

Complaint

IN THE MATTER OF
TOWLE MANUFACTURING COMPANY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT

Docket C-3029. Complaint, July 29, 1980—Decision, July 29, 1980

This consent order requires, among other things, a Newburyport, Mass. manufacturer, importer and distributor of silver products to cease establishing, maintaining or enforcing any agreement or arrangement with its dealers that has the effect of fixing and enforcing resale prices for its products and conditioning retention of dealerships on adherence to suggested resale prices. The firm is prohibited from inducing dealers or prospective dealers to report those who fail to adhere to suggested resale prices and barred from taking adverse action against reported dealers. Materials containing resale pricing information must include a statement advising that dealers are not bound to listed prices. Respondent is further required to reinstate those dealers who were terminated for failing to comply with the firm's pricing policy and maintain a file containing specified data for a period of three years.

Appearances

For the Commission: *Harold F. Moody and William F. Connolly.*

For the respondent: *John R. Hally, Nutter, McClennen & Fish,*
Boston, Mass.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Towle Manufacturing Company, a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. For purposes of this complaint the following definition shall apply:

"Dealer" means any person, partnership, corporation or other business entity who purchases Towle Manufacturing Company products for resale.

PAR. 2. Respondent Towle Manufacturing Company is a corporation organized, existing and doing business under and by virtue of

the laws of the Commonwealth of Massachusetts, with its office and principal place of business located at 260 Merrimac St., Newburyport, Massachusetts.

PAR. 3. Respondent has been and is now engaged in the manufacture, importation, distribution, and sale of silverware, plated ware and stainless steel ware including, but not limited to, sterling silver flatware and hollowware, silver plated and pewter hollowware, stainless steel flatware, cutlery, sterling silver jewelry, candlesticks, hurricane lamps, napkin rings, table trays and table mats. Said products are subsequently distributed and sold to dealers throughout the United States for resale to the general public. Gross sales by respondent for fiscal year 1976 exceeded \$30,000,000.

PAR. 4. Respondent distributes and sells its products to dealers located in all fifty states and the District of Columbia, through salespersons and sales representatives who act under the direction and control and carry out the policies of respondent.

PAR. 5. In the course and conduct of its business as aforesaid, respondent causes and has caused said products to be shipped from the state in which they are manufactured to purchasers in other states. Respondent maintains, and at all times mentioned herein has maintained, a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 6. Except to the extent that competition has been hampered, hindered, lessened or restrained as set forth in this complaint, respondent has been and is now in competition with other persons, firms, and corporations engaged in the manufacture, importation, sale, and distribution of sterling silver flatware and hollowware, silver plated and pewter hollowware, stainless steel flatware, cutlery, sterling silver jewelry, candlesticks, hurricane lamps, napkin rings, table trays and table mats in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 7. Respondent, in combination, agreement or understanding with certain of its dealers, or with the cooperation or acquiescence of other of its dealers, has for the last several years been engaged in a course of action to fix, establish, and maintain certain resale or retail prices at which said products are resold to the general public. In furtherance of said course of action, respondent has for the last several years been engaged in the following acts and practices, among others:

- (a) Establishing agreements, understandings or arrangements

with its dealers, as a condition precedent to the granting or retention of a dealership, that such dealers will sell respondent's products only at prices dictated by respondent;

(b) Informing certain of its dealers, by direct and indirect means, that respondent expects and requires such dealers to maintain and enforce certain resale or retail prices, or such dealerships will be terminated;

(c) Obtaining from its dealers cooperation and assistance in identifying and reporting dealers who advertise, offer to sell, or sell respondent's products at prices other than those dictated by respondent;

(d) Directing or requiring salespersons, sales representatives, and other employees or agents of respondent to secure and report information identifying dealers who advertise, offer to sell or sell respondent's products at prices below the prices established or suggested by respondent;

(e) Communicating with certain dealers who fail to sell respondent's products at those prices dictated by respondent and securing, or attempting to secure, assurances from such dealers that they will adhere to and observe those prices dictated by respondent;

(f) Threatening to terminate certain dealers who fail or refuse to observe and maintain the prices dictated by respondent, or who advertise respondent's products at resale prices below the prices established or suggested by respondent;

(g) Requiring certain of its dealers to agree not to sell or otherwise supply or furnish its products to other dealers; and

(h) Regularly furnishing dealers with price lists and supplements thereto containing resale prices for respondent's products.

PAR. 8. By means of the aforesaid acts and practices, respondent, in combination, agreement, or understanding with certain of its dealers and with the acquiescence of other of its dealers, has established, maintained and pursued a course of action to fix and maintain prices at which respondent's products will be resold.

PAR. 9. The aforesaid acts and practices of respondent have had the effect of hindering, lessening, restricting, restraining and eliminating competition in the resale and distribution of said products, and, thus, are to the prejudice and injury of the public, and constitute unfair methods of competition and unfair acts and practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

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 Boston Regional Office 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, 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 has violated the said Act, and that complaint should issue stating its charges in that respect, and having such agreement on the public record for a period of sixty (60) days, 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 Towle Manufacturing Company is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its office and principal place of business located at 260 Merrimac St., in the city of Newburyport, Commonwealth of Massachusetts.

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

Definition

For purposes of this Order the following definition shall apply:

"Dealer" means any person, partnership, corporation or other business entity who purchases Towle Manufacturing Company products for resale.

I

It is ordered, That Towle Manufacturing Company, a corporation, its successors and assigns, and its officers, and respondent's agents, representatives and employees, directly or through any corporation, subsidiary, division or other device in connection with the manufacture, importation, distribution, offering for sale or sale of sterling silver flatware and hollowware, silver plated and pewter hollowware, stainless steel flatware, cutlery, sterling silver jewelry, candlesticks, hurricane lamps, napkin rings, table top trays, tabletop mats, or other products in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

1. Entering into, maintaining, or enforcing any contract, agreement, understanding, arrangement, combination, or course of conduct which fixes, maintains, establishes, sets or enforces the price at which dealers sell any of respondent's products.

2. Requiring any dealer or prospective dealer to enter into any oral or written agreement or understanding that such dealer or prospective dealer will adhere to any resale price for any of respondent's products as a condition to receiving or retaining its dealership.

3. Refusing to sell or threatening to refuse to sell, either directly or indirectly, to any dealer or prospective dealer who desires to engage in the sale of respondent's products for the reason that such dealer will not enter into an understanding or agreement with respondent to advertise or sell any of respondent's products at only those prices established or suggested by respondent.

4. Securing or attempting to secure any promises or assurances, either directly or indirectly, from any dealer or prospective dealer regarding the prices at which such dealer will advertise or sell any of respondent's products, or requesting any dealer or prospective dealer, either directly or indirectly, to obtain approval from respondent for the price offered by said dealer in any advertisement for any of respondent's products.

5. Requesting or requiring any dealer or prospective dealer, either directly or indirectly, to report any dealer who does not sell any of respondent's products at any particular price, or acting on a report so obtained by refusing or threatening to refuse sales to any dealer so reported, or otherwise to discriminate against any such dealer.

6. Directing or requiring respondent's salesmen, or any other agents, representatives, or employees, directly or indirectly, to

report dealers who do not sell any of respondent's products for any particular price, or to act on such a report by refusing or threatening to refuse sales to any dealer so reported.

7. Refusing to sell or threatening to refuse to sell any of respondent's products to any dealer for the reason that said dealer had been reported as not adhering to or observing those prices established or suggested by respondent.

8. Requiring from any dealer charged with price cutting or failure to adhere to any particular price, either directly or indirectly, promises or assurances of the observance of any particular price as a condition precedent to future sales to said dealer.

9. Terminating, threatening, intimidating, coercing, delaying shipments, or taking any other action to prevent or hinder the sale of any of respondent's products by a dealer because said dealer has advertised or sold, is advertising or selling, or is suspected of advertising or selling any of respondent's products at other than prices that respondent has dictated.

10. Requiring or inducing by any means, any dealer or prospective dealer to refrain or to agree to refrain from reselling any of respondent's products to any other dealer.

11. Requiring, directly or indirectly, any dealer to resell to respondent any unsold stock of any of respondent's products in the event that business relations between respondent and the dealer are terminated; provided that respondent shall not be prohibited from repurchasing such unsold stock with the consent of the dealer, or where respondent has a "security interest" in said products or where the dealer is unable to meet its financial obligations to the respondent.

12. Publishing, disseminating, circulating or providing by any other means, any resale price for any of respondent's products unless it is clearly and conspicuously stated on each page of any price list, book, tag, advertising or promotional material or other document that the price is "suggested" and that the dealer is free to sell respondent's products at whatever price he chooses.

II

It is further ordered, That respondent herein shall, within thirty (30) days after service upon it of this Order, mail or deliver, and obtain a signed receipt therefor, a copy of this Order to every present dealer, to every dealer terminated by respondent since January 1, 1974, unless respondent can establish that the dealer terminated did not at the time of termination have good credit or reasonably

adequate facilities for selling respondent's products, and for a period of three (3) years from the date of service of this Order, to every new dealer within ten days of receipt of the first Order from said dealer, under cover of the letter annexed hereto as Exhibit A.

III

It is further ordered, That respondent shall within sixty (60) days from the date of service of this Order, mail or deliver and obtain a signed receipt therefor, a written offer of reinstatement, upon the same terms and conditions available to respondent's other dealers, to any dealer who was terminated by respondent from January 1, 1974, to the date of service of this Order, unless respondent can establish that the applicant does not or did not at the time of termination have good credit or that the dealer does not have reasonably adequate facilities for selling respondent's products, and forthwith reinstate any such dealer who within thirty (30) days thereafter requests, in writing, reinstatement.

IV

It is further ordered, That respondent herein shall within thirty (30) days of service upon it of this Order, distribute a copy of this Order to each of its operating divisions and subsidiaries and to all officers, sales personnel, sales agents and sales representatives, and secure from each such entity or person a signed statement acknowledging receipt of said Order.

V

It is further ordered, That respondent:

1. Notify the Commission at least thirty (30) days prior to any proposed change in the respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other such change in the corporation which may affect compliance obligations arising out of the Order.
2. For a period of three (3) years from the date this Order becomes final, establish and maintain a file of all records referring or relating to respondent's refusal during such period to sell its products to any dealer, which file shall contain a record of a communication to each such dealer explaining respondent's refusal to sell, and which file will be made available for Commission inspection on reasonable notice.

VI

It is further ordered, That the respondent herein shall, within sixty (60) days after service upon it of this Order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with the Order.

EXHIBIT A

(Letterhead of Towle Manufacturing Company)

Dear Dealer:

Towle Manufacturing Company has entered into an agreement with the Federal Trade Commission relating to the distributional activities and pricing policy of Towle. A copy of the consent order entered into pursuant to that agreement is enclosed herewith.

Towle has entered into this agreement solely for the purpose of settling a dispute with the Commission, and the agreement and consent order is not to be construed as an admission by Towle that it has violated any of the laws administered by the Commission, or that any of the allegations in the complaint are true and correct. Instead, the order merely relates to the activities of Towle in the future.

In order that you may readily understand the terms of the consent order, we have set forth the essentials of the agreement with the Commission, although you must realize that the consent order itself is controlling rather than the following explanation of its provisions:

- (1) Our dealers are free to set their own resale prices for our products.
- (2) Towle will not solicit, invite or encourage dealers, or any other persons to report any dealer not following any resale price for any of said products, and, furthermore, will not act on any such reports sent to it.
- (3) Towle will not require or induce its dealers to refrain from advertising said products at any price or from selling or offering said products at any prices to any person.

Sincerely yours,

Edward W. Mulligan
President

Enclosure

Interlocutory Order

IN THE MATTER OF

KELLOGG COMPANY, ET AL.

*Docket 8883. Interlocutory Order, July 31, 1980*DENIAL OF MOTION TO DISQUALIFY ADMINISTRATIVE LAW JUDGE
BERMAN

ORDER

The Commission has before it a variety of motions and requests filed by respondents, including: (i) the motion of respondent Kellogg Company ("Kellogg"), dated July 20, 1979, for reconsideration of the Commission's Order dated December 8, 1978, in which the Commission concluded that Administrative Law Judge Harry R. Hinkes became "unavailable" within the meaning of 5 U.S.C. 554(d) (1976) upon his retirement on September 8, 1978; (ii) Kellogg's motion, dated January 31, 1980, to disqualify Administrative Law Judge Alvin L. Berman from presiding in this proceeding and for related discovery, which was certified to the Commission by Judge Berman on February 12, 1980; (iii) the request of respondent General Mills, Inc. ("General Mills"), dated April 3, 1980, for discovery and an evidentiary hearing regarding the "unavailability" of Judge Hinkes; (iv) Kellogg's request, dated April 3, 1980, that the Commission rescind its December 8, 1978, Order and direct a retrial of this proceeding or, in the alternative, that the Commission order an evidentiary hearing and allow depositions of 21 persons, and that an ALJ not currently employed by the Commission be appointed to preside over such proceedings; and (v) the motion of General Foods Corporation ("General Foods") dated April 3, 1980 for dismissal of the complaint, which allegedly is required "as a result of the Commission's actions in connection with the retirement and contractual reemployment of former Administrative Law Judge Harry R. Hinkes."¹

After reviewing the relevant procedural history, we shall first consider Kellogg's motion to disqualify Judge Berman and shall then turn to the various issues raised by Kellogg's July 20, 1979, motion for reconsideration of the Commission's Order of December 8, 1978, and the respondents' April 3, 1980, motions and requests.

¹ In addition, on June 9, 1980, Judge Berman certified to the Commission the question of whether he had authority to establish a briefing schedule in the principal proceeding on the merits while the Commission conducted the inquiry into the circumstances of Judge Hinkes' retirement. We agree with Judge Berman that the Commission's inquiry is collateral to the merits, and we affirm his authority to adopt the briefing schedule he has decided upon. We also grant his request for an extension of the time within which the initial decision may be filed.