

IN THE MATTER OF

COCA COLA BOTTLING CO. OF NEW YORK, INC.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2(d) OF
THE CLAYTON ACT*Docket 6594. Complaint, July 19, 1956—Decision, Feb. 26, 1958*

Order dismissing without prejudice for "lack of potential proof" complaint charging a bottling company in New York City with granting unlawful promotional allowances to favored customers indirectly through payments of money to major radio broadcasting networks for the benefit of certain chain store customers for their own advertising purposes, in compensation for services furnished in connection with the sale of respondent's products.

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

Appell, Austin & Gay, by *Mr. Cyrus Austin*, and *Mr. Harry Malter*, of New York, N.Y., for Respondent.

INITIAL DECISION BY ARNER 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 is alleged to have 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 425 E. 34th Street, New York, N.Y.

Respondent also admits that it is now and for a number of years has been engaged in the business of selling and distributing carbonated beverages, and that said beverages are sold by it to independent groceries and grocery chains, some of whom compete with each other. Respondent further admits entering into contracts with the American Broadcasting Co., Columbia Broadcasting System, Inc., and with the National Broadcasting Co., Inc., for the purchase of broadcasting time for the advertising of its beverages. It also admits that each of the broadcasting companies named furnished to the Respondent, at no cost to itself, promotional displays of its advertised products in the stores of certain grocery chains.

Respondent denies, however, the allegations of paragraph 2 of the complaint, that it is now and for a number of years has been engaged in selling its products in commerce, as "commerce" is defined in the Clayton Act as amended; and also denies the allegation that it has violated § 2(d) of that act.

MOTION TO DISMISS THE COMPLAINT

On October 28, 1957, counsel supporting the complaint submitted a motion to dismiss the complaint herein. In that motion they state that this proceeding is one of nine cases in which complaints have been issued against respondents because of their use of certain discriminatory merchandising plans alleged to be in violation of § 2(d) of the Robinson-Patman Act. Counsel aver that the cases above referred to were presented to the hearing examiner for determination on the basis of agreed stipulations of facts common to all. They further assert that, in contrast to the eight companion proceedings, the instant proceeding involves a question of commerce. Counsel supporting the complaint set forth the following:

Information made available to the Commission by the respondent in this matter shows that the respondent, in the New York City metropolitan area, is engaged in commerce only in a limited and temporary manner. According to this information, prior to March 1956 respondent did not sell and distribute bottled Coca Cola in the New York City metropolitan area in commerce as alleged in the complaint. From March 1956 to the present respondent has made some interstate shipments of its "family size" bottles of Coca Cola into Connecticut from respondent's Manhattan plant. Respondent intends to install machinery and equipment for bottling the "family size" bottles at its Connecticut plant in the near future and to discontinue hauling said bottles from Manhattan when this machinery is installed. Once this machinery has been installed at the Bridgeport, Conn., plant respondent will no longer be engaged in the interstate shipment of its products. On the basis of these facts it is expected that the Commission's jurisdiction over the respondent as alleged in the complaint would end prior to the issuance of any order in the instant matter. There is no contrary evidence presently available to counsel supporting the complaint.

They conclude that

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 the 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.

Counsel then ask that the complaint herein be dismissed "without prejudice to the right of the Commission to undertake such further investigation or to institute such further proceedings as facts and circumstances may warrant."

RESPONDENT'S REPLY TO MOTION

Counsel for the respondent has stated, in a letter to the Secretary of the Commission, that no formal answer will be filed to the motion to dismiss. He further states, however, that "the respondent consents to the granting of the relief asked for * * * upon the grounds therein stated."

THE ISSUE RESOLVED

Although we cannot subscribe to all the reasons presented by counsel for the dismissal of this proceeding, counsels' motion does contain one good and valid reason why the complaint herein should be dismissed. They state therein that prior to 1956 the respondent did not sell and distribute bottled Coca Cola in the New York City metropolitan area in commerce, as alleged in the complaint. They further state that although, since March 1956, respondent has engaged in some interstate shipments of its family-size bottles of Coca Cola from the New York area into Connecticut, respondent intends to eliminate such shipments in the near future by the construction of a Connecticut bottling plant; and that, once this plant has been established, respondent will not in any wise be engaged in interstate shipment of its products. The admission by counsel that they have no evidence to disprove those facts is tantamount to a declaration that they cannot prove that the respondent was engaged in selling its products in commerce during the period of time when the acts and practices complained of allegedly occurred. This being so, the further prosecution of this proceeding is unwarranted, and counsels' motion to dismiss the complaint herein should be granted. Since, however, the requested dismissal is being granted on the basis of a confessed lack of potential proof rather than a failure of proof upon trial of the issues, the dismissal should be without prejudice to the public interest. Accordingly.

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Order

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.

FINAL ORDER

This matter having come on for review of the hearing examiner's initial decision dismissing the complaint without prejudice, and the Commission having concluded that the initial decision constitutes an appropriate and adequate disposition of the proceeding:

It is ordered, That the initial decision be, and it hereby is, adopted as the decision of the Commission.

IN THE MATTER OF
OLD YORK DISTRIBUTORS, INC., ET AL.

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

Docket 6790. Complaint, May 3, 1957—Decision, Feb. 27, 1958

Order issued in default requiring the president of an incorporated business in Philadelphia, Pa., to cease using in advertising in newspapers and otherwise purported offers of employment to sell candy vending machines and misrepresenting profits customers would make operating them; and falsely representing orally and through salesmen that he represented the Hershey Chocolate Corp. and that vending machine purchasers would also be Hershey representatives—among a variety of false and misleading claims, all made for the purpose of inducing purchase of his products.

As to the corporation and its secretary-treasurer, also named as respondents, the matter was settled by their consenting to an identical order on September 18, 1957, p. 349 herein.

Mr. Floyd O. Collins and Mr. William M. King for the Commission.
No appearance on behalf of respondent Kolman Freedman.

INITIAL DECISION AS TO RESPONDENT KOLMAN FREEDMAN BY
LOREN H. LAUGHLIN, HEARING EXAMINER

This proceeding involves alleged violations of the Federal Trade Commission Act as amended, it being charged in the complaint, in substance, that the respondents have committed unfair and deceptive acts and practices and unfair methods of competition in commerce by misrepresenting through printed advertisements and oral statements of respondents' salesmen certain claims concerning respondents' vending machines and candies. On August 6, 1957, the hearing examiner herein issued an initial decision based upon an "agreement containing consent order to cease and desist," which had been entered into by and between respondents other than Kolman Freedman and Floyd O. Collins, counsel supporting the complaint, under date of July 15, 1957, which had been approved by the Bureau of Litigation. This initial decision, on September 18, 1957, was approved by the Commission, which issued on that date its "decision and order to file report of compliance." This initial decision now rendered is against only the respondent Kolman Freedman upon his default.

From the record it appears that said respondent Kolman Freedman was duly served with a copy of the complaint herein on June 7, 1957; that he never filed an answer or other pleading and has long been in default of answer or any other appearance, either in person or by