

IN THE MATTER OF
AMERICAN HOME PRODUCTS CORPORATION

Docket 8918. Interlocutory Order, Jan. 12, 1984

ORDER DENYING PETITION TO REOPEN AND ORDER TO SHOW CAUSE

On September 9, 1981, the Commission issued an opinion and order to cease and desist against American Home Products Corporation ("AHP") and the C.T. Clyne Co., Inc., corporate successor to AHP's advertising agency. In its opinion, the Commission held that AHP had engaged in various deceptive practices in violation of Section 5 of the FTC Act in connection with advertising for the aspirin-based pain relievers Anacin and Arthritis Pain Formula. The Commission's order contained provisions designed to secure cessation of these violations and prevent related ones. 98 F.T.C. 362.

AHP sought review of portions of the Commission's order in the United States Court of Appeals for the Third Circuit. On December 3, 1982, the court of appeals affirmed the Commission's order in all respects, save for paragraph II(D), which it ordered deleted. On December 28, 1982, the court denied AHP's petition for rehearing and suggestion of rehearing *en banc*.

On April 8, 1983, no petition for certiorari having been filed by AHP, the Commission entered its modified order to cease and desist, pursuant to the mandate of the Third Circuit. The modified order was identical to the order of September 9, 1981, save for court-ordered deletion of paragraph II(D). By separate order of April 8, 1982, the Commission stayed its modified order as to AHP until the later of September 30, 1983, or 90 days following disposition of a petition to reopen filed no later than April 15, 1983.¹

On April 15, 1983, AHP filed a petition to reopen the modified order of April 8, 1983, asking that it be stayed until the orders in *Bristol-Myers Company*, Docket No. 8917 [102 F.T.C. 21 (1983)], and *Sterling Drug Inc.*, Docket No. 8919 [102 F.T.C. 395 (1983)], became final. In the alternative, AHP requested that paragraph I(B) of the order, the so-called "substantial question" provision, be stayed pending the outcome of the *Bristol* and *Sterling* cases, and that paragraph III, requiring disclosure that Anacin and Arthritis Pain Formula contain aspirin in advertisements that make performance claims for the products, be modified to require disclosure of aspirin content for a

¹ The Commission's stay was issued in response to AHP's letter request of March 15, 1982. In a letter of March 18, 1982 responding to that request, the Commission advised AHP that upon expiration of the time for Supreme Court review of the order, and in the event that no review had been sought, the Commission would enter a stay on the terms of that ultimately entered.

limited period of time in a specified percentage of all advertisements for Anacin and APF, and thereafter only in a smaller class of advertisements than required by the Commission's order.

By letter of August 1, 1983, AHP waived any claim that its petition for reopening be decided within the 120 day period specified by Section 5(b) of the FTC Act, 15 U.S.C. 45(b). By memorandum of October 3, 1983, AHP purported to withdraw that part of its petition for reconsideration that agreed to reformulation of an order, and instead requested only that the Commission stay the effect of the entire order against it until judicial review of the orders against Bristol-Myers Corp. and Sterling Drug, issued on July 5, 1983, was complete and the orders have become final. By memorandum of November 23, 1983, Commission staff replied to AHP's petition for reopening, recommending that it be denied, except that paragraph I(B) be modified to grant AHP the option of making comparative efficacy claims where it possessed a "reasonable basis" therefor. On December 12, 1983, AHP filed a reply reiterating its position that the order against it should be stayed.

It thus appears that the Commission now has before it a petition for reopening by American Home Products, which consists only of a request that the order, in its entirety, be stayed for the indefinite duration of the Bristol and Sterling appeals. That petition for reopening is hereby denied, and unless further modified, the Commission's final order of April 8 will, therefore, take effect 90 days from the date of this order. We will maintain our stay of paragraph I(B) of the order, however, pending resolution of the show cause proceeding initiated by this order.

There is absolutely no basis for a stay of the Commission's entire order, as AHP now seeks. The Commission found that AHP had engaged in numerous serious violations of law, involving deceptive advertising. As to some of these findings of violation and related order provisions, AHP did not even seek judicial review. As to those findings of violation of which AHP did seek review, *all* were judicially affirmed, although one order provision was deleted. There is no provision of equity or law which requires that a party found to have engaged in deceptive practices be left free of restraint to repeat them until such time as judicial proceedings against competitors are completed. To the contrary, the case law makes plain the Commission's authority to exercise prosecutorial discretion in the choice of its targets and the order in which it pursues and places them under order. *FTC v. Universal-Rundle Corp.*, 387 U.S. 244, 251 (1967); *Moog Indus., Inc. v. FTC*, 355 U.S. 411, 413 (1958); *Encyclopedia Britannica v. FTC*, 605 F.2d 964, 974 (7th Cir. 1979), *cert. denied*, 445 U.S. 934 (1980); *Johnson Prods. Co. v. FTC*, 549 F.2d 35, 41 (7th Cir. 1977).

The Third Circuit in affirming the Commission's order in this case, observed that

There is no contention that the Commission abused its discretion by refusing, in its denial of AHP's petition for rehearing, to stay its Order until proceedings against AHP's competitors, Sterling Drug and Bristol-Myers, have been completed.

695 F.2d at 714. The court did indicate that "it would not seem unreasonable that in the interest of fairness a stay be granted at least with respect to part I(B) of the order," *Id.*,² but it also cited with approval the case law holding that simultaneity of prosecution and order finality is not required, and observed that "we do not suggest that the Commission should ignore the interests of scrupulous competitors who forego misleading claims," *Id.* at n.51, to which might also be added, the interests of consumers subjected to those claims.

AHP appears to believe that a stay should be granted because the Second and Ninth Circuits, in which Bristol and Sterling respectively have sought review of their orders, might modify them in some unspecified respect, thus entitling AHP to return and seek the same modifications in its order.

Even assuming, *arguendo*, that decisions by the Second or Ninth Circuits as to *Bristol* and *Sterling* would be grounds for reopening a final order as to AHP that has been affirmed and enforced by the Third Circuit, AHP's position is overbroad, for the petitions in both *Bristol* and *Sterling* focus on limited portions of those orders, and raise not even a theoretical possibility of undermining the underpinnings of portions of the AHP order. Moreover, factual differences between the cases cast doubt on the relevance of the *Sterling* and *Bristol* decisions to AHP's. In any event, compliance with the judicially affirmed, final order entered against it would in no way prevent AHP from seeking modification of that order at some later time should it believe circumstances warrant. See 15 U.S.C. 45(b). That highly speculative possibility, however, is hardly grounds for AHP to escape in the interim the force of an order designed to prevent proven violations of law.

For all these reasons, AHP's suggestion that the entire order against it be held in abeyance is not well taken, and is hereby rejected. In one respect, however, the AHP order is clearly inconsistent with the *Sterling* and *Bristol* orders entered by the Commission. Complaint counsel would remedy this situation by granting AHP the option under paragraph I(B) to make comparative analgesic efficacy claims supported by a reasonable basis as articulated in the *Bristol* and

² The modification proposed by the Commission in the Order to Show Cause, *infra*, would obviate the Third Circuit's concern, by allowing AHP as an alternative method of compliance with paragraph I(B) the same approach as contained in the orders against Bristol and Sterling.

Sterling decisions. Under complaint counsel's proposal, AHP would have the option, when making comparative efficacy claims for analgesics, of complying with the order affirmed by the Third Circuit, or with the reasonable basis provision entered by the Commission in the *Bristol* and *Sterling* orders.

The Commission believes that complaint counsel's proposal has merit, and will order the parties to show cause within 15 days why it should not be adopted. The show cause period will also permit AHP and staff one final opportunity to discuss staff's proposal.

Therefore,

It is ordered, That respondent's petition to reopen of April 15, 1983, as subsequently modified by memorandum of October 3, 1983, be denied. Pursuant to its stay order of April 8, 1983, the Commission's modified order of April 8, 1983 shall take effect 90 days from the date of this order, except for paragraph I(B), which shall remain stayed pending proceedings on the Order to Show Cause.

It is further ordered, That the parties shall, within fifteen days from the date of this order, show cause if any there be, why the Commission's order of April 8, 1983, should not be reopened and modified to the extent of permitting AHP to comply with paragraph I(B) of the order by possessing a reasonable basis for comparative claims of efficacy made for analgesic products.

Set Aside Order

103 F.T.C.

IN THE MATTER OF
THE MAICO COMPANY

ORDER TO SET ASIDE IN REGARD TO ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT

Docket 5822. Consent Order, May 22, 1955—Order To Set Aside, Jan. 13, 1984

On Jan. 13, 1984, the Federal Trade Commission set aside the May 22, 1955 order issued against The Maico Co. (51 F.T.C. 1197), in light of its actions in *Beltone Electronics Corp.*, Dkt. 8928 [100 F.T.C. 68 (1982)] and *Dahlberg Electronics Corp.*, Dkt. 8229 [101 F.T.C. 703 (1983)], which set aside prohibitions on the companies' use of exclusive dealing arrangements.

ORDER TO SET ASIDE ORDER TO CEASE AND DESIST

On May 22, 1955, the Federal Trade Commission issued an order against The Maico Company in Docket No. 5822 prohibiting Maico, in the sale of its own brand name hearing aids, from imposing exclusive dealing arrangements upon its dealers. [51 F.T.C. 1197]

Two of Maico's larger competitors are now permitted by recent Commission actions to engage in the same exclusive dealing practices contained in the order against Maico. On July 26, 1982, the Commission dismissed the complaint in *Beltone Electronics Corp.*, Docket No. 8928 [100 F.T.C. 68], challenging, among other things, the same practices prohibited by the order against Maico. On April 11, 1983, the Commission in *Dahlberg Electronics, Inc.*, Docket No. 8929 [101 F.T.C. 703], set aside prohibitions on Dahlberg's use of exclusive dealing arrangements, which were similar to those contained in the order against Maico.

On December 7, 1983, the Commission, pursuant to Section 3.72(b) of the Commission's Rules of Practice, 16 C.F.R. 3.72(b), issued to Maico an order to show cause why the proceeding herein should not be reopened to set aside the final cease and desist order in Docket No. 5822, prohibiting Respondent's use of exclusive dealing arrangements. Respondent was provided an opportunity to object to the proposed set aside of the order against it, and having failed to do so, is now deemed to have consented to such action. In view of the Commission's actions in *Beltone* and *Dahlberg*, the Commission believes that this modification is in the public interest.

Accordingly,

It is hereby ordered, That this matter be, and it hereby is, reopened and that the order herein shall be set aside as of the effective date of this order.