

Complaint

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IN THE MATTER OF

FIRST BUCKINGHAM COMMUNITY, INC., ET AL.

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

Docket 8750. Complaint, Nov. 30, 1967—Decision, May 20, 1968

Order vacating initial decision and dismissing complaint which charged nine affiliated Arlington, Va., apartment complexes with using advertising which deceptively carried the impression that their apartments were available to the general public without restriction as to race, color, or national origin.

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 First Buckingham Community, Inc., Second Buckingham Community, Inc., Third Buckingham Community, Inc., Fourth Buckingham Community, Inc., Fifth Buckingham Community, Inc., Sixth Buckingham Community, Inc., Paramount Communities, Inc., Claremont Communities, Inc. and Paramount Motors Incorporated, corporations, and Frances W. Freed, Beatrice W. Lesses and Maxwell C. Lieberman, individually and as officers of said corporations, 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. First Buckingham Community, Inc., Second Buckingham Community, Inc., Third Buckingham Community, Inc., Fourth Buckingham Community, Inc., Fifth Buckingham Community, Inc., Sixth Buckingham Community, Inc., Paramount Communities, Inc., Claremont Communities, Inc., are corporations organized, existing and doing business under and by virtue of the laws of the State of Virginia, with their principal office and place of business located at 313 North Glebe Road, in the county of Arlington, State of Virginia.

Paramount Motors Incorporated, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 313 North Glebe Road, in the county of Arlington, State of Virginia.

Corporate respondents First Buckingham Community, Inc., Second Buckingham Community, Inc., Third Buckingham Community, Inc., Fourth Buckingham Community, Inc., Fifth Buckingham Community, Inc., Sixth Buckingham Community, Inc., own, manage and operate Buckingham Community, 313 North Glebe Road, Arlington, Virginia. Corporate respondent, Claremont Communities, Inc., owns, manages and operates Claremont Community, 2733 South Walter Reed Drive, Arlington, Virginia; and corporate respondent Paramount Communities, Inc., owns, manages and operates Chatham, 4501 Arlington Boulevard, Arlington, Virginia. Corporate respondent, Paramount Motors Incorporated, is a holding company which owns all of the stock in each of the aforesaid corporations.

Respondents Frances W. Freed, Beatrice W. Lesses and Maxwell C. Lieberman are individuals and are officers and directors of each of the corporate respondents. They formulate, direct and control the acts and practices of the corporate respondents, including the acts and practices hereinafter set forth. Their business address is the same as that of the corporate respondents.

All of the aforementioned respondents cooperate and act together in carrying out the acts and practices hereinafter set forth.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for rent, rental and general management of the aforesaid apartment complexes located in Arlington, Virginia.

PAR. 3. In the course and conduct of their business, respondents have caused rental advertisements for the aforesaid properties to be published in newspapers and other publications of interstate circulation, including The Washington Post, The Evening Star and the Apartment Shopper's Guide. Said respondents have performed various acts in commerce relating to the advertising of the aforesaid apartments, such as transmitting payment for published advertisements from their place of business in the State of Virginia to the District of Columbia, and maintain, and at all times mentioned herein have maintained a substantial course of business in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their aforesaid business, and for the purpose of inducing persons to apply for rental of their apartments, respondents now cause and have caused to be published in newspapers of interstate circulation certain advertisements, of which the following is typical and illustrative, but not all inclusive thereof:

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CHARACTER!

PRESTIGE!

Two Outstanding Garden Apartment Communities with One of the Largest
Swimming Pools in Virginia!

BUCKINGHAM

313 North Glebe Road, Arlington

Efficiencies, 1, 2 and 3 Bedroom Simplex and Duplex-----from \$74

JA 2-5004

DIRECTIONS: From Washington—Across Memorial Bridge, take Route 50 to
Glebe Road (Route 120).

CLAREMONT

2733 S. Walter Reed Drive, Arlington

2 Bedroom Simplex and Duplex-----from \$107

WE 1-0400

DIRECTIONS: Across 14th Street Bridge, out Shirley Highway to Route 7,
Right ½ mile to S. Walter Reed Drive off King Street to Claremont.

PAR. 5. By and through the use of the above-quoted statements and representations, and others of similar import and meaning but not expressed herein, respondents represent, and have represented, directly or by implication, that such apartments are available to the general public without restrictions or limitations as to race, color, national origin or number of family members.

PAR. 6. In truth and in fact, such apartments are not available to the general public without restrictions or limitations as to race, color, national origin or number of family members. These apartments are not available for rental to applicants who are Negro. Further, respondents limit the occupancy of the one bedroom apartments to two persons and the two bedroom apartments to four persons.

Therefore, the statements and representations as set forth in Paragraphs Four and Five hereof were and are false, misleading and deceptive.

PAR. 7. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the general public into the erroneous and mistaken belief that said statements and representations were and are true.

PAR. 8. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and constituted, and now constitute, unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

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Initial Decision

Mr. Lewis Franke and *Mr. George D. Beischer* supporting the complaint.

Mr. Charles W. Mander and *Mr. Jay Cutler* of Washington, D.C., for respondents.

INITIAL DECISION BY JOHN LEWIS, HEARING EXAMINER

APRIL 24, 1968

STATEMENT OF PROCEEDINGS

The Federal Trade Commission issued its complaint against the above-named respondents on November 30, 1967, charging them with engaging in unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act, by falsely representing in newspaper advertisements that the apartments in certain apartment building complexes owned, managed and operated by the corporate respondents are available for rental by the general public, without restrictions or limitations as to race, color, national origin or number of family members. After being served with said complaint, respondents appeared by counsel and thereafter filed their answer denying having engaged in the illegal practices charged and raising the affirmative defenses that, (a) the complaint fails to state a cause of action against them in that they are engaged in intrastate commerce in the ownership, management and rental of real properties, and the Commission does not have jurisdiction over them based upon the mere insertion of announcements in newspapers concerning the possible availability of their apartments, (b) they have not exceeded in any way what they may lawfully do in the exercise of their right to select tenants for their rental properties, (c) the insertion of announcements in newspapers does not constitute advertising, within the meaning of the Federal Trade Commission Act, requiring the affirmative disclosure of restrictions on the use and occupancy of the apartments, and (d) this proceeding is not in the public interest.

A motion filed by respondents for dismissal of the complaint on the ground that it did not allege facts sufficient to sustain the jurisdiction of the Commission over them was denied by order of the examiner, dated February 12, 1968, without prejudice to the renewal thereof at a later appropriate stage of this proceeding. A motion filed by National Apartment Association to intervene as a party was denied by order of the examiner, dated January 8, 1968, but said Association was granted permission to participate as *amicus curiae*.

Prehearing conferences were thereafter convened before the undersigned hearing examiner on February 15, 1968, and March 13, 1968, at which there was a considerable narrowing of the issues, at which various factual stipulations were reached, and at which substantially all documentary exhibits were received in evidence. The transcripts of said conference were, by agreement of the parties, made a part of the public record, and the results of said conferences were embodied in the examiner's Prehearing Orders Nos. 1 and 2.

Hearings for the reception of testimony and other evidence were held in Washington, D.C., on April 1-2, 1968. All parties were represented by counsel, participated in the hearings and were afforded full opportunity to be heard and to examine and cross-examine witnesses. At the close of all the evidence the parties were granted leave to file proposed findings of fact and conclusions of law on May 2, 1968, and replies thereto on May 13, 1968.

Following the close of hearings and before date fixed for the filing of proposed findings, respondents filed a motion for dismissal of the complaint herein on the ground that the Civil Rights Act of 1968 (Public Law 90-284), signed by the President on April 11, 1968, will render any decision on the merits moot for the reason that such Act makes unlawful, restrictions on the sale or rental of real estate based on race, color or national origin, and there is, therefore, "no real possibility that the alleged restrictions as to race, color or national origin which respondents allegedly failed to reveal in advertising can be continued." While said Act does not cover restrictions as to the number of persons who may occupy premises, respondents contend that such allegation in the complaint involves a "minor" matter and that any order which might result in this proceeding "is rendered ineffective, inconsequential and no longer in the public interest." Counsel supporting the complaint have filed answer to respondents' motion to dismiss, in which they assert that "they do not oppose respondents' Motion to Dismiss in this matter." The evidence adduced herein establishes that following the issuance of the complaint herein, respondents endeavored to insert in their advertisements an affirmative statement to the effect that their apartments were only available on a restricted occupancy basis. However, the two principal newspapers in the District of Columbia used by respondents for the insertion of rental advertisements refused to accept any advertisement containing such a statement (Tr. 171). It may be inferred that such refusal was based on the fact that a local ordinance of the District of Columbia prohibits the knowing publication of any advertisement which states that the

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transfer of an interest in real property will be refused or restricted on account of race, color, religion or national origin (RX 9-A).

This matter is now before the examiner for final consideration on respondents' motion to dismiss, which is unopposed by counsel supporting the complaint. The undersigned has concluded that the issues in this proceeding have been largely rendered moot by the enactment of Public Law 90-284, following the close of hearings. Since it will henceforth be unlawful, even in areas beyond the District of Columbia, to discriminate in the rental of apartments because of race, color or national origin, or to make any reference in advertisements of an intention to discriminate on such grounds, there would appear to be no further substantial public interest in an adjudicative disposition of the issues, as framed by the pleadings and developed by the evidence adduced herein. Accordingly, it would appear to be appropriate to grant respondents' motion and to dismiss the complaint herein.

ORDER

It is ordered, That the complaint in the above-entitled proceeding be, and the same hereby is, dismissed.

OPINION OF THE COMMISSION

MAY 20, 1968

BY ELMAN, *Commissioner*:

In this proceeding, in which the complaint issued on November 30, 1967, the hearing examiner filed an initial decision on April 24, 1968, granting an unopposed motion by respondents to dismiss the complaint. No appeal having been filed, the matter is before the Commission under Section 3.51 of the Rules of Practice to determine whether the case should be placed on its own docket for review.

Respondents' motion to dismiss the complaint was filed on April 16, 1968, following the close of evidentiary hearings. In granting the motion, the examiner made no findings of fact on whether the allegations of the complaint were supported by the evidence adduced at the hearings. His dismissal of the complaint was based solely on the ground that "the issues in this proceeding have been largely rendered moot by the enactment [on April 11, 1968] of Public Law 90-284 [the Civil Rights Act of 1968]," and that, therefore, "there would appear to be no further substantial interest in an adjudicative disposition of the issues, as framed by the pleadings and developed by the evidence adduced herein."

The hearing examiner's action is inexplicable, on several grounds.

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To begin with, respondents' motion to dismiss was one upon which the hearing examiner had no authority to rule, and which he was required instead to certify to the Commission under Section 3.22 of the Rules of Practice. *Drug Research Corporation*, Docket 7179, October 3, 1963 [63 F.T.C. 998]; cf. *Florida Citrus Mutual, et al.*, 50 F.T.C. 959, 961 (1954). The Commission has not delegated to its hearing examiners the authority to rule upon motions to dismiss complaints on the grounds of alleged lack of public interest. Such a motion is addressed to the administrative discretion of the Commission, and necessarily involves reference to policy considerations outside the authority and competence of hearing examiners performing essentially adjudicative functions. As the Supreme Court has held, "the Commission alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically." *Moog Industries v. Federal Trade Commission*, 355 U.S. 411, 413 (1958).

A parallel situation was presented to the Commission in the *Drug Research* case, *supra*, where the hearing examiner also dismissed the complaint on the ground that further proceedings would not be in the public interest. In vacating such action, the Commission stated [63 F.T.C. 1014-1015]:

Complaint counsel's motion to dismiss the complaint was addressed to the Commission in its administrative capacity, as the complainant in this proceeding, and not in its adjudicative capacity; no question going to the merits of the violations of law alleged in the complaint was raised by the motion. In considering such administrative matters as whether to issue a complaint, or, as here, whether to go on with further proceedings in a case that has already been commenced by issuance of a complaint, the Commission is required to take into account a broad range of considerations bearing upon the public interest. In order to discharge its responsibility to make the most effective possible allocation of its necessarily limited resources of funds and personnel, the Commission must consider—as a matter of administrative judgment and discretion—which of the various courses of action open to it should be followed.

Thus, the factors appropriate to the Commission's decision in such a matter are not within the authority and competence of the hearing examiner, whose duty it is, in such a case, to certify the motion to the Commission for its consideration and disposition rather than to act upon it himself. For, as stated in Section 8¹ of the Commission's Statement of Organization, "Hearing examiners are officials to whom the Commission, in accordance with law, delegates the initial performance of its *adjudicative fact-finding* functions to be exercised in conformity with Commission decisions and policy directives and with its rules of practice." (Emphasis added.) Disposition of a motion such as that filed

¹ Now Section 14.

by complaint counsel in this matter is not an "adjudicative fact-finding" function. Since the examiner had no authority to rule upon the motion, he should promptly have certified it to the Commission, pursuant to Section 3.6(a)² of the Commission's Rules of Practice.

It may be observed that the Commission's practice in this regard implies no disparagement of the important adjudicative functions performed by hearing examiners. "An examiner's cardinal function is to sit in a judicial capacity." (*Florida Citrus Mutual, supra* at p. 961.) It enhances the judicial role of hearing examiners to insulate them from such matters of policy and discretion as are involved in determining whether the public interest justifies issuance of, or continuation with, a complaint. We strengthen the judicial character of hearing examiners' determinations of fact and law on the record by relieving them from participation in determinations of broad administrative policy and discretion which cannot be closeted within the record of a single case.

Accordingly, following the precedents cited above, we must vacate the initial decision as *ultra vires* the hearing examiner. We shall instead treat respondents' motion to dismiss the complaint as if it had been properly certified to the Commission by the examiner.

It is clear that the issues of fact and law raised by the complaint in this case were not rendered moot by the subsequent enactment of the Civil Rights Act of 1968. The complaint here challenged the legality of certain newspaper advertisements under Section 5 of the Federal Trade Commission Act. The essence of the complaint was that respondents are engaged in the business of rental and management of described apartment complexes in Arlington, Virginia; that they published advertisements in interstate commerce which conveyed the impression that their apartments were available to the general public without restrictions as to race or color; that, in fact, these apartments were not available for rental to applicants who are Negro; and that, therefore, the advertisements were false, misleading, and deceptive.

If these allegations of the complaint were proved by the evidence adduced at the hearings, a violation of the Federal Trade Commission Act would have been established. Section 5 proscribes "any advertising matter whatsoever which creates a misleading impression in the mind of the ordinary purchaser * * * . [A]n advertisement may be deemed misleading even though the statements of fact it contains are not in and of themselves deceptive. The statutory ban applies to that which is suggested as well as that which is asserted." Handler,

² Now Section 3.22.

The Control of False Advertising Under the Wheeler-Lea Act, 6 Law & Contemp. Prob. 91, 102 (1939). An advertiser's failure to disclose material facts in circumstances where the effect of nondisclosure is to deceive a substantial segment of the public is as much deception as if it were accomplished through affirmative misrepresentations. "To tell less than the whole truth is a well known method of deception." *P. Lorillard Co. v. F.T.C.*, 186 F. 2d 52, 58 (4th Cir. 1950).

It is also clear that the enactment of the Civil Rights Act of 1968 does not render lawful any acts or practices which would otherwise be deemed unlawful under the Federal Trade Commission Act. Neither in its terms nor its legislative history does the Civil Rights Act disclose an intent by Congress to repeal or modify, in whole or in part, expressly or by implication, directly or indirectly, any provision of the Federal Trade Commission Act. Congress surely could not have intended, in passing the Civil Rights Act, to grant anyone a license to engage in false and misleading advertising that violates the Federal Trade Commission Act. Thus, if the facts presented before the hearing examiner showed a violation of the Federal Trade Commission Act, it would be immaterial that they might also show a violation of the Civil Rights Act of 1968. Conduct that violates one federal statute does not become immune because it also violates another statute.

Accordingly, it is not necessary for us to consider whether respondents' conduct violated, or was subject to the remedies or sanctions of, the Civil Rights Act of 1968. To the extent that compliance with the requirements of that Act may eliminate false and misleading advertising which violates the Federal Trade Commission Act, and thereby obviates the need for corrective action against such advertising under the statutes administered by this Commission, the enactment of the Civil Rights Act does bear significantly on the public interest which we must consider in developing "that enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically." *Moog Industries, supra*.

However, we reject any contention that enactment of the Civil Rights Act of 1968 constitutes a mandate by Congress to this Commission to cease and desist enforcement of the Federal Trade Commission Act in the area of false and misleading advertising of housing covered by the Civil Rights Act. In this connection, we have noted the following provision in the Fair Housing Title of that Act:

All executive departments and agencies shall administer their programs and activities relating to housing and urban development in a manner affirmatively to further the purposes of this title and shall cooperate with the Secretary [of

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Housing and Urban Development] to further such purposes. (Title VIII, Section 808(d), 82 Stat. 73, 84-85.)

In the context of these general considerations, we return to the question of the disposition of respondents' motion to dismiss. In their motion, the respondents specifically state that there is "no real possibility that the alleged restrictions as to race, color and national origin which respondents allegedly failed to reveal in advertising can be continued." The Commission interprets this statement as a positive, unqualified affirmation that respondents have discontinued, and will not resume, a policy of restricting the availability of their apartments on the basis of race, color, or national origin. Such a change of rental policy necessarily eliminates from their advertising the deception challenged in the complaint. At this time, therefore, it would appear that the allegedly illegal acts and practices have been effectively terminated and that an order to cease and desist would serve no useful purpose. If it should transpire, however, that we are mistaken in this regard, the matter can always be reopened if necessary.

In view of the unique circumstances presented, therefore, the Commission has determined that the initial decision should be vacated and the complaint dismissed.

ORDER VACATING INITIAL DECISION AND DISMISSING COMPLAINT

For the reasons stated in the accompanying opinion,

It is ordered, That the initial decision of the hearing examiner, filed April 24, 1968, be, and it hereby is, vacated, and that the complaint in this proceeding be, and it hereby is, dismissed.

IN THE MATTER OF

E. FOMIL & SONS ET AL.