

Complaint

IN THE MATTER OF

AMERICAN PETROLEUM COMPANY, INC.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS
OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-4198; File No. 061 0229**Complaint, August 21, 2007 – Decision, August 21, 2007*

This consent order addresses actions by respondent American Petroleum, which agreed with several competing importers and sellers of lubricants to restrict the importation and sale of lubricants in Puerto Rico, in order to pressure the Puerto Rican Government to repeal a law requiring a refundable environmental deposit for lubricants purchased. The order enjoins American Petroleum from agreeing or attempting to agree with any other seller of lubricants (1) to restrain, restrict, limit, or reduce the import or sale of lubricants or (2) to deal with, refuse to deal with, threaten to refuse to deal with, boycott, or threaten to boycott any buyer or potential buyer of lubricants. The order does not interfere with the company's constitutional right to exercise rights under the First Amendment to petition any government body concerning legislation, rules, or procedures.

Participants

For the Commission: *Mark Frankena, Kenneth L. Glazer, Geoffrey M. Green, Peter D. Gulyn, Armando Irizarry, Geoffrey Oliver, and Louis Silvia.*

For the Respondents: *Rosalie Irizarry Silvestrini and Luis Oliver, Fiddler, Gonzalez & Rodriguez, P.S.C.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that American Petroleum Company, Inc., a corporation, hereinafter sometimes referred to as "respondent," has violated the provisions of said Act, and it appearing to the Commission that a proceeding in

Complaint

respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

1. Respondent American Petroleum Company, Inc. (“American Petroleum”) is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Puerto Rico, with its office and principal place of business located at Road 865 KM 0.2, Barrio Campanillas, Toa Baja, Puerto Rico 00951.

2. American Petroleum has for many years been engaged in the business of importing lubricating oil to, and selling lubricating oil in, the Commonwealth of Puerto Rico. The president and owner of American Petroleum is Nelson Soto.

3. Puerto Rico Law 278 of September 14, 2004 was intended to create incentives for the safe disposal of used lubricating oil. The law required all persons in the chain of distribution, from the importer to the end-user, to pay an environmental deposit of fifty cents for each quart of lubricating oil purchased. The deposit could be recovered after the used lubricating oil was delivered to an authorized collection center.

4. During 2005 and 2006, American Petroleum joined with numerous others in the Puerto Rico lubricating oil industry to lobby for the delay, modification, and/or repeal of Law 278. These efforts were partially successful. The Legislature postponed the starting date for the law until March 31, 2006.

5. In March 2006, with the effective date for Law 278 approaching, American Petroleum and several competing importers and sellers of lubricating oil adopted a new strategy to pressure the Legislature and the Governor to repeal Law 278. The companies agreed to cease importing lubricating oil, beginning on March 31, 2006, and continuing for so long as Law 278 remained in effect.

Complaint

6. On March 31, 2006, companies in the lubricating oil industry held a press conference in San Juan, with Nelson Soto of American Petroleum acting as the spokesman for the group. Soto announced that: (i) in order to pressure the government, numerous companies have agreed to suspend the importation of lubricating oil; (ii) this action will continue until Law 278 is repealed; and (iii) as existing inventories are depleted, the suspension of imports will result in shortages of lubricating oil throughout the island.

7. In December 2006, the Puerto Rico Legislature repealed Law 278.

8. The acts and practices of American Petroleum, including the acts and practices alleged herein, are in commerce or affect commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

9. The agreement among American Petroleum and its competitors to cease importing lubricating oil, as alleged herein, had the purpose and effect, or the tendency and capacity, to restrain competition unreasonably, to increase prices, and to injure consumers.

Violations Alleged

10. As set forth in Paragraph 5 above, American Petroleum agreed with competitors to restrict the importation and sale of lubricating oil, in violation of Section 5 of the Federal Trade Commission Act, as amended.

11. The acts and practices of respondent, as alleged herein, constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Such acts and practices, or the effects thereof, will continue or recur in the absence of appropriate relief.

Decision and Order

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-first day of August, 2007, issues its complaint against respondent.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of American Petroleum Company, Inc. (hereinafter referred to as “Respondent”), and Respondent having been furnished thereafter with a copy of the draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order (“Consent Agreement”), containing an admission by Respondent of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondent has violated the said Act, and that a Complaint should issue stating its

Decision and Order

charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comments received from an interested person pursuant to section 2.34 of its Rules, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Order:

1. Proposed Respondent American Petroleum Company, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Puerto Rico, with its office and principal place of business located at Road 865 KM 0.2, Barrio Campanillas, Toa Baja, Puerto Rico 00951.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondent, and the proceeding is in the public interest.

ORDER**I.**

IT IS ORDERED that, as used in this Decision and Order, the following definitions shall apply:

- A. “American Petroleum” or “Respondent” means American Petroleum Company, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled, directly or indirectly, by American Petroleum Company, Inc.; and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Commission” means the Federal Trade Commission.

Decision and Order

- C. “Lubricants” means motor oil, lubricating oil, and any other product used or intended to be used to reduce friction between rubbing surfaces.
- D. “Person” means both natural persons and artificial persons, including, but not limited to, corporations, partnerships, and unincorporated entities.
- E. “Seller” means any person other than American Petroleum engaged in the business of importing or selling Lubricants.

II.

IT IS FURTHER ORDERED that in connection with the importation, distribution, offering for sale, or sale of any Lubricants in or affecting commerce, as “commerce” is defined by the Federal Trade Commission Act, Respondent shall cease and desist from, either directly or indirectly, or through any corporate or other device, soliciting, participating in, entering into, attempting to enter into, implementing, attempting to implement, continuing, attempting to continue, or otherwise facilitating or attempting to facilitate any combination, conspiracy, or agreement, either express or implied, with any Seller:

- A. To restrain, restrict, limit, or reduce the import or sale of Lubricants.
- B. To deal with, refuse to deal with, threaten to refuse to deal with, boycott, or threaten to boycott, any buyer or potential buyer of Lubricants.

Provided, however, that nothing in this Order shall prevent Respondent from exercising rights under the First Amendment to the United States Constitution to petition any government body concerning legislation, rules, or procedures.

Decision and Order

III.**IT IS FURTHER ORDERED** that:

- A. Within sixty (60) days after the date this Decision and Order becomes final, Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which that Respondent has complied and is complying with this Order.
- B. One (1) year after the date this Decision and Order becomes final, annually for the next four (4) years on the anniversary of the date this Decision and Order becomes final, and at other times as the Commission may require, Respondent shall file with the Commission a verified written report setting forth in detail the manner and form in which it has complied and is complying with this Decision and Order.

IV.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to:

- A. Any proposed dissolution of Respondent,
- B. Any proposed acquisition, merger, or consolidation of Respondent, or
- C. Any other change in Respondent that may affect compliance obligations arising out of this Order, including but not limited to assignment, the creation or dissolution of subsidiaries, or any other change in Respondent.

V.

Decision and Order

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this order, upon written request, Respondent shall permit any duly authorized representative of the Commission:

- A. Access, during office hours and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Respondent relating to any matters contained in this Decision and Order; and
- B. Upon five (5) days' notice to Respondent and without restraint or interference from it, to interview officers, directors, or employees of Respondent.

VI.

IT IS FURTHER ORDERED that Respondent shall:

- A. Within thirty (30) days after the date on which this Decision and Order becomes final, send a copy of this Decision and Order by first class mail to each of its directors and officers.
- B. Mail a copy of this Decision and Order by first class mail to each person who becomes a director or officer, no later than (30) days after the commencement of such person's employment or affiliation with Respondent.
- C. Require each person to whom a copy of this Decision and Order is furnished pursuant to subparagraphs VI.A and VI.B of this Decision and Order to sign and submit to Respondent within thirty (30) days of the receipt thereof a statement that: (1) acknowledges receipt of the Decision and Order; (2) represents that the undersigned has read and understands the Decision and Order; and (3) acknowledges that the

Analysis to Aid Public Comment

undersigned had been advised and understands that non-compliance with the Decision and Order may subject American Petroleum to penalties for violation of the Decision and Order.

VII.

IT IS FURTHER ORDERED that this Decision and Order shall terminate on August 21, 2027.

By the Commission.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a proposed consent order with American Petroleum Company, Inc. (“American Petroleum” or “Respondent”), an importer and seller of lubricants with its principal place of business located at Road 865 KM 0.2, Barrio Campanillas, Toa Baja, Puerto Rico 00951. The agreement settles charges that American Petroleum violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by agreeing with competitors to restrict the importation and sale of lubricants in Puerto Rico. The proposed consent order has been placed on the public record for 30 days to receive comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make the proposed order final.

Analysis to Aid Public Comment

The purpose of this analysis is to facilitate comment on the proposed order. The analysis does not constitute an official interpretation of the agreement and proposed order, and does not modify their terms in any way. Further, the proposed consent order has been entered into for settlement purposes only, and does not constitute an admission by Respondent that it violated the law or that the facts alleged in the complaint (other than jurisdictional facts) are true.

I. The Complaint

The allegations of the complaint are summarized below:

American Petroleum has for many years been engaged in the business of importing lubricants into, and selling lubricants in, the Commonwealth of Puerto Rico.

Puerto Rico Law 278, enacted in 2004, was intended to create incentives for the safe disposal of used lubricants. The law required all persons in the chain of distribution, from the importer to the end-user, to pay an environmental deposit of fifty cents for each quart of lubricants purchased. The deposit could be recovered after the used lubricating oil was delivered to an authorized collection center. During 2005 and 2006, American Petroleum joined with numerous others in the Puerto Rico lubricants industry to lobby for the delay, modification, and/or repeal of Law 278. These efforts were partially successful. The Legislature postponed the starting date for the law until March 31, 2006.

In March 2006, with the effective date for Law 278 approaching, American Petroleum and several competing importers and sellers of lubricants adopted a new strategy to pressure the Government to repeal Law 278. The companies agreed to cease importing lubricants, beginning on March 31, 2006, and continuing for so long as Law 278 remained in effect. The conspirators issued a public warning that as a result of this joint action, shortages of lubricants

Analysis to Aid Public Comment

would arise throughout the island, and would continue until Law 278 was repealed.

In December 2006, the Puerto Rico Legislature repealed Law 278.

II. Legal Analysis

In several previous cases, the Commission has challenged under Section 5 of the FTC Act boycott activity where the victim was the government in its capacity as a consumer; that is, the conspiring sellers refused to deal in order to exact higher prices from the government.¹ Here, the lubricant importers are alleged to have used their economic might in order to pressure the government in its role as a regulator. As discussed below, the antitrust laws reach this conduct as well.

The conspiracy alleged in the complaint is per se unlawful. A horizontal agreement to restrict output is inherently likely to harm competition, and there is no legitimate efficiency justification for respondent's conduct. *SCTLA*, 493 U.S. 411; *NCAA v. Board of Regents*, 468 U.S. 85 (1984); *Sandy River Nursing Care v. Aetna Casualty*, 985 F.2d 1138 (1st Cir. 1993); *PolyGram Holding, Inc.*, 5 Trade Reg. Rep. (CCH) ¶ 15,453 (FTC 2003) (available at <http://ftc.gov/os/2003/07/polygramopinion.pdf>), *aff'd*, 416 F.3d 29 (D.C. Cir. 2005).

Ordinarily, members of a cartel reduce output across the market in order to force consumers to bid up prices. Here the strategy was to impose pain on consumers in order to coerce the Government of Puerto Rico to accede to the industry's demand that Law 278 be repealed. This raises the possibility of viewing the alleged conspiracy as a form of petitioning activity that arguably is immune from antitrust sanctions. As the Supreme Court has held, it is not the

¹ E.g., *Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990); *Peterson Drug Co.*, 115 F.T.C. 492 (1992); *Michigan State Medical Society*, 110 F.T.C. 191 (1983).

Analysis to Aid Public Comment

purpose of the antitrust laws to regulate traditional petitioning activity aimed at securing anticompetitive governmental action. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

On the other hand, where competitors coordinate their commercial activity, conspiring in a manner that harms consumers directly, the fact that the conspirators intended thereby to motivate governmental action is not a defense to liability. *SCTLA*, 493 U.S. 411. An exception to this latter rule governs group boycotts that seek a purely political objective (that is, an objective that involves no special pecuniary benefit for the conspirators). A politically motivated boycott is protected by the First Amendment, and is not subject to antitrust liability. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 914 (1982) (The First Amendment protects “a nonviolent, politically motivated boycott designed to force governmental and economic change to effectuate rights guaranteed by the Constitution itself.”).²

The conduct alleged in the complaint would not be immune from antitrust sanctions under these precedents. In *Noerr*, the alleged restraint of trade (legislation favoring the conspirators) was the consequence of governmental action, and for this reason was exempt from antitrust review. In the present investigation, the alleged restraint of trade (a constriction in the supply of lubricants) was the means by which the conspirators sought to obtain favorable legislation. It follows that the *Noerr* defense is not applicable.³ The *Claiborne Hardware* defense is also inapplicable because the Puerto

² See also *Allied International, Inc. v. International Longshoremen’s Ass’n*, 640 F.2d 1368, 1380 (1st Cir. 1981), *aff’d*, 456 U.S. 212 (1982); *Missouri v. National Organization for Women, Inc.*, 620 F.2d 1301 (8th Cir. 1980).

³ See *In re Brand Name Prescription Drugs Antitrust Litig.*, 186 F.3d 781, 789 (7th Cir. 1999) (The *Noerr* doctrine “does not authorize anticompetitive action in advance of government’s adopting the industry’s anticompetitive proposal. The doctrine applies when such action is the consequence of legislation or other governmental action, not when it is the means for obtaining such action . . .”) (emphasis in original).

Analysis to Aid Public Comment

Rico conspiracy was an effort to escape regulation and advance the parochial economic interests of the importers. This was not a politically motivated boycott, as that term is used in the case law.

The present case is similar to *Sandy River Nursing Care v. Aetna Casualty*, 985 F.2d 1138. A group of insurance companies agreed to cease offering workers' compensation policies in Maine in order to coerce the legislature into authorizing higher rates. The Court of Appeals concluded that this concerted refusal to sell insurance was a per se violation of the Sherman Act, and that the legislative agenda of the insurance companies afforded them no defense to liability. The opinion explains: "[P]rivate actors who conduct an economic boycott violate the Sherman Act and may be held responsible for direct marketplace injury caused by the boycott, even if the boycotters' ultimate goal is to obtain favorable state action." 985 F.2d at 1142.

It is not a legitimate antitrust defense to claim that Law 278 is inefficient, and that the repeal thereof would enhance consumer welfare. The legality of an otherwise anticompetitive restraint cannot turn on the wisdom or efficiency of the governmental policy that is targeted by the conspirators.⁴

III. The Proposed Consent Order

⁴ An analogous defense was considered and rejected by the Commission in *Detroit Auto Dealers Ass'n*, 110 F.T.C. 417 (1989), *aff'd in part and rev'd in part*, 955 F.2d 457 (6th Cir. 1992). DADA involved an agreement among competing automobile dealers to limit the hours of operation of their dealerships. Respondents argued, inter alia, that the agreement to limit showroom hours was justified because it reduced the likelihood that their employees would join unions. Unionization would potentially lead to higher wages, and hence higher prices for automobiles. The Commission could find "no merit" in the proposed efficiency defense. "Given the national policy favoring the association of employees to bargain in good faith with employers over wages, hours and working conditions, we do not believe that preventing unionization can be a legitimate justification for an otherwise unlawful restraint." *Id.* at 498 n. 22.

Just as collective bargaining is part of national labor policy, Law 278 represents the environmental policy of the Commonwealth of Puerto Rico. And just as escaping national labor policy is not a cognizable antitrust defense, altering Puerto Rico environmental legislation is not a cognizable antitrust defense.

Analysis to Aid Public Comment

American Petroleum has signed a consent agreement containing the proposed consent order. The proposed consent order enjoins American Petroleum from conspiring with competitors to restrict output.

More specifically, American Petroleum would be enjoined from agreeing or attempting to agree with any other seller of lubricants: (i) to restrain, restrict, limit or reduce the import or sale of lubricants; or (ii) to deal with, refuse to deal with, threaten to refuse to deal with, boycott, or threaten to boycott any buyer or potential buyer of lubricants.

The proposed order would not interfere with the company's Constitutional right to engage in legitimate petitioning activity. The proposed order includes a safe harbor provision expressly permitting American Petroleum to exercise rights under the First Amendment to petition any government body concerning legislation, rules, or procedures.

The proposed order will expire in 20 years.

Complaint

IN THE MATTER OF

**COLEGIO DE OPTOMETRAS,
EDGAR DÁVILA GARCÍA, O.D.,
AND
CARLOS RIVERA ALONSO, O.D.**

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS
OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-4199; File No. 051 0044

Complaint, September 6, 2007 – Decision, September 6, 2007

This consent order addresses charges that respondent Colegio de Optometras de Puerto Rico, acting as a combination of competing optometrists, and in combination with individual optometrists including two of its officers, Edgar Dávila García, O.D., and Carlos Rivera Alonso, O.D., restrained competition among its member optometrists in its dealings with Ivision International Inc., a company that contracts with Puerto Rico health plans to administer vision plans and provide vision care services and products to covered patients. The order, among other things, prohibits the Colegio, Dr. Dávila, and Dr. Rivera from entering into or facilitating agreements among any optometrists with respect to their provision of optometry services, including (1) to negotiate on behalf of any optometrist with any payor; (2) to deal, refuse to deal, or threaten to refuse to deal with any payor; (3) regarding any term upon which any optometrist deals, or is willing to deal, with any payor, including, but not limited to, price terms; or (4) not to deal individually with any payor, or not to deal with any payor other than through the Colegio. Other provisions of the order include the requirement that respondents translate the Commission's order and complaint into Spanish and distribute them to Colegio members and other parties, as well as notification and compliance-related requirements.

Participants

For the Commission: Nancy F. Caban, Mark Frankena, Leonard L. Gordon, Thomas R. Iosso, Mazor Matzkevich, Carole A. Paynter, Susan E. Raitt, Louis Silvia, and David P. Wales, Jr.