UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Commissioners: Robert Pitofsky, Chairman
Sheila F. Anthony
Mozelle W. Thompson
Orson Swindle

In the Matter of Toys "R" Us, Inc., a corporation	Docket No. 9278

ORDER GRANTING PARTIAL STAY

Upon considering Respondent's application to stay enforcement of the Commission's Order, issued October 13, 1998,

IT IS ORDERED that enforcement of Paragraphs II.C. and II.E. of the Commission's Final Order of October 13, 1998, be stayed upon the filing of a timely petition for review of the Commission's Order in an appropriate court of appeals and until the court issues a ruling disposing of the petition for review.

By the Commission.

Donald S. Clark
Secretary

SEAL

ISSUED: December 1, 1998

Attachments:

Opinion of the Commission on Respondent's Application for Stay of the Commission's Final Order
Statement of Commissioner Swindle

OPINION OF THE COMMISSION ON RESPONDENT'S APPLICATION FOR STAY OF THE COMMISSION'S FINAL ORDER

On November 2, 1998, respondent Toys "R" Us, Inc. ("TRU") applied for a stay pending appeal of the Commission's order of October 13, 1998. TRU's application for a stay was received by the Commission on November 3, 1998. Complaint counsel opposes the granting of a stay. For the reasons stated below, the Commission stays the enforcement of Paragraphs II.C. and II.E. of its order, effective upon the filing of a timely petition for review of that order in an appropriate court of appeals and until the court of appeals issues a ruling disposing of the petition for review. The Commission denies the application of TRU in all other respects.

Applicable Standard

Section 5(g) of the Federal Trade Commission Act (the "FTC Act") provides that Commission adjudicatory orders (except divestiture orders) shall take effect "upon the sixtieth day after" the date of service, unless "stayed, in whole or in part and subject to such conditions as may be appropriate by . . . the Commission" or "an appropriate court of appeals." 15 U.S.C. § 45(g)(2). A party seeking a stay must first apply for such relief to the Commission. TRU has done so in its November 2 application.

Pursuant to Commission Rule 3.56(c), 16 C.F.R. § 3.56(c), an application for a stay must be supported with sworn facts and relevant record excerpts. Additionally, an applicant for a stay must address the following considerations: (1) the likelihood of the applicant's success on appeal; (2) whether the applicant will suffer irreparable harm if a stay is not granted; (3) the degree of injury to other parties if a stay is granted; and (4) why the stay is in the public interest. Each such factor is discussed below.

Analysis

TRU objects to the provisions of Paragraph II.E. of the order, which prohibit TRU, for a period of five years, from (1) announcing that it may discontinue purchasing from a supplier who sells toys to a discounter, and (2) refusing to purchase toys or related products from a supplier because, in whole or in part, that supplier offered to sell or sold toys and related products to any discounter. TRU alleges that these provisions, inter alia, deprive TRU of its right to decide "with whom, and on what terms, it will do business with a supplier" and to "inform suppliers of reasons why it may refuse to purchase a product sold to a competitor." Mem. in Supp. of App. for Stay at 7, 10.

TRU also protests Paragraph II.C., which prohibits "[r]equiring, soliciting, requesting or encouraging any supplier to furnish information to [TRU] relating to any supplier's sales or . . . shipments to any toy discounter," and (2) Paragraph II.D., which prohibits TRU from facilitating or attempting to facilitate agreements or understandings

among suppliers "relating to limiting the sale of toys and related products to any retailer." Finally, TRU objects to various definitional provisions of the Commission's order. Specifically, TRU alleges that Paragraphs I.A., I.B., and I.C. are overbroad because they cover non-toy items; encompass the activities of the divisions of TRU that are not toy retailers (i.e., Kids "R" Us and Babies "R" Us); and, together with the substantive provisions of the order, would effectively regulate TRU's ability to communicate with its suppliers about the business activities of all major toy retailers. Although TRU seeks a stay of the order in its entirety, it does not specifically mention Paragraphs II.A. or II.B. (which prohibit agreements with suppliers to limit sales to discounters, and coercion of suppliers to limit sales to discounters) and provides no justification for a stay of those provisions.

I. Likelihood of Success on the Merits

TRU's primary arguments in favor of their likelihood of success on the merits merely revisit arguments that the Commission has already considered and rejected in its October 13, 1998 opinion.[1] The renewal of these arguments, alone, is insufficient to justify the grant of a stay. See, e.g., In re Detroit Auto Dealers Ass'n, Inc., 1995 FTC LEXIS 256, at *4 (Aug. 23, 1995).

Nevertheless, "it can scarcely be maintained that the Commission must harbor doubt about its decision in order to grant the stay." In re California Dental Ass'n, 1996 FTC LEXIS 277, at *9. The difficulty inherent in applying the applicable law to a complex set of facts is a relevant factor in determining whether a stay applicant has made a substantial showing on the merits. See, e.g., In re KVG Coffee Shop, 1995 U.S. Dist. LEXIS 15617 (S.D.N.Y. 1995) (recognizing significance of factual issues in analyzing likelihood of success); Supermarket Services, Inc. v. Hartz Mountain Corp., 382 F. Supp. 1248, 1255 (S.D.N.Y. 1974) (same). In the instant case, TRU argues that the provisions of Paragraphs II.C. and E. sweep too broadly, and present serious potential issues of enforceability in distinguishing truly unilateral conduct or legitimate business activities from improper conspiratorial activities that restrain competition.

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[1] Specifically, TRU again alleges that the Commission's finding of horizontal collusion is inconsistent with the law and with economic theory, Mem. in Supp. of App. for Stay at 16-20, that the Commission's analysis of TRU's market power was erroneous, Mem. in Supp. of App. for Stay at 20-24, and that the Commission should have accepted its free rider defense of its actions, Mem. in Supp. of App. for Stay at 24-26. Each of these arguments was considered and rejected in the Commission's earlier opinion in this matter.

The Commission's principal opinion detailed the reasons for our disagreement with this argument. We explained the legal basis for ordering fencing in relief in antitrust cases:

> It is well settled that once a respondent engages in illegal conduct, the Commission's order need not prohibit merely unlawful conduct, but may "close all roads to the prohibited goal, so that its order may not be by-passed with impunity." FTC v. Ruberoid Co., 343 U.S. 470, 473 (1952). The order may also include such additional provisions as are necessary to "preclude the revival of the illegal practices." FTC v. National Lead Co., 352 U.S. 419, 430 (1957). Indeed, "those caught violating the Act must expect some fencing in." *Id.* at 431.

Op. at 89.

The communications and purchasing policies prohibited by Paragraphs II.C. and II.E. are the means used by TRU to implement and police the illegal restraints of trade. These paragraphs are accordingly necessary to correct the effects and prevent the recurrence of the illegal conduct.

The principal opinion squarely acknowledges (see Op. at 1 (citing United States v. Colgate & Co., 250 U.S. 300 (1919))) that legal liability under section 1 of the Sherman act does not attach to any truly *unilateral* business decision. Likewise, the vast majority of communications between a manufacturer and its distributors enhance the marketing of products and therefore enhance competition. See Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717 (1988); Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. at 764 & n.8. In this case, however, TRU went far beyond the legal and procompetitive use of these business practices. Although the contested provisions of the Commission's Order redress the abuses of these ordinarily acceptable business practices that were identified in the principal opinion, we believe that for the relatively brief period of a stay pending appeal, TRU's asserted difficulties in distinguishing between lawful and unlawful conduct support granting a stay as to these provisions.

II. Irreparable Injury

TRU bears the burden of demonstrating that denial of a stay would cause irreparable harm. Bald assertions of harm or conclusory statements based on unsupported assumptions will not suffice. Rather, TRU must show that the alleged irreparable injury is substantial and likely to occur absent a stay. See Michigan Coalition of Radioactive Material Users v. Griepentrog, Inc., 945 F.2d 150, 154 (6th Cir. 1991).

TRU's most serious allegation of irreparable injury involves the application of the provisions of Paragraphs II.C. and II.E. Complaint counsel argues that these provisions are "reasonably related" to TRU's unlawful conduct and therefore must remain in force during the pendency of an appeal. See FTC v. National Lead Co., 352 U.S. 419 (1957). While the Commission undoubtedly has the authority to impose this relief (Federal Trade Comm'n v. Ruberoid Co., 343 U.S. at 473), these provisions potentially affect to a substantial degree TRU's purchasing behavior during the next one or two buying seasons. Moreover, the communications with suppliers proscribed by Paragraphs II.C. and II.E. would, *if considered alone and undertaken unilaterally*, fall under the umbrella of Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. at 762, United States v. Colgate & Co., 250 U.S. at 307, and their progeny.[2] Despite the fact that it might not be feasible to quantify their potential harm, the Commission recognizes that Paragraphs II.C. and II.E. may unnecessarily impose "irretrievable costs," in terms of changes in purchasing behavior that TRU might not otherwise have made or transaction costs that TRU might not otherwise have incurred, were the Commission's decision to be overturned on appeal.

TRU's remaining allegations of irreparable injury are premised principally upon speculative concerns and misconceptions about the requirements of the Commission's order. Mem. in Supp. of App. for Stay at 12-13. TRU argues primarily that the facilitating conduct prohibited by Paragraph II.D. of the Commission's Order is useful and necessary; however, the Commission has already rejected these contentions in its ruling on the merits.

TRU's objections to the breadth of the definitional provisions of the order (see Mem. in Supp. of App. for Stay at 13-14) are likewise without merit. TRU's inability to extend the same anticompetitive conduct to products and entities beyond the scope of the administrative complaint is not legally cognizable irreparable injury. Cf. FTC v. Universal-Rundle Corp., 387 U.S. 244, 251 (1967) (even "substantial financial injury" is not cognizable where the injury is caused by prohibitions on unlawful activity).

Finally, as noted above, TRU has not even attempted to explain why compliance with Paragraphs II.A. and II.B. would cause it irreparable harm. Indeed, as noted by complaint counsel, these provisions merely prohibit conduct that TRU continues to deny ever occurred. TRU cannot logically argue that it did not enter a vertical agreement, or orchestrate a horizontal agreement, yet also assert that it would be irreparably harmed if not allowed to continue these conspiracies during the pendency of an appeal.

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[2] We emphasize here, however, as we did in the opinion, that TRU's conduct as demonstrated in the record falls far outside of the protections of Colgate.

III. Harm to Others and the Public Interest

Because complaint counsel represents the public interest in effective law enforcement, we consider the third and fourth prongs together. See In re California Dental Ass'n, 1996 FTC LEXIS 277, at *7-8.

TRU contends that the issuance of a stay would be in the public interest because implementation of the order, and particularly of Paragraphs II.C., II.D., and II.E(1), would likely lead to reduced toy output and promotional activity and restrict consumer choice. Mem. in Supp. of App. for Stay at 26-29. The requirements of Paragraph II.D. go to the core of TRU's ability to implement and supervise the unlawful vertical and horizontal agreements. The Commission already has held that absent these agreements, "competition would have driven TRU to lower its prices." Op. at 41. Because a stay of the provisions of Paragraph II.D. would enable TRU to maintain and supervise the vertical and horizontal agreements for another one or two buying seasons, a stay of these provisions would cause substantial harm to consumers and far outweigh any conceivable harm to TRU.

These concerns are reduced somewhat with respect to the requirements of Paragraphs II.C. and II.E(1). While these provisions are necessary under the facts of this case to "'close all roads to the prohibited goal'" (Op. at 88 (quoting FTC v. Ruberoid Co., 343 U.S. at 473)), the conduct at issue was largely a means to a prohibited end and less of an immediate restraint. Accordingly, a stay of these provisions is less likely to cause immediate harm to the public. The unstayed provisions of our Order prohibit TRU from engaging in the core conspiratorial activities during the pendency of appellate review.

Conclusion

Although the decision is a close one, the Commission stays the order with respect to Paragraphs II.C. and II.E., effective upon the filing of a timely petition for review of the Commission's order in an appropriate court of appeals. Cf. California Dental Ass'n, 1996 FTC LEXIS 277, at *11 ("Respondent has not sought to stay those provisions of the order that prohibit continuation of the restraints found to be unlawful. Respondent has thus attempted to minimize the harm to the public interest while focusing on the provisions that create the greatest harm to itself."). The stay will last until the court of appeals issues a ruling disposing of the petition for review. TRU's application is hereby denied in all other respects.

ISSUED: December 1, 1998

STATEMENT OF COMMISSIONER ORSON SWINDLE ON RESPONDENT'S APPLICATION FOR STAY OF THE COMMISSION'S FINAL ORDER

In the Matter of

Toys "R" Us, Inc.
Docket No. 9278

I join the decision of the Commission to stay the enforcement of Paragraphs II.C. and II.E. of the order in this case pending a court of appeals's disposition of any petition for review filed by Toys "R" Us ("TRU"). In the opinion that it issues today, the Commission accurately identifies those two paragraphs as the provisions for which a stay is appropriate under the criteria set forth in Commission Rule 3.56(c).

One might ask why I do not also advocate a stay of order Paragraph II.D., given my previous conclusion that the evidence adduced by complaint counsel did not prove TRU's orchestration of a horizontal boycott among toy manufacturers. The answer is simple. Although I am doubtless more confident than my colleagues about TRU's chances of persuading an appellate court to reverse the Commission's horizontal boycott findings, I also view as negligible the harm that TRU -- which stoutly denies that it ever organized or enforced such a boycott -- will incur if Paragraph II.D. is not stayed. Moreover, in the event a court of appeals sustains the Commission on the horizontal issue, the issuance of a stay at this juncture will have caused considerable harm to the public interest. Thus, under the standards of Rule 3.56(c), a stay of Paragraph II.D. is unwarranted.