

Initial Decision

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forth in detail the manner and form in which they have complied with the order to cease and desist.

IN THE MATTER OF
MAGNAFLO COMPANY, INC., ET AL.

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

Docket 8422. Complaint, June 2, 1961—Decision, Apr. 24, 1965

Pursuant to a remand of the case by the Court of Appeals, District of Columbia Circuit, 343 F. 2d 318, 7 S.&D. 1112, which prohibited a manufacturer of a battery additive from using the trade name "Lifetime Charge," the Commission adopted a supplementary initial decision which reaffirmed the original order issued Dec. 26, 1963, 63 F.T.C. 2024, the respondent having indicated that it did not wish to continue the proceeding.

Mr. John W. Brookfield and *Mr. Sheldon Feldman* supporting the Complaint.

Mr. Albert A. Carretta, of *Carretta & Counihan*, Attorney for respondent, Magnaflo Company, Inc.

Mr. Webster B. Harpman, pro se.

SUPPLEMENTAL INITIAL DECISION, ON REMAND BY JOSEPH W. KAUFMAN
MARCH 17, 1965

An order of the Commission dated February 18, 1965, and served by mail Friday, February 19, 1965, states as follows:

The United States Court of Appeals for the District of Columbia Circuit, by its judgment entered on February 4, 1965, having remanded this case for the further proceedings directed in its opinion of the same date:

It is ordered, That the matter be, and it hereby is, reopened.

It is further ordered, That the matter be, and it hereby is, remanded to Hearing Examiner Joseph W. Kaufman for such further proceedings, including hearings, as are necessary to comply fully with the directions contained in the opinion and judgment of the Court that respondent be given an expeditious and full opportunity to show that its trade name can be limited by the use of qualifying words so as to make unambiguous the claim that its product will conserve battery charge and prolong battery effectiveness.

It is further ordered, That the hearing examiner, upon completion of the further proceedings, shall file a supplemental initial decision based upon the record made prior to the remand and any additional evidence that may be received.

Pursuant to the direction in said order to comply with the judgment of the Court of Appeals, that respondent Magnaflo Company,

Inc., be given an "expeditious" and full opportunity to show that its trade name can be properly qualified, the examiner on February 19, 1965, telephoned Albert A. Carretta, attorney for said respondent, and was advised that he would call back on that day. Not hearing from him, the examiner wrote him by letter dated February 23, 1965, reminding him of the telephone call and stating that the "purpose was to arrange at least an informal prehearing conference this week on the remand," and also requesting him to advise the examiner or to contact complaint counsel.

On the same day, February 23, 1965, Mr. Carretta telephoned the examiner. He stated that the reason he did not call back sooner was that he had wished to talk to his client first, that he had now done so, and that the client wished to drop the case because of the cost and expense. The examiner assured him that he had an open mind on the issue involved in the remand—whether resolved by evidence, proposed qualifications, or both—but suggested that, if there was no change in the client's desire, a letter be sent to the examiner accordingly.

By letter dated February 24, 1965, Mr. Carretta advised the examiner as follows:

Mr. Norman Bramer, President of Respondent Magnaflo Company, Inc., yesterday advised me that he does not desire to carry on this litigation any further and that he will immediately comply with the provisions of the Order of the Commission. Consequently, this is to advise you that no further hearing will be necessary.

* * * * *

Accordingly, the examiner believes and finds that he has faithfully adhered and conformed to the Commission's order of remand dated February 18, 1965, as quoted above. In particular he further finds as follows:

1. The examiner has afforded respondent ample opportunity for such further proceedings as are necessary to comply fully with the directions of the Court of Appeals that respondent be given expeditious and full opportunity to show how its trade name can be fully qualified.
2. The opportunity so afforded the respondent for further proceedings consisted, in part, of the opportunity for "at least an informal prehearing conference" the week immediately following Friday, February 19, 1965, the date of mailing of the Commission's remand order.
3. The opportunity so afforded the respondent comprehended not merely further proceedings of an informal nature, such as prehearings and the like, but, by clear implication and understanding,

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further proceedings "including hearings," necessary to comply with the directions of the Court of Appeals that respondent be given a "full opportunity to show" that its trade name can be properly qualified.

4. The opportunity for further proceedings so afforded gave respondent "expeditious" as well as full opportunity, within the meaning of the Commission's order of remand.

5. Said respondent Magnaflo Company, Inc., has elected not to avail itself of the opportunity for further proceedings on this remand. It has, as shown above, declined even the opportunity for "at least an informal prehearing conference." It has advised by letter that "no further hearing will be necessary" and that it "does not desire to carry on this litigation any further," and that it "will immediately comply with the provisions of the order of the Commission."

Pursuant to the direction in the Commission's order of remand that the "examiner, upon completion of the further proceedings, shall file a supplemental decision based upon the record made prior to the remand and any additional evidence that may be received," the examiner declares and finds as follows:

I. There has been "completion of the further proceedings" ordered by the Commission, although these proceedings had not gone beyond a highly informal stage when respondent declared it "does not desire to carry on this litigation any further." Respondent has not submitted, even informally, proposals for qualifications which might make the trade name proper.

II. No "additional evidence," *i.e.*, to that contained in the record prior to remand has been received, so that there is no additional evidence on which this supplemental decision can be based.

III. Accordingly, "the record made prior to the remand" must serve as the record upon which this supplemental initial decision is based, supplemented only by the informal procedures, discussions, and correspondence recited herein.

IV. In conclusion, to the extent it may be deemed procedurally necessary, it is hereby declared that the examiner's initial decision filed May 25, 1962 [63 F.T.C. 2024, 2027], as supplemented by matters recited herein, is to be deemed the supplemental initial decision herein.

V. Accordingly, also, and in view of the respondent's advice that it "will immediately comply with the order of the Commission," no reason exists for modification of the Commission's order to cease and desist.

ORDER ADOPTING SUPPLEMENTAL INITIAL DECISION

The Commission, by order issued February 18, 1965 [p. 1351 herein], having reopened this matter and remanded it to the hearing examiner in compliance with the directions contained in the opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit entered on February 4, 1965 [7 S.&D. 1112]; and

The hearing examiner, pursuant to the Commission's order of February 18, 1965, having filed a supplemental initial decision wherein he states that upon remand, respondent Magnaflo Company, Inc., through counsel, advised that it did not desire to offer additional evidence and that it intended to comply with the Commission's order to cease and desist issued on December 26, 1963 [63 F.T.C. 2024]; and

The hearing examiner having concluded that no reason exists for modification of the order to cease and desist; and

The United States Court of Appeals for the District of Columbia Circuit having entered its decree on March 23, 1965, ordering that respondent Magnaflo Company, Inc., forthwith comply with the Commission's order to cease and desist issued on December 26, 1963 [63 F.T.C. 2024]; and

The Commission having determined that the supplemental initial decision complies with the direction set forth in its order of February 18, 1965:

It is ordered, That on April 24, 1965, the hearing examiner's supplemental initial decision after remand be adopted by the Commission.

It is further ordered, That respondent Magnaflo Company, Inc., a corporation, shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the Commission's order to cease and desist issued on December 26, 1963 [63 F.T.C. 2024].