

Dissenting Statement

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IN THE MATTER OF

SPERRY & HUTCHINSON COMPANY

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

*Docket 8671. Complaint, Nov. 15, 1965—Order, Sept. 18, 1973.**

Consent order requiring the nation's largest trading stamp redemption firm, based in New York City to cease combining or conspiring to prevent redemption of trading stamps or the operation of a trading stamp exchange. Respondent is further required to give \$2 in cash per book of 1200 green stamps to all customers who choose to redeem their stamps for cash. S&H is further obligated to redeem as few as 300 stamps for a cash value of \$.50 and to inform consumers of these new rights by prominent notices in S&H stamp saver books and redemption centers; and required to cancel all injunctions obtained against trading stamp exchanges in the last 12 years.

Appearances

For the Commission: *Sidney A. Steinitz* and *Morton Needleman*.

For the respondent: *Morrison, Clapp, Abrams & Haddock*, Washington, D.C. and *Casey, Lane & Mittendorf*, New York, New York.

DISSENTING STATEMENT

By JONES, *Commissioner*:

The Commission has accepted a consent order in this case which in my judgment is inadequate and contrary to the interests of consumers who are affected by the respondent's trading stamp practices challenged in the complaint.

The central issue in this case, which the Supreme Court directed the Commission to resolve, concerned the rationale relied upon by the Commission for its findings respecting the illegality of S&H's activities designed to prevent the redemption or exchange of S&H stamps by trading stamp exchanges or retailers not permitted to carry S&H stamps.¹

*See 73 F.T.C. 1099, and 82 F.T.C. 388, 390.

¹ In its opinion remanding this case to the Commission and reversing the Circuit Court's dismissal of this count, the Supreme Court held that while the Commission had ample power to eliminate unfair acts and practices, it was not able to sustain the Commission's findings and order relating to Count III of the complaint because the Commission's opinion lacked any rationale to support its order provisions based on "the Commission's assessment of particular competitive practices or considerations of consumer interests independent of possible or actual effects of competition." The Supreme Court directed the remand of this case to the Commission to enable the Commission to articulate a rationale for its

In its original opinion in this case, the Commission took the position that the free exchange and redemption of trading stamps are important both to consumers and to competing retailers and that respondent's efforts to suppress the free exchange and redemption of stamps lessens consumers' freedom of choice. The Commission's original order, therefore, directed S&H to cease and desist from impeding the free transferability of trading stamps and from attempting in any way to suppress the free and open redemption or exchange of stamps by retailers or stamp exchanges.

The proffered consent order contains no such prohibitions. Indeed it seems to condone all of S&H's anti-stamp exchange and redemption activities by not prohibiting future injunction suits by S&H against stamp exchanges and retailers and by expressly permitting S&H to place a notice of its legal position respecting its stamp ownership in its stamp books, thus apparently accepting S&H's legal position respecting its continued ownership of its stamps and the consequent illegality of consumer trafficking in their stamps.

The Commission's rationale for accepting the order is that under it consumers will now receive a right to a cash redemption from S&H for their S&H stamps in the amount of \$2 per book.

At the present time, 20 states already require trading stamps that cash options be provided for and in at least seven of these states \$2 is the going rate. Thus essentially this consent order does no more than simply require respondents to do in all states what it is presently required to do in 20 states with the slight additional plus that under the consent order the cash redemption value of a book of stamps will not be fixed at \$2 instead of fluctuating between \$1.20 and \$2 as it has in the past, depending on the competition among stamp redemption or exchange firms.²

My central objection to this settlement order is that in my judgment it fails to extricate consumers from what I believe are the essentially unfair features of trading stamp merchandising. Moreover, it provides consumers at best with only partial relief against condemned S&H

order based on the facts surrounding the challenged transactions which might amount to the unfairness which the Supreme Court held would properly constitute a violation of law under Section 5 of the Federal Trade Commission Act. The Commission's Order to Show Cause sought the guidance of the parties as to the facts and theories of law applicable to determine whether the respondent's activities were unfair within the meaning of the Supreme Court's holding respecting the Commission's jurisdiction to eliminate unfair acts and practices.

² It should also be noted that while cash redemption is fixed at the estimated value of the premium merchandise which these stamps could be exchanged for, there is no evidence that this value bears any relationship to the difference in retail prices which consumers may be paying the stamp-dispensing retailer as a result of their use of trading stamps.

practices which is in fact already available in many states and which experience suggests has not been widely made use of by consumers where it has been available. The consent settlement is premised on a view that the only possible—or significant—area of unfairness which trading stamps pose to consumers lies in their lack of an option to redeem stamps for cash in lieu of merchandise. It disregards other potential areas of unfairness flowing from respondent's trading stamp merchandising practices insofar as they deprive consumers of an opportunity to redeem or exchange S&H stamps for other stamps or of an opportunity to choose redemption offers from retailers or stamp exchanges as well as from S&H or coerce consumers in the first instance to deal with retailers selected by S&H in order to collect S&H stamps or to accept trading stamps at all when in fact they might prefer lower retail prices.³

A second major objection I have to this order is its failure to take into consideration in any way the disadvantages which non-favored retailers have vis-a-vis their S&H stamp dispensing competitors. The settlement contains a built-in leverage effectively forcing consumers to continue to collect S&H stamps in order to obtain the proffered case redemption right since consumers must buy a minimum of \$30 worth of merchandise before they can amass the minimum 300 stamps which are required in order to make the cash redemption right operative. This consent order not only fails to take into account the possible unfairness of S&H practices to retailers not permitted to handle S&H stamps but the order virtually ensures that they will continue to suffer competitive disadvantages since their potential customers practically speaking still remain tied to those of their competitors who are permitted to dispense S&H stamps. However involuntary a consumer's stamp collecting may be, this order virtually ensures that consumers will continue to have a practical need to deal with these favored retailers in order to amass the minimum number of stamps required to get the cash redemption.

Finally, I object to this settlement because it preserves in tact—and perhaps even adds the Federal Trade Commission stamp of approval to—respondent's claims respecting its proprietary relationship to these stamps. Respondent is expressly permitted by the order to tell consumers in effect that they cannot legally deal with stamp

³ While these possible effects of S&H trading stamp practices may not be borne out by the record or be within the Supreme Court's definition of unfairness, nevertheless, acceptance of this consent order effectively prevents the Commission from exploring these issues on the basis of the briefs and arguments of the parties as was the original intent of its Order to Show Cause.

exchanges. Moreover, respondent is expressly not prohibited from continuing in the future to try and enjoin stamp exchanges from engaging in business. Indeed, it could be said that with its required \$2 cash redemption, the order almost precludes competition between the exchanger and S&H and thus speeds the demise of the stamp exchanges rather than leaving their ultimate value to the determination of the marketplace.

Thus in my judgment this settlement accomplishes virtually nothing for the consumer. It accepts the basic unfairness of forcing trading stamps on consumers and gives them simply an option of getting cash instead of merchandise for these stamps. It does nothing about what I regard as the basic unfairness of respondent's trading stamp practices to non-favored retailers. Finally, it leaves trading stamp exchanges at the continued mercy of S&H and provides them with no relief from S&H's efforts to put them out of business.

For all of these reasons, I dissent to this consent settlement.

DECISION AND ORDER RELATING TO COUNT III OF THE COMPLAINT

The Commission issued a three-count complaint in this matter on November 15, 1965, charging respondent, the Sperry & Hutchinson Company, with violation of Section 5 of the Federal Trade Commission Act. After a full hearing on the record, the Commission entered a cease and desist order on June 26, 1968 [73 F.T.C. 1099] covering all three counts. Respondent appealed from the Commission's decision to the United States Court of Appeals for the Fifth Circuit seeking review of the issues relating to Count III only. No appeal was taken from the Commission's order relating to Counts I and II, and a final order respecting Counts I and II was entered on February 16, 1973 [82 F.T.C. 388]. Nothing contained in the consent order herein respecting Count III is intended to supersede or in any way affect the final order entered under Counts I and II.

After the Court of Appeals for the Fifth Circuit set aside the Commission's June 26, 1968 [432 F. 2d 146, 8 S&D 1259] order relating to Count III, the Commission appealed to the Supreme Court which reversed the Fifth Circuit and ordered the case remanded to the Commission for such further proceedings as may be appropriate [405 US 233].

The Commission having now duly determined upon motion submitted by complaint counsel and respondent that, in the circumstances presented, the public interest would be served by a withdrawal of the matter from adjudication for the purpose of negotiating a settlement

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by the entry of a consent order relating to Count III of the complaint herein; and

The respondent and counsel for the Commission having executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in the complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having considered the agreement and having accepted same, and the agreement containing consent order having been placed on the public record for a period of thirty (30) days, and having duly considered the comments filed thereafter pursuant to Section 2.34 of its rules, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby makes the following jurisdictional findings, and enters the following order relating to Count III of the complaint:

1. The Sperry & Hutchinson Company is a corporation organized and existing under and by virtue of the laws of the State of New Jersey, with its offices and principal place of business located at 330 Madison Avenue, New York, New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I. *It is ordered*, That respondent, the Sperry & Hutchinson Company, its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the issuing, distribution, sale, or the redemption of trading stamps in commerce, as "commerce" is defined in the Federal Trade Commission Act, shall within sixty (60) days of the effective date of this order:

- (a) Offer to redeem in cash at any of its redemption centers all of its trading stamps presently outstanding or hereafter issued which are duly presented for redemption by bona fide holders, *provided* a minimum of 300 stamps is presented for redemption. The holder who elects redemption in cash shall be entitled to receive an amount of money which shall not be less than the sum of
- (1) the merchandise cost incurred by respondent in redeeming a like number of stamps presented for merchandise redemption and
 - (2) 32 percent of such merchandise cost. The term "merchandise

cost incurred by respondent," for the purposes of this order, shall be determined on the basis of the average merchandise cost incurred by respondent, according to its books and records, in redeeming 1200 stamps for merchandise in each of the five fiscal years preceding the fiscal year in which the stamps are presented. Respondent's initial cash redemption value shall be set at \$2 per 1200 stamps pursuant to the above described formula, and said value shall not be changed until such time as the merchandise cost plus 32 percent, as determined pursuant to the above formula, is at least 20 cents above or below the then current cash redemption value. Respondent's cash redemption value shall thereafter be further adjusted by applying the above procedures;

(b) Include in every stamp saver book to be printed by respondent after the date of this order the following notice which is to be printed in no less than 14 point type at the top of the inside cover of said book: "A minimum of 300 stamps may be redeemed at the option of the holder for cash instead of merchandise. The cash value of 300 stamps is _____ and the cash value of a completed book of stamps (1200 stamps) is _____."; and

(c) Conspicuously display in every redemption center the notice set forth in (b) above.

II. *It is further ordered*, That respondent shall cease and desist from:

1. Combining or conspiring with, or soliciting concerted action from, any other trading stamp company to prevent redemption of trading stamps or the operation of a trading stamp exchange.

2. Communicating in any way with any other trading stamp company or acting in any way in response to any communication from any trading stamp company with respect to preventing the operation of any trading stamp exchange or the free and open redemption or exchange of trading stamps by any person.

III. *It is further ordered*, That respondent:

(a) Within sixty (60) days after the effective date of this order make an application to vacate every injunction which has been issued in any court within the twelve years preceding the effective date of this order against the redemption, exchange, sale or other use of respondent's trading stamps by any commercial trading stamp exchange, without prejudice to respondent's right to bring new actions in the same courts (and in other courts) to enjoin the redemption, exchange, sale or other use of S & H trading stamps by such commercial trading stamp exchanges in the

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future on the basis of facts occurring after the aforementioned injunctions have been vacated, and without prejudice to the right of the Federal Trade Commission to take any action it considers appropriate with regard to any future actions brought by respondent against commercial trading stamp exchanges; and respondent shall within such sixty-day period notify every such commercial trading stamp exchange of said application to vacate;

(b) Notify the Federal Trade Commission in writing of any such action it may institute in the future against any commercial trading stamp exchange and such notification shall be mailed to the Commission no later than the date on which such action is commenced.

It is further ordered, That respondent, within sixty (60) days after the effective date of this order, notify in writing all of its redemption employees of the provisions of this order.

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That respondent herein shall within sixty (60) days after service upon them 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 this order.

It is agreed that for the purposes of this order, the term "commercial trading stamp exchange" as used herein means any person, firm, partnership, corporation or other business entity, other than a trading stamp company, which is engaged in the business of exchanging, redeeming, selling or otherwise dealing in trading stamps and where such business is conducted as a separate and independent enterprise which is not ancillary to, or does not result in a direct benefit to, any retailing or other business conducted by such person, firm, partnership, corporation or other business entity.

Commissioner Jones dissenting.