

(66) 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 they have complied with this order.

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IN THE MATTER OF  
NATIONAL HOUSEWARES, INC., ET AL.

*Docket 8733. Interlocutory order, Dec. 3, 1974*

Order (1) denying respondents' motion to vacate and set aside Commission's order to show cause; (2) reopening proceeding; (3) remanding case to Office of Administrative Law Judges for purpose of hearings for receipt of evidence and entry of recommendations; and (4) denying staff counsel's motion for consolidation of matter with *Emdeko International, et al.*

*Appearances*

For the Commission: *John M. Porter, Gerald E. Wright and Ralph E. Stone.*

For the respondents: *Edwin Rockefeller and Alan Frey, Bierbower & Rockefeller, Wash., D.C.*

ORDER OVERRULING RESPONDENTS' OPPOSITION  
TO ORDER TO SHOW CAUSE AND DIRECTING HEAR-  
INGS FOR RECEIPT OF EVIDENCE.

The Commission on June 21, 1974 issued an Order to Show Cause to the above-named parties, respondents to a final consent order issued Feb. 12, 1968 in a proceeding brought under Section 5 of the Federal Trade Commission Act. The order directed the respondents to show cause why the proceeding should not be reopened pursuant to Section 3.72(b) of the Commission's Rules of Practice because of the failure of the original consent order adequately to remedy the violations of law

alleged in the complaint issued Mar. 13, 1967 against the above respondents. The Order to Show Cause further alleged the Commission had reason to believe that respondents National Housewares, Inc. and Edward Gilson<sup>1</sup> have continued to violate the Federal Trade Commission Act in respect to certain practices enumerated in a Proposed Modified Complaint and Order attached to and made a part of the Commission's Order to Show Cause.<sup>2</sup> It was concluded that the public interest may require altering and modifying the 1968 Order (only as to respondents National Housewares and Edward Gilson), to the form of order attached to the Proposed Modified Complaint, or to whatever form of order the Commission might adopt as a result of the consideration of record facts developed in an adjudicative proceeding on reopening.

On Aug. 2, 1974, respondents National Housewares and Edward Gilson filed an Opposition to Order to Show Cause and Joint Answer to Proposed Modified Complaint. In their opposition, respondents first denied that the 1968 order proved inadequate to remedy the violations alleged in the 1967 complaint. Second, respondents denied that any continuing violations of the F.T.C. Act had occurred. Third, it was denied that the public interest required reopening of the 1968 proceeding. Fourth, it was argued that any alteration in the terms of a finalized consent order required the consent of both parties to the order. Fifth, respondents charged that the Proposed Modified Complaint and Order are so materially different from the 1968 order that this proceeding cannot fairly be characterized as a reopening. The Rules of Practice, according to respondents, nowhere provide for a reopening accompanied by a new complaint whose factual allegations differ so substantially from those alleged in the original complaint. In their Joint Answer to Proposed Modified Complaint, respondents deny the substantive allegations of the complaint, or state that they are without knowledge or information sufficient to form a belief as to their truth.

On Sept. 30, 1974, Commission staff counsel filed a Reply to Respondents' Answers to Order to Show Cause and Motion to the Commission to Assign Matter to Administrative Law Judge for Receipt of Evidence. Staff counsel argue that the Commission's empowering statute, 15 U.S.C. §45(b) authorizes the Commission to reopen, alter, modify, or set aside, in whole or in part, an order issued under that Act whenever, in

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<sup>1</sup> Respondents to the original 1968 proceeding, other than National Housewares and Edward Gilson, were served with the Order to Show Cause, as required by the Commission's Rules of Practice, but they have been notified that inasmuch as they are no longer associated with either National Housewares or Edward Gilson, they are not intended to be parties to these new proceedings.

<sup>2</sup> Commissioner Thompson dissented.

the opinion of the Commission, conditions of fact or of law have so changed as to require such action, or if the public interest shall so require.

Staff counsel defend the issuance of the Proposed Modified Complaint and Order as part of the reopening process because they allege that the illegal practices charged in the new complaint are substantially similar to the practices which were the subject of the former order. Staff counsel also argue that a reopening of the 1968 proceeding is preferable to the issuance of an altogether new complaint because of the decision of the United States Court of Appeals for the District of Columbia Circuit in *The Elmo Division of Drive-X Company, Inc. v. Dixon*.<sup>3</sup> Staff counsel finally request that this proceeding be consolidated with *Emdeko International, Inc., et al.*, Docket 8973, because the allegations of both cases are substantially identical and arise out of the same transactions and occurrences, presenting common questions of law and fact.<sup>4</sup>

On Oct. 3, 1974, respondents filed a Request for Leave to Respond to Reply of Complaint Counsel.<sup>5</sup> In this document, respondents argue essentially two points. First, they repeat their argument that the Commission's Order to Show Cause is improper because the Proposed Modified Complaint and Order incorporated in the show cause procedure charges entirely new practices which were not challenged in the 1967 complaint. Respondents view the new proposed order as an effort to fashion relief based not on practices held illegal under the 1968 consent order, but on entirely new post-1968 practices, as detailed in the Proposed Modified Complaint.<sup>6</sup> Second, respondents object to staff counsel's motion to join these proceedings at this time with those in the *Emdeko* matter. According to respondents, this request is premature in the first instance, and is secondly a matter properly to be decided by an administrative law judge should this matter be set down for hearings.

The key issue in this matter, simply put, is whether the Commission should properly proceed against these respondents by *de novo* complaint, or by reopening the older proceeding and modifying the 1968 consent order. We believe that the basis for the Commission's proceeding as it has thus far is mandated by the decision in *The Elmo Division of Drive-X Company, Inc., et al. v. Dixon*.<sup>7</sup> In that case, a 1952 consent order was entered against respondents in which it was stipulated that

<sup>3</sup> 348 F.2d 342 (D.C. Cir. 1965).

<sup>4</sup> Both *Emdeko* and the instant matter were voted by the Commission on the same day, and are related.

<sup>5</sup> By order dated Oct. 15, 1974, respondents were granted leave to file their reply.

<sup>6</sup> See Paragraphs 2, 3, 6, and 7 of the Proposed Modified Complaint.

<sup>7</sup> 348 F.2d 342 (D.C. Cir. 1965).

the consent order could be set aside in whole or in part by means of a reopening procedure, after which, under the original or a new complaint, adversary hearings could be held resulting in a new modified order. Rather than following this procedure, the Commission elected the comparatively simple expedient of issuing a totally new complaint—much as National Housewares and Edward Gilson are now urging. Elmo challenged the Commission's procedure, arguing that the newly challenged practices were substantially the same matters as those covered by the 1952 consent order, and that Elmo was therefore being subjected to a second full scale round of litigation on the same issues. The United States Court of Appeals for the District of Columbia Circuit held that the Commission was bound to proceed against Elmo in the manner stated in the original 1952 consent order, by a reopening process to modify the consent order in light of new, substantially similar practices to those covered in the original consent order.

Here, as in *Elmo*, the original Agreement Containing Consent Order states that the order entered "may be altered, modified or set aside in the manner provided for other orders." Staff counsel urge that in cases where the newly alleged illegal practices bear a striking similarity to those originally attacked, the phrase, "in the manner provided" for alteration or modification has reference to the reopening procedures set out in the Rules of Practice.

Respondents argue that the practices alleged in much of the new complaint<sup>8</sup> are not substantially similar to the practices set out in the original complaint, and they point to the concluding statement of the court in *Elmo* indicating that if the practices alleged in the Commission's second *Elmo* complaint had varied substantially from those circumscribed in the 1952 consent order, then perhaps the complaint route was preferable to reopening.<sup>9</sup>

We agree that the determining question is whether the practices alleged in the Proposed Modified Complaint are substantially similar to those alleged in the original 1967 complaint. In the original proceeding, respondents were charged with deception in the marketing of various types of household appliances, among other products. The central theme of these allegations was that customers were solicited to purchase respondents' products through elaborate and deceptive representations regarding special savings, free prizes, and purported participation in consumer surveys and product testimonials. The Proposed Modified

<sup>7</sup> 348 F.2d 342 (D.C. Cir. 1965).

<sup>8</sup> Paragraphs 2, 3, 6, and 7 of the Proposed Modified Complaint.

<sup>9</sup> Respondents also cite *Floersheim v. F.T.C.*, 411 F.2d 874 (9th Cir. 1969), *Exposition Press, Inc. v. F.T.C.*, 295 F.2d 869 (2d Cir. 1961) for the proposition that where new charges are leveled against respondents which go beyond those involved in prior cases, a new complaint is preferable to a reopening procedure.

Complaint alleges all these same practices are occurring, though not in a manner which violates the narrow letter of the rather restrictive 1968 consent order. In addition, various other deceptive practices, still related to the sale of these same products, are also alleged.

We have no difficulty in determining that these allegations, if true, are substantially similar to those made in the original proceeding, sufficient to support reopening of this matter for evidentiary adversary hearings. We feel the Order to Show Cause states a reason to believe that the original order has not corrected the deception and sales abuses originally alleged, and that such deception is continuing. The most forthright manner of dealing with the apparent problem of an ineptness of expression in the original order would be through a reopening and modification, in effect, a clarification of the original order.<sup>10</sup>

Under the applicable Commission Rule of Practice, 3.72(b), the Commission may decide to reopen on one of two grounds. There may be *either* a finding of changed facts, *or* there may be reason to believe the public interest requires reopening. In this instance, the Order to Show Cause makes clear that it is the second ground that is relied on.<sup>11</sup> The public interest is in remedying alleged violations of law not remedied by the original order, which violations are on account of the weakness of the original order, alleged to be continuing today.

We find no merit in respondents' last line of defense on this point, which is that a consent order may not be reopened without the consent of all the original parties. As noted, the consent order itself provides for a possible reopening, and, in any event, the statute, 15 U.S.C. §45(b) grants to the Commission the clear authority to reopen and modify its own orders under its Rules of Practices establishing standards for so doing and assuring adversary hearings to respondents on the issues themselves.<sup>12</sup>

The sole issue remaining to be resolved in this matter is whether, at this time, to consolidate this proceeding with that in *Emdeko, International, Inc., et al.*, Docket 8973, a case arising out of the same facts and circumstances. We are aware of the fact that but for the decision to reopen the 1968 proceedings in which National Housewares and Edward Gilson were parties, those two respondents and Emdeko International and Anthony J. Wanlass would have been joined in a single complaint.

<sup>10</sup> *Mohr, et al. v. F.T.C.*, 272 F.2d 401 (9th Cir. 1959), *cert. denied*, 362 U.S. 920 (1960).

<sup>11</sup> The public interest determination made in connection with a reopening is identical to the public interest determination associated with the issuance of a *de novo* complaint. *The Elmo Company, Inc. v. F.T.C.*, 389 F.2d 550 (D.C. Cir. 1967), *cert. denied*, 392 U.S. 905 (1968). This case is a later review of the *Elmo* litigation previously referred to.

<sup>12</sup> *ITT Continental Baking Company*, (order directing hearings for receipt of evidence) 81 F.T.C. 1021 (1972).

However, the question of consolidating proceedings is traditionally left to an administrative law judge to determine, based on his analysis of whether the matters are sufficiently factually and legally related to justify being consolidated for the purpose of hearings to receive evidence. We also leave to the Judge the question of how to treat respondents' Joint Answer to the Proposed Modified Complaint for it addresses the issues we rely upon the hearings to resolve.

The Commission having found reason to believe that the 1968 consent order entered here fails adequately to protect the public interest, and having found reason to believe that the public interest would therefore be served by the reopening of this matter, accordingly:

*Now, Therefore, It is ordered,* That respondents' motion to vacate and set aside the Commission's Order to Show Cause be, and it hereby is, denied;

*It is further ordered,* That this proceeding be, and it hereby is, reopened;

*It is further ordered,* That this matter be, and it hereby is, remanded to the Office of Administrative Law Judges for assignment to an administrative law judge to begin expeditious hearings, in accordance with this order, for the purpose of receiving evidence to determine if the Commission's 1968 consent order should be altered or modified to encompass the practices alleged as illegal in the Proposed Modified Complaint and remedied by the proposed form of order thereto attached;

*It is further ordered,* That upon termination of the hearings the administrative law judge shall within 90 days thereafter enter his recommendations, confined to the issues hereinabove specified which shall be subject to review and final consideration by the Commission under Subpart F of Part III of the Commission's Rules of Practice.

*It is further ordered,* That staff counsel's motion that this matter be consolidated at this time with *Emdeko International, et al.* be, and it hereby is, denied.

Commissioner Thompson dissenting.

Complaint

84 F.T.C.

IN THE MATTER OF

## GENERAL FOODS CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF  
THE FEDERAL TRADE COMMISSION ACT*Docket C-2606. Complaint, Dec. 3, 1974 - Decision, Dec. 3, 1974*

Consent order requiring a White Plains, N.Y., distributor of "Gainesburgers" dog food, among other things to cease misrepresenting the nutrient content of its product; misrepresenting the nutritional need of pets; misrepresenting the nutritional value of any of the ingredients contained in its product; and failing to maintain accurate records which support any advertising claims made by respondent.

*Appearances*

For the Commission: *Henry B. Cabell.*

For the respondent: *John F. Kavin, Clifford, Warnke, Glass, McIlwain & Finney, Wash., D.C.*

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said act, the Federal Trade Commission, having reason to believe that General Foods Corp., a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. The proposed respondent is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 250 North Street, White Plains, N.Y.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the advertising, sale and distribution of a product, specifically a dog food called "Gainesburgers."

PAR. 3. Respondent causes the said product when sold, to be transported from its places of business in various states to purchasers thereof located in various other States of the United States. Respondent maintains, and at all times mentioned herein has maintained, a course of trade in said product in commerce as "commerce" is defined in the Federal Trade Commission Act. The volume of business in such commerce has been and is substantial.