

Modifying Order

92 F.T.C.

IN THE MATTER OF

RUBBERMAID INCORPORATED

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT*Docket 8939. Complaint, Sept. 5, 1973 — Modifying Order, Aug. 17, 1978*

This order reopens proceedings and modifies the cease and desist order issued on April 13, 1976, 41 FR 20161, 87 F.T.C. 676, by replacing Sections III and IV of the original order. The modification eliminates the requirement to send copies of the order to resellers of firm's products; provides a description of the required notice to be sent to resellers; and places the responsibility of sending such notice to indirect resellers on company's distributors.

ORDER MODIFYING ORDER TO CEASE AND DESIST

On August 7, 1978, respondent and complaint counsel jointly petitioned the Commission to reopen this proceeding to modify Sections III and IV of the order to cease and desist which issued on April 13, 1976, and became final on August 7, 1978.¹

Section III of the order requires that respondent provide its direct and indirect resellers a copy of the order and a notice describing generally respondent's policy relating to resale prices. Section III further provides that those customers terminated because they failed to comply with any refusal-to-deal provision, will be extended an offer to be reinstated. Finally, Section III provides for the treatment of complaints relating to the provisions of the notice.

Section IV requires respondents, for a period of five years, to send a copy of the order to new resellers to whom it directly sells.

By the proposed modification the order would describe the content of the notice to be sent to resellers and would relieve respondent of the requirement that it send a copy of the order to resellers. The proposed modification would further provide that respondent's distributors, rather than respondent, send notices to indirect resellers.

Because of the repeal of the McGuire Act and the consequent end of state-sanctioned resale price maintenance, several of the provisions in the order and the notice to be sent resellers are no longer relevant and would likely be misunderstood by resellers of respondent's products. As a further result of the abandonment of state-sanctioned resale price maintenance, respondent no longer is required to, nor does it, retain the names of indirect purchasers.

¹ Petitioners also filed on August 8, 1978, a Joint Motion for Suspension of Compliance. This order obviates the necessity for the requested suspension of compliance and therefore the motion is rejected.

These changed conditions of fact and law warrant the modifications requested by respondent and complaint counsel.

Accordingly,

It is ordered, That the proceeding be, and it hereby is, reopened.

It is further ordered, That the order to cease and desist be, and it hereby is, modified by substituting for Sections III and IV of the order, the following:

III

It is further ordered, That respondent shall:

1. Within sixty (60) days from the date upon which this order becomes final:

(a) mail or deliver to all resellers which purchase directly from respondent a copy of the notice attached as Exhibit A, and execute an affidavit so stating; and

(b) mail or deliver to each of respondent's wholesalers sufficient additional copies of the notice attached hereto as Exhibit A and request such wholesalers

(i) to mail or deliver these notices to each reseller of respondent's goods with whom they deal; and

(ii) to affirm to respondent in writing that they have made the distribution of these notices as requested.

2. Within sixty (60) days from the date upon which this order becomes final, mail or deliver, and obtain a signed receipt for, a copy of the notice attached as Exhibit A and a written offer of reinstatement, to every reseller who has been terminated by, at the request of, or with the participation of respondent since January 1, 1966, for failure to comply with any refusal to deal provision of his contract, and reinstate forthwith any such reseller who within thirty (30) days thereafter requests reinstatement.

3. Immediately upon receipt, take such action as may be proper to insure correction of any complaints concerning the unavailability of Rubbermaid products to any reseller as a result of such reseller's pricing or customer selection policies or practices and retain such complaints and records of corrective action taken thereon for a period of five (5) years from the date on which each complaint is received. Reports of said complaints and of corrective action taken shall be included in reports to the Commission required by Paragraph V. 1. of this order.

IV

It is further ordered, That respondent shall:

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1. Fully acquaint all appropriate present and future personnel with the provisions and the requirements of this order.
 2. For a period of five (5) years from the date of this order, mail or deliver a copy of the notice attached as Exhibit B to all new resellers to whom respondent directly sells.
- Commissioner Pitofsky did not participate.

EXHIBIT A

TO: All Rubbermaid Wholesalers and Retailers

SUBJECT: Discontinuance of Fair Trade Program

On June 10, 1975, we notified you that the Rubbermaid fair trade program was discontinued effective July 1, 1975. Pursuant to an order of the Federal Trade Commission, this is to remind you that since that time you have been free to sell all Rubbermaid products to such customers and at such prices as you see fit. Any contrary suggestions from any source are unauthorized and should be promptly reported to the company. It is Rubbermaid's policy to distribute its goods through its wholesalers and retailers without regard either to the resale prices charged by such wholesalers and retailers or to the customers to whom they resell.

We look forward to serving you in the future as we have in the past. We feel certain that Rubbermaid will continue to represent an excellent source of sales volume to you and will continue to represent good value and a brand name to be depended upon by consumers.

Cordially yours,

E.C. Donaldson
Vice President
Marketing

EXHIBIT B

TO: All New Rubbermaid Wholesalers and Direct Purchasing Retailers

SUBJECT: Sales of Rubbermaid Products

We look forward to serving you and welcome you as a Rubbermaid customer. We wish to emphasize that all Rubbermaid wholesalers and retailers are free to sell all Rubbermaid products to such customers and at such prices as they see fit. Any contrary suggestions from any source are unauthorized and should promptly be reported to the company.

We feel certain that Rubbermaid will represent an excellent source of sales volume to you and will represent good value and a brand name to be depended upon by your customers.

Yours truly,

E.C. Donaldson
Vice President
Marketing

Interlocutory Order

IN THE MATTER OF

JAMES B. LANSING SOUND, INC.

Docket C-1785. Interlocutory Order, Aug. 29, 1978

ORDER DENYING PETITION TO REOPEN

By petition of April 14, 1978, supplemented by reply memorandum of June 23, 1978,¹ respondent James B. Lansing Sound, Inc. (JBL) requests that a consent order issued against JBL on August 24, 1970 be modified to prohibit certain non-price vertical restrictions only when these restrictions are engaged in for the purpose of or with the effect of controlling retail prices.² JBL contends that changed conditions of law as well as the public interest warrant such a change. In particular, respondent relies upon the decision in *Continental T.V., Inc. v. GTE Sylvania*, 433 U.S. 36 (1977), and the presence of "vibrant intra-brand [sic] competition in the relevant product market" to support the requested modification. After due consideration of JBL's contentions, the Commission has determined to deny the petition.

As the Commission recently stated, *Sylvania* did not legalize territorial, customer, or other non-price vertical restrictions.³ Rather, the court simply directed that non-price vertical restrictions which are not part of a larger price-fixing scheme be scrutinized under the rule of reason when challenged under the Sherman Act.⁴ A respondent seeking relief from order prohibitions against vertical

¹ Respondent's motion for leave to file a reply memorandum is granted.

² The Commission's order [77 F.T.C. at 1168] currently requires JBL to cease and desist from:

1. Entering into, maintaining or enforcing any contract, agreement, combination, understanding or course of conduct which has as its purpose or effect the fixing, establishing or setting of the prices at which its independent dealers or distributors may resell their products; *provided, however*, that nothing contained herein shall be construed to prevent respondent from engaging in a legitimate fair trade program in those states having fair trade laws.

2. Preventing or prohibiting any independent dealer or distributor from reselling his products to any person or group of persons, business or class of businesses, except as may be expressly provided herein.

3. Preventing or prohibiting any independent dealer or distributor from soliciting sales outside of his market area.

4. Requiring its independent dealers or distributors to make their sales records available to respondent for inspection.

Respondent requests that the following language be inserted in lieu of Paragraphs 2, 3, and 4:

2. Engaging in any of the following activities for the purpose of or which have the effect of controlling the retail prices at which its products are sold or advertised:

(a) Preventing or prohibiting any independent dealer or distributor from reselling his products to any person or group of persons, business or class of businesses.

(b) Preventing or prohibiting any independent dealer or distributor from soliciting sales outside of his market area.

(c) Requiring its independent dealers or distributors to make their sales records available to respondent for inspection.

³ See Commission letter of May 19, 1978 to David J. Cynamon, Esq., regarding Performance Sailcraft, Inc., File No. 771 0027 at 2 ("Cynamon letter").

⁴ The *Sylvania* Court noted that the jury had rejected the allegation that Sylvania's location restriction was part of a larger scheme to fix prices and characterized this finding as "[m]ost important." 433 U.S. at 41 n.9.