UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
	)	
Petitioner,	)	Supplemental to
	)	Civil Action No. 56-15748
v.	)	
	)	Hon. Paul V. Gadola
FTD CORPORATION; FLORISTS'	)	
TRANSWORLD DELIVERY, INC.;	)	Civil Contempt Of Judgment
and FTD ASSOCIATION,	)	
	)	
Respondents.	)	Filed: 8/1/95

PETITION BY THE UNITED STATES FOR AN ORDER TO SHOW CAUSE WHY THE RESPONDENTS SHOULD NOT BE FOUND IN CIVIL CONTEMPT

The United States of America, Petitioner, by its attorneys, acting under the direction of the Attorney General, presents this Petition for an order requiring the above-named Respondents to show cause why they should not be found in civil contempt of the Modified Final Judgment ("MFJ"), entered pursuant to this Court's Order on November 8, 1990 in United States v. Florists' Transworld Delivery Association, Civil Action No. 56-15748. Copies of the MFJ and the Court's Order Accepting the MFJ are attached hereto as Appendix A. Petitioner represents to the Court as follows:

I.

JURISDICTION OF THE COURT

I. This Petition alleges violations of the MFJ by Respondents FTD Corporation,[1/] Florists' Transworld Delivery, Inc., and FTD Association, all successors to Florists' Telegraph Delivery Association, the defendant in Civil Action 56-15748, all of whom

[1] Prior to May 17, 1995, FTD Corporation was known as Perry Capital Corp. ("Perry Capital").

participated in said violations with actual notice of the MFJ. This Court has jurisdiction over all named Respondents under its inherent power to enforce compliance with its orders, pursuant to 18 U.S.C. § 401(3) (1988) and Rule 42(b) of the Federal Rules of Criminal Procedure and under Sections III and XI of the MFJ.

1. Section III of the MFJ provides:

> The provisions of this Modified Final Judgment applicable to defendant shall apply to defendant and its officers, agents, servants, employees, subsidiaries, successors, and assigns, and to all persons in active concert or participation with defendant who shall have received actual notice of this Modified Final Judgment by personal service or otherwise.

2. Section XI of the MFJ provides:

> Jurisdiction of this Court is retained for the purpose of enabling any of the parties to this Modified Final Judgment to apply to the Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Modified Final Judgment, for the modification or termination of any of the provisions thereof, for the enforcement of compliance therewith and punishment of violations thereof.

II.

DESCRIPTION OF RESPONDENTS

4. Respondent FTD Corporation (hereinafter "FTD Corp.") is a corporation organized and existing under the laws of the State of Delaware with its principal place of business at 29200 Northwestern Highway, Southfield, Michigan, 48034. As a successor to Florists' Transworld Delivery Association (hereinafter "FTD"), the defendant in Civil Action No. 56-15748, and as the parent of Florists' Transworld Delivery, Inc., FTD Corp. became subject to the MFJ at least as early as December 19, 1994, when it acquired FTD.

5. Respondent Florists' Transworld Delivery, Inc. (hereinafter "FTDI") is a corporation organized and existing under the laws of the State of Michigan with its principal place of business at 29200 Northwestern Highway, Southfield, Michigan, 48034. It is a wholly-owned operating subsidiary of FTD Corp. FTDI became a successor to FTD, the defendant in Civil Action No. 56-15748, at least as early as December 19, 1994, and thus is subject to the MFJ. FTDI operates the nation's largest flowers-by-wire business. In this business, it faces competition from other floral wire clearinghouses, most of which are organized as associations.[2/] FTDI now also owns and operates the Mercury Network (formerly FTD's), the nation's only computerized floral wire network, which provides an essential on-line telecommunications link for wire orders placed through FTDI or competing floral wire clearinghouses. Using the Mercury Network, a florist can arrange, at a customer's request, for an order to be filled and delivered by a florist in another city. All floral wire associations that compete with FTDI also use the Mercury Network to transmit their orders.

6. Respondent FTD Association (hereinafter "FTDA") is a non-profit corporation organized and existing under the laws of the State of Ohio with its principal place of business at 29200 Northwestern Highway, Southfield, Michigan, 48034. FTDA became a successor to FTD, the defendant in Civil Action No. 56-15748, at least as early as December 19, 1994, and thus is subject to the MFJ. A florist must be a member of FTDA to send or receive wire orders over the Mercury Network, even if the order is being directed through a

[2] FTDI's competitors are American Floral Services, Teleflora, Redbook, Carik Services, and Florafax.

wire association that competes with FTDI.

7. The acts alleged in this Petition to have been done by each of the corporate Respondents were authorized, ordered or done by the officers, directors, agents, employees or representatives of said corporations, while actively engaged in the management, direction, or control of its affairs.

III.

PRIOR ORDERS OF THE COURT

8. On June 1, 1956, the United States filed a civil action in this Court against the Florists' Telegraph Delivery Association, Civil No. 56-15748. The Complaint alleged, inter alia, that since 1935, FTD had combined and conspired to restrain interstate commerce in flowers-by-wire orders by preventing FTD member florists from placing wire orders through other member florists or other wire clearinghouses. This action was settled upon consent and the Court entered a Final Judgment that enjoined and restrained FTD from, inter alia, engaging in practices that had the purpose or effect of limiting membership in FTD to those not affiliated with other flowers-by-wire associations. The Final Judgment in this action was modified by the Court's Order of November 8, 1990. 9. On August 1, 1966, the United States filed a second civil action against the Florists' Transworld Delivery Association, Civil Action No. 66-28784 (E.D. Mich.). This Complaint alleged that for many years FTD had combined and conspired to unreasonably restrain and to monopolize interstate and foreign commerce in the floral wire order business in violation of Sections 1 and 2 of the Sherman Act by, inter alia, fixing and raising the retail prices of flowers and floral arrangements, restricting

competition among retail florists and causing its members to refrain from using any clearinghouse other than FTD's. On March 20, 1969, this action was settled upon consent and the Court entered a Final Judgment enjoining the alleged violations. The Final Judgment in this action was modified by the Court's Order of November 8, 1990.

10. On November 8, 1990, as already described, this Court entered its Order modifying the Final Judgments in Civil Nos. 66-28784 and 56-15748. This Petition alleges violations by the Respondents of the MFJ entered by the Court at that time.

11. Sections IV and V of the MFJ read in pertinent part:

> IV. (A) Defendant is enjoined and restrained from entering into, adhering to, promoting, or following any course of conduct, practice or policy, or any agreement or understanding, having the purpose or effect of:
>
> * * * * * * * *
>
> (2) Restricting or limiting membership in defendant to florists who are not members of any other wire association.
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> * * * * * * * *
>
> V. Defendant is enjoined and restrained from hereafter (a) entering into, adhering to, promoting, or following any course of conduct, plan, program, practice, or policy, or (b) entering into any agreement or understanding with any other person that is prohibited by or contrary to any of the provisions of the foregoing Section IV of this Modified Final Judgment.

12. The consistent purpose of the 1956 Final Judgment and the 1990 MFJ was to prevent FTD from using its economic power to restrict, limit or eliminate competition by other wire clearinghouses for individual floral wire orders. The 1990 MFJ clarified that FTD

could compete aggressively for wire orders, but could not exploit its control over the only computerized floral wire network to induce florists to forgo membership in competing wire associations.[3/]

IV.

OFFENSES CHARGED

13. Petitioner alleges that, with unquestioned knowledge of the MFJ, and in violation of this Court's Order, Respondents have devised, effectuated and implemented a plan and program and followed a course of conduct having the prohibited purpose and the natural and probable effect of causing FTDA's retail florist members to sever their memberships in competing wire associations and to use FTDI exclusively as their clearinghouse for sending and receiving flowers-by-wire orders.

14. Petitioner alleges that to carry out this prohibited plan and program and course of conduct, Respondents have utilized the following means and methods in violation of Sections IV(A)(2) and V of the MFJ:

a. Respondent FTD Corp., from on or about July 1, 1994, and Respondents FTDI and FTDA, from on or about December 19, 1994, to the date of filing of this Petition, have knowingly disobeyed, resisted and violated Sections IV(A)(2) and V of the MFJ by devising, creating, implementing and promoting a new "FTD Only"

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[3] "The proposed amendments would not, however, give FTD absolutely free rein to take any action it deemed to be 'competitive.' Any action whose purpose or effect was to return FTD to the exclusive membership organization it once was would be prohibited by the proposed MFJ." Memorandum of United States in Support of Defendant FTD's Amended Motion, at 19 (July 31, 1990).

program.

b. On or about November 18, 1994, prior to Perry Capital's acquisition of FTD, but after the FTD membership had approved the acquisition, Respondent FTD Corp., announced a plan to offer special financial incentives, including stock ownership, to FTDA members based upon the amount of wire service business they did in the future with FTDI.

c. On or about December 18, 1994, immediately before FTD was acquired by Perry Capital, Respondent FTDA committed, through a 99-year Mutual Support Agreement, not to:

> . . . provide material support or material assistance to any Person that, directly or indirectly, carries on any business activity which is in competition with the Businesses [of FTDI].[4/]

In addition, while purporting to remain an independent, member-owned, non-profit trade association, FTDA agreed in the Mutual Support Agreement to subject its membership standards to the control of Respondent FTDI, a for-profit corporation, and to allow FTDI to discipline and even expel FTDA member florists from FTDA for violations of FTDA's membership standards or FTDI's standards for use of the Mercury Network, the clearinghouse, and its trademarks.

d. On or about January 9, 1995, Respondent FTDI unveiled the new "FTD Only" program to FTDA members, stating that FTDI

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[4] The FTDI businesses acquired from FTD include the Mercury Network and the FTDI Clearinghouse.

stock would soon be offered to FTD members and that a multiplier would be applied to the stock distribution formula for all "FTD Only" members, based upon their length of time in "FTD Only".

e. Prior to Perry Capital's acquisition of FTD, "FTD Only" was a recognition program that offered its members only a plaque as a reward for clearing wire orders exclusively through FTD. However, under the direction of the Respondents, "FTD Only" has become an incentive package targeted at eliminating competition from other wire clearinghouses.

f. On or about January 9, 1995, the "FTD Only" program began to offer financial incentives to FTDA members that terminated their memberships in competing wire clearinghouses. Among these inducements are: (a) a buy-back of any unsold holiday product; (b) extra voting stock in FTD Corp.; (c) increased local advertising; and (d) reduced branch shop and multi-shop fees.

g. Through its field representatives, FTDI has been actively pressuring FTDA member florists to sever their existing membership agreements with competing wire associations. Since January 1995, Respondent FTDI's officers have authorized, and its field representatives and agents have distributed to FTDA member florists, pre-addressed form letters with step-by-step instructions for terminating membership agreements with competing wire associations.[5/] FTDI's field representatives have then pressured FTDA members to use these letters to cancel all such memberships in favor of "FTD Only."

[5] Copies of certain of these FTDI form letters are attached hereto as Exhibit 1.

h. The "FTD Only" program, as its name indicates, is designed to induce FTDA member florists to cease doing business with wire clearinghouses that compete with FTDI, with the purpose of restricting or limiting membership in FTDA to florists that are not also members of competing wire associations.

i. As a result of the "FTD Only" program, over 750 retail florists across the nation had severed their memberships with competing wire clearinghouses as of May 28, 1995. Because some of these florists had been members of more than two wire associations, the total number of such memberships cancelled in the first five months was nearly 1000, despite the pendency of a Department of Justice investigation of which Respondents were aware.

j. If unchecked, the "FTD Only" program will result in further resignations by retail florists from wire associations that compete with FTDI, potentially reducing memberships in competing clearinghouses to levels that would threaten their continued viability, all in continuing violation of Paragraph IV (A)(2) and V of the MFJ.

k. Respondents FTD Corp., FTDI and FTDA have, with the help of overlapping personnel, coordinated to implement and promote the "FTD Only" program, actively encouraging members to drop other wire associations in favor of "FTD Only."

16. At no time prior to June 1995, did the Respondents ever attempt to ascertain from this Court or the United States Department of Justice whether their activities might be viewed as

violations of the provisions of the MFJ.

17. Petitioner alleges that, because of their above-described acts and failures to act, Respondents have knowingly disobeyed and resisted the lawful orders of this Court, as set out in Sections IV(A)(2) and Section V of the MFJ, and thus are in civil contempt of this Court's authority.

18. Petitioner further alleges that the above- described violations have continued to the date of filing of this Petition, and will continue unless the relief prayed for hereinafter is granted.

V.

PRAYER

WHEREFORE, the Petitioner moves this Court to issue an Order directing the Respondents to appear before this Court at a time and place to be fixed in said Order, to show cause why they should not be adjudged in civil contempt of this Court; and

THEREAFTER, issue an Order adjudging Respondents in civil contempt of this Court's MFJ, and further:

1. Order and direct Respondents forthwith to comply with the MFJ;

2. Order and direct Respondents to cease and desist within 15 days of the issuance of this Order from continuing the "FTD Only" program in any form;

3. Order and direct Respondents to cease and desist within 15 days of the issuance of this Order from offering any inducements to any FTDA member, or user of the Mercury Network or the FTDI clearinghouse, not to participate in any competing floral wire clearinghouses;

4. Order and direct Respondents to inform each FTD or FTDA member by publication in the FTD News that the current "FTD Only" program and the issuance and promotion by FTDI of form termination letters severing florists' membership in competing wire associations were in violation of the MFJ, and that the "FTD Only" program has been abolished;

5. Impose upon Respondents FTD Corp., FTDI and FTDA, fines of up to $5,000 each, for every day after this Court's order that each said Respondent fails to carry out the directions of this Court;

6. Order and direct Respondents to cease and desist at once from urging FTD or FTDA members to sign letters resigning their memberships in other wire associations, and from providing form letters that call for such resignations;

7. Order and direct Respondents to restructure the 99-year Mutual Support Agreement;

8. Order and direct Respondents to restructure FTDA's and FTDI's mutual rights and obligations so that:

a. FTDA's standards are not subject to FTDI's control or review;

b. FTDI shall have no right to discipline, directly or indirectly, any FTDA member for violating any FTDA standard; and

c. FTDI shall have no right to discipline any FTDA member, with respect to that member's membership in FTDA, for violating any FTDI standard;

9. Order and direct Respondents, within 30 days of this Order, to dissolve all personnel overlaps that exist between FTD Corp. or FTDI and FTDA;

10. Order and direct Respondents FTD Corp., FTDI and FTDA to establish compliance committees, designed by and reporting directly to their respective general counsels, to assure that no further violations of the MFJ take place;

11. Order and direct that Respondents FTD Corp., FTDI and FTDA, no later than 10 days after a person begins performance of his or her duties as a new officer or management employee, provide that person with a copy of the MFJ and a written directive setting forth Respondents' policies regarding compliance therewith, and obtain an executed certificate acknowledging its receipt;

12. Order and direct that Respondents FTD Corp., FTDI and FTDA, no later than 30 days after the entry of this Order, distribute to each officer and management employee of Respondents the following material:

a) A copy of this Order and a written directive setting forth Respondents' policies regarding

compliance with this Order;

b) A description of the procedures to be followed to comply with this Order, including identification of the members of each compliance committee and the procedures to be followed by the compliance committees; and

c) An admonition that non-compliance with the MFJ and this Order will result, in every case, in disciplinary action, which may include dismissal, and that such non-compliance may result in conviction for contempt of court and imprisonment or fine;

13. Order and direct that Respondents FTD Corp., FTDI and FTDA each take disciplinary action against any person under its control who refuses or fails to comply with the MFJ or any MFJ Order;

14. Order and direct that the termination date of the MFJ, in Section X, be eliminated;

15. Issue such further orders as the nature of the case may require and as the Court may deem just and proper to compel obedience to and compliance with the orders and decrees of this Court; and

16. Grant to the Petitioner its costs of maintaining this proceeding.

Dated: July 31, 1995

Respectfully submitted,

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