

Interlocutory Order

91 F.T.C.

IN THE MATTER OF  
BELTONE ELECTRONICS CORPORATION, ET AL.

*Docket 8928. Interlocutory Order, May 12, 1978*

Remand for additional hearings ordered for consideration of customer and territorial restriction on interbrand and intrabrand competition.

ORDER REMANDING FOR ADDITIONAL HEARINGS

By order of July 5, 1977, the Commission directed the parties in this proceeding to submit supplemental briefs concerning the impact of *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977). After careful review of the briefs submitted by the parties and the record developed before the administrative law judge ("ALJ"), the Commission has determined that a limited remand of the case is necessary for consideration of the impact of respondents' customer and territorial restrictions upon both interbrand and intrabrand competition.

The complaint in this proceeding was issued on May 8, 1973, charging respondents with various violations of Section 5, including, *inter alia*, imposition of exclusive dealing, maintenance of territorial and customer restrictions, use of certain post-termination restraints, and misappropriation of the names and addresses of dealers' customers. After extensive pretrial discovery and 115 days of hearings in Washington, D.C., Chicago, San Francisco, and New Orleans, the ALJ filed his initial decision on September 7, 1976, finding that the respondents had engaged in the following unfair acts and practices and unfair methods of competition in violation of Section 5:

- (A) Requiring their selected dealers to sell Beltone products within assigned geographic territories;
- (B) Requiring their selected dealers to deal exclusively in Beltone hearing aids;
- (C) Prohibiting their dealers from dealing with certain potential customers;
- (D) Preventing others, not their dealers, from dealing in or repairing Beltone products; and
- (E) Appropriating and using for their own purposes the names and addresses of their dealers' customers.

The ALJ's legal analysis of respondents' territorial and customer restrictions (ID 79-82)<sup>1</sup> leaves no doubt that he examined these

<sup>1</sup> We recognize, of course, that respondents deny the existence of any territorial or customer restrictions and

particular restraints in light of the then-prevailing *per se* standard of *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), under the rationale that conduct violating the Sherman Act would necessarily violate Section 5 of the FTC Act. Moreover, complaint counsel's trial and answering briefs indicate that they contemplated application of a *per se* theory throughout the proceeding. Although the record contains some discussion of the competition effects of respondents' territorial and customer restrictions, it is clear that the evidence introduced provides, on balance, an incomplete picture of the interbrand and intrabrand effects of these practices. Hence, the need to premise our disposition of this case upon a thorough examination of the competitive impact of these specific restraints leads us to conclude that we should remand the proceeding.<sup>2</sup> Accordingly,

*It is ordered*, That this matter is remanded to the administrative law judge for an expedited proceeding solely to receive additional evidence regarding the effects of respondents' territorial and customer restrictions upon interbrand and intrabrand competition.

*It is further ordered*, That, after the receipt of such additional evidence, the administrative law judge certify the record to the Commission together with any findings of fact or conclusions of law which he may make in light of the additional evidence.

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<sup>2</sup> In view of the unusual amount of cumulative dealer testimony evident in the present record, we wish to emphasize that an expeditious resolution of the issues on remand is in the best interest of all parties. To this end, stipulations should be freely utilized to avoid the introduction of duplicative testimony. In any event, we assume that the ALJ will exercise appropriate control over the receipt of additional evidence.

Interlocutory Order

91 F.T.C.

IN THE MATTER OF  
SUNKIST GROWERS, INC.

*Docket 9100. Interlocutory Order, May 15, 1978*

Application for review of ALJ order denied for failure to raise an issue having substantial ground for difference of opinion.

ORDER DENYING APPLICATION FOR REVIEW

Respondent, Sunkist Growers Inc. ("Sunkist"), has filed an Application for Review of Order Denying Respondent's Motion to Dismiss for Lack of Jurisdiction pursuant to Rule 3.23(b). Because Sunkist has failed to raise an issue as to which there is substantial ground for difference of opinion, the Application for Review is denied. While further elaboration is unnecessary, a brief explanation of the reasons for our decision seems warranted.

Sunkist argues that the Commission lacks jurisdiction over the subject matter of this proceeding by reason of the Capper-Volstead Act, 7 U.S.C. 291, 292. Alternatively, Sunkist argues that primary jurisdiction of this matter rests with the Secretary of Agriculture.

It is well settled that the Capper-Volstead Act does not vest exclusive jurisdiction of antitrust claims against agricultural cooperatives in the Secretary of Agriculture. *Maryland & Virginia Milk Producers Ass'n, Inc. v. United States*, 362 U.S. 458, 462-64 (1960); *United States v. Borden Co.*, 308 U.S. 188, 205-06 (1939); *Central California Lettuce Producers Cooperative*, Dkt. 8970, slip opinion at 4-5 (July 25, 1977) [90 F.T.C. at 53,54], Cf. *Washington Crab Ass'n*, 66 F.T.C. 45 (1964). While conceding that federal courts have jurisdiction over monopolization suits initiated by the Department of Justice, Sunkist argues that the Commission lacks similar jurisdiction with respect to complaints issued under the Federal Trade Commission Act. Respondent, however, cites no authority in support of this anomalous position. The complaint alleges that Sunkist is a corporation within the meaning of Section 4 of the Federal Trade Commission Act which has engaged in unfair methods of competition. It thus appears that the complaint states a cause of action under Section 5 against a respondent which is subject to the Commission's jurisdiction.

Respondent's alternative argument is that "primary jurisdiction rests with the Secretary of Agriculture." As we explained in *Perpetual Federal Savings & Loan Ass'n*, Dkt. 9083 (December 6, 1977) [90 F.T.C. 608], it is not wholly clear that the doctrine of