

Order

84 F.T.C.

Appearances

For the Commission: *Jerome M. Steiner, Jr. and Ralph E. Stone.*
For the respondents: *Rosenberg & Wiseman, San Jose, Calif.*

ORDER DENYING RESPONDENTS' MOTION FOR RECONSIDERATION

On July 23, 1974, the Commission issued its Decision and Order in this matter, sustaining Counts II, III, IV, and V of the complaint, and vacating Count I. Respondents were served with the Decision and Order on Aug. 21, 1974, and they have timely filed for reconsideration and certain other relief pursuant to Section 3.55 of the Commission's Rules of Practice.¹ Complaint counsel have answered opposing the motion.

The Commission has considered the arguments raised by respondents and finds that they do not warrant modification of its order, or a remand of this case to the administrative law judge, or a stay of its order, and respondents' requests will be denied.

Respondents basically seek reconsideration of certain order provisions entered by the Commission, and reconsideration of the Commission's conclusions concerning respondents' argument made at trial and on appeal that they should in some fashion be relieved of liability for their law violations because certain of their competitors may be engaged in the same or similar practices.

With respect to the order in this matter, the Commission in its deliberations on appeal devoted considerable attention to the matter of appropriate relief, and solicited supplemental briefs from both sides on the question, and we find no grounds stated in the motion to reconsider to warrant further modification of the order, or further hearings as to its propriety. See *Interstate Builders, Inc.*, 72 F.T.C. 1009,10 (1967). The Commission's order is similar in some respects to that proposed by the administrative law judge, but the Commission has added certain provisions, omitted others, and significantly modified some, as is its duty when, in reviewing the administrative law judge's recommendation, it concludes that a different disposition is appropriate. Paragraph 1, to which respondents object, was added by the Commission. It is fully justified by the facts of this case, and the abuse sought to be remedied, and respondents have not suggested in any way why it is not reasonably

¹This provides in pertinent part:

"Within twenty (20) days after completion of service of a Commission decision, any party may file with the Commission a petition for reconsideration of such decision, setting forth the relief desired and the grounds in support thereof. Any petition filed under this subsection must be confined to new questions raised by the decision or final order and upon which the petitioner had no opportunity to argue before the Commission."

related to the findings in this matter or the scope of the complaint. Paragraph 2 is merely a weaker version of the provision proposed by the administrative law judge. The administrative law judge's proposal would have prevented respondents from establishing, via participant recruitment, a three-tiered distributional system. In response to respondents' objections, and in the interests of balancing legitimate business interests with the need to eliminate the deceptiveness of respondents' sales program, the Commission modified the judge's order to permit recruitment through three levels, with the third level recruits prevented from recruiting for a period of one year in order to interrupt the chain mechanism and ensure that participants in respondents' program understand that their profits must be derived from their own efforts at retail sales. The necessity for some limitation on recruitment of this sort was fully argued originally, and the Commission does not find new grounds presented for reconsidering its order in this regard.

Finally, with regard to the order, respondents object to the use of the term "marketing area" rather than "community or geographic area" to describe the unit for which respondents must under specified circumstances provide potential distributors with information concerning the number of other distributors already operating. The purpose of Paragraph 7 of the order is to ensure that individuals who pay a valuable consideration for the opportunity to distribute respondents' products are given some idea in advance of the number of intrabrand competitors who will be trying to sell the same products in competition with them. That purpose can only be satisfied if the figures are provided for some relevant "marketing area." In modifying the phrase "community or geographic area" to market area for the purposes of Paragraph 7 only, the Commission was concerned that use of the former term might itself provide the potential for serious deception. To cite two examples: (1) in some states it may transpire that the bulk of respondents' distributors are situated in a few localities. Provision of statewide figures only to a prospect in one of those localities may suggest a picture of low overall density, when in fact the prospect will face stiff competition intrabrand in the area in which he or she will actually be selling. Or (2), provision of figures for a small community may suggest the absence of competition when in fact there may be many competitors outside the community but still within the marketing area.

Obviously, the definition of "marketing area" is not capable of absolute precision, nor does the Commission expect that this will be achieved. It is, however, necessary for respondents to make a serious, good faith effort to apprise potential recruits who must pay a consider-

ation beforehand of the amount of intrabrand competition they will face when they enter respondents' program, and we know of no other way to achieve this result than by the language employed in the order. As a matter of compliance, the Commission will, of course, allow respondents the latitude warranted by the necessarily less-than-absolutely exact order language. This is hardly an uncommon occurrence, and resolution is best left for the compliance process. (Cf. *The Regina Corporation v. Federal Trade Commission*, 322 F.2d 765, 769-70 (3d. Cir. 1963).

The other major argument raised in respondents' motion relates to the Commission's rejection of their "affirmative defense" of abuse of discretion, which they base on certain dicta in *Federal Trade Commission v. Universal-Rundle Corp.*, 387 U.S. 244 (1967). It was stipulated at trial in this matter that competitors of respondents used a system of distribution similar to that utilized by respondents. The administrative law judge properly ruled that this stipulation did not absolve respondents of liability for their illegal acts and practices, including the illegality of their marketing system. In reviewing this determination, the Commission examined the evidentiary exhibits which respondents had introduced in support of their argument, and concluded that no evidence had been adduced which would suggest any abuse of discretion on the part of the Commission, and, therefore, the argument was similarly rejected on appeal. Respondents raise no new issues in their motion for reconsideration of this point that have not been fully litigated already. It is well recognized that the Commission is not obliged to proceed simultaneously against all law violators in a particular industry. See *Moog Industries, Inc. v. Federal Trade Commission*, 355 U.S. 411 (1958), *rehearing denied*, 356 U.S. 905 (1958). The Commission's resources are severely limited, and to impose a requirement of simultaneity upon it would render its statutory mission impossible of fulfillment. Additionally, the claim that the Commission has abused its discretion in bringing this complaint is at best an affirmative defense, that is, the burden is upon the law violator to exempt his unlawful conduct by proving it. As noted in our main opinion, respondents have not done that, and to require the Commission, as a condition of suing any given company, to hold hearings to determine that it has not abused its discretion, *i.e.*, to review in any single adjudication the conduct of every other member in an industry, would place an intolerable burden on this or any other law enforcement agency. Moreover, the Commission must reject respondents' apparent interpretation of the second sentence on page 25 of its Opinion in this matter, which respondents have cited in their motion for reconsideration. Insofar as the sentence is construed to

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imply that an agency abuses its discretion when it sues one law violator while neglecting simultaneously to detect and sue a violator whose practices are of equal scope and duration, the implication is erroneous, for it sets forth a standard for administrative action which is too constricting and which is not required by the dictates of *Moog Industries* and *Universal-Rundle, supra*.

The Commission does recognize that it must to the best of its ability, resources, and other statutory commitments, endeavor to eliminate serious violations of the sort engaged in by respondents that may be being engaged in by others. To this end, the Commission will treat the charges made by respondents in their motion to reconsider as a complaint from a member of the public, will refer this complaint to the staff for evaluation and appropriate action, and will welcome any additional specific information which respondents may provide. The Commission finds no reason, however, to warrant eliminating, or tolling the effective date of, order provisions designed to remedy what it has found to be a clear violation of law which threatens severe harm to members of the public.

Respondents' other argument, concerning the Commission's use of the word "substantial," raises no issue warranting reconsideration.

For the foregoing reasons, respondents' motion for reconsideration and related requests for relief must be denied. Therefore,

It is ordered, That respondents' Motion for Reconsideration be, and it hereby is, denied.

Commissioner Nye not participating.

IN THE MATTER OF

STERLING DRUG, INC., ET AL.

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

Docket 8899. Complaint, Sept. 21, 1972—Decision, Oct. 1, 1974

Consent order requiring a New York City manufacturer of household disinfectants and its New York City advertising agency, among other things to cease making disease-prevention claims for its Lysol Brand products or any other house disinfectants.