

Interlocutory Order

IN THE MATTER OF
EASTMAN KODAK COMPANY*Docket 6040. Order and opinion, Sept. 25, 1953*

Before *Mr. J. Earl Cox*, hearing examiner.

Mr. Fletcher G. Cohn and *Mr. Lewis F. Depro* for the Commission.

Nixon, Hargrave, Devans & Dey, of Rochester, N. Y., and *Donovan, Leisure, Newton & Irvine*, of New York City, for respondent.

ORDER DISPOSING OF MOTION TO STRIKE AND RESPONDENT'S MOTION
TO DISMISS

This matter came before the Federal Trade Commission upon respondent's motion to dismiss the complaint herein and upon the motion of counsel supporting the complaint to strike respondent's motion to dismiss. Briefs in support of and in opposition to said motions have been filed and oral argument of counsel has been heard by the Commission.

Promptly after the issuance of the complaint herein respondent filed with the hearing examiner a motion to dismiss the complaint. This motion was denied by the hearing examiner on the ground that he did not have jurisdiction to hear the motion. Respondent then filed with the Commission a motion to dismiss the complaint. Counsel supporting the complaint thereupon filed a motion to strike said motion to dismiss as being improperly filed with the Commission.

Under the Commission's Rules of Practice, respondent properly filed its original motion to dismiss with the hearing examiner, who did have jurisdiction over the motion and who should have considered it. Respondent's remedy from the hearing examiner's ruling that he lacked jurisdiction over the motion was to seek an appeal therefrom under Rule XX of the Commission's Rules of Practice. Respondent's procedure of filing a new motion to dismiss directly with the Commission was improper and the motion of counsel supporting the complaint to strike this motion was procedurally correct.

However, the Commission is of the opinion that, inasmuch as respondent's motion to dismiss has been briefed and argued before it on the merits, it would be in furtherance of a prompt decision in this matter for the Commission to rule on the issues presented therein. The Commission, therefore, has considered the motion on its merits as if the motion were properly before it rather than remanding the matter to the hearing examiner for consideration of the motion.

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Under these circumstances the motion to strike respondent's motion to dismiss is denied.

Respondent's motion to dismiss is based on two separate and distinct grounds, namely:

It is ordered, That respondent's motion to dismiss the complaint be, and it hereby is, denied.

It is further ordered, That this proceeding be, and it hereby is, remanded to the hearing examiner herein for proceedings in regular course.

Commissioner Howrey dissenting insofar as this order holds that the complaint herein states a cause of action; Commissioner Mead not participating due to absence.

Chairman HOWREY, dissenting:

I feel compelled to dissent from that part of the order which holds that the complaint states a cause of action.

The complaint alleges that respondent, a manufacturer of photographic and optical products sold under the name of Kodak, enters into resale price maintenance contracts with independent retail stores which are, in some cases, in competition with respondent's own retail outlets, and that this course of conduct is unlawful under Section 5 of the Federal Trade Commission Act.

The charging paragraph, Paragraph Nine, reads as follows:

"The contracts and agreements entered into by respondent with its retail store customers, whereby it fixes and maintains the resale prices of many of its amateur photographic products, are illegal in that some of the said retail store customers are in competition with respondent's wholly owned and controlled retail stores in the sale of such products to the consuming public."

Nowhere in the complaint is it alleged, or even suggested, that respondent has entered into resale contracts for the purpose or with the effect of establishing an unlawful horizontal price-fixing arrangement, or, as a retailer, has combined or conspired with independent retailers to fix or maintain prices. Nothing is set forth with respect to the nature or degree of competition which is alleged to exist between respondent and independent retail stores. In brief, no elements of the charge are particularized except those stated above.

The McGuire Act (66 Stat. 631, 15 U. S. C. 45) established no new antitrust prohibitions. It served only to validate interstate sales of articles under vertical resale price contracts where such contracts are authorized by State law. Like the Miller-Tydings Amendment, which is similar for purposes of this case, the McGuire Act was merely an enabling measure. See 97 Cong. Rec. 13405. Congressman McGuire, the sponsor of the legislation which ultimately was passed

as the Federal Fair Trade Act, stated on the floor in support of H. R. 5767 that: "The McGuire bill adds no new powers to the Federal Trade Commission Act. It merely exempts from the Federal Trade Commission Act and the Antitrust Acts, so far as interstate commerce is concerned, that type of resale price maintenance contract which is permitted by the fair trade acts of 45 States."¹

Section 5 (a) (5) provides that horizontal arrangements are exempted from the immunizing effects of the Act. Such arrangements were and are prohibited by existing law and the processes of the Commission should be directed against them with vigor. But facts sufficient to show a violation of existing law are not alleged in the complaint before us. Compare *U. S. v. Frankfort Distillers, Inc., supra*; *U. S. v. Univis Lens Co., Inc., et al.*, 316 U. S. 241, 252.

The fact that respondent functions in a dual capacity—as a manufacturer and as a retailer—has not in the past been considered a violation of law.² The practice of manufacturers to market their products through their own outlets, while at the same time selling to independent retail stores, is a widespread marketing practice.³ Mere competition between some of these outlets and independent retail stores having resale price contracts with the manufacturer is certainly not determinative of illegality. If the contracts are truly vertical, no violation of the Federal Trade Commission Act is present. Neither the Miller-Tydings Amendment nor the McGuire Act were intended by the Congress to discriminate between integrated and nonintegrated manufacturing concerns in securing the benefits of resale price maintenance for themselves or their customers.⁴

"There is no indication in the Miller-Tydings Act itself [or the McGuire Act] or in its legislative history that Congress intended to

¹ 98 Cong. Rec. 4900-4901. To this same effect, see *U. S. v. Frankfort Distillers, Inc.*, 324 U. S. 293, 296.

² See my opinion on Count III in Docket No. 5897, In the Matter of *Doubleday and Co., Inc.*, decided September 25, 1953.

³ See Phillips, *Marketing by Manufacturers* (1946), p. 144 *et seq.*

⁴ Senator Humphrey, a leading proponent of the McGuire Act, explained on the floor of the Senate that the test of:

"whether a resale price maintenance contract is vertical is if the contract is between a seller and buyers who resell the original seller's product; whereas, the test of whether a resale price maintenance contract is horizontal is if it is between competing sellers between whom the relation of buyer and seller or reseller does not exist as to the product involved.

"It is important to keep this distinction in mind, because many producers of trade-marked items sell them to customers, retailers, and wholesalers alike.

"Under the bill, such firms may make resale price-maintenance contracts with both wholesalers and retailers because such contracts are vertical, that is, between sellers and buyers. While in one sense firms in this position function not only as producers but also as wholesalers and retailers, they may still lawfully make contracts with other wholesalers and retailers, when in making such contracts they act as producers of a trademarked or branded commodity, rather than as whole-

* * * alter established systems of distribution in order [for a manufacturer] to avail himself of the benefits of the act.”⁵

The complaint in this case does violence to the fundamental principle that legislation should be construed in the light of its basic purpose. The Congress has validated vertical resale price contracts and it is not the Commission's function to invalidate the use of such contracts by a large segment of the economy.

If it were alleged, for example, with sufficient particularity, that a bona fide relationship of buyer and seller did not exist between respondent and its retail store customers, or that the transactions between them involved something more than customary marketing transactions affecting successive stages of the marketing process, or that the contracts were not between parties at different levels of the distribution system, or that there was a purpose to suppress and restrain competition through an unlawful horizontal arrangement, then a cause of action might be stated.

As it stands, however, the complaint represents another one of those peripheral “test” cases of strained statutory interpretation, doubtful validity and unfortunate economic consequence.

salers and retailers entering into forbidden horizontal resale price-maintenance contracts with other wholesalers or other retailers.” 98 Cong. Rec. 8870.

See colloquy between Congressman Patman and Hale, Hearings on Minimum Resale Prices before a Subcommittee on the House Committee on Interstate Commerce, 82d Cong., 2d Sess., p. 13. A commentator has said: “All of the legislation is expressly made inapplicable to horizontal price-fixing contracts, but this provision has not been deemed to prohibit contracts between a retailer and a manufacturer with a retail outlet, or between a manufacturer and a manufacturing retailer.” Williams, *Resale Price Maintenance and Minimum Price Legislation* (1950), Institute on Antitrust Laws and Price Regulations, p. 141. See also Callman, *Unfair Competition and Trademarks*, Vol. 1, p. 377. Cf. Statement of Thurmond Arnold in *Final Report and Recommendations of the TNEC* (1941), p. 238.

⁵ *Sunbeam Corp. v. Payless Drug Stores*, 113 F. Supp. 31 (N. D. Calif. 1953).

Syllabus

IN THE MATTER OF
SCIENTIFIC LIVING, INC., ET AL.

DECISION IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT

Docket 6099. Complaint, May 21, 1953—Decision, Oct. 1, 1953

Where a corporation and its three officers, engaged in the interstate sale and distribution of certain food and drug preparations and a stainless steel cooking utensil designed for cooking food in steam or vapor below the boiling point; in advertising their said food and drug preparations through their own magazine and otherwise; directly and by implication—

- (a) Falsely represented that their "Adolphus Imported Peppermint Tea" sweetened the entire intestinal tract; that their "El Rancho Adolphus Clover Honey" was a cure for coughs and colds, and that their "El Rancho Adolphus Pure Apple Juice Concentrate" eliminated mucus and toxins present in the body;
- (b) Falsely and misleadingly represented not only that certain symptoms and conditions (such as nervousness, neuritis, fatigue, insomnia, constipation, dizziness, and vague aches and pains) for which they offered their "Adolphus B-Complex Tablets" as beneficial, might be due to certain vitamin deficiencies, but that there was a reasonable probability that they were due thereto and that the preparation would cure or relieve them, through such statements as that the tablets could benefit the person if such symptoms resulted from a deficiency of one or more of the B-complex vitamins they contained, coupled with the statement that such symptoms could occur in the event of a prolonged deficiency of Vitamin B₁, Vitamin B₂, and Niacin in amounts under the minimum daily requirements; and

Where said corporation's officers, for the purpose for inducing the sale of their said "Adolphus Tenderizer" cooking utensil, in statements in lectures on health and nutrition given in various localities by one of them, and in pamphlets, booklets, and other written material, including certain books, distributed or sold to members of the audience—

- (a) Represented falsely that the cooking of foods in utensils other than said "Tenderizer" resulted in damage, destruction, or loss of minerals and vitamins to the extent that the consumer of the food would not receive the minimum daily requirements thereof;
- (b) Falsely represented that their "Tenderizer" would retain minerals and vitamins of food cooked therein to a greater extent than utensils sold by any competitor;
- (c) Falsely represented that food cooked in their "Tenderizer" was more beneficial than that cooked in other utensils in that it provided more and better blood, more energy, better health, greater immunity to fatigue and disease, increased vitality, longevity, and virility; and was more beneficial to sufferers from constipation;
- (d) Falsely represented that the use of their "Tenderizer" in the preparation of food was of value in the treatment of cancer and tuberculosis; would prevent and cure neuralgia, neuritis, melancholia, gastric cancer, rheuma-