THE ELMO COMPANY, INC.

Docket 5959. Order, Dec. 1, 1965

Order vacating show cause order and referring case to hearing examiner for receiving evidence on question of whether there is sufficient change of law or fact to require setting aside of original order.

ORDER VACATING ORDER TO SHOW CAUSE AND REOPENING PROCEEDING TO DETERMINE WHETHER A CHANGE OF LAW OR FACT OR THE PUBLIC INTEREST REQUIRES SETTING ASIDE CONSENT SETTLEMENT IN WHOLE OR IN PART

The Commission on June 10, 1952 [48 F.T.C. 1379], having issued an order to cease and desist in accordance with a consent agreement executed by respondent and counsel in support of the complaint; and

It appearing that said order requires respondent, in connection with the offering for sale, sale, or distribution of various drugs and devices, known collectively as "Elmo's Home Treatment" to cease and desist from:

1. Disseminating or causing to be disseminated any advertisement (a) by means of the United States mails or (b) by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase of said preparations and device, which advertisement represents, directly or through inference:

(a) That the use of its preparations and device, singly or in combination, as directed, or otherwise, will have any beneficial effect upon deafness not caused by a catarrhal condition of the nose, ear or air passages.

(b) That the use of its preparations and device, singly or in combination, as directed, or otherwise, will have any beneficial effect in the treatment of deafness, impaired hearing, or head or ear noises caused by discharging catarrh, in excess of affording temporary relief therefrom.

(c) That the effects of its preparations in the treatment of deafness or impaired hearing or head or ear noises due to dry catarrh is in excess of softening of the dry exudates, or that any benefit can be expected by reason of this action of respondent's preparations in the treatment of conditions caused by dry catarrh of the ear canal unless the softened exudates are removed by other means.

(d) That said preparations and device constitute a method of treatment based upon the findings of accepted medical authorities.

(e) That catarrh is the most common cause of deafness.

(f) That Elmo Ear Oil No. 1 or Elmo No. 8 Ear-Vibrator are harmless or may be used without ill effects.

2. Disseminating or causing to be disseminated any advertisement (a) by means of the United States mails or (b) by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase of respondent's aforesaid Elmo Ear Oil No. 1, which advertisement fails to reveal that the cotton on which the product is used should not be pushed into the

ear so far that it cannot be easily removed with the fingers, and that when infection is present, the use of cotton in connection with said product when pushed deeply into the ear may result in injury to the ear, including the extension of any infection therein present into the deeper structures of the ear.

3. Disseminating or causing to be disseminated any advertisement (a) by means of the United States mails or (b) by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase of Elmo No. 8 Ear-Vibrator, which advertisement fails to reveal that, when infection is present in the ear, the use of this device may result in extending such infection into the deeper structures of the ear and in serious injury.

4. 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 of said preparations and device in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement contains any representations prohibited in paragraph 1 hereof, or which fails to comply with the affirmative requirement set forth in paragraphs 2 and 3 hereof.

It further appearing to the Commission that The Drive-X Company, a corporation, and its officers, Craig Sandahl and Richard Johann, are the successors to The Elmo Company, Inc., and are bound by the aforementioned order to cease and desist in the same manner and to the same extent as the corporate predecessor; and

It further appearing to the Commission that subsequent to the issuance of the said order to cease and desist, respondent revised its advertisements for the said drugs and devices to conform to the requirements of the order, and thereafter continued, and is at present continuing, advertisements for its products which represent, directly or by implication, that its drugs or devices, when used in combination as directed, will cure or constitute an effective treatment for poor hearing, ear and head noises, and so-called "catarrhal" conditions of the head; and

On the basis of the expert medical opinion with which it has recently been furnished, the Federal Trade Commission now having reason to believe that, in truth and fact, the aforementioned drugs and devices will not cure or have any beneficial effect on hearing loss, ear and head noises, or so-called "catarrhal" conditions of the head, and accordingly, that respondent's advertisements are misleading in material respects and constitute "false advertisements" as that term is defined in the Federal Trade Commission Act; and

The Federal Trade Commission having authority under Section 5(b) of the Federal Trade Commission Act to reopen a proceeding whenever, in its opinion, conditions of fact or law have so changed as to require such action or the public interest so requires, and after appropriate proceedings to alter, modify, or set aside, in whole or in part, its order previously entered; and

The aforesaid agreement for consent settlement having provided that the Commission's order may be set aside in whole or in part under the conditions and in the manner provided in paragraph (f) of Rule V of the Commission's Rules of Practice then in effect; and

It further appearing to the Commission that the Order To Show Cause Why Proceeding Should Not Be Reopened issued on September 16, 1965, should be vacated; accordingly,

It is ordered, That the "Order To Show Cause Why Proceeding Should Not Be Reopened" issued on September 16, 1965, be, and it hereby is, vacated; and

It is further ordered, On the Commission's own motion that the proceeding in Docket No. 5959 be, and it hereby is, reopened, and that the matter be referred to a hearing examiner for the purpose of receiving evidence to determine whether a change of law or fact, or the public interest, requires that the consent settlement be set aside in whole or in part; and

It is further ordered, That the proceeding be conducted pursuant to the Commission's Rules of Practice For Adjudicative Proceedings insofar as those Rules are applicable; and

It is further ordered, That the hearing examiner, upon the conclusion of the hearings, certify the record, together with a report of his findings, conclusions and recommendations with respect thereto, to the Commission for final disposition.

BEATRICE FOODS CO. AND THE KROGER CO., INC.

Docket 8663. Order and Opinion, Dec. 1, 1965

Order denying respondents' joint request to appeal from hearing examiner's denial of their motion for early trial or dismissal, and his order for production of documents; Kroger's appeal from examiner's taking official notice of certain facts granted.

DISSENTING OPINION

BY ELMAN, *Commissioner:*

The examiner's orders involved in this interlocutory appeal will have the effect of delaying the hearing for a year, if not longer. The Commission's present Rules of Practice, adopted in 1961, were designed to encourage expeditious hearings and to avoid delay. The purpose of an adjudicative proceeding is to adjudicate the issues raised by the complaint; and not to provide a springboard for continuing investigation of other possible violations by the respondent. Nor can the doctrine of official notice be invoked as a substitute

for "adequate probative analysis" and "realistic appraisals of relevant competitive facts" (*F.T.C.* v. *Sun Oil Co.*, 371 U.S. 505, 527). I would vacate the examiner's orders and direct him to proceed to a trial of the case without further delay.

ORDER RULING ON REQUESTS FOR PERMISSION TO FILE INTERLOCUTORY APPEAL

This matter has come on to be heard upon a request jointly made by the respondents for permission to file an interlocutory appeal from the examiner's orders of October 25 and 26, 1965, requiring them to produce documents and denying respondent Beatrice's motion to set the case down for early trial or to dismiss and also upon a request by respondent Kroger for permission to file an interlocutory appeal from the hearing examiner's order of October 29, 1965, granting in part complaint counsel's request for the taking of official notice. Complaint counsel has filed statements opposing the requests.

First to be considered is the question on the production of records. The material to be produced by Beatrice, mostly covering designated periods from 1962 to 1964, includes books, records, documents or verified summaries thereof showing net prices charged to Kroger for cottage cheese in designated size containers delivered to the stores of Kroger's Charleston division, other information relative to sales volumes, prices and concessions for cottage cheese and milk, names and addresses of certain officers, employees and agents, sources of supply of dairy products and Beatrice's annual reports. The material ordered to be produced by Kroger, for similar periods, includes certain designated advertisements, information as to prices and concessions granted to Kroger by Beatrice, designated grocery sales plans published by Kroger, market letters referring to private label dairy products purchases and sales, Kroger annual reports and records revealing the names of personnel engaged in planning negotiations and other activities regarding the purchase and sale of dairy products for the Charleston division.

There is no issue here, as respondents contend, of the examiner sanctioning a new investigation or the continuation of an old one; he is only granting discovery as provided for in § 3.11 of the Commission's adjudicative Rules of Practice. Whether or not the request is merited is governed solely by the terms of that rule. The documents which were ordered produced by the examiner clearly constitute or contain evidence relevant to the subject matter covered by the complaint. There appears to be no question that such records are nonprivileged and that they are in the possession and control of the respondents. The examiner in effect concluded that as to part

of the documents good cause had been shown for their production and so he ordered them produced. His ruling is in harmony with our recent decision in *Associated Merchandising Corporation*, Docket No. 8651 (Order and Opinion Denying Respondents' Request for Permission To File Interlocutory Appeal, September 23, 1965 [p. 1175 herein]). Respondents have not shown that the examiner has abused his discretion nor have they made a showing, as required under § 3.20, of extraordinary circumstances where an immediate decision by the Commission is clearly necessary to prevent detriment to the public interest. Accordingly, permission to file an appeal will be denied as to the examiner's order for the production of documents.

The request as to the examiner's order denying the motion to set this cause for trial or to dismiss appears, in part at least, to be a response to the request of complaint counsel for the production of documents. This will likewise be denied because similarly there has been no showing as required by § 3.20.

Secondly, we have for consideration respondent Kroger's request for permission to appeal from the examiner's order of October 29, 1965, taking official notice of certain designated facts. As to this, we believe the requirements of § 3.20 have been met and permission to appeal will be granted. Accordingly,

It is ordered, That the respondents' joint request for permission to file an interlocutory appeal from the examiner's order of October 25, 1965, denying requests for an early trial or alternatively dismissing the complaint and his order of October 26, 1965, ordering the production of documents, be, and it hereby is, denied.

It is further ordered, That the request of respondent Kroger for permission to file an interlocutory appeal from the examiner's order of October 29, 1965, taking official notice of certain facts, be, and it hereby is, granted.

Commissioner Elman dissenting.

AMERICAN BRAKE SHOE COMPANY

Docket 8622. Order, Dec. 9, 1965

Order granting respondent's appeal from hearing examiner's order excluding from six subpoenas certain data relating to competitive mechanical systems of braking employing friction materials.

ORDER GRANTING INTERLOCUTORY APPEAL