

Modifying Order

104 F.T.C.

IN THE MATTER OF

WILLIAM H. RORER, INC.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL
TRADE COMMISSION ACT AND SEC. 2(a) OF THE CLAYTON ACT*Docket 8599. Final Order, Aug. 21, 1967—Modifying Order, Sept. 14, 1984*

This Order modifies the August 21, 1967 Order issued against a pharmaceutical manufacturer, 72 F.T.C. 412, pursuant to the March 20, 1967 decision of the Court of Appeals for the Second Circuit, 374 F.2d 622 (1967). After reviewing respondent's request and other relevant information, the Commission denied the request to vacate the Order in its entirety and retained the provision that prohibited the company from charging different prices for its products to competing customers. The Commission noted that the Order "in essence requires compliance with Section 2(a) of the Robinson-Patman Act," and the firm had not shown that complying with an order that essentially requires adherence to the law is causing it injury. However, the Commission determined that retaining certain "fencing-in" provisions that had been in effect for 17 years "placed the firm at a disadvantage with respect to its competitors by increasing its compliance costs unnecessarily." Therefore, in accordance with its conclusions, the Commission modified the Order by deleting requirements that the company promptly inform the Commission when it charged competing retailers different prices for its products, submit to the Commission a written statement containing justification for price differences, and publicize to all its retail customers that prices to some are higher than to others, together with reasons and details of the price differences or discounts.

ORDER MODIFYING CEASE AND DESIST ORDER ISSUED AUGUST 21, 1967

On March 2, 1984, respondent William H. Rorer, Inc. ("Rorer") filed a "Request To Reopen Proceeding And Vacate Cease And Desist Order" ("Request"), 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. The Request asked the Commission to reopen the proceeding and vacate the cease and desist order issued on August 21, 1967 ("the Order") in its entirety.

After reviewing respondent's Request and other relevant information, the Commission has concluded that respondent has not made a satisfactory showing that changed conditions of law or fact or public interest considerations require that the Order be vacated in its entirety. The Commission has found, however, that it is in the public interest to modify the Order to terminate certain of its provisions.

The Order against Rorer prohibits price discrimination in the sale of prescription and nonprescription pharmaceutical products and in essence requires compliance with Section 2(a) of the Robinson-Patman Act. Additionally, the Order contains certain provisions de-

signed to help ensure compliance with the prohibition of price discrimination. The Commission finds that the changed facts relied on by Rorer do not provide a basis for setting aside the Order. Rorer maintains that the nature of the marketplace for antacids has changed since the Order was issued. In particular, Rorer says that independent drug stores are less significant outlets for its products than they were at the time the Order issued. However, Rorer has failed to show that independent drugstores or other retailers would not suffer competitive injury from illegal price discrimination favoring their competitors. Moreover, such changes do not warrant setting aside an order that applies to all competing retailers, not merely to independent drugstores. Indeed, the growing importance of mass marketers in the sale of covered products cited by Rorer demonstrates that it was appropriate for the Commission to issue, and for the Court of Appeals to sustain, an order applicable to all competing retailers.

Further, the Order's requirement that Rorer comply with the law in its sales of all of its "prescription and nonprescription pharmaceutical products" does not justify reopening of the Order. The fact that Rorer has introduced new products since the Order was issued and that the percentage of total Rorer sales accounted for by Maalox (the product involved in the original case) has declined are not reasons for setting aside the Order. Rorer has not shown that complying with an order that essentially requires adherence to the law is causing it injury.

Rorer also says that legal and economic thinking about the Robinson-Patman Act has changed since the Order was issued and that the level of Commission enforcement activity has declined. Request, pp. 27-29. Rorer does not contend, however, that the conduct that led to the Order would be legal today. Indeed, the Second Circuit found that the discrimination in this case, which continued for eight years, constituted a serious and extensive violation and amounted to "a classic price discrimination in favor of the chains as against individual retailers, a principal reason for and target of the Robinson-Patman Act." 374 F.2d 622, at 625 (2d Cir. 1967).

Nor has Rorer demonstrated that there has been a change in law or policy regarding the duration of conduct orders issued by the Commission. As a general rule, the Commission has issued perpetual orders in conduct cases and the perpetual conduct order is an important element of the Commission's ability to deter law violations. The deterrent effect of law enforcement actions by the Commission could be adversely affected if the Commission were to sunset conduct orders that do no more than require compliance with the law. And in recent cases the Commission has declined to terminate conduct orders solely because of their age. See, e.g., *National Dairy Products Corp.*, 100

F.T.C. 431 (1982) (Commission declined either to rescind or terminate in five years a perpetual order issued under Section 2(a) of the Clayton Act); *ABC Vending Corp.*, Docket No. 7652 (Letter from Secretary of the Commission to Arthur H. Kahn, Esquire, dated January 28, 1982, declining to set aside perpetual order provision based on Section 2(f) of the Clayton Act that "merely restates the law that must be adhered to by the respondent . . . and consequently does not hinder the respondent's ability to compete"); Letter of April 11, 1984 from Secretary of the Commission to James T. Halverson, Esq. concerning the Beecham Petition (Docket Nos. 8547, C-2037, C-2266 and Docket No. 4332); *Textileather Corp.*, Docket No. 1585 (Letter of January 20, 1984 from Secretary of the Commission to Kenneth B. Peterson, Esq.).¹

Rorer has also failed to show that it would be in the public interest to terminate the Order. Rorer's arguments that the Order prevents it from competing misconstrue the scope and meaning of the Order in two important respects. First, Rorer claims in effect that the Order bars *all* price discrimination among competing retailers that is not concurrently cost justified to the Commission. Request, p. 37. This, however, is not the case. The Order does not bar all price discrimination, although it does require certain compliance procedures regarding discriminations in price that are allegedly justified by savings in costs. Second, Rorer says that no "meeting competition" defense is included in the Order. Request, pp. 38-39. While it is true that the defense is not explicitly stated in the Order, the Supreme Court held in *FTC v. Ruberoid Co.*, 343 U.S. 470 (1952), that the cost justification and meeting competition defenses "are necessarily implicit in every order issued under the authority of the act just as if the order set them out *in extenso*." 343 U.S. at 476. Thus, the order does not prohibit Rorer from granting price discounts either in instances where it can cost justify those discounts or where it is meeting the lawful competition of a competitor.

However, the Commission has determined that the public interest warrants modifying the Order to terminate certain "fencing-in" provisions. These provisions require that in any instance where respondent institutes a price schedule charging a different price for its products to competing retail customers "on the basis or in the belief" that such difference in price is cost justified (1) it promptly notify the Commission of the institution of such price schedule; (2) submit to the Commission a written statement with necessary underlying data in support of the cost justification of such price discrimination; and (3)

¹ In *Occidental Petroleum Corp.*, Docket No. C-2492, the Commission terminated a perpetual reciprocity order after the expiration of ten years. However, *Occidental* involved a broad order, issued under Section 5 of the Federal Trade Commission Act, that prohibited all forms of reciprocity including practices that are today considered lawful and procompetitive. In contrast to the broad reach of Section 5, the Robinson-Patman Act is far more specific in defining prohibited forms of conduct.

adequately and regularly publicize to all retail customers that prices to some are higher than to others, together with reasons and details of the price differences or discounts. These "fencing-in" provisions have now been in effect for almost 17 years. The Commission finds that the pattern of conduct by Rorer which led to the entry of these "fencing-in" provisions has now been interrupted for a sufficient period of time so that they are no longer necessary either to dissipate the effects of respondent's past conduct or to prevent its recurrence. Although these provisions were justified at the time the Order was issued, their continued existence puts respondent at a disadvantage with respect to its competitors by increasing its compliance costs unnecessarily.

Accordingly, *it is ordered* that this matter be, and it hereby is, reopened, and that the Commission's Order issued on August 21, 1967, be, and it hereby is, modified to read as follows:

It is ordered, That respondent William H. Rorer, Inc., a corporation, and its officers, representatives, agents and employees, directly, indirectly, or through any corporate or other device, in or in connection with the sale of prescription and nonprescription pharmaceutical products in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from discriminating, directly or indirectly, in the price of such products of like grade and quality by selling to some retailers at prices higher than the price charged to any other retailer who, in fact, competes in the resale and distribution of respondent's products with the retailer paying the higher prices.

Set Aside Order

104 F.T.C.

IN THE MATTER OF
FOREMOST DAIRIES, INC.

Docket C-1161. Consent Order, Jan. 23, 1967—Set Aside Order, Sept. 18, 1984

This Order reopens the proceeding and sets aside the divestiture Order issued against a dairy products processor in 1967 (71 F.T.C. 56) and modified in 1983 (101 F.T.C. 343) by deleting the provision requiring prior Commission approval for any further acquisitions by the company. After considering the request of successor company, McKesson Corporation, together with supporting materials and other relevant data, the Commission found that the competitive problem that had prompted issuance of the divestiture Order no longer existed and termination of the Order to relieve respondent of compliance costs was in the public interest.

ORDER REOPENING AND SETTING ASIDE MODIFIED ORDER ISSUED ON
JANUARY 23, 1967

By a petition filed on May 16, 1984, and a supplement thereto dated June 29, 1984, McKesson Corporation (formerly Foremost-McKesson, Inc. and Foremost Dairies, Inc. and hereafter "McKesson") requests that the Commission reopen the proceeding in Docket No. C-1161 and set aside the modified order against McKesson issued by the Commission on January 23, 1967. Pursuant to Section 2.51 of the Commission's Rules of Practice, McKesson's petition was placed on the public record for comment. No comments were received.

Upon consideration of McKesson's petition and supporting materials, and other relevant information, the Commission now finds that changed conditions of fact and the public interest warrant reopening the proceeding and setting aside the modified order. The record demonstrates that the competitive problem Paragraph IV of the order intended to remedy no longer exists and termination of the order to relieve respondent of compliance costs is in the public interest.

Accordingly,

It is ordered, That this matter be, and it hereby is reopened and that the Commission's modified order be, and it is hereby set aside.

Chairman Miller did not participate.