

OPINION OF THE COMMISSION

This matter is before the Commission on respondent's application for review of an order by the administrative law judge granting complaint counsel's motion to strike portions of certain affirmative defenses from respondent's answer on the ground that

they were not relevant to the issues raised by the complaint. Counsel supporting the complaint have filed an answer in opposition to this application.

The matters stricken from respondent's answer are allegations concerning previous Commission investigation and litigation of charges against claims relating to the efficacy of Listerine Anti-septic. Respondent contends, *inter alia*, that:

24. In the circumstances, the present Complaint is an arbitrary and capricious abuse of the Commission's authority, a violation of the applicable statutes governing Commission proceedings and represents an unlawful attempt to relitigate matters against which the Commission is estopped from proceeding.

33. In the circumstances, the Commission's renewal in this Complaint of the same charges which were not sustained in previous proceedings before this same agency is contrary to the public interest and represents an harassment of respondent offensive to the standards of administrative fairness and substantial justice to which litigants before the Federal Trade Commission are entitled by statute and by constitutional right.

In his order permitting respondent to file an interlocutory appeal, the administrative law judge observed that "There can be little doubt but that these defenses would require lengthy discovery which probably would result in considerable delay as well as result in the introduction of irrelevant evidence at hearings."

The gist of respondent's argument, as we understand it, is that the issues raised by the complaint were decided by the Commission in favor of respondent's predecessor, *Lambert Pharmacal Co.*, in 1944 and that the Commission is barred forever by the doctrine of *res judicata* from again litigating those issues. In the 1944 case, *Lambert Pharmacal Co.* was charged with falsely representing, *inter alia*, that Listerine would cure dandruff and halitosis and that it would prevent colds and sore throat. A majority of the Commission held that there was insufficient proof in the record to sustain the charges and ordered that the complaint be dismissed "without prejudice to the right of the Commission to institute further proceedings should future facts so warrant."

The administrative law judge properly ruled on the basis of our decision *In the Matter of Manco Watch Strap Co., Inc., et al.*, 60 FTC 495, that in the circumstances shown to exist respondent's reliance on the defense of *res judicata* was misplaced. In *Manco*, after having dismissed for failure of proof a prior

complaint containing substantially similar allegations against the respondents in that matter, we held:

The principle of *res judicata*, properly applied, does not require dismissal of the present complaint. We are dealing here with new and different issues of fact and law. The complaint in the first *Manco* case involved acts and practices occurring prior to February 23, 1951; the present complaint covers the period from approximately January 1, 1957, to February 24, 1960. A failure of proof in the first proceeding does not establish a similar failure of proof in every subsequent proceeding based on like allegations.

The point is settled by the Supreme Court's decision in *Federal Trade Commission v. Raladam Co.*, 316 U.S. 149, which followed a prior decision between the same parties, 283 U.S. 643, denying enforcement of a Commission order because of "the inadequacy of the findings and proof, as revealed in the particular record * * *." 316 U.S., at 150-151. The Court stated that "these reasons are not controlling in this case, arising, as it does, out of different proceedings and presenting different facts and a different record for our consideration." *Id.*, at 151. Raladam's plea of *res judicata* was rejected as "without merit." *Id.*, at 152.

Like the second *Raladam* case, this is a new proceeding presenting a new record and new facts. The Commission's authority to take such action as may be proper on the record here is not impaired by the failure of proof found in the earlier record. Were it otherwise, factual deficiencies in a prior proceeding, for whatever reason, would forever bar any later complaint based on new or different facts. Congress deliberately rejected any such limitation on the Commission's power * * *.

In the matter presently before us, as in *Manco*, we are dealing with practices occurring years after the period covered by the previous complaint. Also, as pointed out in complaint counsel's answer, there are other significant differences between the two cases, including the fact that the complaint here is brought under Section 5, instead of Section 12, and challenges labeling claims whereas the prior case did not. *Cf. In the Matter of J. C. Martin Corporation*, 66 FTC 1, *aff'd*, 346 F.2d 147 (3rd Cir. 1965).

Moreover, as stated above, the 1944 case was dismissed without prejudice to the right of the Commission to institute further proceedings should future facts so warrant. In *Hastings Mfg. Co. v. Federal Trade Commission*, 153 F.2d 253 (6th Cir. 1946) the court held "Judicial, as well as quasi-judicial tribunals, do not lose jurisdiction of a cause by its dismissal with a proviso authorizing its reinstatement." The cases are legion where a dismissal without prejudice has been construed as a reservation of a right to reinstate the proceedings." Respondent argues,

however, that the complaint does not allege "future facts" within the meaning of the 1944 order. While the complaint does allege future facts, as indicated above, it is unnecessary that it do so. The future facts which would warrant a new proceeding are those upon which the Commission's decision to issue a complaint are based and, as we have previously held, respondent is precluded from inquiring into our mental processes leading up to that decision. *In the Matter of The Seeburg Corporation*, 70 FTC 1818.

Respondent also argues that the stricken affirmative defenses directly relate to the question of whether or not a violation of Section 5 has occurred, pointing out that in a recent case, *In the Matter of Pfizer Inc.*, Docket No. 8819, July 11, 1972 [81 F.T.C. 23], the Commission concluded that the making of an affirmative product claim in advertising is unfair to consumers unless there is a "reasonable basis" for making that claim. Consequently, respondent contends, a showing that the Commission has on several occasions examined the factual material on which respondent's claims were based and had taken no action with respect thereto would be relevant to the issue of whether respondent had a reasonable basis for making the claims. This argument is also rejected. The complaint in this case, unlike that in *Pfizer*, does not charge as a separate violation that respondent did not have a reasonable basis for its claims. It alleges that respondent's claims are false, misleading and deceptive. Whether or not respondent had a reasonable basis for making such claims is therefore totally irrelevant.

Also rejected is the argument that the stricken affirmative defenses are relevant to the issue of whether the order should contain a "corrective advertising" provision. A determination that corrective advertising is required would not under any circumstances turn on the presence or absence of respondent's good faith in making the claims, as suggested in respondent's application.

Respondent also contends that it has been foreclosed from raising issues relating to administrative fairness, *i.e.*, to argue that repeated Commission action challenging claims for Listerine amounts to harassment. It appears from the stricken portion of respondent's answer that in 1932 the Commission conducted, and later closed, an investigation of claims concerning the efficacy of Listerine in the treatment of colds and sore

throats. Subsequent to dismissal of the aforementioned complaint against respondent's predecessor in 1944, the Commission communicated with respondent on three occasions concerning its advertising of Listerine—in 1951 and 1962 it requested specimens of Listerine advertising and data supporting the claims therein and in 1957 it entered into a stipulation with respondent whereby the latter agreed to discontinue the use of certain claims concerning the efficacy of Listerine in preventing Asian Flu. We believe that the argument that these investigations over a 40 year period amount to harassment borders on the frivolous. It is therefore rejected.

For the foregoing reasons, we find no error in the ruling by the administrative law judge striking as irrelevant the aforementioned portions of respondent's answer. Respondent's appeal from this ruling will therefore be denied. An appropriate order will be entered.

ORDER DENYING INTERLOCUTORY APPEAL

The Commission having permitted respondent to appeal from the ruling by the administrative law judge on October 13, 1972, striking portions of respondent's answer as irrelevant to the issues raised by the complaint herein and having determined for the reasons stated in the accompanying opinion that the appeal should be denied:

Accordingly, *It is ordered*, That respondent's appeal from the aforesaid ruling of the administrative law judge be, and it hereby is, denied.

Commissioner MacIntyre dissenting.

IN THE MATTER OF ARA SERVICES, INC.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT AND THE FEDERAL TRADE COMMISSION ACT

Docket C-2360. Complaint, March 8, 1973—Decision, March 8, 1973.

Consent order requiring the nation's largest wholesaler of periodicals and paperback books, located in Philadelphia, Pennsylvania, among