
IN THE MATTER OF
KOSCOT INTERPLANETARY, INC., ET AL.

Docket 8888. Opinion and Order, May 24, 1973.

Opinion and order granting complaint counsel's motion for leave to file a supplemental answer and receiving and filing the supplemental answer to respondents' motion for withdrawal of the case from the adjudication process; and denying respondents' said motion for withdrawal from adjudication.

OPINION OF THE COMMISSION

This matter is before the Commission upon a certification by the administrative law judge filed with the Commission on March 30, 1973, and consists of a "Motion for an Order Withdrawing this Case from the Adjudication Process" filed with the administrative law judge on March 5, 1973, by Koscot Interplanetary, Inc., Glenn W. Turner Enterprises, Inc., and four of the remaining seven individual respondents. The motion was made under Rule 2.34(d) of the Commission's Rules of Practice and the purpose for the withdrawal is to permit the negotiation of a settlement by the entry of a consent order. Complaint counsel, on March 15, 1973, filed an answer in opposition to the motion. The administrative law judge recognized in his order certifying the matter to the Commission that he has no authority to rule upon a motion of this character. He recommends in his order, however, that the motion be

granted by the Commission. After the certification of the motion to the Commission, complaint counsel on April 11, 1973, filed with the Commission a motion for leave to file a supplemental answer which was attached to the motion. The motion avers that the supplemental answer deals with events which occurred after complaint counsel's answer to respondents' motion was filed.¹

I

The four individual and two corporate respondents base their motion to have the case withdrawn from adjudication upon developments in the pending case, *In re Glenn W. Turner Enterprises* (MDL Dkt. No. 109) No. Misc. 5670, in the United States District Court for the Western District of Pennsylvania and their willingness now to enter into a consent order containing the prohibitions in the Notice Order issued with the complaint in the proceeding before the Commission except a provision relating to restitution which the complaint states may be included in the final order if warranted by the facts. These respondents contend that the District Court litigation now pending will result in adequate restitution, thereby making unnecessary any such provision in any order of the Commission.

On May 7, 1973, the United States Court of Appeals for the Third Circuit entered orders staying all proceedings in the District Court, except any settlement negotiations conducted among the parties, pending disposition by the Court of Appeals of petitions filed with it challenging certain actions of the District Court.

II

The District Court papers attached to respondents' motion show that the case is a consolidation of numerous private suits and class actions brought against respondents and others by separate plaintiffs. It is alleged that the plaintiffs purchased contracts or agreements based on the defendants' misrepresentations. The jurisdiction of the District Court rests, in part, upon the Federal Securities Acts. On the basis of findings that the separate suits involve common questions of fact, the Judicial Panel on Multidistrict Litigation under 28 U.S.C. 1407

¹ No objection to complaint counsel's motion has been made by respondents. The motion is granted and the supplemental answer and papers attached thereto will be considered. Complaint counsel has filed copies, without objections by respondents, of court orders entered at various times relating to the class action relied upon by respondents. These court orders will also be considered.

ordered the various suits transferred and consolidated in the class action proceeding now pending in the District Court.

The District Court in its memorandum and order filed January 15, 1973, and supplemental orders has not enjoined the Commission from going forward with this administrative proceeding. Indeed, the respondents in their motion, while broadly construing the Court's orders, do not contend that the Court has enjoined any aspect of the proceeding before the Commission. There is no conflict between the Court litigation and the proceeding before the Commission. The Court action is to vindicate private individual rights; the Commission proceeding is to enforce the Federal Trade Commission Act.

III

Respondents in their motion and supporting papers have failed to demonstrate sufficient reason or facts to warrant the Commission foreclosing at this time the inclusion of an appropriate restitution provision in any cease-and-desist order. The proposed settlements in the pending litigation do not purport to require all of the respondents to disburse to their customers all funds retained by them as a result of alleged violations of Section 5 of the Federal Trade Commission Act. Until there is a clear showing that respondents have accomplished disbursement of all such funds, it is premature at this time to determine that no provision for restitution should be included in any Commission order.

The violation for which restitution in some instances is an appropriate corrective action occurs when the seller's retention of its customers' money or property is an unfair trade practice, in and of itself, in violation of the Federal Trade Commission Act. *Curtis Publishing Co.*, 3 Trade Reg. Rep. ¶19,719, p. 21,759 (D. 8800, 1971 [78 F.T.C. 1472]); *Universal Credit Acceptance Corp.*, 3 Trade Reg. Rep. ¶20,240, p. 22,242 (D. 8821, 1973 [See p. 570 herein]). If the private parties involved agree to an approved settlement, they will be bound by its terms, but this does not bar a restitution provision in a cease and desist order by the Commission if one is issued. An effective remedy may require complete disbursement of such funds to the victims of the unlawful practices up to the amount of their actual payments, and the possibility that this may result in some parties receiving funds in addition to amounts they have received in settlement of their claims does not prevent such restitution. The public policy

expressed in the Federal Trade Commission Act is, of course, paramount. *Universal Credit Acceptance Corp., supra*, at pp. 22,248, 22,251.

For the reasons stated, exceptional and unusual circumstances do not exist which would justify withdrawing this matter from adjudication and respondents have not shown good cause for withdrawal as is required by Rule 2.34(d) of the Commission's Rules of Practice.

ORDER DENYING MOTION TO WITHDRAW FROM ADJUDICATION AND
GRANTING MOTION FOR LEAVE TO FILE SUPPLEMENTAL ANSWER

Upon consideration of respondents' Motion for an Order Withdrawing this Case from the Adjudication process filed March 5, 1973, and certified to the Commission by the administrative law judge on March 30, 1973, and upon consideration of complaint counsel's Motion for Leave to file Supplemental Answer in further response to respondents' motion, the Commission, for the reasons set forth in the accompanying opinion, has determined that respondents' motion should be denied and complaint counsel's motion should be granted. Accordingly,

It is ordered, That the motion filed by respondents for an order withdrawing this matter from the adjudication process be, and it hereby is, denied.

It is further ordered, That the motion filed by complaint counsel for leave to file a supplemental answer be, and it hereby is, granted and the supplemental answer is received and filed.
