less than their real value when such was not the fact. Nor do we think the words "unless such is the fact" should be added to paragraph (2). Petitioners are engaged in the business of selling, not conducting surveys, and there is no evidence that they have ever conducted a legitimate survey in the past or intend to in the future. If and when they decide to do so, either through their own organization or in conjunction with another company or organization as is permitted in paragraph (1), they may apply to the Commission for a modification of the order.[11] An order forbidding the making of representations which are deceptive need not be qualified by a provision [409] permitting them if in the future they can be truthfully made.[12]

The petition to review is dismissed and an order of enforcement may be entered.

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[9] *N. L. R. B.* v. *Express Publishing Co.*, 312 U. S. 426, 436–437; *Local 167* v *United States*, 291 U. S. 293, 299; *Hershey Chocolate Co.* v. *Federal Trade Commission*, 3 Cir., 121 F. (2d) 968, 971–972 [33 F. T. C. 1798; 3 S. & D. 392], *C. B. Miller Co.* v. *Federal Trade Commission*, 6 Cir, 142 F. (2d) 511, 520 [38 F. T. C. 868; 4 S. & D. 151].

[10] *Herzfeld* v. *Federal Trade Commission*, 2 Cir., 140 F. (2d) 207, 209 [38 F. T. C. 833; 4 S. & D. 109]; *Hillman Periodicals, Inc.* v. *Federal Trade Commission*, 2 Cir., 174 F. (2d) 122, 123 [45 F. T. C. 1103]; *Gold-Tone Studios, Inc.* v. *Federal Trade Commission*, 2 Cir., 183 F. (2d) 257, 259 [47 F. T. C. 1745]; *Independent Directory Corp.* v. *Federal Trade Commission*, 2 Cir., 188 F. (2d) 468, 470 [47 F. T. C. 1821].

[11] *P. Lorillard Co.* v. *Federal Trade Commission*, 4 Cir., 186 F. (2d) 52, 59 [47 F. T. C. 1755].

[12] *Macher* v. *Federal Trade Commission*, 2 Cir., 126 F. (2d) 420 [34 F. T. C. 1835; 3 S. & D. 467]; *Century Metalcraft Corp.* v. *Federal Trade Commission*, 7 Cir., 112 F. (2d) 443, 446–447 [30 F. T. C. 1676; 3 S. & D. 224]; *Lane* v. *Federal Trade Commission*, 9 Cir., 130 F. (2d) 48, 52 [35 F. T. C. 949; 3 S. & D. 501].

CONSOLIDATED MFG. CO. ET AL. v. FEDERAL TRADE COMMISSION [1]

CONTAINER MFG. CO. ET AL. v. FEDERAL TRADE COMMISSION

SUPERIOR PRODUCTS ET AL. v. FEDERAL TRADE COMMISSION

Nos. 6428–6430—F. T. C. Dockets 5557, 5560, 5561

(Court of Appeals, Fourth Circuit. Oct. 11, 1952)

METHODS, ACTS AND PRACTICES—AIDING AND ABETTING UNFAIR OR UNLAWFUL ACT OR PRACTICE—LOTTERY MERCHANDISING DEVICES

The Federal Trade Commission has power to eradicate merchandising by gambling in interstate commerce and to prohibit distribution in such commerce of devices intended to aid and encourage such merchandising.

CEASE AND DESIST ORDERS—METHODS, ACTS AND PRACTICES—AIDING AND ABETTING UNFAIR OR UNLAWFUL ACT OR PRACTICE—LOTTERY MERCHANDISING DEVICES—SELLERS OF

Punch board sellers were subject to Federal Trade Commission's cease and desist order, notwithstanding fact that merchandise which was sold or distributed as result of operation of boards was not sold by them.

CEASE AND DESIST ORDERS—SCOPE—WHETHER TOO BROAD—AIDING AND ABETTING UNFAIR OR UNLAWFUL ACT OR PRACTICE—LOTTERY MERCHANDISING DEVICES

Federal Trade Commission's order, directing manufacturer to cease and desist from selling or distributing in commerce push cards, punchboards or other lottery devices which were to be used, or might be used, in sale or distribution of merchandise to public by means of game of chance, gift enterprise or lottery scheme, prohibited, when properly interpreted, only the distribution in interstate commerce of any push card, punchboard or other device which was designed to serve as an instrumentality for sale of articles of merchandise by lottery methods, and therefore such order was not too broad.

(The syllabus, with substituted captions, is taken from 199 F. (2d) 417)

On petition for review of Commission's orders, orders affirmed and enforced.

Mr. Alexander Blumenthal,, of New York City (*Glassgold & Blumenthal*, of New York City, on the brief), for petitioners.

Mr. Alan B. Hobbes, Sp. Atty., Federal Trade Commission, Washington, D. C. (*Mr. W. T. Kelley*, Gen. Counsel, and *Mr. Robert B.*

[1] Reported in 199 F. (2d) 417. For cases before Commission *see* 48 F. T. C. 692 (D. 5557); 48 F. T. C. 705 (D. 5560); 48 F. T. C. 718 (D. 5561).

Dawkins, Asst. Gen. Counsel, Federal Trade Commission, of Washington, D. C., on the brief), for respondent.

Before PARKER, *Chief Judge*, and SOPER and DOBIE, *Circuit Judges*.

PER CURIAM:

These are petitions to review and set aside orders of the Federal Trade Commission, which, on its part, asks that the or[418]ders be enforced. The orders complained of direct petitioners to cease and desist from selling or distributing in commerce as defined in the Federal Trade Commission Act "push cards, punchboards or other lottery devices which are to be used or may be used in the sale or distribution of merchandise to the public by means of a game of chance, gift enterprise or lottery scheme". Petitioners contend that the Commission is without jurisdiction over them because they merely sell in commerce the punchboards and not the merchandise which is sold or distributed as a result of the operation of the boards, their argument being that the sale of the boards does not involve any "unfair methods of competition" or any "unfair or deceptive acts or practices" when considered apart from the merchandise sold or distributed in connection with their operation. This position was adequately answered in the opinion of Mr. Justice Minton, then a Circuit Judge, speaking for the Court of Appeals of the Seventh Circuit in *Modernistic Candies* v. *Federal Trade Commission* 7 Cir. 145 F. (2d) 454, 455, [39 F. T. C. 709; 4 S. & D. 288] wherein he said:

"It is clear that the Federal Trade Commission has the power to eradicate merchandising by gambling in interstate commerce. We think the Commission also has the power to prohibit the distribution in interstate commerce of devices intended to aid and encourage merchandising by gambling. The gamblers and those who deliberately and designedly aid and abet them are both engaged in practices contrary to public policy. Merchandising by gambling should not be divided into insulated acts, which appear innocent when examined separately. This unfair practice should be viewed as a whole. If the Federal Trade Commission is to police merchandising by gambling, it must police those who designedly and deliberately aid and abet this practice. We think the Commission has such power."

The decision of the Court of Appeals of the Seventh Circuit is squarely in point here. So also are the decisions in four other Circuits. See *Charles A Brewer & Sons, Inc.* v. *Federal Trade Commission* 6 Cir. 158 F. (2d) 74 [43 F. T. C. 1182; 4 S. & D. 588]; *Globe Cardboard Novelty Co.* v. *Federal Trade Commission* 3 Cir. 192 F. (2d) 444 [48 F. T. C. 1725]; *Bork Manufacturing Co.* v. *Federal Trade Commission* 9 Cir. 194 F. (2d) 611 [48 F. T. C. 1756]; *Lichtenstein* v. *Federal Trade*

Commission 9 Cir. 194 F. (2d) 607 [48 F. T. C. 1750]; *Hamilton Manufacturing Co.* v. *Federal Trade Commission* App. D. C. 194 F. (2d) 346 [48 F. T. C. 1743]. No judge anywhere has expressed a contrary opinion and nothing to the contrary can be worked out arguendo from *Trade Commission* v. *Bunte Bros.* 312 U. S. 349 [32 F. T. C. 1848; 3 S. & D. 337], which held merely that the Commission was without power over purely intrastate transactions.

We agree with the Court of Appeals of the Third Circuit that the order complained of is not too broad and that, properly interpreted, it prohibits "only the distribution in interstate commerce of any push card, punchboard or other device which is designed to serve as an instrumentality for the sale of articles of merchandise by lottery methods."

The orders of the Commission will be affirmed and an order will be entered by this court enforcing them in accordance with the provisions of 15 USC 45 (c).

Affirmed and enforced.

NATIONAL TOILET CO. v. FEDERAL TRADE COMMISSION [1]

No. 10411—F. T. C. Docket 5342

(Court of Appeals, Seventh Circuit. Oct. 20, 1952)

Order dismissing, pursuant to stipulation of counsel for the parties, petition to review and set aside the cease and desist order of Feb. 27, 1951, 47 F. T. C. 1023, prohibiting false representations in advertising to the effect that respondent's "Nadinola" cosmetic creams would clear up externally caused pimples and other types of skin blemishes and constituted an effective treatment therefor, and would improve skin texture.

Mr. James F. Hoge, of New York City, for petitioner.

Mr. James W. Cassedy, Asst. General Counsel, of Washington, D. C., for Federal Trade Commission.

Pursuant to stipulation of counsel for the parties, it is ordered by the Court that the petition filed May 7, 1951, to review and set aside the order to cease and desist be, and the same is hereby, dismissed without costs to either party.

[1] Not reported in Federal Reporter. Case before the Commission reported in 47 F. T. C. 1023.

FEDERAL TRADE COMMISSION v. NATIONAL HEALTH AIDS, INC. ET AL.[1]

Civ. A. No. 6077—F. T. C. Docket 5997

(United States District Court, D. Md., Civ. Div. Nov. 12, 1952)

FEDERAL TRADE COMMISSION ACT—WHEELER-LEA AMENDMENT—IN GENERAL

The Wheeler-Lea amendment to the Federal Trade Commission Act is in the nature of remedial legislation and should be liberally construed.

STATUTES AND STATUTORY CONSTRUCTION—IN GENERAL

A statute should be construed in light of the purpose it seeks to achieve and of the evil it seeks to remedy.

FEDERAL TRADE COMMISSION ACT—WHEELER-LEA AMENDMENT—INTENT—FALSE ADVERTISEMENTS

Evident intent of the Wheeler-Lea amendment to Federal Trade Commission Act is to enable Federal Trade Commission, in the public interest, to take more effective action against false advertisements.

FEDERAL TRADE COMMISSION ACT—FALSE ADVERTISING OF FOOD, DRUGS, ETC.—INJUNCTIVE PROCEEDINGS AND INJUNCTIONS—AS AUTHORIZED EITHER BEFORE OR DURING PENDENCY OF COMMISSION'S ADMINISTRATIVE PROCEDURE

Considering word "pending", in sense of "during", and in light of reference to dismissal of complaint, provision of Federal Trade Commission Act for the enjoining of false advertising pending issuance of complaint by Commission and until such complaint is dismissed, authorizes application for temporary injunction either before or during pendency of Commission's administrative procedure.

FEDERAL TRADE COMMISSION ACT—FALSE ADVERTISING OF FOOD, DRUGS, ETC.—INJUNCTIVE PROCEEDINGS AND INJUNCTIONS—VALIDITY—THAT PRODUCT, AS ASSERTED, A FOOD AND NOT A DRUG

[241] In proceeding by Federal Trade Commission for preliminary injunction against false advertising of a drug, objection by defendant that product was a food was technical rather than substantial in that Commission had jurisdiction over the advertising of both foods and drugs, and that complaint could readily be amended.

FEDERAL TRADE COMMISSION ACT—FALSE ADVERTISING OF FOOD, DRUGS, ETC.—INJUNCTIVE PROCEEDINGS AND INJUNCTIONS—"PROPER SHOWING"—APPLICABLE CRITERIA

Under Federal Trade Commission Act provision that, "upon proper showing", a temporary injunction against false advertising shall be granted without bond, a reasonable belief on part of Commission warrants its application for injunction, but action of Court should be based on the general considerations that properly apply in the issuance of preliminary injunctions.

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[1] Reported in 108 F. Supp. 340.

ADVERTISEMENTS—FALSITY OF—TEST—NET IMPRESSION UPON GENERAL PUBLIC AS PROPER

Under Federal Trade Commission Act, test of falsity of advertisement is not whether it could be basis for civil action for deceit or for criminal proceeding for obtaining money by false pretences, but is what is likely to be net impression made upon general public by the advertisement, considered in its entirety, and as read or understood by those to whom it would appeal.

FEDERAL TRADE COMMISSION ACT—FALSE ADVERTISING OF FOOD, DRUGS, ETC.—INJUNCTIVE PROCEEDINGS AND INJUNCTIONS—"PROPER SHOWING"—APPLICABLE CRITERIA—POTENTIAL PECUNIARY INJURY TO PUBLIC FROM INDUCED PURCHASE OF PRODUCT

Showing of potential pecuniary injury to public from inducing purchase of product which, in advertisements was strongly represented as effective to make one well and keep one well, entitled Federal Trade Commission to temporary injunction restraining manufacturer of product from further dissemination of such advertisements.

(The syllabus, with substituted captions, is taken from 108 F. Supp. 340)

In proceeding for preliminary injunction to restrain dissemination of allegedly false advertisements, injunction granted.

Mr. Daniel J. Murphy and *Mr. Joseph Callaway*, of Washington, D. C., *Mr. Bernard J. Flynn*, U. S. Atty., of Baltimore, Md., for plaintiff.

Freer, Church and Green, Mr. Robert E. Freer and *Miss Nelle Ingels*, of Washington, D. C., and *Mr. Bernard H. Herzfeld*, of Baltimore, Md., for defendants.

CHESTNUT, *District Judge:*

In this case the Federal Trade Commission has filed a motion for a preliminary injunction against the defendants under the authority of s. 13 of the Federal Trade Commission Act, 15 USCA, s. 53, section (a) of which reads as follows:

"(a) Whenever the Commission has reason to believe—

(1) That any person, partnership, or corporation is engaged in, or is about to engage in, the dissemination or the causing of the dissemination of any advertisement in violation of section 52 of this title, and (2) that the enjoining thereof, *pending the issuance of a complaint by the Commission under section 45 of this title, and until such complaint is dismissed by the Commission or set aside by the court on review*, or the order of the Commission to cease and desist made thereon has become final within the meaning of section 45 of this title, would be to the interest of the public, the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States or in the United States court

of any Territory, to enjoin the dissemination or the causing of the dissemination of such advertisement. *Upon proper showing* a temporary injunction or restraining order shall be granted without bond. Any such suit shall be brought in the district in which such person, partnership, or corporation resides or transacts business."

I have italicized the phrases of the statute which are particularly in question in this [342] case. Upon *proper showing* subsection (b) is not here in point.

Section 52 (referred to in section 53) reads as follows:

"52. Dissemination of false advertisements—Unlawfulness.

(a) It shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement—

(1) By United States mails, or in commerce by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of foods, drugs, devices, or cosmetics; or

(2) By any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in commerce of foods, drugs, devices, or cosmetics.

(b) The dissemination or the causing to be disseminated of any false advertisement within the provisions of subsection (a) of this section shall be an unfair or deceptive act or practice in commerce within the meaning of section 45 of this title. Sept. 26, 1914, c. 311, s. 12, as added Mar. 21, 1938, s. 49, s. 4, 52 Stat. 114."

The motion is based on the ground that the defendants are engaged in the sale and distribution in interstate commerce of a product designated as "N.H.A. Complex" and in connection therewith are causing the dissemination of false advertisements. The motion alleges that the advertisements are false in that they represent directly or by implication that N.H.A. Complex "will make one well and keep one well," and that it is a competent and effective treatment for various diseases including arthritis, rheumatism, neuralgia, sciatica, lumbago, gout, coronary thrombosis, brittle bones, bad teeth, malfunctioning glands, infected tonsils, infected appendix, gall stones, neuritis, underweight, constipation, indigestion, lack of energy, lack of vitality, lack of ambition and inability to sleep; and that all persons in this country normally consume a diet deficient in vitamins, minerals and proteins and that it is necessary for everyone to use a dietary supplement such as N.H.A. Complex to obtain the vitamins and proteins necessary to good health. It is further alleged that the Commission has reason to believe that the injunction would be in the interest of the public and that further dissemination of false advertisements will cause irreparable injury to the public.

The motion for the injunction was filed on September 18, 1952, contemporaneously with the filing of a formal complaint by the Federal Trade Commission in this court against the defendants which allege that under sections 5 and 12 of the Federal Trade Commission Act (52 Stat. 111, 15 USCA, ss. 45, 52) the Commission had issued its complaint against the defendants charging that they were engaged in the dissemination of false advertisements in violation of section 12 of the Act. In the complaint filed in this court it is alleged that the composition of N.H.A. Complex consists principally of certain enumerated vitamins and minerals with a certain amount of iodine, calcium and phosphorous. The detailed quantities, taken from the labels on the packages, are stated and the directions for dosage are "adults take ¼ oz. daily (which is approximately 2 level teaspoonsful or 4 half teaspoonful) followed by water, or take as directed by your physician." It is further alleged that the defendants have caused and are continuing to cause various false advertisements with respect to said drug preparation to be disseminated by radio and television broadcasts from broadcasting stations located in different States of the United States that have sufficient power to transmit said advertisements across State lines; and that such advertising is national in its scope. It is further alleged in the complaint that the advertisements are false in that they represent that N.H.A. Complex, used as directed "will make one well and keep one well" and will be effective in the treatment of various diseases and otherwise as heretofore mentioned with respect to the motion for a preliminary injunction. The complaint asks for the preliminary injunction. A copy of the complaint by the Commission in its own proceedings (Docket No. 5997) is attached as an exhibit to the complaint filed here for [343] a preliminary injunction. The administrative complaint was filed by the Commission May 29, 1952, and the complaint in this court was filed September 18, 1952.

On the separately filed motion for a preliminary injunction issued by this court, an order was signed for the defendants to show cause why said preliminary injunction should not issue as prayed within 3 days after service on them of a copy of the complaint and the motion for a preliminary injunction. On September 29, 1952, the defendant, National Health Aids of Baltimore, Inc. (formerly National Health Aids, Inc.) filed an answer to the motion and on the same day filed an answer to the complaint in this court. Some affidavits were also filed in support of the defendant's answer. The individual defendant, Charles Kasher, has not yet been served in the case and has filed no answer.