

Decision

IN THE MATTER OF

STEPHEN M. ROTH AND FRED D. RUDIN TRADING AS
RUDIN & ROTH; JAMEE KNIT HOSIERY MILLS, INC.;
SUPERBILT HOSIERY MILLS, INC., ET AL.

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

Docket 6419. Complaint, Sept. 21, 1955—Decision, Sept. 5, 1956

Order requiring New York City distributors of men's hosiery to wholesalers and jobbers, supermarkets and supermarket chains to cease preticketing their hosiery with fictitious and exaggerated prices and thereby placing in the hands of retailers means for deceiving the purchasing public as to the customary retail prices; and to cease representing falsely, through use of the word "Mills" in their corporate names and otherwise, that they manufactured the hosiery they sold.

Edward F. Downs, Esq., counsel supporting the complaint.

Dickler & Halbert, by *George H. Halbert, Esq.*, of New York City, for respondents.

INITIAL DECISION BY ROBERT L. PIPER, HEARING EXAMINER

STATEMENT OF THE CASE

On September 21, 1955, the Federal Trade Commission issued its complaint against Jamee Knit Hosiery Mills, Inc. (hereinafter called Jamee), Superbilt Hosiery Mills, Inc. (hereinafter called Superbilt), and Stephen M. Roth and Fred D. Rudin, individually, as officers of said corporations, and as copartners trading under the firm name and style of Rudin & Roth (all hereinafter collectively referred to as respondents), charging them with the use of unfair methods of competition and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act (hereinafter called the Act), 15 U.S.C. 41, *et seq.* Copies of said complaint together with a notice of hearing were duly served upon respondents.

The complaint alleges in substance (1) that Messrs. Rudin and Roth, individually and as copartners, by attaching price labels to their hosiery products, falsely represented that such prices were the regular and usual retail prices for said hosiery when in fact they were not, thereby placing in the hands of retailers a means and instrumentality for deceiving and misleading the public; and (2) that Jamee and Superbilt, through the use of the word "mills" as part of their corporate names, falsely represented that they owned or

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operated mills or factories in which their hosiery was manufactured when in fact they did not. Respondents appeared by counsel and filed a joint answer admitting the corporate, partnership, commerce and competition allegations of the complaint, and the attaching of price labels to their hosiery thereby representing such prices to be the usual and regular retail prices, but denying all alleged violations of the Act.

Pursuant to notice, hearings were thereafter held on January 11 and March 15, 1956, in New York City before the undersigned hearing examiner, duly designated by the Commission to hear this proceeding. All parties were represented by counsel, participated in the hearings, and afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence pertinent to the issues, to argue orally upon the record, and to file proposed findings of fact, conclusions of law, and orders, together with reasons therefor. At the conclusion of the case-in-chief, counsel for respondents made several separate motions to dismiss the complaint for want of proof which were denied.

During the initial hearing, counsel supporting the complaint objected to the introduction of any evidence concerning the "value" of respondents' products, upon the ground that value was not relevant to the issues in the case. After reserving ruling on this objection and consideration thereof, prior to the second hearing an order was issued sustaining the objection on the ground that, since the only issue was whether or not respondents' prices attached to their products were the usual and regular *prices* of such products, the value of such products was irrelevant. At the close of the case-in-chief, respondents made an offer of proof concerning the value of their products, which offer was rejected, and thereafter rested without offering any further evidence in refutation of the case-in-chief. All parties waived oral argument and, pursuant to leave granted, thereafter filed proposed findings of fact, conclusions of law, and orders, together with reasons in support thereof. All such findings of fact and conclusions of law proposed by the parties respectively, not hereinafter specifically found or concluded, are herewith specifically rejected.¹

Upon the entire record in the case and from his observation of the witnesses, the undersigned makes the following:

FINDINGS OF FACT

I. The Business of Respondents

The complaint alleged, respondents admitted, and it is found that Messrs. Rudin and Roth are copartners trading under the firm name

¹ 5 U.S.C. §1007(b).

and style of Rudin & Roth and Jamee and Superbilt are corporations organized, existing and doing business under and by virtue of the laws of the State of New York, all with their offices and principal places of business at 45 W. 34th Street, New York City. Respondent Roth is president and respondent Rudin is secretary and vice president of both corporations. The aforesaid individual respondents formulate and direct the policies, acts and practices of said corporations, which are engaged in the sale and distribution of men's hosiery.

II. Interstate Commerce and Competition

The complaint alleged, respondents admitted, and it is found that they are now and have been for several years last past engaged in the sale and distribution of men's hosiery. Respondents admitted that Rudin & Roth sell their hosiery to wholesalers and retailers, that Jamee sells its hosiery to supermarkets, wholesalers and jobbers, and that Superbilt sells its hosiery to super markets and super market chains. In the course and conduct of their business, respondents now cause and for the past several years have caused said product, when sold, to be transported from their place of business in the State of New York, or from the usual place of manufacture thereof, namely, the State of North Carolina, to the purchasers thereof located in various other states of the United States and in the District of Columbia. Respondents maintain and at all times mentioned herein have maintained a substantial course of trade in said hosiery, in commerce, among and between the various states of the United States and the District of Columbia. In the course and conduct of their business, respondents are in substantial competition in commerce with other corporations, firms and individuals likewise engaged in the sale and distribution of hosiery.

III. The Unlawful Practices

A. *The Issues Framed*

The two principal issues in this case are whether respondents Rudin and Roth falsely represented the usual and regular retail prices of their products by attaching to them price tickets in specific amounts, and whether respondents Jamee and Superbilt falsely represented that they owned or operated mills or factories in which the hosiery sold by them was manufactured, by the use of the word "mills" as part of their corporate names. Subsidiary issues flowing therefrom are whether, by such actions, respondents placed in the hands of retailers a means and instrumentality for deceiving purchasers, and whether such representations tended to mislead dealers, retailers and the public into the purchase of such products, thereby

causing injury to the public, diverting trade to respondents from competitors, and injuring competition.

B. The False Representations

1. The Fictitious Pricing

The undisputed facts establish that respondents' representations concerning the usual and regular retail prices of their hosiery were false. Respondents in their answer admitted that Rudin & Roth attached price tickets to their hosiery, thereby representing such prices as the regular and usual retail prices. In addition, respondents called no witnesses and, other than an offer of proof as to the value of such hosiery, offered no evidence in refutation of the chief-in-case. As a result, all of the testimony of the witnesses called by counsel supporting the complaint stands undisputed. In addition to the admission in the answer, Mr. Roth also testified that Rudin & Roth preticketed some of their hosiery with specific price labels.

The record establishes that the prices attached to the hosiery sold by Rudin & Roth were not the usual and regular retail prices but were substantially in excess thereof. It was undisputed that the price labels attached to the hosiery were 55¢, 75¢, and \$1.00 respectively. Mr. Roth testified that the retail markup in the trade ranged from 33 $\frac{1}{3}$ % to 45%. He further said that respondents' wholesale price for a pair of the 55¢ hosiery ranged from 21¢ to 25¢, for the 75¢ hosiery from 29¢ to 35¢, and for the \$1.00 hosiery from 33¢ to 46¢. It is apparent that such wholesale prices would require a markup far in excess of 45% to reach the ticketed price. In fact, the lower wholesale price of the \$1.00 hosiery would require a markup in excess of 200% to reach the labeled price. In addition to Mr. Roth's testimony, three retail dealers called by counsel supporting the complaint testified that they always sold the Rudin & Roth hosiery at prices substantially below the labeled price.

It must now be considered well settled that such "fictitious pricing" constitutes an unfair and deceptive practice and an unfair method of competition. As the Commission recently said: "fictitious pricing is a practice which the Commission and the courts have repeatedly held to be unfair and in violation of the Federal Trade Commission Act."²

Respondents argued that there should not be a finding of violation with respect to their fictitious pricing because only a small amount of the hosiery distributed by Rudin & Roth was preticketed. Under cross examination by his counsel, Mr. Roth testified that less than

²*The Orloff Company, Inc.*, Docket No. 6184 (1956), and cases cited therein.

10% of all of the hosiery sold by all of the respondents was preticketed with the 55¢, 75¢, and \$1.00 labels. However, this included the hosiery sold by Jamee and Superbilt, concerning which there was no allegation of preticketing with fictitious prices. Obviously the percentage computed would be higher if limited to the hosiery sold only by Rudin & Roth. In addition, the three retail buyers called by counsel supporting the complaint testified that almost all of the hosiery which they purchased from Rudin & Roth was preticketed with price labels, which tends to controvert the testimony of Mr. Roth. In any event, a defense that respondents were violating the law only part of the time is not persuasive. The record contains sufficient evidence to establish the public's interest and injury.

2. The Representation Through the Use of the Word "Mills"

There was no dispute that Jamee and Superbilt used the word "Mills" as part of their corporate names. The complaint alleged that by the use of such a name, Jamee and Superbilt represented that they owned or operated mills or factories in which their hosiery was manufactured. Mr. Roth admitted that neither Jamee nor Superbilt owned or operated any mills or factories. However, he testified that respondents from time to time advanced funds to certain mills, apparently secured by liens upon machinery and other collateral. It is, of course, well settled by numerous decisions of the Commission and the courts that the use of the word "mills" and other similar descriptive words in a corporate name constitutes a representation that the user owns and operates mills or factories.³

Respondents' contention that the representation that they owned or operated a mill or factory was not false because of the fact that occasionally they loaned money to certain of their supplier mills is without merit. A similar contention based upon stronger facts was made in the *Herzfeld* case and found to be without merit.⁴ Even though the record in that case established that the respondents therein had in the past controlled mills in Europe which manufactured exclusively for them according to their designs and orders, presently controlled a mill in the United States, purchased all of its raw materials, made all determinations with respect to the nature of the product, which was manufactured exclusively for them, had a mortgage on much of the property of the mill, leased the premises on which it was situated, and owned a majority of the shares of a company found to be identical with the mill, nevertheless the Com-

³*F.T.C. v. Royal Milling Co.*, 288 U.S. 212 (1933); *F.T.C. v. Mid West Mills, Inc.*, 90 F. 2d 723 (C.A. 7, 1937); *Bear Mill Mfg. Co. v. F.T.C.*, 98 F. 2d 67 (C.A. 2, 1938); and *Herzfeld v. F.T.C.*, 140 F. 2d 207 (C.A. 2, 1944).

⁴Footnote 3, *supra*.

mission forbade the use of the word "mills" as a misrepresentation and the Court affirmed the Commission's order.

C. *Respondents' Contentions and Defense*

In addition to respondents' formal denial of all alleged violations of the Act, respondents further contend that: (1) the hosiery distributed by Rudin & Roth had a value comparable to other hosiery labelled and actually sold at the same prices as respondents' labels and hence purchasers were not misled or injured; (2) they had no control over the prices at which their retailers sold the hosiery; (3) there is no proof in the record that trade was diverted from their competitors or that competition was substantially injured; and (4) there is no proof in the record that there is a preference on the part of many purchasers to buy directly from factories or mills believing that costs and other advantages thereby accrue to them.

(1) Respondents' contention concerning the "value" of their hosiery, namely, that such hosiery is of a value comparable to other hosiery actually selling at the same prices, as above noted has previously been decided adversely to respondents in the order of the undersigned ruling on the objection of counsel supporting the complaint to such evidence. For the reasons stated therein and in the undersigned's initial decision in the *Ma-Ro Hosiery Company, Inc.* case⁵ involving the same contention, proof of the value of respondents' products is irrelevant to the issue of whether respondents falsely represented the usual and regular prices of such products.

(2) The fact that respondents have no control over the prices charged by their retailers, although correct, is completely irrelevant. The gravamen of the violation is not the prices charged by the retailers but the fact that respondents falsely represented such prices. Knowing, as the record establishes, that their retailers usually and regularly sold at prices substantially less than the labels, nevertheless Rudin & Roth continued to label such hosiery with such prices to the deception and injury of the public, and continued to place in the hands of retailers a means of deceiving the public. That the retailers fixed their own prices cannot justify such deception. The original false representation was made by respondents, and they must assume the responsibility for its use to deceive the public. One who places in the hands of others such a means of deception is responsible therefor and himself guilty of deception.⁶

(3) Respondents' argument that there is no proof in the record concerning any diversion of trade from their competitors or sub-

⁵*Ma-Ro Hosiery Co., Inc.*, Docket No. 6436, Initial Decision, June 19, 1956.

⁶*F.T.C. v. Winsted Hosiery Company*, 258 U.S. 483 (1922).

stantial injury to competition in commerce is without merit. It is well settled that where persons engage in unfair and deceptive representations of their products in commerce, the Commission properly may infer that such representations mislead the public into the purchase of such products, thereby unfairly diverting trade from competitors and causing substantial injury to competition.⁷ In addition, the proof in this record establishes that the false representations engaged intended to divert trade from respondents' competitors. Mr. Roth admitted, and all of the experienced retailers testified, that in their opinion the price labels aided in the sale of the product to the public.

(4) As respondents contend, there is no direct proof in the record that a preference exists on the part of many purchasers to buy directly from factories or mills believing that costs or other advantages thereby accrue to them. Counsel supporting the complaint urges that it is proper and appropriate to draw a factual inference that purchasers prefer to buy directly from factories or mills. This position appears to be sound. As stated above, where persons engage in unfair and deceptive representations of their products in commerce, the Commission properly may infer that such representations mislead the public into the purchase of such products, thereby unfairly diverting trade from competitors and causing substantial injury to competition.⁸ In addition, the Commission and the courts many times have found that a preference exists on the part of purchasers to buy directly from mills or factories, thereby eliminating the middleman and presumably effecting savings.⁹ As the Supreme Court said in the *Royal Milling Company* case:¹⁰ "If consumers or dealers prefer to purchase a given article because it was made by a particular manufacturer or class of manufacturers, they have a right to do so, and this right cannot be satisfied by imposing upon them an exactly similar article, or one equally as good, but having a different origin. * * * The result of respondents' acts is that such purchasers are deceived into purchasing an article which they do not wish or intend to buy, and which they might or might not buy if correctly informed as to its origin. We are of the opinion that the purchasing public is entitled to be protected against that species of deception, and that its interest in such protection is specific and substantial."

⁷*F.T.C. v. Raladam Co.*, 316 U.S. 149 (1942).

⁸Footnote 7, *supra*.

⁹*F.T.C. v. Royal Milling Co.*, *supra*; *Brown Fence & Wire Co. v. F.T.C.* 64 F.2d 934 (C.A. 6, 1933); *F.T.C. v. Mid West Mills, Inc.*, *supra*; *Bear Mill Mfg. Co. v. F.T.C.*, *supra*; *Hersfeld v. F.T.C.*, *supra*; *Deer v. F.T.C.*, 152 F.2d 65 (C.A. 2, 1945); and *M. Rudin & Sons, Inc.*, Docket No. 6318 (1956).

¹⁰Footnote 3, *supra*.

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After citing a portion of the foregoing opinion of the Supreme Court, the Court of Appeals for the Sixth Circuit held that it was not necessary for the Commission to produce direct testimony tending to show that any of the respondent's customers were imposed upon or deceived by its representations.¹¹ The court said: "We know of no reasons why reasonable factual inference may not be the basis for the fact findings of the Commission as well as direct evidence. Price is so fundamental a factor in merchandising, and so persuasive in drawing customers to one competitor and from others, that it seems superfluous to demand direct proof of the efficacy of methods, frankly relied upon, to accomplish the results now denied." The preference among certain purchasers to buy directly from the mill, factory or manufacturer seems to be equally well known and established, and hence the foregoing conclusion of the Court that direct proof seems superfluous because the Commission may properly draw such a reasonable factual inference seems equally applicable here.

That such an inference is warranted is also evidenced by the decision of the Court of Appeals for the Second Circuit in the *Bear Mill Manufacturing Company* case,¹² wherein the Court said: "The proof indicated that the retail trade of the company was trivial and that its customers generally knew that it was not itself manufacturing and that those who did not know usually did not care. Indeed, the line between manufacturing itself and supervising the finishing of the product as to color, style and workmanship where, as here, the orders are given to an independent contractor is so tenuous that, upon the record, we regard the damage, if any, to customers or competitors as highly speculative. Yet accuracy of representations implicit in a trade-name indicating whether a concern is a manufacturer, converter or jobber is in general important and *it cannot be denied* that a misleading name may lead to injurious misapprehensions on the part of customers, actual or prospective, and damage to competitors. We think that the Commission is authorized to guard the public against such dangers. Indeed, it exists to promote fair rules of trade and in so doing to curb practices that involve a likelihood of injury to the public, even if in a particular case the acts complained of are, as here, innocent in purpose and may thus far have done little harm." (Emphasis added.)

D. Concluding Findings

The undisputed credible evidence in the entire record establishes, and hence it is found, that the hosiery distributed and sold by

¹¹*Brown Fence & Wire Co. v. F.T.C., supra.*

¹²Footnote 3, *supra*.

respondents Rudin and Roth was not regularly and usually sold at the prices attached to it by them, but on the contrary was usually and regularly sold at prices substantially less than the labeled prices. By attaching such price labels, Rudin and Roth thereby represented that such prices were the usual and regular retail prices, when in truth and in fact such representations were false, misleading and deceptive.

It is further concluded and found that Jamee and Superbilt, through the use of the word "mills" as part of their corporate names, falsely and deceptively represented that they owned or operated mills or factories in which their hosiery was manufactured when in truth and in fact they did not.

It is further found that respondents, by the practices above-found, have placed in the hands of retailers and dealers a means and instrumentality whereby they may deceive and mislead the purchasing public as to the usual and customary retail prices of Rudin & Roth's products, and as to the source or origin of the products of Jamee and Superbilt.

E. *The Effect of the Unlawful Practices*

The acts and practices of respondents Rudin and Roth, as hereinabove found, have had and now have the tendency and capacity to mislead and deceive members of the purchasing public¹³ with respect to the usual and regular retail prices of their hosiery and thereby induce the purchase of substantial quantities thereof. The acts and practices of Jamee and Superbilt, as hereinabove found, have had and now have the tendency and capacity to mislead dealers, retailers and members of the purchasing public with respect to the source and origin of said respondents' products and thereby induce the purchase thereof. As a result, substantial trade in commerce has been and is being unfairly diverted to respondents from competitors, and substantial injury has been and is being done to competition in commerce.

CONCLUSIONS OF LAW

1. Respondents are engaged in commerce, and engaged in the above-found acts and practices in the course and conduct of their business in commerce, as "commerce" is defined in the Act.

2. Respondents are in substantial competition in commerce with other corporations, firms and individuals engaged in the sale and distribution of hosiery.

¹³For the reasons stated in the undersigned's initial decision, *supra*, *Ma-Ro Hosiery Company, Inc.*, no finding is made that the fictitious pricing has the tendency or capacity to mislead or deceive dealers and retailers.

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3. The acts and practices of respondents hereinabove found are all to the prejudice and injury of the public and of their competitors, and constitute unfair methods of competition and unfair and deceptive acts and practices in commerce, within the intent and meaning of the Act.

4. As a result of the above-found acts and practices of respondents, substantial injury has been done to competition in commerce.

5. This proceeding is in the public interest, and an order to cease and desist the above-found unlawful practices should issue against respondents.

ORDER

It is ordered, That respondents Jamee Knit Hosiery Mills, Inc., a corporation, Superbilt Hosiery Mills, Inc., a corporation, Stephen M. Roth and Fred D. Rudin, individually, as officers of said corporations, and as co-partners trading under the firm name and style of Rudin & Roth, or under any other name, and their agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of hosiery in commerce, as "commerce" is defined in the Act, do forthwith cease and desist from:

As to respondents Rudin and Roth:

1. Representing in any manner that certain amounts are the regular and usual retail prices of hosiery when such amounts are in excess of the prices at which such hosiery is usually and regularly sold at retail;

2. Putting into operation any plan whereby retailers or others may misrepresent the regular and usual retail prices of merchandise; and

As to respondents Jamee Knit Hosiery Mills, Inc., Superbilt Hosiery Mills, Inc. and Messrs. Rudin and Roth, individually and as officers of said corporations:

1. Representing, through the use of the word "mills" or any other word or words of similar import or meaning in their corporate or firm name, or otherwise, that they, or any of them, manufacture the hosiery or other merchandise sold by them.

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 5th day of September, 1956, become the decision of the Commission; and, accordingly:

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It is ordered, That the respondents herein 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.

IN THE MATTER OF
WOONSOCKET SPINNING COMPANY ET AL.

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

Docket 6474. Complaint, Dec. 5, 1955—Decision, Sept. 5, 1956

Consent order requiring a manufacturer in Woonsocket, R.I., to cease violating the Wool Products Labeling Act by failing to label certain cones of yarn to show the percentages of fiber content, and by making false statements on invoices and shipping memoranda concerning the fiber content.

Mr. Frederick McManus for the Commission.

Hartman & Craven, by *Mr. Milton Rosenberg*, of New York City, for Woonsocket Spinning Co.

Weil, Gotshal & Manges, by *Mr. Jesse D. Wolff*, *Mr. Edward C. Wallace* and *Mr. Ira M. Millstein*, of New York City, and *Mr. Edward L. Merrigan*, of Washington, D.C., for Theodore Birnbaum.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

This proceeding was initiated December 5, 1955. The complaint charges that respondent Woonsocket Spinning Company, and respondent Theodore Birnbaum individually and as an officer of said corporation, violated the provisions of Section 4(a)(2) of the Wool Products Labeling Act of 1939, and the provisions of the Federal Trade Commission Act, in that certain of the yarns manufactured and sold by said respondents were not properly "stamped, tagged, or labeled", and in that respondents had made certain misstatements on their invoices and shipping memoranda concerning the content of the wool products manufactured and sold.

The corporate respondent, Woonsocket Spinning Company, on March 13, 1956, entered into an Agreement Containing Consent Order To Cease And Desist with counsel supporting the complaint, which was approved by the Assistant Director and Director of the Commission's Bureau of Litigation and transmitted to the Hearing Examiner.

The agreement identifies respondent Woonsocket Spinning Company as a corporation existing and doing business under and by virtue of the laws of the State of Rhode Island, with its offices and principal place of business located at 115 Ricard Street, Woonsocket, Rhode Island.

The agreement provides, among other things, that said respondent admits all the jurisdictional facts alleged in the complaint and that