

Findings

IN THE MATTER OF
AZOME UTAH MINING COMPANY, INC., ET AL.

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

Docket 6475. Complaint, Dec. 6, 1955—Decision, Sept. 6, 1957

Order requiring sellers in Sterling, Utah, to cease disseminating in commerce false advertising concerning the value and effectiveness of their "Azomite" product, a natural rock-like substance mined or collected from the surface of the land in central Utah and processed and sold by them for use in the feeding of poultry and other animals and also as a soil conditioner.

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

Mr. George E. Steinmetz and *Mr. Terral A. Jordan* for the Commission.

Mr. Dilworth Woolley, of Manti, Utah, for respondents.

FINDINGS OF FACT, CONCLUSION AND ORDER

The complaint in this matter, issued December 6, 1955, and subsequently served on all the respondents named therein, charged said respondents with the dissemination of false advertisements, as that term is defined in the Federal Trade Commission Act, and with otherwise misrepresenting the value and effectiveness of a product sold by them known as "Azomite," all in violation of said Federal Trade Commission Act. After the filing of respondents' answer admitting in part and denying in part the various allegations in the complaint, hearings were held at which testimony and other evidence, both in support of and in opposition to the complaint, were received. Proposed findings and conclusions having been submitted by the parties, the hearing examiner, on May 23, 1957, filed his initial decision in which he found that certain of the respondents' representations were erroneous and misleading and included an order to cease and desist.

No appeal from said initial decision having been filed, the Commission, by order issued July 3, 1957, placed the case on its own docket for review, and having subsequently vacated and set aside the initial decision, makes the following findings of fact, conclusion and order in lieu of those contained in said initial decision:

FINDINGS OF FACT

1. Respondent Azome Utah Mining Company, Inc., is a corporation organized and doing business under the laws of the State of Utah, with its principal office and place of business located in Sterling,

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Utah. Respondents Rollin J. Anderson, Alyce T. West and Elsie M. Anderson are president, vice-president and secretary-treasurer, respectively, of the corporation. Respondents Donald K. Jensen and Sherman C. Anderson are directors of the corporation. The address of the individual respondents is the same as that of the corporation, with the exception of respondent Sherman C. Anderson, whose address is 237 Trinity Avenue, Berkeley, California.

The individual respondents have formulated, controlled and put into effect the policies, acts and practices of the corporate respondent, including those hereinafter referred to.

2. Respondents are engaged in the sale and distribution of a product known as "Azomite," which they recommend for use in the feeding of poultry and other animals, and also as a soil conditioner. To the extent that said product is used in the feeding of poultry and other animals, it is a food and drug as those terms are defined in the Federal Trade Commission Act. There is no issue as to the interstate character of respondents' business, substantial quantities of their product being regularly sold by them to purchasers located in various states of the United States other than the State of Utah.

3. Respondents' product is a rock-like substance which is found at certain places in the central part of Utah. It is mined or collected by respondents from the surface of the land. It is processed by respondents into particles of various sizes, depending upon the use to which it is intended to be put. According to an analysis supplied by respondents, the product contains the following ingredients:

	<i>Percent</i>
Silica	66.66
Ferrous Oxide	0.62
Ferric Oxide	0.18
Aluminum Oxide	15.92
Titanium Oxide	0.02
Calcium Oxide	5.74
Magnesium Oxide	0.35
Sodium Oxide	2.00
Potassium Oxide	1.81
Moisture at 105° C.	1.72
Combined Water & Organic Matter	4.33
Manganese Oxide	0.02
Chromium Oxide	Trace
Strontium Oxide	0.03
Barium Oxide	0.04
Carbon Dioxide	0.20
Sulphuric Anhydride	0.11
Phosphoric Anhydride	Trace
Boric Anhydride	0.01

	<i>Percent</i>
Chloride	0.01
Arsenic Oxide	1 ppm
Copper Oxide	0.02
Zirconium Oxide	0.04
Lead Oxide	Trace
Gallium Oxide	Trace

4. In the course and conduct of their business, respondents have disseminated and caused the dissemination of advertisements concerning said product by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including circulars entitled "AZOMITE * * * Natural Minerals for Particular Poultry Producers" and "AZOMITE Soil Ayl * * * Natural Minerals for Normal Agriculture," for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said product; and respondents have also disseminated and caused the dissemination of advertisements by various means, including the circulars above mentioned, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of said product in commerce, as "commerce" is defined in the Federal Trade Commission Act.

By means of statements appearing in said advertising with respect to the feeding of the product to poultry, respondents have represented, among other things,

(a) That poultry will consume minerals whenever they are needed for nutrition.

(b) That the addition of Azomite to feed will furnish poultry with needed minerals.

(c) That the use of Azomite will lower the cost of production.

(d) That Azomite is a stimulator of appetite.

(e) That the use of Azomite will reduce "picking" and "cannibalism" in poultry, increase profits, increase growth of poultry, and increase egg production.

(f) That Azomite will accelerate growth in poultry.

(g) That Azomite will satisfy "hidden hunger" of poultry for minerals.

5. In addition to the foregoing, and in connection with the use of the product Azomite as a soil conditioner, respondents in the advertising matter hereinabove referred to have made the following representations:

(a) That Azomite will aid in growing plants on poor soil and increase the resistance of plants to disease.

(b) That the use of Azomite on soil will keep the soil healthy and restore needed minerals to worn-out soil.

(c) That the use of Azomite on soil will result in fewer insects on plants.

6. Three members of the faculty of the Utah State Agricultural College at Logan, Utah, were called as witnesses in support of the complaint. The first is head of the Poultry Department in this institution and is a specialist in poultry nutrition and husbandry. The second is an agronomist, being a professor of Agronomy and head of that department. The third is a veterinarian, being a professor and head of the Department of Veterinary Medicine. There appears to be no doubt that all of the witnesses are well qualified in their respective fields.

Respondents called as their expert witness a biochemist of Los Angeles, California, who, like the Commission's experts, appears to be well qualified in his field. There was also extended testimony from respondent Rollin J. Anderson who, while claiming no qualifications from the viewpoint of formal scientific education, has devoted the past twenty years to the study of minerals and their effects on plant and animal life. Finally, there was testimony from five laymen, primarily poultrymen, relating to their use of Azomite.

The findings and conclusions which follow have been reached after consideration of all of the evidence. As to some of the issues there is little or no conflict in the evidence. On those points where there is conflict, the findings and conclusions are in accord with what the hearing examiner and the Commission consider to be the greater weight of the evidence.

7. Respondents' statement that poultry will consume minerals whenever they are needed is substantially true. On the other hand, it is not true that the addition of Azomite to feed will furnish poultry with needed minerals. For example, it will not supply adequate amounts of calcium, manganese, phosphorus, chlorine or sodium. While these minerals are present in Azomite, they are not present in quantities sufficient to be of significance in the feeding of poultry. Nor will Azomite stimulate the appetite, accelerate or increase the growth of poultry, satisfy "hidden hunger" for minerals, lower the cost of production, increase egg production, or increase profits.

With respect to "picking" and "cannibalism," picking is the tendency of poultry, when irritated due to overcrowding or overheating, to pick at the feathers of one another. If a feather is pulled out and bleeding results, the other birds in the pen or coop are attracted by the blood and are likely to attack or cannibalize the victim. As indicated, all of this is usually due to overcrowding or overheating, and the use of Azomite is incapable of affecting it.

Accordingly, it is found that the representations referred to in paragraph 4 concerning the feeding of Azomite to poultry have been and are misleading in material respects, and the advertisements wherein such representations are made are "false advertisements" as that term is defined in the Federal Trade Commission Act.

8. Insofar as the use of Azomite as a soil conditioner is concerned, most soils already contain essential minerals in sufficient amounts, and in such cases the addition of Azomite will serve no useful purpose. Speaking generally, therefore, the use of Azomite will not aid in growing plants in poor soil, increase the resistance of plants to disease, or restore needed minerals to the soil. Azomite might, however, be of some benefit to the soil in those exceptional cases in which the soil is deficient in the minerals which are found in Azomite, provided sufficient quantities of the product are used to supply such deficiencies. In no event will the use of Azomite keep the soil healthy or result in fewer insects on plants.

Respondents' representations to the contrary as set forth in paragraph 5 have been and are false and deceptive.

9. At the hearings it was found that certain of the advertising referred to in the complaint had not in fact been disseminated or authorized by respondents, and in consequence a number of the charges in the complaint have not been sustained.

CONCLUSION

The use by respondents of the representations found to have been false has the tendency and capacity to mislead and deceive a substantial portion of the public with respect to respondents' product and the results which may be expected from its use, and to cause such members of the public to purchase the product as a result of the erroneous and mistaken belief so engendered. The present proceeding is, therefore, in the public interest. Respondents' acts and practices are to the prejudice of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered, That the respondents, Azome Utah Mining Company, Inc., a corporation, and Rollin J. Anderson, Alyce T. West and Elsie M. Anderson, individually and as officers of said corporation, and Donald K. Jensen and Sherman C. Anderson, individually and as directors of said corporation, and the respondents'

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agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of their product designated "Azomite," or any other product of substantially similar composition or possessing substantially similar properties, under whatever name sold, do forthwith cease and desist from:

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 for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase of said product, which advertisement represents, directly or by implication:

(a) That the addition of said product to poultry feed will supply poultry with needed minerals.

(b) That the use of said product will accelerate or increase the growth of poultry, stimulate the appetite, satisfy hidden hunger of poultry for minerals, lower the cost of production, increase egg production or increase profits.

(c) That the use of said product will reduce "picking" or "cannibalism" in poultry.

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 said product 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 respondents, Azome Utah Mining Company, Inc., a corporation, and Rollin J. Anderson, Alyce T. West and Elsie M. Anderson, individually and as officers of said corporation, and Donald K. Jensen and Sherman C. Anderson, individually and as directors of said corporation, and the respondents' agents, representatives 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 the product "Azomite," or any other product of substantially similar composition or possessing substantially similar properties, under whatever name sold, do forthwith cease and desist from representing, directly or by implication:

1. That the addition of said product to the soil will keep the soil healthy or result in fewer insects on plants.

2. That the addition of said product to the soil will restore needed minerals to the soil, aid in growing plants on poor soil, or increase the resistance of plants to disease, unless such representations are

limited to those cases in which the soil is deficient in the minerals contained in said product and said product is used in quantities sufficient to supply such deficiencies.

It is further ordered, That the aforesaid respondents 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 this order.

ON REVIEW OF INITIAL DECISION

By KERN, Commissioner:

This case has been fully tried before the hearing examiner who, on May 23, 1957, filed his initial decision consisting of certain findings of fact, conclusions and an order to cease and desist. Neither the respondents nor counsel in support of the complaint appealed the decision, but the Commission, acting pursuant to § 3.21 of its Rules of Practice, on July 3, 1957, issued its order placing the matter on its own docket for review.

The proceeding involves the respondents' advertising claims for a natural rock-like substance which they sell under the trade name "Azomite" and which they recommend for use in the feeding of poultry and other animals, and also as a soil conditioner.

In separate paragraphs, the complaint charges the respondents, in part, with having disseminated and caused to be disseminated certain false advertisements of the product as a food or drug for poultry and other animals, and, in part, with having misrepresented in advertising the value of the product as a soil conditioner. In so doing, the complaint clearly recognizes the distinction between a violation of Section 12 of the Federal Trade Commission Act, under which it is unlawful to disseminate any false advertisement, through the mails or by any means in commerce, for the purpose of inducing or which is likely to induce the purchase of food, drugs, devices or cosmetics, or to disseminate any such advertisement, by any means, for the purpose of inducing or which is likely to induce the purchase in commerce of such commodities, and a violation of Section 5, which broadly proscribes "unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce." The initial decision, however, does not take into account this distinction, but, on the other hand, deals with the case just as though all of the charges arose under the general provisions of Section 5, thus limiting somewhat the permissible scope of the order to cease and desist.

In view of the fact that the record supports the broader approach, insofar as concerns the respondents' claims in connection with the

feeding of their product to poultry, the Commission feels that the initial decision is deficient and should be modified.

We have noted also that the initial decision does not find, as alleged in the complaint and admitted in the respondents' answer, that the individual respondents have formulated, controlled and put into effect the policies, acts and practices of the corporate respondent, including those which are alleged to be unlawful. Such a finding should have been made as a basis for the order to cease and desist against these respondents.

The initial decision is vacated and set aside, and the Commission's findings of fact, conclusion and order to cease and desist will be issued in lieu thereof.

Decision

IN THE MATTER OF
ANHEUSER-BUSCH, INC.ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 2(a) OF THE CLAYTON ACT

Docket 6331. Complaint, Apr. 19, 1955—Decision, Sept. 10, 1957

Order requiring one of the nation's leading breweries, with manufacturing plants in St. Louis, Mo., Newark, N.J., and Los Angeles, Calif., to cease reducing beer prices in any market where it competes with others unless it proportionally reduces prices everywhere, following findings that in 1954, while maintaining its price elsewhere in the nation, it had reduced the price on its Budweiser beer in the St. Louis area to match its regional competitors' price, with general adverse effect on the local market and in violation of Sec. 2(a) of the Clayton Act as amended.

Mr. Francis C. Mayer and Mr. Philip R. Melington for the Commission.

Mr. Dwight Ingamells, of St. Louis, Mo., *White & Case*, by *Mr. Edgar Barton* and *Mr. Howard J. Aibel*, all of New York, N.Y., and *Gravelle, Whitlock & Markey*, by *Mr. Harold F. Baker*, of Washington, D.C., for respondent.

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

Formal complaint herein, issued April 19, 1955, charged respondent with price discrimination in violation of Section 2(a) of the Clayton Act, as amended (15 U.S.C. 13), in drastically cutting its price of beer in St. Louis and St. Louis County, while maintaining it elsewhere in the Nation, thereby causing substantial competitive injury to respondent's competitors in the reduced area through loss of sales to them and consequent gain to it. Respondent's answer, filed June 17, 1955, admitted descriptive and jurisdictional facts, the reductions and their amounts, denied discrimination and the effects alleged therefrom, and affirmatively pleaded that such price reductions were made in good faith to meet the equally low prices of competitors; were made to meet changing market conditions and were justified by differences in the cost of manufacture, sale and delivery as between areas. After ten hearings, resulting in 1118 pages of transcript, and 73 exhibits for the proponent, 217 for the respondent (one of the latter being 15 feet long), the trial wound up on May 15, 1956, after which proposed findings of fact, conclusions