

It is further ordered, That the matter be, and it hereby is, remanded to a hearing examiner to be designated by the Director of Hearing Examiners, for the purpose of receiving evidence, consistent with the opinion of the Court of Appeals, with respect to the present competitive structure of the record club market, and the extent to which record clubs have been or may be foreclosed from competing in the record club market by Columbia's practice of exclusive licensing; and

It is further ordered, That the hearings be conducted in accordance with the Commission's Rules of Practice for Adjudicative Proceedings insofar as those rules are applicable; and

It is further ordered, That the hearing examiner, upon termination of the hearings, certify the record with his recommendations to the Commission for final disposition of the matter.

Commissioners Weinberger and Elman not participating.

LESTER S. COTHERMAN, ET AL.

Docket 8723. Order and Opinion, April 10, 1970

Order denying respondents' petition to reconsider modified order of Jan. 29, 1970, p. 81 herein, on the grounds that it is not consistent with the judgment of U.S. Court of Appeals, Fifth Circuit.

ORDER AND OPINION DENYING PETITION FOR RECONSIDERATION

Respondents, Lester S. Cotherman and William F. Sullivan, pursuant to Section 3.55 of the Commission's Rules of Practice, although their time had expired, filed on March 20, 1970, a petition for reconsideration of the Commission's modified order to cease and desist, issued January 29, 1970.¹ The grounds stated are that, assertedly, such cease and desist order is not consistent with the judgment of the U.S. Court of Appeals for the Fifth Circuit, issued October 3, 1969 [417 F.2d 589 (1969), 8 S.&D. 1008], and the language thereof is redundant and not relevant to the court's mandate. Complaint counsel filed his answer, opposing such petition, on March 30, 1970.

The modified order, issued January 29, 1970, p. 81 herein, was drafted expressly to conform to the directions and opinion of the Court of Appeals for the Fifth Circuit. We believe that it does so conform and that respondents in their petition have shown nothing to the contrary. We conclude, therefore, that the above-stated arguments do not justify the requested reconsideration of the modified order.

¹ The Commission, by its order issued March 6, 1970, denied respondents' motion for an extension of time to file their petition.

I

Respondents Cotherman and Sullivan also petition the Commission to reconsider its modified order and determine (a) that such order is no longer necessary since the enactment into law of the Consumer Credit Protection Act (the so-called Truth in Lending Act) and (b) that the issuance thereof is not in accordance with the public interest because assertedly these respondents have abandoned the money-lending field after having sworn that they have no intention of returning.

These arguments, broadly relating to the issues of the public interest in the proceeding, were in one way or another raised before the Court of Appeals for the Fifth Circuit. We recognize that that court did not review, at least directly, the merits of the contention concerning the Truth in Lending Act; nevertheless, the court did not find the Commission had proceeded improperly and, in fact, affirmatively held that the Commission was within its authority in finding that respondents had violated Section 5 of the Federal Trade Commission Act. The argument that the respondents have promised not to enter the lending business again and that therefore the public interest does not require an order was expressly rejected by the court.

Thus, while the petitioning respondents have had ample opportunity to raise, or have raised, every issue connected with questions of the public interest in this proceeding, they are now again seeking, without any showing of change of fact or circumstance, to have such issues further reviewed. We do not believe that these contentions justify their petition for reconsideration.

II

The respondents herein further specifically pray, if the Commission determines restraints are necessary, that it allow them the opportunity to dispose of the matter on a nonadjudicatory basis pursuant to Section 2.21 of the Commission's Rules of Practice or allow the matter to be withdrawn for the purpose of negotiating a consent order pursuant to Section 2.31 of the Commission's rules. Finally, they also seek an oral hearing on their petition.

The petitioning respondents seem to misconceive the posture of this proceeding. After a full hearing before the Commission respondents appealed this matter to the Court of Appeals for the Fifth Circuit, which court reviewed the issues raised. Such court entered its judgment, rejecting respondents' arguments and affirming the Commission's finding of a violation of Section 5 of the Federal Trade Commission Act. It is untimely, therefore, for the respondents to seek, and it would be inappropriate after full adjudication for the Commission to grant, a disposition of this matter on a nonadjudicatory basis or through the Commission's consent order procedure.