
IN THE MATTER OF

NATIONAL DYNAMICS CORPORATION, ET AL.

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

Docket 8803. Decision, Feb. 16, 1973 - Modified Order, Mar. 4, 1975

Order modifying previous Commission order, 82 F.T.C. 488, 38 F.R. 9157, issued against a New York City seller of battery additive, VX-6 and other products, by changing the provisions of Paragraph 1 of the order to permit respondents to represent sales, earnings, and profits in a format utilizing ranges instead of

averages. Paragraph 2 was modified to require maintenance of substantiation claims made pursuant to the requirements of Paragraph 1 as modified.

Appearances

For the Commission: *Jeffrey Tureck* and *Michael McCarey*.
For the respondents: *Solomon H. Friend*, New York, N.Y..

OPINION OF THE COMMISSION

BY DIXON, *Commissioner*:

The Commission issued an order in this case on Feb. 16, 1973, from which respondents appealed to the Court of Appeals for the Second Circuit, challenging four of the six order paragraphs. The court has remanded the matter to the Commission with instructions that paragraphs 1 and 2 of the Commission's order be reformulated in accordance with the court's decision.¹

The paragraphs in question would enjoin respondents from:

1. Representing, directly or by implication, that persons purchasing respondents' products can or will derive any stated amount of sales, profits or earnings; or representing, directly or by implication, the past or present sales, profits or earnings of purchasers of respondents' products unless in fact the past sales, or profits and earnings represented, are those of a substantial number of purchasers and accurately reflect the average sales, profits or earnings of such purchasers under circumstances similar to those of the purchaser or prospective purchaser to whom the representation is made; or misrepresenting in any manner, the past, present or future sales, profits or earnings from the resale of respondents' products.

2. Failing to maintain accurate records which substantiate that the past or present sales, profits or earnings represented are accurate and are those of a substantial number of purchasers and accurately reflect the average sales, profits or earnings of such purchasers under circumstances similar to those of the purchaser or prospective purchaser to whom the representation is being made.

In framing these order provisions, the Commission sought to eliminate the substantial misrepresentations of earnings figures which were found by the administrative law judge and whose existence was unchallenged before the Court of Appeals. The court concluded, however, that the Commission had reined respondents in too tightly. It expressed disapproval of the prohibition on representations of earnings figures that were not average figures, and use of the phrase "under circumstances similar to those of the purchaser* * *" which the court

¹ *National Dynamics Corp. v. F.T.C.*, 492 F.2d 1333 (2d Cir. 1974); *cert. denied*, 419 U.S. 993 (1974). Certiorari had been sought by respondents with respect to the two paragraphs of the order which the Court of Appeals affirmed.

concluded was unduly vague. The court indicated that respondents should be able to make use of ranges of earnings in their advertisements.² Paragraph 2, a recordkeeping requirement, was remanded so that it could be changed to reflect whatever alterations were made in Paragraph 1.

The Commission on remand has considered the views of respondents and complaint counsel. Both have submitted proposed drafts of a reformulated order, and have commented on each other's proposal. While we do not doubt that the submissions evidence that "good will on both sides" which the court thought would yield a solution on remand, to say that the parties remain at odds is an understatement. The Commission has sought to address the court's mandate by retaining those portions of the broad prohibitory language in Paragraph 1 of which the court did not disapprove, while adding two provisos which make clear the right of respondents under the order to use earnings ranges and testimonials under specified conditions. The Commission believes that this order addresses the court's fundamental concern, which was to allow respondents to utilize certain common approaches to the advertising of earnings, while forbidding them to use these or other techniques to perpetuate the deceptions described in the record.

Under modified Paragraph 1, use of earnings ranges may be made provided that for any stated range (*i.e.*, \$5—10,000), respondents also provide an equally clear and conspicuous statement of the number of distributors who achieved earnings within that range, and a statement of the period of time over which the figures were compiled. In addition, the top figure for the highest earnings range may not exceed the highest earnings figure actually achieved by a distributor, to prevent, for example, use of a \$20—40,000 category when the highest achieved figure might be only \$30,000. We believe that these requirements are necessary to prevent the deceptive use of earnings ranges, without being unduly burdensome.

With respect to testimonials the Commission has taken a similar approach. Among the earnings representations found deceptive by the administrative law judge were representations of the earnings of a few exceptional individuals in a context which implied that they were typical. While the Court of Appeals did not make clear its view on the

² The court said:

We likewise do not see why NDC should be limited to advertising only the average sales or earnings of its distributors rather than be permitted to state ranges for various types of distributors provided it does not make deceptive use of unusual earnings realized only by a few.

The court did not address itself expressly to the question of earnings "testimonials." Respondents assert that these should be permitted; complaint counsel cite the quoted language as evidence that the court disapproved of such testimonials, and argue that to cite the experience of an atypical distributor in an advertisement is inherently deceptive. The above-quoted language can certainly be read to imply that the court felt that nondeceptive use could be made of unusual earnings realized only by a few. The Commission's modified order addresses this issue by requiring clarifying disclosures where earnings testimonials are used.

use of earnings testimonials, as opposed to earnings ranges, the Commission has endeavored to permit use of testimonials in a nondeceptive manner, in view of the court's general desire to permit truthful claims. The second proviso to Paragraph 1, therefore, permits accurate testimonials provided they are accompanied by (1) a disclosure of the amount of time per week or per month required by the testifying party to achieve the stated results; (2) a disclosure of the year or years during which, and the geographic area in which, the stated results were achieved; and (3) a disclosure of the median or average results of all participants, or the following statement:

IMPORTANT NOTICE: THE RESULTS ACHIEVED BY THIS PURCHASER ARE BETTER THAN, AND NOT TYPICAL OF, THE RESULTS ACHIEVED BY THE MAJORITY OF PURCHASERS WHO PARTICIPATED DURING THE TIME PERIOD DESCRIBED.

One of these last alternative disclosures must be made *only if* the results described in the testimonial do not in fact represent the average or median results achieved by purchasers of respondents' products.

The necessity for these disclosures is readily apparent. Consumers cannot possibly assess the relevance of a testimonial to their own likely experience without knowing the amount of time per week or month devoted by the testifying party to achieving the results, or the geographic area within which such results were achieved. A statement of the year or years during which the stated results were achieved is needed to ensure that testimonials either reflect recent results or consumers are aware that they do not.

The third disclosure is designed to eliminate the likelihood that a consumer will construe the testimonial of an individual as being representative of what the average participant in the program has achieved, when such performance is not representative. Even when testimonials are not accompanied by deceptive embellishments, there is a substantial likelihood that many consumers will understand them to represent a result that the average consumer can expect to achieve. Moreover, in this case respondents sought in many ways to convey to prospective purchasers that the exceptional results of individuals were not exceptional at all, for example, by stressing the ordinariness of the individuals who had achieved the unusual results. Where the results described in testimonials are not typical, we believe that the only way that deception may be avoided is by means of disclosures which indicate the lack of representativeness. An ideal solution would be a flat requirement that where stated performance is not typical, respondents be required to state affirmatively what exactly is the typical result. Only in this way is the consumer likely to be made fully aware of the extent to which the testimonial result departs from what the majority have accomplished. In recognition, however, of the fact

that detailed compilation of average or median figures for all distributors may impose a substantial burden on respondents³, our order provides, as an alternative, that respondents may state conspicuously that the performance of a testifying party is not typical, and exceeds the average. Respondents recognize, in their own proposed order, the necessity for some indication of whether or not testimonial results are typical. We have enlarged upon this recognition simply to the extent of requiring that the lack of representativeness be disclosed clearly and forcefully, in a way that its import cannot be mitigated by the text of the testimonial.⁴

With respect to the words "circumstances similar to those of the purchaser or prospective purchaser," to which the court objected, complaint counsel note that inclusion of these words may be unnecessarily cautious inasmuch as most of respondents' distributors are part-time and any figures (mean, median, range) based on the performance of a large number of distributors would necessarily be largely results of part-time performers. In light of this the Commission has determined simply to omit the language to which the court had objected.

Paragraph 2 has been modified to require maintenance of substantiation for claims made pursuant to the requirements of Paragraph 1.

The Commission has further determined to republish those portions of its order which were appealed and affirmed by the Court of Appeals or not appealed at all. An appropriate order is appended.

ORDER MODIFYING FINAL ORDER ON REMAND

This matter is before the Commission upon remand from the United States Court of Appeals for the Second Circuit for revision of Paragraphs 1 and 2 of the order, and upon briefs submitted by counsel for respondents and complaint counsel relating to said paragraphs. The Commission has determined to modify paragraphs 1 and 2 as explained in the accompanying decision, and has further determined to republish the remainder of the order in the same form as issued, such remainder having become final. Therefore,

It is ordered, That respondents National Dynamics Corporation, a corporation, and its officers, and Elliott Meyer, individually and as an officer of such corporation, and respondents' agents, representatives, and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale, or distribution of the battery additive, VX-6, or of any other products, in commerce, as

³ In this respect earnings claims may be somewhat different from typical product performance claims, as to which information regarding average performance should be readily available to the advertiser.

⁴ If respondents do not wish to maintain information allowing them to know whether or not testimonial results are typical, we think clearly the presumption must be that such results exceed the average. Respondents can avoid this disclosure by compiling and stating average or median results.

"commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that persons purchasing respondents' products can or will derive any stated amount of sales, profits, or earnings; or misrepresenting in any manner, the past, present, or future sales, profits, or earnings from the resale of respondents' products;

Provided, That the foregoing paragraph shall not be construed to prohibit:

(a) an accurate representation of any range or ranges of sales, profits, or earnings achieved by purchasers of respondents' products which includes a clear and conspicuous disclosure (in bold-face type at least equal in size to that of the representation of the range or ranges where such appear in print) of the following information:

(i) an accurate statement of the number of participants achieving sales, profits, or earnings within the stated range; and

(ii) an accurate statement of the time period in which the reported figures were achieved.

The figure purporting to be the end figure of the highest range in an advertisement may not exceed the highest amount of sales, profits, or earnings actually achieved by a purchaser.

(b) accurate testimonials regarding the sales, profits, or earnings achieved by a purchaser of respondents' products; *Provided*, That any such testimonial includes or is accompanied by the following clear and conspicuous disclosures (in bold-face type at least equal in size to that of the principal portion of the testimonial, if printed):

(i) an accurate statement of the average amount of time per week or month required by the purchaser to achieve the stated results;

(ii) an accurate statement of the year or years during which, and the geographical areas in which, the stated results were achieved; and

(iii) if the results achieved by the purchaser providing the testimonial do not represent the average or median sales (or profits or earnings, whichever is included in the testimonial) of all purchasers of respondents' products during the time period covered by the testimonial, an accurate statement of the average or median sales (or profits or earnings) of all purchasers of respondents' products during the time period covered by the testimonial, or the following statement: **IMPORTANT NOTICE: THE RESULTS ACHIEVED BY THIS PURCHASER ARE BETTER THAN, AND NOT TYPICAL OF, THE RESULTS ACHIEVED BY THE MAJORITY OF PURCHASERS WHO PARTICIPATED DURING THE TIME PERIOD DESCRIBED.**

2. Failing to maintain records which substantiate that any past or

present sales, profits, or earnings represented are accurate. Where ranges of sales, profits, or earnings are represented, such records shall be sufficient to substantiate the number of purchasers achieving results within any stated range and the time period during which such results were achieved. Where average or median figures are represented, such records shall be sufficient to substantiate that such median or average figures are accurate. Where testimonials regarding sales, profits or earnings are employed without the statement entitled "IMPORTANT NOTICE," described in Paragraph 1(b)(iii) above, such records shall be sufficient to substantiate that the performance described in the testimonial constitutes the average or median performance for all purchasers of respondents' products during the stated time period.

3. Representing, directly or by implication, contrary to fact, that any product has been approved by any laboratory or by any other organization or person.

4. Representing, directly or by implication, in any advertisement that an independent laboratory has tested any product or that any laboratory test substantiates or supports performance claims in said advertisement, unless each performance claim in said advertisement has been substantiated by a competent scientific test conducted by said laboratory or laboratories and unless such laboratory or laboratories have supplied respondents with a written report which describes, in detail, the entire test performed, including, but not limited to, the product tested, instruments used, test procedures, data, and results of such test.

5. Using, publishing, or referring to any testimonial or endorsement unless (1) such use, publication or reference is expressly authorized in writing, and unless (2) respondents have good reason to believe that at the time of such use, publication, or reference, the person or organization named subscribes to the facts and opinions therein contained.

6. Failing to deliver a copy of this order to cease and desist to all present salesmen or other persons engaged in the sale of respondents' products, and failing to secure from each such salesman or other person a signed statement acknowledging receipt of such order.

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That respondents shall notify the Commission at least 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, the creation or dissolution of

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subsidiaries, 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 it 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.