In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 76

KLOR'S, INC.,
Petitioner,

v.

BROADWAY-HALE STORES, INC., et al.,
Respondents.

Brief for Respondents in Reply to Memorandum for the United States as Amicus Curiae

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The Memorandum of the Solicitor General, like the petition for a writ of certiorari, completely misconceives the case decided by the court below. Over and over the Government refers to this case as one involving "'the opportunity of a single trader to compete'" (p. 3), a conspiracy "designed solely to eliminate a competitor" (p. 4), "'the liberty of a trader to engage in business'" (pp. 4-5), "the basic right of the individual entrepreneur to go into business" (p. 5), "the elimination of individual entrepreneurs" (p. 5, n. 6), the "purpose * * * to stifle a competitor" (p. 7).

These characterizations are wholly alien to the case presented by the record. The pleadings and the affidavits,[1] dis-

1. The question below, contrary to the statements of the Solicitor General (pp. 2, 6), was not whether the complaint stated a cause of action. Affidavits on the motion for summary judgment, uncontested by petitioner, supplied the controlling facts. This was emphasized by the court below (Pet. App. 7).

close, simply, a case of competition between *continuing* competitors: the familiar competition between retailers for the right to resell the particular brands of certain manufacturers.

Respondent Hale and petitioner are two household appliance stores located within a few doors of each other on Mission Street in San Francisco. They are two of "literally hundreds of dealers in the San Francisco Bay Area" (Pet. App. 30) selling the products involved. Hale successfully competed with petitioner for the right to purchase and resell certain brands of certain products of certain suppliers. Numerous other brands were available to petitioner. Numerous other retailers, located near and far, purchased and sold the brands Hale succeeded in buying (Pet. App. 30). No possible inference from the pleadings and affidavits supports the statements of the Solicitor General that there was any agreement to "eliminate" petitioner. On the contrary, as the court below pointed out, among the competing brands available to petitioner were "many of the outstanding and most widely advertised brands in the country * * *. Appellant does not charge that he was denied the right to handle any of this vast number of brands manufactured and sold by companies not parties to this action" (Pet. App. 12). The broad allegation of the complaint that defendants "conspired" to prevent petitioner from obtaining radios, clothes washers, refrigerators, etc. (R. 9) was met on the motion for summary judgment by the uncontroverted showing that petitioner was able to obtain numerous brands of these appliances which were in free and open competition with the brands purchased by Hale.

Further, as the court below pointed out (Pet. App. 23):

> "There was no charge or proof that by any act of defendants the price, quantity, or quality offered the

> public was affected, nor that there was any intent or purpose to effect a change in, or an influence on, prices, quantity, or quality, either directly or indirectly. It is not suggested that either the object or effect of the alleged conspiracy was to create an unreasonable restraint, illegal per se."

One of the most common forms of competition which exists in merchandising is the competition for the brand name goods of particular manufacturers. Two clothing stores situated side by side in a shopping district compete, for example, for the right to purchase Hart, Schaffner & Marx clothing. If one obtains that right on the condition that the next-door seller is not supplied with the same brand, the unsuccessful retailer is not "eliminated" where (as in the case at bar) he has available Hickey Freeman and numerous other brands of clothing. And this, of course, remains true where (as in the case at bar) additional lines of clothing are involved—Stetson hats versus Dobbs hats, Florsheim shoes versus Hanan shoes, Manhattan shirts versus Arrow shirts, Phoenix socks versus Interwoven socks—as long as each retailer has free access to the competing brand and numerous others. And no Sherman Act violation can exist, as the court below emphasized, where the public has access to all of these goods in a highly competitive market.[2]

The Government paraphrases the allegations of the complaint that Hale "as the operator of 'a chain of key stores' in the Pacific Coast area (R. 11), has used its monopolistic buying power" (Govt. Memo. p. 2), and that Hale "using its 'strategic position' * * * as the operator of a chain of key stores on the Pacific coast, has coerced distributors and

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2. See cases cited at pages 13 and 14, footnote 12, Brief for Respondents in Opposition.

manufacturers into cutting off supplies to petitioner," (p. 6). But the affidavits on the motion for summary judgment demonstrated that these allegations were wholly without factual basis and presented no genuine issue.[3]

The Government's memorandum asserts that "The court below has rejected [the] flexible approach" (pp. 4-5) approved by this Court which "has stressed the necessity for considering the various relevant factors in the particular case, such as the nature and history of the restraint, the actual or probable extent of the anti-competitive effect, and the reason for adopting the restraint" (p. 3). But this approach, approved by this Court, is exactly the approach which the court below took.

The Government also cites numerous cases familiar in the field of antitrust, and quotes isolated phrases from each. It refers to tying arrangements (Govt. Memo. p. 5), to "resale price maintenance schemes" enforced by refusals to deal (p. 6), and to concerted refusals to deal with the purpose "to coerce or destroy an enterprise" (p. 7). No one of these situations is here presented, and no one of the cases cited has any resemblance to the case at bar. The quotations, out of context, are only misleading. The Government cites no conflicting decision and makes no reference to the numerous cases in the trial and appellate courts which accord with the decision below.[4]

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3. Brief for Respondents in Opposition, p. 9.

4. Brief for Respondents in Opposition, pp. 13, 14, n. 12. And see the following additional decisions, recently reported:

Delaune v. Hibernia National Bank of New Orleans (E.D. La. July 29, 1958), CCH Trade Reg. Rep. Current, par. 69,123;

Alexander v. Texas Co. (W.D. La. Aug. 22, 1958), CCH Trade Reg. Rep. Current, par. 69,124;

Nelligan v. Ford Motor Company (W.D. S.C. April 9, 1958), 161 F. Supp. 738.

CONCLUSION

For the foregoing reasons and for those stated in our brief in opposition, we submit that the petition for a writ of certiorari should be denied.

Dated, San Francisco, California, September 22, 1958.

Respectfully submitted,

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