

INTERLOCUTORY, VACATING, AND MISCELLANEOUS ORDERS

AVON PUBLICATIONS, INC., ET AL.

Docket 6911. Opinion and Order, July 15, 1969

Order adopting hearing examiner's recommendation that show cause order be vacated and that proceeding to determine whether Hearst Corporation was to be considered the successor to any of corporate respondents be dismissed.

OPINION OF THE COMMISSION

This matter presents a single narrow issue for the determination of the Commission: Is the Hearst Corporation a successor to the respondent corporations herein such that it may be bound by the consent order entered against those respondents?

On October 21, 1958, the Commission issued a consent order against Avon Publications, Inc., Avon Publishing Company, Inc., Avon Book Sales Corporation,¹ Joseph M. Mann, and Harry Rebell, prohibiting continuance of certain misleading practices with respect to the titling of books, *Avon Publications, Inc.*, 55 F.T.C. 619. The respondent corporations were part of a group of publishing companies, owned entirely by Joseph Meyers and Harry Rebell, which had been separately incorporated for tax and other business purposes. Mr. Meyers, who owned 85 per cent of the stock of these corporations and was responsible for formulating company policy and managing daily operations, died on November 3, 1957, prior to issuance of the order against the Avon companies. Mr. Meyers' interest in the publishing companies comprised the major portion of his estate and, from the time of Mr. Meyers' death, the attorneys representing the Meyers' estate urged Mr. Rebell—who owned the remaining 15 percent of the stock in the corporate group—to liquidate the Meyers' interest.

¹ Before the order issued, Avon Publishing Company, Inc., was merged into Avon Publications, Inc. In this opinion, the corporations subject to the 1958 consent order are sometimes referred to as "the Avon companies."

The principal consideration leading to disposition of both the Meyers and Rebell interests in the publishing companies was the desire of Mr. Rebell to find a more profitable and more easily manageable investment for himself and for Mr. Meyers' widow than was afforded by investment in a group of publishing companies. Consequently in late 1958, after the order against the Avon companies had issued, Mr. Rebell contacted Fred Lewis, vice president of Hearst Corporation, regarding the possible sale of Avon's assets.² Negotiations between Lewis and Rebell, evidently at arm's length and guided carefully by experienced counsel,³ culminated in an agreement dated May 5, 1959, for the transfer to Hearst of most of the assets of the Avon companies, including the inventories, trademarks, trade names, and the goodwill of the businesses.⁴ Not all of the Avon assets were transferred, however; for example, the accounts receivable were not sold.

The evidence is uncontradicted that the Hearst Corporation never received actual notice, prior to consummation of the agreement, of the order issued against the Avon companies, and there is evidence that Hearst would not have purchased the Avon assets had it known of the order.

After the transfer of the Avon assets to Hearst, only two major employees of Avon—neither an Avon stockholder—were retained by Hearst. Neither of these employees became officers of Hearst and both left the employ of Hearst within a few years of the transfer. The Avon company operations became the operations of the Avon Division of Hearst Magazines of Hearst Corporation and, within a year of the transfer, were moved from their previous location to the Hearst Corporation's main building.

² Prior to this time, there had been other dealings between Hearst and the Avon companies. International Circulation Distributors, a division of the Hearst Corporation, had been a distributor of Avon's pocketbooks for seven years to wholesalers and retailers throughout the United States. This relationship between Hearst and Avon was not an exclusive one; Hearst had competitors in the field and it performed distribution services for many other customers.

³ The final agreement encompassed 15 pages of typewritten provisions specifying the details of the arrangements and how they were to be carried out. Among other things, a representation was secured by Hearst that there was no litigation pending or threatened that would affect the trademarks or trade names transferred; moreover, Avon's attorney represented that only one suit was pending against any Avon company and that was probably barred by the statute of limitations.

⁴ The other publishing companies which belonged to the group of publishing companies owned by Meyers and Rebell but not named in the Commission order were also parties to this agreement.

On November 10, 1960, the Avon companies—which had continued to exist as independent corporations—underwent a change of name and, on the same day, were formally dissolved.

On August 17, 1967, the Commission, in view of the fact that similar orders issued against other publishers contained provisions which were broader in scope than those entered against the Avon companies and which were more appropriate for the protection of the public interest, issued an order to show cause why its 1958 consent order against the Avon companies should not be reopened and modified. The order to show cause was served upon the Hearst Corporation as the alleged successor of the Avon companies. Hearst appeared specially, contesting the jurisdiction of the Commission; counsel for the Commission also moved, on December 15, 1967, to vacate the show cause order. On October 28, 1968, however, the Commission, having determined that a substantial factual issue was presented requiring the receipt of evidence pursuant to Section 3.72(b) (3) of the Commission's rules,⁵ ordered the taking of evidence to determine whether Hearst was to be considered the successor to any of the corporate respondents named in the order against the Avon companies. Following the taking of such evidence, which resulted in the findings summarized above, the examiner concluded that Hearst was not the successor of the Avon companies for purposes of enforcement of the 1958 consent order and recommended that the order to show cause be vacated and that these proceedings be dismissed. We adopt the recommendations of the examiner.

While the order entered here is not expressly binding upon the "successors" of respondents,⁶ it is fundamental that parties subject to an order may not, through transfer of the business or otherwise, nullify its provisions by carrying out prohibited acts through persons who were not parties to the original proceeding.

⁵ Rule 3.72(b) (3) provides in relevant part: "Whenever an order to show cause or petition to reopen is not opposed, or if opposed but the pleadings do not raise issues of fact to be resolved, the Commission, in its discretion, may decide the matter on the order to show cause or petition and answer thereto * * *. When the pleadings raise substantial factual issues, the Commission will direct such hearings as it deems appropriate, including hearings for the receipt of evidence by it or by a hearing examiner * * *. Upon conclusion of hearings before a hearing examiner, the record and the hearing examiner's recommendations shall be certified to the Commission for final disposition of the matter."

⁶ The Commission has, in other cases, entered orders which were expressly binding upon the "successors and assigns" of the respondent, see, *e.g.*, *Sherwin-Williams Co.*, 36 F.T.C. 25, 72 (1943).

Regal Knitwear Co. v. N.L.R.B., 324 U.S. 9, 14-15 (1945). An order may, therefore, be enforced against the transferee of a corporation subject to the order where the transfer was made in circumstances indicating an attempt by the transferor to evade the order with the aid or, at least, with the knowledge, of the transferee; mere succession to the assets of the transferor is, however, insufficient to invoke this principle. *Ibid.* Stated otherwise, "Whether a successor corporation is liable is a question of fact which turns on whether, for example, it is the alter ego of the original respondent or whether it has participated in an attempted evasion of obligations * * *." *N.L.R.B. v. Mastro Plastics Corp.*, 354 F.2d 170, 180 (2d Cir., 1965).

With due regard to these principles, we find no basis in precedent⁷ or policy for holding Hearst, as the successor to the Avon companies, liable under the Avon order. There is neither substantial identity of parties nor any attempt to evade the order here.⁸ Rather, this was an arm's length transaction involving a sale of the major assets of a group of corporations; the incentives for the transfer on both sides were independent of the order; the selling corporations existed after the transfer and were dissolved after a change of name; only two major employees went over to the successor corporation, neither of whom became officers and both of whom have since left; and the evidence is uncontradicted that the transferee, Hearst, had no actual notice of the outstanding order.⁹ Under these circumstances, we do not see how this

⁷ We are not aware of a single case in which an administrative order was held binding upon a successor corporation where there was not substantial identity of parties or some element of active participation by the successor in an attempt to evade the order. See, e.g., *N.L.R.B. v. Tempest Shirt Mfg. Co.*, 285 F.2d 1 (5th Cir., 1960); *N.L.R.B. v. Ozark Hardwood Co.*, 282 F.2d 1 (8th Cir., 1960). Moreover, it should be noted that the circumstances of this case are readily distinguishable from the facts in *Crowell-Collier Publishing Co.*, Dkt. 7751 (1969) [75 F.T.C. 241], recently decided by the Commission. In that case, the successor corporation was a subsidiary of the same parent as the respondent corporation and the Commission found an "identity of interest and of business operations" between the respondent and its successor; this is obviously not the case here.

⁸ We note the examiner's specific finding that "The Hearst Corporation did not take any action that, if it had been a respondent, would have violated the consent order; and its policy as to titling books, in a manner to prevent confusion, was in accord with the Commission's expressed policy." *Certification of Record*, February 27, 1969, p. 20.

⁹ Even if Hearst had received actual notice there is some question as to whether it would be bound by the order under the circumstances of this case. The Supreme Court has very recently held that: "Although injunctions issued by federal courts bind not only the parties-defendant in a suit, but

order can be enforced against Hearst without doing violence to the salutary principle which forbids enforcement of an order "so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law." *Regal Knitwear, supra*, 324 U.S. at 13. Moreover, we believe that a contrary conclusion would lead to bewildering consequences. The transaction here involved a transfer of some, but not all, of the Avon assets. Who would be subject to the Avon order if the assets had been transferred to several different parties? If a sale of assets *per se* is sufficient to hold a "successor" liable under an order entered against the transferor, how few or how many assets must be transferred? Is a transferee constrained to purchase the transferor's liability as well as any of its assets? Are the assets perpetually to be encumbered by the outstanding order regardless of the number of transfers made?

We believe that the present rule, by which a successor corporation is liable under an order entered against a predecessor where there is substantial identity of parties or knowing participation in an attempt to evade the order, adequately protects the public interest and is in accord with sound policy. Since, therefore, the evidence in this case does not remotely suggest that this transaction involved any of these factors, we adopt the recommendations of the examiner; the order will issue accordingly.

ORDER VACATING ORDER TO SHOW CAUSE

This matter having come before the Commission upon the hearing examiner's certification of record and recommendation pursuant to Section 3.72(b)(3) of the Commission's Rules of Practice, and the hearing examiner having recommended that the Commission's order to show cause issued in this matter on August 17, 1967, be vacated and this proceeding be dismissed; and

The Commission, for the reasons stated in the accompanying opinion, having determined that the examiner's recommendations should be adopted:

It is ordered, That the Commission's order to show cause issued in this matter on August 17, 1967, be, and it hereby is, vacated.

Commissioner Nicholson concurring in the result.

also those persons 'in active concert or participation with them who receive actual notice of the order by personal service or otherwise,' Fed. Rule Civ. Proc. 65(d), a nonparty with notice cannot be held in contempt until shown to be in concert or participation." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 37 U.S. Law Week 4424, 4426 (May 19, 1969).