

IN THE MATTER OF
UNITED CIGAR-WHELAN STORES CORPORATION ET AL.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT

Docket 6525. Complaint, Mar. 6, 1956—Decision, July 31, 1956

Consent order requiring a corporate operator of a chain of some 1,350 retail drug stores and tobacco shops throughout the United States, together with its wholly owned advertising agency, to cease violating Sec. 5 of the Federal Trade Commission Act through "knowingly inducing or receiving" any payment from a supplier for television or radio programs they sponsored or which advertised or promoted their products when the supplier did not make such payment available on proportionally equal terms to all their competitors.

Mr. Donald R. Moore for the Commission.

Aranow, Brodsky, Bohlinger, Einhorn & Dann, of New York City, for respondents.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The respondents in this proceeding are alleged to have engaged in unfair methods of competition and unfair acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act. The complaint sets forth that respondent United Cigar-Whelan Stores Corporation (United-Whelan) operates a large chain of retail drug stores and tobacco shops, reselling to the consuming public drug, cosmetic and other products which it purchases from manufacturers, processors and handlers; and that respondent Product Advertising Corporation (PAC) is an advertising agency and a wholly-owned subsidiary of United-Whelan. Specifically, the complaint alleges that United-Whelan, directly or through PAC, has knowingly induced or received from many of its suppliers, as compensation for advertising their products through PAC on television programs, money or other things of value, or contracts for the payment thereof, such or similar payments not being made available by such suppliers on proportionally equal terms to all their other customers competing with United-Whelan in the sale and distribution of such products.

By answer the respondents denied the charges contained in the complaint, but thereafter respondents, their counsel, and counsel supporting the complaint entered into an Agreement Containing Consent Order To Cease And Desist, which was approved by the Director and Assistant Director, Bureau of Litigation of the Com-

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mission, and thereafter transmitted to the Hearing Examiner for consideration.

The agreement identifies respondent United Cigar-Whelan Stores Corporation as a corporation existing and doing business under and by virtue of the laws of the State of Delaware, and respondent Product Advertising Corporation, an advertising agency wholly owned by United-Whelan, as a corporation existing and doing business under and by virtue of the laws of the State of New York, both respondents having their office and principal place of business located at 82 39th Street, Brooklyn, New York.

The agreement provides, among other things, that respondents admit all the jurisdictional facts alleged in the complaint and agree that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations; that respondents' answer to the complaint shall be considered as having been withdrawn, and that the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement; that the agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission; that the complaint may be used in construing the terms of the order agreed upon, which may be altered, modified or set aside in the manner provided for other orders; that the agreement is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint; and that the order set forth in the agreement and hereinafter included in this decision shall have the same force and effect as if entered after a full hearing.

Respondents waive any further procedural steps before the Hearing Examiner and the Commission, the making of findings of fact or conclusions of law, and all of the rights they may have to challenge or contest the validity of the order to cease and desist entered in accordance with this agreement.

The order agreed upon fully disposes of all the issues raised in the complaint as to both respondents, and adequately prohibits the acts and practices charged therein as being in violation of Section 5 of the Federal Trade Commission Act. Accordingly, the Hearing Examiner finds this proceeding to be in the public interest and accepts the Agreement Containing Consent Order To Cease And Desist as part of the record upon which this decision is based. Therefore,

It is ordered, That respondent United Cigar-Whelan Stores Corporation, a corporation, and respondent Product Advertising Cor-

poration, a corporation, and their respective officers, employees, agents and representatives, directly or through any corporate or other device, in or in connection with the purchase in commerce (as "commerce" is defined in the Federal Trade Commission Act) of drug, cosmetic, or tobacco products or other merchandise, do forthwith cease and desist from:

Knowingly inducing or receiving, or contracting for the receipt of, any payment or other consideration from any supplier of United Cigar-Whelan Stores Corporation for or in connection with television or radio programs which are sponsored by United Cigar-Whelan Stores Corporation or which advertise or promote United Cigar-Whelan Stores Corporation, when such payment or other consideration is not affirmatively offered or otherwise made available by such supplier on proportionally equal terms to all other customers competing with United Cigar-Whelan Stores Corporation in the sale and distribution of the supplier's products;

Provided, however, That this order shall not be construed to prohibit respondent Product Advertising Corporation from selling to other persons, corporations or firms, including suppliers of United Cigar-Whelan Stores Corporation, advertising time on television or radio programs which are not sponsored by respondent United Cigar-Whelan Stores Corporation and which do not advertise or promote United Cigar-Whelan Stores Corporation.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 31st day of July, 1956, become the decision of the Commission; and, accordingly:

It is ordered, That respondents United Cigar-Whelan Stores Corporation, a corporation; and Product Advertising Corporation, a corporation, shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist.

Commissioner Anderson not participating.

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IN THE MATTER OF
SERUTAN COMPANYORDER OF DISMISSAL IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2(D)
OF THE CLAYTON ACT

Docket 6522. Complaint, Mar. 5, 1956—Decision, Aug. 1, 1956

Order dismissing—for defect in party respondent due to corporate transfers, mergers, and changes of name—complaint charging violation of Sec. 2(d) of the Clayton Act in the sale of “Serutan” medicinal preparation and a dieting aid designated “R.D.X.” by such practices as payment of substantial sums of money to United Cigar-Whelan Stores Corp. for services and facilities furnished by the latter in the form of advertising of Serutan products on television programs it sponsored.

Mr. Donald R. Moore for the Commission.

Covington & Burling, of Washington, D.C., for respondent.

INITIAL DECISION AND ORDER GRANTING RESPONDENT’S MOTION
TO DISMISS COMPLAINT BY J. EARL COX, HEARING EXAMINER

The complaint in this proceeding, charging violation of Section 2(d) of the Clayton Act, was served by registered mail March 13, 1956, upon Serutan Company, a New Jersey corporation, at its place of business, 290 Jelliff Avenue, Newark, New Jersey. Thereafter, on May 4, 1956, a motion was filed by Serutan Company, asking dismissal of the complaint on the ground that said company is not now and never has been engaged in the manufacture and sale of Serutan or RDX, the products with respect to which the acts and practices set forth in the complaint are alleged to be unlawful. (Two Serutan Companies being involved, the terms “old” and “new” will be used hereinafter to distinguish them.) Respondent’s motion is supported by affidavit signed by Henry E. Schultz, general counsel of Pharmaceuticals, Inc., a New Jersey corporation formerly known as Serutan Company (the “old” Serutan Company), and organizer of the “new” Serutan Company, he being familiar with all the facts and circumstances referred to in the motion.

On June 18, 1956, counsel supporting the complaint filed an answer to this motion, joining in the request for dismissal. Attached to this answer is a copy of a letter dated June 11, 1956, addressed by one of counsel for respondent to counsel supporting the complaint, which sets forth in more detail than is disclosed in the Schultz affidavit the facts upon which respondent’s motion is based, and upon the basis of which counsel supporting the complaint joins in the motion for dismissal.