

Decision

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.

Briefly, the relevant facts are as follows:

The corporate name of the "old" Serutan Company, originally organized in January, 1935, was changed to Pharmaceuticals, Inc., by resolution of its Board of Directors on February 24, 1956; approved by its stockholders on March 5, 1956; and confirmed by a certificate filed with the Secretary of State of New Jersey on March 9, 1956. Prior to this change of name, but some time after November 1, 1955, the "old" Serutan Company had ceased to be the manufacturer of Serutan, which function has since been performed by an interrelated corporation, Lifetime Living, Inc., organized under the laws of New York, and producer also of RDX, the other product involved in this proceeding.

The "old" Serutan Company, under its new name, Pharmaceuticals, Inc., "to the exclusion of Lifetime Living, Inc., is engaged in the distributing, advertising, and merchandising functions for all products" [referred to in the complaint] "(including the activity with respect to cooperative advertising)."

Contemporaneously with the change of name of the "old" Serutan Company, a "new" Serutan Company was organized. Its certificate of incorporation was executed March 6, 1956, and filed March 9, 1956. As of the date of filing of respondent's motion, no corporate officers had been elected by the "new" Serutan Company, which was not and had not been engaged in the manufacture and sale of Serutan or RDX, nor in any of the activities alleged in the complaint. Upon this "new" company, the complaint in this proceeding was served. Clearly there is a defect in party respondent, and the complaint should be dismissed as requested. The dismissal should be without prejudice to the right of the Commission to issue a new complaint against the proper party or parties.

The action should be of dismissal rather than of substitution of parties because the foregoing constitutes only an abbreviated summary of events that have transpired affecting matters at issue. Involved also in corporate transfers, mergers and changes of name, which may need to be explored before a proper conclusion can be reached as to proper parties respondent in any future proceeding that may be instituted relating to the acts and practices complained of in the instant matter, were Lo-Calory Food Corporation, of New York, once the producer of RDX and a wholly-owned subsidiary of the "old" Serutan Company; Nutrex Company, Inc., also a New York corporation and an "old" Serutan Company subsidiary; Journal of Living Publishing Corporation, of New York, another "old" Serutan Company subsidiary; and a New York corporation called Pharmaceuticals, Inc. The simple expediency of substitution of parties will not solve the riddle.

Respondent requests, alternatively, that its motion for dismissal be certified by the Hearing Examiner to the "full Commission." This alternate request is denied because, counsel for respondent and counsel supporting the complaint having joined in the request for dismissal, the matter appears to be clearly within the jurisdiction of the Hearing Examiner, and such certification would be placing upon the Commission an unnecessary burden.

Respondent also urges, irrespective of the manner in which the question of dismissal is disposed of, that in the public interest the Hearing Examiner certify to the Commission the matter as to "whether the Commission should suspend all further action with respect to preparation and issuance of a new complaint * * *." Such a certification by the Hearing Examiner would be clearly inappropriate and improper. This proceeding being dismissed without prejudice, the matter of further action rests entirely with the Commission without comment or suggestion by the Hearing Examiner. This request of respondent is therefore denied. Accordingly,

It is ordered, That the complaint herein be, and the same hereby is, dismissed without prejudice to the right of the Commission to institute such further proceedings as the facts and circumstances may warrant.

It is further ordered, That in all other respects, respondent's motion be, and it hereby is, denied.

DECISION OF THE COMMISSION

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 1st day of August, 1956, become the decision of the Commission.

IN THE MATTER OF
PREMIER KNITTING COMPANY, INC., ET AL.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION AND THE WOOL PRODUCTS LABELING ACTS

Docket 6506. Complaint, Feb. 14, 1956—Decision, Aug. 2, 1956

Consent order requiring distributors in New York City to cease violating the Wool Products Labeling Act by labeling as "Pure Cashmere" and "Pure Imported Cashmere" ladies' sweaters which were a blend of hair from the Cashmere goat and sheep's wool; by failing to label certain of the sweaters with the name or registration number of the manufacturer, etc.; and by removing stamps, tags, etc., containing information required by the Act.

Mr. Floyd O. Collins for the Commission.

Rothstein & Korzenik, of New York City, for respondents.

INITIAL DECISION BY JOHN LEWIS, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above-named respondents on February 14, 1956, charging them with having violated the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, and the Federal Trade Commission Act, through the misbranding of certain wool products. After being served with said complaint, respondents appeared by counsel and filed their answer thereto. Thereafter they entered into an agreement containing consent order to cease and desist, dated May 21, 1956, purporting to dispose of all of this proceeding as to all parties. Said agreement, which has been signed by both respondents and by counsel supporting the complaint, and approved by the Director and Assistant Director of the Commission's Bureau of Litigation, has been submitted to the above-named hearing examiner for his consideration, in accordance with Section 3.25 of the Commission's Rules of Practice and Procedure.

Respondents, pursuant to the aforesaid agreement, have agreed to withdraw their answer, have admitted all the jurisdictional facts alleged in the complaint, and have agreed that the record may be taken as if findings of jurisdictional facts had been made in accordance with such allegations. Said agreement further provides that 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 into in accordance with said agreement. It has also been agreed that the order to cease and desist issued in accordance with