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United States District Court, C.D. California.
Marilyn ACTON, an individual, dba Profit-Line, etc.

v.

MERLE NORMAN COSMETICS, INC.
No. CV 88-7462-AJW.

Oct. 12, 1994.

Ronald Gold, of Murphy & Gold, Calabasas, CA, Brian R. Strange, of Strange & Hoey, Paul F. Cohen, of Law Offices of Paul F. Cohen, and Joel R. Bennett, Los Angeles, CA, for plaintiffs

Dale F. Kinsella, Michael J. Kump and Michael D. Howald, of Kinsella, Boesch, Fujikawa & Towle, Los Angeles, CA, and John J. Steele, of Fenwick, Davis & West, Palo Alto, CA, for defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

WISTRICH, United States Magistrate Judge.

*1 Defendant Merle Norman Cosmetics, Inc. ("Merle Norman") moved for summary judgment in its favor on plaintiffs' First Claim for Relief alleging actual and attempted monopolization in violation of section 2 of the Sherman Act, 15 U.S.C. § 2. The Court has considered the pleadings and other documents filed in this action and the arguments of counsel. On this basis, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Plaintiffs have owned one or more Merle Norman studios.
2. Merle Norman is a California corporation that manufactures and distributes the Merle Norman line

of cosmetics, which primarily consists of makeup products and skin care products.

3. Merle Norman distributes its cosmetics exclusively through a network of independently-owned retail stores, which are known as "Merle Norman studios."

4. Merle Norman cosmetics compete with cosmetics manufactured and distributed by others, including color and skin care products which are functionally similar to and interchangeable with the color and skin care products distributed by Merle Norman. [2 Estavillo depo. 187:11-190 (June 27, 1989); 6 Estavillo depo. 931:9-933:24 (May 9, 1990)].

5. Plaintiffs have conceded that they counted other manufacturers and distributors of cosmetics whose products are sold by department stores, drug stores, supermarkets, and on a house-to-house basis among their competitors. [See e.g., 5 Goldthread depo. 842:21-25 (August 23, 1989); 3 Goldthread depo. 375:22-376-24 (May 18, 1989); 3 Morrison depo. 343:15-344:3, 351:3-17 (June 15, 1989); 1 Aldrich depo. 17:13-22:24 (November 3, 1986)].

6. Plaintiffs' expert, Dr. Allan G. Goedde, has conceded that cosmetics sold and distributed by Merle Norman compete with cosmetics manufactured and distributed by others that are available for retail sale in department stores, drug stores, and the like. [1 Goedde depo. 30:16-31:3 (May 2, 1994); 2 Goedde depo. 284:13-25 (September 16, 1994)].

7. Plaintiffs have alleged that the relevant market consisted of the sale of cosmetic products to and by owners of "cosmetics specialty stores," namely, "specialized retail outlets that emphasize the sale of cosmetics together with the training of [retail] customers in their intelligent and appropriate use." [Third Amended Complaint, para. 14].

8. During the September 28, 1994 hearing on defendant's motion for summary judgment, plaintiffs'

counsel stated that plaintiffs did not intend to pursue their claim under section 2 of the Sherman Act based upon the relevant market pleaded in the Third Amended Complaint, namely, the relevant market alleged in paragraph 14 of the Third Amended Complaint.

Not Reported in F.Supp., 1994 WL 706740
(C.D.Cal.), 1994-2 Trade Cases P 70,784

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CONCLUSIONS OF LAW

1. This Court has subject matter jurisdiction over this action. 28 U.S.C. § 1337.

2. Plaintiffs' claim for actual monopolization under section 2 of the Sherman Act requires proof of monopoly power in the relevant market, and plaintiff's claim for attempted monopolization under section 2 of the Sherman Act requires proof that there was a dangerous probability that Merle Norman would succeed in monopolizing the relevant market. *Thurman Industries, Inc. v. Pay 'N Pak Stores, Inc.*[1989-1 TRADE CASES ¶ 68,592], 875 F.2d 1369, 1373 (9th Cir.1989); *McGlinchy v. Shell Chemical Co.*[1988-1 TRADE CASES ¶ 67,973], 845 F.2d 802, 811 (9th Cir.1988).

*2 3. Plaintiffs bear the burden of proving the appropriateness of the relevant market on which their claims are based. *Thurman Industries, Inc.*, 875 F.2d at 1380.

4. The provision of point of sale services in connection with the sale of a product is not sufficient to establish a separate relevant product market where the product competes with similar products offered without such service. *Thurman Industries, Inc. v. Texaco, Inc.*[1982-83 TRADE CASES ¶ 65,029], 691 F.2d 1303, 1306-08 (9th Cir.1982).

5. The relevant market alleged by plaintiffs in paragraph 14 of the Third Amended Complaint is not an appropriate relevant market upon which claims for actual or attempted monopolization under section 2 of the Sherman Act may be based.

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