UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT GREENEVILLE

UNITED STATES OF AMERICA	)	
	)	
V.	)	NO. 2:97-CV-509
	)	
ALPINE INDUSTRIES, INC., and WILLIAM J. CONVERSE	)	

MEMORANDUM OPINION

Subsequent to the jury's verdict that the defendants made numerous claims and representations in violation of the administrative Consent Order entered into between the defendants and the Federal Trade Commission ["FTC"], a bench trial was conducted to determine the civil penalties that should be imposed upon defendants, as well as any appropriate equitable relief which should be granted, under 15 U.S.C. § 45(l).

I. CIVIL PENALTIES

Relying on *United States v. Readers Digest Ass'n*, 662 F.2d 955 (3rd Cir. 1981), the Court ordered on February 9, 2000,[1] that the following issues would be considered at the "penalty phase" of this litigation:

1. The number of individual violations;
2. The financial condition of the defendants;
3. The effect of penalties on defendants' ability to continue business;
4. Defendants' good faith efforts to comply with the Consent Order, including
   a. Defendants' efforts to obtain direction or clarification of the Consent Order from the FTC; and

[1]File Doc. 178.

b. Defendants' good faith or lack thereof regarding reliance on expert opinions;

5. The appropriate amount of monetary penalty; and

6. Whether restitution should be ordered and, if so, the means of accomplishing same.[2]

The liability phase of this case involved three issues or categories of claims: Did defendants represent that their product eliminated, removed, cleared or cleaned airborne pollutants and contaminants and, if they did, were those representations supported by competent and reliable scientific evidence; did defendants represent that their product, when used as directed, prevented or provided relief from a medical or health-related condition and, if they did, was any such representation supported by competent and reliable scientific evidence; and did defendants represent that their product maintained indoor ozone concentrations at .05 parts per million or less and, if they did, were any such claims supported by competent and reliable scientific evidence? The jury found that the defendants made a plethora of the representations described above and, with the exception of tobacco smoke, found in every instance that defendants did not possess competent and reliable scientific evidence to support those claims. Because defendants' good faith or lack thereof is different with respect to each category, each necessarily must be discussed separately.

A. Removal of Pollutants and Contaminants

Rather obviously, it is submitted, the defendants' good faith or lack thereof is the most

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[2]This Court earlier advised the parties that restitution would not be part of any equitable relief granted to the plaintiff, believing at the time that the logistical problems attendant to an award of restitution outweighed any positive aspects. The evidence presented during the penalty phase of the trial only reinforced the Court's belief in that regard.

important of all the criteria the Court is to consider in determining the relief to be awarded the plaintiff. If the defendants violated the Consent Order, but did so innocently, i.e., in utter good faith, then the imposition of a civil penalty would be unfair and inappropriate, regardless of the defendants' financial condition or the need to vindicate the authority of the FTC. "Good faith" is not necessarily an "absolute" in the sense that it either exists or does not. Like many issues in the real judicial world in which we operate, there may be degrees of culpability and, just as surely, there may be degrees of good faith. This facet of this case aptly illustrates that, sometimes, things are not wholly black or wholly white, but some shade of gray between.

The good faith *vel non* issue necessarily implicated, to a limited extent, not only the scientific substantiation which defendants claimed they had, but also the negotiations between defendants' counsel (Mr. Erhart) and representatives of the FTC that preceded the execution of the administrative Consent Order. To paraphrase Mr. Erhart, the pre-consent order negotiations and the post-consent order dispute between Alpine and the FTC involved a "battle of experts"; defendants, relying upon their experts (primarily Dr. Olcerst), insisted that their substantiation was adequate, whereas the FTC insisted that it was not. That battle was resolved in the FTC's favor by the jury; with one exception (smoke), the jury found that defendants did not have competent and reliable scientific evidence to support any of the claims the defendants made during the relevant time period.

The jury's findings, of course, were made within the parameters set by the Court's evidentiary rulings and charge. Probably the most significant of those evidentiary rulings was the one premised upon the parol evidence rule, which precluded defendants from introducing any evidence of their negotiations with the FTC that led to the execution of the Consent Order.

Defendants have insisted from the outset that they — and Mr. Erhart — had a totally different interpretation of the Consent Order from that put forward by the FTC after the execution of the Consent Order.

The Court still believes its ruling concerning negotiations and "understandings" was correct; the Consent Order is not ambiguous, and a court may not receive evidence of contemporaneous or prior "understandings" or agreements to create an ambiguity where none otherwise would exist. Further, absent an ambiguity, parol evidence is admissible only if reformation of the contract is sought on the basis of mutual mistake, and no such suit was filed. As a result, defendants were burdened at the liability phase of this trial with a far more restrictive interpretation of the Consent Order than they advanced; they are still burdened with it, and will continue to be burdened with it as far as any future claims or representations are concerned. However, as far as the imposition of civil penalties is concerned, the Court should look to the pre-Consent Order negotiations between the parties, and should consider defendants' alleged subjective interpretation of that Consent Order to determine if they truly believed they possessed the requisite scientific substantiation, and if that belief was reasonable, i.e., in good faith.

Regarding removal of particulates and contaminants from the air, defendants contend that they and the FTC agreed that defendants should be precluded only from making "absolute" claims, i.e., claims that referenced a specific quantitative amount (of a contaminant) that could be removed by use of defendants' product. In this same vein, defendants assert that they believed that the Consent Order allowed them to make generalized claims of "reduction," and that evidence of the parties' negotiations prior to the execution of the Consent Order supported

their belief. Ms. Kerry O'Brien, a staff attorney with the FTC, was the primary individual who negotiated with Mr. Erhart prior to execution of the Consent Order. Ms. O'Brien mailed to Mr. Erhart a proposed consent order that provided (in Part II) that defendants "cease and desist from representing, in any manner, directly or by implication, that the product eliminates or *significantly reduces* indoor air pollution or any specific indoor air pollutant unless said representation is true . . . ."[3] Mr. Erhart suggested to Ms. O'Brien that the words "significantly reduces" were ambiguous and a source for further controversy. Responding to Mr. Erhart's concern, Ms. O'Brien wrote a letter to him, dated November 16, 1994 (Exhibit 340), in which she stated:

> To address these concerns, we have restructured Part II to eliminate this uncertainty. As you will see, Part II now requires your clients to possess scientific evidence before claiming that their products can eliminate, remove, clear, or clean any indoor air pollutant. Thus, we have removed the troublesome language. We, however, added a provision that requires your clients to possess scientific evidence before claiming that their products can eliminate, remove, clear, or clean <u>any quantity</u> of indoor pollutants. This provision, for example, would apply to a claim that an ozone generator can remove seventy-five percent of the mold from a user's environment. We believe that this is a compromise that addresses both of our concerns and is one that we can both endorse. (Underscored emphasis in original.)

This letter from Ms. O'Brien shows rather clearly that she intended this language to bar defendants only from claiming a specific amount of reduction; indeed, the example she provided to Mr. Erhart in the letter removes all doubt. Although an objective — and cold — reading of what ultimately became Part I of the final Consent Order supports only the interpretation this Court has placed upon it, it is easy to understand how Mr. Erhart came to have the understanding of this language that he did. Ms. O'Brien planted the seed and it grew.

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[3]Italics supplied.

blinding Mr. Erhart to any contrary literal interpretation. Whether this arose from a mutual misunderstanding, or whether due to outright deception, the fact remains that the illustration in Ms. O'Brien's correspondence suggested that the order was not intended to bar claims that the product generally reduced contaminants by some unspecified amount. Even if Ms. O'Brien did intend to bar any and all reduction claims, on two separate occasions prior to the execution of the final Consent Order, Mr. Erhart indicated to her that he understood that the language did not ban the making of generalized reduction claims (as opposed to claims of specific amounts). [See Exhibit 400.] Ms. O'Brien chose not to correct his misapprehension. To put it succinctly, this simply was not fair.

On the other hand, defendants are not without blame themselves, Ms. O'Brien's letter notwithstanding. When the matter was transferred to the Enforcement Division of the FTC, it quickly became apparent that the FTC was relying upon the explicit language of the Consent Order, and just as clearly was disinterested in any pre-Consent Order understandings of what that language was meant to cover. Defendants sought the advice of Attorney Warren Dennis in Washington, D.C., who had extensive experience in dealing with the FTC. In a memorandum to Mr. Erhart [Exhibit 243] dated January 17, 1996, Attorney Dennis several times addressed the issue of interpretation of the Consent Order:

> The FTC's Enforcement Division will concentrate on the actual text of the consent order, ignoring much of the "negotiations" history. Based on the order language, the Division may take a substantially more restrictive view of what "claims" are covered than you might believe is reasonable based on the negotiations

[Page 5.]

> [T]he "legislative history" involved in the negotiations with Kerry O'Brien will be of only limited help in interpreting the order. While

> some "absolute" phrases were taken out of the draft order, the words ultimately used in the final order will be asserted by the agency as the "functional equivalent" of the words replaced. In all events, the FTC will assert that the consent order provisions, on their face, are easy to interpret.

[Page 6.]

> While we believe Alpine needed to take the position it did with the FTC, and that Alpine may not have intended such broad restrictions, we must be prepared for the Enforcement Division to assert a contrary interpretation — namely, that Alpine is prohibited from making any claims that its machines will reduce indoor air pollutants, by any amount, whether stated quantitatively or qualitatively, unless Alpine has competent and reliable scientific evidence substantiating the claim. The FTC would assert that such an interpretation is supported both by the text of the consent order and by the document and negotiations history.

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> While Alpine reads Section I.B. as addressing only "specific quantities" or "numeric quantities," the language arguably does not make such a fine distinction. Quantities expressed in non-numeric terms such as "substantially reduces" or "greatly reduces" — may be deemed to fall within the consent order provision. Certainly, it could be argued that if the FTC had intended to cover only specific, numeric quantities, they could have and would have included limiting language.

[Page 14].

Mr. Dennis, rather obviously, performed his job well. He correctly anticipated the position the FTC would take regarding prior negotiations and, by implication, he anticipated what a court might do. An objective and detached reading of the Consent Order could have generated but one interpretation. Even if Mr. Erhart is extended every benefit of the doubt, Attorney Dennis's memorandum of January 17, 1996, was more than enough to neutralize any erroneous interpretation implanted by Ms. O'Brien. Nevertheless, defendants made no effort to seek reformation of the Consent Order, but rather persisted in generating promotional materials based upon its flawed interpretation of the Consent Order. Stated another way,

although Ms. O'Brien's "example" perhaps spawned a misunderstanding, defendants' subsequent actions, undertaken after they knew with what they were faced, cost them much of the higher moral ground.

There is one further factor that must be considered. As noted, Attorney Dennis's memorandum of January 17, 1996, should have corrected any misinterpretation engendered by Ms. O'Brien's statements to Mr. Erhart but, nevertheless, defendants continued to make the same representations based upon that erroneous interpretation. The jury reported that a total of 129 exhibits contained claims that defendants' product eliminated, removed, cleared, or cleaned indoor air pollutants from the user's environment. Of these 129 promotional pieces, virtually all of them were generated in 1998. However, at this point defendants were confronted with an unpalatable choice. Ms. Paoli, a staff attorney with the Enforcement Division of the FTC, in early 1997 indicated to Mr. Erhart that she intended to insist upon a "six-figure" civil penalty for violation of the Consent Order. As a result, defendants were confronted with either acknowledging their erroneous interpretation and paying a substantial civil penalty, notwithstanding that Ms. O'Brien arguably precipitated and confirmed that interpretation, or continuing to insist upon the righteousness of their position by making the same representations. The Hobson's choice presented to Mr. Erhart and defendants does not excuse defendants' continuing violations, but it does serve to reduce the amount of penalty that otherwise would be imposed.

B. Health Claims

Unfortunately for defendants, there is no ameliorating explanation for their violations of Part II of the Consent Order. They were required to possess and rely upon competent and

reliable scientific evidence before making any claim that their product could prevent or provide relief from any medical or health-related condition. The words "competent and reliable scientific evidence" are the key to this issue. Bearing in mind the educational and professional backgrounds of the various principals, there can be no doubt regarding the nature of *scientific* evidence. Although there was much made of the fact that the Consent Order did not require "peer review" or other specific modalities embraced within the "scientific method," clearly scientific evidence is far more than mere anecdotal evidence,[4] a subject discussed in a prior order (*see*, Doc. 77). In any event, the jury found the defendants did not possess and rely upon competent and reliable scientific evidence in making the various health-related claims set forth in the exhibits, and this Court is constrained to hold that the evidence proffered by defendants was not relied upon in good faith.

C. Ozone Levels

Relatively little attention was paid to this aspect during the penalty phase of the trial. At the liability phase, only eleven (11) exhibits contained references to the ozone sensor and its ability to control ozone concentrations in indoor air. The scientific evidence which the defendants presented as "scientific evidence" was a certification by the Canadian Standards Association ["CSA"] and testing on a single Alpine product model by ITS, which was performed at defendants' behest. The jury determined that neither constituted competent and reliable scientific evidence, and this Court agrees; the CSA subsequently amended its certification, defendants misrepresented the extent of that certification, and the ITS test

[4]Whether offered by a physician or by customer "testimonials."

methodology was suspect, at best. Nevertheless, defendants possessed and relied upon at least a modicum of evidence which, although it does not excuse defendants' violations, does serve to lessen the penalty that otherwise should be imposed.

D. Penalty Amount

The relevant statute, 15 U.S.C. § 45(l) provides:

> Any person, partnership, or corporation who violates an order of the Commission after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $10,000[5] for each violation . . . . Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure to obey or neglect to obey a final order of the Commission, each day of continuance of such failure or neglect shall be deemed a separate offense.

Practically every individual item of promotional material generated by defendants, whether taped or written, contained numerous claims, most implicating Parts I and II of the Consent Order, and some implicating Part III as well. In other words, each item of promotional material usually contained multiple health claims (expressed or implied) and multiple contaminant claims. Most of the promotional material could be compared to the seemingly ubiquitous "infomercials" so prevalent on television after midnight. If each exhibit shown to the jury is parsed for individual misrepresentations, there would be thousands upon thousands of violations. The statute itself provides the answer: "[I]n the case of a violation through continuing failure to obey or neglect to obey a final order of the Commission, each day of continuance of such failure or neglect shall be deemed a separate offense." The only reasonable way to characterize defendants' violations of the Consent Order is as a "continuing

[5]The maximum penalty for any violation occurring after November 20, 1996, was increased from $10,000 to $11,000. 28 U.S.C. § 2461.

failure to obey."

The statutory maximum penalties are just that — maximums. The amount that a court should actually impose should be determined after giving consideration to the effect of any penalty on the defendants' ability to stay in business (if, indeed, the defendant should stay in business); the egregiousness of the violation, i.e., the extent of the defendants' good faith; and the need to vindicate the FTC's authority, i.e., to provide a deterrent factor. The Court frankly believes that the injunctive relief, discussed in the next section of this opinion, is more important than the amount of the civil penalty.

Defendants' violations continued over a total of one thousand four hundred ninety (1,490) days. The Court has considered the defendants' conduct, their financial resources, and the need to vindicate the authority of the Federal Trade Commission. The Court has no wish to destroy defendants; their product does not do much of what they said or implied it did, but it is not wholly without efficacy. It does remove *visible* smoke, and it does remove at least some odors. Based on these considerations, the Court concludes that a civil penalty in the amount of one thousand dollars ($1,000.00) per day, for a total of one million four hundred ninety thousand dollars ($1,490,000), is appropriate.

II. INJUNCTIVE RELIEF

A. Injunction

As mentioned earlier in this opinion, the jury determined that defendants did not possess or rely upon competent and reliable scientific evidence regarding any claims (other than removal of tobacco smoke) made by them during the relevant time period. Subject to any

motions filed under Rules 50 and 59, the controversy between the FTC and defendants regarding the adequacy of defendants' scientific evidence is at an end, at least with respect to the evidence presented to the jury. It follows that defendants must be enjoined from making further claims until they acquire scientific evidence that is (1) different from that presented to the jury, and (2) competent and reliable scientific evidence.

Defendants shall make no claims or representations in any form or by any means, expressed or implied, that any Alpine product can eliminate, remove, clear or clean from indoor air any pollutant, contaminant, microorganism (including bacteria, viruses, molds and mildew), chemical or particulate, or any specific quantity or amount of any of the foregoing. Defendants may, however, represent that their product can remove "visible" tobacco smoke and *some* odors (without specifying what odor), provided, however, the defendants may not claim or represent, expressly or impliedly, that removal of visible tobacco smoke or some odors necessarily implicates the removal of any chemical, particulate, or microorganism.

Defendants shall make no claims or representations in any form or by any means, expressly or impliedly, that Alpine's products prevent or provide, or may prevent or provide, relief from any health or medical condition of any kind.

Defendants shall make no claims or representations in any form or by any means, expressly or impliedly, that any sensor installed on any of Alpine's air cleaning machines is capable of controlling the ambient level of ozone in indoor air.

This injunction is immediately binding upon defendants, their heirs, successors, assigns, and licensees, without exception. Defendants, and their heirs, successors, assigns, and licensees, shall disseminate this injunction, *verbatim*, to all existing and future officers,

employees, agents, and "independent dealers" who sell or distribute the product by any means.

B. Subsequently-Acquired Scientific Evidence

The issue of injunctive relief is inextricably intertwined with the question of how defendants or their successors may present "competent and reliable scientific evidence" which they assert they now have or in the future may acquire with respect to any claim or representation covered by the Consent Order.

First, it bears noting that the defendants agreed to the language in the Consent Order; the Court should not rewrite it if there is any means to avoid it. As the tortuous history of this litigation illustrates, determining what constitutes competent and reliable scientific evidence is problematical. Obviously, the FTC is the penultimate arbiter; a jury was the ultimate arbiter. But a trial is outrageously expensive for all concerned, and time-consuming in the extreme. Looking at it from defendants' perspective, one can imagine that they feel like Job, when he asked who could possibly umpire between him and God. The FTC cannot and will not advise defendants of what does constitute competent and reliable scientific evidence; it has told, and presumably will continue to tell, defendants only what does *not* qualify as such evidence. From the FTC's perspective, it has no facilities to conduct scientific tests and product evaluations. Further, product claims obviously are generated by defendants, and they tout those claims, directly or indirectly, to the consumer to induce him or her to buy the product. Any claim should be engendered by pre-existing scientific evidence; defendants should not make a claim and then belatedly seek evidence to support a *fait accompli*.

The language of the Consent Order comes perilously close to presenting the Court with

a problem that has no solution. This Court cannot say that defendants will never acquire scientific evidence that will support a claim that their product can remove one or more contaminants from the air, or that use of the product will not ameliorate at least some health problems. In the same vein, it is at least possible that the defendants could develop a new product or methodology that, unlike the existing product, indeed does remove certain particulates or contaminants from the air. The Consent Order does not say that the defendants "shall make no claim regarding X, Y or Z"; rather, it says that the defendants "shall make no claim regarding X, Y or Z *unless they have and rely upon competent and reliable scientific evidence*." The language, in other words, explicitly recognizes that there may be scientific evidence that justifies a particular representation, or that there may be such evidence available in the future.

To compound the dilemma, this Court has no wish to become an ersatz FTC, forever refereeing what probably will be interminable disputes between the defendants and the FTC regarding subsequently-acquired scientific evidence. For one thing, this Court most surely is not the FTC, ersatz or otherwise. Secondly, for this Court to *initially* determine the competence and reliability of any scientific evidence is to (1) effectively rewrite the Consent Order, thereby usurping the prerogative of the FTC, and (2) potentially deny to one or more of the parties their right to a trial by a jury.

Again, there seems to be no wholly satisfactory answer, but only a series of bad solutions, some worse than others.

The Consent Order says what it says, and the Court declines to rewrite it in wholesale fashion. If defendants assert that they now have substantiating scientific evidence for any

claim, or should they in the future assert they have such evidence, then they shall present it to the FTC, as the Consent Order requires, and the FTC shall promptly advise defendants of its position regarding that proffered scientific evidence. The problem arises, of course, if the FTC's response is not to defendants' liking, i.e., the FTC states that the proffered evidence is inadequate. The only alternatives defendants presently have under those circumstances would be to either refrain from making the representation which they claim is supported by competent and reliable scientific evidence, or make the representation at the peril of further litigation, the imposition of additional (and larger) civil penalties, and sanctions for contempt of court for violation of the injunction. That, it is submitted, is not much of a choice since, as a prior ruling of this Court in a related case suggests, a declaratory judgment action is not available to resolve such an issue.

Therefore, with some reluctance, but determining that there is no choice to do otherwise, the Court now provides to the defendants one additional option to the two discussed above:

Defendants will first present any new evidence to the FTC as the Consent Order requires, and the FTC will review that evidence and respond in a timely fashion. If the FTC rejects defendants' proffered scientific evidence, then defendants (or their successors, etc.) may petition this Court for a lifting or modification of the injunction based upon such newly-acquired scientific evidence.

The Court will review defendants' evidence and determine if it arguably constitutes

competent and reliable scientific evidence."[6] Such could be initiated by the Court *sua sponte* or by a motion for summary judgment filed by either party. If the evidence arguably is "competent and reliable scientific evidence," the matter shall proceed to a hearing to determine if the injunction should be lifted to any extent. The Court, if it deems appropriate, may appoint an independent laboratory, testing service, scientist or engineer (as appropriate to the issue) to test and evaluate defendants' product with reference to the claim or representation sought to be made, and to evaluate the evidence submitted by defendants which they claim constitutes "competent and reliable scientific evidence." The costs for such independent testing and evaluation will be borne by the defendants or their successors. The independent evaluation and analysis of any experts that might be appointed by this Court will be evaluated with all other evidence of both the defendants and the FTC in determining whether to lift or modify the injunction.

No application for a modification of the injunction will be entertained until eighteen (18) months have elapsed from finality of judgment.

A judgment shall be entered in accordance with the foregoing.

ENTER:

DENNIS H. INMAN
UNITED STATES MAGISTRATE JUDGE

[6]For purposes of illustration, anecdotal evidence is not, and never will be, competent and reliable scientific evidence.