Commissioner Elman dissenting, and Commissioner MacIntyre not participating.

LAKELAND NURSERIES SALES CORP. ET AL.

Docket 8670. Order and Opinion, Feb. 3, 1966

Order denying respondents' motion to dismiss complaint on the grounds that many of the issues here in dispute have been litigated in a previous order, Docket 6666, 53 F.T.C. 1189, against the same respondents.

OPINION OF THE COMMISSION

This matter is before the Commission upon the respondents' motion requesting permission to file an interlocutory appeal from the hearing examiner's order filed January 13, 1966, denying their motion to dismiss the complaint. Complaint counsel has filed an answer opposing the request, and respondents have filed a reply to the answer.

Section 3.20 of the Commission's Rules of Practice provides, with exceptions not here pertinent, that an interlocutory appeal from a ruling of the hearing examiner may be filed only after permission is first obtained from the Commission and that such permission will not be granted except in extraordinary circumstances where an immediate decision by the Commission is clearly necessary to prevent detriment to the public interest.

Respondents' position here is that under § 3.28 (b) (1) of the Commission's Rules of Practice, the Commission should proceed by way of reopening the prior proceeding in which a consent order was issued against these respondents and others (Lakeland-Deering Nurseries Sales, Docket No. 6666, order issued June 25, 1957 [53 F.T.C. 1189]) rather than by the issuance of a new complaint. They claim that extraordinary circumstances justify an appeal because if they are right in asserting that the new complaint seeks to modify the prior cease and desist order and their position is vindicated after trial, all of the time, effort and expenses will be in vain. They further assert that they will be greatly prejudiced and suffer irreparable harm if permission to appeal is not granted, although they have not set forth the precise ways in which such alleged effects will occur.

The instant proceeding is essentially, if not entirely, a different case from the old one. The examiner held in his order denying

respondents' motion to dismiss that although some minor overlapping between the two matters was suggested, the issues raised by the new complaint are essentially different from those in the old. There is, in fact, no similarity between the matters except, of course, that some of the named respondents are, or appear to be, the same.*

The complaint in Docket No. 6666, the prior matter, was very narrowly drawn and brought into issue matters relating to only two plants, namely, the Shasta Daisy (Chrysanthemum Maximum) and the Lythrum Morden Gleam, and only on the latter were representations as to physical characteristics challenged. The order there is equally narrow in scope; its prohibitions are confined to representations concerning only the two plants named in the complaint and it prohibits representations as to physical characteristics (in issue as to other plants in the instant case) only as to Lythrum Morden Gleam. The present complaint, on the other hand, while it alleges misrepresentation as to the physical characteristics of plants, is limited in such connection to the Nearly Wild rose plant, the Scarlet Showers rose plant, the Wilson's Climbing Doctor rose plant, the Azaleamum chrysanthemum plant, and the Fragramum chrysanthemum plant. The two complaints are otherwise completely different as to the practices charged.

Respondents significantly do not claim in their motion that any issue in the complaint proper was previously litigated. The only specific connection asserted other than the common identity of certain respondents is that the proposed order, apparently broader in scope than the old as to misrepresentations of physical characteristics, overlaps to some extent the prior order. However, it is clearly speculative to argue that this creates a conflict or inconsistency. The proposed order here was included with the complaint as a form of order which the Commission had reason to believe should issue if the facts are found to be as alleged (§ 3.3 (3) of the Commissions' Rules of Practice). It is not necessarily the final order, even if the allegations are proved. Respondents will have ample opportunity to argue as to any asserted inappropriateness of the order. Furthermore, if a prohibi-

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*The prior complaint named the following parties: Lakeland-Deering Nurseries Sales, a corporation, and Henry L. Hoffman, Chester Carity, Lillian Zogheb and Allen Lekus, individually and as officers of said corporation. The present complaint does not include the individual respondents Lillian Zogheb and Allen Lekus. As to the differences in the corporate names, respondents, in a footnote in their motion, state:

"Lakeland-Deering Nursery Sales Corp. is the same corporation named in the instant proceeding as Lakeland Nurseries Sales Corp., the name 'Lakeland-Deering Nursery Sales Corp.' having been changed to Lakeland Nurseries Sales Corp. in 1957."

tory order issues here and there is a conflict as claimed, the remedy might be (1) a change in the proposed order (*i.e.*, to exclude the Lythrum Morden Gleam plant) or (2) a reopening and modification of the prior order as to Lythrum Morden Gleam. Nevertheless, this proceeding has not reached the point where a determination should be made on the form of the order. This will come later. Clearly, the possibility of a relatively minor overlap between the proposed tentative order and the prior order is not an extraordinary circumstance requiring an immediate decision by the Commission.

Elmo Division of Drive-X Company, Inc. v. *Dixon,* 348 F. 2d 342 (D.C. Cir. 1965), the principal case relied on by the respondents, is not controlling in this matter since that holding was based upon a showing of the incorporation of a Commission Rule into the consent order which "vested" that respondent with the right to a reopening hearing. No such situation exists here. In addition, in *Drive-X* the court concluded that if it should appear the practices complained of varied significantly from those governed by the consent settlement, Drive-X could not object to a new complaint directed at new conduct. Likewise, the respondents here cannot object to a new complaint covering new conduct. See also *Federal Trade Commission* v. *Motion Picture Ad. Service Co., Inc.,* 344 U.S. 392, 397–398 (1953); *Exposition Press, Inc.* v. *Federal Trade Commission,* 295 F. 2d 869, 872 (2d Cir. 1961).

In view of the above discussion, we conclude that respondents have not shown that they will be prejudiced in any way by the trial of this proceeding and that they have not shown the extraordinary circumstances which would require an immediate decision by the Commission to prevent detriment to the public interest.

An appropriate order will be entered.

ORDER DENYING REQUEST FOR PERMISSION TO FILE INTERLOCUTORY APPEAL

This matter having come on to be heard upon the respondents' motion requesting permission to file an interlocutory appeal from the hearing examiner's order filed January 13, 1966, denying their motion to dismiss the complaint, and the Commission having determined, for the reasons stated in the accompanying opinion, that the request should be denied:

It is ordered, That respondents' request for permission to file an interlocutory appeal from the aforesaid order of the hearing examiner be, and it hereby is, denied.

DEVCON CORPORATION ET AL.

Docket C-607. Order, Feb. 8, 1966

Order denying for the second time respondents' motion to suspend show cause proceedings and ordering respondent to answer the show cause order.

ORDER DENYING MOTION

The respondents by counsel having filed with the Commission under date of November 24, 1965, a Motion to Suspend Show Cause Proceedings, and

The Commission on January 19, 1966, having issued its order denying said motion and ordering that respondents shall have ten (10) days from the date of service upon them of the order to answer its order to show cause dated October 25, 1965, and

Respondents by counsel having thereafter filed with the Commission on January 24, 1966, a letter, herein treated as a motion, renewing its request to the Commission to be heard either formally or informally on its motion of November 24, 1965, and

The Commission now having considered the latter motion of January 24, 1966,

It is ordered, That said motion be, and it hereby is, denied.

It is further ordered, That respondents shall have ten (10) days from the date of service upon them of this order to answer our show cause order dated October 25, 1965.

Commissioner Elman dissents and would grant respondents' request to be heard.

DIAMOND ALKALI COMPANY

Docket 8572. Order and Opinion, March 4, 1966

Order denying respondent's petition for reconsideration and its motion to reopen the record and supplement additional evidence.

OPINION OF THE COMMISSION

Respondent on December 9, 1965, filed a Petition for Reconsideration under § 3.25 of the Commission's Rules and a Motion to Supplement or Reopen the Record for Purposes of Receiving Evidence. We are of the opinion that both petitions must be denied.

Since the objective of both motions is the same, that is, to