

IN THE MATTER OF
MARLENE'S, INC. ET AL.

DECISION AND OPINION IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT

Docket 5998. Complaint, June 4, 1952—Decision, Nov. 19, 1953

Where a corporation and its president, engaged in the interstate sale and distribution of their "Mynex" drug preparation which contained vitamins and minerals and to which they had added methylcellulose in such a quantity as they deemed sufficient to give the user of the preparation a feeling of fullness and satisfaction and thereby curb his appetite; and two individuals who were their advertising representatives, and prepared, edited, tested, and placed all advertising material used to promote the sale of said "Mynex"; in advertising the same through newspapers of general circulation, radio and television continuities, and letters and circulars, directly and by implication—

- (a) Represented that said "Mynex" tablets, used in conjunction with a calorie-reducing regime, comprised a basically different type of weight reducer greatly superior to any other weight reducer known to medical science;

When in fact said "Mynex Plan" for reducing weight was dependent solely upon the low-calorie diet for its effectiveness, and, as such, was not basically different from or superior to numerous other weight-reducing plans, even with the addition of methylcellulose;

- (b) Falsely represented that said tablets possessed weight-reducing properties and that they would prevent the weak, tired, run-down feeling that usually accompanies a restrictive diet, and that through the use of their so-called "Mynex Plan", specific reductions could be achieved within a prescribed period of time;

The facts being they possessed no weight-reducing properties in themselves; a tired, weak, or run-down feeling which might result from following said "Mynex Plan" would ordinarily be caused by the low-calorie diet rather than a lack of vitamins or minerals; since said tablets would only prevent such conditions caused by such deficiency, it could not be truthfully stated that use of said preparation would prevent the same; and no specific predetermined weight reduction can be achieved by using respondents' preparation for a prescribed period of time; and

- (c) Falsely represented that their said preparation and low-calorie diet had been approved for advertising by the Canadian Government;

The facts being that while they had relied, in said representation, upon correction and apparent approval of advertising copy by an official of the Canadian Department of National Health and Welfare, advertising of weight-reducing preparations is expressly forbidden by Canadian law and approval of the advertising of "Mynex" in Canada was beyond the power of any official:

Held, That such acts and practices, under the circumstances set forth, were all to the prejudice and injury of the public and constituted unfair and deceptive acts and practices in commerce.

Before *Mr. Abner E. Lipscomb*, hearing examiner.

Mr. Joseph Callaway for the Commission.

Mr. Henry Junge, of Chicago, Ill., for respondents.

ORDERS AND DECISION OF THE COMMISSION

Order denying appeal from initial decision of hearing examiner and decision of the Commission and order to file report of compliance, Docket 5998, November 19, 1953, follows:

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on June 4, 1952, issued and subsequently served its complaint in this proceeding upon the respondents named in the caption hereof, charging them with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of said Act. Thereafter, counsel supporting the complaint and counsel for respondents, on December 31, 1952, entered into a stipulation as to the facts, which was subsequently amended by a supplemental stipulation as to the facts filed on January 14, 1953, wherein it was stipulated and agreed that the facts set forth therein might be taken as the facts in this proceeding in lieu of evidence in support of the charges stated in the complaint or in opposition thereto, and that the hearing examiner might, without any intervening procedure, issue his initial decision herein upon the basis of said stipulations. Thereafter, counsel for respondents filed a motion to dismiss the complaint and counsel supporting the complaint filed an answer in opposition thereto. After final consideration of the record, including said motion to dismiss and answer thereto, the hearing examiner, on February 13, 1953, filed his initial decision herein.

Within the time permitted by the Commission's Rules of Practice, counsel for respondents filed an appeal from said initial decision. The Commission having duly considered said appeal and briefs and oral argument of counsel in support of and in opposition thereto and being of the opinion that, for the reasons stated in the accompanying opinion of the Commission, the appeal is without merit:

It is ordered, That respondents' appeal from the initial decision of the hearing examiner be, and it hereby is, denied.

The Commission is of the further opinion, however, that the initial decision of the hearing examiner is inappropriate to dispose of this proceeding, for the reason that the stipulated facts and the hearing examiner's findings based thereon with respect to respondent James O. Webb do not warrant an order against him as an individual. Therefore, the Commission, being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes the following findings as to the facts, conclusion drawn therefrom, and order, the same to be in lieu of the initial decision of the hearing examiner.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Marlene's, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business located at 230 North Michigan Avenue, Chicago, Illinois.

PAR. 2. The individual respondent R. J. Smasal is now, and has been since the creation of the corporate respondent, president of Marlene's, Inc. individual respondent Martin P. King (erroneously called M. T. King in the complaint herein) formerly served the corporate respondent as vice president, but disposed of his entire ownership of stock and formally resigned as vice president of said corporate respondent some time before the issuance of the complaint herein. He has had no connection with said corporation since on or about January, 1952, and the complaint will, therefore, be dismissed as to him. The individual respondent James O. Webb is secretary-treasurer of the corporate respondent. The president of the corporate respondent, R. J. Smasal, has directed and controlled the policies of the corporate respondent in regard to acts and practices hereinafter set forth. His address is the same as that of the corporate respondent. It does not appear that respondent James O. Webb has participated in the direction or control of the policies of the corporate respondent in such a manner or to such an extent as to warrant an order against him as an individual. The complaint will, therefore, be dismissed as to him as an individual, but not as an officer of the respondent corporation. As hereinafter used, the term "respondents" does not include James O. Webb as an individual, and Martin P. King.

PAR. 3. The corporate respondent, Marlene's, Inc., and the individual respondent, R. J. Smasal, are now and for several years last past have been engaged in the business of selling and distributing a drug preparation, as "drug" is defined in the Federal Trade Commission Act, in conjunction with a calorie reducing regimen.

The designation used by these respondents for said drug preparation, the directions for use thereof, and until approximately a year ago the formula for said preparation were as follows:

Designation: "Mynex"

63 Tablets of Mynex

2 Green Tablets together contain:

Ferric Pyrophosphate.....	16 mg.
Tricalcium Phosphate	720 mg.
Diastase of Malt.....	100 mg.

Each Maroon Tablet Contains :

Vitamin B ₁ -----	1 mg.
Vitamin B ₂ -----	1 mg.
Vitamin C-----	16 mg.
Niacin Amide-----	6 mg.
Vitamin D-----	200 INT Units
Vitamin B ₆ -----	0.4 mg.
Calcium Pantothenate-----	2 mg.

Directions for Use

For adults only : Take 2 green tablets one half hour before each meal (3 times a day) preferably with grape juice, grapefruit juice, orange juice, skimmed milk or water. Take one maroon tablet soon (after) each meal with a glass of water.

The formula for said preparation was changed approximately a year ago by the addition of methylcellulose in such quantity as these respondents deemed sufficient to give the user of the preparation a feeling of fullness and satisfaction, and in this way curb his appetite. No other effect is claimed for the methylcellulose.

PAR. 4. These respondents cause and have caused the said preparation, when sold, to be transported from their place of business in the State of Illinois to purchasers thereof located in various other States of the United States. These respondents maintain, and at all times mentioned herein have maintained, a substantial volume of trade in said preparation in commerce between and among the various States of the United States.

PAR. 5. Respondents Edward H. Larson and Nelson J. McMahon operate the respondent advertising agency of O'Neil, Larson & McMahon, with its office and principal place of business located at 230 North Michigan Avenue, Chicago, Illinois. These respondents are the advertising representatives of respondent Marlene's Inc., and prepare, edit, test, and place all advertising material used by respondent Marlene's, Inc., to promote the sale of the aforesaid drug preparation.

PAR. 6. The respondents, Marlene's, Inc., R. J. Smasal, Edward H. Larson, and Nelson J. McMahon have acted in conjunction and cooperation with one another in the performance of the acts and practices hereinafter set forth.

PAR. 7. In the course and conduct of their business, these respondents have disseminated, and have caused the dissemination of, advertisements concerning their said preparation, by the United States mails, and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, for the purpose of inducing and

Findings

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which were likely to induce, directly or indirectly, the purchase of said preparation. These respondents also disseminated, and caused the dissemination of, advertisements concerning said preparation by various means, including, but not limited to, newspapers of general circulation, radio and television continuities, letters, and circulars, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of said preparation in commerce, as "commerce" is defined in the Federal Trade Commission Act, but at the present time there is no advertising being employed.

PAR. 8. Among and typical, but not all-inclusive, of the statements and representations, disseminated and caused to be disseminated as hereinabove set out, until approximately one year ago, are the following:

* * * an amazing discovery.

Mynex brings guaranteed, the safest, easiest, fastest reducing discovery ever made by modern medical science.

* * * an amazing new reducer called Mynex was introduced in Canada.

This sensational reducer is called MYNEX.

HOW SMALL TABLET BRINGS AMAZING RESULTS Canadian overeaters who found usual reducing methods too hard * * * acclaimed new MYNEX * * *

* * * try Mynex Reducing Food Tablets * * *

Today, the most popular reducing tablet is * * * called MYNEX * * *

* * * tablets avoid weak, tired, run-down feeling.

* * * if you want to lose fat * * * without feeling tired or rundown * * * ask * * * for MYNEX.

This was the first time I was ever able to reduce without getting headaches, feeling tired, weak and rundown.

5-10 pounds disappear first 7 days eating concentrated vitamin mineral tablets.

3-5 pounds disappear safely first few days.

16-23-35 pounds * * * Even more in a few short weeks.

Start reducing fat very first day.

* * * Mynex is so safe it was actually approved for advertising in Canada * * *

* * * Mynex Reducing method is an Approved Canadian method in food tablet form * * * accepted for advertising by Canadian authorities.

PAR. 9. Through the use of the statements and representations contained in the advertisements hereinabove set forth and others of the same import but not specifically set out herein, the respondents represented, directly and by implication: that Mynex tablets used in conjunction with a calorie reducing regimen comprised a basically different type of weight reducer greatly superior to any other weight reducer known to medical science; that Mynex tablets possess weight-

reducing properties; that Mynex tablets will prevent the weak, tired, run-down feeling that usually accompanies a restrictive diet; that through the use of the so-called Mynex plan specific predetermined weight reductions can be achieved within a prescribed period of time; and that respondents' preparation and low calorie diet have been approved for advertising by the Canadian government.

PAR. 10. The aforesaid representations were misleading in material respects and constituted "false advertisements" as that term is defined in the Federal Trade Commission Act. In truth and in fact, the Mynex plan for reducing weight is dependent solely upon a low calorie diet for its effectiveness and as such is not basically different from or superior to numerous other weight-reducing plans, even with the addition of methylcellulose. Mynex tablets possess no weight-reducing properties in themselves. A tired, weak, or run-down feeling which might result from following the Mynex plan would ordinarily be caused by the low calorie diet rather than by a lack of vitamins or minerals. Since Mynex tablets will only prevent such conditions when caused by vitamin or mineral deficiency, it cannot be truthfully stated that the use of said preparation will prevent said conditions. No specific predetermined weight reduction can be achieved by using respondents' preparation for a prescribed period of time. Respondents, in representing to the public in this country that Mynex had been approved for advertising by Canadian authorities, were relying upon correction and apparent approval of advertising copy by an official of the Canadian Department of National Health & Welfare. In truth and in fact advertising of weight-reducing preparations is expressly forbidden by Canadian law, and approval of the advertising of Mynex in Canada was and is beyond the power of any official.

PAR. 11. The use by the respondents of the foregoing false advertisements and the false, misleading, and deceptive statements and representations contained therein had the capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that all of said statements and representations were true, and into the purchase of respondents' preparation because of such erroneous and mistaken belief.

CONCLUSION

The acts and practices of the respondents as herein found are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce within the meaning of the Federal Trade Commission Act.

Order

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ORDER

It is ordered, That the respondents, Marlene's, Inc., a corporation, its officers, and R. J. Smasal, individually and as an officer of said corporation, and respondents Edward H. Larson and Nelson J. McMahon, individually and doing business as O'Neil, Larson & McMahon, or under any other name, and respondents' agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution of respondents' preparation designated as "Mynex", or any other preparation containing substantially similar ingredients or possessing substantially similar properties, whether sold under the same name or any other name, do forthwith cease and desist from, directly or indirectly:

1. Disseminating or causing to be disseminated, by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which represents directly or by implication:

(a) That respondents' weight-reducing plan is basically different from or superior to other weight-reducing plans requiring a low calorie diet with a dietary supplement;

(b) That Mynex tablets possess weight-reducing properties;

(c) That Mynex tablets will prevent the development of a tired, weak, or run-down feeling except when such conditions result solely from vitamin or mineral deficiencies;

(d) That specific or predetermined weight reduction will be achieved within a prescribed period of time through the use of respondents' plan;

(e) That respondents' preparation or plan has been approved for advertising by the Canadian government;

2. Disseminating or causing to be disseminated, by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of respondents' preparation, in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which contains any of the representations prohibited in paragraph 1 hereof.

It is further ordered, That the complaint herein be, and it hereby is, dismissed as to Martin P. King and as to James O. Webb in his individual capacity but not in his capacity as an officer of the corporate respondent.

It is further ordered, That Marlene's, Inc., R. J. Smasal, Edward H. Larson, and Nelson J. McMahon 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.

OPINION OF THE COMMISSION

By CARRETTA, Commissioner:

This matter is before the Commission upon an appeal by the respondents from the initial decision of the hearing examiner and upon briefs and oral argument of counsel in support of and in opposition to the appeal.

The Commission's complaint in this proceeding charges the respondents with the use of unfair and deceptive acts and practices through the dissemination of false advertisements concerning a drug preparation designated "Mynex", advertised to reduce weight. The complaint sets forth a number of the statements and representations which the respondents have made in their advertising of the product, and alleges that such statements and representations are misleading in material respects and constitute "false advertisements" as that term is defined in the Federal Trade Commission Act. The respondents in their answer to the complaint admitted all the material allegations except with respect to certain of the individual respondents, and alleged that the statements and representations challenged by the complaint were abandoned and that the formula for the product involved was materially changed prior to the issuance of the complaint.

Counsel supporting the complaint and counsel for the respondents entered into a written stipulation as to the facts, which was subsequently amended by a supplemental stipulation as to the facts, in which it was stipulated and agreed, among other things, that the statement of facts contained therein "may be taken as the facts in this proceeding in lieu of evidence in support of the charges stated in the complaint or in opposition thereto; that the Hearing Examiner may proceed upon said statement of facts to make his Initial Decision, stating his findings as to the facts, including inference which he may draw from said stipulation of facts, and his conclusion based thereon, and enter his order disposing of the proceeding, without the filing of proposed findings and conclusions or the presentation of oral argument." The facts so stipulated between counsel are, with certain exceptions, essentially the same as those alleged in the complaint.

The respondents thereafter filed a motion with the hearing examiner for dismissal of the complaint on the grounds that the advertising statements challenged by the complaint had been discontinued and that it would not be in the public interest to continue the proceeding. This motion was denied by the hearing examiner, except as to respondent Martin P. King.

The hearing examiner filed his initial decision, in which he found that the respondents, except individual respondent Martin P. King (erroneously named in the complaint as "M. T. King"), have engaged

in the acts and practices alleged in the complaint, and ordered the respondents, except Martin P. King, to cease and desist disseminating advertisements containing the representations found to be false. He dismissed the complaint as to respondent Martin P. King.

Respondents filed an appeal from the hearing examiner's initial decision in which they contend (1) that no order should be issued because the respondents had discontinued the use of the false advertisements approximately six months prior to the issuance of the complaint; (2) that no order should issue because the formula for the product involved was changed prior to the issuance of the complaint; and (3) that prohibition 1 (e) of the order in the initial decision is not supported by the facts.

It is well settled law that discontinuance or abandonment of an unlawful practice does not constitute a bar to an order of the Commission restraining the respondents from engaging in the unlawful practices. Whether or not the Commission will enter an order in a proceeding where the complained of practices have been discontinued is a matter within the discretion of the Commission and in the exercise of that discretion the Commission must necessarily consider, among other things, whether there is a likelihood that the practice may be resumed. There is nothing in the record in this case upon which to base a determination that the respondents will not resume the practices found to be unlawful. It appears that the respondents are still offering for sale and selling a drug preparation and plan for reducing weight. Under these circumstances, the Commission deems it necessary in the public interest to insure against a resumption of the unlawful practices by the issuance of an order to cease and desist.

The change in the formula for a product concerning which false advertisements have been disseminated obviously does not constitute a bar to the issuance of an order to cease and desist. The change in the formula for the product involved in this proceeding consisted of the addition of a new ingredient, methylcellulose, "in such quantity as these respondents deemed sufficient to give the user of the preparation a feeling of fullness and satisfaction, and in this way curb his appetite." No other effect is claimed for the methylcellulose. It was stipulated that "the Mynex plan for reducing weight is dependent solely upon a low calorie diet for its effectiveness and as such is not basically different from or superior to numerous other weight reducing plans, even with the addition of methylcellulose." The addition of the new ingredient to the preparation in no way changed the situation as to the representations which the respondents have admitted were false.

Paragraph 1 (e) of the order in the initial decision prohibits the respondents from representing that their "preparation or plan has

been approved for advertising by the Canadian government.” The complaint alleges, and the respondents in their answer admit, that the respondents have represented that their “preparation and low calorie diet have been approved for advertising by the Canadian government” and that “Said preparation and low calorie diet have not been approved for advertising by the Canadian government. In truth and in fact, advertising of weight reducing preparations is expressly forbidden by Canadian law.”

In a stipulation between counsel it was agreed that “Respondents in representing to the public in this country that Mynex had been approved for advertising by Canadian authorities were relying upon correction and apparent approval of advertising copy by an official of the Canadian Department of National Health & Welfare. In truth and in fact advertising of weight reducing preparations is expressly forbidden by Canadian law, and approval of the advertising of Mynex in Canada was and is beyond the power of any official.” This stipulated fact may have the effect of showing respondent’s reasons for having made the representation, but it in no way changes the fact that the representation was made and that it was false. The hearing examiner’s finding is in accordance with the stipulated facts, and fully supports prohibition 1 (e) of the order.

Although respondents did not raise the point in their appeal, we are of the opinion that the stipulated facts and the hearing examiner’s findings based thereon with respect to respondent James O. Webb do not warrant an order against him as an individual.

In view of the foregoing, respondents’ appeal should be denied. However, the complaint should be dismissed as to respondent James O. Webb in his individual capacity, but not as an officer of the corporate respondent.

IN THE MATTER OF
COUNTRY TWEEDS INCORPORATED AND MARCUS
WEISMAN

DECISION IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE
COMMISSION ACT

Docket 5957. Complaint, Feb. 21, 1952—Decision, Nov. 25, 1953

Where a corporation and its secretary-treasurer, who formulated its policies and directed and controlled all its practices, engaged in the manufacture and competitive interstate sale and distribution of women's coats, including its "Kashmoor" line in which the fabric of the coat, containing no Cashmere, was composed of 80% wool (Alpaca, mohair, and sheep's wool) and 20% nylon—

Made use, without more, of the legend "An exclusive fabric—KASHMOOR—Country Tweeds" on the permanent labels affixed by them to their said coats, as distinguished from the temporary tag attached to the coat in compliance with the Wool Products Labeling Act:

Held, That such acts and practices of the respondents, under the circumstances set out, were all to the prejudice of the public and of respondents' competitors, and constituted unfair methods of competition in commerce and unfair and deceptive acts and practices therein.

Before *Mr. William L. Pack*, hearing examiner.

Mr. George E. Steinmetz for the Commission.

Barshay & Frankel, of New York City, for respondents.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on February 21, 1952, issued and subsequently served its complaint in this proceeding upon the respondents named in the caption hereof, charging them with the use of unfair methods of competition and unfair and deceptive acts and practices in commerce in violation of the provisions of that Act. After the filing by respondents of their answer to the complaint, hearings were held at which testimony and other evidence in support of and in opposition to the allegations of the complaint were introduced before a hearing examiner of the Commission, theretofore duly designated by it, and such testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, the said hearing examiner, on April 17, 1953, filed his initial decision.

Within the time permitted by its Rules of Practice, the Commission, having reason to believe that said initial decision did not constitute an adequate disposition of the proceeding, issued an order placing