

Interlocutory Order

IN THE MATTER OF

KOSCOT INTERPLANETARY, INC., ET AL.

Docket 8888. Interlocutory Order, May 16, 1978

Order denying petition for reconsideration on finding that respondents failed to show the existence of circumstances which would warrant reopening or reconsidering the docketed proceeding.

ORDER DENYING "PETITIONS FOR RECONSIDERATION"

The Court of Appeals, by order of December 28, 1977, granted leave to two respondents in *Koscot Interplanetary, Inc., et al.*, Dkt. 8888, 86 F.T.C. 1106 (1975), to apply to the Commission for reconsideration of that proceeding based on further defenses or additional evidence.¹ Having carefully considered the contentions raised by respondents Glenn W. Turner and Raleigh P. Mann in petitions filed April 14, 1978,² and the answering submission of complaint counsel, the Commission hereby denies the petitions and directs that the Court of Appeals be notified that the Commission will not request the Court to remand the record for further proceedings. The Commission finds that respondents have failed to show the existence of circumstances which would warrant reopening or reconsidering the docketed proceeding.

In so holding, the Commission takes note of the exhaustive nature of the proceedings in *Koscot*, which stretched from May 24, 1972, when complaint issued, through the filing of the initial decision on March 20, 1975, to the issuance of the Commission's decision and order on November 18, 1975, and subsequent modifying order on January 13, 1976 [87 F.T.C. 75]. The trial spawned a transcript in excess of 5000 pages, accompanied by numerous documents. Respondents received a proper hearing on the record, with notice and a fair opportunity to be heard, to be represented by counsel, to conduct cross-examination, and to offer rebuttal evidence. See 5 U.S.C. 554, 556, 557; 15 U.S.C. 45.

Moreover, they exercised their rights. Respondent Turner had counsel of record throughout the entire proceeding and at no time objected to the competency or adequacy of such counsel. Respondent

¹ The Court also gave permission to respondents to petition the Commission for appointment of counsel, upon a proper showing of indigency. They have made no such motion and are represented in this matter by retained counsel.

² The following abbreviations are used in this order:

Turner petition - Petition by respondent, Glenn W. Turner, for Reconsideration

Mann petition - Petition by respondent, Raleigh P. Mann, for Reconsideration

C.C. Answer - Complaint Counsel's Answer to above Petitions

ALJ - Administrative Law Judge

Mann had legal representation during parts of the adjudication, including, contrary to his statement, the period "during the very critical post-hearing proceedings." Mann petition at 4. Notice of Appeal of Administrative Law Judge's Initial Decision filed May 29, 1975, see Appendix A to C.C.'s Answer, point 49. Complaint counsel has sworn that he timely advised respondent Mann of the availability of appointed counsel for indigents, but petitioner Mann declined to pursue this option. See Appendix D to C.C. Answer.³ Mann testified on the record and presented all the evidence which the instant petition seeks to reassert. At that time he was afforded the right to make a statement on his own behalf for the record, and did so. See Mann petition at 9. A month later, respondent Mann filed, *pro se*, a motion to dismiss, which was denied in the initial decision. 86 F.T.C. at 1127. He was, however, excepted from the requirements of the ALJ's restitution order, at least partly on the basis of his testimony. 86 F.T.C. at 1155. Counsel for respondent Turner filed a Brief in Opposition to Complaint Counsel's Proposed Findings of Fact. The same counsel filed an Appeal Brief and argued the cause for *all* respondents before the Commission. While the Commission affirmed most aspects of the initial decision, it excised the order provisions requiring restitution, which objective was the main focus of respondents' counsel's argument on appeal to the Commission.

Respondents now contest the order on the ground of inadequacy of representation. They claim that insufficiency in representation, which was not visited upon them by any act of the Commission, led to a failure to offer exculpatory evidence. Respondents have not, however, actually presented any additional or "newly discovered" evidence, see *Smith v. Pollin*, 194 F.2d 349, 350 (D.C. Cir. 1952), and content themselves with restating their desire for further proceedings which appear to hold only the promise of reviewing old evidence. Respondent Mann offers nothing more than a reiteration of matters already in the record, which were the subject of findings by the ALJ and of a denial of Mann's motion to dismiss. Mann petition at 5-8. That respondent now believes a more articulate presentation or more cogent marshalling of his arguments would have exonerated or might still vindicate him cannot be the basis of reopening and further protracting proceedings where the evidence was already fully considered, and with benefit to respondent. The doctrine of *res judicata* is not without purpose. Cases cannot be reheard whenever respondents find a better orator or a superior way to package their contentions. There is an interest in finality, and in

³ Even without notice of the Commission's policy of appointment of counsel for indigents.

preserving scarce public resources. Care must be taken to protect the public interest, and the rights of those who fall victim to the few who would violate the law.

It is understandable that respondent Mann now regrets his failure to present a defense on the merits, but such was his choice, and one echoed by others who had the benefit of counsel throughout (including Koscot itself, which even respondent Turner does not allege was inadequately represented). Mann's petition reaffirms that he believed his testimony and documentary evidence were sufficient to absolve him of liability for any violations of law. Mann petition at 9-10. This was a strategic decision made in presenting his case and cannot be undone because the ALJ and Commission were not persuaded to his view. Respondent Mann suffered no denial of rights incident to a fair hearing.

Respondent Turner claimed before the Court of Appeals and now here that his legal representation fell short of the mark because his counsel appeared on behalf of multiple parties, subjecting respondent to a conflict of interest which prejudiced him since "certain evidence tending to disprove the allegations against [him] was not proffered." Court of Appeals Order of December 28, 1977. See Turner petition at 5-7. To support this contention, he offers only a conclusory, *ex post facto* affidavit of his former counsel which appears to contradict earlier statements made by that attorney on the adjudicative record, that there was no conflict of interest. See Appendix B to C.C. Answer, transcript at 4326-27.⁴ Even assuming that respondent did not waive, either formally or constructively, objection to a possible conflict of interest, he points to no evidence which was omitted from the adjudication because of a real or

⁴ Canon 5 of the Code of Professional Responsibility and attendant Ethical Considerations and Disciplinary Rules plainly warn against the representation or continued representation of multiple clients where a conflict of interest may occur. See especially EC5-14 to EC5-19 and DR5-105. Respondent's counsel specifically represented that he was familiar with Canon 5 and was not in violation of it. He admitted of the potential for conflict between respondents if less than all wished to effect a consent agreement, but this situation did not develop. He adverted to a "conflict of itself [sic] between Mr. Wilder and Mr. Bunting," transcript at 4325, but not to any involving Mr. Turner. He also used the word "conflict" in a looser sense, in saying "But quite realistically, there is a conflict. If they had each [the individual respondents] had money and had their druthers, I think each of them would have had a different attorney representing them in all kinds of litigation across the country, but circumstances were that they were stuck with one law firm for which they pay no money." Transcript at 4326. It is not clear which meaning is intended by Mr. Robinson's affidavit, see Exhibit I to Turner petition and also p. 6 of the petition. Moreover, the affidavit indicates that any conflict affecting Glenn Turner could only have arisen after the "early August 1974" sale of Koscot. Affidavit at 4. In fact, the sale occurred in August 1973, according to the ALJ's findings, 86 F.T.C. at 1121. Mr. Robinson's averment on the record of the absence of a conflict of interest took place on August 19, 1974, and any conflicts triggered by the sale would presumably have come to light by the time Mr. Robinson denied that any existed.

Complaint counsel has pointed out other inconsistencies in this affidavit which must erode its credibility. C.C. Answer at 8-9. One of the most serious is prior counsel's implication in the 1976 affidavit that he repeatedly tried to withdraw his representation on the ground of conflict of interest. See Turner petition at 6, point 3. His motion to withdraw, attached as Exhibit D to the Turner petition does not plead conflict of interest as a supporting basis. See C.C. Answer at 6-7.

theoretical conflict. Instead, he relies on a theory of diminished vigor, that is, that counsel slighted the case for Turner to concentrate on that of Koscot, the client for which he received some compensation.⁵ There is no evidence that this occurred to any noticeable degree, and considering that Turner was found to be the alter ego of Koscot (86 F.T.C. at 1123) a radical divergence of interests appears unlikely.

To show prejudice, respondent states that no defense on the merits was presented on his behalf, that "virtually all of the relatively few . . . items of documentary evidence submitted on behalf of respondents were related to the interest of Respondent Koscot," and that "the principal post-hearing filings on behalf of respondents . . . only tangentially, and with minimal efficacy, tended to protect, advance, or defend the significant interests of Respondent Turner." Turner petition at 5-6. The ALJ found, however, that no real defense on the merits was presented on behalf of Koscot either, since none of the respondents represented by attorney Robinson objected to the issuance of the order proposed by complaint counsel except with regard to restitution. 86 F.T.C. at 1118-19, 1178. The documentary evidence introduced for respondents accordingly went to the contested restitution issue, "primarily relating to the status of respondent Koscot as a result of its petition for an arrangement under Chapter 11 of the Federal Bankruptcy Act," 86 F.T.C. at 1118. As the other respondents had refused to discuss their finances, standing on their Fifth Amendment rights (86 F.T.C. at 1183), there were not many disputed issues about which respondents could have submitted documentary evidence. With regard to the post-hearing filings, the Commission can detect little difference in the force and persuasiveness of the arguments for the various respondents. Respondent Turner concedes that the Brief in Opposition and Appeal Brief "ostensibly" defended the interests of all the respondents counsel represented. Turner petition at 5. He offers no clue as to what, if anything, negated this appearance of representation of all the parties' interests. Counsel seems to have made a tactical decision

⁵ In any case, it appears that the representation of Koscot had not proved so lucrative for Mr. Robinson that it would likely have induced him to abandon the other respondents in Koscot's favor, to the extent that their interests may have differed. Compare Turner petition at 6, point 2, with transcript at 5098, 5104-05, and respondents' "Response Complaint Counsel's Answer to Motion for Extension of Time," cited in Appendix A TO C.C. Answer, points 30, 52. The performance of special bankruptcy counsel for Koscot, and any particularized assistance he gave to Koscot is not relevant to the charge of deficient representation originating in Mr. Robinson's alleged conflict of interest.

It should also be noted that "none of the respondents put on an individual defense in the Jacksonville mail fraud trial either," (transcript at 5117, quoted in C.C. Answer at 11), which ended in a hung jury. Mr. Robinson's decision to follow the same course before the Commission may well have reflected a tactical judgment based upon his experience. Courts do "not sit to second guess strategic and tactical choices made by trial counsel." *United*

that only the restitution issue should be pursued, and his arguments would seem to have benefited all the respondents. Indeed, there is ample evidence that respondents were willing from the start to agree to an order very like the one the Commission ultimately adopted and only really opposed the restitution remedy. See Appendix A to C.C. Answer, points 4-5, 32-34. Particularly as the Commission dropped the restitution provisions from its order, we agree with complaint counsel that "it simply cannot be said that prior counsel did not defend the significant interests of petitioner." C.C. Answer at 12.

Most important is the fact that the record shows, and respondent has not demonstrated otherwise, that the actions counsel did not take, the witnesses he did not call, the exhibits he did not introduce, and the case he did not make, derived from strategic decisions or possibly lack of funds^{*} and not from any conflict of interest respondent here argues prevented the proffering of exculpatory evidence. Nor has respondent offered any additional evidence to contradict the record on this point. Respondent Turner has failed to show the existence of a conflict of interest or that any prejudice has accrued to him from what he mistakenly perceives to be a possible conflict. Especially in a civil case, where the application and policy of the Sixth Amendment are unclear, see *United States v. Rogers*, 534 F.2d 1134, 1135 (5th Cir.), *cert. denied*, 429 U.S. 940 (1976), the courts do not lightly assume the inadequacy of counsel. *United States v. McCord*, 509 F.2d 334, 353 (D.C. Cir. 1974), *en banc*, *cert. denied*, 421 U.S. 930 (1975).

Respondent Turner raises another issue, collateral to those directed for Commission consideration by the Court. He argues that the assertion of their privilege against self-incrimination prevented him and the other respondents from testifying and therein exonerating some or all of the respondents from liability. Turner petition at 7. Even though respondents did not request immunity, Mr. Turner contends that the Commission's failure to secure it for respondents under Section 4.12 of the Rules kept him from participating "actively and directly in the proceedings without the necessary intervention of unwilling, and consequently ineffective, counsel." Turner petition at 8. To the extent that this represents an assertion that conducting one's case *pro se* is impossible for those who seek to preserve their Fifth Amendment rights, it is mistaken. Only by voluntarily testifying on the stand and only in response to questions related to incriminating matters, would he have risked waiver of the privilege.

^{*} Although counsel for respondents hinted several times during the proceeding that some or all of them were in straitened circumstances, respondents refused to give evidence on the question, citing the privilege against self-incrimination, and thus no related findings were made. 86 F.T.C. at 1183. Accordingly, it is not known whether their failure to fund their attorney was a matter of choice or necessity.

8 Wigmore, Evidence §2276 (McNaughton rev. 1961). Respondent did not need immunity to examine or cross-examine witnesses or to submit evidence on his own behalf. Had he wished to introduce his own testimony, which was evidently not needed by complaint counsel, respondent could himself have sought immunity by applying to the ALJ under Section 4.12.⁷ The same procedure could have secured for him the immunized testimony of other respondents. Respondent Turner made no effort during the proceeding to avail himself of the immunity provision and now claims that he was prejudiced in his case because complaint counsel did not do so for him. Turner petition at 8. But complaint counsel had no such duty. It is no abuse of the right against self-incrimination to respect its privilege of silence.

Respondent Turner now seeks to turn that shield into a sword (cf. *United States v. Newman*, 468 F.2d 791 (5th Cir. 1972), *cert. denied*, 411 U.S. 905 (1973)), by claiming a right to additional hearings where undescribed testimony of co-respondents may be elicited, if they are willing, now that the criminal charges against them have been resolved. Turner petition at 7. Respondent Turner himself would like another chance to testify. He supplies no information, however, upon which to judge the likelihood or value of this possible testimony. Nor does he address the fact that respondents had already pleaded *nolo contendere* before the oral argument⁸ and thus could have sought leave to give their testimony even before the Commission reviewed the initial decision and issued its opinion and final order. He would have us remand for new hearings on the strength of a vague intimation that further evidence may be forthcoming and, if so, that it may be valuable. Turner petition at 7. He does not even assert that this hypothetical evidence would change the outcome of the proceedings. Under the circumstances, the Commission does not find it unduly harsh or in any way contrary to the public interest to reject this gambit. "A respondent cannot be permitted to gamble on one course of action and, upon an unfavorable decision, to try another course of action." *Gross v. SEC*, 418 F.2d 108, 109 (2d Cir. 1969).

The capacity of the administrative process to resolve cases will be seriously compromised, and the public badly disserved,⁹ if respon-

⁷ The Commission has made no determination that immunity would or should have been granted in this case. See, e.g., *United States v. Bautista*, 509 F.2d 675, 677 (9th Cir.), *cert. denied sub nom. Monsivais v. United States*, 421 U.S. 976 (1975); *Earl v. United States*, 361 F.2d 531, 534 (D.C. Cir. 1966), *cert. denied*, 388 U.S. 921 (1967).

⁸ Indeed, their counsel was directly asked about the status of the criminal proceedings during oral argument before the Commission and revealed their conclusion. Transcript of Oral Argument, October 2, 1975, at 14-15.

⁹ We do feel compelled to note that the lengthy trial record presented to the Commission in this matter, analyzed in depth in the ALJ's initial decision, and summarized in the Commission's opinion, reveals violations of 15 U.S.C. 45 and losses to the public of enormous proportions. Unless and until the Commission's order in this matter becomes final against respondents, they remain free to repeat the practices which contributed to those

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dents in such cases are permitted to delay their finality for long periods of time by waiting for the conclusion of the administrative process and then hinting at the existence of further relevant evidence which might, in any event, have been presented at trial.

Having thoroughly and carefully considered the submissions of petitioners and complaint counsel, the Commission has determined that they do not raise any grounds that would warrant reconsideration by the Commission of its earlier decision, and therefore the Commission does not request that the Court of Appeals remand this matter to it for further proceedings. Accordingly,

It is ordered, That the "Petitions for Reconsideration" by respondents Mann and Turner are hereby denied.

adduced to warrant reopening of administrative proceedings, the Commission is distressed that 2 1/2 years should have elapsed since the issuance of its order, without its consideration on the merits. The Commission is hopeful that this proceeding may be brought to a speedy conclusion and the public given the protection which the record indicates it deserves.

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IN THE MATTER OF

KOSCOT INTERPLANETARY, INC., ET AL.

Docket 8888. Interlocutory Order, May 16, 1978

Grant of complaint counsel's motion requesting leave to file an answer to petition for reconsideration.

ORDER GRANTING LEAVE TO FILE ANSWER

Counsel supporting the complaint in this matter have filed two requests for brief extensions of time within which to file an answer to "Petitions for Reconsideration" filed by respondents Glenn W. Turner and Raleigh P. Mann pursuant to an order entered December 28, 1977 by the United States Court of Appeals for the District of Columbia. Complaint counsel, having received no response to these motions, subsequently filed an "Answer" accompanied by a motion to file the answer "out of time."

Complaint counsel have apparently assumed that the time established for filing of an answer is governed by Section 3.55 of the Commission's Rules of Practice, pertaining to requests for reconsideration of Commission orders. This section of the Rules requires that petitions for reconsideration be filed within 20 days after service of a Commission order. Thereafter, opposing counsel are given 10 days within which to file an answer. The Commission doubts whether Section 3.55 should properly be applied to the case at hand, because it plainly applies only to requests for reconsideration filed within a short time of the entry of an order, before the matter has left the Commission's jurisdiction.

Complaint counsel's position doubtless results from the use by petitioners and the Court of Appeals of the term "reconsideration" to characterize petitioners' request. Petitioners have also referred to Section 3.55 of the Rules. Assuming *arguendo* that this section of the Rules has any applicability to the matter at hand, the Commission has determined that the 8 days' total extension of time requested by complaint counsel is appropriate, given that respondents have had a much longer period of time than that allowed by Section 3.55 of the Rules within which to prepare the petition to which complaint counsel responds. Accordingly,

It is ordered, That complaint counsel's motion requesting leave to file an Answer to Respondents' Petitions for Reconsideration be granted.