

IN THE MATTER OF
CHAS. PFIZER & CO., INC.

Docket 7780. Order, July 10, 1964

Order directing reargument of case on the single question of whether the 1962 amendments to the Federal Food, Drug, and Cosmetic Act cover the practices alleged in the complaint.

ORDER DIRECTING REARGUMENT

The Commission has determined that the appeal in this case should be reargued, such reargument to be limited, however, to the following single question: whether the Drug Amendments of 1962 (76 Stat. 780) to the Federal Food, Drug, and Cosmetic Act, and/or any regulations issued under such amendments by the Secretary of Health, Education, and Welfare cover the acts and practices alleged in the complaint. Accordingly,

It is ordered, That (1) complaint counsel and respondent shall each file within forty-five (45) days of receipt of this order a supplemental brief; (2) the Secretary of the Commission shall set the matter down for oral argument; and (3) the General Counsel of the Department of Health, Education, and Welfare is invited to submit a brief setting forth the Department's views on the question presented and, if he desires, to participate in the oral argument.

IN THE MATTER OF
FRITO-LAY, INC.

Docket 8606. Order, July 13, 1964

Order remanding to hearing examiner the issue of the admission of the truth of statements in certain documents submitted by respondent.

ORDER REMANDING PROCEEDINGS TO THE HEARING EXAMINER FOR
FURTHER CONSIDERATION

The Commission has before it an application by respondent for leave to file an interlocutory appeal from a ruling of the hearing examiner. During the course of the pretrial proceedings, complaint counsel served upon respondent a request for the admission of the authenticity of a large number of documents and in addition a request for the admission of the truth of all statements contained in certain of them. Respondent filed an objection to the requests in their entirety, contending that they are unreasonable, unduly burdensome, harassing, and inconsistent with the purpose and spirit of Section 3.13 of the

Commission's Rules of Practice. The hearing examiner held lengthy oral argument upon respondent's objections, and he subsequently denied all the objections, without indicating the grounds for his ruling. Subsequently the examiner declined to postpone respondent's answers to the requests until the Commission shall have acted upon its application for an interlocutory appeal. Since respondent then promptly sought a stay from the Commission itself, the Commission will regard this application, not heretofore acted upon, as having effectively stayed respondent's duty to answer the request for admissions. Accordingly, respondent's submittal of the affidavit of John D. Williamson, Jr., on June 19, 1964, in response to the request for admissions has not mooted respondent's objections.

The Commission has considered the application for leave to file an interlocutory appeal, complaint counsel's answer in opposition, and respondent's reply, and has concluded that this matter should be remanded to the hearing examiner for his further consideration. The Commission has not had the benefit of a statement by the examiner of the reasons that led him to overrule respondent's objections in their entirety, but upon examination of the transcript of the prehearing conferences, it appears that both the examiner and the parties may have misapprehended the purpose and scope of the procedure set forth in Section 3.13 of the Commission's Rules. If the request for admissions and the objections thereto are reevaluated in the light of a clearer understanding of the purpose of the pretrial discovery procedures, it should be possible to arrive at a solution that satisfactorily accommodates the legitimate interests of both parties. Thus, we need only set forth certain considerations that ought to guide the examiner's decision.

The admissions device provided by Section 3.13 is primarily designed to spare a party the burden and expense of proving elements of his case which his opponent does not intend to controvert and which indeed may be incontrovertible. Admissions serve the further and subsidiary purpose of clarifying the issues between the parties, revealing the areas of agreement and thereby exposing the matters of genuine controversy.

Since the revised Rules of Practice emphasize the goals of expeditious and continuous hearings, with a full identification of the relevant issues at the outset and with a minimum of surprises during the trial, the Commission encourages an effective and proper use of Section 3.13. Moreover, pretrial discovery ought ordinarily to proceed with a minimum of intervention by the examiner or the Commission. In this instance, however, complaint counsel's request for admission encompasses an unusually large number of documents, and it would

appear that if respondent is to have reasonable opportunity to give conscientious consideration to each of the items for which an admission is requested, serious delays in commencement of the hearings might be required.

Respondent's most vigorous objections center upon the complaint counsel's requests for the admission of the truth of all statements contained in 827 documents, selected from the much larger list of documents with respect to which requests for the admission of authenticity are made. Respondent states that these 827 documents contain literally tens of thousands of statements, many of which have no apparent relevance at this point to any issue in the case.

The Commission has noted that, in large measure, these documents constitute the statements of respondent itself or its agents. Thus, for example, 167 of the documents are respondent's answers to specific questions asked by the Commission staff during the course of its investigation. There are many company press releases, notices to stockholders, annual reports, house publications, etc. Some 267 of the documents represent market surveys that were prepared by respondent's employees.

It is a familiar rule of evidence, even in judicial proceedings where perhaps more rigid rules prevail, that any relevant and nonprivileged statement of an opposing party or his agent may be received in evidence under the "admissions" exception to the hearsay rule. See McCormick, *Evidence*, p. 502 (1954). Thus the party who bears the burden of proof in a proceeding may establish his *prima facie* case simply by introducing into evidence, for the truth of the matters contained therein, the out-of-court statement of his opponents, whether it appear in a document or in the testimony of a third party. It is therefore unnecessary ordinarily to seek the opponent's admission of the truthfulness of his own document in order to accomplish the primary purpose of Section 3.13 of the rule—the document is already admissible to prove the point. In these circumstances, the only function that would be accomplished by extracting an admission of truthfulness is to limit the possibility of the opponent's introducing rebuttal evidence to detract from the force of its own admission. For example, the opponent might be able to show, by testimony or some other document, that the author of the statement received in evidence against it was mistaken; but an admission of truthfulness under Section 3.13 would ordinarily preclude the possibility of such rebuttal (even then a party may be relieved of an improvident admission of truthfulness upon an adequate showing of justification).¹

¹ See 4 Moore, *Federal Practice* ¶ 36.08 (2d ed. 1963)

A party undoubtedly has a legitimate and understandable interest in knowing before trial the approximate nature and extent of his opponent's defense. Thus, we do not rule that it is in all circumstances unnecessary or improper to seek admissions of truthfulness with respect to a party's own documents. But in this instance we are mindful of the great volume of the documents included within complaint counsel's request.² We believe that the examiner, who has a greater familiarity with the matters that are likely to be at issue in the proceeding, should consider whether the additional clarification that might be expected to result from responses to the requests for admission of truthfulness in their entirety is sufficient to justify the expenditure of time and effort that would be required of respondent.

Somewhat different considerations are applicable to complaint counsel's requests for the admission of authenticity of the documents. Regardless of whether a document appears on its face to be respondent's own or that of some third person, complaint counsel would be obliged, in the absence of an admission or waiver of objection to genuineness, to stand ready to prove that the document is authentic. Since challenges to the authenticity of documents are quite rare in Commission proceedings, there is all the more reason to have the question settled at the outset and avoid the uncertainty that may hang over a party who proposes to introduce documentary evidence. Such a consideration is especially pertinent in this case, for all of the documents listed by complaint counsel in its request were supplied by respondent from its own files in response to staff requests during the course of an investigation. While the number of documents is very large, there is little reason to anticipate that respondent would be unable to determine readily whether each of them is in fact what it purports to be. The authenticity of most of them ought to be immediately apparent on their face.

As we understand respondent's present application, their principal objection to the scope of complaint counsel's requests for admission of genuineness is not primarily to the number of documents or the time required to accomplish the task, but rather to the effect that the examiner intends to give an admission of genuineness. Referring to a portion of the transcript of prehearing conference,³ respondent ex-

² It is pertinent to observe here that requests for admissions of truthfulness demand more than a perfunctory searching of present knowledge—a party is obliged to resort to sources of information reasonably available to him in order to determine whether he is in a position to make the admission. See 4 Moore, Federal Practice ¶ 36.04.

³ "MR. HOWREY: Now, you are suggesting as I understand it, if we concede authenticity to those documents, which I think is a normal request, then you suggest we put them in a book and offer them in evidence and they'll be admitted if you think they are relevant."

"HEARING EXAMINER BENNETT: Yes.

"MR. HOWREY: Now, then I come along. I suppose in my own case, and subpoena

presses its understanding of the examiner's position as follows: that respondent must indicate at the time it responds to the requests for admission of genuineness whether it intends to introduce any testimony to rebut the inferences that would normally be drawn from any of the documents and that, if it does not do so then, it will be regarded as having waived the right of rebuttal. Although it is not altogether clear that this was the purport of the examiner's ruling, we think it appropriate, in order to facilitate the proceedings on remand, to indicate that respondent will not risk any such waiver of right of rebuttal by responding to the requests for admission of genuineness. An admission of genuineness of a letter concedes that the signer in fact sent this letter to the named addressee, but it would still be open to respondent to show that the signer was mistaken in what he said, did not intend to be taken seriously, etc. To attribute any greater significance to an admission of genuineness blurs the distinction between it and an admission of truthfulness. Accordingly,

It is ordered, That the proceeding be, and it hereby is, remanded to the examiner for the further consideration, in the light of this order, of respondent's objections to the requests for admissions.

PACIFIC MOLASSES COMPANY ET AL.

Docket 7462. Order and Opinion, July 20, 1964

Order denying request for reopening of Sec. 2(a) Clayton Act proceeding, modification of the desist order not being warranted by reason of "changed conditions."

OPINION ON RESPONDENTS' REQUEST FOR REOPENING

On May 21, 1964 [65 F.T.C. 675], the Commission issued its opinion and order in this proceeding, modifying and adopting the hearing examiner's initial decision that respondents had discriminated in favor

the authors of a few of them that I want to explore and cross examine them. That cross examination isn't a part of our case. We have that right—

"HEARING EXAMINER BENNETT: That of course, is not what I am saying, sir. What I am saying is that if you have such a document, I will understand and approve your saying as to that document that we cannot concede the authenticity of this document, because we believe that the statements made on the face of the document are not correct. And we will insist that a witness be called. But I want you to do that at the time these documents come before you for authentication. I don't want you to wait until the day when counsel hands you a list of documents that he proposes to offer and then say, oh no, you can't have that document, because it's going to throw off his entire order of proof and I'm never going to be able to understand him. So the time to do that is at the time when this document is given to you for you to authenticate it. And you say, I cannot admit it for the reasons that John Jones who wrote this document has told me—I'm not suggesting that you need to go all through this—that he didn't mean what he said, or it was a joke, or something of that nature. and that I am going to insist upon his being put on the stand." (Tr. 422-23.)

of certain of their customers and against certain others in violation of Section 2(a) of the amended Clayton Act, 15 U.S.C. 13. Respondents Pacific Molasses Company and James M. Ferguson¹ now request a reopening of the proceeding for consideration of their contentions that the order was made applicable to James M. Ferguson, as an individual, on the basis of an erroneous "finding" that he was "guilty" of a "crime"; that our order prohibiting future price discrimination by respondents should be set aside because Pacific's principal competitor, Southwestern Sugar & Molasses Company, which is under a somewhat similar Commission order, has now left the business and has been replaced by another company, National Molasses Company, "against whom there is no cease and desist order"; and that the Commission erred in its earlier opinion in concluding that there was no denial of due process in the examiner's failure to follow a pretrial order requiring counsel supporting the complaint to give respondents a list of his witnesses and exhibits 15 days in advance of the hearing.

I

First, we note that respondents have been less than diligent in exhausting their administrative rights. Under § 3.25 of the Federal Trade Commission's Rules of Practice, any party may file, within 20 days after service upon it of any Commission decision, a "petition for reconsideration" of that decision. Respondents filed no such petition. (Their present request was filed on June 30, 1964, 30 days after service upon them (June 1, 1964) of the Commission's decision and order to cease and desist, and thus not within the 20 days provided for the filing of such a petition for reconsideration.)

Having failed to request reconsideration under § 3.25, respondents now ask for a reopening of the matter under § 3.27. Here, interestingly enough, they are premature. That section provides for a reopening "either on the Commission's own initiative or on the request of any party to the proceeding," but § 3.28 provides that it is only upon the Commission's own initiative that a matter may be reopened prior to the expiration of the statutory 60-day period allowed for the filing of a petition for review in the appropriate court of appeals; reopening at the request of a party is provided for only after a Commission decision has become "final," either by court affirmance or by expiration of the statutory period for seeking review. Here, that statutory 60-day period would not be up until August 1, 1964, 30 days after respondents filed the instant request for reopening under § 3.27.

¹ No request is made on behalf of Bascom Doyle, the other officer against whom the order was directed.

II

But putting aside the question of timeliness, there is no merit in respondents' request, whether we treat it as a petition for reconsideration under § 3.25 or for reopening under §§ 3.27 and 3.28. Under the first, there must be some showing of error in the Commission's prior decision. Under the second, it must appear that a modification or setting aside of the order is warranted by reason of "changed conditions of fact or law or the public interest." None of these tests are met here. Respondents' contention with regard to the examiner's failure to follow the pretrial order was considered fully in our prior decision. As we said there, these respondents never had a constitutional "right" to a list of complaint counsel's witnesses and exhibits; certainly there is nothing in the authorities pointed to by respondents that converts every agency rule of practice into a "right" of constitutional proportions. The question in such cases is whether there has been a loss of a substantial right, one that genuinely prejudices the party's cause. Here, there could have been no such prejudice to respondents in view of the 40-day continuance they were given to investigate and prepare their case, together with the right to recall and cross-examine as adverse witnesses any of the witnesses previously called by the Commission's attorney. We do not understand how respondents could now benefit by a remand of the case to the hearing examiner for a second presentation of the same evidence.

Respondents' argument with regard to our inclusion in the cease-and-desist order of respondent James M. Ferguson, president of respondent Pacific Molasses Company, is even more difficult to follow. The Commission's hearing examiner, in his initial decision, had found that Mr. Ferguson personally participated in and directed the discriminatory pricing found unlawful. This was, of course, a factual "finding." However, the examiner was of the opinion that, as a matter of law, such personal participation in the offense was not sufficient basis for including him, as an individual, in the order to cease-and-desist. In our earlier opinion, we disagreed with this legal conclusion, explaining our reasons and referring to, among other cases, *United States v. Wise*, 370 U.S. 405, 409, 416 (1962). Respondents challenge this ruling, quoting the following from our prior opinion, and characterizing these three sentences as "findings":

James M. Ferguson, President of respondent Pacific Molasses testified that he personally ordered the discriminatory pricing.

The Clayton Act, like the Sherman Act, should be construed "in its common-sense meaning to apply to all officers who have a responsible share in the proscribed transaction," including the officer who "authorizes, orders, or helps perpetrate the crime—regardless of whether he is acting in a representative capacity." *United States v. Wise*, 370 U.S. 405, 409, 416 (1962).

We see no reason why these two corporate officers, having once been found guilty of deliberate and purposeful price discrimination that seriously injured others in the industry, should be left free to give and execute the same kind of unlawful orders on behalf of some other molasses company.

Respondents then go on to "assume" that "all three findings are necessary to support the opinion."

The first of these quoted statements, that respondent Ferguson "personally ordered the discriminatory pricing," is not challenged here, as indeed it could not be.² But they contend that the second one wrongfully accuses Ferguson of a "crime," and that the third one is unfounded.

The second of those sentences was not a "finding," as is plainly apparent on its face. We do not understand how a quotation of a proposition of law from an opinion of the Supreme Court of the United States could be construed as a "finding" of fact by an administrative agency. Since the Sherman, Clayton, and Federal Trade Commission Acts are in *pari materia*, *Federal Trade Commission v. Cement Institute*, 333 U.S. 683, 688-693 (1948), the Court's declaration in the *Wise* case³ that individual criminal punishment is appropriate for the cor-

² Mr. Ferguson testified as follows:

Q. * * * What authority did Mr. Doyle have in the Gulf area with respect to Pacific Molasses' pricing policies?

A. Well, Mr. Doyle's authority was such authority as I might have granted to him. His responsibility was to execute the policies, prices, sales procedures that I established. I would provide him, after discussing with him the general molasses situation, I would provide him with a sales price * * *.

We maintained at that time a very close working relationship by correspondence and also by telephone. He would keep me informed of demands and competitors' activities and I would then make the determinations as to what action Pacific should take. I would say that he had no authority other than the authority that I personally gave to him regarding prices or sales policies.

HEARING EXAMINER LEWIS: Are you saying that he never established any price without first discussing it with you, a particular price?

THE WITNESS: Yes, sir.

HEARING EXAMINER LEWIS: There never was a price change without discussing it with you?

THE WITNESS: Right, Tr. 946-947.

The negotiation and granting of the discriminatory price concessions of some \$24,487.70 to Pacific's largest and most favored customer, Fort Worth Molasses Company, was described by Ferguson as follows:

* * * I was in New Orleans in early January of 1955 and Mr. Doyle and I discussed the Fort Worth Molasses Company account, and it was agreed that on my return to San Francisco I would visit with Mr. Hill [of Fort Worth Molasses] at Amon Carter Field which is the Fort Worth Air Field. And we telephoned Mr. Hill and he agreed to come out to the airport and see me for the 45 minutes or hour between our connecting planes * * *.

* * * We were admittedly interested in trying to arrange a long-term contract with Fort Worth Molasses Company, and we were trying to present Fort Worth with the best possible offering that we could make. And, in discussing this with Mr. Hill, I did present to him in the way that it is shown here * * *.

So when I returned to San Francisco, I prepared this letter agreement of January 13 [CX 17], and sent it to him. Tr. 971, 973.

³ See also *United States v. National Dairy Products Corp.*, 372 U.S. 29 (1963), holding that the indictment's charge of discriminatory and unreasonably low prices for the purpose of destroying competition in violation of Section 3 of the Robinson-Patman Act, 15 U.S.C. 13(a), was not unconstitutionally vague and indefinite. On remand, a jury found

porate officer who "authorizes, orders, or helps perpetrate" a violation of a criminal provision of the antitrust laws makes it, we believe, an *a fortiori* proposition that an individual cease-and-desist order is not inappropriate for the officer who "authorizes, orders, or helps perpetrate" a violation of one of those related statutes. As the court said in *Pati-Port, Inc. v. Federal Trade Commission*, 313 F. 2d 103, 105 (4th Cir. 1963), "it would seem in cases of this sort to be a futile gesture to issue an order directed to the lifeless entity of a corporation while exempting from its operation the living individuals who were responsible for the illegal practices."

Respondents misread our comment that Ferguson and Doyle had engaged in "deliberate and purposeful price discrimination that seriously injured others in the industry." This was to make it clear that the discrimination was practiced knowingly, not inadvertently, and that its effects were serious, not minimal. While an "intent" to injure competitors is certainly relevant in any price discrimination case, *Federal Trade Commission v. Anheuser-Busch, Inc.*, 363 U.S. 536, 552 (1960), *Forster Mfg. Co.*, Dkt. 7207, at 7 (January 3, 1963) [62 F.T.C. 852, 893], it is not a necessary element in a finding of unlawful price discrimination under the statutory provision involved here and is thus not a necessary predicate of an order requiring both corporate and individual offenders to cease their unlawful conduct. In other words, we found only that respondent Ferguson was a knowing participant in the unlawful acts; whether he also "intended" the consequences⁴ that did in fact flow from them makes no difference to our determination that he should be individually prohibited from repeating those violations of the statute.

III

Respondents' contention that the Commission should reopen this proceeding to "consider the advisability and public interest of an order in this case" because of the fact that a competitor against whom a cease-and-desist order had also been entered by this Commission has apparently gone out of business and been replaced by a new company

both National Dairy and Mr. Wise guilty of violating both the Sherman and Robinson-Patman Acts. On June 22, 1964, the company was fined \$380,000 and Mr. Wise was fined \$52,500 and given a 3-month suspended jail sentence. 5 CCH Trade Regulation Reporter Par. 45,059 (Case 1479).

⁴ Under Section 2(a) of the Clayton Act, the provision involved here, it is enough that the act is done and that its results have in fact been, or will probably be, injurious to competition; it is not necessary that the discriminator intend either the act itself or the harmful results. Section 3 of the Robinson-Patman Act, on the other hand, in making sales at discriminatory or unreasonably low prices "for the purpose of destroying competition or eliminating a competitor" a criminal offense, requires a showing of an "intent" both to do the act and to "achieve a result—destruction of competition * * *," all "in furtherance of that design or purpose." *National Dairy, supra* at 35 (emphasis by the Court).

"against whom there is no cease and desist order" is patently unsound. First of all, no determination has been made as to whether the new competitor, as a "successor" to a corporation with an order outstanding against it at the time of the acquisition, is also bound by that order. Secondly, however, respondents' contention is erroneous as a matter of law. It is true, of course, that the Commission, as a matter of policy and discretion, attempts to deal with industrywide violations on an industrywide basis. Respondents, however, have not alleged industrywide violations of Section 2(a), or even that the one new competitor they mention is engaged in such violations. Obviously, the public interest in preventing members of an industry already found to have violated the law from repeating those offenses would not be served by setting aside outstanding orders the moment a new competitor appears. See *Moog Industries, Inc. v. Federal Trade Commission*, 355 U.S. 411 (1958).

Respondents have made no showing that warrants either a reconsideration of our prior decision and order, or a reopening of the matter. Their request will be denied.

Commissioner Elman did not participate.

ORDER DENYING REQUEST FOR REOPENING

Respondents Pacific Molasses Company and James M. Ferguson having filed, on June 30, 1964, a request for a reopening of this proceeding, and counsel supporting the complaint having filed an answer in opposition thereto; and

The Commission, having considered respondents' request as a petition for reconsideration of the Commission's decision and order of May 21, 1964 [65 F.T.C. 675], and as a petition for reopening, and having determined that the same should be denied:

It is ordered, That respondents' request be, and it hereby is, denied.
Commissioner Elman not participating.

IN THE MATTER OF

FALSTAFF BREWING CORPORATION ET AL.

Docket 8618. Order, July 20, 1964

Order denying respondents' request that this proceeding be settled by the consent order procedure.