

Order

85 F.T.C.

IN THE MATTER OF
HOLIDAY MAGIC, INC., ET AL.

MODIFYING ORDER, ETC., IN REGARD TO ALLEGED VIOLATION
OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 2, OF THE
CLAYTON ACT

Docket 8834. Decision, Oct. 15, 1974 Order, Jan 21, 1975*

Order modifying Final Order issued against respondents on Oct. 15, 1974, 40 F.R. 10665, 84 F.T.C. 748, by deleting Paragraph V of the order which required corporate respondent and respondent Olivo to make restitution as provided therein.

Appearances

For the Commission: *Joseph S. Brownman* and *D. Stuart Cameron*.
For the respondents: *Alvin H. Goldstein, Jr., Tuckman, Goldstein & Philips*, San Francisco, Calif.

ORDER REOPENING PROCEEDING AND MODIFYING FINAL ORDER

The Commission's final order in this matter, dated Oct. 15, 1974, provided, in Paragraph V, that respondent Olivo should make restitution as provided therein, and that corporate respondent, Holiday Magic, should also make restitution. The requirement as to Holiday Magic, however, was to be effective only in the event that the company should cease to be in compliance with a district court order also requiring that it make restitution. By order dated Jan. 8, 1975, the Commission denied a motion of respondent Olivo to reconsider its order as to him.

In its opinion, the Commission recognized that its action in ordering restitution, in particular its assertion that it possessed the authority to do so, was contrary to the holding of the Ninth Circuit Court of Appeals in the case of *Heater v. Federal Trade Commission*, No. 73-1750, Sept. 11, 1974 [503 F.2d 321 (1974)]. In footnote 11, page 23 [84 F.T.C. 1045] of its final decision, the Commission noted its disagreement with the holding in *Heater* and stated that it would seek to obtain review of the decision by the Supreme Court.

Subsequent to rendition of the Commission's final order in this matter, and rendition of its order denying the motion to reconsider, the Commission has determined that it will not seek review of the *Heater* decision by the Supreme Court. While this determination should not be construed to signify a change in the view of the Commission regarding

* Reported in 84 F.T.C. 748. Petitions for review of the Oct. 15, 1974 order to cease and desist were filed in the Court of Appeals for the Ninth Circuit. Subsequently, the appeals were dismissed pursuant to petitioners' motion.

the correctness of the *Heater* decision, it does eliminate any possibility that *Heater* will not continue to be governing law in the Ninth Circuit. Corporate respondent's principal place of business is in the Ninth Circuit; individual respondent and the estate of the deceased respondent are situated in the Ninth Circuit, and respondents have appealed this matter in that circuit. Under these circumstances the Commission does not feel that it is privileged to disregard judicial precedent of such recent and clearly dispositive vintage. Under the holding in *Heater*, at the time the Commission issued its final order in this matter it was not empowered by the F.T.C. Act to require respondent to make restitution for prior fraudulent activities. That holding not having been overruled, it would now be improper for the Commission, only a short time thereafter, to put respondent to the expense of relitigating the same issue in the same forum. This is particularly so inasmuch as the assets of the wrongdoer's estate with which the cost of such litigation would be financed are limited, and may be subject to other claims, including claims of private plaintiffs seeking repayment for the same wrongs which led the Commission to issue the original order of restitution in this case.

Pursuant to Section 3.72(a) of its rules of practice, the Commission may, "prior to the filing of the transcript of the record of a proceeding in a United States court of appeals pursuant to a petition for review" reopen the proceeding on its own motion and modify its order in said proceeding. Therefore,

It is ordered, That this matter be reopened and that the final order be modified by striking Paragraph V in its entirety, and renumbering all subsequent paragraphs.

Commissioner Nye not participating.

IN THE MATTER OF
EXXON CORPORATION, ET AL.

Docket 8934. Order, Jan. 21, 1975

Denial of application by all respondents except Texaco for review of administrative law judge's ruling denying motions to exclude issues beyond the scope of the complaint.

Appearances

For the Commission: *Peter A. White, James H. Thessin, James C. Egan, Jr. and Ira S. Nordlicht.*

For the respondents: *William Simon, J. Wallace Adair, McKean,*