

*Docket 7719. Order, Oct. 8, 1964*

Order denying respondent's motion to reopen proceeding for purpose of vacating the cease and desist order against it.

ORDER DENYING MOTION TO REOPEN PROCEEDING

Respondent in the above-captioned proceeding filed with the Commission on August 18, 1964, a motion pursuant to Section 3.28(b) (2) of the Commission's Procedures and Rules of Practice (effective Au-

gust 1, 1963) to reopen the proceeding for the purpose of vacating the cease and desist order entered therein [60 F.T.C. 196]. An answer in opposition to this motion was filed by the Director of the Commission's Bureau of Restraint of Trade on September 14, 1964.

A threshold question is whether the Commission is empowered to modify or vacate a cease and desist order issued by it under the Clayton Act where, as here, that order has been affirmed on review by the Court of Appeals, without first seeking leave from the court. The parties agree that Section 3.28(b) (2) of the Commission's Procedures and Rules of Practice so empower the Commission and that this provision is proper under Section 11 of the Clayton Act. It is established that the Commission may modify orders issued under the Federal Trade Commission Act, even after affirmance by a court of appeals, without seeking leave of the court. *American Chain & Cable Co. v. F.T.C.*, 142 F. 2d 909 (4th Cir. 1944). The language of Section 11 of the Clayton Act was amended in 1959 to conform with the parallel provisions of the Federal Trade Commission Act, and the legislative history confirms that orders under the Clayton Act are now to be treated the same as orders under the Federal Trade Commission Act for purposes of modification.

Section 3.28(b) (2) provides that the Commission will reopen a proceeding and vacate the cease and desist order where "changed conditions of fact or law . . . or . . . the public interest" so require. Respondent predicates the present motion upon the Commission's decisions in *Max Factor & Co.*, F.T.C. Docket 7717 (July 22, 1964), and *Shulton, Inc.*, F.T.C. Docket 7721 (July 22, 1964) [66 F.T.C. 184], wherein the Commission, without adjudicating the question whether the respondents had violated Section 2(d) of the Clayton Act, ordered dismissal of the complaints on the ground that "entry of cease-and-desist orders against these particular respondents . . . would not be an equitable and fully effective method of eliminating the discriminatory practices in which respondents engaged." The Commission stated that, with respect to the problem of large or chain retailers who sponsor special promotional events and solicit discriminatory payments from competing suppliers for participation in such events, the enforcement policy best calculated to achieve the ends contemplated by Congress is one based on Section 5 of the Federal Trade Commission Act and directed primarily at the buyer. The present respondent is among the competing suppliers who participated in the special promotional events involved in the *Max Factor* and *Shulton* matters and against whom the Commission proceeded under Section 2(d) and obtained an order to cease and desist.

The Commission has determined that, in the particular circumstances presented here, vacation of the cease and desist order against the present respondent is not justified by changed conditions of fact

or law or the public interest. *Cf. Moog Industries v. F.T.C.*, 355 U.S. 411. The considerations bearing on whether to enter a cease and desist order, which was the question for determination by the Commission in *Shulton* and *Max Factor*, are crucially different from those bearing on whether the Commission shall vacate a cease and desist order that has become final, here after protracted litigation. The present respondent, unlike the respondents in *Max Factor* and *Shulton*, has been found by the Commission and the courts to have violated the law. This finding was predicated not only on participation in the special promotional events involved in those cases, but also, as respondent concedes, on discriminatory and unlawful promotional payments to another buyer in different circumstances. While the Commission will vacate a cease and desist order where it appears that the order is no longer necessary to prevent recurrence of the unlawful conduct, we cannot, on the basis of respondent's motion, conclude that such is the case here. With respect to respondent's contention that it will suffer a competitive detriment by remaining under order while its competitors are not, it should be pointed out that the good-faith meeting-of-competition defense is applicable to Section 2(d) and is read into every order entered under that statute.

*It is ordered.* That respondent's motion to reopen the proceeding be, and it hereby is, denied.

Commissioner MacIntyre concurring in the result.

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IN THE MATTER OF

GRABER MANUFACTURING COMPANY, INC., ET AL.

*Docket 8038. Order, Oct. 15, 1964*

Order that the proceeding in this case be suspended is herewith denied.