

IN THE MATTER OF

LENOX, INCORPORATED

SET ASIDE ORDER IN REGARD TO ALLEGED VIOLATION OF THE
CLAYTON AND THE FEDERAL TRADE COMMISSION ACTS*Docket 8718. Consent Order, June 24, 1970—Set Aside Order, April 19, 1989*

The Federal Trade Commission has set aside a portion of the 1970 consent order with Lenox, Inc., (77 FTC 860), thus removing the provisions that prohibited respondent from terminating dealers after receiving complaints from other dealers and that required the respondent to reinstate dealers terminated for discounting prices or for transshipping products.

ORDER GRANTING IN PART AND DENYING IN PART
REQUEST TO REOPEN AND SET ASIDE ORDER

On December 20, 1988, Lenox, Incorporated ("Lenox"), filed a "Request of Lenox, Incorporated to Vacate Final 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, 16 CFR 2.51. In the Request, Lenox asks the Commission to reopen the proceeding and set aside the cease and desist order entered by the Commission on June 24, 1970 (77 FTC 860) and modified by the Commission on July 12, 1982 (100 FTC 259). Lenox alleges that setting aside the order is warranted by changed conditions of fact and law and the public interest. Request at 2. The Request was placed on the public record for thirty days, pursuant to Section 2.51(c) of the Commission's Rules, and two comments were received. On February 24, 1989, Lenox submitted an affidavit responding to one of the public comments.

The Commission has carefully considered Lenox's Request, the public comments and Lenox's response to one comment and has concluded that Lenox has not made a satisfactory showing that changed conditions of fact or law or the public interest require that the order be set aside in its entirety. The order prohibits Lenox from agreeing with its dealers with respect to resale prices and in essence requires compliance with Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1). Lenox has not shown changed circumstances that eliminate the need for the order. Lenox also has not shown that it is unduly burdened by an order that merely requires

it to abide by the law, and, therefore, setting aside the order is not warranted in the public interest.

The Commission believes that the second part of Paragraph 3 of the order should be set aside in the public interest. The second part of Paragraph 3 prohibits conduct that by itself may not be unlawful, and this provision is no longer necessary to ensure Lenox's compliance with the law. In addition, Paragraphs 9(a) and (b), which require Lenox to reinstate dealers terminated for failing to observe Lenox's suggested resale prices or for transshipping Lenox products, are inconsistent with subsequent modifications of the order. Consequently, the public interest is served by setting aside these provisions.

I.

The Commission's complaint in this matter, issued October 13, 1966, alleged that Lenox agreed with its dealers to fix the resale prices for its products. In the original proceeding, the Commission found that "agreements as to resale prices between respondent and its dealers do in fact exist," 73 FTC at 597, and held that Lenox had entered into unlawful price agreements with its dealers in violation of Section 5 of the Federal Trade Commission Act. On appeal, the United States Court of Appeals for the Second Circuit affirmed the Commission's decision and order, as modified. *Lenox, Inc. v. FTC*, 417 F.2d 128 (2d Cir. 1969).¹

The final order of the Commission contains provisions to remedy unlawful price maintenance by Lenox.² Paragraphs 1 and 2 of the order prohibit Lenox from requiring its dealers to agree to sell Lenox products at specified prices as a condition of dealing. The first part of Paragraph 3 prohibits Lenox from asking its dealers "to report any person or firm who does not observe the resale prices suggested by respondent." The second part of Paragraph 3 prohibits Lenox from "acting on reports so received" by refusing to sell to noncompliant dealers. Paragraph 4 prohibits Lenox from "[h]arassing, intimidating, coercing, threatening or otherwise exerting pressure on dealers" to

¹ The court held that the Commission lacked authority to prohibit resale price maintenance agreements in states permitting such agreements under "fair trade laws," enacted pursuant to the McGuire Act. The Commission modified the order accordingly, incorporating a fair trade law proviso as Paragraph 9 (later renumbered as Paragraph 8) of the order. 77 FTC 860.

² Four of the remaining eight paragraphs of the original order have no further effect. Paragraphs 5 and 6 were time-limited and expired in 1973. Former Paragraph 8, which prevented Lenox from banning dealer transshipments of its products, was set aside by the Commission in 1982. Finally, Lenox complied with the order provision that required it to file a compliance report 60 days after service of the order.

comply with established resale prices. Paragraph 7 prohibits Lenox from "[u]tilizing any other cooperative means of accomplishing the maintenance of resale prices." Paragraph 10 (later renumbered as Paragraph 9) requires Lenox to reinstate dealers that had been terminated for failing to maintain resale prices or for transshipping.

Paragraphs 5 and 6 of the order, both of which expired in 1973, prohibited Lenox from selling to dealers at a discount from retail prices and from publishing suggested retail prices. Paragraph 8, which was vacated in 1982, prohibited Lenox from banning transshipment of its products by dealers. 100 FTC 259 (1982).³

II.

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), provides that the Commission shall reopen an order to consider whether it should be modified if the respondent "makes a satisfactory showing that changed conditions of law or fact" so require. A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of the order inequitable or harmful to competition. S. Rep. No. 96-500, 96th Cong., 2d Sess. 9 (1979) (significant changes or changes causing unfair disadvantage); *Louisiana-Pacific Corp.*, Docket No. C-2956, Letter to John C. Hart (June 5, 1986), at 4.

Section 5(b) also provides that the Commission may modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest so requires. Respondents are therefore invited in petitions to reopen to show how the public interest warrants the requested modification. 16 CFR 2.51. In such a case, the respondent must demonstrate as a threshold matter some affirmative need to modify the order. *Damon Corp.*, Docket No. C-2916, Letter to Joel C. Hoffman, Esq. (March 24, 1983), at 2. For example, it may be in the public interest to modify an order "to relieve any impediment to effective competition that may result from the order." *Damon Corp.*, Docket No. C-2916, 101 FTC 689, 692 (1983). Once such a showing of need is made, the Commission will balance the reasons favoring the modification

³ After Paragraph 8 was set aside, Paragraphs 9 and 10 were renumbered Paragraphs 8 and 9. 100 FTC at 250

requested against any reasons not to make the modification. Damon Letter at 2. The Commission also will consider whether the particular modification sought is appropriate to remedy the identified harm.

The language of Section 5(b) plainly anticipates that the burden is on the petitioner to make "a satisfactory showing" of changed conditions to obtain reopening of the order. The legislative history also makes clear that the petitioner has the burden of showing, by means other than conclusory statements, why an order should be modified. The Commission "may properly decline to reopen an order if a request is merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modification of the order." S. Rep. No. 96-500, 96th Cong., 2d Sess. 9-10 (1979). If the Commission determines that the petitioner has made the necessary showing, the Commission must reopen the order to determine whether modification is required and, if so, the nature and extent of the modification. The Commission is not required to reopen the order, however, if the petitioner fails to meet its burden of making the satisfactory showing of changed conditions required by the statute. The petitioner's burden is not a light one in view of the public interest in repose and the finality of Commission orders. See *Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

III.

Lenox has shown neither changed conditions of law or fact nor public interest considerations that require setting aside the order in this matter in its entirety. The order prohibits agreements to fix resale prices, conduct that is *per se* unlawful. The changed circumstances advanced by Lenox do not affect the *per se* illegality of agreements to maintain resale prices or bring the order into conflict with existing law. In addition, Lenox "has not shown that complying with an order that essentially requires adherence to the law is causing it injury." *William H. Rorer, Inc.*, Docket No. 8599, Order Modifying Cease and Desist Order, 104 FTC 544, 545 (1984).⁴

Lenox asserts that the law governing vertical restraints and the

⁴ In *Rorer*, the Commission declined to modify an order provision that "in essence" required the respondent to comply with Section 2(a) of the Robinson-Patman Act. See also *Alhambra Motor Parts*, Docket No. 6889, Letter to John C. Peirce, Esq. (January 19, 1988), at 6-7 (denying petition to set aside order prohibiting violations of Section 2(a) of Robinson-Patman Act).

circumstances in which an unlawful agreement can be inferred have changed significantly since the order was entered in 1970. According to Lenox, its argument in the original proceeding that its conduct was unilateral and therefore lawful under *United States v. Colgate & Co.*, 250 U.S. 300 (1919), was rejected by the Commission on the authority of decisions that had expanded the circumstances in which an agreement between a manufacturer and its dealers could be inferred. Subsequent decisions, according to Lenox, "have changed the legal criteria for evaluating whether an agreement to maintain resale prices can be inferred" to such an extent that the evidence considered by the Commission in this matter "would not have given rise to [the original] proceeding must less to a conclusion of violation, under today's standards." Request at 55.

Lenox relies on *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764 (1984), in which the Supreme Court said that an unlawful vertical price agreement must be proved by unambiguous evidence so as not to deter or penalize legitimate, unilateral conduct and legitimate communications between a manufacturer and its dealers. The evidence must "tend to exclude the possibility that the manufacturer and the nonterminated distributor were acting independently." Lenox also cites *Business Electronics Corp. v. Sharp Electronics Corp.*, — U.S. — 108 S. Ct. 1515 (1988), in which the Court said that a vertical restraint is not *per se* unlawful unless it includes an agreement on price or price levels.⁵ In both of these cases, the Supreme Court reiterated the *Colgate* doctrine that a manufacturer generally has a right to deal or to refuse to deal with whomever it likes, as long as it does so independently.

The Commission's conclusion in the original proceeding that Lenox had engaged in unlawful resale price agreements was based on findings consistent with these cases. The Commission expressly found that Lenox had required its dealers to agree to resale prices. See 73 FTC at 594-95 & 597. Lenox is incorrect when it suggests that the standards applied by the Commission in the original proceeding are inconsistent with current law. Accordingly, Lenox has not shown that changed conditions of law require the Commission to reopen and set aside the order.

Here, as in *Monsanto*, it is necessary to distinguish between

⁵ In *Monsanto*, the Court held that a *per se* unlawful agreement could not be inferred from nothing more than a dealer termination following competitors' complaints. In *Sharp*, the Court said that a vertical agreement to terminate a price-cutting dealer is not *per se* unlawful unless there is also an agreement on price

concerted and independent action and between concerted action to set prices, which is *per se* unlawful, and concerted action on nonprice vertical restraints, which is judged under the rule of reason. The order in this matter proscribes concerted action to set prices. Paragraphs 1 and 2 of the order prohibit Lenox from entering into agreements concerning price with its dealers. These prohibitions are consistent with *Monsanto* and *Sharp*, in which the Court said that vertical agreements to fix price are *per se* unlawful.

The first part of Paragraph 3 and Paragraphs 4 and 7 of the order also are consistent with *Monsanto* and *Sharp*. The first part of Paragraph 3, which bars Lenox from “[r]equesting dealers, either directly or indirectly, to report any person or firm who does not observe the resale prices suggested by respondent,” in essence prohibits Lenox from inviting its dealers to participate in a resale price maintenance scheme. *See Monsanto*, 465 U.S. at 764 n.9 & 765. This provision does not bar dealers from complaining to Lenox about price cutters. Instead, it bars Lenox from seeking the dealers’ participation in policing and maintaining resale prices.

Similarly, Paragraph 4 of the order prohibits Lenox from coercing its dealers, by threats of termination or otherwise, to comply with Lenox’s resale prices. Paragraph 7 prohibits Lenox from using “any other cooperative means of accomplishing the maintenance of resale prices fixed by respondent.” Nothing in *Monsanto* makes the conduct described in these provisions of the order lawful. Threats to obtain dealer acquiescence in resale prices are “plainly relevant and persuasive to a meeting of the minds.” *Monsanto*, 465 U.S. at 765 & n.10. Although cooperation and coordination between Lenox and its dealers “to assure that their product will reach the consumer persuasively and efficiently” is not unlawful, 465 U.S. at 763–64, cooperation to maintain resale prices clearly is unlawful.

The second part of Paragraph 3 of the order prohibits Lenox from “acting on reports so obtained by refusing or threatening to refuse sales to the dealers so reported.” As written, this provision applies only when Lenox solicits and obtains the cooperation of its dealers in enforcing compliance with resale prices and acts on the information so obtained. In addition, termination of a price cutting dealer is not lawful in all circumstances. For example, a manufacturer’s threat to refuse to deal to obtain compliance with resale prices can evidence an invitation to an unlawful agreement. *Monsanto*, 465 U.S. at 765. Nevertheless, this provision will be set aside in the public interest. As

the Court explained in *Monsanto*, dealers "are an important source of information for manufacturers," dealer complaints about price cutters "arise in the normal course of business and do not indicate illegal concerted action" and a manufacturer's termination of a dealer following complaints from other dealers would not, by itself, support an inference of concerted action. 465 U.S. at 763-64. To the extent that this second part of Paragraph 3 may inhibit Lenox from legitimate unilateral conduct, it may cause competitive injury.⁶ Because any conduct that would be unlawful under this part of Paragraph 3 would be prohibited by other provisions of the order, the reasons to set aside this provision outweigh any reasons to retain it.

IV.

Lenox alleges that "changes in market facts warrant vacation of the order." Request at 36. Lenox has not shown that these alleged changed conditions require setting aside the order. Agreements to fix resale prices remain unlawful, and Lenox has not shown that changed conditions of fact require setting aside order provisions that require compliance with the law.

Lenox claims that intrabrand competition has increased significantly. Since 1976, when the McGuire Act was repealed, Lenox states that it has authorized "multiple, quality dealers" in all marketing areas and that price competition among Lenox dealers is and will continue to be "the norm." Request at 36-37. An increase in the number of authorized Lenox dealers and increased competition among them are not changed conditions that eliminate the need for the order or make continued application of it inequitable. Instead of demonstrating a need to reopen and modify the order, these conditions appear to be consistent with compliance with the order.

Lenox also claims that interbrand competition has changed since 1970. According to Lenox, domestic manufacturers of fine china have withdrawn from the market, and imports have become dominant. Lenox claims that its foreign rivals are not restricted from preventing dealer practices that "tarnish[] [Lenox's] image and sap[] the profit of other quality dealers," so that Lenox is at a competitive disadvantage. Request at 38. Lenox does not claim that Lenox is

⁶ As discussed below, Lenox's claims of competitive disadvantage and injury are premised for the most part on its perceived inability unilaterally to refuse to deal with firms that have small retail mark ups and do not provide customer services. Request at 16-20 & 52-54; see note 8 *infra*. Although Paragraph 3 does not prohibit unilateral refusals to deal, the modification eliminates any ambiguity in that regard.

competitively disadvantaged by the fact that other U.S. firms are no longer its competitors.⁷ Increased competition from foreign firms also is not a changed condition that requires reopening and modification of the order. To the extent that the foreign firms do business in the United States, they, like domestic firms, are required to comply with the law, and they are not free to agree with their dealers to fix resale prices.

Lenox also alleges that marketing has changed, citing increased competition from “certain deep-discounting dealers, trading on the efforts of others” and “destroying Lenox’s distribution through prestige outlets.” Request at 38–39. According to Lenox, “deep” discounters often sell Lenox products at prices 30% to 50% less than suggested resale prices. See Velsmid Affidavit at 2. These discounters usually (but not always) maintain inferior displays and only minimal inventories of Lenox china and do not offer the full range of services that Lenox expects from its dealers. *Id.* at 3. Many of these discounters accept telephone orders from distant customers, who select their china from the displays of full-service dealers.

As a result of deep discounting and free riding, Lenox claims, full-service dealers discontinue or reduce their sales efforts for Lenox products, Request at 39–40, and Lenox’s image of quality, prestige and elegance has begun to erode. To substantiate this claim, Lenox has submitted affidavits from its employees and from “prestige” retailers who say that such retailers have either cut back or discontinued their displays and sales of Lenox products, because widespread deep discounting has made carrying them both unprofitable and incompatible with the “quality image” of their stores. Lenox vigorously contends that its quality image is a major component of the value of fine china to consumers and that it must be allowed to terminate deep discounters to protect that image before it is irreversibly damaged. Request at 40–45. In addition, Lenox asserts that interbrand competition is impaired when prestige retailers curtail or discontinue sales of the Lenox lines. Request at 37–38.

Neither free riding nor the erosion of Lenox’s quality image is a changed condition that would warrant vacating the order. The order prohibits vertical price fixing, which is unlawful. The order does not bar Lenox from imposing lawful nonprice vertical restraints to protect

⁷ Lenox also does not claim that the withdrawal of other domestic firms, impliedly reducing interbrand competition, is in any way attributable to the order.

its product image.⁸ Lenox, however, has made a threshold showing that continued application of the second part of Paragraph 3 and of Paragraphs 9(a) and (b) of the order is causing injury to its competitive position. As discussed above, the second part of Paragraph 3 may inhibit Lenox from legitimate conduct. Paragraphs 9(a) and (b) of the order require Lenox to reinstate dealers terminated for discounting or for transshipping Lenox products.⁹ Because unilateral termination of a dealer for discounting is not unlawful and because the order's prohibition of Lenox's ban on transshipments was set aside in 1982, requiring Lenox to reinstate dealers for these reasons would be inconsistent with the order, as modified, and clearly would serve no further remedial purpose. To the extent that conduct described in these provisions might be in furtherance of an unlawful scheme to fix resale prices, such conduct would be prohibited by the other provisions of the order. Consequently, the need to set aside these provisions of the order outweighs any reasons to retain them.

Accordingly, *it is ordered*, that Lenox's Request to reopen and set aside the order in this matter in its entirety be, and it hereby is, denied; and

If it further ordered, That this matter be reopened and that the Commission's order in Docket No. 8718, issued June 24, 1970, as modified by order dated July 12, 1982, be, and it hereby is, modified, as of the date of service of this order, by setting aside Paragraph 9 and by deleting from Paragraph 3 "or acting on reports so obtained by refusing or threatening to refuse sales to the dealers so reported."

⁸ To the extent that Lenox's injury claim turns on free riding by deep discounters on services provided by other dealers, Lenox has been able to ban resale of its products to unauthorized dealers since the 1982 modification of the order. Nothing in the order prevents Lenox from requiring its dealers to provide customer services and from terminating dealers for failing to do so.

⁹ Lenox asserts that these provisions are "no longer applicable." Request at 7-8, footnote. By their terms, however, these paragraphs are still in effect.

FEDERAL TRADE COMMISSION DECISIONS

Findings, Opinions and Orders

IN THE MATTER OF

ENCYCLOPAEDIA BRITANNICA, INC., ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 8908. Final Order, March 9, 1976—Modifying Order, July 5, 1988

This order reopens the proceeding and modifies the Preambles to Paragraphs I through IV, Paragraph II.C (Telephone Talk), and Paragraph II.L (No-Contact Period) of the Commission's final order issued on March 9, 1976 [87 FTC 421]. The Commission concludes that the modifying order is in the public interest. The modification of the Preambles clarifies that the Commission's final order applies only to subsidiaries and employees of Encyclopaedia Britannica, Inc. engaged in selling or being recruited to sell via in-home, over-the-counter, direct mail, or telephone solicitations. The modification of Paragraph II.C requires respondents to disclose the sales purpose of a call or an appointment within 30 seconds of beginning a sales call or a call to make a sales appointment. The modification of Paragraph II.L allows respondents to contact purchasers to correct inadvertent errors on sales forms, or to obtain necessary information that respondent inadvertently failed to obtain during a sales presentation.

ORDER REOPENING THE PROCEEDING AND MODIFYING CEASE AND DESIST ORDER

On September 22, 1987, Encyclopaedia Britannica, Inc. ("EB") filed with the Commission a request that the above-referenced proceeding be reopened and that the order issued therein on March 9, 1976, either

- (1) be set aside in its entirety; or
- (2) be modified by setting a date certain when the order would expire and in the interim modifying specific provisions; or
- (3) be modified by altering specific order provisions. The specific modifications requested were alterations to Parts I.B., II.C, II.H., IV., and the Preambles I- IV, and deletion of Parts I.D., I.E., II.L., and V. [2]

This petition replaced an earlier petition filed on April 2, 1987, that was subsequently withdrawn.