

Complaint

96 F.T.C.

IN THE MATTER OF
MILTON BRADLEY COMPANY

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

Docket C-3046. Complaint, Oct. 16, 1980—Decision, Oct. 16, 1980

This consent order requires, among other things, a manufacturer of art materials, located in Springfield, Mass., to cease fixing the prices of its products. The firm is required to establish interest-bearing escrow accounts for the purpose of making restitution to consumers for purchases of certain school art materials. Further, the firm is required to distribute consumer redress funds to any state institutions which purchased said products; the FTC, with the cooperation of the State Attorney General, will distribute the respective funds in lump-sum amounts to each of the states which satisfy the application requirements for receiving the money.

Appearances

For the Commission: *Susan L. Belman.*

For the respondent: *Richard G. Schultz, Foran, Wiss & Schultz,*
Chicago, Ill.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondent has violated the Federal Trade Commission Act, and that a proceeding by it in respect thereof would be in the public interest issues this complaint.

RESPONDENT

1. Respondent Milton Bradley Company is a Massachusetts corporation, with its principal office located at 1500 Main St., Springfield, Massachusetts.

2. At all times relevant to this complaint, respondent has been engaged in the manufacture, offering for sale, sale, and distribution of chalks, crayons, watercolors or tempera paints.

COMMERCE

3. Respondent has maintained a substantial course of business, including the acts and practices alleged in this complaint, in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended.

COMPETITION

4. In the course and conduct of its business, and at all times mentioned herein, respondent has been in competition with other corporations, firms, or individuals engaged in the manufacture, offering for sale, sale and distribution of chalks, crayons, watercolors or tempera paints, except to the extent that competition has been restrained by the acts and practices alleged in this complaint.

NATURE OF THE OFFENSE

5. In the course and conduct of its business, for some years continuing into 1976, respondent and other manufacturers of chalks, crayons, watercolors or tempera paints, communicated with each other prices which were to be contained in proposed price lists for those products, and entered into a horizontal agreement, conspiracy, planned common course of action, or series of horizontal arrangements to fix, stabilize, maintain, or tamper with the manufacturers' price structure of chalks, crayons, watercolors or tempera paints at the primary level of distribution.

Thus, respondent has engaged in unfair acts or practices in violation of Section 5(a)(1) of the Federal Trade Commission Act.

EFFECTS

6. The capacity, tendency or effect of the above conduct of respondent was to:

(a) Fix, control, establish or maintain the prices at which various of respondent's chalks, crayons, watercolors or tempera paints are sold.

(b) Artificially inflate the price paid by consumers for various of respondent's chalks, crayons, watercolors or tempera paints.

(c) Deprive consumers of prices determined by free and open competition and of the other benefits of competition.

7. The acts and practices of respondent alleged here constitute unfair acts or practices in violation of Section 5(a)(1) of the Federal Trade Commission Act.

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 Cleveland Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with a violation of the Federal Trade Commission Act; and

The respondent, and its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, dated January 25, 1980, and modified as of August 18, 1980, 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 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 thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, 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 Milton Bradley Company is a Massachusetts corporation, with its principal office located at 1500 Main St., in the City of Springfield, State 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

As used in this order:

(a) "*Person*" means any individual, partnership, firm, corporation, association, business or other legal entity.

(b) "*State*" means a state, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, the Northern Mariana Islands, and any other territory of the United States.

(c) "*State Institution*" means any state agency, instrumentality, or institution or any political subdivision thereof, including, but not limited to, any county, city, town, municipality, or school district.

(d) "*Art materials*" means any of the following products: adhesives

(including art and craft glue and white paste), brushes, chalks (including art, chalkboard and industrial chalk), crayons (including drawing, checking, and marking crayons), modeling clays, oil pastels, paints (including finger paint, finger paint powder, tempera, poster paint, watercolors, and transparent, powder, and textile paints), watercolor markers, stencil brushes, chalkboard cleaner, stencil knives, modeling material, excello squares, ink (including printing ink), linoleum blocks, linoleum, media mixer, acrylics, and paper trimmers.

(e) "*Respondent*" means the Milton Bradley Company, a Massachusetts corporation, its subsidiaries and divisions, with its principal office located at 1500 Main St., Springfield, Massachusetts 01115.

I

It is ordered. That respondent, its successors and assigns, and its officers, and respondent's agents, representatives, and employees, directly or indirectly, or through any corporation, subsidiary, division or other device, in connection with the manufacture, offering for sale, sale or distribution of art materials in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from directly or indirectly:

(1) Entering into, maintaining, or enforcing any agreement, combination, understanding or plan with any competitor to fix, determine, establish, or maintain the prices, discounts or other terms or conditions for the sale of art materials.

(2) Submitting any bid to any customer or prospective customer for the sale of any art materials when any price, term or condition of sale or any element contained in such bid was discussed with, disclosed to, or received from, directly or indirectly, any competitor, actual or potential.

(3) Circulating or sending to, or exchanging with, any other person who manufactures, distributes, markets or sells art materials, any price list, price quotation or pricing factor applicable to art materials—except for price lists, price quotations, or pricing factors provided to or received from any person in the course of, and solely related to, negotiating for, entering into, or carrying out bona fide sales or potential sales by respondent directly to such person—in advance of the printing, publication, effectuation, circulation or communication of such price lists, price quotations, or pricing factors to customers generally.

(4) Communicating or exchanging with any other person who manufactures, distributes, markets, or sells art materials, any actual

or proposed price, price change, discount, or other term or condition of sale at or upon which art materials are to be, or have been, sold—except for such information provided to or received from any person in the course of, and solely related to, negotiating for, entering into, or carrying out bona fide sales or potential sales by respondent directly to such person—prior to the communication of such information to customers generally.

(5) Disclosing to, or communicating to, any other person who manufactures, distributes, markets, or sells art materials:

(a) respondent's intention to submit, or not to submit, a bid to any purchaser,

(b) the fact that a bid has or has not been submitted prior to the communication of such information to the general public, or

(c) the content of any bid prior to the communication of such information to the general public;

except that, in declining to furnish a price quotation to a distributor to be used in connection with a particular bid, respondent may disclose that the reason for such refusal is respondent's intention to bid directly.

Nothing in Section I shall be construed to prevent New England School Supply, a division of Milton Bradley Company, from carrying out its ordinary, lawful course of business, which business is limited to the secondary level of distribution and includes the purchasing of art materials and other educational products from Milton Bradley Company, Milton Bradley's competitors, and others, and the resale and distribution of such materials to the school and commercial markets. However, respondent shall not use New England School Supply, nor any distributor, as an instrument or medium to achieve, accomplish, promote or engage in any of the acts or practices described in the paragraphs (1) through (5) of Section I or in any way to circumvent the prohibitions contained in Section I of this order, all of which prohibitions are intended to address conduct between horizontal competitors.

II

It is further ordered, That, for a period of five (5) years from the date of entry of this order, respondent shall preserve all written price computations and other written calculations actually performed by respondent in the preparation and submission of any bid required to be sealed which is submitted to any actual or potential

purchaser of art materials. Respondent shall retain such written computations and calculations for a period of at least five (5) years from the date each bid which is based on such computations or calculations is submitted to any purchaser.

Section II of this order shall not apply to New England School Supply, a division of the Milton Bradley Company, in New England School Supply's ordinary, lawful course of business, which business is limited to the secondary level of distribution and includes the purchasing of art materials and other educational products from Milton Bradley Company, Milton Bradley's competitors, and others, and the resale and distribution of such materials to the school and commercial markets.

III

It is further ordered, That respondent shall not issue any instructions or directions respecting the Escrow Account to the Federal Trade Commission or its designee, or to the Escrow Agent, with respect to the performance of their duties. These duties shall be pursuant to this order and to the Escrow Instructions, and shall include, but not be limited to, the investment of the property held by the Escrow Agent, the disbursement of the property held by the Escrow Agent, and compliance with any written directions of the Federal Trade Commission or its designee. Respondent shall not exercise any control over the property in the Escrow Account.

IV

It is further ordered, That:

(1) Respondent shall submit to the Federal Trade Commission, within thirty (30) days after the date this order is served on respondent, a notarized affidavit executed by a duly authorized officer of respondent listing, to the best of its knowledge, the names of all the states within which any state institutions made purchases of respondent's chinks, crayons, watercolors or tempera paints during any of the years 1972 through 1976, inclusive.

(2) As it has been determined by the Federal Trade Commission that the most readily identifiable and most significantly affected market consists of the school art materials purchasers, the purpose of the Escrow Account established pursuant to agreement paragraphs 8, 9, 10, 11 and Section III of this order is to disburse the consumer redress funds to any state institutions that purchase

chalks, crayons, watercolors or tempera paints for schools and are located in a state listed pursuant to Section IV(1) of this order.

(3) The Federal Trade Commission or its designee shall determine the appropriate recipients of funds in the Escrow Account, the sum paid to each recipient, and the most appropriate method to distribute the funds, taking into consideration the amount of funds available, the administrative feasibility and costs of disbursement, and the purposes of the Escrow Account, and shall instruct the Escrow Agent to distribute the funds in accordance with its determination.

(4) Funds to be distributed pursuant to Section IV of this order shall be paid out of the Escrow Account within three (3) years after the date of service of this order.

V

It is further ordered, That respondent:

(1) Serve within sixty (60) days after the date this order becomes final, a copy of this order upon each of its officers and directors, and upon each of its employees and agents who have any responsibility for establishing prices, discounts or other terms or conditions for the sale of art materials.

(2) Within sixty (60) days after service upon them of this order, file with the Federal Trade Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

(3) Notify the Commission at least thirty (30) days prior to any proposed change in the respondent which may affect compliance obligations arising out of this order.

APPENDIX A

To: Continental Illinois National Bank
and Trust Company of Chicago
Trust and Investment Services
Corporate Trust Division, Escrow Section
30 North LaSalle Street—10th Floor
Chicago, Illinois 50593

The following property is deposited with you by the undersigned:

Two Hundred Thousand Dollars (\$200,000)

As Escrowee, you are hereby directed to hold, deal with and dispose of the aforesaid property and any other property at any time held by you hereunder in the following manner subject, however, to the terms and conditions hereinafter set forth:

A. In the event you are notified in writing by the Federal Trade Commission (hereinafter called the "FTC") or its designee that it has accepted the Agreement Containing Consent Order to Cease and Desist entered into between Milton Bradley Company (hereinafter called the "Company") and the staff of the Cleveland Regional Office of the Federal Trade Commission, dated January 25, 1980, and that the FTC has issued a Decision and Order in the Matter of Milton Bradley Company, a corporation, you will hold the property and any other property at any time held by you hereunder (hereinafter called the "Property") until directed in writing by the FTC or its designee to distribute the Property, in which event the Property shall be distributed in accordance with its instructions. In addition to deducting such fees, costs and expenses as incurred by you under paragraphs 7 and 8 hereof, you also will pay from the Property, as directed in writing by the FTC or its designee, such sums as you are authorized by the FTC or its designee to pay for the administration of the distribution scheme established by the FTC or its designee pursuant to the Agreement Containing Consent Order to Cease and Desist and the Decision and Order. In addition, you shall execute such contracts regarding administration and distribution of the Escrow Account as the FTC or its designee directs. Subject to this paragraph, this Escrow will terminate upon the disbursement of all the Property pursuant to the written direction of the FTC or its designee.

B. In the event the FTC or its designee notifies you that it has determined not to accept the Agreement Containing Consent Order to Cease and Desist and to issue a Decision and Order as provided in Paragraph A, this Escrow will terminate and the Property will be returned by you to the Company not later than ten days after receipt of written notice from the FTC or its designee that the Agreement was not accepted.

C. Upon receipt of the Property you will invest the proceeds in either certificates of deposit other than certificates of deposit of Escrowee, or obligations of the United States Government or its agencies, either of which will have maturity not exceeding six (6) months from date of purchase. You will invest the Property with the aim of securing principal, while maximizing interest income. In the exercise of your sound discretion, if you determine it necessary to sell any or all of the Property prior to maturity and invest the proceeds in either other certificates of deposit or obligations of the United States Government or its agencies, you may do so.

D. Upon maturity of any of the Property you will invest the proceeds in either additional certificates of deposit other than certificates of deposit of Escrowee, or obligations of the United States Government or its agencies, either of which will have maturity not exceeding six (6) months from date of purchase. You will invest the proceeds with the aim of securing principal, while maximizing interest income. In the exercise of your sound discretion, if you determine it necessary to sell any or all of the Property prior to maturity and invest the proceeds in either other certificates of deposit or obligations of the United States Government or its agencies, you may do so.

E. You will send the FTC or its designee, monthly cash and asset statements of this Escrow Account.

F. These Escrow instructions may be amended any time by a document duly executed by the FTC or its designee entitled "Amendment to Escrow Instructions" to which you acknowledge receipt.

G. If the FTC decides to use a designee, you will not act pursuant to such designee's orders, until you receive a certified copy of the order of the FTC naming such designee.

Decision and Order

96 F.T.C.

Terms and Conditions

1. Your duties and responsibilities shall be limited to those expressly set forth in these Escrow Instructions, and you shall not be subject to, nor obliged to recognize, any other agreement between, or direction or instruction of, any or all of the parties hereto even though reference thereto may be made herein; *provided, however*, with your written consent, these Escrow Instructions may be amended at any time or times by an instrument in writing signed by the FTC or its designee.

2. You are authorized, in your sole discretion, to disregard any and all notices or instructions given by any of the undersigned or by any other person, firm or corporation, except only such notices or instructions as are hereinabove provided for and orders or process of any court entered or issued with or without jurisdiction. If any Property subject hereto is at any time attached, garnished, or levied upon under any court order or in case the payment, assignment, transfer, conveyance or delivery of any such Property shall be stayed or enjoined by any court order, or in case any order, judgment or decree shall be made or entered by any court affecting such Property or any part thereof, then and in any of such events you are authorized, in your sole discretion, to rely upon and comply with any such order, writ, judgment or decree which you are advised by legal counsel of your own choosing is binding upon you; and if you comply with any such order, writ, judgment or decree you shall not be liable to any of the parties hereto or to any other person, firm or corporation by reason of such compliance even though such order, writ, judgment or decree may be subsequently reversed, modified, annulled, set aside or vacated.

3. You shall not be personally liable for any act taken or omitted hereunder if taken or omitted by you in good faith and in the exercise of your own best judgment. You shall also be fully protected in relying upon any written notice, demand, certificate or document which you in good faith believe to be genuine.

4. Unless otherwise specifically indicated herein you shall proceed as soon as practicable to collect any checks or other collection items at any time deposited hereunder. All such collection shall be subject to the usual collection agreement regarding items received by your commercial banking department for deposit or collection. You shall not be required or have a duty to notify anyone of any payment or maturity under the terms of any instrument deposited hereunder, nor to take any legal action to enforce payment of any check, note or security deposited hereunder. You shall have no liability to pay interest on any money deposited or received hereunder.

5. You shall not be responsible for the sufficiency or accuracy of the form, execution, validity or genuineness of documents or securities now or hereafter deposited hereunder, or of any endorsement thereon, or for any lack of endorsement thereon, or for any description therein, nor shall you be responsible or liable in any respect on account of the identity, authority or rights of the persons executing or delivering or purporting to execute or deliver any such document, security or endorsement or these Escrow Instructions.

6. Any notices which you are required or desire to give hereunder to the FTC or its designee shall be in writing and may be given by mailing the same to the address provided by the FTC or its designee by United States mail, postage prepaid. For all purposes hereof any notice so mailed shall be as effectual as though served upon the FTC or its designee to whom it was mailed at the time it is deposited in the United States mail by you whether or not the FTC or its designee thereafter actually receives such notice. Notices to you shall be in writing and shall not be deemed to be given until actually received by your trust department employee or officer who administers this Escrow. Whenever under the terms hereof the time for giving a notice or

16. Executed this _____ day of _____, _____ at Chicago, Illinois.

Addresses

[illegible]

Decision and Order

96 F.T.C.

ATTEST:

Continental Illinois National Bank and Trust
Company of Chicago, Escrowee_____
Trust OfficerBy: _____
Vice President

Executed in _____ Copies

APPENDIX 1

SCHEDULE OF FEES FOR SERVICES AS ESCROW AGENT

A. ADMINISTRATION FEES

The following rates are applicable for ordinary services in handling an escrow subject to a minimum acceptance fee of \$250 and minimum annual charge of \$250. The Acceptance Fee will be based on the initial value of the deposits at the opening of the account.

ACCEPTANCE FEE

\$250 minimum on assets up to \$50,000
\$1.25 per \$1,000 on next \$300,000 valuation
\$.50 per \$1,000 on next \$350,000 valuation
\$.20 per \$1,000 on next \$1,000,000 valuation
\$.10 per \$1,000 on excess above \$1,700,000 valuation

ANNUAL ADMINISTRATIVE FEE

\$250 minimum on assets up to \$50,000
\$1.25 per \$1,000 on next \$300,000 valuation
\$.50 per \$1,000 on next \$350,000 valuation
\$.20 per \$1,000 on next \$1,000,000 valuation
\$.10 per \$1,000 on excess above \$1,700,000 valuation

The Annual Administrative Fee will be based on the value of the assets in the account at the beginning of the fee period plus any deposits made through the fee billing period.

When our only current duties consist of holding life or casualty insurance policies, the minimum annual fee will be reduced to \$150 until the occurrence of a casualty, at which time the regular schedule will apply to the insurance proceeds.

* * * * *

APPENDIX 2

B. OPERATING SERVICE FEES

When the escrow account requires the maintenance of participants' or claimants'

records, the issuance of payments, and the preparation of tax forms, the following schedule applies:

- 1.) \$2.50 per account per year (includes up to two distributions),
- 2.) \$0.50 per check issued over two distributions.

When the escrow requires the investment of funds, a \$50 charge will be made for each purchase or sale transaction. A \$35 charge will be made for any free deposit or delivery of assets (securities, deeds, insurance policies, etc.).

C. TERMINATION

There are no separate termination charges. Fees for the final billing period will be prorated to the date of termination; subject to a minimum of six months from the date of inception.

D. MISCELLANEOUS

The fees quoted in this schedule apply to services ordinarily rendered in administering an escrow account, and are subject to a reasonable adjustment if we are called upon to undertake unusual duties, responsibilities, procedures, or if the cost of doing business increases. The cost of all stationery and supplies, telephone, postage, printing, or other out-of-pocket expenses will be added to our regular service charges.

In determining our general schedule of fees, we have taken into consideration the various incidental benefits occurring to us from the operation of accounts. These include temporary availability to the Trust Department of funds resulting from the retention of dividends or interest in accounts pending disbursement, the execution of securities transactions for accounts, and funds from other sources.

* * * * *

Interlocutory Order

96 F.T.C.

IN THE MATTER OF

E. I. DUPONT DE NEMOURS & COMPANY

*Docket 9108. Interlocutory Order, Oct. 20, 1980*ORDER INVITING ADDITIONAL BRIEFS ON RESPONDENT'S MOTION
FOR CONTINUED *IN CAMERA* TREATMENT

By motion filed January 16, 1980, respondent E. I. DuPont de Nemours and Company ("DuPont") requested a three year extension of *in camera* protection for certain documents in the record in this case. Administrative Law Judge Miles J. Brown previously ordered that these materials be given *in camera* treatment until the date of the Commission's final order or as otherwise ordered by the Commission. As indicated in DuPont's motion and confirmed in a subsequent pleading, complaint counsel have no objection to a three year extension of *in camera* treatment except to the extent that the Commission finds it necessary to refer to *in camera* evidence in its opinion. In a supplemental memorandum, DuPont raised additional issues concerning the effect of the Federal Trade Commission Improvement Act of 1980, Pub. Law 96-252, on our adjudicative *in camera* standards. Complaint counsel did not address respondent's contention that the legislation modified the criteria for *in camera* treatment because they do not oppose the requested extension.

We reject respondent's supplemental arguments at the outset and state our view that the provisions of the Improvement Act governing treatment of confidential information do not apply to or affect the Commission's standards for *in camera* protection of exhibits in adjudicative proceedings. Those standards are clearly expressed in *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184 (1961); *Bristol-Myers Company*, 90 F.T.C. 455 (1977); and *General Foods Corporation*, Dkt. 9085, Order of March 10, 1980.

In applying the standards set forth in these cases to the instant motion for extended *in camera* treatment, we have found that certain issues raised by the respondent require clarification before a final determination can be made. While some of the documents appear to warrant extended *in camera* protection, the appropriate treatment for other data is less clear. Accordingly, we invite respondent, and complaint counsel should they so desire, to submit additional briefs on the following matters:

(1) Respondent has argued that certain earnings data should be given *in camera* treatment not only because of their commercial sensitivity, but also because a ruling by the Internal Revenue