

IN THE MATTER OF

SAM S. GOLDSTEIN TRADING AS SUN GOLD INDUSTRIES

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

Docket 7414. Complaint, Feb. 19, 1959—Decision, May 10, 1960

Order dismissing, for lack of supporting evidence, complaint charging a New York City distributor with using fictitious prices by attaching to women's hosiery tickets printed with excessive price figures, and with setting out similar amounts in advertising, thereby falsely representing such figures to be the usual retail prices.

Mr. Edward F. Downs and Mr. Anthony Kennedy for the Commission.

Bader & Bader, by *Mr. I. Walton Bader*, of New York, N.Y., for respondent.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

Respondent is charged with having engaged in the practice of using fictitious prices in connection with the labeling and advertising of women's hosiery, in violation of the Federal Trade Commission Act.

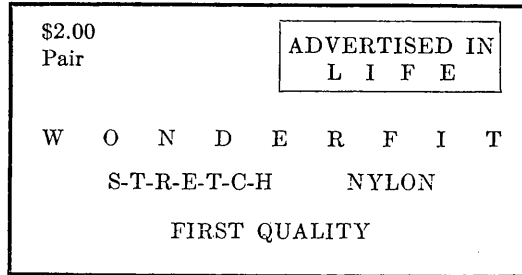
Upon the basis of the entire record, after hearings and submission of proposed findings of fact and conclusions, the following findings of fact are made, conclusions reached and order issued.

1. Respondent Sam S. Goldstein is an individual trading as Sun Gold Industries, with his office and principal place of business located at 1220 Broadway, New York, New York.

2. Respondent is now, and for some time last past has been, engaged in the advertising, sale and distribution of a number of products, including women's hosiery, to distributors and jobbers, and to retailers for resale to the consuming public.

3. In the course and conduct of his business, respondent now causes, and for some time last past has caused, his women's hosiery, with which this proceeding is particularly concerned, when sold, to be shipped from his place of business in the State of New York, and from the factories from which he buys said product, to the purchasers thereof, many of whom are located in states other than the state in which such shipments originated. Respondent's business in commerce has been substantial, amounting to approximately \$190,000 a year. Respondent's sales were mostly to jobbers, mail-order establishments, house-to-house canvassers, and direct premium users, at prices varying from \$6.00 to \$9.00 per dozen.

4. The particular brand of women's hosiery involved in this proceeding is trademarked "WONDERFIT," and each pair is stamped:



Respondent's hosiery was advertised in Life Magazine at \$2.00 per pair.

5. It is charged in the complaint that the prices used by respondent in the advertising and on the hose "are fictitious and in excess of the usual and regular retail prices of said hosiery." There is insufficient reliable, probative evidence in the record to establish what the usual and regular retail price of respondent's Wonderfit hosiery was.

6. Evidence was presented in support of the complaint that the profit of wholesalers on resale of hosiery to retail outlets varies from 10% to 30%, and that retailers, for their own benefit, add a mark-up of from 30% to 44%, based on their selling price. This gives only a slight clue as to the retail selling price of respondent's hosiery, and furnishes the basis for a wide variance in the price at which the hosiery is sold to the public. From such evidence no usual and regular retail price can be determined. The fallacy of trying to determine selling price upon the basis of wholesale cost and of comparing selling prices of similar products is aptly illustrated in this proceeding where it was shown that a stocking which was described as a 60-gauge, 15-denier nylon stocking had cost the B. Altman Company \$13.50 per dozen and was sold by them at \$1.95 a pair; the buyer of women's hosiery for the J. C. Penney Company, after examining the hose but not knowing where it came from, said, "We use this stocking in promotions to retail at two for a dollar."

7. (a) One candy wholesaler testified that in May or June, 1958, he purchased a quantity of respondent's hose, 95% of which he resold at wholesale. Some he sold at retail, at \$2.50 for a box of three, to customers who came into his place of business to buy for their own use.

(b) Another witness, manager of a hosiery company, testified that his company had purchased hosiery from respondent; he pre-

sented invoices showing purchases between February 6, 1958, and May 2, 1958, of 105 dozen pairs of "Wonderfit stretch nylon hose" at \$6.50 per dozen, and 20 dozen "Wonderfit Seamless Stretch Hosiery" at \$8.00 per dozen. Most of his company's business is wholesale, but some sales are made at retail and auction. At retail a box of three pairs of respondent's hose is sold for \$3.00. The witness said that his company is not a discount operator, but that when people go into the store "they expect to get considerable off the list price."

(c) A third witness, a manufacturer of ladies' lingerie, stated that he had purchased some of respondent's hosiery—the invoices show purchases in May and June, 1957, of 60 dozen pairs at \$6.50 per dozen, and 22½ dozen pairs seamless at \$8.50 per dozen. In connection with his lingerie manufacturing he conducts a retail business and sells some of respondent's hosiery at from 60¢ to 75¢ a pair. He said his retail prices would be unfair, "because I do this mostly for accommodation for the girls in the factory. Sometimes we give it away for no mark-up and sometimes a very little mark-up, for expenses." He had never sold any at \$2.00 per pair retail. His "retail accommodation business" was discontinued "a year and a half ago" (his testimony was given June 16, 1959). Upon this evidence, the case in support of the complaint was rested.

(d) Respondent testified that he personally had observed and knew that certain of his customers who sell through agents in house-to-house solicitation sell his hose at \$5.95 for a box of three pairs, which for all practical purposes amounts to \$2.00 per pair. From this evidence the usual and regular selling price of respondent's hosiery is not established. It is not adequate to establish that there actually was or is no usual and regular retail price for respondent's hosiery.

8. For lack of substantial, reliable, probative evidence in support of the charges contained in the complaint, this proceeding, which is in the public interest and over which the Commission has jurisdiction, should be dismissed. Accordingly,

It is ordered, That the complaint herein be, and it hereby is, dismissed.

OPINION OF THE COMMISSION

By KERN, *Commissioner*:

The complaint in this matter charges respondent with violation of Section 5 of the Federal Trade Commission Act in the promotion and sale of hosiery. The hearing examiner in his initial decision held that the allegations were not sustained by the evidence

136S

Opinion

and ordered dismissal of the complaint. Counsel supporting the complaint have appealed from that decision.

In substance, the complaint alleges that respondent by setting forth a certain amount (\$2.00 per pair) in the labeling and advertising of his hosiery products, represented that said amount was the usual and regular retail price of those products, whereas this \$2.00 price was fictitious and in excess of the usual and regular retail price of the hosiery.

In his rulings, the hearing examiner has taken the position that since the evidence fails to establish the usual and regular selling price of respondent's hosiery products, the burden of proof has not been sustained. He ruled that it is not adequate to establish that there actually was or is no usual and regular retail price for these products. We do not agree with these rulings. Upon a showing that respondent labeled and advertised his hosiery products at the \$2.00 price, the only additional proof required is that \$2.00 is not the usual and regular retail price of such hosiery products but is an exaggerated or fictitious price. If it is shown that the products ordinarily retailed at prices less than \$2.00 per pair, regardless of what these prices may be, the burden of proof imposed on counsel supporting the complaint has been met. The hearing examiner's rulings would allow respondent to use any price figure to promote the sale of his hosiery products as long as there is such a variance in the retail price of the hosiery that a usual and regular price cannot be established.

Counsel supporting the complaint contends that the record establishes that the hosiery products in question are usually and regularly sold at retail at prices less than \$2.00. The evidence of record in support of the charge is reviewed in paragraphs numbered 6 and 7(a) through (c) of the initial decision. Two of the three witnesses called by counsel supporting the complaint were primarily wholesalers who sold only a small proportion of respondent's hosiery at retail. The third witness was a lingerie manufacturer whose sales at retail of respondent's hosiery were mostly as an accommodation for girls working in his factory. None of these witnesses sold respondent's hosiery for as much as \$2.00 per pair. However, there is no evidence as to the amount of sales at retail by these witnesses, the percentage relationship of such sales to the total sales at retail of respondent's hosiery, nor that these witnesses were the only sellers of respondent's hosiery at retail in their respective trade areas. There is evidence as to the customary wholesale and retail markup of hosiery products which when applied to respondent's selling price would indicate a retail price somewhat less than

\$2.00 per pair. However, there is testimony that the retail price of identical hosiery varies widely depending upon the store selling it and there is no evidence from which we could conclude that respondent's customers ordinarily applied the customary markup in arriving at the price at which respondent's hosiery products were sold. In the circumstances, we do not believe the record supports a finding that the usual and regular retail price of respondent's hosiery is less than \$2.00 per pair.

In view of the foregoing, the appeal of counsel supporting the complaint is denied. The initial decision, in those respects in which it is contrary to the views expressed herein, is modified to conform with such views. An appropriate order will be entered.

ORDER DISMISSING COMPLAINT

This matter having been heard by the Commission upon the appeal of counsel supporting the complaint from the hearing examiner's initial decision dismissing the complaint; and

The Commission, for the reasons stated in the accompanying opinion, having denied the aforementioned appeal, and having modified the initial decision to the extent it is contrary to the views expressed in the said opinion:

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

It is further ordered, That the complaint in this proceeding be, and it hereby is, dismissed, without prejudice, however, to the right of the Commission to issue a new complaint or to take such further or other action against the respondent at any time in the future as may be warranted by the then existing circumstances.

IN THE MATTER OF

WETTER NUMBERING MACHINE COMPANY, INC.