

Final Order on Remand

92 F.T.C.

IN THE MATTER OF

KRAFTCO CORPORATION, ET AL.

FINAL ORDER ON REMAND, OPINION, ETC., IN REGARD TO
ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND
CLAYTON ACTS

Docket 9035. Complaint,¹ June 17, 1975 — Decision, Oct. 4, 1978

This order on remand from the Second Circuit Court of Appeals is identical to that issued by the Commission on January 11, 1977, 42 FR 10979, corrected at 13820, 89 F.T.C. 46, and requires the SCM Corporation, a New York City producer of margarine, edible oils and barbecue sauce, among other things, to cease seating on its board of directors, any individual who is simultaneously serving on the board of the Kraftco Corporation, or any other competitive company.

ORDER ON REMAND

FINAL ORDER

This matter has been heard by the Commission upon remand from the Second Circuit Court of Appeals. The Commission, for the reasons stated in the accompanying opinion, has determined that an order to cease and desist should be entered. Therefore,

It is ordered, That the following order to cease and desist be, and it hereby is, entered:

ORDER

The following definitions shall apply in this order:

"Subsidiary" of SCM means any corporation, 50 percent or more of the voting stock of which is owned or controlled, directly or indirectly, by SCM.

"Parent" of SCM means any corporation which owns or controls, directly or indirectly, 50 percent or more of the voting stock of SCM.

"Sister" of SCM means any subsidiary of a parent of SCM.

1. *It is ordered,* That respondent SCM Corporation and its successors and assigns shall forthwith cease and desist from having, and in the future shall not have, on their board of directors any individual who either:

(a) serves at the same time as a director of Kraftco Corporation, its successors or assigns (so long as Kraftco and SCM Corporation compete in the production or sale of any product or service), or

¹ For complaint, see 88 F.T.C. 362.

serves at the same time as a director of any other corporation (other than a subsidiary, parent, or sister of SCM) which competes with SCM Corporation in the production or sale of any product or service; or

(b) fails to submit to SCM Corporation any statement required by Paragraph Two of this order to be obtained by SCM.

2. *It is further ordered*, That within thirty (30) days of the effective date of this order, and prior to each election of directors or prior to the solicitation of proxies for such election, whichever is earlier, SCM Corporation shall obtain a written statement from each member of its board of directors (except directors whose terms expire at the next election and who are not standing for re-election) and from each nominee for a directorship (who is not then a director) showing:

(a) the name and home mailing address of each director or nominee; and

(b) the name and principal office mailing address of, and a listing of each product or service produced or sold by, each corporation which the director or nominee then serves as a director, or has been nominated to serve as a director at the time of the statement.

The requirements of this paragraph shall not apply to elections of directors occurring after five years from the effective date of this order, nor shall directors or nominees be required to list products or services of subsidiaries, sisters, or parents of SCM Corporation.

Nothing in this paragraph shall be construed to relieve respondent of its obligation under paragraph 1(a) hereto due to any error or omission contained in any written statement received pursuant to this paragraph.

3. *It is further ordered*, That within forty-five (45) days of the effective date of this order and annually for a period of ten (10) years thereafter, SCM Corporation shall file with the Commission a written report setting forth in detail the manner and form in which it has complied with this order. Copies of the statements obtained pursuant to Paragraph Two of this order shall be submitted to the Commission as part of the reports of compliance required by this paragraph during the first five (5) years. Nothing in this paragraph shall relieve SCM Corporation of its obligation to comply with Paragraphs One and Four of this order once it is no longer required to submit reports of compliance to the Commission.

4. *It is further ordered*, That SCM Corporation shall notify the Commission at least thirty (30) days prior to any change in the corporation 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.

OPINION OF THE COMMISSION

By DIXON, *Commissioner*

This matter is before the Commission upon remand from the Second Circuit Court of Appeals. The Court affirmed the Commission's earlier determination that respondent SCM has violated Section 8 of the Clayton Act (15 U.S.C. 18) by virtue of its maintenance of a common director, Richard C. Bond, with a competitor, Kraftco Corporation. *SCM Corporation v. Federal Trade Commission*, 565 F. 2d 807 (2d Cir. 1977). However, the Court remanded the matter to the Commission for further consideration as to whether there exists some cognizable danger of recurrent violation, a finding that the Court deemed a necessary predicate to any imposition by the Commission of an order to cease and desist. On remand, both sides have filed briefs and reply briefs on this question.

In its original decision in this matter, the Commission, as had the administrative law judge, noted several factors that it believed warranted entry of an order in this case. Among these were the fact that the violation in question had been longstanding in nature, involved more than \$80 million in sales by SCM, and was terminated only following issuance of a complaint by the Commission. *See* 89 F.T.C. 46, 65 (1977). Having made these observations, however, we then went on to state (in addressing SCM's arguments that no order should enter) that

SCM's position here would necessitate that having shown a violation, complaint counsel then demonstrate by affirmative evidence the likelihood of future additional violations. To the contrary, we think the violation is itself the best evidence of the possibility of future such occurrences, and that *the burden rests with respondent to demonstrate that violations will not recur before consideration may be given to omitting an order.* . . . (89 F.T.C. at 66, emphasis added.)

The underlined wording met with the disapproval of the Court of Appeals, which was concerned that the Commission may have applied an incorrect standard and shifted the burden of proof in determining the need for an order.

Our phraseology was plainly infelicitous. What we intended by our words to convey was that record evidence concerning the nature of the violation and the circumstances surrounding it demonstrated to us the need for an order. In the face of such evidence, it was incumbent upon respondent to rebut, if it could, complaint counsel's showing that an order should enter.

Having once again reviewed the evidence and carefully considered the submissions of the parties, we adhere to our earlier conclusion that an order is necessary. We find that there is plainly a cognizable danger of recurrent violation of Section 8 of the Clayton Act in this case. Our conclusion is based upon the facts that the law violation which occurred persisted for a period of 7 years, involved markets in which SCM and its interlocked competitor made over \$300 million in sales (of which \$80 million were SCM's), and was halted only after intervention by the Commission (in this instance, after issuance of the complaint). In our view, these considerations show that SCM acted without adequate attention to its obligations under the law. Having acted in this fashion in the past, and given that it continues to do business and elect directors, we believe there is cognizable danger that SCM will again neglect to prevent the election and service of an interlocking director absent an order to deter it. See *SEC v. Commonwealth Chem. Securities, Inc.*, 574 F.2d 90, 100 (2d Cir. 1978).

In its briefs before the Commission, SCM contends that the grounds cited by complaint counsel, and upon which the Commission relies in finding a danger of recurrent violation, do not constitute "affirmative evidence" in support of the conclusion reached. We disagree.¹ As the Court of Appeals properly reminded us, the mere occurrence of a law violation, however trivial, technical, short-lived, and speedily corrected may not, in and of itself, dictate the need for remedial action. The Commission's holding in its earlier opinion could fairly have been read to say otherwise. We do believe, however, that with corporations as with individuals, past conduct is probative of future behavior. A driver who carelessly runs over a pedestrian is deemed in need of deterrence lest he repeat his act, even though the only significant proof that he is likely to be careless in the future is the fact that he was careless in the past. The same is true of a careless corporation. That a company would elect to its Board of Directors a member who simultaneously directs a competitor in a market in which the two companies share over \$300 million of sales, and that it could retain the director for seven years without detecting, or in any event moving to terminate the interlock, implies to us a degree of disregard for the law's requirements that demands remedy, at least so long as the corporation remains in business and continues to hire directors. If there are genuinely extenuating

¹ We note that the Court of Appeals specifically rejected SCM's assertion that the record is insufficient as a matter of law to support the issuance of an order, 565 F.2d at 813.

circumstances, the corporation is peculiarly well suited to suggest what they are.² Absent such rebuttal, the inference of cognizable danger of recurrent violation must stand.

For its part, SCM has failed to cite any evidence that might tend to overcome the showing made by complaint counsel. Indeed, what SCM has presented adds to our concern that it may again violate the law in the future. In particular, SCM has promised only to refrain from returning Mr. Bond to its board so long as he directs Kraftco or any other competitor of SCM. SCM has not promised to refrain from other interlocks with either Kraftco or any other competitor of SCM, nor has it indicated that it now has or has ever had *any* procedures whatsoever (let alone adequate procedures) for ensuring that it does not violate Section 8 in its choice of directors.³

We are also unpersuaded by SCM's suggestion that the allegedly peculiar nature of Section 8 violations (which harm the public only insofar as they create the potential for anticompetitive abuse), the alleged impossibility of hiding such violations, and their alleged infrequency militate against imposition of an order. It cannot be subject to serious dispute, we believe, that the efforts of federal antitrust agencies to ensure adherence to the antitrust laws depend heavily for their success upon corresponding efforts by the private sector to avoid such violations. It is much more costly for the Federal Trade Commission to determine whether any of SCM's directors simultaneously directs a competitor of SCM than it would be for SCM (which presumably knows who its competitors are) to make the same determination. Unless it is able to create strong monetary incentives for companies which have demonstrated disregard for the law's requirements to maintain such regard in the future, this agency and any other law enforcement agency is relegated to the role of publicly-subsidized house counsel, capable only of spotting violations (to the extent the resources to do so exist) but unable to do more than exhort the violator to mend its ways. We find no precedent to suggest that violations of Section 8 are to be regarded less seriously than any other, or that this agency's ability to enter an order to prevent their recurrence should be subjected to a different standard from that applicable to any other violation of law.

Our conclusions are, we believe, consistent with the mandate of the Court of Appeals, as well as with the teaching of numerous prior

² An example of such extenuating circumstances in an interlock case might be that the corporation in fact maintained rigorous procedures for avoiding interlocks, but such procedures proved inadequate to detect the interlock as the result of circumstances beyond the corporation's reasonable control.

³ We do not mean to suggest that promises made after a Commission investigation has begun are sufficient to obviate the need for an order, *SCM Corp. v. FTC supra*, 565 F.2d at 812, but in this case the limited nature of the promise that was made is further grounds for concern.

decisions which hold that the Commission is empowered to enter an order to cease and desist in circumstances in which the violator has discontinued the illegal conduct and volunteered not to repeat it. *E.g., Fedders Corp. v. FTC*, 529 F. 2d 1398, 1403 (2d Cir.), *cert. denied*, 429 U.S. 818 (1976); *William H. Rorer, Inc. v. FTC*, 374 F.2d 622, 625-26 (2d Cir. 1967); *Coro, Inc. v. FTC*, 338 F.2d 149, 153 (1st Cir. 1964), *cert. denied*, 380 U.S. 954 (1965); *Hershey Chocolate Corp. v. FTC*, 121 F.2d 968, 971 (3d Cir. 1941); *Perma-Maid Co. v. FTC*, 121 F.2d 282, 284-85 (6th Cir. 1941); *Sears, Roebuck & Co. v. FTC*, 258 F. 307, 310 (7th Cir. 1919); *FTC v. Wallace*, 25 F.2d 733, 738 (8th Cir. 1935).

The order we have entered is identical to the one previously issued. The terms of that order were reviewed by the Commission in the original proceeding, and upon appeal the Court of Appeals expressed no objection, assuming that any order should be deemed appropriate.

Complaint

92 F.T.C.

IN THE MATTER OF

MARATHON OIL COMPANY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT*Docket C-2931. Complaint, Oct. 18, 1978 — Decision, Oct. 18, 1978*

This consent order, among other things, requires a Findlay, Ohio producer and retailer of petroleum products to cease instituting, or authorizing the institution of debt collection suits in forums other than those in which consumer resided or signed the credit contract. The firm is further required to terminate suits pending in distant counties; vacate resulting default judgments; and provide consumers and credit reporting agencies with notice of such suit terminations.

*Appearances*For the Commission: *Eddie W. Correia.*For the respondent: *William J. Lowrey, Findlay, Ohio.*

COMPLAINT

The Federal Trade Commission, having reason to believe that certain acts and practices engaged in by respondent Marathon Oil Company violated Section 5 of the Federal Trade Commission Act, and that a proceeding in respect thereof would be in the public interest, issues this complaint:

PARAGRAPH 1. Marathon Oil Company is an Ohio corporation with its principal office located at 539 South Main St., Findlay, Ohio.

PAR. 2. Respondent produces petroleum products and distributes them to consumers for retail purchase.

PAR. 3. In the course and conduct of its business as aforesaid, respondent now causes the sale, ships and distributes its merchandise to purchasers located in various States of the United States. Therefore, respondent maintains a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 4. In the course and conduct of its business, respondent extended credit to holders of its credit card for the purpose of facilitating consumers' purchases of respondents' merchandise.

PAR. 5. In the course and conduct of attempting to collect allegedly delinquent retail credit accounts, respondent instituted collection suits in the name of respondent against consumers in counties other than where the consumers resided or signed the contract sued upon.

PAR. 6. The above acts and practices were all to the prejudice and