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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-3693
	)	
Waterous Company, 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 Waterous is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota, with its principal place of business at 300 John E. Carroll Avenue East, South Saint Paul, Minnesota 55075.

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 Order, the following definitions shall apply:

(a) "Respondent Waterous" means (1) Waterous Company, Inc.; (2) its predecessors, subsidiaries, divisions, and groups and affiliates controlled by Waterous Company, Inc., and their successors and assigns; (3) all companies or entities that any parent of Waterous Company, Inc., creates in the future and that engage in the manufacture or sale of Mid-Ship Mounted Fire Pumps, or Waterous' parent if it engages in the manufacture or sale of Mid-Ship Mounted Fire Pumps; (4) the respective directors, officers, employees, agents and representatives of any of the entities described in subparagraphs (1), (2) and (3) above.

(b) "Mid-Ship Mounted Fire Pumps" are truck mounted fire pumps that meet the National Fire Protection Association Standard for Pumper Fire Apparatus known as "NFPA 1901."

(c) "Commission" means the Federal Trade Commission.

(d) "OEM's" are original equipment manufacturers who buy and install Mid-Ship Mounted Fire Pumps, as well as many other components, into a final fire truck. OEM's then sell the trucks to fire departments in the United States.

II

IT IS FURTHER ORDERED that Respondent Waterous, directly or through any corporation, subsidiary, division, or other device, including franchisees or licensees, in connection with the offering for sale or sale of any Mid-Ship Mounted Fire Pump in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, does forthwith cease and desist from entering into, continuing, or enforcing any condition, agreement or understanding with any OEM that such OEM will refrain from the purchase or sale of Mid-Ship Mounted Fire Pumps of any manufacturer, or will purchase or sell Mid-Ship Mounted Fire Pumps of only Respondent Waterous; *provided however*, that nothing in this Order shall prohibit any price differentials 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 Waterous 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 Waterous 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. § 18a, and at least ten (10) days in the case of transactions subject to the notification provisions of the Hart-Scott-Rodino Act.

VI

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

By the Commission, Commissioners 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

[Waterous' Letterhead]

PLEASE READ THIS

Enclosed with this notice is a copy of a Consent Order agreed to between the Federal Trade Commission and Waterous Company, Inc. In the Order, Waterous 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 Waterous pumps exclusively. The Order does not prohibit OEMs from purchasing only Waterous Mid-Ship Mounted Fire Pumps if, in the OEM's sole discretion, it deems it advisable. Moreover, Waterous 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 WATEROUS 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 separatel y 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 midship-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 the contrary. In any event, even if one assumes *arguendo* the validity of the theories of anticompetitive effects, the orders issued today are unlikely to remedy those alleged effects.

The complaints allege, *inter alia*, that the arrangements between Waterous, Hale, and their OEM customers reduce competition in two ways -- by facilitating an allocation of customers between Waterous and Hale, and by creating a barrier to the entry of new pump manufacturers. The first theory posits that Waterous and Hale wish to set the prices of their fire pumps collusively but find themselves unable to reach and maintain a direct agreement on price. Under this hypothesis, in order to achieve collusive pricing without a direct agreement on prices, Waterous and Hale have entered into a *de facto* agreement to allocate fire truck OEMs between themselves. That agreement, combined with an agreement not to bid for each other's OEM business, makes each pump maker a monopolist with respect to its OEMs. As monopolists, it is argued, the pump manufacturers are able to set supracompetitive prices.

This theory is fatally flawed. For a customer allocation scheme to allow Waterous and Hale to set supracompetitive prices, it *necessarily* must entail the allocation of the *final* customers -- the fire departments -- between the two pump makers. Absent such an allocation, an exclusive dealing contract between a pump maker and one or more OEMs -- or even outright vertical integration between the pump producer and one or more OEMs -- does not allow the pump producer to raise prices anticompetitively. Under the Commission's theory of competitive harm, Waterous and Hale "allocate customers" in lieu of trying to enter into direct pump price agreements that presumably would break down under each party's incentives to undercut the collusive price. In other words, the pump makers' "customer allocation" scheme solves this instability problem. However, unless Waterous and Hale also agree not to compete against one another for the patronage of the fire departments -- *i.e.*, unless they collusively allocate fire departments between themselves -- each pump maker retains its incentive to take business from its 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 compete indirectly -- *i.e.*, when, as here, their affiliated OEMs submit bids to a fire department incorporating not merely the pump price but rather the prices of all of the truck's components -- it will be more difficult for a pump maker to determine whether a loss of business is attributable to price-cutting by the rival pump maker or to reductions in the prices of other components.[3]

The difficulty of maintaining coordination is exacerbated if there is substantial market share volatility among the affiliated customers for reasons unrelated to the pumps. Such volatility makes it difficult for a pump maker to infer whether a sales loss stems from secret pump price concessions or from some other cause. Moreover, if the fortunes of buyers (here, fire truck OEMs) are expected to differ over time -- some flagging, others flourishing -- the utility of customer allocation as a long-run aid to collusion appears questionable. The pump producer with the misfortune to have affiliated with unsuccessful buyers will have still greater incentives to depart from the collusive scheme. In this regard, the fire truck OEM market witnessed substantial turnover during the period in which Waterous and Hale allegedly maintained exclusive distribution agreements.[4] Thus, even if one could overcome the defects in the Commission's collusion theory,

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[1] The majority's assertion that pump prices and pump brands are relatively unimportant to final consumers (*i.e.*, fire departments) is inconsistent with the events that triggered this investigation -- namely, complaints from OEMs that they suffered significant competitive harm from their alleged inability to offer multiple pump brands. It is hard to reconcile those complaints with the majority's claimed end-user indifference to pump brands.

[2] *See, e.g.*, Stigler, "A Theory of Oligopoly," 72 *J. Pol. Econ.* 44 (1964), *reprinted in* THE ORGANIZATION OF INDUSTRY, ch. 5 (1968).

[3] The majority appears to have misunderstood my point with regard to the detection of cheating. By "cheating," I am not referring to an effort by, say, Hale to sell to Waterous OEMs (or vice-versa). Rather, I refer to Hale's hidden reduction in pump prices *to its own customers*, which consequently allows those customers to take business from OEMs affiliated with the rival pump brand. This form of cheating is extremely difficult to detect, because an OEM's capture of sales from a rival OEM could be attributable to many reasons other than a reduced pump price.

[4] For example, just since 1990, at least four major OEMs -- Grumman, Mack, FMC, and Beck --

these other factors would continue to cast substantial doubt upon this theory's applicability.[5]

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[6] 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]

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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 anticompetitive behavior that the impact of vertical integration in reducing entry would allow such behavior to occur. Second, the degree of vertical integration subsequent to the merger must be so extensive that an entrant into the primary market would also have to enter the other market (the "secondary" market). If substantial unintegrated capacity remains in the secondary market after the vertical merger, it is less likely that the merger will facilitate an anticompetitive outcome. Third, the requirement that a firm enter both the primary and secondary markets -- rather than just the primary market -- must make entry into the primary market significantly more difficult and therefore less likely to occur. 4 Trade Reg. Rep. (CCH) ¶ 13,103 at 20,565-66; *see also* Blair and Kaserman, LAW AND ECONOMICS OF VERTICAL INTEGRATION AND CONTROL 152 (1983).

Although this effect might occur in some settings, in this case I find the evidence to support invoking this theory tenuous at best. The Commission's complaints apparently rest on the difficulty allegedly experienced by another pump maker in obtaining the patronage of OEMs.[8] An alternative explanation for that firm's failure to achieve a larger market share is that fire departments find its pumps significantly less attractive than those of Hale and Waterous for reasons unrelated to the pump makers' distribution policies. The evidence adduced by the staff is far from sufficient to establish that this firm, or any other actual or potential competitor, was anticompetitively excluded from selling pumps to OEMs.[9]

In addition to the weaknesses in the anticompetitive theories outlined above, a factual problem plagues this case: evidence gathered in the investigation calls into question whether Waterous's and Hale's relationships with their respective OEM customers can even be characterized as "exclusive." Although many OEMs have tended to deal principally with only one pump maker -- a fact, I note in passing, that is as consistent with an efficiency rationale for exclusivity as it is with an anticompetitive theory -- several larger OEMs affiliated with Waterous and Hale have expressed a willingness to install another manufacturer's pumps at customers' request. Indeed, several OEMs -- including at least one of the largest ones affiliated with Hale -- have installed another competitor's pumps, and this investigation produced no evidence to suggest that any dealer was terminated for selling that firm's pumps. In any case, however, even if OEM exclusivity could be convincingly demonstrated, it should be clear from the discussion above that a great deal more is required to prove that the exclusive arrangements had anticompetitive effects.[10] The evidence on the competitive effects of existing arrangements between pump makers and OEMs is as consistent with the view that the arrangements induce greater efficiency in the production and marketing of pumps as it is with a market power theory.

I am therefore unpersuaded that respondents' distribution policies have harmed competition in any relevant market. Even had I concluded otherwise, however, I would not endorse the consent orders, which require each respondent to cease and desist from requiring OEM exclusivity as a condition of sale. As I have noted elsewhere,[11] the problems with remedies

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8 The evidence supporting the Commission's entry-deterrence theory appears to consist of that producer's experience in trying to erode OEMs' preferences for Waterous and Hale pumps.

9 The majority's assertion with respect to the entry-deterring effects of the arrangements is simply that -- an assertion. All of the evidence gathered in this investigation is easily reconciled with an efficiency rationale for the challenged arrangements between pump makers and OEMs. In this market, as in any other, superior efficiency on the part of incumbents is a powerful entry deterrent. It is not an antitrust violation.

10 *Cf. Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58-59 (1977) (plaintiff must demonstrate anticompetitive effects and defendant's market power when challenging vertical restraints).

11 Dissenting Statement of Commissioner Roscoe B. Starek, III, in *Silicon Graphics, Inc.*,

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 a nonexistent 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).