

Complaint

100 F.T.C.

IN THE MATTER OF
THE TIMES MIRROR COMPANY, INC.

DISMISSAL ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9103. Complaint, July 27, 1977—Dismissal Order, July 8, 1982

This order returns the matter to adjudication and dismisses the complaint charging a Los Angeles, Calif. publisher with adversely affecting competition by the use of a discriminatory rate structure for run-of-the-paper and suburban display advertising. Having considered the views of the parties and the comments received from the public, the Commission concluded that the public interest would best be served by rejecting the consent agreement and dismissing the complaint.

Appearances

For the Commission: *Carleton C. Eastlake, Jon R. Calhoun and Caprice L. Collins.*

For the respondent: *Julian O. von Kalinowski, John J. Hanson, J. Edd Stepp, Jr., Joseph A. Collins and R.C. Lobdell, Gibson, Dunn & Crutcher, Los Angeles, Calif.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act (15 U.S.C. 41, *et seq.*) and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the party listed in the caption hereof and more particularly described and referred to hereinafter as respondent, has violated the provisions of Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. 45) and Section 2(a) of the Clayton Act, as amended, (15 U.S.C. 13) and it appearing to the Commission that a proceeding by it in respect thereof would be in the interest of the public, hereby issues its complaint, stating its charges as follows:

PARAGRAPH 1. Respondent Times-Mirror Company, Inc. is a corporation organized on or about October 6, 1884, and is existing and doing business under and by virtue of the laws of the State of California. Respondent maintains its home office and principal place of business at Times-Mirror Square, Los Angeles, California.

PAR. 2. Respondent is the largest publicly-held publishing company in the United States. Its newspaper publishing revenues were

approximately 44% of its total revenue in 1976, or about \$426 million.

PAR. 3. Publication of the *Los Angeles Times* newspaper is the largest operation of respondent Times-Mirror Company. The *Los Angeles Times* enjoys an average daily circulation in excess of one million copies, and has the largest weekday circulation among the nation's standard-size newspapers. The *Los Angeles Times* has for many years led all newspapers in the nation in advertising volume. Its total advertising revenues for 1976 were approximately \$276 million, with retail display advertising approximately one-half of total advertising revenues.

PAR. 4. In connection with its newspaper publishing operations, from its home and branch offices, respondent solicits, offers to sell and sells advertising lineage in the *Los Angeles Times* to purchasers located in the various States of the United States. In the course of such operations it frequently sends and receives contracts, rate cards, advertising materials, billings and payments across state lines.

The acts and practices herein described in connection with the promoting, offering for sale and sale of newspaper advertising lineage to retail merchandisers are "in or affecting commerce" as the term "commerce" is defined by the Federal Trade Commission Act, as amended, and "in commerce," as defined in the amended Clayton Act.

PAR. 5. The *Los Angeles Times* is distributed and sold primarily in Los Angeles County, Orange County, Riverside County, San Bernardino County, San Diego County, San Luis Obispo County, Santa Barbara County, Tulane County, and Ventura County in California; with some additional distribution in numerous other states and the District of Columbia. For example, the *Los Angeles Times* has a significant and substantial distribution in the State of Arizona and in Clark County, Nevada.

PAR. 6. In the course and conduct of its business, respondent has been and is now offering to sell and sells advertising lineage to various purchasers, including, among others, persons, firms and corporations engaged in the manufacture, distribution, offering for sale or sale of merchandise at retail. A substantial number of the retailer purchasers of respondent's advertisers have retail outlets in other states as well as California. The advertising lineage purchased is used for the purpose of offering for sale or promotion of products, labels and materials.

PAR. 7. Retail merchandisers who purchase advertising lineage in the *Los Angeles Times* have also promoted merchandise to customers

in adjoining states, who travel into California to purchase products or purchase them by mail order. Marketers of merchandise offered for sale and sold at retail, who purchase advertising lineage in the *Los Angeles Times*, also promote sales in some out-of-state locations thereby.

PAR. 8. In the course and conduct of its business, respondent has been and is now discriminating in price, directly or indirectly, between different purchasers of its advertising lineage of like grade and quality, by selling said commodities at higher prices to some purchasers than it sells to other purchasers, many of whom have been and now are in competition with the purchasers paying the higher prices. More specifically, respondent offers for sale and sells advertising lineage to persons, firms or corporations engaged in the offering for sale, sale and distribution of merchandise at retail, including, but not limited to, apparel and accessories, appliances, and furniture. Such sales are made on the basis of a rate structure that results in higher advertising rates to some competing purchasers than to others.

The aforesaid rate structure provides for a cumulative volume discount on an annual basis according to the number of lines that an advertiser or prospective advertiser may purchase or agree to purchase. Advertisers or prospective advertisers who agree to purchase a specific number of lines may take advantage of yearly bulk contract rates, whereas advertisers or prospective advertisers who cannot and do not contract for a specified number of column lines pay at the "open rate" price level. The price per line purchased decreases as the lineage purchased increases. The differences in rates per line are substantial.

PAR. 9. Respondent's use of a cumulative volume discount advertising rate structure results in a substantial and systematic discrimination in the price of advertising lineage sold to various customers, in that larger volume advertisers receive more favorable rates than smaller volume advertisers.

COUNT I

Alleging violation of Section 5 of the Federal Trade Commission Act, as amended.

PAR. 10. The allegations of Paragraphs One through Nine are incorporated by reference herein as if fully set forth verbatim.

PAR. 11. Respondent's advertising rate structure, and the discrimination in the price of advertising between and among various purchasers of advertising lineage, adversely affect competition be-

tween those paying higher and those paying lower advertising rates, and constitute unreasonable restraints of trade and unfair methods of competition in or affecting commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act, as amended.

COUNT II

Alleging violation of Section 2(a) of the Clayton Act, as amended.

PAR. 12. The allegations of Paragraphs One through Nine are incorporated by reference herein as if fully set forth verbatim.

PAR. 13. The effect of respondent's discrimination in prices may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which its favored purchasers are engaged, or to injure, destroy or prevent competition between the favored and non-favored purchasers, and constitute violations of the provisions of subsection (a) of Section 2 of the Clayton Act, as amended.

STATEMENT OF THE COMMISSION

By BAILEY, *Commissioner*

The Commission brought this case in 1977 out of a concern that the *Los Angeles Times*' discriminatory rate structure for run-of-the-paper and suburban display advertising adversely affected competition by disadvantaging smaller advertisers. In November 1980 the *Los Angeles Times* entered into a negotiated agreement and jointly with FTC staff proposed a consent order for the Commission's consideration.

On September 25, 1981, the Commission, Commissioner Clanton dissenting, provisionally accepted the consent order. At that time, however, the Commission expressed concern about whether the order would work as intended, and whether it was practical or feasible to apply similar orders to newspapers in other markets. The Commission believed it had insufficient data against which to test its concerns and so sought public comment on the order for ninety days.

The comment period produced a broad sampling of opinion: 65 newspapers and broadcasters, 13 media trade associations, 10 retailers, 7 trade associations and four individuals responded. Of the 99 comments received, 98 urged the Commission to reject the consent order.

These comments caused reexamination of two important assumptions which formed the basis of the Commission's original decision to bring the case and on which the proposed consent was based. The

first assumption was that smaller advertisers were injured competitively by the *Los Angeles Times*' cumulative volume discount rate structure. However, all but one of the retailers and retail trade associations which responded opposed the consent agreement and indicated no concern about competitive injury. Their position was reinforced by academics knowledgeable in the field of mass media economics, who concluded that the benefits of the proposed order were fairly speculative, and that the order might well raise prices to all advertisers. Thus, the Commission has concluded that the benefits to competition from accepting this order are much more uncertain than was originally believed.

The comments also highlighted the issue of whether the principles of this order could or should be extended beyond the *Los Angeles Times*. It now appears that to do so within the newspaper industry would be unwise, as the type of uniform pricing required by the order could impair the pricing flexibility of secondary size papers. Were the principles of the order to be extended to other advertising media, the uncertainties as to the trade-offs between vigorous pricing flexibility and the benefits of eliminating price discrimination increase. In particular, making cross-media comparisons for the purpose of assessing a valid meeting competition defense is likely to be impossible. Clearly, however, it was never the Commission's intention, and would be inappropriate now, to leave the *Los Angeles Times* as the only seller of advertising space subject to Robinson-Patman Act principles.

In conclusion, the Commission notes that the process of decision-making in this matter worked precisely as the Commission's Rules contemplate. The scope and depth of public comment contributed greatly to the Commission's ability to reach an informed decision.

SEPARATE STATEMENT OF CHAIRMAN MILLER

In concurring with the Commission's decision today, I am heartened to find that the extensive administrative exercise required to analyze this consent proposal has reached the same conclusion that my analysis of the likely economic consequences, as well as my reading of the law, would have suggested in the first instance.

First, economic analysis and overwhelming public comment have demonstrated persuasively that an order applying Robinson-Patman rules to newspaper advertising could injure competition in this industry.

Second, and more importantly, it seems quite clear that the intent

of Congress was to leave advertising rates outside the reach of the Robinson-Patman Act.¹ While I do not dispute our role of filling inadvertent gaps in antitrust law with enforcement of the FTC Act, that role should stop short of creating law in defiance of Congress.

SEPARATE STATEMENT OF COMMISSIONER CLANTON

I concur with the Commission's decision to dismiss the complaint in this matter not only for the reasons set out in the Commission's statement but for an additional reason that I expressed earlier when I voted not to accept provisionally the negotiated consent agreement. My decision to dismiss this complaint stems from my concerns about extending the coverage of Section 5 of the FTC Act to encompass commercial circumstances on which we reserved judgment in *Reuben H. Donnelley Corp.*, 95 F.T.C. 1 (1980), *rev'd sub nom. Official Airline Guides, Inc. v. FTC*, 630 F.2d 920 (2d Cir. 1980), *cert. denied*, 101 S.Ct. 1362 (1981).

The Commission's opinion in *Donnelley* did not distinguish between an absolute refusal to deal and dealing on discriminatory terms. While we did not foreclose the possibility of reaching price discrimination under Section 5, we emphasized the difficulties of extending a duty to deal into the area of secondary-line discrimination, which is at issue in *Times-Mirror*. In *Donnelley*, we signaled a cautionary note for any future applications of such a duty to deal where the inevitable result would be to involve the Commission in regulatory-style monitoring of the reasonableness of pricing or other on-going activities. 95 F.T.C. at 81. Furthermore, in defining "arbitrary" conduct in *Donnelley*, we indicated that our concern should be limited to "conduct which results in a substantial injury to competition and lacks substantial business justification." *Id.* at 82. I was persuaded earlier and remain persuaded that this matter would not be likely to meet the *Donnelley* standards for liability. At the least, I am persuaded that this possibility is insufficient to justify acceptance of the order, especially in light of the other significant uncertainties associated with the case.

SEPARATE STATEMENT OF COMMISSIONER PERTSCHUK

I have voted to reject the tentatively accepted order against Times-Mirror for two reasons.

First, the benefits to competition from accepting this order are much more uncertain than we had believed. The comments, by

¹ In Senate floor debates, Senator Logan flatly replied, "No," when asked if the Act would require newspapers selling advertising to observe its price discrimination provisions. 80 Cong. Rec. 3115.

newspapers, retailers and academics alike, overwhelmingly support the view that the competitive strength of newspapers themselves require more pricing flexibility than the order allows and that smaller retailers may not be significantly helped by it.

Second, it is clear that, if we were to prohibit newspapers from giving discounts to large advertisers which are not cost-justified, we should apply the same principle to other advertising media which compete with newspapers, including network and cable television. I do not see a realistic possibility that this Commission in the foreseeable future will apply Robinson-Patman principles in this way, and I do not believe it is appropriate to single out Times-Mirror as the only company to be subjected to such standards.

Consequently, I join the Commission in rejecting this particular order. It is important to state, however, that this decision by the Commission does not represent any repudiation of Robinson-Patman principles, only a decision that it would be inappropriate to apply them in this case.¹

Finally, I note that Times-Mirror, to its credit, argued its position thoroughly and carefully on the merits and through public comment. It did not, as has increasingly become the custom, solicit members of Congress to pressure the Commission, after having heard an incomplete and biased presentation of the disputed issues.

FINAL ORDER RETURNING MATTER TO ADJUDICATION AND DISMISSING COMPLAINT

On November 7, 1980, this matter was withdrawn from adjudication for consideration by the Commission of a proposed consent agreement. The Commission accepted the proposed consent and placed it on the public record on September 25, 1981, for comment pursuant to Section 3.25(f) of the Commission's Rules of Practice and Procedure.

Having considered the views of the parties to the consent and the comments received from the public, the Commission has determined that the public interest would best be served by rejecting the consent agreement and dismissing the complaint. Therefore

It is ordered, That this matter be returned to adjudication and
It is furthered ordered, That the complaint issued in the matter be, and it hereby is, dismissed.

¹ I agree with Chairman Miller's point in his statement that the Commission should not defy the will of Congress. I therefore am hopeful that the Commission will continue to enforce the Robinson-Patman Act in other industries.

IN THE MATTER OF
LENOX, INCORPORATED

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT

Docket 8718. Final Order, April 19, 1968—Modifying Order, July 12, 1982

This order reopens the proceeding and modifies the Commission's modified order issued on June 24, 1970, 77 F.T.C. 860, by deleting Paragraph 8 from the order, so as to allow Lenox to prevent transshipping of its products by its authorized dealers. The Commission has also included a provision which prevents Lenox from taking disciplinary action against any dealer for transshipment which occurred before the effective date of the order.

DECISION AND ORDER

Whereas, a "Request of Lenox, Incorporated for Modification of Final Order" was filed by Respondent on March 15, 1982 pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice, 16 C.F.R. 2.51, wherein Lenox, Incorporated seeks a partial modification of the order that issued on June 24, 1970 by the deletion of Paragraph 8; and

Whereas, the matter was thereafter placed on the public record for thirty (30) days pursuant to Section 2.51(c) of the Commission's Rules of Practice, 16 C.F.R. 2.51(c), during which time comments from the public were received; and

Whereas, the Commission thereafter considered the Petition presented by Lenox, Incorporated and all of the materials and information submitted as public comments on the petition and has determined that the request makes a satisfactory showing that changed conditions of fact and law and the public interest require that the order be reopened for the purpose of modification.

Accordingly, *it is ordered* that the matter is reopened and that the order is modified by deleting the language of paragraph 8 that reads:

Requiring or inducing, by any means, dealers or prospective dealers to refrain, or to agree to refrain, from reselling respondent's products to any dealers or distributors;

It is further ordered, That paragraphs 9 and 10 be renumbered to 8 and 9.

It is further ordered, That nothing herein shall be construed to permit respondent to terminate or otherwise discipline any dealer for (1) having resold respondent's products to any dealer or distributor prior to the effective date of this order or (2) for any such resale