
IN THE MATTER OF
ELECTRA SPARK COMPANY ET AL.

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

Docket 8274. Complaint, Jan. 13, 1961—Decision, April 20, 1966

Order adopting the initial decision on remand of a hearing examiner which dismissed, for lack of public interest, a complaint against three companies charged with falsely advertising automobile spark plugs.

Mr. Terral A. Jordan supporting the complaint.

Mr. R. Gettinger and *Mr. M. Gettinger*, New York, N.Y. (by *Mr. Irving J. Kaufman*), formerly for all respondents.

Bass & Friend, New York, N.Y., formerly for respondents Electra Spark Company, Lectra Sales Corporation, Mr. Fred P. Dollenberg (now deceased), and Mr. Bernard L. Silver.

Wolf, Block, Schorr and Solis-Cohen, Philadelphia, Pa. (by *Mr. Burton Caine*), for respondent Mr. Harry J. Petrick.

Rodman and Maurer, New York, N.Y. (by *Mr. Leroy E. Rodman*), for respondents Barilen Corp., Mr. Hyman Schlosberg, and Mr. Lawrence Serlin.

Respondent *Mr. Jack Howard*, *pro se*.

INITIAL DECISION ON REMAND BY DONALD R. MOORE, HEARING
EXAMINER

FEBRUARY 23, 1966

PRELIMINARY STATEMENT

The complaint in this proceeding was issued by the Federal Trade Commission on January 13, 1961, and was duly served on all respondents. The complaint charges the respondents with misrepresentation in the sale of automobile spark plugs designated "Lectra Fuel Igniter," in violation of the Federal Trade Commission Act. After being served with the complaint, the respondents appeared by counsel and filed answer making certain admissions but denying generally any violation of law.

After assignment to two other hearing examiners, this case was reassigned to the present hearing examiner on November 30, 1961. Trial of the case was deferred to permit negotiations between counsel designed to obviate the necessity of hearings. However, as stated in the Reply of counsel supporting the complaint,* two proposed consent settlements negotiated by the parties were successively rejected by the Commission.

After further negotiations, a "Stipulation as to Facts and Proposed Order" was submitted by the parties, and on the basis of this stipulation, the hearing examiner, on March 31, 1964, entered an initial decision containing an order to cease and desist. By Final Order dated June 5, 1964 [65 F.T.C. 877], the initial decision was adopted as the decision of the Commission.

*Sometimes referred to herein simply as Reply.

By petition filed October 23, 1964, certain of the respondents requested that the Commission reopen the proceeding and set aside or modify the order to cease and desist. These respondents alleged in substance that one of the prohibitions in the order was contrary to the stipulation agreed to by the parties and was "unduly oppressive and burdensome. . . ." As a result, the Commission, on January 18, 1965 [67 F.T.C. 1347], reopened the proceeding; vacated and set aside the initial decision and the final order adopting it; and ordered that the "Stipulation as to Facts and Proposed Order" be withdrawn from the record and that the case be remanded to the examiner for trial.

Following the remand, efforts were made to reach agreement on a new stipulation of facts or, alternatively, to proceed with hearings. These efforts were thwarted, however, by a variety of factors, including the protracted illness of the principal respondent, Fred P. Dollenburg, terminating in his death on May 15, 1965. Negotiations continued with the remaining principal respondent, Bernard L. Silver, but delays ensued as a result of the withdrawal of his counsel from the case, as well as the protracted illness of Mr. Silver's wife, terminated by her death on December 5, 1965.

Meanwhile, certain of the other respondents filed motions to dismiss or equivalent documents, and on January 14, 1966, respondent Silver filed a motion to dismiss in affidavit form.

The case is now before the examiner for consideration of the motions filed by or on behalf of the individual respondents and one of the corporate respondents (now dissolved), together with the Reply of complaint counsel, in which he states that he does not oppose dismissal of the complaint as to all parties respondent, subject only to the customary reservation of the Commission's rights respecting future proceedings.

Specifically, the following motions are pending:

(1) Motion of respondent Harry J. Petrick to dismiss the complaint as to him, etc.;

(2) Motion of respondents Barilen Corp., and Hyman Schlosberg and Lawrence Serlin,* individually and as officers of said corporation, to dismiss the complaint as to them and each of them;

(3) Motion of respondent Fred P. Dollenberg to dismiss the complaint as to him;

*It appears that the first name of this respondent is correctly spelled *Lawrence* (See Motion of Barilen Corp., et al.).

(4) Motion of respondent Jack Howard to dismiss the complaint as to him; and

(5) Motion of respondent Bernard L. Silver to dismiss the complaint as to him.

It will be observed that no motions have been filed on behalf of Electra Spark Company or Lectra Sales Corporation, as such. Counsel supporting the complaint raises no issue as to this technical deficiency but, as we have seen, specifically states that he does not oppose dismissal "as to *all* parties respondent" (emphasis added). On the basis of the present record, it is apparent that both these corporate respondents are dormant, if not moribund. Moreover, if dismissal is warranted as to the individuals who allegedly formulated, directed, and controlled the acts and practices of these corporations, there remains no real basis for continuing the proceeding as to the corporations. Actually, the failure of the parties to file formal motions to dismiss as to the two principal corporate respondents is a further demonstration of the nonexistence of these corporations as going entities.

In the circumstances, the examiner deems it appropriate to consider plenary disposition of the case on the present record. To insist on the filing of further motions would be empty formalism that would result only in additional delay. Sufficient facts are now before the examiner to permit an informed determination as to the proper disposition of the case as to all parties.

Before reaching the substantive question whether those facts warrant dismissal, it is necessary to consider the procedural question of the examiner's authority to rule on the pending motions (Rule 3.6; *R. H. Macy & Co., Inc.*, Docket 8650 (Order Denying Motion to Vacate Complaint, etc., February 4, 1965)) [67 F.T.C. 1349]. This threshold question arises because the ruling of the Commission in *Drug Research Corporation*, Docket 7179 (Order Vacating Initial Decision and Dismissing Complaint, October 3, 1963) [63 F.T.C. 998], might be interpreted as holding that it is "not within the authority and competence of the hearing examiner" to order dismissal on the grounds set forth in the pending motions. However, the examiner considers *Drug Research* to be distinguishable and has determined that the motions filed by respondents in the instant case, together with the Reply of complaint counsel, constitute a record sufficient to authorize, if not to require, the examiner to exercise the "adjudicative factfinding functions" delegated to him by the Commission (Sec. 8, Statement of Organization (August 1963); cf. Rule 3.6(e)).

In *Drug Research*, the motion to dismiss was filed by counsel supporting the complaint and was opposed by respondents. The motion was predicated primarily on the pendency of court proceedings against the respondents involving issues similar to those constituting the subject of the Commission's complaint. Consideration of this question and other questions required policy determinations not properly within the province of the examiner. The Commission held that the motion to dismiss "was addressed to the Commission in its administrative capacity, as the complainant . . . , and not in its adjudicative capacity" so that "the factors appropriate to the Commission's decision" were "not within the authority and competence of the hearing examiner. . . ."

Drug Research is not controlling here. In the instant case, there is no dispute between the parties, and the factual setting is different. For our purposes, the appropriate precedent is *American Music Guild, Inc.*, Docket 8550 (Order Remanding Proceeding to the Hearing Examiner, April 6, 1964) [65 F.T.C. 1296, 1297], where the Commission held that a motion to dismiss a complaint against corporate respondents which had been adjudged bankrupt was "properly before the hearing examiner and within his powers to decide." Cf. *The Logan-Long Company*, Docket 7906 (Final Order, December 14, 1965) [68 F.T.C. 1016], and *The Celotex Corporation*, Docket 7907 (Final Order, December 15, 1965) [68 F.T.C. 1021]. In *Logan-Long* and *Celotex*, the examiner granted motions to dismiss filed by counsel supporting the complaint reciting that information in their hands "disclosed facts inconsistent with some of the allegations contained in the complaint." The supporting statements of counsel supporting the complaint were not contradicted or questioned by the respondents and were accepted as the findings of fact. The Commission affirmed the action of the hearing examiner in each case, and it adopted each initial decision as the Decision of the Commission. Cf. also *Jefferson-Travis Incorporated*, Docket 7970, 61 F.T.C. 966 (1962), and *Thompson-Hayward Chemical Co.*, Docket 7527, 61 F.T.C. 323 (1962).

Having considered the complaint and answer, the motions of the respondents (in affidavit form or supported by affidavits), and the Reply of complaint counsel, the examiner makes Findings of Fact and enters Conclusions and Order, as follows:

FINDINGS OF FACT

On the basis of the complaint and answer, the motions and affidavits filed by the individual respondents, and the Reply of complaint counsel, the following facts have been established:

Respondent Electra Spark Company (incorrectly designated in the complaint as The Lectra Spark Company) is a corporation which was organized, existed, and did business under and by virtue of the laws of the State of New Jersey, with headquarters in Jenkintown, Pennsylvania. (Complaint and Answer) The stock of respondent Electra Spark Company was owned by respondent Fred P. Dollenberg, respondent Lectra Sales Corporation, and others* not parties to this proceeding. (Reply)

In 1959 the stock of Electra Spark Company was acquired by Amoskeag-Lawrence Mills, Inc., apparently to facilitate certain financing arrangements, and respondent Harry Petrick was installed as treasurer. Amoskeag-Lawrence disposed of its stock in 1961, and although the record is not altogether clear, it appears that the stock was reconveyed to the original owners. (See p. 2 of the affidavit of respondent Harry J. Petrick; Reply of Counsel Supporting the Complaint filed February 5, 1965.)

Respondents Fred P. Dollenberg and Harry J. Petrick were officers of Electra Spark Company, but it appears that respondent Dollenberg formulated, directed, and controlled the acts and practices of the corporation and that respondent Petrick was involved only as the representative of Amoskeag-Lawrence Mills, Inc., of New York, in connection with certain financing arrangements. (Reply) Petrick's affidavit recites that he had nothing to do with the advertising or sales policies and that, in any event, he severed his connection with Electra Spark in 1961.

By November 1961, respondent Electra Spark Company had ceased doing business. It appears that respondent Electra Spark Company is now subject to the jurisdiction of the Pennsylvania court that is supervising the administration of the estate of respondent Dollenberg. (Reply)

As recited above, and as set forth in the motion filed June 14, 1965, by the law firm of Bass & Friend, as well as in the death certificate attached to the reply of complaint counsel, respondent Dollenberg died on May 15, 1965.

Respondent Lectra Sales Corporation is a corporation which was organized, existed, and did business under and by virtue of the laws of the State of New York, with offices at 222 Fourth Avenue, New York, New York. (Complaint and Answer) It was the

*The exact breakdown of the ownership interests is not known. The shareholding percentages set forth in the Reply of complaint counsel add up to 120 percent. From the record as a whole, it may be inferred that respondent Dollenberg was the dominant shareholder.

principal promotional and sales arm of the respondent Electra Spark Company. Its stock was owned as follows: 40 percent by respondent Jack Howard, 40 percent by respondent Bernard L. Silver, and 20 percent by Electra Spark Company. In 1959, respondent Lectra Sales Corporation was sold in its entirety to Amoskeag-Lawrence Mills, Inc., as part of a financing arrangement. A petition in bankruptcy was filed in November 1961, and Lectra Sales Corporation was formally adjudged bankrupt soon thereafter. The corporate charter has not been formally revoked, but Lectra Sales Corporation is not now, and for several years has not been, engaged in any kind of business operations. (See Reply, p. 3.)

During the time of the actual business operations of Lectra Sales Corporation, its officers were respondents Jack Howard, Bernard L. Silver, and Harry Petrick. (Complaint and Answer) Petrick's role in Lectra Sales was similar to his role in Electra Spark.

The address of respondent Petrick was Amoskeag-Lawrence Mills, Inc., 1407 Broadway, New York, New York. The address of respondent Jack Howard was 33 West Ninth Street, New York, New York. The address of respondent Bernard L. Silver was and is 4 Romola Drive, Kingspoint, New York.

Respondent Jack Howard filed an affidavit in which he states that he has had "no connection with the management, operating policy, finance or conduct of the business since May of 1961." Not only is this averment uncontradicted in the Reply of complaint counsel, but it is adopted as a statement of fact in that Reply. In his affidavit Howard further states that he has no active current business relations with the other respondents "other than a financial interest in the form of an investment," the value of which he describes as "questionable at this time." Howard has been a resident of Florida since May 1961, and he has not communicated with any of the respondents since late 1961.

Respondent Howard gives assurance that he "will not use any of the material to which the Federal Trade Commission objects" in any manner challenged by this proceeding.

Respondent Bernard L. Silver states in his affidavit that "All corporate respondents have long ceased to function as active companies." Specifically, the affidavit says that Electra Spark Company, to the best of Silver's knowledge, "stopped functioning as a company" in late 1962 or early 1963, and that "Lectra Sales Corp. was adjudicated a bankrupt in 1962."

Regarding his role in the enterprise, Silver says that he was at no time associated with Electra Spark Company either as an employee, an officer, or a stockholder. Silver describes Dollenberg (now deceased) as "the sole driving force" behind Electra Spark Company, and complaint counsel seems to concur in that conclusion.

Silver was a vice-president of, and a stockholder in, Lectra Sales Corporation, which "had the responsibility for marketing the device within the continental United States." As vice president, Silver did not have the responsibility for either manufacture or copy claims. The product was manufactured by or for Electra Spark Company, which also provided the advertising material. (Motion of respondent Silver; Reply.)

After Lectra Sales Corporation was adjudicated a bankrupt, Silver discontinued all active association with both companies. He says in his affidavit that the advertising which constituted the subject of this proceeding was discontinued many years ago and that there is no likelihood it will ever again be used. The affidavit adds:

In a very real sense, and for all practical purposes, the marketing of the original LECTRA device is dead

Not only does Silver state that he has no intention of marketing the product involved in this proceeding, but he also offers assurance that should any question arise in the future regarding any product with which he may be associated, he will "cooperate to the fullest extent with the Commission."

Respondents Barilen Corp., Hyman Schlosberg, and Lawrence Serlin operated on a so-called "P.I." (per inquiry) basis in connection with the sales of the Lectra Fuel Igniter.

Respondent Barilen Corp. was a New York corporation, with offices at 730 Third Avenue, New York, New York. Individual respondents Schlosberg and Serlin were officers of Barilen Corp. and formulated, directed, and controlled the acts and practices of the Barilen Corp. Their business address was the same as that of the corporation.

Barilen Corp. is now dissolved, the certificate of dissolution having been filed with the Department of State of the State of New York on July 21, 1965.

Barilen Corp. placed its last advertisement for the Lectra Fuel Igniter in December 1961, and it did not further engage in the sale and distribution of that product except to wind up its sales promotional campaign.

Individual respondents Schlosberg and Serlin have now separated their business interests and have not directly or indirectly engaged in the sale or distribution of Lectra Fuel Igniters or of any other product of similar design or construction; and they have stated their intention not to do so. (See Motion and Supplemental Statement of Barilen *et al*; Reply.)

Concerning the operation of the entire venture, the Reply of complaint counsel states that the respondents, commencing in 1957, "put together a very extensive promotional organization and devised sales material, containing wildly exaggerated claims, for the sale and distribution of an automobile spark plug." The Reply also explains:

This spark plug was of the so-called annular design and was marketed under the trade name of "Lectra Fuel Igniter." Although respondents made some claims for uniqueness and Colonel Dollenberg is claimed to have been granted a patent with respect to certain design features, it appears that basically the plug was substantially the same as any other annular spark plug. Annular spark plugs have been produced by a number of both domestic and foreign manufacturers and have been used in internal combustion engines for many years.

According to complaint counsel, the respondents' sales operation "got in full swing during early 1958," but by mid-1959 "respondents were experiencing financial difficulties." The Commission began its investigation during 1959, about the time respondents were running into financial difficulties, and issued its complaint in January 1961. But by this time, "the promotional scheme had fallen apart and the respondents were scattered" and were, for the most part, "uninterested in the disposition of the proceeding." Dollenberg and Silver "were the only ones in the least concerned with the matter." (Reply)

Concerning public interest, complaint counsel emphasizes that the spark plugs that are the subject of this proceeding are apparently but one of a number of different kinds and models of spark plugs now on the market. Since the respondents' spark plugs do not appear to be unique, complaint counsel takes the position that "there would appear to be no public interest whatsoever which would justify the protracted public hearings necessary to establish the performance characteristics of the device" (Reply). Complaint counsel adds:

Extensive investigation by the Commission, other governmental agencies and private organizations have clearly marked out the area of performance for this type of product so that no useful purpose could be achieved by the expenditure of the substantial funds necessary to conduct formal hearings to establish such facts (Reply).

From a practical standpoint, complaint counsel further notes that "the material in the file is almost ten years old, and more current promotional material does not exist."

In summary, complaint counsel states:

. . . the respondents and their whole promotional scheme have simply dissolved. The single respondent, Colonel Dollenberg, who had any interest in the matter insofar as the Lectra Fuel Igniter as a product is concerned is now dead. Not a single one of the corporate respondents remains as a viable organization or has engaged in the sale and distribution of the Lectra Fuel Igniter for more than five years. The other individual respondents were engaged in the operation purely on a promotional basis and there appears to be no public interest which would warrant the further prosecution of the matter.

* * * * *

As a practical matter both parties and practices have long since ceased to be (Reply).

Concurring, in effect, in the various motions to dismiss, complaint counsel, in his Reply, points to "the death of the principal individual respondent, Colonel Fred P. Dollenberg, the bankruptcy or dissolution of the several corporate respondents, the complete breakdown and termination of the promotional scheme, [and] the apparent, long continued abandonment of the alleged unlawful practices. . . ." In view of these facts, together with other circumstances set forth in respondents' motions, complaint counsel states that "there appears to be no public interest warranting the further prosecution of this matter. . . ."

Accordingly, complaint counsel "does not oppose the granting of the relief sought . . . as to all parties respondent, but without prejudice to the right of the Commission to institute such further action as in its opinion the public interest may require."

CONCLUSIONS

The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents.

The complaint herein states a cause of action, and issuance of the complaint was in the public interest. But in view of the present status of the respondents' business and the stated position of complaint counsel to the effect that "there appears to be no public interest which would warrant the further prosecution of the matter," the examiner concludes that there is, in fact, no present public interest in the continued prosecution of the proceeding.

The case must be dismissed, of course, as to respondent Dollenberg by reason of his death.

The examiner further concludes that the case should be dis-

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missed, without decision on the merits, subject only to a reservation of the right of the Commission to take such action in the future as may be warranted by the then-existing circumstances. Accordingly, the following order is entered:

ORDER OF DISMISSAL

It is ordered, That the complaint be, and it hereby is, dismissed as to respondent Fred P. Dollenberg by reason of his death on May 15, 1965; and

It is further ordered, That the complaint be, and it hereby is, dismissed as to all other respondents, without decision on the merits and without prejudice to the right of the Commission to reopen the proceeding or to take such action in the future as may be warranted by the then-existing circumstances.

FINAL ORDER

No appeal from the initial decision of the hearing examiner having been filed, and the Commission having determined that the case should not be placed on its own docket for review and that pursuant to Section 3.21 of the Commission's Rules of Practice (effective August 1, 1963), the initial decision should be adopted and issued as the decision of the Commission:

It is ordered, That the initial decision of the hearing examiner shall, on the 20th day of April, 1966, become the decision of the Commission.
