

Set Aside Order

109 F.T.C.

IN THE MATTER OF

THE ADVERTISING CHECKING BUREAU, INC.

SET ASIDE ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL
TRADE COMMISSION ACT*Docket C-2947. Consent Order, Jan. 4, 1979—Set Aside Order, May 19, 1987*

The Federal Trade Commission has set aside a 1979 consent order with The Advertising Checking Bureau, Inc. (93 F.T.C. 4), thus removing restrictions on respondent's involvement in cooperative advertising programs.

ORDER REOPENING AND SETTING ASIDE ORDER
ISSUED ON JANUARY 4, 1979

On January 16, 1987, The Advertising Checking Bureau, Inc. ("ACB") filed its Petition to Reopen Proceeding And To Set Aside Consent Order ("Petition"), 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 CFR 2.51, requesting that the Commission set aside the order in Docket No. C-2947, issued on January 4, 1979.¹ ACB's petition was placed on the public record for thirty days, pursuant to section 2.51 of the Commission's Rules. One comment was received.

The complaint in this case alleged that ACB violated section 5 of the Federal Trade Commission Act by auditing price restrictive cooperative advertising programs. ACB's conduct, as alleged in the complaint, had the effect of fixing or "illegally influencing" the resale prices of dealers selling ACB's clients' merchandise and eliminating intra-brand competition. It is clear that the complaint challenging ACB's conduct applied a *per se* rule of illegality. The order prohibits ACB from "designing, implementing, conducting, administering or auditing" any cooperative advertising program that conditions the right of any dealer to obtain cooperative advertising allowances or credits because the dealer, among other things, sells or advertises merchandise at a discount or sale price.²

In its petition, ACB asserts that the order's prohibitions hinder ACB's efforts to compete with cooperative advertising auditing firms not subject to the order's constraints. ACB states that setting aside

¹ ACB also requests the Commission to withdraw the Commission's "Policy Statement Regarding Price Restrictions In Advertising Programs" ("Policy Statement"), 4 Trade Reg. Rep. (CCH) ¶39,057 (October 26, 1981), issued on June 27, 1980. In conjunction with the issuance of this order, the Commission is also withdrawing its policy statement.

² The order does not bar ACB from auditing cooperative advertising programs that restrict any dealer's right to obtain cooperative advertising allowances for the advertising of "closeouts," "irregulars" or "seconds."

the order would enable ACB to become a more effective competitor. ACB also argues that the restraints prohibited by the order are generally procompetitive or competitively neutral. ACB also states that the restraints covered by the order do not prohibit retailers from selling at discount prices or advertising discounts or sale prices with their own funds. ACB would like the Commission to set aside the order because "there is no rational economic basis for the order and no sound legal justification exists for its continuation."

Based on the information provided by ACB, and other available information, the Commission has concluded that ACB has made a satisfactory showing that the public interest requires reopening the proceeding in Docket No. C-2947 and setting aside the order. The Supreme Court's decisions in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), and *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984) make it clear that the rule of reason should be applied in determining whether nonprice vertical restraints unreasonably restrain competition and violate the antitrust laws. In a vertical setting, the *per se* rule applies only to agreements to fix resale prices that prevent the dealer from making independent pricing decisions. See *Monsanto*, 465 U.S. at 764. The fact that a distributional restraint may have an incidental effect on resale prices is not by itself enough to condemn the practice as *per se* unlawful.

The cooperative advertising practices prohibited by the order in this case would not by themselves constitute agreements to fix resale prices. Although such restrictions may in some cases reduce a dealer's incentive to cut prices, the restraints do not prevent the dealer from selling at discount prices or even from advertising discount prices at the dealer's own expense. Moreover, price restrictive cooperative advertising programs are likely to be procompetitive or at least competitively neutral in most cases by, for example, lowering the manufacturer's costs of monitoring retailer compliance with other, seemingly unrelated, cooperative advertising restrictions or channeling the retailer's advertising efforts in directions that the manufacturer believes consumers will find more compelling and beneficial. ACB's Petition at 5-9. This, in turn, may stimulate dealer promotion and investment and, thus, benefit interbrand competition.

Based on the record, the Commission believes that there is no evidence that price restrictive cooperative advertising programs, standing alone, are sufficiently likely to be harmful that a flat ban, rather than a case-by-case inquiry, is appropriate. The practices prohibited by the order do not appear to be ones that would always or almost always tend to restrict competition and decrease output and, thus, do not warrant summary condemnation. *Broadcast Music, Inc. v. CBS*,

441 U.S. 1 (1979). In sum, the impediments to effective competition resulting from the order outweigh any reasons to retain the order.

In light of the foregoing, continuation of the order against ACB is no longer justified and would not be in the public interest because its application harms ACB's ability to administer cooperative advertising programs that are likely to be lawful even though they contain restrictions on the prices advertised. Absent evidence that ACB is knowingly helping to enforce resale price maintenance agreements, any prosecution of cooperative advertising restrictions under the rule of reason would more properly be directed against ACB's clients rather than against ACB.

Accordingly, *it is ordered* that the order of January 4, 1979, in Docket No. C-2947 be, and it hereby is, set aside.

By direction of the Commission, Commissioner Bailey dissenting. Commissioner Strenio did not participate.

IN THE MATTER OF
PLAS-TIX USA, INC.

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

Docket C-3213. Complaint, June 5, 1987—Decision, June 5, 1987

This consent order prohibits, among other things, a Miamisburg, Ohio manufacturer of lighter-to-lighter automobile battery chargers from claiming that the chargers are jumper cables or that they can restart a disabled vehicle as quickly as jumper cables. Also, respondent is required to make specified disclosures on its packaging and in advertisements for a period of five years.

Appearances

For the Commission: *Allen Hile.*

For the respondents: *Joseph A. Koenig, Turner, Granzow, & Hollenkamp, Dayton, OH.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. 45 *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that respondent Plas-Tix USA, Inc., hereinafter 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 as follows:

PARAGRAPH 1. Plas-Tix USA, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Ohio, with its office and principal place of business located at 510 South Riverview, Miamisburg, Ohio.

PAR. 2. Respondent is now and for sometime in the past has been engaged in the manufacturing, marketing, distributing, advertising, offering for sale, and selling to the public of "Safe-T-Start" and other lighter-to-lighter chargers, which are devices to be used to recharge the battery in a disabled vehicle by connection to an operating vehicle through the cigarette lighter receptacles of both vehicles.

PAR. 3. In the course and conduct of its business, respondent causes, and in the past has caused Safe-T-Start and other lighter-to-lighter chargers to be offered and sold from its place of business to purchasers