

IN THE MATTER OF
CHESTER H. ROTH COMPANY, INC., ET AL.

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

Docket 7100. Complaint, Mar. 28, 1958—Order, Jan. 29, 1959

Order dismissing without prejudice—for the reason that, before the date of the initial hearing, the hosiery business of the corporate respondent was acquired by a large manufacturer of lingerie, hosiery, gloves, etc., and the challenged practices discontinued—complaint charging a corporate manufacturer of hosiery in New York City with making use of a deceptive scheme to establish a fictitious retail price solely for use in promoting the sale of its hosiery at a lesser price, and with falsely representing that the hosiery was created by famous fashion designers.

Mr. Edward F. Downs and Mr. Eugene Kaplan for the Commission.

Mr. Harold L. Glasser and Mr. Milton Handler, of New York, N.Y., for respondents.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

1. This matter is now before the hearing examiner upon a motion filed by respondents to dismiss the complaint on the ground that all of the challenged practices have been discontinued and will not be resumed. Counsel supporting the complaint have filed an answer in opposition to the motion. No hearings in the case have been held, the initial hearing being set for September 25, 1958.

2. Respondents are charged with the fictitious pricing of women's hosiery, the complaint (par. 5) alleging that:

* * * respondents attached to certain hosiery the names "Jacques Heim," "Mr. John" and "John Frederics," and to some of such hosiery respondents affixed the price of \$1.95 per pair. This hosiery was advertised by respondents in magazines of national circulation at the retail price of \$1.95 per pair. The retail stores buying the aforesaid hosiery from respondents were required, by respondents, to purchase a basic stock thereof at a wholesale price of \$12.00 per dozen pair and offer it to the consuming public at a retail price of \$1.95 per pair. However, respondents permitted such retail stores to hold special sales of this hosiery, selling it at retail at one-half price or ninety-nine cents per pair, and for these special sales respondents sold this hosiery to the retail stores at wholesale prices ranging from \$7.25 to \$7.75 per dozen. In addition, respondents supplied the retail stores with "mailers" for use in promoting such sales, which "mailers" stated that the aforesaid hosiery was

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being offered for a limited time only at one-half price, that it was nationally advertised and sold at \$1.95 per pair and that the regular price of it was \$1.95 per pair, and respondents otherwise assisted such retail stores in promoting these so-called "half price" sales.

The complaint further alleges (par. 7) that:

* * * While respondents did, by reason of the aforesaid plan or scheme, sell some of such hosiery at \$12.00 per dozen wholesale, which was in turn sold at \$1.95 per pair retail, sales at \$1.95 per pair were so limited in number that they did not in fact establish the customary and usual retail price, therefore such price was fictitious.

An additional charge in the complaint is that respondents have falsely represented that the hosiery in question was created, designed or fashioned by famous fashion designers.

3. Respondents' motion is supported by affidavits executed by one of their attorneys of record and by two of the individual respondents who are also president and executive vice president, respectively, of the corporate respondent.

In substance, the papers state that all of the practices challenged by the complaint have been completely discontinued and will not be resumed; that immediately upon the institution of the Commission's investigation, respondents sought to ascertain from the Commission's staff information as to any practices of respondents considered objectionable, a number of interviews for that purpose being held by respondents' attorney with staff members; that such efforts were at first largely unsuccessful, but that just as fast as the necessary information was obtained the practices were discontinued; that the practice of preticketing was discontinued on September 1, 1957, some six months before issuance of the complaint in March 1958; that in February 1958, all references to prices in respondents' magazine advertisements were discontinued; that that in May 1958, shortly after service of the complaint, respondents discontinued the use of the challenged "mailers" and also discontinued advertising that the hosiery was created, designed or fashioned by famous fashion designers.

4. The most recent cases in which the Commission has passed upon the matter of dismissing a complaint because of discontinuance of the challenged practices appear to be those of Ward Baking Company, Docket No. 6833, decided June 23, 1958, and Sheffield Merchandise, Inc., Docket No. 6627, decided July 7, 1958. In the light of the holdings in those cases, the present motion must be denied insofar as the ground of discontinuance is concerned. Here there appear to be no unusual circumstances at-

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tending the discontinuance which meet the standard set up by the two cases cited.

5. There is, however, another circumstance in the present case which presents a much more serious question. That is the fact, set forth by the affidavits accompanying respondents' motion, that on August 1, 1958, the hosiery business of the corporate respondent was acquired by another company, Julius Kayser & Co. a large manufacturer and distributor of lingerie, hosiery, gloves, etc. In view of this acquisition it appears that further proceedings in the present case would serve no useful purpose; that the case is without public interest.

Accepting at face value the statements in the motion and affidavits, it is evident that the practices challenged by the complaint have been discontinued, and if there should be any resumption of the practices such resumption presumably would not be by the respondents but by the Kayser company, which is not a party to the present proceeding. In the circumstances, the practical and sensible course would seem to be to dismiss the complaint without prejudice, leaving open for future consideration the question as to what further action, if any, should be taken by the Commission in the premises.

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It is therefore ordered, That the complaint be, and it hereby is, dismissed, without prejudice to the right of the Commission to take such further action in the matter in the future as may be warranted by the then existing circumstances.

OPINION OF THE COMMISSION

By TAIT, Commissioner:

Counsel in support of the complaint has appealed from the initial decision of the hearing examiner which dismissed the complaint as to all respondents herein.

The complaint was issued on March 28, 1958, and charged Chester H. Roth Company, Inc., a corporation, and ten of its named officers, individually and as officers, with violation of the Federal Trade Commission Act. It alleged that respondents had fictitiously priced women's hosiery and had falsely represented that the hosiery was created, designed, or fashioned by famous fashion designers.

Counsel for respondents subsequently filed with the hearing examiner a motion to dismiss the complaint, accompanied by two

supporting affidavits. One affidavit was executed by the corporate respondent's president and executive vice president, who are among those officers named as respondents in their individual and official capacities; the other was executed by respondents' counsel of record. In addition to furnishing assurances of discontinuance and stating an intention not to resume the practices, the affidavits asserted, inter alia, that on August 1, 1958, the hosiery business of the corporate respondent was acquired by another company, Julius Kayser & Co., a manufacturer and distributor of sportswear, lingerie, sleepwear, gloves, hosiery and related apparel. The affidavits of the corporate respondent's president and executive vice president also averred that they had nothing to do with conceiving or executing the practices in question and that upon being apprised of the Commission's objections they "promptly and unequivocally caused the corporate respondent to abandon all the promotional features complained of." These two affiants further stated that they were to be employed in principal executive capacities by the acquiring firm and gave assurances that the latter would not engage in any of the practices covered by the complaint.

Counsel supporting the complaint filed answer opposing the motion on grounds that the alleged discontinuance of the challenged practices did not warrant a dismissal of the complaint. No hearings were held and no evidence was otherwise taken in the proceeding.

Based upon this record, the hearing examiner concluded that the practices challenged in the complaint had been discontinued and that further proceedings would serve no useful purpose. His conclusion was premised upon the disclosures in the affidavits that the hosiery business of the corporate respondent had been sold. In this connection, the hearing examiner stated that "* * *" if there should be any resumption of the practices such resumption presumably would not be by the respondents but by the Kayser Company, which is not a party to the present proceedings." He thereupon dismissed the complaint as to both the corporate respondent, Chester H. Roth Company, Inc., and the individual respondents "without prejudice to the right of the Commission to take such further action in the matter in the future as may be warranted by the then existing circumstances."

In his appeal brief, counsel supporting the complaint questions the basis for dismissal, and in oral argument before the Com-

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mission attempted to introduce and enlarge upon alleged factual matters apart from the established record.

It is elementary that Commission decisions are to be founded upon the established record. Administrative Procedure Act. Counsel is not to depart from such record on appeal in an effort to argue before the Commission factual claims and allegations outside the record. At no stage in this proceeding did counsel supporting the complaint take any steps to supplement the record herein with additional record evidence.

The record to be considered by the Commission is thus the same as that considered by the hearing examiner. The hearing examiner accepted the respondents' moving papers and accompanying affidavits at face value. He had little reason to do otherwise. These documents still stand uncontroverted in the record. We therefore concur in his view that, under the particular circumstances revealed here, the corporate respondent's sale of its hosiery business is a factor sufficient to render further procedure against the corporation unnecessary at this time and to warrant dismissal of the instant complaint as to said corporation.

To the extent that the hearing examiner appears to have based his dismissal as to the additionally named respondents upon this same factor, however, he was in error. The complaint charged these named respondents not only in their capacities as officers of the corporate respondent, Chester H. Roth Company, Inc., but also in their capacities as individuals. The mere sale of a corporation's business is, without more, insufficient to resolve the issue of alleged individual liability. However, the Commission has wide discretion in determining the necessity of attaching individual liability in any instance. The Commission's purpose is to stop the unlawful practice. We conclude that "the public interest will best be served by allowing the initial decision to stand undisturbed." *R. H. White Corporation*, Docket No. 6884, June 9, 1958.

Except as modified by the views expressed herein, the initial decision, including the order of dismissal without prejudice, is adopted as the decision of the Commission.

FINAL ORDER

This matter having been heard on an appeal filed by counsel in support of the complaint from the hearing examiner's initial decision dismissing the complaint without prejudice; and

The Commission, for the reasons set forth in its accompanying

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opinion, having concluded that the initial decision, as modified by said opinion, constitutes an appropriate disposition of this proceeding and having adopted as its own decision the initial decision as so modified:

It is ordered, That except to the extent noted in the aforesaid opinion the appeal of counsel in support of the complaint be, and it hereby is, denied.

IN THE MATTER OF
CHARLTON PRESS, INC., ET AL.

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

Docket 6628. Complaint, Sept. 11, 1956—Decision, Jan. 30, 1959

Order requiring a publisher and a distributor in Derby, Conn., to cease selling comic books consisting largely of material previously published by others without conspicuously disclosing on the front cover the fact of such previous publication.

Mr. Charles S. Cox for the Commission.

Eastman, Bronstein & Van Veen, of New York, N.Y., by *Mr. Lee V. Eastman*, for respondents.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

1. The Commission's complaint in this matter charges the respondents with violation of the Federal Trade Commission Act through the publication and sale of "comic" books or magazines consisting in large part of material previously published by others, without disclosing such fact to prospective purchasers. After the filing of respondents' answer, hearings were held at which evidence both in support of and in opposition to the complaint was received. Proposed findings and conclusions have been submitted by all parties and the case is now before the hearing examiner for final consideration. Any proposed findings and conclusions not included herein have been rejected.

2. Respondents Charlton Press, Inc., and Capital Distributing Company are corporations organized and doing business under the laws of the State of Connecticut. Respondent John Santangelo is president and general manager of Charlton Press, Inc., and president of Capital Distributing Company. Respondent Edward Levy is treasurer of both corporations. Respondent Burton N. Levy is vice president of Charlton Press, Inc. Respondent Allan Adams is vice president and general manager of Capital Distributing Company. The address of all of the respondents is Charlton Building, Derby, Conn. The individual respondents formulate the policies and direct and control the acts and practices of the corporate respondents of which they are officers.

3. Respondents are engaged in the publication, sale and distribution of comic books or magazines. The term comic books