

Modifying Order

86 F.T.C.

IN THE MATTER OF
HERCULES INCORPORATED

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

Docket C-2558. Decision, Oct. 4, 1974—Modifying Order, Dec. 2, 1975

Order modifying an earlier order dated Oct. 4, 1974, 40 F.R. 3974, 84 F.T.C. 605, by eliminating order Paragraphs I.B., I.C., II.B., II.C. and III and including two provisos: (1) that simple efficacy claims will not be considered absolute safety claims under Paragraph I.A., and (2) that primarily institutional advertising will not require the "STOP" clause. This is to provide for a uniformity of treatment among competitors against whom the F.T.C. proceeded simultaneously issuing complaints involving the same practices. The modified order affords respondent the benefits of the terms of the consent order afforded to FMC Corporation in Docket No. 8961, 40 F.R. 53552, 86 F.T.C. 897, but leaves intact those provisions which are peculiar to the facts of the Hercules complaint.

Appearances

For the Commission: *Joan Z. Bernstein.*

For the respondent: *Charles S. Maddock*, Wilmington, Del., *Burton Caine, Wolff, Block, Schorr & Solis-Cohen*, Philadelphia, Pa.

ORDER REOPENING AND MODIFYING CEASE AND DESIST
ORDER

Upon consideration of respondent's petition to reopen and modify the cease and desist order entered by consent against respondent in this matter on Oct. 4, 1974 [84 F.T.C. 605], to afford respondent the benefits of the terms of the consent order afforded to FMC Corporation in Dkt. 8961 [86 F.T.C. 897], but leaving intact those provisions which are peculiar to the facts of the Hercules complaint, and the Acting Director of the Bureau of Consumer Protection having recommended that the requested modifications be granted, and the Commission having concluded on the basis of the foregoing that the petition should be granted,

It is ordered, That this matter be reopened and the following modified final order be substituted and issued in lieu of the order entered herein on Oct. 4, 1974:

MODIFIED FINAL ORDER

I

It is ordered, That respondent, Hercules Incorporated, a corporation,

its successors and assigns and respondent's officers, representatives, agents, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, or distribution of any insecticide product with precautionary labeling which contains any active insecticidal ingredient(s) presently marketed by respondent or currently being field tested by respondent and which is intended for use by custom applicators and commercial growers to protect animals or food, forage, field or fiber crops by virtue of the capacity of its active ingredient(s) to kill insects (sometimes referred to hereinafter as "such products"), do forthwith cease and desist from:

A. Representing, directly or by implication, by print or broadcast advertising, by other promotional material, or by sales representatives' oral statements, that such products are absolutely or unqualifiedly safe, nontoxic or free of hazard for any use registered under the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (hereinafter FIFRA) or any other approved use based upon evidence filed in connection with registration under FIFRA.

Provided however, That for purposes of enforcing Paragraph I.A. of this order any advertisement, statement, claim or representation that such products may be employed for a crop or plant use registered under FIFRA or any other approved use based upon evidence filed in connection with registration under FIFRA shall not be deemed a violation of this order; *Provided, further*, That this exception shall be effective only until such time as a trade regulation rule covering the advertising and promotion of such products subject to this order and containing terms at least as onerous as Paragraph I.A. of this order becomes final and effective.

II

With respect to representations not covered by the provisions of Section I. of this order; *It is ordered*, That Hercules Incorporated, a corporation, its successors and assigns and respondent's officers, representatives, agents, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, or sale or distribution of such products, do forthwith cease and desist from:

A. Representing, directly or by implication, by print or broadcast advertising, by other promotional material, or by sales representatives' oral statements, that such products are absolutely safe, nontoxic or free of hazard to human beings, warm-blooded animals, birds, fish, beneficial insects, or the environment.

B. Representing, directly or by implication, by print or broadcast

advertising or by other promotional material, that Toxaphene insecticide, or any product containing Toxaphene insecticide:

(1) is "soft;" or

(2) is "nonpersistent," "nonmobile" and/or will "not magnify biologically;" *Provided, however,* That the use of such terms shall not be prohibited if:

(a) accompanied by statements, which clearly and conspicuously and in close conjunction with such terms, fully and accurately explain such terms and the specific context within which such terms are used, and that context reflects normal circumstances or conditions in which the product could be expected to be used; and

(b) accompanied by statements which set forth all relevant and material adverse effects on the environment known to result from the uses of such product which are suggested claims for the product; and

(c) statements concerning such terms are substantiated by competent scientific tests or other objective material which provide a reasonable basis for the representations made, and the substantiation materials are either (i) available for public inspection, or (ii) otherwise available to the Federal Trade Commission to determine compliance with this order; and

(d) statements concerning such terms include no conclusory representations, either directly or indirectly or by implication, suggesting that the product is unqualifiedly safe, nontoxic or free of hazard.

III

It is further ordered, That respondent, Hercules Incorporated, a corporation, its successors and assigns and respondent's officers, representatives, agents, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, or sale or distribution of such products do forthwith cease and desist from disseminating or causing the dissemination of:

A. Any print advertising or print promotional material which contains any use or efficacy claim or any environmental or safety claim for any such products unless it clearly and conspicuously includes in such print advertisement or print promotional material the following statement:

STOP! ALL PESTICIDES CAN BE HARMFUL TO HEALTH AND THE ENVIRONMENT IF MISUSED. READ THE LABEL CAREFULLY AND USE ONLY AS DIRECTED.

B. Any broadcast advertisement more than 30 seconds in length which contains for any such products any use or efficacy claim or any

environmental or safety claim unless it clearly and conspicuously includes the following statement:

ALL PESTICIDES CAN BE HARMFUL TO HEALTH AND THE ENVIRONMENT IF MISUSED.
READ THE LABEL CAREFULLY AND USE ONLY AS DIRECTED.

C. Any broadcast advertisement not more than 30 seconds in length which contains for any such products any use or efficacy claim or any environmental or safety claim unless it clearly and conspicuously includes the following statement:

ALL PESTICIDES CAN BE HARMFUL. READ THE LABEL. USE AS DIRECTED.

Provided, That in television advertisements not more than 10 seconds in length for any such products which contain no direct representations concerning product safety, the requirements of the term "clearly and conspicuously" shall in all cases be met by including the above statement in the video portion of the advertisement.

Provided however, That for purposes of enforcing Paragraph III of this order any advertisement, statement, claim or representation that such products may be employed for a crop or plant use registered under FIFRA, or any other approved use based upon evidence filed in connection with registration under FIFRA shall not be deemed sufficient to require the disclosure of any statement otherwise required under the provisions of Paragraph III; *Provided further*, That this exception shall be limited to advertisements which promote the respondent's corporate image and which only incidentally promote the sale or distribution of such products.

IV

It is further ordered, That the provisions of this order shall apply to all advertising (or advertising claims) prepared by respondent, whether or not such advertising is placed or paid for by respondent alone, or by respondent in conjunction with another under a cooperative advertising plan, or otherwise; *Provided, however*, That Sections I, II, and III of this order shall not apply to any advertising prepared by the customers of respondent, whether or not respondent makes payment in whole or in part for such advertising under any cooperative advertising plan, or otherwise. Nothing in this Section IV shall be construed to extend any provision of this order beyond the specific terms thereof.

Respondent shall, *nevertheless*, condition all future payments to customers of insecticide products covered by this order, made in connection with any cooperative advertising plan in which respondent participates, upon said customer's certification to respondent that they have complied with the standards set forth in Section III of this order.

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V

Nothing in this order shall be construed to apply to scientific articles published in recognized scientific or agricultural journals or government publications, or reprints thereof, or representations (other than print advertising or other promotional material) before public or governmental forums such as public hearings, scientific meetings, or to governmental agencies, agents, or employees responsible for the regulation, testing, or dissemination of information concerning pesticide products covered by this order.

VI

It is further ordered, That nothing in this order shall prohibit the dissemination of product labels (as defined by Section 2(p)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended), or reproductions thereof.

VII

It is further ordered, That should the Federal Trade Commission promulgate a trade regulation rule or industry guide governing the advertising or promotion of products subject to this order, then any pertinent less comprehensive or less restrictive provisions of such rule or guide shall automatically replace any comparable provisions set forth herein which are effective on the date that such rule or guide becomes final and effective.

VIII

It is further ordered, That the respondent forthwith distribute a copy of this order to each of its operating divisions engaged in the manufacture, sale, advertising, promotion or distribution of products subject to this order, and to all present and future employees of respondent responsible for the advertising, promotion, distribution or sale of such products, and to all parties participating in respondent's cooperative advertising programs for such products; *Provided however,* That distribution by respondent of the order issued in this matter on Oct. 4, 1974 shall be considered as if such distribution had been made under this Section VIII and respondent shall not be required to make distribution of this order to persons to whom such previous order has been distributed.

IX

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

X

It is further ordered, That the compliance report heretofore filed by respondent shall be considered by the Commission as if it had been filed under this order.

XI

It is further ordered, That this order shall become effective upon service.
