
IN THE MATTER OF

HOLIDAY PRODUCTS, INC., ET AL.

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

Docket 8675. Complaint, Dec. 22, 1965—Decision, May 19, 1966

750

Complaint

Order requiring a South Minneapolis, Minn., distributor of stainless steel cooking utensils, to cease using false health claims and other misrepresentations to sell its products.

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 Holiday Products, Inc., a corporation, and Bernard Hermesen and Elizabeth Michelson, individually and as officers of said corporation, hereinafter referred to as respondents, have 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. Respondent Holiday Products, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota, with its office and principal place of business located at 2920 Lyndale Avenue, South Minneapolis, Minnesota.

Respondents Bernard Hermesen, and Elizabeth Michelson are officers of said corporation. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been engaged in the advertising, offering for sale, sale and distribution of stainless steel cooking utensils to the public.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, the said cooking utensils, which they advertise and sell under their brand name, Holiday, when sold, to be transported from their place of business located in the State of Minnesota, or from the manufacturer of said products, the Vollrath Company, located in the State of Wisconsin, 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 products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, and for the purpose of inducing the purchase of their stainless steel cooking utensils respondents through the oral statements of their sales

Complaint

69 F.T.C.

agents and representatives, and through pamphlets and other advertising literature have represented and are representing directly or by implication:

1. That use of respondents' stainless steel cooking utensils will enable the user to:

(a) Cook foods more quickly than with competing cooking utensils.

(b) Spend less money for food.

(c) Spend less money on fuel or electricity.

(d) Keep food hot for hours in the utensils after heat is turned off.

2. That the use of respondents' stainless steel cooking utensils:

(a) Is more conducive to good health than is the use of cooking utensils manufactured from materials other than stainless steel regardless of the method of cooking used.

(b) Will prevent disease.

(c) Will cause the food cooked therein to retain more vitamins, minerals and other food nutrients than will be retained in similar foods cooked in utensils manufactured from materials other than stainless steel regardless of the method of cooking used.

3. That the use of cooking utensils manufactured from materials other than stainless steel is injurious to health.

PAR. 5. In truth and in fact:

1. Use of respondents' stainless steel cooking utensils will not enable users to:

(a) Cook foods more quickly than with competing cooking utensils.

(b) Spend less money for food.

(c) Spend less money on fuel or electricity.

(d) Keep food hot for hours in the utensils after the heat is turned off.

2. Use of respondents' stainless steel cooking utensils.

(a) Is not more conducive to good health than is the use of cooking utensils manufactured from other materials when an efficient method of cooking is used.

(b) Will not prevent disease.

(c) Will not cause the food cooked therein to retain more vitamins, minerals or other food nutrients than will be retained in similar foods cooked in utensils manufactured from materials other than stainless steel when an efficient method of cooking is used.

3. The use of cooking utensils manufactured from materials other than stainless steel is not injurious to health.

Therefore the representations referred to in Paragraph Four are false, misleading and deceptive.

PAR. 6. The use by respondents and their sales agents and representatives of the above mentioned false, misleading, deceptive and disparaging statements, disseminated as aforesaid, has had and now has, the tendency and capacity to mislead and deceive a substantial number of the purchasing public into the erroneous and mistaken belief that all of said statements and representation were and are true, and to induce a substantial number of the purchasing public, because of such erroneous and mistaken belief, to purchase substantial quantities of respondents' stainless steel cooking utensils.

PAR. 7. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors, and constituted and now constitute unfair and deceptive acts and practices and unfair methods of competition, in commerce, in violation of Section 5 of the Federal Trade Commission Act.

Mr. William E. McMahon, II, supporting the complaint.

Mr. Samuel Segall, of Minneapolis, Minn., for respondents.

INITIAL DECISION BY JOSEPH W. KAUFMAN, HEARING EXAMINER

The complaint herein was issued on December 22, 1965. It alleges violation of section 5 of the Federal Trade Commission Act by the making of false and misleading representations in connection with the selling of stainless steel cooking utensils. In addition to naming the respondent corporation, the complaint names as respondents Bernard Hermesen and Elizabeth Michelson, individually and as officers of said corporation. Respondents are located in Minneapolis, Minnesota.

A notice of appearance for all three respondents, the corporation, and the two individuals, as named and designated was duly filed by Samuel Segall, attorney at law, located in Minneapolis.

Thereafter an answer was interposed by said attorney. Actually the answer was subscribed by him only as attorney for the corporation and Benard Hermesen. Although the name of Elizabeth Michelson does not show up in the appearance, the answer was careful to protect her from individual liability.

Primarily the answer was a naked general denial (par. II), not

conforming with the Rules of the Commission, although it did make some affirmative statements. (It was later amended, as will appear below.)

The answer admitted that respondent "Bernard Hermesen does operate said corporation in its business affairs" but it denied this as to respondent Elizabeth Michelson, who is referred to as "having recently resigned and left said corporation."

The answer also stated that the corporation "has sold products manufactured by the Vollrath Company of Sheboygan, Wisconsin, in various states," but otherwise denied the interstate commerce allegation. The answer stated that the corporation used literature and brochures furnished by the Vollrath Company containing representations which respondent believed to be true.

In general, however, as already stated, the answer generally denied all allegations in the complaint and in express words it put "the Federal Trade Commission upon its strict proof."

The answer also stated that respondents were without funds to appear in the District of Columbia, either for prehearing or hearing, and requested that all hearings or prehearings be held in Minneapolis, where respondents are located. This theme of lack of funds to litigate a case in Washington had also been pressed by the attorney directly in letters received by the hearing examiner from him.

By order dated February 3, 1966, the examiner ruled that the answer was defective under section 3.5(b)(1) of the Rules, but he authorized an amended answer provided that it conform strictly with the said section and make affirmative disclosure, as meticulously specified by the order, in respect to each denial of the allegations of the complaint, treated subdivision by subdivision, and sentence by sentence.

The examiner's purpose, in addition to trying to obtain a responsive answer, was to eliminate the necessity for a prehearing in Washington, D.C., which respondents stated they could not afford.

An amended answer was duly filed by the aforesaid attorney, subscribing himself as "Attorney for Respondents." There is no express statement or indication as to whether this subscription extended to Elizabeth Michelson, although her interest is carefully protected in the amended answer.

In general, this amended answer conforms to the examiner's

order, despite some ambiguities.¹ The amended answer, significantly, makes substantial admissions bearing on liability.

The amended answer sets forth that the activities of Elizabeth Michelson were "limited to office work only" and that in October 1965 she completely sold out her interest in the corporation to respondent Hermesen and the corporation.

The amended answer in effect admits the engaging in interstate commerce (although not since the issuance of the complaint).

The amended answer also admits that two of the main alleged misrepresentations were and are false, although it denies that the misrepresentations have been made by respondents.

Thereafter, as the examiner was informed, complaint counsel telephoned respondents' counsel and arranged to meet him in Minneapolis. This was for the purpose of favoring respondents by not putting them to the expense of a prehearing in Washington, unless absolutely necessary, of discussing with counsel the issues or the remaining issues, and of arriving at any stipulations which might expedite the disposition of this case.

The result was a document entitled *Agreement Containing Stipulation of Facts and Agreed Order*, which was duly filed herein on March 3, 1966. This agreement is signed by Samuel Segall as "Attorney for Respondents," as well as by respondent corporation, respondent Bernard Hermesen, individually and as an officer, and, of course by complaint counsel. The agreement is not signed by Elizabeth Michelson, although again her interests seem to be fully protected.

The Stipulation of Facts proper disposes of the allegations of the complaint as follows:

"A" sets forth the agreed facts exactly as alleged in the first sentence of Paragraph One of the complaint, *i.e.*, as to identification of respondent corporation.

"B" sets forth the agreed facts exactly as alleged in the other sentence of Paragraph Two of the complaint, *i.e.*, as to individual direction and control—except that they are made to apply only to Bernard Hermesen and not to Elizabeth Michelson. As to her, further agreed facts are that in October 1965 (prior to the time the complaint was issued) she completely divested herself of her interest in the corporation in favor of Hermesen and the corporation, and that prior thereto, although an officer, her "activities

¹ One ambiguity is created by the fact that the preamble states that the amended answer realleges all of the allegations of the old answer.

were limited to general corporate office work," with no part in the "formulation, direction, or control of the acts and practices" of the corporation.

"C" reads as follows: "Respondents Holiday Products, Inc. and Bernard Hermesen admit all of the material allegations of fact contained in Paragraphs Two, Three, Four and Five of the Complaint."

There is no express statement in the agreement and stipulation as to the remaining two paragraphs of the complaint, to wit, Six and Seven. However, the examiner, after consideration, deems this to be unimportant. Paragraph Six is merely an expansion of Paragraph Five, last sentence, already stating, although more briefly, that the representations are false and misleading. Paragraph Seven is merely a conclusion that section 5 of the Act has been violated. Moreover, the parties, obviously on the basis of there being adequate supporting facts, do agree to an order, which will be referred to below.

One further question about the sufficiency of the agreement and stipulation is presented by a footnote in this part entitled Stipulation of Facts, stating: "Respondents aver that any violation of the law that may legally be attributed to them as the result of this admission occurred without their knowledge and consent, and represent that it is respondents' intent to fully comply with the provisions of the order hereinafter set forth." Although this is an unusual provision, the examiner regards it as harmless in this case and in the nature of surplusage.

The "Agreed Order" is, word for word, precisely the same order as proposed in the complaint herein, except in two particulars, both designed to exonerate respondent Elizabeth Michelson as named and described in the complaint.

First, the very beginning and body of the order is altered so as not to be expressly directed against "Elizabeth Michelson, individually and as an officer of said corporation," which would have followed the proposed order in the complaint. However, entirely like the proposed order in the complaint, it is directed generally against unnamed corporate officers (as well as described agents, representatives, and employees), which still might conceivably include Elizabeth Michelson.

Second, the Agreed Order adds the following final paragraph:

It is further ordered, That the complaint herein be dismissed as to Elizabeth Michelson, in her individual capacity and as an officer of Holiday Products, Inc.

In the examiner's opinion the intent of each of the two changes is precisely the same, namely, to exonerate Elizabeth Michelson from individual liability, and to put her in the same status as if she had never been named in the complaint as a respondent, as described therein—although not put her in the same status as if she had never been an officer or otherwise connected with the corporation, which she concededly once was, and, of course, could possibly become again.

The first alteration simply, by omission, makes the order inapplicable to her individually as well as an officer. It is still applicable to her, however remote the actual possibility in a practical sense, as one of the unnamed "officers" (or described agents, etc.)—past, present, or future.

The second alteration, by addition of the paragraph quoted above, is obviously not intended to destroy the first and main prohibition directed against the "officers" (and agents, etc.) generally—including Elizabeth Michelson, in the remote possibility that she might be involved by reasons of conceivable future connection with the corporation or for any other reason dating, perhaps, from her past connection as an officer. The purpose, as the examiner finds, is simply to make doubly clear that there is no order against her by *name*, in her individual capacity and as an officer, *i.e.*, the description used in naming such a person as an individual respondent in a Commission complaint and ensuing order.

The complaint is dismissed by the said additional paragraph in the Agreed Order only, in the examiner's opinion, insofar as Elizabeth Michelson is named as a respondent in her individual capacity as an officer of the corporation. The result is much the same as if she had not been so named as a respondent in the complaint, *i.e.*, she can be bound by the order only insofar as officers, as well as described agents, etc., are generally bound even though not named as respondents in the complaint.

On this construction of the two alterations of the Agreed Order, the examiner adopts the same in his order appended to this decision. He had added, however, by footnote to his order, an appropriate *caveat* that the additional paragraph is not in derogation of the first and main part of the order. It is the examiner's opinion that this does not change the provisions of the Agreed Order. He also points out that, even if this can be construed as a change, the stipulation of the parties does not, certainly not explicitly, con-

fine the examiner to an order precisely following the Agreed Order word for word.

One more point deserves passing consideration here, namely, that Elizabeth Michelson is technically in default for not interposing an answer, even though the attorney did file a preliminary appearance in her behalf. On such default, section 3.5(2)(c) of the Rules of the Commission does "authorize" the examiner to enter, without further notice, an initial decision with "appropriate" conclusions and order. However, it is the examiner's opinion that he is not required by this section to issue an order directed against Elizabeth Michelson by name even though not warranted by the facts. Moreover, he believes that the appended order, reaching out to officers, agents, and employees generally, is altogether appropriate, *i.e.*, without naming Elizabeth Michelson.

The agreement and stipulation also provides, under III, entitled "Further Procedural Steps," that findings of fact and conclusions of law may be made on the basis of the facts stipulated, that the record on which the decision shall be based shall consist solely of the complaint and the stipulation, and that any further procedural steps and rights of review are waived.

The examiner herewith accepts the said agreement and stipulation of the parties, dated March 1, 1966. Based thereon he hereby makes the following Findings of Fact as well as Conclusions, to which is appended his Order.

FINDINGS OF FACT

1. Respondent Holiday Products, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota, with its office and principal place of business located at 2920 Lyndale Avenue, South Minneapolis, Minnesota.

Respondent Bernard Hermsen is the principal officer of said corporation. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices set forth in said complaint and which are alleged therein to be unlawful.

Respondent Elizabeth Michelson, during, or about, the month of October 1965 did completely divest herself of her interest in the corporate respondent to the said Bernard Hermsen and to the corporate respondent. Prior to that time, and when she was an officer of the corporate respondent, Elizabeth Michelson's activities were limited to general corporate office work and she had no part

in the formulation, direction or control of the acts and practices of Holiday Products, Inc.

2. Respondents² are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of stainless steel cooking utensils to the public.

3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, the said cooking utensils, which they advertise and sell under their brand name, Holiday, when sold, to be transported from their place of business located in the State of Minnesota, or from the manufacturer of said products, the Vollrath Company, located in the State of Wisconsin, 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 products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

4. In the course and conduct of their business, and for the purpose of inducing the purchase of their stainless steel cooking utensils, respondents, through the oral statements of their sales agents and representatives, and through pamphlets and other advertising literature, have represented and are representing directly or by implication:

(1) That use of respondents' stainless steel cooking utensils will enable the user to:

- a. Cook foods more quickly than with competing cooking utensils.
- b. Spend less money for food.
- c. Spend less money on fuel or electricity.
- d. Keep food hot for hours in the utensils after heat is turned off.

(2) That the use of respondents' stainless steel cooking utensils:

- a. Is more conducive to good health than is the use of cooking utensils manufactured from materials other than stainless steel regardless of the method of cooking used.
- b. Will prevent disease.
- c. Will cause the food cooked therein to retain more vitamins, minerals and other food nutrients than will be retained in similar foods cooked in utensils manufactured from materials other than stainless steel regardless of the method of cooking used.

² "Respondents," as used in these Findings, and also the Conclusions, refers only to Holiday Products, Inc., and Bernard Hermesen, individually, etc.

(3) That the use of cooking utensils manufactured from materials other than stainless steel is injurious to health.

5. In truth and in fact:

(1) Use of respondents' stainless steel cooking utensils will not enable users to:

- a. Cook foods more quickly than with competing cooking utensils.
- b. Spend less money for food.
- c. Spend less money on fuel or electricity.
- d. Keep food hot for hours in the utensils after the heat is turned off.

(2) Use of respondents' stainless steel cooking utensils:

- a. Is not more conducive to good health than is the use of cooking utensils manufactured from other materials when an efficient method of cooking is used.
- b. Will not prevent disease.
- c. Will not cause the food cooked therein to retain more vitamins, minerals or other food nutrients than will be retained in similar foods cooked in utensils manufactured from materials other than stainless steel when an efficient method of cooking is used.

(3) The use of cooking utensils manufactured from materials other than stainless steel is not injurious to health.

CONCLUSIONS

1. The use by respondents and their sales agents and representatives of the above mentioned false, misleading, deceptive and disparaging statements, disseminated as aforesaid, has had and now has, the tendency and capacity to mislead and deceive a substantial number of the purchasing public into the erroneous and mistaken belief that all of said statements and representations were and are true, and to induce a substantial number of the purchasing public, because of such erroneous and mistaken belief, to purchase substantial quantities of respondents' stainless steel cooking utensils.

2. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors, and constituted and now constitute unfair and deceptive acts and practices and unfair methods of competition, in commerce, in violation of Section 5 of the Federal Trade Commission Act.

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents.

ORDER

It is ordered, That respondents Holiday Products, Inc., a corporation, and its officers, and Bernard Hermesen, individually and as an officer of said corporation, and said 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 cooking utensils made of stainless steel or of any other product of substantially similar composition, design, construction or purpose, do forthwith cease and desist from:

I. Representing directly or by implication:

A. That use of respondents' cooking utensils will enable the user to:

- (1) Cook foods more quickly than with other cooking utensils.
- (2) Spend less money on food.
- (3) Spend less money on fuel or electricity.
- (4) Keep food hot for hours after the heat is turned off, or that food will remain hot, under such conditions, for any length of time not in accordance with the facts.

B. That the use of respondents' cooking utensils:

- (1) Is more conducive to good health than the use of cooking utensils manufactured from materials other than stainless steel.
- (2) Will prevent disease.
- (3) Will cause the food cooked therein to retain more vitamins, minerals and other nutrients than will be retained in similar foods efficiently cooked in utensils manufactured from materials other than stainless steel.

C. That the use of cooking utensils manufactured from materials other than stainless steel is injurious to health.

II. Misrepresenting the construction, efficacy or any other feature of respondents' products.

III. Supplying to or placing in the hands of any distributor, dealer or salesman brochures, sales manuals, charts, pamphlets, or any other advertising materials which are dis-

played, or may be displayed, to the purchasing public which contain any of the false or misleading representations prohibited in Paragraphs I and II hereof.

IV. Furnishing or supplying to distributors, dealers or salesmen such products for resale to the public when such distributors, dealers or salesmen refuse to, or do not comply with, all of the prohibitions set forth in Paragraphs I, II and III of this order.³

It is further ordered, That the complaint herein be dismissed as to Elizabeth Michelson, in her individual capacity and as an officer of Holiday Products, Inc.

FINAL ORDER

No appeal from the initial decision of the hearing examiner having been filed, and the Commission having determined that the case should not be placed on its own docket for review and that pursuant to Section 3.21 of the Commission's Rules of Practice (effective August 1, 1963), the initial decision should be adopted and issued as the decision of the Commission:

It is ordered, That the initial decision of the hearing examiner shall, on the 19th day of May 1966, become the decision of the Commission.

It is further ordered, That respondent Holiday Products, Inc., a corporation, and Bernard Hermesen, individually and as an officer of said corporation, shall, within sixty (60) days after service of this order upon them, file with the Commission a report in writing, signed by each respondent named in this order, setting forth in detail the manner and form of their compliance with the order to cease and desist.
