

SKYLARK ORIGINALS, INC., ET AL.*

Docket 8771. Order, Sept. 25, 1970

Order vacating initial decision, and case remanded to hearing examiner for further proceedings.

ORDER VACATING INITIAL DECISION AND REMANDING PROCEEDING TO HEARING EXAMINER

The complaint in this proceeding, issued November 27, 1968, charged that respondents violated the Federal Trade Commission Act by engaging in false and misleading advertising of their ladies' clothing and wigs by advertising fictitious prices at which their products were claimed to have been sold; falsely advertising that they unconditionally guarantee the return of the purchaser's money on request; falsely advertising that their wigs were available in five styles and ten colors at reduced prices from a limited supply for a limited time; and falsely advertising that their merchandise would be delivered promptly.

On November 26, 1969, the hearing examiner certified to the Commission a motion by respondents requesting that an agreement containing a consent order be accepted. Complaint counsel had joined in respondents' motion and the hearing examiner recommended that it be approved. This motion was denied by the Commission on December 18, 1969 [76 F.T.C. 1091], and a subsequent motion for reconsideration also was denied.

Thereafter, counsel for respondents and counsel supporting the complaint submitted to the hearing examiner a stipulation of facts and an agreed order with the understanding that the facts were stipulated subject to the acceptance by the Commission of the agreed order. On the basis of this stipulation the examiner cancelled hearings which were scheduled to commence March 23, 1970, and entered his initial decision adopting the stipulated facts and the order agreed upon by counsel.

The Commission by order of June 1, 1970, placed this proceeding on its own docket for review to permit a determination of whether the changes in Paragraphs 3, 5, 6 and 9 of the order which accompanied the complaint, particularly the addition of the language "in good faith," was warranted by the facts and whether the revised paragraphs would effectively prevent a resumption of the practices they purported to cover. Pursuant to authorization in said order, counsel supporting the complaint and counsel for respondents have filed briefs on the above issue.

*Order to cease and desist issued by Commission, March 9, 1972, 80 F.T.C. 337.

Paragraphs 3, 5, 6 and 9 in the notice order would prohibit respondents from failing to make refunds within the time and in the amount represented, failing to perform all of the actual and represented obligations under the terms of their guarantee, advertising merchandise of stated features or characteristics unless such merchandise is on hand and available to fill orders, and failing to make timely delivery of merchandise. According to the briefs submitted by counsel, the words "in good faith" were added to each of these paragraphs for the purpose of affording respondents a defense in the event of a violation which might occur without their knowledge or beyond their control. Counsel contend that such an order would effectively prevent recurrence of the practices found to be unlawful. Counsel further contend (as did the hearing examiner) that the inclusion of the "good faith" provision in the above paragraphs is consistent with the use of the same provision in Paragraphs 1, 7 and 8 of the original order.

With respect to the latter contention, the words "in good faith" as used in Paragraphs 1, 7 and 8 of the notice order do not provide respondents with a defense for practices which would otherwise be proscribed. In fact, the exact opposite is true. The words "in good faith" as used in these three paragraphs have nothing to do with a "defense" or with violations "which might occur without respondents' knowledge or beyond their control." Rather than provide a defense, these words would impose additional restrictions on respondents.¹

Counsel are also in error in contending that an order which would permit respondents to make claims which may be false because of events or circumstances beyond respondents' control would be effective in preventing recurrence of the violations found by the hearing examiner. Respondents, having chosen to make representations about refunds, guarantees, availability and deliveries, must either perform as advertised or discontinue making these representations. The public is entitled to get what is advertised irrespective of respondents' good intentions or innocent motives. It should be emphasized that it is completely immaterial whether respondents' representations are made in good faith or bad faith. The purpose of the order is to protect the public from false and misleading claims and an order which would permit respondents to make such claims if they are "motivated by honest intentions" as complaint counsel suggests, would not accomplish that end.

For the foregoing reasons, the Commission has determined that the modification of Paragraphs 3, 5, 6 and 9 of the notice order is not

¹ In Paragraphs 1 and 7 these words would require respondents to use only a *bona fide* offer to sell as a basis for claiming that an offering price is a regular or former price. In Paragraph 8 respondents would be prohibited from representing that an offer is limited unless such limitation is actually imposed and "in good faith" adhered to.