

IN THE MATTER OF
NORKON PHARMACAL, INC., ET AL.

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

Docket 6885. Complaint, Sept. 11, 1957—Decision, May 21, 1959

Order requiring New York City distributors of a drug preparation designated "Norkon Tablets" to cease representing falsely in advertisements in newspapers, magazines, etc., that said preparation was an effective treatment for the symptoms of arthritis and similar ailments and would afford complete relief from the pains thereof; that it had an antacid or buffer effect and prevented digestive or stomach upsets; and that it afforded faster and longer relief than competitive products, and prevented loss of calcium.

Harold A. Kennedy, Esq. for the Commission.

Arthur D. Herrick, Esq., of New York, N.Y., for respondents.

INITIAL DECISION BY ROBERT L. PIPER, HEARING EXAMINER

STATEMENT OF THE CASE

On September 11, 1957, the Federal Trade Commission issued its complaint against Norkon Pharmacal, Inc., and Paul McCoy, individually and as an officer of said corporation, (hereinafter collectively called respondents), charging them with disseminating false advertisements in violation of Sections 5 and 12 of the Federal Trade Commission Act (hereinafter called the Act), 15 U.S.C. 41, *et seq.* Copies of said complaint together with a notice of hearing were duly served on respondents.

The complaint alleges in substance that respondents sell a drug preparation, called Norkon tablets, in commerce, and in connection therewith disseminate and cause to be disseminated false advertisements through the United States mail and by various other means in commerce, for the purpose of inducing the purchase of said product. Respondents appeared by counsel and filed an answer admitting the corporate, commerce, and advertising allegations of the complaint as well as the representations set forth therein, but denying any false advertisements or violations of the Act. Pursuant to notice, hearings were thereafter held on January 27 and 28, 1958, before the undersigned hearing examiner duly designated by the Commission to hear this proceeding. After allotting time for the presentation of defense, some months

thereafter counsel for respondents notified the undersigned that he did not desire to offer any proof, and accordingly the hearings were then concluded.

All parties were represented by counsel, participated in the hearings, and were afforded full opportunity to be heard, to examine and cross-examine the witnesses, to introduce evidence pertinent to the issues, to argue orally upon the record, and to file proposed findings of fact, conclusions of law, and orders, together with reasons in support thereof. All parties filed proposed findings of fact, conclusions of law, and orders together with reasons in support thereof. Counsel for respondents requested oral argument thereon, which request is hereby denied, because the proposed findings of fact, conclusions of law, and reasons in support thereof adequately and fully present the position and contentions of the parties. All such findings of fact and conclusions of law proposed by the parties, respectively, not hereinafter specifically found or concluded are herewith specifically rejected.¹

Upon the entire record in the case and from his observation of the witnesses, the undersigned makes the following:

FINDINGS OF FACT

I. The Business of Respondents

The complaint alleged, respondents admitted, and it is found that Norkon Pharmacal, Inc., is a corporation organized under the laws of the State of Delaware, with its office and principal place of business located at 522 Fifth Avenue, New York, N.Y. Respondent Paul McCoy is the president of said corporation and maintains his office at the same address. The complaint alleged, respondents denied, but the record establishes and it is found that respondent Paul McCoy formulates and controls the policies, activities, and practices of the corporate respondent.

II. Interstate Commerce and Dissemination of Advertising

The complaint alleged, respondents admitted, and it is found that for more than one year preceding the issuance of the complaint, they were engaged in the sale and distribution in commerce between and among the various States of the United States and the District of Columbia of their preparation, Norkon tablets, containing drugs, as "drug" is defined in the Act. Respondents cause the said preparation, when sold, to be transported from

¹ 5 U.S.C. § 1007 (b).

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their place of business in the State of New York to purchasers thereof located in other States of the United States and in the District of Columbia. Respondents maintain and at all times mentioned herein have maintained a course of trade in said preparations in commerce, as "commerce" is defined in the Act.

Respondents have disseminated and are now disseminating, and have caused and are now causing the dissemination of, advertisements concerning Norkon tablets by means of the United States mails and by various means in commerce, including advertisements inserted in newspapers, magazines, pamphlets, and letters for the purpose of inducing, and which were and are likely to induce, directly or indirectly, the purchase of Norkon tablets; and respondents have disseminated and are now disseminating, and have caused and are now causing the dissemination of, advertisements concerning Norkon tablets by various means for the purpose of inducing, and which were and are likely to induce, directly or indirectly, the purchase of said preparation in commerce.

III. The Unlawful Practices

A. *The Issues Framed*

Inasmuch as respondents admit the sale of the product in commerce, the dissemination of their advertising in commerce, and the representations contained in said advertising as alleged in the complaint, the basic issue is whether or not such representations constitute false advertisements as that term is defined in Section 15 of the Act. There is no dispute that Norkon tablets are composed of drugs within the meaning of the Act.

B. *The False Representations*

The complaint included certain excerpts from advertisements of respondents which were received in evidence. Respondents admitted the correctness of such excerpts but contended that they were unfairly selected and that the advertisements should be read as a whole. An examination of the advertisements reveals the contrary. If anything the excerpts were on the conservative side, and the advertisements themselves make claims in excess of those set forth in the excerpts. The complaint further alleged, and respondents admitted, that the aforesaid advertisements contained, directly and by implication, certain representations, considered *seriatim*:

1. Norkon tablets are an adequate, effective, and reliable treatment for the symptoms and manifestations of arthritis, rheuma-

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tism, neuralgia, neuritis, lumbago, bursitis, and sciatica, and will afford immediate and complete relief from the aches, pains and discomforts of such conditions and disorders, including the severe aches, pains and discomforts thereof.

As previously found, respondents admitted this representation but denied representing the product as a treatment, unless by treatment was meant symptomatic relief. In this respect respondents' contention is probably correct, inasmuch as counsel supporting the complaint concededly does not contend that respondents falsely represented their product as a treatment for the enumerated ailments, but instead apparently equates the phraseology, "adequate, effective and reliable treatment for the symptoms and manifestations," as a representation concerning relief of the severe aches, pains and discomforts of such ailments. This is further borne out by the fact that the advertising representations of respondents do not include any claim that Norkon tablets constitute a treatment or cure for the listed ailments but limit their claim to fast, effective, safer and longer relief of the severe pains caused thereby. In this respect, respondents argued that because the complaint concedes that Norkon tablets do afford temporary relief of the minor aches and pains of such ailments, the representation is not false because the pain associated with such ailments is relatively minor. This contention is completely negated by respondents' own advertising, which characterizes such pain as "awful" and "agonizing." In addition, the record establishes that the pain associated with the enumerated ailments is anything but minor.

Norkon tablets are composed of the following drugs: each tablet contains 5 grains of aspirin (acetylsalicylic acid), 2 grains of calcium glutamate, and 25 milligrams of ascorbic acid (vitamin C). Respondents' directions state that the user should take two Norkon tablets with a glass of water every three hours until the pain is relieved, and if the pain persists for two days to consult a physician.

Counsel in support of the complaint called Dr. Richard T. Smith, a physician specializing in the field of arthritis and rheumatic diseases. In addition thereto respondents stipulated that Doctors Robinson and Lockie, equally well qualified specialists in the field, if called would testify to the same effect as Dr. Smith. The record establishes that the only pain-relieving ingredient in respondents' tablets is the aspirin, and since regular or ordinary aspirin tablets contain 5 grains, the pain-relieving properties of

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Norkon tablets in the same dosages would be exactly the same as ordinary aspirin.

The gist of the expert testimony is that treatment for the various listed ailments must be individualized and varies with each person, and that the only relief which can be obtained from the taking of Norkon tablets (or aspirin) is limited to temporary relief of the minor aches and pains of such ailments. In view of this undisputed expert medical evidence, and in the light of the fact that respondents represented their product as affording immediate, effective, and complete relief from the severe aches, pains, and discomforts of the listed ailments, it is concluded and found that Norkon tablets do not afford immediate, effective, and complete relief from the aches, pains, and discomforts of arthritis, rheumatism, neuralgia, neuritis, lumbago, bursitis, and sciatica, and will not have any therapeutic effect upon any of the symptoms or manifestations of any such conditions in excess of affording temporary relief of the minor aches or pains thereof.² It is further concluded and found that such statements and representations are false and misleading in material respects, and constitute "false advertisements" within the meaning of the Act.

2. Norkon tablets have an antacid or buffer effect and prevent digestive or stomach upsets.

Respondents admitted this representation. Lewellyn H. Welsh, a research chemist with the U.S. Food & Drug Administration, was called in support of the complaint and testified that he made four chemical tests to ascertain whether or not Norkon tablets are an antacid or a buffer. Without encumbering this decision with the highly technical details of Mr. Welsh's analysis, suffice it to say that he found that Norkon is itself primarily an acid, since both aspirin and vitamin C are acids, and that it is neither an antacid nor a buffer within the accepted meaning of those terms. In addition thereto, Dr. Smith, as well as the other two physicians, testified that the tablets would not be effective as an antacid or buffer, and would not prevent digestive or stomach upsets. Accordingly, it is concluded and found that the aforesaid statements and representations are false and misleading in material respects and constitute false advertisements within the meaning of the Act.

² For a similar conclusion with respect to a similar product and representation, see *Rhodes Pharmacal Company v. FTC*, 208 F. 2d 382 (C.A. 7, 1953), affirmed with directions to reinstate Commission order, 348 U.S. 940 (1955); and *Dolcin Corporation v. FTC*, 219 F.2d 742 (C.A.D.C., 1954).

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3. Norkon tablets provide faster, safer, and longer relief from pain than ordinary salicylate analgesics and prevent loss of calcium.

Again, respondents admitted making these representations. The testimony of the three physicians specializing in this field establishes that Norkon tablets do not provide any faster, safer, or longer relief from pain than ordinary salicylate analgesics, and do not prevent the loss of calcium. In addition, the administering of ordinary salicylates, such as aspirin, does not cause any loss of calcium. Accordingly, it is concluded and found that the aforesaid statements and representations are false and misleading in material respects and constitute false advertisements within the meaning of the Act.

C. The Effect of the Unlawful Practices

The use by respondents of the foregoing false advertisements has had and now has the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that the statements contained therein are true and cause the purchase of substantial quantities of Norkon tablets because of such erroneous and mistaken belief.

CONCLUSIONS OF LAW

1. The advertisements disseminated by respondents are false advertisements, as that term is defined in the Act.
2. Respondents' preparations contain drugs, as that term is defined in the Act.
3. The acts and practices of respondents hereinabove found are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Act.
4. This proceeding is in the public interest, and an order to cease and desist the above-found practices should issue against respondents.

ORDER

It is ordered, That respondent Norkon Pharmacal, Inc., a corporation, and its officers, and Paul McCoy, individually and as an officer of said corporation, their representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of the preparation "Norkon tablets," or any product of substantially similar composition or possessing substantially similar proper-

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ties, 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 Act, any advertisement which represents, directly or by implication, that such product:

a. Will afford any relief of severe aches, pains, and discomfort of arthritis, rheumatism, neuralgia, neuritis, lumbago, bursitis, and sciatica, or will have any therapeutic effect upon any of the symptoms or manifestations of any such conditions or disorders in excess of affording temporary relief of the minor aches or pains thereof;

b. Is an antacid or buffer, has an antacid or buffer effect, or prevents digestive or stomach upsets; and

c. Provides faster, safer, or longer relief from pain than ordinary salicylate analgesics, or prevents loss of calcium.

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 Act, of any such product which advertisement contains any of the representations prohibited in paragraph 1 hereof.

DECISION OF THE COMMISSION AND ORDER TO FILE
REPORT OF COMPLIANCE

This matter having been heard on the respondents' appeal from the hearing examiner's initial decision; and

The Commission having considered the entire record, including the briefs and oral arguments of counsel, and having determined that the hearing examiner's findings and conclusions are fully substantiated on the record and that the order contained in the initial decision is appropriate in all respects to dispose of this matter:

It is ordered, That the aforesaid appeal be, and it hereby is, denied.

It is further ordered, That the hearing examiner's initial decision, filed October 24, 1958, be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That the respondents, Norkon Pharmacal, Inc., and Paul McCoy, 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 contained in said initial decision.

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IN THE MATTER OF
NUT-DISTRIBUTORS, INC., ET AL.CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT

Docket 7335. Complaint, Dec. 15, 1958—Decision, May 21, 1959

Consent order requiring White Plains, N.Y., sellers of peanut vending machines and electron tube testing devices and supplies and equipment used therewith, to cease making, in newspaper advertisements and through their salesmen, a variety of false offers of employment, sales assistance, investment required, profits, etc., as in the order below set forth.

Mr. Terral A. Jordan for the Commission.

Mr. Isaac Kaplan, of New York, N.Y., for respondents, except Pat Simone.

Respondent Pat Simone, for himself.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

On December 15, 1958, the complaint herein was issued, charging respondents with the use of false, misleading and deceptive representations in connection with the advertising, offering for sale and sale in commerce of vending machines, electron tube-testing devices, machines or devices used in connection with the sale of merchandise, and the supplies and equipment used in connection therewith, which representations constitute unfair and deceptive acts and practices in commerce, in violation of the Federal Trade Commission Act.

Thereafter, on March 31, 1959, respondents, their counsel, and counsel supporting the complaint entered into an Agreement Containing Consent Order to Cease and Desist, which was approved by the director and an assistant director of the Commission's Bureau of Litigation, and thereafter submitted to the Hearing Examiner for consideration.

Respondent I.E.M. Corp. is identified in the agreement as a New York corporation, of which individual respondent Margaret Hynes is president. The agreement identifies respondents Pat Simone and Michael Hynes as individuals, and states that the office and principal place of business of each of the respondents, except Pat Simone, is located at 19 Old Mamaroneck Road, White Plains, N.Y.; that the address of respondent Pat Simone is 58 Parkway South, Mount Vernon, N.Y.; and that the office and prin-