
IN THE MATTER OF
BESTLINE CORPORATION, ET AL.

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

*Docket C-1986. Decision, July 22, 1971 - Modified Order, Mar. 4, 1975**

Order modifying an earlier order dated July 22, 1971, 79 F.T.C. 107, 36 F.R. 17982, issued against a San Jose, Calif., seller and distributor of household, commercial, and industrial cleaners and waxes, and distributorships therefor, by expanding the order, as to corporate respondents only, to include a more precise definition and clarification of "multi-level marketing programs."

Appearances

For the Commission: *W. J. Marschalk* and *Robert Galler*.

For the respondents: *Robert N. Humphries, Humphries, Berger,*

* Reported as corrected by order of Apr. 22, 1975.

Pitto & Pearl, San Jose, Calif., *Joseph N. Cotchett*, *Hutchinson & Dyer*, San Mateo, Calif.

ORDER REOPENING PROCEEDINGS AND MODIFYING ORDER TO
CEASE AND DESIST

Respondents Bestline Corporation (incorrectly identified earlier as Bestline Products Corporation) and Bestline Products, Inc., filed a petition on Dec. 6, 1974, requesting that this matter be reopened and the cease and desist order of July 22, 1971, be modified. Following negotiations with the Commission's staff attorneys, respondents filed a supplement to this petition, one that, with a slight further modification, is not opposed by Commission counsel.

Section 3.72(b) of the Commission's Rules of Practice permits a reopening of a final order of this agency only upon a showing of changed conditions of law or fact or that such reopening and modification are otherwise required by the public interest. In the instant matter, these tests are said to be satisfied in that (a) the order in question is uncertain in scope because of a failure to define a key phrase, "multilevel marketing program," and that (b) this infirmity is illustrated by the fact that subsequent Commission orders, *e.g.*, *Ger-Ro-Mar, Inc., et al.*, Docket No. 8872 (Oct. 15, 1974) [84 F.T.C. 95] and *Holiday Magic, Inc., et al.*, Docket No. 8834 (Oct. 15, 1974) [84 F.T.C. 748] employ a substantially different terminology of more precise and different scope. While inconsistencies between consent orders are generally attributable to factual differences between cases and the give-and-take of negotiation rather than order deficiencies that require reopening and clarification, we are persuaded that the public interest requires a modification in the instant case.

The petition before us having been filed only on behalf of the corporate respondents, and a civil penalty action involving an alleged violation of the order by one of the individual respondents being in progress before the United States District Court for the Northern District of California, we will defer any modification of the order in regard to said individuals until such time as an appropriate application therefor might be duly filed. Accordingly,

It is ordered, That the proceedings in the above-captioned matter be, and they hereby are, reopened.

It is further ordered, That the Commission's order in said matter, issued July 22, 1971 [79 F.T.C. 107], be, and it hereby is, modified to read as follows:

ORDER

PART I

It is ordered, That respondents William E. Bailey and Robert W. DePew individually and as officers of Bestline Corporation and Bestline Products, Inc., directly or through any corporate or other device in connection with the advertising, offering for sale, sale or distribution of household, industrial or commercial cleaners or waxes or other products or of distributorships or franchises in a multi-level or other marketing program or with the seeking to induce or inducing the participation of persons, firms, or corporations in a multi-level or other marketing program in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Operating or, directly or indirectly, participating in the operation of any multi-level marketing program wherein the financial gains to the participants are dependent upon the continued, successive recruitment of other participants.

2. Offering to pay, paying or authorizing the payment of any finder's fee, bonus, override, commission, cross-commission, discount, rebate, dividend or other consideration to any participants in respondent's multi-level marketing program for the solicitation or recruitment of other participants therein.

3. Offering to pay, paying or authorizing payment of any bonus, override, commission, cross-commission, discount, rebate, dividend or other consideration to any person, firm or corporation in connection with the sale of any product or service under respondent's multi-level marketing program unless such person, firm or corporation performs a bona fide and essential supervisory, distributive, selling or soliciting function in the sale and delivery of such products to the ultimate consumer.

4. Requiring prospective participants or participants in respondents' said program to purchase the product or pay any other consideration, other than payment for the actual cost of necessary sales materials, in order to participate in any manner therein; *Provided, however,* That respondents may require or may suggest the purchase of specific and reasonable inventories only, by any distributor, on the express condition that respondents at the same time agree to repurchase any unused and undamaged portion of an initial inventory from any purchaser thereof at full cost less reasonable shipping costs, if any, within 90 days from the delivery of the product at the option of the purchaser; *Provided further, however,* That if inventory costs reach \$500 or more, within said 90 day period, then said obligation to

repurchase shall cease immediately upon participant's tendering a subsequent order to purchase the product.

5. Using any multi-level marketing program, either directly or indirectly:

(a) Wherein any finder's fee, bonus, override, commission, cross-commission, discount, rebate, dividend or other compensation or profit inuring to participants therein is dependent on the element of chance dominating over the skill or judgment of the participants; or

(b) Wherein no amount of judgment or skill exercised by the participants has any appreciable effect upon any finder's fee, bonus, override, commission, cross-commission, discount, rebate, dividend or other compensation or profits which the participants may receive; or

(c) Wherein the participant is without that degree of control over the operation of such plan as to enable him substantially to affect the amount of any finder's fee, bonus, override, commission, cross-commission, discount, rebate, dividend or other compensation or profit which he may receive or be entitled to receive.

6. Using any multi-level marketing program which fails to:

(a) Inform orally all participants in respondents' multi-level marketing programs and to provide in writing in all contracts of participation that the contract may be cancelled for any reason by notification to respondents in writing within three working days from the date of execution of such contract.

(b) Refund immediately all monies to (1) participants who have requested contract cancellation in writing within three working days from the execution thereof, and (2) participants showing that respondents' contract solicitations or performance were attended by or involved violation of any of the provisions of this order.

7. Representing, directly or by implication, that participants in respondents' multi-level marketing programs will earn or receive any stated or gross or net amount; or representing, in any manner, the past earnings of participants unless in fact the past earnings represented are those of a substantial number of participants in the community or geographical area in which such representations are made and accurately reflect the average earnings of these participants under circumstances similar to those of the participant or prospective participant to whom the representation is made.

8. Representing, directly or by implication, that it is not difficult for participants to recruit or retain persons to invest in respondents' multi-level marketing programs as distributors or as sales personnel to work home routes or sell respondents' products door-to-door or any other manner.

9. Representing, directly or by implication, that it is not difficult for

407

Order

participants to ascend to a higher level of distribution within the marketing chain.

10. Representing, directly or by implication, that all participants in the respondents' multi-level marketing program or any other sales program will succeed.

11. Representing, directly or by implication, that the supply of available entrants or investors in the respondents' marketing program is inexhaustible; or misrepresenting, in any manner, the availability of such entrants or investors.

12. (a) Failing to disclose, orally and in writing, the terms of this order to cease and desist to all present and future distributors, salesmen or other persons engaged in the sale of respondents' products, services, or merchandising programs, and securing from each such distributor, salesman or other person a signed statement evidencing receipt of said disclosure.

(b) Failing to make available on request a copy of this cease and desist order to any participant or prospective participant.

It is further ordered, That the respondents 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 they have complied with this order.

PART II

It is further ordered, That respondents Bestline Products, Inc. and Bestline Corporation, corporations, their officers, agents, representatives and employees, directly or indirectly, or through any corporate or other device in connection with the advertising, offering for sale, or sale of products, services, franchises or distributorships, or in connection with seeking to induce or inducing the participation of persons, firms or corporations therefor, or in connection with any marketing program or any other kind of merchandising, marketing or sales promotion program in commerce, or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

1. Operating or directly or indirectly participating in the operation of any marketing or sales program wherein the financial gains to the participants are dependent upon the continued, successive recruitment of other participants; *Provided, however*, That financial gains offered or received in accordance with paragraph 3 hereinbelow shall not be prohibited by this paragraph.

2. Offering to pay, paying, or authorizing the payment of any finder's fee, bonus, override, commission, cross-commission, discount, rebate, dividend or any other form of consideration to any participant

or prospective participant for the solicitation or recruitment of any other participant or participants in any marketing or sales program.

3. Offering to pay, paying, or authorizing payment of any bonus, override, commission, cross-commission, discount, rebate, dividend or any other form of consideration to any person, firm or corporation in connection with the sale of any product or service unless such person, firm or corporation performs a bona fide and essential supervisory, distributive, selling or soliciting function in the sale and delivery of products or services to the ultimate consumer.

4. Requiring prospective participants or participants, in order to participate in any manner in respondents' marketing or sales program, to purchase products or pay any other consideration other than the actual costs to respondents, as determined by generally accepted accounting principles, of reasonably necessary sales materials and training relating to the sale of products or services; *Provided, however*, That respondents may suggest, but not require, that participants or prospective participants purchase specific amounts of product inventory; *Provided*, That such suggested purchases shall not exceed the reasonably necessary inventory requirements of participants of the same level of distribution and status for a period not to exceed one (1) month, based on the actual monthly purchasing experience of at least fifteen percent (15 percent) of the participants who have been engaged in respondents' program at such level and status for at least six (6) months and who have purchased products or services, either directly or indirectly, from respondents within the past six (6) months.

5. Failing to repurchase any unused and undamaged products which were purchased directly or indirectly from respondents by a participant within eighteen (18) months before the voluntary or involuntary termination of such participant at not less than 95 percent of the net cost of such products to such participant upon the return of such products to respondents or their designated nominee for such purpose, freight prepaid.

6. Failing, clearly and conspicuously, to disclose on each product or services order form and other documents utilized by participants or prospective participants to acquire products or services either directly or indirectly from respondents the following: Distributors are not required to purchase any specific amount of products. (*Name of applicable business organization*) guarantees the repurchase, at 95 percent of net cost, of all unused and undamaged products purchased within 18 months before a distributor's termination and returned freight prepaid.

7. Using any marketing or sales program which fails to:

(a) Inform orally all new participants in such program and to provide

407

Order

in writing in all contracts of participation relating thereto that the contract may be cancelled for any reasons by notification to respondents or to their sponsoring distributor, in writing, within three (3) working days from the date of execution of such contract.

(b) Refund immediately all monies to (1) participants who have requested contract cancellation in writing within three (3) working days from the execution thereof, and (2) participants showing that respondents' contract solicitation or performance were attended by or involved violation of any of the provisions of this order.

8. Representing, directly or by implication, or by use of hypothetical examples that participants in any marketing program, or any other kind of merchandising, marketing or sales promotion program, will earn or receive, or have the potential or reasonable expectancy of earning or receiving, any stated or gross or net amount, or representing in any manner the past earnings of participants, unless in fact the earnings represented are those of a substantial number of participants in the community or geographic area in which such representations are made, and the representation clearly indicates the amount of time required by said past participants to achieve the earnings represented, and failing to maintain adequate records which disclose the facts upon which any claims of the type discussed in this paragraph are based, and from which the validity of any claim of the type in this paragraph can be determined.

9. Representing, directly or by implication, that it is not difficult for participants to recruit or retain persons to invest in respondents' marketing or sales programs as distributors or as sales personnel to work home routes or sell respondents' products door-to-door or any other manner.

10. Representing, directly or by implication, that it is not difficult for participants to ascend to a higher level of distribution within the marketing chain.

11. Representing, directly or by implication, that all participants in respondents' marketing or sales programs will succeed.

12. Representing, directly or by implication, that the supply of available entrants or investors in the respondents' marketing program is inexhaustible; or misrepresenting, in any manner, the availability of such entrants or investors.

13. (a) Failing to disclose, in writing, the existence of this order to cease and desist and its terms to all present and future distributors, salesmen or other persons engaged in the sale of respondents' products, services or merchandising programs by mailing to the last known address of each present distributor such written disclosures and by securing from each distributor, salesman or other person who becomes

Order

85 F.T.C.

a participant in respondents' marketing or sales program subsequent to the effective date of this order a signed statement evidencing receipt of such disclosure. ("Present distributors" as used herein shall mean those distributors who have purchased products, directly or indirectly, from respondents within eighteen (18) months of the effective date of this order.)

(b) Failing to make available on request a copy of this cease and desist order to any participant or prospective participant.

It is further ordered, That for 120 days subsequent to the effective date of this order or until the existing order forms presently utilized by respondents are exhausted, whichever occurs first, it shall be sufficient to show compliance with Part II, paragraph 6 of this order, to show that each order form which respondents disseminate subsequent to the effective date of this order has attached to it or stamped thereon the disclosure required by said paragraph 6.

It is further ordered, That the corporate respondents 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, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of this order.

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

It is further ordered, That the corporate respondents 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 they have complied with this order.

IN THE MATTER OF

FLEETWOOD ENTERPRISES, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE