

**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

COMMISSIONERS:

Robert Pitofsky, Chairman
Mary L. Azcuenaga
Janet D. Steiger
Roscoe B. Starek, III
Christine A. Varney

_____)	
In the Matter of)	DOCKET NO. C-3694
_____)	
Hale Products, Inc.,)	DECISION AND ORDER
a corporation,)	
_____)	

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorney and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said 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 the respondent had violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the

following order:

1. Respondent Hale Products is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, with its principal place of business at 700 Spring Mill Avenue, Conshohocken, Pennsylvania 19248.

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.

ORD

that make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which Mid-Ship Mounted Fire Pumps are sold or delivered, or that are otherwise lawful under the provisions of the Robinson-Patman Act, 15 U.S.C. § 13.

III

IT IS FURTHER ORDERED that Respondent Hale Products shall provide a copy of this Order with the attached complaint, and a copy of the notice set out in Appendix A:

(a) within thirty (30) days after the date this Order becomes final, one notice to each OEM to whom it sold a Mid-Ship Mounted Fire Pump at any time during the two (2) years prior to the date this order becomes final; and

(b) for a period of three (3) years after the date this Order becomes final, to each OEM not covered by sub-paragraph (a) above to whom it provides a price list for or a price quotation on a Mid-Ship Mounted Fire Pump. Such notice shall accompany the price list or price quotation, or in the case of telephone quotations shall be delivered as soon as practical after such quotation, and need only be provided once to each OEM not covered by sub-paragraph (a) above.

IV

IT IS FURTHER ORDERED that Respondent Hale Products shall file with the Commission within sixty (60) days after the date this order becomes final, and annually on the anniversary of the date this order becomes final for each of the three (3) years thereafter, a report, in writing, signed by the Respondent, setting forth in detail the manner and form in which it has complied and is complying with this order.

V

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of this order. Such notification shall be at least thirty (30) days in cases not subject to the notification provisions of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C.

VI

IT IS FURTHER ORDERED that this order shall terminate on November 22, 2016.

By the Commission, Commissioner Azcuenaga and Starek dissenting.

[Seal]

Donald S. Clark
Secretary

ISSUED: November 22, 1996

Attachments: Separate statement of Chairman Pitofsky, Commissioner Varney,
and Commissioner Steiger
Dissenting Statement of Commissioner Azcuenaga
Dissenting Statement of Commissioner Starek

Appendix A

[Hale Products' Letterhead]

PLEASE READ THIS

Enclosed with this notice is a copy of a Consent Order agreed to between the Federal Trade Commission and Hale Products, Inc. In the Order, Hale has agreed that it will not refuse to sell, or refuse to contract to sell, Mid-Ship Mounted Fire Pumps on the grounds that an OEM refuses to sell Hale pumps exclusively. The Order does not prohibit OEMs from purchasing only Hale Mid-Ship Mounted Fire Pumps if, in the OEM's sole discretion, it deems it advisable. Moreover, Hale retains the right to refuse to sell Mid-Ship Mounted Fire Pumps to any OEM for lawful reasons. **THE TYPE OF PUMP YOU USE IS YOUR BUSINESS, AND YOU ARE FREE TO OFFER AND INSTALL COMPETING PUMPS AS ALTERNATIVES TO HALE PUMPS.**

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**Separate statement of Chairman Pitofsky, and
Commissioners Varney and Steiger**

In the Matter of

**Waterous Company, Inc./Hale Products, Inc.,
Docket Nos. C-3693, C-3694**

We write separately to respond to some of the concerns raised in Commissioner Starek's dissent.

First, we cannot concur with Commissioner Starek's suggestion that, for customer allocation of a component product to work, the participants must be able to allocate the ultimate customers of the finished product (p.1).

There will be situations where downstream competition will undermine a customer allocation scheme of a component of a final good. For example, that might be the case where the component is a significant part of the cost of the final product, or where the ultimate consumers have a much stronger preference for the component than the ultimate good.

None of those conditions was present in this case. Fire truck buyers make purchase decisions primarily on the basis of truck brand, the pump price is only a small part of the final purchase price, and pump features are only a small part of the entire truck package. Evidence of relatively high profits at the component level supports this interpretation.

Second, Commissioner Starek suggests that these exclusive dealing arrangements would not increase the likelihood of successful collusion because of the difficulty of detecting cheating. (p.2) We agree that maintaining collusion requires the ability to detect and discipline cheating. But here that methodology was simple: if a fire engine manufacturer used an alternative pump it would be readily identified. Moreover, the fact that the customer allocation through exclusive dealing was maintained over almost five decades suggests that there was an effective method for enforcing the exclusive dealing arrangements.

Third, Commissioner Starek observes that instability at the truck manufacturing stage (i.e., changes in market share) may lead to the demise of any customer allocation agreement with respect to a component. We agree that might be the case where a very large portion of a pump manufacturer's sales were tied to a single truck manufacturer. Here, however, the arrangements were durable; the fact is that instability among truck manufacturers did not deter the effectiveness of these agreements.

Finally, Commissioner Starek suggests that the arrangements did not foreclose new entry because they were not really exclusive. He relies on the fact that some OEMs were willing to install the pumps of a third manufacturer at customers' request. (p.3) The fact that the exclusive policy was not perfect and that some truck manufacturers may

have offered the pumps of a third pump manufacturer, accounting for a very small share of pump sales, did not have a significant effect on competition at the pump level.

The key to competition in this market was the competitive positions of Hale and Waterous, which together account for more than 90% of the market. The evidence establishes that Hale and Waterous understood that as long as both firms maintained the exclusive dealing arrangements, competition between them would be diminished, prices would be higher and entry would be more difficult. That is in fact how things worked in this industry for several decades, and those are the anticompetitive effects that the Commission's orders are intended to address.

DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

in Waterous Company, Inc., Docket C-3693,
and Hale Products, Inc., Docket C-3694

I generally endorse the views expressed by Commissioner Starek in his dissenting statement. The evidence does not in my view suggest a market in which competition has been unlawfully restrained, and I do not find reason to believe that the law has been violated.

DISSENTING STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III

In the Matter of

Waterous Company, Inc./Hale Products, Inc.
Docket Nos. C-3693, C-3694

I respectfully dissent from the Commission's decision to issue complaints and final consent orders against Waterous Company, Inc., and Hale Products, Inc., two producers of fire truck-mounted pumps for fire trucks. The complaints claim anticompetitive effects arising from alleged exclusive dealing arrangements between each respondent and its direct customers, the original equipment manufacturers of fire trucks ("OEMs"), in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. I remain unpersuaded that the arrangements between respondents and their customers can be characterized accurately as "exclusive." More important, however, there is no sound theoretical or empirical basis for believing that these relationships, even if exclusive, harmed competition; in fact, there are good reasons to believe that

rival through price cuts. Absent allocation of fire department customers, one should expect the same sort of "cheating," with the equivalent competitive result, that the Commission believes frustrated direct collusion between Waterous and Hale.¹

Thus, it is implausible that "exclusive dealing" arrangements between respondents and their OEMs increase the likelihood of successful collusion between Waterous and Hale. Indeed, there are compelling reasons why such an arrangement might actually reduce this likelihood. Maintaining collusion requires the reasonably accurate identification and punishment of cheating.² If Waterous and Hale bid directly and repeatedly for OEM business, cheating might be inferable from one firm's loss of a pump sale to its rival. On the other hand, when Waterous and Hale

these other factors would continue to cast substantial doubt upon this theory's applicability.

The Commission's second theory of harm alleges that exclusive arrangements between pump makers and OEMs have created a barrier to the entry of new pump manufacturers, thereby allowing the incumbent pump sellers to set and maintain supracompetitive prices. Although the vertical section of the 1984 Merger Guidelines is not cited explicitly, the theory here appears to have been drawn from those Guidelines. That analysis focuses on a market in which, but for ease of entry, conditions are favorable to the exercise of market power, and asks whether a vertical merger (or, in the current case, vertical integration through contract) might reduce entry so that market power could be exercised.⁷

have exited the market. This period also witnessed entry by such OEMs as Firewolf and Becker. As discussed below, substantial entry into and exit from the OEM market also bear on the applicability of the complaints' second theory of competitive harm (entry deterrence).

⁵ With regard to the pump makers' ostensibly high accounting profits, antitrust economists no longer consider accounting profits as a reliable indicator of high economic profits (which can themselves be as consistent with superior efficiency as with collusion). Fisher and McGowan, "On the Misuse of Accounting Rates of Return to Infer Monopoly Profits," *73 Am. Econ. Rev.* 82 (1983). Moreover, concerning the longevity of the arrangements between pump makers and OEMs, that factor testifies only to their profitability; it does not distinguish between anticompetitive and procompetitive (or competitively neutral) explanations for their use. Indeed, the asserted instability of OEMs' market shares lends greater credence to an efficiency explanation: one would not expect the parties to an efficient exclusive dealing arrangement to abandon it simply because a customer loses market share, while (as I have explained above) the same cannot be said of an anticompetitive arrangement.

⁶ U.S. Department of Justice, Merger Guidelines, § 4.2 (1984), 4 Trade Reg. Rep. (CCH) ¶ 13,103.

⁷ The 1984 Merger Guidelines (§ 4.21) identify three necessary but not sufficient conditions for this problem to exist. First, the market in which power would be exercised (the "primary" market) must be sufficiently conducive to

of this sort are significant.¹² A formal ban on exclusive dealing accomplishes little if respondents have alternative means available to achieve the same end. One readily available method in this case, fully consistent with the terms of the orders, would be to establish a set of quantity discounts providing a customer with substantial financial incentives to procure all of its pumps from a single seller. Moreover, nothing in the orders would prevent a pump manufacturer from unilaterally refusing to sell to an OEM so long as the refusal was not conditioned on a promise of exclusivity. Another possible method would be to give exclusive OEMs better service (e.g., faster delivery times) than their non-exclusive rivals receive.

I cannot endorse an ineffective remedy for an existing harm.

Docket No. C-3626.

¹² For a discussion of why nondiscrimination remedies are problematic, see Brennan, "Why regulated firms should be kept out of unregulated markets: understanding the divestiture in *United States v. AT&T*," 32 *Antitrust Bull.* 741 (1987).