

Opinion

IN THE MATTER OF
PREMIER PILLOW CORPORATION ET AL.

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

Docket 6136. Complaint, Oct. 28, 1953—Decision, May 25, 1956

Interlocutory order reversing the hearing examiner's ruling that he is "without authority to rule on respondents' motion" to dismiss at the close of the prosecution's case-in-chief, and remanding the matter to him for decision.

Before *Mr. J. Earl Cox*, hearing examiner.

Mr. Ames W. Williams and *Mr. Charles S. Cox* for the Commission.

Mr. Edward L. Smith, of Washington, D. C., for respondents.

ORDER REMANDING CASE TO HEARING EXAMINER

This matter having come on to be heard by the Commission upon the hearing examiner's ruling referring respondents' motion to dismiss to the Commission for disposition; and

The Commission having determined, for the reasons appearing in the accompanying opinion of the Commission, that the hearing examiner erroneously concluded that he is without authority to rule upon respondents' motion to dismiss, and that the case should be remanded to the hearing examiner:

It is ordered, That this case be, and it hereby is, remanded to the hearing examiner with instructions to proceed in accordance with the Commission's opinion.

OPINION OF THE COMMISSION

MASON, Commissioner:

This matter is before the Commission upon the hearing examiner's ruling referring to us respondents' motion "to dismiss the complaint ¹ herein for the reason that, under the testimony and evidence, the proceeding lacks 'the public interest necessary to support the Commission's jurisdiction'."

The examiner indicates the issue raised by respondents' motion in this proceeding is based on a procedural record similar to that presented in the Florida Citrus case,² and accordingly ruled:

¹ Complaint issued Oct. 28, 1953, charging violation of the Federal Trade Commission Act.

² In the Matter of Florida Citrus Mutual, Docket 6074, May 10, 1954.

"Under this decision of the Commission, the hearing examiner is without authority to rule on respondents' motion, and it must, therefore, be referred to the Commission for consideration."

However, the record shows that the motion in the instant case challenging the existence of public interest was filed after the close of the prosecution's case-in-chief.

This is the significant and distinguishing factor—the point of departure as it were—from the Florida Citrus matter wherein the proceedings had advanced only so far as the preliminary hearing stage. The Florida Citrus respondents sought dismissal of their suit on lack of public interest prior to the prosecution's case-in-chief.

To prevent future misconception and eliminate areas of doubt, we say it is not our intention to foreclose the hearing examiner's consideration of the question of "public interest" after full presentation of the government's case.

Prior—he cannot do it. After—he can.

To say that he has this former power would be to recognize in the hearing examiner the right to sit in judgment on discretionary administrative decisions of the Commission.

In the matter now before us government counsel has completed its case-in-chief and the question of whether an order to cease and desist would be in the "public interest" becomes justiciable in nature and rests within those judicial powers we have delegated to hearing examiners. In the instant proceedings the prosecution has presented its full case and rested. With the facts upon which the government has predicated its charge thus disclosed, the hearing examiner may apply the criteria upon which to base his adjudicatory conclusion. The hearing examiner here in no way assumes the administrative function of the Commission.

This case is remanded to the hearing examiner to rule on the respondents' motion.

Chairman HOWREY, with whom Commissioner SECREST joins, concurring:

We agree that the hearing examiner should have entertained and ruled upon the motion to dismiss at the close of the case-in-chief.

We disagree with the majority opinion to the extent that it makes the added observation that an examiner is not empowered to entertain and rule upon a motion to dismiss for lack of public interest at any prior stage of the case.

For the reasons set forth in the dissenting opinion in the *Florida Citrus Mutual* case,³ we feel the majority view on this point is con-

³ Docket No. 6074, Decided May 14, 1954.

trary to the provisions of the Administrative Procedure Act, decisional law, and the Commission's own Rules of Practice.

Public interest is a jurisdictional prerequisite to proceedings under the Federal Trade Commission Act. To suggest that such an issue can never be adjudicated on the basis of a preliminary motion, properly filed and supported, is to favor—literally—the imposition upon parties of the onerous burden to litigate the merits even in a case where a jurisdiction defect may be self evident.

In the dissenting opinion in the *Florida Citrus Mutual* case, *supra*, it was stated:

“Counsel supporting the complaint also question the wisdom of ruling on the ‘public interest’ issue prior to a hearing on the merits. They suggest that public interest cannot be determined until all the facts are in the record. There is much to be said for the argument and certainly restraint should be exercised in ruling on such motions before counsel in support of the complaint have closed their case-in-chief. As I have indicated, public interest lacks specificity and cannot be directly measured; it is usually determined from all the facts and circumstances of the particular case. However, this is not to say that such motions should never be granted. In exceptional instances, like the *Klesner* case, for example, the hearing examiner should by all means consider and decide the matter on a preliminary motion.”

Section 7 (b) of the Administrative Procedure Act provides, among other things, that hearing examiners shall have the authority to make decisions or recommended decisions and to take “any other action authorized by agency rule * * *.”⁴ Rule X of the Commission's Rules of Practice provides in part that “During the time a proceeding is pending before a trial examiner all motions * * * shall be addressed to and ruled upon by him * * *.” This includes motions to dismiss at any stage of the proceedings.

In the leading case of *F.T.C. v. Klesner*, 280 U.S. 19 (1929), the Supreme Court stated that a complaint should be dismissed “at any time during the course of the proceeding” if it is shown that the matter is not in the public interest. In *Moretrench Corp. v. F.T.C.*, 127 F. 2d 792 (C.A. 2, 1942), Judge Learned Hand observed that the *Klesner* case “did indeed decide that the public interest in the controversy was a justiciable issue * * *.”

In our view, there is no validity in the position that an examiner can rule on a motion to dismiss after the close of the case-in-chief but that he cannot rule on a motion prior to the reception of evidence on the merits, no matter how strongly supported.

⁴ 5 U. S. C. 1006 (b).

Appeal

52 F. T. C.

It is true that the decision of the Commission to issue a complaint is a discretionary, administrative function. It is equally clear—at the same time—that Commission proceedings become judicial in character immediately upon issuance and service of complaint. In considering the jurisdictional issue of public interest after complaint—whether or not hearings have been held with respect to the allegations of the complaint—the hearing examiner is performing a judicial function. Obviously if he should rule for or against a motion to dismiss without compelling supporting evidence his decision should and would be reversed. This would also be true in the unlikely event that an examiner, without evidence, substituted his judgment for that of the Commission in issuing the complaint. However, the question raised is whether or not the hearing examiner has authority to rule on the motion, not whether he misuses—or might misuse—that authority.

Authority is always subject to error and abuse. But the contingency of error should not impair the efficient administration of justice.

Interlocutory order remanding case to hearing examiner for further proceedings to harmonize with *Burton-Dixie* case.⁵

ORDER REMANDING PROCEEDING TO HEARING EXAMINER

Counsel supporting the complaint having filed an appeal from the hearing examiner's initial decision dismissing the complaint herein at the close of presentation of the case in support of the complaint; and the matter having been heard on briefs and oral argument, and the Commission having rendered its decision vacating and setting aside said initial decision:

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

ON APPEAL FROM INITIAL DECISION

By SECRET, Commissioner:

This is one of a group of ten cases, all tried and considered together, involving the use on labels of allegedly false and deceptive representations with respect to the filling material contained in feather and down pillows. This case differs from the others, however, in that it is an appeal from the hearing examiner's initial decision granting the respondents' motion to dismiss the complaint made at the close of the case in chief, whereas the appeals in the other cases were from initial decisions filed after full hearings. The sole question for decision is whether or not the hearing examiner was correct in his conclusion that there is no public interest in the proceeding.

⁵ 51 F. T. C. 1330.

1417

Decision

The representations alleged in the complaint to have been false and deceptive relate solely to pillows filled with crushed feathers. Similar representations were involved in the matter of Burton-Dixie Corporation, et al., Docket No. 6134, in which case the hearing examiner also held that there was no public interest in attacking the representations, and in that case the Commission has written an opinion holding that in so doing the examiner was in error. In view of the similarity of the cases, the opinion in the Burton-Dixie case is equally applicable here, and for the reasons there stated, the appeal of counsel supporting the complaint in this case is granted and the initial decision of the hearing examiner is vacated and set aside. In consequence of this action, it will be necessary for the case to be remanded to the hearing examiner for further proceedings.

Order requiring a manufacturer in Brooklyn, N. Y., to cease labeling pillows as "All New Material Consisting of" variously "Crushed Goose Feathers," "Crushed Duck Feathers," "Crushed Duck Quill," or "Crushed Goose Quill"; when analysis of the content of the pillows showed that they were not accurately labeled within the 15% tolerance specified in the feather industry trade practice rules.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The complaint charges that respondents have violated the provisions of the Federal Trade Commission Act by misrepresenting the contents of feather pillows which they manufacture and distribute in commerce.

After the filing of an answer, hearings were held, at which testimony and other evidence was presented in support of the allegations of the complaint, duly recorded and filed in the office of the Commission. Thereupon respondents, without waiving any other rights in the proceeding, filed a motion to dismiss the complaint "for the reason that, under the testimony and evidence, the proceeding lacks the public interest necessary to support Commission's jurisdiction." This motion was granted by the Hearing Examiner in an Initial Decision which, upon appeal, was vacated and set aside. The case was remanded to the Hearing Examiner for further appropriate proceedings, and thereafter a hearing was held at which respondents waived the presentation of evidence in their behalf and the right to file proposed findings. Counsel supporting the complaint later submitted proposed findings and conclusions, and the proceeding is presented for Initial Decision upon the entire record.

THE FACTS

1. Respondent Premier Pillow Corporation is a New York corporation, with its principal office located at 121 North 11th Street,

Decision

52 F. T. C.

Brooklyn, New York. Respondents Louis Silverman, Samuel Shipper and Isador Shipper are President, Treasurer and Secretary, respectively, of said corporate respondent, and direct its policies, acts, practices and business affairs.

2. Respondents are now, and for more than one year prior to the filing of the complaint herein were engaged in the manufacture and sale to dealers for resale to the general public of feather and down products, specifically pillows, which they have caused and now cause to be transported from their place of manufacture to purchasers thereof located in various other states of the United States. Respondents maintain and at all times mentioned herein have maintained a substantial course of trade in said feather and down products in commerce between and among the various states of the United States.

3. In the course and conduct of their aforesaid business respondents are now, and have been, in substantial competition in commerce with other corporations and with firms, individuals and partnerships engaged in the sale and distribution of feather and down products, including pillows, and have caused labels to be affixed to certain of their pillows, purporting to state the kinds or types of filling material contained therein. Similar identification of the kinds or types of filling material contained in said pillows has also been made in invoices.

4. There are four types of labeling involved in this proceeding, all of which are alleged to be false, misleading and deceptive.

A. Some types of their pillows were labeled by respondents as containing

ALL NEW MATERIAL CONSISTING OF CRUSHED GOOSE FEATHERS

Three of such pillows were introduced as evidence in this proceeding. Their contents had been analyzed, substantially in accordance with the provisions of the Trade Practice Rules for the Feather and Down Products Industry, promulgated by the Commission on April 26, 1951, by an expert who since 1916 has been employed by the Department of Health of the State of Maryland and since 1924 has been Chief, Division of Bedding and Upholstery of that department.

The average of the analyses of the contents of these three pillows is as follows:

	<i>Percent</i>
Waterfowl feathers	25.1
Waterfowl fiber	10.6
Chicken feathers	34.6
Chicken fiber	14.0
Pith and scale.....	15.7

1417

Decision

Interpreting the term "waterfowl" in the analysis to mean "goose," the analysis still shows that the pillows were not accurately labeled within the 15% tolerance specified in the feather industry trade practice rules.

B. Others of respondents' pillows were labeled as containing

ALL NEW MATERIAL CONSISTING OF CRUSHED DUCK FEATHERS

The contents of three of these pillows were similarly analyzed, and the average of the analyses shows the following:

	<i>Percent</i>
Duck feathers	28.3
Duck fiber	9.9
Chicken feathers	39.3
Chicken fiber	13.7
Pith and scale.....	8.8

These pillows, likewise, were not accurately labeled within the permissible tolerance.

C. Still others of respondents' pillows were labeled as containing

ALL NEW MATERIAL CONSISTING OF CRUSHED DUCK QUILL

The content of one pillow of this type was analyzed, and shown to be as follows:

	<i>Percent</i>
Duck feathers	32.2
Duck fiber	37.5
Chicken feathers	7.8
Chicken fibers	8.8
Pith and scale.....	12.7

D. A fourth type of pillow was labeled

ALL NEW MATERIAL CONSISTING OF CRUSHED GOOSE QUILL

An analysis of the content of a single pillow of this type shows the following:

	<i>Percent</i>
Goose feathers	37.7
Goose fiber	38.4
Chicken feathers	4.8
Chicken fibers	4.9
Quills	6.0
Pith and scale.....	8.2

The trade practice rules were not strictly followed in analyzing the contents of the last two types of pillows, in that only one pillow of each type was used; yet sufficient data are shown to justify a finding that these types of pillows were also inaccurately labeled, although such a finding is not essential to the conclusions reached in this proceeding.

Order

52 F. T. C.

5. Upon all the facts of record, the conclusion reached is that respondents have made representations as to the contents of their pillows which are false, misleading and deceptive.

In its decision in the matter of *Burton-Dixie Corporation, et al.*, Docket No. 6134, the Commission said:

We conclude that the evidence herein is reliable, probative, and substantial as to consumer preference for waterfowl feathers; that that preference can be assumed to carry over to crushed feathers; that from the standpoint of utility there are distinct advantages and differences as between different types or kinds of crushed feathers and that while there may be no significant difference in price as between crushed waterfowl feathers and crushed landfowl feathers there is a significant difference in utility and the pillow buyer is entitled to get what the label represents the contents to be. Insofar as purchasers of pillows are concerned, we see no justification for recognizing any different standards or requirements to be observed with respect to purchasers at the lower end of the economic ladder than those observed with respect to purchasers at the upper end.

In the *Burton-Dixie* case, under circumstances similar to those presented in this proceeding, the Commission found the issuance of a cease-and-desist order to be in the public interest.

Upon the complete record, the following conclusions are reached in this proceeding—

CONCLUSIONS

1. This proceeding is in the public interest;
2. The use by respondents of the aforesaid false, misleading and deceptive representations on the labels affixed to their pillows has had and now has the capacity and tendency to mislead and deceive dealers and the purchasing public as to the composition of the filling materials of said pillows and to induce the purchase of substantial quantities of said pillows because of such mistaken and erroneous belief; and
3. The aforesaid acts and practices of respondents, as herein found, are all to the prejudice and injury of the public, and constitute unfair acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act; wherefore,

ORDER

It is ordered, That the respondents, Premier Pillow Corporation, a corporation, and Louis Silverman, Samuel Shipper, and Isador Shipper, individually, and as officers of said corporation, and their representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of feather and down products, including pillows, do forthwith cease and desist from misrepresenting in any

1417

Decision

manner, or by any means, directly or by implication, the identity of the kind or type of filling material contained in any such products, or of the kinds or types, and proportions of each, when the filling material is a mixture of more than one kind or type.

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 25th day of May, 1956, become the decision of the Commission; and, accordingly:

It is ordered, That respondents Premier Pillow Corporation, a corporation, and Louis Silverman, Samuel Shipper, and Isador Shipper, individually, 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.

Commissioner Kern not participating.

Complaint

52 F. T. C.

IN THE MATTER OF

MAWSON DeMANY FORBES ET AL.

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

Docket 6513. Complaint, Feb. 17, 1956—Decision, May 26, 1956

Consent order requiring furriers in Philadelphia to cease violating the Fur Products Labeling Act through abbreviating the required information on invoices which also failed to disclose that certain products were composed in substantial part of sides and flanks; and, in advertising in newspapers, failing to disclose the names of animals producing the fur and misrepresenting prices and values.

Before *Mr. James A. Purcell*, hearing examiner.

Mr. John T. Walker for the Commission.

Mr. Isadore S. Wachs, of Philadelphia, Pa., for respondents.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Mawson DeMany Forbes, a corporation, David DeMany, individually and as President and Treasurer of said corporation, and Morris B. Marks, individually and as Vice President and Secretary of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Mawson DeMany Forbes is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, with its office and principal place of business at 1113 Chestnut Street, Philadelphia, Pennsylvania.

Respondent David DeMany is President and Treasurer of said corporation, and respondent Morris B. Marks is Vice President and Secretary of said corporation. These individuals, acting in cooperation with each other, formulate, direct and control the acts, policies and practices of said corporate respondent. Their addresses are the same as that of said corporate respondent.

PAR. 2. Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, respondents have been, and are now, engaged in the introduction into commerce, and in the sale, advertising, and offering for sale in commerce, and in the transportation and distribution in commerce, of fur products, and have sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of fur which had been shipped and received in commerce, as "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act.

PAR. 3. Certain of said fur products were falsely and deceptively invoiced in that they were not invoiced as required under the provisions of Section 5 (b) (1) of the Fur Products Labeling Act, and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

PAR. 4. Certain of said fur products were falsely and deceptively invoiced, in violation of the Fur Products Labeling Act, in that they were not invoiced in accordance with the Rules and Regulations promulgated thereunder, in the following respects:

(a) Required information was set forth in abbreviated form, in violation of Rule 4 of the aforesaid Rules and Regulations;

(b) Respondents failed to disclose as part of the required information that such fur products were composed in whole or in substantial part of sides and flanks, when such was the fact, in violation of Rule 20 of the aforesaid Rules and Regulations.

PAR. 5. Certain of said fur products were falsely and deceptively advertised, in violation of the Fur Products Labeling Act, in that respondents caused the dissemination in commerce, as "commerce" is defined in said Acts, of certain advertisements, by means of newspapers, which advertisements were not in accordance with provisions of Section 5 (a) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder, and which advertisements were intended to and did aid, promote and assist, directly or indirectly, in the sale and offering for sale of said fur products. Among and included in the advertisements as aforesaid, but not limited thereto, were advertisements of respondents appearing under the name of Sattler's, Inc., a Buffalo furrier, which appeared in issues of the Buffalo Evening News, a newspaper published in Buffalo, New York, and having wide circulation in said State and in various other States of the United States. Under an agreement with Sattler's, Inc., the respondents shipped certain fur products to said Sattler's, Inc., and agreed to pay to Sattler's, Inc., 17 percent of the net sales of all of said fur products sold. Respondent Mawson DeMany Forbes assumed all of the cost of shipping and advertising said fur products and its

officials supervised the preparation of and approved the said advertisements.

By means of the aforesaid advertisements, and through others of the same import and meaning not specifically referred to herein, respondents falsely and deceptively:

(a) Failed to disclose the name or names of the animal or animals that produced the fur contained in the fur product, as set forth in the Fur Products Name Guide, in violation of Section 5 (a) (1) of the Fur Products Labeling Act.

(b) Misrepresented, by means of comparative prices not based on current market values, the amount of savings to be effectuated by purchasers of said fur products, in violation of Rule 44 (b) of the aforesaid Rules and Regulations.

(c) Misrepresented the value of fur products, when such claims and representations were not true in fact, in violation of Rule 44 (d) of the aforesaid Rules and Regulations.

Respondents, in making the pricing claims and representations referred to in subparagraphs (b) and (c) hereof, failed to maintain full and adequate records disclosing the facts upon which such claims and representations were purportedly based, in violation of Rule 44 (e) of said Rules and Regulations.

PAR. 6. The aforesaid acts and practices of respondents, as herein alleged, were in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder, and constituted unfair and deceptive acts and practices in commerce under the Federal Trade Commission Act.

INITIAL DECISION BY JAMES A. PURCELL, HEARING EXAMINER

The complaint in this proceeding, issued February 17, 1956, charges the respondents Mawson DeMany Forbes, a corporation, David DeMany, individually and as President and Treasurer of said corporation, and Morris B. Marks, individually and as Vice President and Secretary of said corporation, all hereinafter referred to as respondents, with having violated the provisions of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder, as well also the provisions of the Federal Trade Commission Act.

Subsequent to proper service of the complaint upon all respondents the parties hereto entered into an agreement for consent order to cease and desist, dated March 30, 1956, said agreement disposing of all the issues in this proceeding without hearing. Said agreement has been submitted to this Hearing Examiner, heretofore duly designated to act as such, for his consideration in accordance with Section 3.25 of the Rules of Practice of the Commission.

Respondents, pursuant to the aforesaid agreement, have admitted all of the jurisdictional allegations of the complaint and agreed that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations. Said agreement further provides that respondents waive all further procedural steps before the hearing examiner or the Commission, including the making of findings of fact or conclusions of law and the right to challenge or contest the validity of the order to cease and desist entered in accordance with such agreement. It has also been agreed that the record herein shall consist solely of the complaint and said agreement; that the agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission; that said agreement is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint; that said order to cease and desist shall have the same force and effect as if entered after a full hearing and may be altered, modified, or set aside in the manner provided for other orders, and that the complaint may be used in construing the terms of the order.

This proceeding having now come on for final consideration on the complaint and the aforesaid agreement containing the consent order, and it appearing that the order and agreement cover all of the allegations of the complaint and provide for appropriate disposition of this proceeding, the same are hereby accepted and ordered filed upon becoming part of the Commission's decision pursuant to Sections 3.21 and 3.25 of the Rules of Practice, and the hearing examiner accordingly makes the following findings, for jurisdictional purposes, and order:

1. Respondent Mawson DeMany Forbes is a corporation existing and doing business under and by virtue of the laws of the State of Pennsylvania; respondent David DeMany is President and Treasurer of said corporation and respondent Morris B. Marks is Vice President and Secretary of said corporation. The two named individual respondents, acting in concert, formulate, direct and control the acts, policies and practices of the corporate respondent. The office and principal place of business of all of said respondents is at No. 1113 Chestnut Street, Philadelphia, Pennsylvania.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents hereinabove named. The complaint states a cause of action against the respondents under and by virtue of the provisions of the Fur Products Labeling Act and of the Rules and Regulations promulgated thereunder, as well also

Order

52 F. T. C.

under the provisions of the Federal Trade Commission Act, and this proceeding is in the interest of the public.

ORDER

It is ordered, That respondents, Mawson DeMany Forbes, a corporation, and its officers; and David DeMany, individually and as President and Treasurer of said corporation; and Morris B. Marks, individually and as Vice President and Secretary of said corporation; and their representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction into commerce, or the sale, advertising, or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product, or in connection with the sale, advertising, offering for sale, transportation, or distribution of any fur product which is made in whole or in part of fur which has been shipped and received in commerce, as "commerce," "fur," and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Falsely or deceptively invoicing fur products by:

1. Failing to furnish invoices to purchasers of fur products showing:

(a) The name or names of the animal or animals producing the fur or furs contained in the fur product as set forth in the Fur Products Name Guide and as prescribed under the rules and regulations;

(b) That the fur product contains or is composed of used fur when such is a fact;

(c) That the fur product contains or is composed of bleached, dyed, or artificially colored fur when such is a fact;

(d) That the fur product is composed in whole or in substantial part of paws, tails, bellies, or waste fur when such is a fact;

(e) The name and address of the person issuing such invoices;

(f) The name of the country of origin of any imported furs contained in the fur product.

2. Setting forth the required information in abbreviated form.

3. Failing to disclose as part of the required information that fur products were composed in whole or in substantial part of sides and flanks, when such was the fact.

B. Falsely or deceptively advertising fur products, through the use of any advertisement, representation, public announcement, or notice which is intended to aid, promote or assist, directly or indirectly, in the sale or offering for sale of fur products, and which:

1. Fails to disclose the name or names of the animal or animals producing the fur or furs contained in the fur products as set forth

1426

Decision

in the Fur Products Name Guide and as prescribed under the rules and regulations.

2. Represents directly or by implication:

(a) That the regular or usual price of any fur product is any amount which is in excess of the price at which the respondent has usually and customarily sold such products in the recent regular course of its business;

(b) The value of fur products, when such claims and representations are not true in fact.

3. Makes use of comparative prices or percentage savings claims unless such compared prices or claims are based upon the current market value of the fur product or upon a bona fide compared price at a designated time.

4. Makes price claims and representations of the type referred to in sub-paragraphs (a) and (b) and paragraph 3 above, unless there is maintained by respondents full and adequate records disclosing the facts upon which such claims or representations are based.

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 26th day of May, 1956, 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.

Order

52 F. T. C.

IN THE MATTER OF

WORLD INSURANCE COMPANY

Docket 6455. Order and Opinion, May 28, 1956

Interlocutory order reversing hearing examiner's ruling limiting scope of proceeding to certain states, and denying, as not complying with the Rules of Practice, respondent's request for consideration of alleged error in ruling denying motion to dismiss.

Before *Mr. Frank Hier*, hearing examiner.

Mr. William A. Somers for the Commission.

Mr. J. W. Marer, of Omaha, Nebr., for respondent.

ORDER GRANTING APPEAL FROM HEARING EXAMINER'S RULING
LIMITING SCOPE OF PROCEEDING

Counsel in support of the complaint having filed an interlocutory appeal from a ruling of the hearing examiner limiting the scope of the proceeding in some respects to respondent's advertising representations disseminated in the States of Missouri, Mississippi, Rhode Island, Montana, and in the District of Columbia, and respondent in its answer having requested for the first time consideration of alleged error in the hearing examiner's ruling denying a motion to dismiss; and

The Commission having concluded, for the reasons set forth in its opinion in the matter of The American Hospital and Life Insurance Company, Docket No. 6237, issued April 24, 1956, that the examiner was in error in the ruling appealed from by counsel supporting the complaint; and

It appearing to the Commission that it can consider alleged error in an interlocutory ruling of a hearing examiner only when it is made the basis of an interlocutory appeal in accordance with § 3.20 of the Rules of Practice and that respondent's request for consideration of alleged error in the further ruling of the hearing examiner does not comply with the aforementioned section of the Rules of Practice:

It is ordered, That the appeal of counsel in support of the complaint be, and it hereby is, granted; and

It is further ordered, That insofar as the hearing examiner's ruling of February 29, 1956, purports to limit the scope of this proceeding in some respects to the advertising representations disseminated in Missouri, Mississippi, Rhode Island, Montana and in the District of Columbia, said ruling is hereby reversed; and

1432

Opinion

It is further ordered, That respondent's request for consideration of alleged error in the hearing examiner's ruling denying the motion to dismiss be, and it hereby is, denied.

Chairman Gwynne and Commissioner Mason dissenting in part and concurring in part.

JOINT OPINION OF CHAIRMAN GWYNNE AND COMMISSIONER MASON,
DISSENTING IN PART AND CONCURRING IN PART

We concur in the order herein to return this proceeding to the hearing examiner, but, in accord with our partial dissent to the interlocutory order of May 11, 1956 in *Federal Life and Casualty Company*, Docket No. 6312, would do so for the limited purpose of determining whether there are here particular advertising practices—for instance radio or TV—effectively beyond the reach of state regulation and subject to the exercise of our jurisdiction under Section 5 of the Federal Trade Commission Act.

Complaint

52 F. T. C.

IN THE MATTER OF

TRION, INC.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT*Docket 6507. Complaint, Feb. 14, 1956—Decision, May 29, 1956*

Consent order requiring a manufacturer in McKees Rocks, Pa., to cease representing falsely in advertisements in newspapers, periodicals, circulars, etc., that use of its "Trion Electronic Air Cleaner" device would afford protection from colds and other respiratory infections.

Before *Mr. Robert L. Piper*, hearing examiner.

Mr. Floyd O. Collins for the Commission.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission having reason to believe that Trion, Inc., a corporation, hereinafter referred to as respondent has violated the provisions of said Act and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Trion, Inc., is a corporation organized and existing under and by virtue of the laws of the State of Pennsylvania with its home office and principal place of business located at 1000 Island Avenue, McKees Rocks, Pennsylvania.

PAR. 2. Respondent is now, and for more than one year last past has been, engaged in the manufacture, sale, and distribution of an air cleaning device variously designated as "Trion Electronic Air Cleaner," "Trion Electric Air Cleaner," and "Trion Electric Air Filter." Said product is represented to be of value in the prevention of disease and is a device as "device" is defined in the Federal Trade Commission Act.

PAR. 3. Respondent causes said product when sold to be transported from its place of business in the State of Pennsylvania to purchasers thereof located in various other states of the United States and maintains and at all times mentioned herein has maintained a constant course of trade in said product in commerce among and between the various states of the United States. Its volume of business in said product is and has been substantial.

PAR. 4. In the course and conduct of its business respondent has disseminated and caused the dissemination of certain advertisements

1434

Complaint

concerning its said device 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 which were likely to induce, directly or indirectly, the purchase of its said device, including but not limited to advertisements inserted in newspapers and periodicals and by means of circulars and other advertising literature; and respondent has disseminated and caused the dissemination of advertisements by various means, including but not limited to the means aforesaid, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of its said device in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Among and typical, but not all inclusive, of the statements contained in the advertisements, disseminated as aforesaid, are the following:

Fewer colds and other diseases.

Over 90% of air-borne bacteria and virus is removed.

Lower doctor and drug bills.

A healthful atmosphere reduces sickness.

* * * bacteria and virus are eliminated.

* * * germ-free * * * air.

* * * banishing * * * germs from the air in homes, offices, plants, theaters, hospitals.

PAR. 6. Through the use of the advertisements containing the aforesaid statements, and others of the same import, but not specifically set out herein, respondent represented, directly and by implication, that the use of its device will afford protection from colds and other respiratory infections.

PAR. 7. The said advertisements are misleading in material respects and constitute "false advertisements" as that term is defined in the Federal Trade Commission Act. In truth and in fact, colds and other respiratory infections are contracted, in practically all instances, by germs, bacteria, and viruses spread through close personal contact between persons and from droplets sprayed from the mouth during coughing, sneezing, and talking. The likelihood that such infectious materials would pass through respondent's device is so remote that, from any practical standpoint, said device would be of no value in preventing colds or other respiratory infections.

PAR. 8. The use by respondent of the foregoing false, misleading, and deceptive statements contained in said advertisements has had and now has the tendency and capacity to mislead a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements and representations are true and to induce a

substantial portion of the purchasing public to purchase respondent's said product because of said erroneous and mistaken belief.

PAR. 9. The aforesaid acts and practices of respondent, as herein alleged, are and were all to the prejudice and injury of the public and constituted and now constitute unfair and deceptive acts and practices, in commerce, within the intent and meaning of the Federal Trade Commission Act.

INITIAL DECISION BY ROBERT L. PIPER, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above-named respondent on February 14, 1956, charging it with having violated the Federal Trade Commission Act. After being served with said complaint, respondent entered into an agreement, dated March 29, 1956, containing a consent order to cease and desist, disposing of all the issues in this proceeding without hearing. Said agreement has been submitted to the undersigned, heretofore duly designated to act as hearing examiner herein, for his consideration in accordance with Section 3.25 of the Rules of Practice of the Commission.

Respondent, pursuant to the aforesaid agreement, has admitted all of the jurisdictional allegations of the complaint and agreed that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations. Said agreement further provides that respondent waive all further procedural steps before the hearing examiner or the Commission, including the making of findings of fact or conclusions of law and the right to challenge or contest the validity of the order to cease and desist entered in accordance with such agreement. It has also been agreed that the record herein shall consist solely of the complaint and said agreement, that the agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission, that said agreement is for settlement purposes only and does not constitute an admission by respondent that it has violated the law as alleged in the complaint, that said order to cease and desist shall have the same force and effect as if entered after a full hearing and may be altered, modified or set aside in the manner provided for other orders, and that the complaint may be used in construing the terms of the order.

This proceeding having now come on for final consideration on the complaint and the aforesaid agreement containing the consent order, and it appearing that the order and agreement cover all of the allegations of the complaint and provide for appropriate disposition of this proceeding, the same are hereby accepted and ordered filed upon

becoming part of the Commission's decision pursuant to Sections 3.21 and 3.25 of the Rules of Practice, and the hearing examiner accordingly makes the following findings, for jurisdictional purposes, and order:

1. Respondent is a corporation existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its office and principal place of business located at 1000 Island Avenue, in the City of McKees Rocks, State of Pennsylvania.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent hereinabove named. The complaint states a cause of action against said respondent under the Federal Trade Commission Act, and this proceeding is in the interest of the public.

ORDER

It is therefore ordered, That the respondent Trion, Inc., a corporation, its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the sale, offering for sale or distribution of a device designated as Trion Electronic Air Cleaner, or any other device of substantially similar character, 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 other means in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which represents directly or by implication that the use of respondent's device will afford protection from or will effectively prevent the spread of colds or similar respiratory infections;

2. Disseminating or causing to be disseminated, any advertisement by any means for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in commerce, as "commerce" is defined in the Federal Trade Commission Act, of respondent's device, which advertisement fails to comply with the requirements set forth in Paragraph 1 hereof.

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 29th day of May, 1956, become the decision of the Commission; and, accordingly:

It is ordered, That the respondent herein shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with the order to cease and desist.

Complaint

52 F. T. C.

IN THE MATTER OF
BUCKSPAN'S ET AL.

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

Docket 6514. Complaint, Feb. 17, 1956—Decision, May 30, 1956

Consent order requiring furriers in Dallas, Tex., to cease violating the Fur Products Labeling Act by labeling and invoicing which failed to disclose that certain fur products were composed of flanks, and failed to set forth information as required; and by advertising in newspapers which failed to disclose the names of animals producing the fur, the country of origin, the fact that fur contained in the products was artificially colored, consisted of paws, tails, bellies or waste fur, or of flanks; which abbreviated required information; and which misrepresented prices and values.

Before *Mr. J. Earl Cox*, hearing examiner.

Mr. William R. Kearney for the Commission.

Passman & Jones, of Dallas, Tex., for respondents.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Buckspan's, a corporation, and H. M. Buckspan, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts, and the Rules and Regulations promulgated under the Fur Products Labeling Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, Buckspan's, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas. Respondent H. M. Buckspan, an individual, is president of respondent, Buckspan's, and formulates and controls the policies and practices of said corporate respondent. The said corporate respondent and said individual respondent have their office and principal place of business located at 1619 Main Street, Dallas, Texas.

PAR. 2. Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, respondents have sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of fur which had been shipped and received