

Order

IN THE MATTER OF
ARGUS CAMERAS, INC.

Docket 6199. Complaint, Mar. 26, 1954—Decision, Oct. 20, 1954

Dismissal—on the ground that respondent voluntarily discontinued all the practices involved, that resumption thereof was unlikely, and that everything that could be accomplished by a desist order had already been accomplished—of complaint charging a manufacturer of photographic equipment at Ann Arbor, Mich., with violation of Sec. 2 (a) of the Clayton Act as amended through its practice of pricing its products on an annual-volume discount basis, and violation of Sec. 2 (d) of the same Act through granting two of its customers an extra 3% discount from list price on all purchases made from their mail order business as compensation for advertising the products in their nationally-distributed mail order catalogs.

Before *Mr. William L. Pack*, hearing examiner.
Mr. Peter J. Dias, and *Mr. Rice E. Schrimsher* for the Commission.
Rogers, Hoge & Hills, of New York City, for respondent.

ORDER DISMISSING COMPLAINT WITHOUT PREJUDICE

This matter coming on for the Commission's consideration of the question whether or not the respondent's showing of complete abandonment of the practices alleged in the complaint to have been unlawful warrants dismissal of said complaint without prejudice, which question was certified to the Commission by the hearing examiner under the provisions of Rule XIV (9) of the Commission's Rules of Practice; and

The Commission having considered the record thus far made, including the respondent's motion for dismissal and supporting material, and the answer in opposition to said motion filed by counsel in support of the complaint; and

The Commission having determined that said question should be answered in the affirmative and having set forth its reasons therefor in the accompanying written opinion:

It is ordered that the complaint in this proceeding be, and it hereby is, dismissed, without prejudice, however, to the right of the Commission to issue a new complaint or to take such further or other action against the respondent at any time in the future as may be warranted by the then existing circumstances.

Commissioner Mead dissenting.

OPINION OF THE COMMISSION

By Gwynne, Commissioner:

Complaint charges violation of Sections 2 (a) and (d) of the amended Clayton Act. Prior to the taking of testimony, respondent filed a motion supported by affidavits requesting the hearing examiner to dismiss the complaint or, in the alternative, to certify to the Commission for its determination the following question: Should the proceedings herein be terminated and the complaint herein be dismissed for lack of public interest? Grounds for its motion are that the respondent has fully and voluntarily abandoned the practices complained of and will not resume them. The motion was supported by two affidavits by W. J. Scholten, a vice president and director of respondent, who was responsible for its selling policies. On May 24, 1954, the hearing examiner certified the matter to the Commission.

The respondent is a manufacturer of photographic equipment which it sells to retailers. The complaint charges respondent in Count I with violation of Section 2 (a) of the Clayton Act in its practice of pricing on an annual volume discount basis as follows:

	<i>Percent</i>
Purchases less than \$600 per year.....	33⅓
Purchases from \$600 to \$99,999.....	40
Annual purchases of \$100,000.....	40 plus 7

Count II charges that respondent gave an extra 3% discount to two customers for advertising purposes which allowance was not made available to other customers.

Following the service of the complaint, respondent took steps to modify its practices and took additional steps when attention was called to the fact that the new pricing policy did not eliminate all the charges made in the complaint. It now appears that respondent has discontinued all the illegal practices charged in the complaint. The affidavits of Mr. Scholten are to the effect that the abandonment of such discounts has been made by respondent without intention of resuming them or any similar arbitrary discounts.

It is well settled that a discontinuance of the practices which the Commission found to constitute a violation of the law does not render the controversy moot. (*FTC v. Goodyear Tire & Rubber Company* (1938) 304 U. S. 257.) The fact that a respondent has discontinued an illegal practice even prior to the issuance of a complaint does not prevent the Commission from issuing a cease and desist order. "In such cases, the Commission must exercise its discretion in view of all the circumstances." (*Guarantee Veterinary Company v. FTC* (1922)

285 Fed. 853.) In *Eugene Dietzgen Company v. FTC* (1944) 142 F. 2d 321, the court said:

The propriety of the order to cease and desist, and the inclusion of a respondent therein, must depend on all the facts which include the attitude of respondent towards the proceedings, the sincerity of its practices and professions of desire to respect the law in the future and all other facts. Ordinarily the Commission should enter no order where none is necessary. This practice should include cases where the unfair practice has been discontinued.

On the other hand, parties who refused to discontinue the practice until proceedings are begun against them and proof of their wrongdoing obtained, occupy no position where they can demand a dismissal. The order to desist deals with the future, and we think it is somewhat a matter of sound discretion to be exercised wisely by the Commission—when it comes to entering its order.

The object of the proceeding is to *stop* the unfair practice. If the practice has been surely stopped and by the act of the party offending, the object of the proceedings having been attained, no order is necessary, nor should one be entered. If, however, the action of the wrongdoer does not insure a cessation of the practice in the future, the order to desist is appropriate. We are not satisfied that the Commission abused that discretion in the instant case.

In exercising its discretion, the Commission should examine not only the question of a discontinuance of all the illegal practices (as distinguished, for example, from the giving up only of certain specific acts (see *Hershey Chocolate Company v. FTC* (1941) 121 F. 2d 968), but it should also consider the likelihood of the practices being resumed in the future. Promises of a respondent as to its future course of action should be weighed in the light of attending circumstances. For example, in *Goshen Manufacturing Company v. Myers Manufacturing Company*, 242 U. S. 202, a suit based on infringement of a patent, it appeared that defendant had sold his factory before the suit was filed with no present intention of resuming manufacturing. Nevertheless, he was still attacking the validity of the patent so an injunction was held proper. In *Sears, Roebuck and Company v. FTC* (1919) 258 Fed. 307, respondent had discontinued the illegal practices before complaint issued and in its answer alleged it had no intention of resuming them. Nevertheless, it contended that its acts were not illegal because the law was unconstitutional. A cease and desist order was held proper. In *Perma-Maid Company v. FTC* (1941) 121 F. 2d 282, the record failed to show that the alleged attempts made by respondent to terminate the illegal practices were successful or were likely to be so in the future. Issuance of an order was therefore upheld. In *U. S. v. W. T. Grant Company* (1953) 345 U. S. 629, the court declined to grant an injunction to prevent future violation of Section 8 of the Clayton Act where defendants advised

the court that "the interlocks no longer existed and disclaimed any intention to revive them." The court said, at page 633;

"The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive. The chancellor's decision is based on all the circumstances; his discretion is necessarily broad and a strong showing of abuse must be made to reverse it. To be considered are the bona fides of the expressed intent to comply, the effectiveness of the discontinuance, and, in some cases, the character of the past violations."

In the matter of *Wildroot Company, Inc.*, (1953) Docket No. 5928, it appeared that the respondent had subscribed to the Trade Practice Conference Rules for the Cosmetic and Toilet Preparations Industry, which Rules adequately covered the practices complained of. There was also in the record a declaration under oath of respondent's vice president and general manager that the respondent had no intention of resuming the practices. The complaint was dismissed without prejudice.

As bearing upon the good faith of the respondent in the instant case and the likelihood of the resumption of the practices complained of, the record shows as follows.

At various times during 1947 and 1948, respondent was contacted by representatives of the Commission by telegram, letter and in person for information in regard to respondent's fair trade contracts and its discount practices. The requested information was furnished and said representatives were allowed unrestricted access to respondent's books. In 1949, respondent received a letter from the Commission, the material part of which follows:

"The Commission has reviewed the preliminary investigation made pursuant to an application for complaint alleging violation of Section 5 of the Federal Trade Commission Act through the alleged use of full line forcing and tie-in sales practices in connection with the sale of cameras and photographic equipment by Argus, Inc., proposed respondent in the above-numbered application.

"From the facts as disclosed by the preliminary investigation, the Commission does not contemplate at this time further proceedings in this matter. You are advised, however, that the Commission may, at any time, take such further action as the public interest may require."

In a similar manner in 1952, respondent was again contacted and information secured as to its discount structure and particularly as to its transactions with two customers.

A copy of the complaint was mailed April 1, 1954. On April 15, respondent wrote customers that certain discounting practices were being discontinued in order to comply with the direction of the Commission. Respondent says its intention was to abandon all the practices complained of by the Commission. At the hearing, when respondent's attention was called to the fact that all the practices complained of had not been abandoned, respondent agreed to give these up also and filed a second affidavit to that effect.

The record indicates that the respondent has at all times been cooperative; that prior to the service of the complaint, respondent was not specifically advised that its practices were correct nor was it told that they were irregular; that the course of dealing over the years was such as to justify respondent in the belief, prior to the issuance of the complaint, that no challenge was being made to its practices.

Dismissal of a complaint in cases of this general character is not the usual procedure. It should not be done unless there is a clear showing of unusual circumstances which in the interest of justice require it. Those circumstances exist in this case. Respondent has shown its good faith by both word and deed. That fact has an important bearing on the likelihood of the practices complained of not being resumed in the future.

We conclude (1) that respondent has voluntarily discontinued all the practices involved in the complaint, (2) that a resumption of these practices is not likely, and (3) that everything that could be accomplished by a cease and desist order has already been accomplished.

It is therefore ordered that the complaint be dismissed without prejudice.

Commissioner Mead dissents.

IN THE MATTER OF
GAMBLE-SKOGMO, INC., ET AL.

Docket 5575. Complaint, July 15, 1948—Decision, Oct. 28, 1954

Order of dismissal—following setting aside and remand by the Court of Appeals of the Commission's order to cease and desist, for the reason that the recommended decision was made by a substitute examiner who did not preside at the reception of evidence—of complaint charging a manufacturer and seller with violating section 3 of the Clayton Act and section 5 of the Federal Trade Commission Act through making sales of various merchandise to its 1600 retail dealer customers in many States on the condition that the purchasers not deal in similar goods of its competitors.

Before *Mr. Randolph Preston* and *Mr. Webster Ballinger*, hearing examiners.

Mr. William C. Kern, *Mr. William H. Smith* and *Mr. Andrew C. Goodhope* for the Commission.

Mr. W. P. Berghuis, of Minneapolis, Minn., for respondents

ORDER DISMISSING COMPLAINT WITHOUT PREJUDICE

Whereas, the United States Court of Appeals for the Eighth Circuit, by judgment entered on February 25, 1954, in the matter of Gamble-Skogmo, Inc., a corporation, et al., Petitioners, vs. Federal Trade Commission, No. 14657,¹ set aside the decision and order of the Commission issued in this proceeding on June 11, 1952,² and remanded the cause to the Commission for proceedings consistent with the Court's opinion; and

Whereas, the Court's opinion was based on the view that the recommended decision, in which credibility evaluation of witnesses on a personal basis was a salient factor, was made by a substitute hearing examiner who did not preside at the reception of the evidence, and that this constituted a violation of Section 5 (c) of the Administrative Procedure Act, 5 U. S. C. A. § 1004 (c);

It appearing that the examiner who presided at the reception of the evidence is unavailable to the Commission, and, hence, that the procedural deficiency which provided the basis for the Court's decision could be remedied only by a trial *de novo*, either in whole or in part; and

It further appearing that the allegations in the complaint as well as the evidence in the record relate to acts and practices occurring

¹ 211 F. 2d 106.

² 48 F. T. C. 1396.