

Decision

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IN THE MATTER OF
PEPSI COLA CO.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2(d) OF
THE CLAYTON ACT

Docket 6593. Complaint, July 19, 1956—Decision, Dec. 21, 1957

Order dismissing without prejudice complaint charging a seller of carbonated beverages, with principal office in New York City, with violating section 2(d) of the Clayton Act by making payments to broadcasting companies for the benefit of certain customers—consisting of broadcasting time furnished the favored customers for their own advertising purposes—as compensation for promotional services in connection with the sale of respondent's products, while failing to make such payments available to its other customers.

Mr. J. Wallace Adair, Mr. William R. Tincher and Mr. Eugene Kaplan, for the Commission.

Appell, Austin & Gay, by Mr. Cyrus Austin, and Kaye, Scholer, Fierman & Hays, by Mr. Milton Handler, all of New York, N.Y., for respondent.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

THE COMPLAINT

The complaint in this proceeding charges the respondent with having paid money to three of the major broadcasting companies for the benefit of certain chain-store customers, thereby providing broadcasting time through such broadcasting companies to respondent's favored customers for their own advertising purposes. The payments thus made by respondent are alleged to have been made as compensation or in consideration for services or facilities furnished it by these favored customers in connection with the offering for sale and sale of respondent's products. It is further alleged that the benefits so furnished to some of respondent's customers were not made available to respondent's other customers on proportionally equal terms, in violation of the provision of subsection (d) of § 2 of the Clayton Act, as amended.

The complaint then describes in some detail the sales-promotion plans through which respondent favored certain of its customers.

THE ANSWER

Respondent in its answer admits that it is a corporation organized and doing business under the laws of the State of Delaware, with its principal office and place of business located at 3 W. 57th Street, New

York 19, N.Y. Respondent denies, however, that it has been engaged, as alleged in paragraph 2 of the complaint, in the business of selling and distributing its products, including carbonated beverages, in commerce to competing independent grocers and grocery chain-stores located throughout the United States. Moreover, respondent avers that it manufactures and sells concentrates and syrups used in making carbonated beverages in commerce, but that it does not sell or distribute any of its products either to independent grocers or to grocery chain-stores.

MOTION TO DISMISS COMPLAINT

On October 28, 1957, counsel supporting the complaint submitted a motion to dismiss the complaint herein. In this motion they state that this proceeding is one of nine cases in which complaints have been issued against respondents for their use of certain discriminatory merchandising plans alleged to be in violation of § 2(d) of the Robinson-Patman Act. They further state that in seven of those proceedings, the hearing examiner has already issued initial decisions containing orders to cease and desist. In addition, they state that the respondents in these cases constitute 9 of approximately 100 similar grocery-product advertisers who have adopted and utilized similar allegedly illegal merchandising plans.

Counsel aver that six of the above cases were presented to the hearing examiner for determination on the basis of agreed stipulations of facts common to all. The stipulations in those proceedings presented a detailed analysis of the various merchandising plans used and the method by which they were effectuated. In contrast, counsel assert that the instant proceeding involves distinct problems requiring separate consideration as to both law and fact.

Counsel supporting the complaint set forth that in September 1957, respondent presented to them information showing that the respondent corporation was not a party to any of the promotional contracts with broadcasting companies as alleged in the complaint herein. They state that this information shows, rather, that the contracts referred to were executed between the Metropolitan Bottling Co. a subsidiary of the respondent, and certain broadcasting companies. Counsel quote an official of the respondent as stating that this subsidiary, the Metropolitan Bottling co., operates as an independent company, and that respondent has not participated in any way in any of this subsidiary's acts and practices of the type here involved. This information further indicates that the Metropolitan Bottling Co. does not sell its products to grocery outlets as alleged in the complaint,

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but distributes its products by selling them to independent distributors, who, in turn, sell to such grocery outlets.

Counsel supporting the complaint state that they have no evidence available to contradict respondent's statements. They conclude that the complaint should be dismissed

* * * without prejudice to the right of the Commission to undertake such further investigation or to institute such further proceeding as facts and circumstances may warrant.

Since respondent has never conceded commerce in this matter, and it has been impossible to negotiate a stipulation as to the other cases, continued prosecution of this matter would necessitate the expensive and time-consuming presentation of factual proof regarding all issues.

Since the legality of the adoption and use of these merchandising plans is already being tested in the above-referred-to cases, counsel supporting the complaint consider this separate and continued prosecution of this matter an unnecessary expenditure in determining the legality of the alleged practice and in the protection of the public interest. It is reasonable to assume that if the Commission upholds the examiner's initial decision that the use of these plans by the respondent advertisers is illegal: (1) the numerous other grocery product advertisers will be deterred from the further use of these plans; (2) the necessity of issuing complaints against such other advertisers will be obviated; and (3) these plans will not then be available for use by this respondent.

THE ISSUE RESOLVED

We cannot subscribe to all the reasons presented by counsel supporting the complaint for the dismissal of this proceeding. Counsel's motion, however, does contain one good and valid reason why the complaint herein should be dismissed. As previously stated, counsel have submitted in such motion a statement of facts which they admit they have no available proof to contravene. That statement shows that the respondent was not a party to any of the contracts with any of the broadcasting companies, as alleged in the complaint; that the respondent's subsidiary, Metropolitan Bottling Co., operates as an independent company in whose acts and practices respondent did not participate; and that the Metropolitan Bottling Co. does not sell its products to grocery outlets as alleged in the complaint, but rather distributes them by selling to independent distributors who, in turn, sell to such grocery outlets. The admission by counsel supporting the complaint that they have no evidence to disprove these facts indicates that they cannot prove the allegations of the complaint against the respondent, and that, accordingly, the prosecution of this proceeding is unwarranted. It follows, therefore, that the motion to dismiss the complaint should be granted. Since, however, the dismissal is based upon a confessed lack of potential proof rather than

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a failure of proof upon a trial of the issues, the dismissal should be without prejudice to the public interest. Accordingly,

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

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 21st day of December 1957, become the decision of the Commission.

IN THE MATTER OF
HARLEY BELT CO., INC., ET AL.

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

Docket 6861. Complaint, Aug. 13, 1957—Decision, Dec. 21, 1957

Consent order requiring a manufacturer in New York City to cease preticketing ladies', men's, and boys' belts with fictitious and exaggerated prices, thereby placing in the hands of retailers means of misleading the purchasing public as to the usual retail price.

Mr. Harry E. Middleton, Jr. for the Commission.

Mr. Louis N. Porter, of New York, N.Y., for respondents.

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on August 13, 1957, issued and subsequently served its complaint in this proceeding against respondents Harley Belt Co., Inc., a corporation existing and doing business under and by virtue of the laws of the State of New York, Harry Liebovitz and Louis B. Fox, individually and as officers of the corporate respondent. The office and principal place of business of said respondents is at 102 Wooster Street, New York, N.Y.

On November 1, 1957, there was submitted to the undersigned hearing examiner an agreement between respondents and counsel supporting the complaint providing for the entry of a consent order. By the terms of said agreement, 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. By such agreement, respondents waive any further procedural steps before the hearing examiner and the Commission; waive the making of findings of fact and conclusions of law; and waive 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. Such agreement further provides that it disposes of all of this proceeding as to all parties; that the record on which this initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement; that the latter shall not become a part of the official record unless and until it becomes a part of the decision of the Commission; that the agreement is for settlement purposes only and does not constitute an admission by