UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

UNITED STATES OF AMERICA	)	C70-931
	)	
Plaintiff	)	
	)	
v.	)	
	)	
YODER BROTHERS, INC., et al.	)	
	)	
Defendnts	)	

MEMORANDUM AND ORDER

THOMAS, Senior Judge

Defendant Yoder Brothers, Inc. on September 17, 1985 moved this court to modify its final judgment of March 15, 1972, entered by consent. The court is asked to modify section II(C)'s definition of "Distributor." Pursuant to the court's order, defendant Yoder Brothers published a notice of its motion to modify the final judgment in the "Wall Street Journal" and in "Florist's Review Magazine." In addition, the government published a notice of the "Proposed Modification of Final Judgment: Yoder Brothers, Inc." Comment from interested persons was invited. The government has received two comments, both in opposition to the proposed change.

The government has consented to the modification. By the filed "Notice" of April 2, 1986, the court requested the government to file evidentiary proof in support of

its conclusion that "the proposed modifications would not harm competition in the chrysanthemum industry." In the "Notice" the court also extended to the writer of one of the letters of comment an opportunity to document a statement in his letter. In response to the court's notice, Frank Seales, Jr., attorney in the Antitrust Division of the U.S. Department of Justice, has submitted a full affidavit. No other person has responded.

With the record now complete, the court proceeds to consider and rule upon the requested modification.

I.

This court on March 15, 1972, entered a "Final Judgment" consented to by the parties. Defendants Yoder Brothers, Inc. (Yoder), Yoder-California, Inc. and BGA (Breeders Growers Association) International, Inc. were enjoined and restrained from: (1) fixing royalties with other breeders on licensing the use of or sale of chrysanthemum cuttings, and (2) from requiring a purchaser of unpatented cuttings to pay a royalty for them.[1]

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1. The United States states that it recognized that "Yoder could obtain patent rights on new varieties of chrysanthemums by compliance with the Plant Patent Act (35 U.S.C. §161, et seq.) [but] objected to the company's attempt to gain monopoly benefits by extra-patent means."

The government notes that BGA was "terminated on July 1, 1972, in accordance with Paragraph VI of the Judgment which required each defendant to eliminate from its agreements all provisions prohibited by the Judgment." Also, "Paragraph VIII enjoined the defendants from collecting royalties on unpatented cuttings, the job BGA was set up to do."

While other acts of the defendants were prohibited by the final judgment, it is pertinent to additionally refer to only the following judgment paragraphs.[2] Paragraph XI enjoined and restrained Yoder Brothers and the other defendants from directly or indirectly:

> (1) Suggesting, urging or requiring any distributor to adopt or abide by prices, discounts or other terms and conditions for the sale of cuttings established or suggested by Yoder or Yoder-California;
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> *****
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> (4) Printing or distributing price lists purporting to contain prices, discounts and other terms and conditions at and upon which distributors sell cuttings to any third person.

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2. Paraphrasing the prohibitions in various paragraphs of the final judgment, the government states:

> Section IV of the Judgment enjoins defendants from entering into or maintaining any agreements with another breeder or propagator-distributor of chrysanthemum cuttings to fix royalties or other terms or conditions of sale of cuttings, refuse to solicit customers or allocate sales territories, boycott actual or potential competitors, or hinder third parties from engaging in the business of breeding or propagating cuttings. Defendants are prohibited by this section from agreeing with competitors that purchasers of cuttings must report mutations on purchased cuttings to the seller. It also forbids agreements which would restrain the export from or import into the United States of unpatented cuttings.
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> Section V enjoins each defendant from unilaterally placing customer or territorial restrictions upon purchasers of cuttings, from refusing to deal with indirect purchasers and from requiring indirect purchasers to report mutations.
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> Section VIII enjoins defendants from requiring any purchaser of unpatented cuttings to pay a royalty or other charge for additional unpatented cuttings propagated by the purchaser from unpatented cuttings.

Paragraph II(C) defined a "distributor" as "any person who sells cuttings propagated by Yoder of Yoder-California, other than employees of Yoder or Yoder-California."

Yoder moves to modify the final judgment pursuant to Fed.R.Civ.P. 60(b)(5) and (6) and section XIV of the final judgment.[3] Defendant seeks to modify section II(C)'s definition of "Distributor" to read:

> "Distributor" means any person who purchases and resells cuttings propagated by Yoder or Yoder-California.

Affiant Yoder states in his affidavit, and the record does not controvert, the following facts: Yoder's past and present relationships with distributors have been such that the "distributor's primary function is obtaining orders." Yoder delivers "cuttings" directly to the growers, guaranteeing that the cuttings are live on delivery, and Yoder, in detailed ways, services the growers with respect to the cuttings. Distinguishing "the traditional distributor," affiant Yoder states that the "distributor never takes possession of the cuttings, has nothing to do with their delivery to the grower and has no inventory of cuttings from which to sell." While distributors

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3. Section XIV of the final judgment provides in relevant part:

> Jurisdiction is retained for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time...for the modification...of any of the provisions thereof....

now purchase the cuttings and resell the cuttings to its own customers, Yoder asserts that its distributors "have no need to take title to the product because they only submit orders to Yoder Brothers in response to specific orders which they receive from their own customers." Each order placed by a distributor is "specific to a particular grower customer." Moreover, "[t]he distributor has no risk of loss whatever in the transaction, save the credit risk, and that risk is voluntarily sought by the distributor to use as a selling device."

Declaring that the distributor's primary function of obtaining orders is the same as "the function served by a classic sales agent," Yoder states that these "essentially independent salesmen" are treated "like distributors as a legal matter because of the constraints placed on Yoder Brothers by the Final Judgment."

Under the modified definition of distributor, Yoder Brothers states that it will be able to consult with these intermediaries and develop pricing strategies for large accounts. The modified definition of "distributor" would not alter or relax the paragraph XI prohibitions against resale price maintenance. Yet, the modified definition would permit Yoder to become more competitive, it is asserted.

In its memorandum in response to the motion to modify the final judgment, the United States tentatively consented

to the entry of an order modifying the final judgment pursuant to public notice of the proposed modification followed by an opportunity for comment. On September 23, 1985, this court ordered publication of notice of the motion to modify final judgment and further ordered that copies of all comments received by plaintiff be filed with the court.

The Department of Justice received and filed with the court comments from California-Florida Plant Corporation and California Plant Corporation (successor in interest to California-Florida Plant Corporation) objecting to defendant's motion for a modification of the final judgment. The government concluded after its review of these comments that the modification "is in the public interest" and reaffirmed its consent to Yoder's motion.

II.

The court first considers the standards which apply to control a trial judge's consideration of an antitrust consent judgment modification motion where, as here, the government approves the requested modification.

In United States v. Swift & Co., 286 U.S. 106, 114 (1932), a case in which the government contested a motion for modification of a consent decree, the Court recognized that a court of equity may modify an injunction "in adaptation to changed conditions though it was entered by consent." As Justice Cardozo aptly worded the principle, a continuing decree of injunction "directed to events to come is subject

always to adaptation as events may shape the need." Id. Neither the defendant Yoder Brothers or the United States expressly rely on a claim of "changed conditions." However, Yoder Brothers does say that because "Yoder Brothers cannot safely consult with its distributors on price concessions for specific customers without running a risk of violating the Final Judgment's prohibition on 'suggesting' retail resale prices, the distributors are unable to remain price competitive for the largest, most lucrative accounts."

While referring to the 1932 teaching of Swift, supra, the parties emphasize more recent pronouncements in that case at the district court level. In 1960, Judge Hoffman declared that the underlying policy of equity jurisdiction in antitrust enforcement is "protection of the public interest in competitive economic activity," United States v. Swift & Co., 189 F.Supp. 885, 905 (N.D.Ill. 1960), aff'd., 367 U.S. 909 (1961).[4] In 1975, Judge Hoffman considered the court's role when "confronted with a stipulation entered into by that department of the Executive Branch charged with protecting the public interest in free competition." United States v. Swift & Co., 1975-1 Trade Cas. (CCH) ¶60,201 at 65,702 (N.D.Ill. 1975).

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4. See also United States v. Western Electric Co., Inc. and American Telephone and Telegraph Co., 552 F.Supp. 131, 149-51, and n.77 (D.C.D.C. 1982), aff'd, 460 U.S. 1001 (1983).

Judge Hoffman concluded that at the very least, the court is

> obligated to insure that the public and all interested parties have received adequate notice of the proposed modification, and to require that the parties place on the record reasons in support of the modification. Courts have gone further, requiring "proper supports either by way of evidence, affidavits or stipulation... that the proposed decree is in accord with the dictates of Congress...and in the public interest."

Id. at 65,703 (citations omitted).

Courts have recognized that the Attorney General is the representative of the public interest in antitrust cases brought by the government, Control Data Corp. v. International Business Machines Corp., 306 F.Supp. 839, 845 (D.Minn. 1969), aff'd, 430 F.2d 1277 (8th Cir. 1970), and that the "government is in a better position to determine what serves the public interest best." United States v. Shubert, 305 F.Supp. 1288, 1292 (S.D.N.Y. 1969). For example, in United States v. Mid-America Dairymen, Inc., 1977-1 Trade Cas. (CCH) ¶61,508 at 71,980 (W.D.Mo. 1977), the court described its deference to the Justice Department's public interest determination as follows:

> Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should...carefully consider the explanations of the government...and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.[5]

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5. The court in Mid-America acknowledged that the Department of Justice:

III.

The court now turns to the several issues raised in the submissions.

A.

In his affidavit G. Ramsey Yoder, the president and chief executive officer of Yoder Brothers, states that "to save large accounts which cannot be retained by Yoder Brothers' distributors, Yoder Brothers has been forced to utilize an internal sales force, which is not hampered by the restrictions of the Final Judgment." Through its internal sales force, Yoder Brothers "is able to offer prices which are competitive to its largest customers." However, it is pointed out that the loss

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5. Continued.

> has an appropriate range of discretion in prosecuting alleged violations of the antitrust laws and determining appropriate injunctive relief...[t]his Court may not substitute its opinion on views concerning the prosecution of alleged violations of the antitrust laws or the determination of appropriate injunctive relief for the settlement of such cases absent proof of an abuse of discretion.
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> The court concluded:
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> under all the factual data before the Court the proposed consent judgment is within the appropriate range of discretion of the Department of Justice.

1977-1 Trade Cas. (CCH) ¶61,508 at 71,980. See also United States v. National Finance Adjusters, Inc., 1985-2 Trade Cas. (CCH) ¶66,856 at 64,248 (E.D. Mich. 1985) (government did not abuse its discretion in determining a proposed modification in the public interest).

of distributors' "most valued large customers to Yoder Brothers' internal sales force over the years" has resulted in "a deterioration in Yoder Brothers' relationships with its distributors." As of today, Mr. Yoder states that distributors "account for approximately 40 percent of Yoder Brothers' chyrsanthemum revenues in the United States." Because "distributors typically attract small, new customers and develop them over the years into substantial purchasers," affiant Yoder states that

> [a]ny substantial reduction in the distributors' incentives to continue to attract and develop new customers for Yoder Brothers could have a significant, detrimental long-term impact on Yoder Brothers' prospects for future growth.

Hence, Yoder Brothers seeks the modification of the definition of "distributors" in order "to change its relationship with a distributor to a pure form of sales agency."

The United States, after examining the proposed modification in the definition of "distributor," declares:

> This change would neither permit nor facilitate anticompetitive behavior. Sales through agents generally have not been held to be resales and, therefore, urging, suggesting or requiring agents to adopt or abide by prices established by the manufacturer has not been held to constitute illegal resale price maintenance. See, e.g., Marty's Floor Covering Co. v. GAF Corp., 604 F.2d 266 (4th Cir. 1979), cert. denied, 444 U.S. 1017 (1980); Fagan v. Sunbeam Lighting Co., 303 F.Supp. 356, reconsideration denied, 1969 Trade Cas. (CCH) ¶72,978 (S.D.Ill. 1969).

In United States v. General Electric Co., 272 U.S. 476, 488 (1926), the Court reaffirmed its holding in

Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911), that the antitrust laws prohibit any attempt "to control the trade in the articles sold and fasten upon purchasers, who had bought at full price and were complete owners, an obligation to maintain prices." Thereupon, the Court added:

> We are of opinion, therefore, that there is nothing as a matter of principle, or in the authorities, which requires us to hold that genuine contracts of agency like those before us, however comprehensive as a mass or whole in their effect, are violations of the Anti-Trust Act. The owner of an article, patented or otherwise, is not violating the common law, or the Anti-Trust law, by seeking to dispose of his article directly to the consumer and fixing the price by which his agents transfer the title from him directly to such consumer.

Simpson v. Union Oil Co., 377 U.S. 13 (1964), distinguished but did not overrule United States v. General Electric Co. The Court held that a Union Oil Co. "consignment device" was "an agreement for resale price maintenance, coercively employed" and therefore illegal. As Justice Douglas observed:

> When...a consignment device is used to cover a vast gasoline distribution system, fixing prices through many retail outlets, the antitrust laws prevent calling the consignment an agency....

Id. at 21. Use of a bona fide agency system, then, remains a lawful and well-accepted means of distribution. Newberry v. Washington Post Co., 438 F.Supp. 470 (D.C.D.C. 1977).[6]

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6. Consistent with General Electric, supra, the Court later declared:

The objectors to the proposed modification contend that the agency system Yoder will employ is "in reality a method for sanctioning verticle price restraints." Upon full analysis of the record, it is concluded that the use of Yoder Brothers' distributors as sales agents, as proposed by Yoder Brothers, does not create a resale price maintenance problem. The sales agents will not assume title, dominion, or risk of loss with respect to the Yoder Brothers' plant cuttings. At all times under these indicia, ownership of the cuttings will remain with defendant Yoder Brothers.[7] Hence, as the United States says:

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6. Continued.

> Where the manufacturer retains title, dominion and risk with respect to the product and the position and function of the dealer in question are, in fact, indistinguishable from those of an agent or salesman of the manufacturer, it is only if the impact of the confinement is "unreasonably" restrictive of competition that a violation of §1 results from such confinement, unencumbered by culpable price fixing. Simpson v. Union Oil Co., 377 U.S. 13 (1964).

United States v. Arnold Schwinn & Co., 388 U.S. 365, 380 (1967), overruled on other grounds, Continental T.V., Inc. v. G.T.E. Sylvania, Inc., 433 U.S. 36 (1977). For an application of the quoted Schwinn statement, see Fagan v. Sunbeam Lighting Co., 303 F.Supp. 356, 361 (S.D.Ill. 1969).

7. This court's April 2, 1986 notice acknowledged the statement made in the comment of John H. Boone, counsel for California-Florida Plant Corporation (CFPC), that "Yoder never had 'broker-agents who do not take possession

> Where the manufacturer does not part with title, dominion or risk with respect to the product, there is no sale to the agent and hence no resale when the agent takes a customer's order. Price control by a manufacturer in the first sale of his product is not the kind that the antitrust laws seek to prohibit.

The United States declares "[w]hen a manufacturer seeks to employ a sales agency arrangement, the real issue is whether the arrangement is a sham or a vast consignment system of the sort declared unlawful in Simpson v. Union Oil Co.," supra. This court accepts the statement of the United States that "[w]e have no facts or evidence, nor has counsel proffered any to suggest that what Yoder purports to do is a sham."[8]

Of course, should a "distributor," under the modified definition, purchase and resell cuttings propagated by

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7. Continued.

or title,'" and offered counsel for CFPC the opportunity to "suppl[y] the court with discovery disclosures" to support this statement.

Counsel for CFPC did not respond to this invitation by filing the materials referred to in its comment. The court accepts the explanation of Yoder's "role in the distribution process" contained in the Yoder affidavit.

8. As the government further observes, if Yoder's agency arrangement is a sham, see Simpson v. Union, supra at 21 (1964), such conduct would continue to be prohibited by section XI of the final judgment. Such conduct would then be subject to a contempt proceeding. Moreover, any conduct that would constitute retail price maintenance would "continue to be per se unlawful under the Sherman Act regardless of the scope of the remaining judgment provisions."

Yoder or Yoder of California, then Yoder Brothers would be barred by paragraph XI of the final judgment from suggesting or in any other way affecting the resale price of the cuttings.

B.

The court now considers Yoder Brothers' avowed objective of large volume price reductions likely to result from the use of sales agents and its foreseeable competitive impact. As seen, to take advantage of the "substantial cost efficiencies" obtained by offering large volume purchasers discount prices, Yoder needs to consult with its "distributors" on these price concessions. Such discount price programs geared to large volume retailers, however, are not considered coercive price fixing arrangements when their purpose is to promote sales and not to "cripple small retailers as competitors." AAA Liquors, Inc. v. Joseph H. Seagram & Sons, Inc., 705 F.2d 1203, 1207-8 (10th Cir. 1982), cert. denied, 461 U.S. 919, (1983), followed in Lewis Service Center, Inc. v. Mack Trucks, Inc., 1983-2 Trade Cas. (CCH) ¶65,554 at 68,762-764 (8th Cir. 1983), (a sales assistance program held to have a pro-competitive effect).

In concluding his letter of objection to the proposed modification, counsel for California Florida Plant Corporation (CFPC) observes:

> Certainly if Yoder is again to be allowed to impose a vertical price fixing scheme on the industry that it has dominated for years, it should not be through clever draftsmanship. On the contrary such a clear change in antitrust enforcement should be made only after an exhaustive analysis of this industry and only with an honest admission that price fixing will now be allowed despite its clear condemnation by the courts.[9]

Noting the "concerns raised in counsel's letter," the United States reports that it has conducted a two-year investigation of the chrysanthemum industry in which it "interviewed officials of CFPC and of other major and small firms operating at each level of the chrysanthemum industry, namely, breeding, propagating, distributing

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9. Counsel for CFPC argued in his comment that "given Yoder's monopoly share of the market," the rule of reason analysis discussed in the 1985 "Department of Justice Guidelines - Vertical Distribution Restraints," 5 Trade Reg. Rep. (CCH) ¶50,473 (January 23, 1985), should be undertaken to assess the proposed modification's competitive impact.

The court notes first that in Yoder Bros., Inc. v. California-Florida Plant Corp., 537 F.2d 1347 (5th Cir. 1976), Judge Goldberg found that Yoder's market share of the relevant product market, ornamental plants, was 20 percent and that Yoder as a matter of law was not guilty of monopolization. Id. at 1368. (The judge also found that barriers to entry in the ornamental plant industry were low and conditions were highly competitive, id. at 1369).

Also, CFPC's counsel's suggestion that the Department of Justice's Vertical Restraint Guidelines are implicated by the proposed modification appears unfounded. The Guidelines address only non-price vertical restraints, and the court does not comprehend that Yoder's proposed agency arrangement creates a vertical distribution restraint.

and growing." It was "[o]nly after considering the concerns raised by CFPC and others in the industry did we conclude that the proposed modifications would not harm competition in the chrysanthemum industry."

Based on the Department's investigation set forth in the margin,[10] and upon the entire record, the court

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10. The April 11, 1986 affidavit of Department of Justice attorney Frank Seales, Jr. describes the investigation the Antitrust Division conducted "to determine if termination or modification of the Judgment would be in the public interest." Mr. Seales explains that during the course of the investigation, the Antitrust Division interviewed officials at the following:

> the United States Department of Agriculture; the United States Plant Patent Office; six firms that compete with or have competed with Yoder Brothers at the propagating level of the chrysanthemum industry; four firms that distribute or have distributed chrysanthemum cuttings bred or propagated by Yoder Brothers; and 18 firms that are present or past growers/customers of Yoder chrysanthemum cuttings.

The affidavit states that of those officials interviewed,

> only one competitor of Yoder Brothers at the propagating level, California-Florida Plant Corporation ("CFPC"), expressed opposition to termination or modification of the Judgment.... Essentially, counsel complained about the trend in the chrysanthemum industry from cut varieties toward potted varieties and Yoder Brothers' growing dominance of the potted market. Counsel cited Yoder Brothers' plant patent program as the source of concern. Counsel did not accuse Yoder Brothers of any wrongdoing involving its plant patent program, but stated that the Judgment did not go far enough in the first place to create structural changes in the chrysanthemum industry. Counsel further stated that "the consent decree had stopped BGA [but] it did little to correct the monopoly power that Yoder had been able to accumulate through the BGA system. In fact, Yoder was allowed to merely

determines that the statements and conclusions of the Department of Justice, approving the modification of the final judgment, are within its discretion. In sum, the court finds that entry of the proposed modification is consistent with the purposes of the antitrust laws

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10. Continued.

> switch its new varieties into plant patents without any period of adjustment." Counsel concluded that, "in large part [CFPC] efforts to stay competitive through lower prices have been because of the terms of the consent decree restraining the ability of Yoder to control the resale prices of the Yoder distributors. [The Yoder "monopoly power" claim is considered and rejected in n.9, supra.]

The affidavit outlines the Justice Department's "position concerning the points raised in counsel's letter":

> (1) we could not, 12 years later, renegotiate the terms of the consent decree; (2) one of the primary objectives of the action against Yoder Brothers and the dismantling of the BGA Program was to force Yoder Brothers to use the plant patent system to protect its varieties of chrysanthemum cuttings (to the extent that Yoder Brothers is now making full use of the system, an important goal of the Judgment has been accomplished); (3) substantially all of the officials we interviewed, at each level of the chrysanthemum industry, complained primarily about the impact foreign competition has had on the industry, particularly on cut varieties. We were told by one propagator that approximately 50 percent of all cut chrysanthemums consumed in this country are imports. Growers told us that the impact on the potted market is less because of U.S. Department of Agriculture restrictions on the importation of soil into this country and that shipping potted plants would be cost prohibitive; and (4) if, as a result of using an agency arrangement, Yoder derives certain efficiencies and can price its products lower than CFPC, the harm is to a competitor, not competition, which the federal antitrust laws seek to protect.

and thus is in the public interest. The motion to modify the final judgment, consented to by plaintiff United States, is therefore granted.

The following definition of distributor is substituted in II(C):

> "Distributor" means any person who purchases and resells cuttings propagated by Yoder or Yoder California.

IT IS SO ORDERED.

William K. Thomas

U.S. DISTRICT SENIOR JUDGE

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10. Continued.

Finally, the affidavit contains the Department's assessment of the responses from other officials contacted during the investigation:

> The positions of other industry firms we interviewed concerning modifications of the Judgment fell into these categories: some support modification; some think the proposal is competitively neutral; and others have no opinion one way or the other.