

Decision

IN THE MATTER OF

BENNER TEA COMPANY

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT*Docket 7866. Complaint, Apr. 19, 1960—Decision, July 25, 1961*

Order dismissing complaint charging with knowing inducement of discriminatory payments from suppliers, a corporate operator of a chain of retail grocery stores which was sold more than a month prior to issuance of the complaint, resulting in complete change of ownership.

Mr. John Perry for the Commission.

McDermott, Will & Emery, by *Mr. James O. Smith*, of Chicago, Ill., for respondent.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

The Federal Trade Commission (sometimes also hereinafter referred to as the Commission) on April 19, 1960, issued its complaint herein, charging the above-named respondent with having violated the provisions of § 5 of the Federal Trade Commission Act (U.S.C. Title 15, § 45) in certain particulars, and respondent was duly served with process.

On May 8, 1961, there was submitted to the undersigned hearing examiner, by counsel supporting the complaint, a Motion to Dismiss, setting forth the following facts and circumstances:

The above-mentioned complaint was issued against Benner Tea Company, an Iowa corporation, with its office and principal place of business located at 3400 Mt. Pleasant Street, Burlington, Iowa. More particularly, Paragraph Five of the complaint states as follows:

PAR. 5. In the course and conduct of its business in commerce, and particularly since 1957, respondent has knowingly induced or received from some of its suppliers the payment, or contracts for the payment, to it or for its benefit, of money or other things of value as compensation or in consideration for services or facilities furnished by or through respondent in connection with the sale or offering for sale of products sold to it by said suppliers. But such payments were not made available by such suppliers on proportionally equal terms to all their other customers competing with respondent in the sale and distribution of such suppliers' products.

An answer was duly filed to the complaint herein; but it was filed by Benner Tea Company, a Delaware corporation, and not by

Benner Tea Company, an Iowa corporation, respondent herein. Among other things, said answer states as follows:

Effective March 16, 1960 BTC, Inc., a Delaware corporation, purchased 100% of the stock of Benner Tea Company, an Iowa corporation, named as Respondent in the complaint herein. On March 31, 1960 Benner Tea Company, an Iowa corporation, ceased to exist by virtue of being merged into BTC, Inc., a Delaware corporation, which subsequently changed its name to Benner Tea Company, a Delaware corporation, which presently maintains its office and principal place of business at 3400 Mt. Pleasant St., Burlington, Iowa.

From the facts stated in the answer, it is evident that the company against which the complaint was issued, namely, Benner Tea Company, an Iowa corporation, was not even in existence on the date of issuance of the complaint.

Because of these facts, counsel supporting the complaint, on November 23, 1960, filed a "Motion to Hearing Examiner to Certify Proposed Amended Complaint to Commission", transmitting therewith an amended complaint which would, in effect, substitute Benner Tea Company, a Delaware corporation, as respondent. Paragraph Four of the amended complaint stated:

PAR. 4. Respondent Benner Tea Company, a Delaware corporation (hereinafter referred to as Benner (Delaware)), as legal successor to Benner Tea Company, an Iowa corporation (hereinafter referred to as Benner (Iowa)), is legally responsible for all the unlawful acts and practices of Benner Tea Company, an Iowa corporation, hereinafter alleged.

On December 7, 1960, the hearing examiner certified the proposed amended complaint to the Commission, and on December 30, 1960, the Commission denied the motion for amended complaint, stating in part as follows:

It further appearing that neither the motion nor the proposed amended complaint attached thereto sets forth a sufficient basis for the alleged responsibility of Benner Tea Company, a Delaware corporation, for the alleged unlawful acts and practices of Benner Tea Company, an Iowa corporation, occurring prior to the purchase by the former of the stock of the latter, or sufficient reason for the Commission to believe that a proceeding against Benner Tea Company, a Delaware corporation, would be in the public interest; and

The Commission having determined that in these circumstances the motion for issuance of the amended complaint cannot be granted:

It is ordered, That said motion be, and it hereby is, denied * * *.

Thereafter, counsel supporting the complaint inquired into the ownership and the managerial setup of Benner Tea Company as

an Iowa corporation and as a Delaware corporation, and found that the ownership has completely changed hands; the officers and directors who controlled and managed the business affairs of Benner Tea Company, an Iowa corporation, in no way control the business affairs of Benner Tea Company, a Delaware corporation. The officers and directors of the new Delaware corporation are not the same as those of the old Iowa corporation; nor does counsel supporting the complaint have any evidence that Benner Tea Company, a Delaware corporation, did or will continue the acts and practices of Benner Tea Company, an Iowa corporation, upon which the complaint herein was based.

The complaint herein, therefore, is now outstanding against a non-existing corporation, namely, Benner Tea Company, an Iowa corporation, and counsel supporting the complaint cannot, at this time, show sufficient basis for the alleged responsibility of Benner Tea Company, a Delaware corporation, for the alleged unlawful acts and practices of Benner Tea Company, an Iowa corporation, or sufficient public interest in a proceeding against Benner Tea Company, a Delaware corporation, to justify the issuance by the Commission of an amended complaint herein. Counsel supporting the complaint is therefore of the opinion that dismissal of the complaint herein is justified and in the public interest, and respectfully requests that the hearing examiner dismiss the complaint against Benner Tea Company, an Iowa corporation.

Upon consideration of the record herein, the hearing examiner concurs in the opinion of counsel supporting the complaint, that said complaint should be dismissed. Accordingly, the hearing examiner hereby grants the Motion To Dismiss submitted by counsel supporting the complaint, and issues his order to that effect as follows:

It is ordered. That the complaint herein, heretofore issued against Benner Tea Company, an Iowa corporation, be, and the same hereby is, dismissed.

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 25th day of July 1961, become the decision of the Commission.

Complaint

59 F.T.C.

IN THE MATTER OF

SMITH-FISHER CORPORATION ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT*Docket 8169. Complaint, Nov. 8, 1960—Decision, July 25, 1961*

Consent order requiring an individual in Owosso, Mich., to cease misrepresenting, in advertisements in trade journals, newspapers, circulars, etc., the effectiveness, comparative qualities, guarantee, and other relevant facts concerning their "Super Atom" electrical fence charger used to prevent cattle from straying.

On Mar. 30, 1961 (518 F.T.C. 517), the same order was consented to by the corporate manufacturer and one officer.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe the Smith-Fisher Corporation, a corporation, and Jack D. Smith and Frank Fisher, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Smith-Fisher Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Michigan. Its office and principal place of business is located at 1426 North Michigan, Route 47, Owosso, Michigan.

Individual respondents Jack D. Smith and Frank Fisher are officers of said corporation. They formulate, direct and control the policies and practices of the corporate respondent. The individual respondents' address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the manufacturing, offering for sale and selling fence chargers known as "Super Atom Charger".

In the regular and usual course and conduct of their business, respondents cause, and have caused, said fence charger, when sold, to be transported from their place of business in the State of Michigan to purchasers thereof located in various other States of the United States.