

IN THE MATTER OF
REVLON PRODUCTS CORPORATION¹

Docket 5685. Complaint, Aug. 1, 1949—Order, Nov. 22, 1954

Order denying respondent's motion to reopen proceedings for new evidence that respondent's exclusive-dealing agreements did not stop a competitor from emerging as one of the leaders in the field, since even if this were proven, respondent's contracts still had the requisite likelihood of adversely affecting the power of smaller cosmetic companies to compete; and denying as not in the public interest respondent's alternative motion for reargument because of a change in membership of the Commission.

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

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

Blumberg, Singer, Heppen & Blumenthal, of New York City, and *Davies, Richberg, Tydings, Beebe & Landa*, of Washington, D. C., for respondent.

OPINION OF THE COMMISSION

By GWYNNE, Commissioner:

This opinion relates to respondent's motion to reopen this proceeding for the reception of further evidence or in the alternative to grant reargument before the Commission. It was filed after the Commission's decision denying respondent's appeal from the hearing examiner's decision holding that respondent had violated section 3 of the Clayton Act, but prior to receipt of the decision by respondent. By a supplementary memorandum filed after its receipt of the Commission's decision, respondent urges that its motion be granted to admit newly discovered and additional evidence relating to the effect of its exclusive dealing agreements on competition. Counsel supporting the complaint opposes this motion in its entirety.

Respondent's motion for reargument points out, among other considerations, that there has been a change in the membership of the Commission since the oral argument in this matter. It notes that Commissioners Howrey and Gwynne have succeeded Commissioners Carson and Spingarn and that Commissioner Carretta was being succeeded by Commissioner Secrest on September 27, 1954.

In fact, this matter was decided unanimously on September 23, 1954, by Commissioners Mason, Mead and Carretta, each of whom heard oral argument. Respondent's appeal from the initial decision

¹ Order to cease and desist, *supra*, p. 260.

and an earlier motion by respondent for reargument on substantially the same grounds were both denied in that decision.

Respondent now urges that the matter be reopened to allow it to present evidence as to the economic effect of respondent's exclusive dealing contracts. It points out that counsel supporting the complaint urged that evidence as to the effect of the exclusive dealing agreements should be limited to a showing of the substantiality of the volume of business done through the foreclosed outlets of distribution. However, this view did not prevail. Respondent was permitted to present fully evidence as to the lack of effect of its exclusive dealing agreements on competition. The record in this proceeding contains 2,224 pages of transcript of hearings. Of this, over 1,000 pages contain defensive matter presented by respondent. The Commission in reaching its decision considered the entire record and concluded that the greater weight of the evidence established that respondent's agreements had a substantial probability of lessening competition.

Where, as here, the parties have been given a full opportunity to present defensive evidence, it is not in the public interest to retry the same issues because of a change in membership of the Commission or because additional evidence, available at the time of trial, may be relevant. At some stage there must come an end to litigation if our regulatory processes are to be effective. Respondent's contention that evidence relating to conditions in 1949 and before is obsolete, is rejected as the complaint on which the proceeding is based alleged violation of the Clayton Act prior to the date of its issuance on August 1, 1949.

The request for reopening for presentation of newly discovered evidence presents a different question. The newly discovered evidence relates to the emergence of Hazel Bishop, Inc., as an important competitor, especially in the lipstick field, since the issuance of the complaint in this proceeding. Respondent claims that this company, with no sales in 1949, has risen to where its sales by the end of this year will total \$9,800,000 annually. It contends that this company's ability to grow to this extent establishes that respondent's exclusive dealing agreements with beauty supply jobbers, in fact, did not and do not foreclose its competitors from the market.

As an order to cease and desist is of a continuing nature, an absolute prohibition against use of exclusive dealing agreements entitles respondent to move to modify it if in fact conditions have so changed that the exclusive dealing agreements no longer have the requisite likelihood of adverse effect on competition. Thus, the question before the Commission is: Accepting the findings of fact and decision that

respondent violated section 3 of the Clayton Act prior to August 1, 1949, as alleged, would prove that Hazel Bishop, Inc., has been able to emerge as a leading competitor in the face of respondent's exclusive dealing agreements establish that these agreements do not have the requisite likelihood of adversely affecting competition at the present time? If not, there is no necessity for reopening this proceeding.

In support of its motion, respondent has filed an affidavit of one of its attorneys as to the facts it could prove if this proceeding were reopened. For the purposes of this decision, the Commission has considered the facts stated in the affidavit as if they were proven. It states that Hazel Bishop, Inc., since 1949 has risen to be a leading competitor in the lipstick field, that it is making heavy inroads in the beauty parlor field in the sale of lipsticks, that it entered the nail enamel field in 1953, and that it is making similar inroads in the beauty parlor fields in the sale of nail enamel. It further shows that Hazel Bishop, Inc., has spent millions of dollars annually in the advertising of its products and has a complete jobbing setup from coast to coast.

From these facts, it is clear that respondent's exclusive dealing agreements did not have the power to stop Hazel Bishop, Inc., from emerging as one of the leaders in the lipstick field and from making inroads into the nail enamel field. However, this is far different from finding that these exclusive dealing agreements with respondent's beauty supply jobbers do not have a substantial restrictive effect on smaller competitors who do not have sufficient resources to spend millions for advertising or to establish a complete jobber setup for their products from coast to coast. The Clayton Act is concerned with helping small business. The fact that a company with a large advertising budget and an equally strong jobber organization is not foreclosed from the market, does not remove the fact that smaller companies are denied access to a substantial part of the beauty supply jobber market by respondent's agreements. As to the smaller cosmetic companies, respondent's exclusive dealing contracts still have the requisite likelihood of adversely and substantially affecting their power to compete.

For these reasons, the Commission is of the opinion that respondent's newly discovered evidence, if established, would not justify a retrial or a modification of the order to cease and desist. The motion, therefore, is denied.

ORDER DENYING RESPONDENT'S MOTION TO REOPEN PROCEEDING OR FOR
REARGUMENT

This matter having come before the Commission upon respondent's alternative motion for reopening of proceedings for reception of further evidence or for reargument before the Commission on respondent's appeal from the initial decision, the answer of counsel supporting the complaint opposing said motion, and respondent's memorandum and affidavit in support of said motion; and

The Commission having fully considered the matter and, for the reasons stated in the written opinion of the Commission issued simultaneously herewith, being of the opinion that said motion should be denied;

It is ordered, That said motion is hereby denied.

IN THE MATTER OF

WILLIAM R. PEARSALL, FRANCIS COLUCCI AND AARON
SILVERMAN DOING BUSINESS AS BOND SEWING
STORESORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT*Docket 6112. Complaint, May 5, 1954¹—Decision, Nov. 23, 1954*

Order requiring a concern engaged in selling domestic and imported sewing machines from its principal office in New York City and branches in New Jersey, Pennsylvania, Maryland, Georgia, and Florida, to cease branding sewing machines made in Japan or machines of which Japanese heads were a part with the legend "Made in U. S. A." and American names and selling them with no disclosure of their foreign origin; advertising as "bait", machines never intended to be sold at the prices published, for the purpose of obtaining leads to prospects; advertising false guarantees of parts actually unobtainable; and misrepresenting the ease of operation of advertised machines.

Before *Mr. Frank Hier*, hearing examiner.

Mr. Michael J. Vitale for the Commission.

Mr. Eugene W. DuFlocq, of New York City, for respondents.

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

On July 27, 1953, the Commission, pursuant to the provisions of the Federal Trade Commission Act, issued and subsequently served its complaint in this processing upon the respondents herein, charging them with the use of unfair methods of competition and unfair and deceptive acts and practices in commerce in violation of the provisions of said Act. There are two charges in the complaint: (1) that respondents have sold to the purchasing public sewing machines, the heads of which are manufactured in and imported from Japan, and that these sewing machine heads have been inadequately marked with the result that purchasers thereof have been deceived into believing that the machines were of domestic manufacture; and (2) that respondents by extensive advertising of very low priced sewing machines have secured the names and addresses of customers interested in the purchase of sewing machines, but that respondents, on demonstration of the advertised machines, have made no real

¹ As amended.