

IN THE MATTER OF

THOMPSON MEDICAL COMPANY, INC., ET AL.

Docket 9149. Interlocutory Order, April 22, 1981

ORDER DENYING MOTION OF RESPONDENT THOMPSON MEDICAL
COMPANY, INC. TO RECONSIDER COMPLAINT

The administrative law judge has certified to the Commission a motion filed by respondent Thompson Medical Company, Inc. to reconsider the complaint issued by the Commission in this proceeding.¹ In support of its motion, respondent argues that the Food and Drug Administration (FDA) has the responsibility to determine drug efficacy, and that the FDA-appointed panel on topical analgesics will review the evidence on the efficacy of Aspercreme's active ingredient ("TEA"). Respondent contends that it is consequently not in the public interest for the FTC to conduct the above-captioned proceeding. For the reasons stated below, the Commission disagrees.

The Commission has authority under Sections 5 and 12 of the FTC Act, 15 U.S.C. 45 and 52, to challenge, *inter alia*, advertising claims which it has reason to believe are false or deceptive. While the statutory authority of the FDA and FTC overlap to some degree, under the Liaison Agreement between the two agencies there is in fact no duplication of function because the Commission exercises primary jurisdiction over nonprescription drug advertising and the FDA exercises primary jurisdiction over drug labeling. 36 Fed. Reg. 18539 (1971), 3 Trade Reg. Rep. (CCH) ¶9851 at 17,678.² Thus, while any relevant findings to emerge from FDA's OTC drug review—concerning, *e.g.*, the performance of "TEA"—can of course be given appropriate consideration by the ALJ and the Commission if made part of the record of the present proceeding, the Commission's responsibility to police allegedly false or deceptive OTC drug advertising is in no way diminished during the pendency of the

¹ The motion is captioned "Motion to Reconsider Complaint." Elsewhere in its filing, respondent frames its motion as a request "that the Commission withdraw those portions of the complaint which challenges the efficacy of Aspercreme as a topical analgesic ***" (Motion at 2), and as a request that "the Commission amend its complaint *** to remove the allegations challenging the advertising claims regarding the efficacy, and mode of action of the product Aspercreme" (Motion at 5). This Order constitutes a denial of the requested relief in all its forms.

² Moreover, the Supreme Court has long held that the same issues and parties may be proceeded against simultaneously by more than one agency. See, *e.g.*, *FTC v. Cement Institute*, 333 U.S. 683 (1948). See also *Warner-Lambert v. FTC*, 361 F. Supp. 948, 952 (D.D.C. 1973), in which the court applied this principle in disposing of precisely the same argument that respondent has presented here.

FDA's extensive process. See *Warner-Lambert Co. v. FTC*, 361 F. Supp. 948 (D.D.C. 1973).³

Respondent also argues that the Commission has unfairly "singled it out" and placed it at a disadvantage relative to other marketers of TEA-based products. As the complaint is based on advertising claims allegedly made by this respondent, however, it is appropriately focused solely on this respondent (along with the advertising agency respondent).⁴ Accordingly,

It is ordered, That the aforesaid motion be, and it hereby is, denied.

³ See also, e.g., Commission Response to Morton-Norwich's Motion to Quash Subpoena Duces Tecum, File No. 7923228 (May 14, 1980); Order of the Commission Denying Respondent American Home Products' Motion to Dismiss the Complaint or in the Alternative Suspend Proceeding, Docket No. 8918 (May 31, 1977).

⁴ In any event, it is well settled that the Commission may exercise its discretion to proceed against one company without taking action against similarly situated competitors. *FTC v. Universal Rundle Corp.*, 387 U.S. 244 (1967); *Moog Industries, Inc. v. FTC*, 355 U.S. 411 (1958).

IN THE MATTER OF

TEXORA INTERNATIONAL CORPORATION, ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC.
5 OF THE FEDERAL TRADE COMMISSION ACT AND THE WOOL
PRODUCTS LABELING ACT OF 1939

Docket C-2794. Decision, Feb. 23, 1976—Modifying Order, April 22, 1981

This order reopens the proceeding and modifies the Commission order issued on Feb. 23, 1976 (41 F.R. 11817, 87 F.T.C. 273), by deleting the first "IT IS FURTHER ORDERED" paragraph which required respondents to file a special performance bond with the Secretary of the Treasury and replacing it with one requiring respondents to provide for fiber content testing and relabeling of misbranded wool products.

ORDER MODIFYING CEASE AND DESIST ORDER

In their request filed on January 23, 1981, and their amended request filed on February 12, 1981, the respondents petitioned the Commission, pursuant to Section 2.51 of its Rules of Practice, to reopen the proceedings and modify the order of February 23, 1976, entered in Docket No. C-2794. Respondents ask that the first "*It is further ordered*" paragraph be deleted from the order and that a new paragraph be inserted in the order in lieu of that paragraph. The paragraph requested to be deleted from the order reads as follows:

It is further ordered, That respondents Texora International Corp., a corporation, its successors and assigns, and its officers, and Max Kovner, individually and as an officer of Texora International Corp., and respondents' representatives, agents, and employees, directly or through any corporation, subsidiary, division, or other device, do forthwith cease and desist from importing or participating in the importation of wool products into the United States except upon filing bond with the Secretary of the Treasury in a sum double the value of said wool products and any duty thereon, conditioned upon compliance with the provisions of the Wool Products Labeling Act of 1939.

The paragraph which respondents requested be inserted in the order to replace the paragraph deleted, as amended by their amended petition and further revised by agreement with staff reflected in their letters dated March 17, 1981, and March 24, 1981, is as follows:

It is further ordered, That respondents Texora International Corp., a corporation, its successors and assigns, and its officers, and Max Kovner, individually and as an officer of Texora International Corp., and respondents' representatives, agents and employees, directly or