

IN THE MATTER OF

ADOLPH COORS COMPANY

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket 8845. Order, Feb. 4, 1975*—Modifying Order, Aug. 1, 1989*

This order reopens the proceeding and modifies the Commission's order issued on Feb. 4, 1975 (85 FTC 187), by deleting provisions that prohibited respondent from imposing certain territorial and customer restrictions on its distributors.

ORDER GRANTING IN PART AND DENYING IN PART PETITION TO
REOPEN AND MODIFY ORDER

Adolph Coors Company ("Coors"), has filed, on April 3, 1989, a "Petition to Modify 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 and Procedure, 16 CFR 2.51. The petition asks the Commission to reopen the proceeding and set aside the modified cease and desist order entered by the Commission on February 4, 1975, in Docket No. 8845, 85 FTC 187, "except insofar as the order prohibits price fixing or resale price maintenance." Petition at 2. Specifically, Coors requests that the Commission set aside in their entirety paragraphs 4(c), 5, 6, 7, 8 and 11 of the order, which prohibit Coors from, among other things, imposing non-price vertical restraints on distributors of Coors' beer products.¹ In support of its request, Coors argues that the order modification is warranted by changed conditions of law. Petition at 2-3. The petition was placed on the public record for thirty days, pursuant to Section 2.51(c) of the Commission's Rules, and one comment was received. For the reasons discussed below, the Commission has determined that Coors has not shown a changed condition of law requiring reopening the order but that Coors has shown that granting the request, with one exception, would be in the public interest. The Commission has therefore reopened and modified the order.

*Decision issued July 24, 1973 (83 FTC 32).

¹ In addition to prohibiting Coors from refusing to deliver beer to distributors selling outside their designated territory, paragraph 7 of the order also prohibits Coors from refusing to deliver beer to distributors who sell beer at prices, markups or profits lower than those approved by Coors. 85 FTC at 189.

I.

The Commission's complaint, issued on June 7, 1971, 83 FTC 32, alleges that Coors violated Section 5 of the Federal Trade Commission Act by, among other things, fixing wholesale and retail prices, imposing territorial and customer restrictions on its distributors, and using unfair short-term termination provisions in its contracts with distributors. Following extensive evidentiary hearings, the Administrative Law Judge ("ALJ") ordered the dismissal of the complaint against Coors. 83 FTC at 174. On appeal from the ALJ's Initial Decision, the Commission substituted its findings for those of the ALJ and issued its order on July 24, 1973. 83 FTC at 211. The Commission condemned Coors' territorial restraints as *per se* unlawful because they were part of an unlawful resale price maintenance scheme. Coors appealed the Commission's order to the United States Court of Appeals for the Tenth Circuit, which upheld all of the provisions of the Commission's order, except those dealing with the notice and arbitration requirement in the event of a distributor's termination. The court also held that Coors' territorial restraints were themselves *per se* unlawful under *United States v. Arnold, Schwinn & Co., et al.*, 388 U.S. 365 (1967). See *Adolph Coors Company v. FTC*, 497 F.2d 1178 (10th Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975).

Consequently, the Commission issued its final order on February 4, 1975. The order, among other things, prohibits Coors from engaging in wholesale and retail price fixing, imposing certain non-price vertical restrictions on its distributors, including territorial restraints, and requiring exclusive draught accounts. 85 FTC 187.

II.

Coors requests that the Commission reopen the proceeding and set aside in their entirety paragraphs 4(c), 5, 6, 7, 8 and 11 of the order. Paragraph 4(c) of the order prohibits Coors from refusing to sell beer to any Coors distributor or terminating any Coors distributor because the distributor sold Coors beer to another distributor or retailer located outside of the territory granted to the Coors distributor. 85 FTC at 188. Paragraph 5 prohibits Coors from restricting "the territory in which or the persons to whom a distributor may sell Coors beer."² *Id.* at 189. Paragraph 6 prohibits Coors from allocating Coors

² A proviso to paragraph 5 states, however, that the order does not prohibit Coors from "convinving with the

beer among its distributors "in times of beer shortage at the Coors brewery," by any means not equitably related to their proportionate purchases of Coors beer during "the last three months before the allocation" *Id.* Paragraph 7 prohibits Coors from refusing to deliver all of a distributor's order because the distributor made sales outside of his assigned territory or because the distributor is selling Coors beer at "unapproved" prices or markups. *Id.* Paragraph 8 of the order prohibits Coors from prohibiting its distributors from selling Coors beer for "central warehouse delivery."³ *Id.* Finally, paragraph 11 generally prohibits Coors from hindering, suppressing or eliminating competition between or among distributors or retailers handling Coors beer. *Id.* at 189-90.⁴

Coors argues that these provisions of the order, especially in the context of Coors' unique brewing method, and experience with the unauthorized distribution of its products in expansion markets, have "placed Coors at a competitive disadvantage and [have] been harmful." Petition at 9. Among other things, Coors beer distributors are required to maintain Coors' beer products in refrigerated warehouses. Additionally, the distributors must monitor the age of their Coors inventory and are responsible for closely monitoring product shelf-life and ensuring that only fresh product is available to consumers. Petition at 5. Coors believes that its ability to restrict its distributors' territories and impose other non-price vertical restraints is necessary because such restrictions would allow Coors to (1) monitor better its distributors' performance, (2) provide incentives to distributors to invest the resources and provide services necessary to comply with Coors' quality control requirements, and (3) compete better against other beer brewers.

Coors asserts that the relief it seeks is required by a change in law. Specifically, Coors argues that the order provisions it is asking the Commission to set aside were predicated upon the *Schwinn* doctrine,

requirements of any state law." *Id.*

³ Coors, however, is not prohibited from establishing refrigeration standards for the central warehouses "which are substantially similar to those established for distributors." 85 FTC at 189.

⁴ Paragraph 1 of the order prohibits Coors from fixing the prices at which distributors sell Coors beer to retailers or the prices at which retailers sell Coors beer to consumers. Paragraphs 2 and 3 of the order (prohibiting Coors from suggesting prices or mark-ups for its distributors) expired by their own terms in 1978. Subparagraphs 4(a), (b) and (d) prohibit Coors from terminating any distributor because the distributor either sold beer or advertised at prices different from those approved by Coors, or because the distributor has distributed the product of another brewer. Paragraph 9 prohibits Coors from requiring that retailers serve Coors draught beer as their only light-colored draught beer. Paragraph 10 prohibits Coors from requiring its distributors to eliminate or refrain from obtaining and handling rival brands of beer in order to become or remain a Coors distributor. 85 FTC at 187-90. Coors does not seek relief from these remaining operative order provisions. Petition at 16.

which the Supreme Court overruled in *Continental T.V., Inc. v. GTE-Sylvania, Inc.*, 433 U.S. 36 (1977). Consequently, according to Coors, Coors' non-price vertical restraints "were never put to . . . the 'market power' analysis currently used in vertical, non-price restraint cases." Petition at 12. Coors asserts that it does not have sufficient market power⁵ to raise its prices significantly without materially and adversely affecting its business, and suggests that Coors' non-price vertical restraints would be judged under a rule of reason analysis today.

III.

Section 5(b) of the FTC 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" require such modification. 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 it inequitable or harmful to competition. *Louisiana-Pacific Corp.*, Docket No. C-2956, Letter to John C. Hart (June 5, 1986), at 4.

The Commission may also modify an order pursuant to Section 5(b) when, although changed circumstances would not require reopening, the Commission determines that the public interest requires such action. Therefore, Section 2.51 of the Commission's Rules of Practice invites respondents in petitions to reopen to show how the public interest warrants the requested modification. In the case of a request for modification based on this latter ground, a petitioner must demonstrate as a threshold matter some affirmative need to modify the order. *Damon Corp.*, Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (March 29, 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 (1983). If the showing of need is made, the Commission will balance the reasons favoring the requested modification against any reasons not to make the modification. *Damon Letter* at 2. The Commission will also consider whether the

⁵ Coors' national market share is less than eight percent and it no longer holds the leading position in any

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 the requisite satisfactory showing. The petitioner must make a "satisfactory showing" of changed conditions to obtain reopening of the order. The legislative history also makes it clear that the petitioner has the burden of showing, other than by conclusory statements, why an order should be modified.⁶ If the Commission determines that the petitioner has made the required showing, the Commission must reopen the order to consider 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 required by the statute. The petitioner's burden is not a light one given the public interest in 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).

IV.

Based on the information provided by Coors, and other available information, the Commission has determined that Coors has not made a satisfactory showing that changes in law require reopening the proceeding and setting aside the order provisions prohibiting Coors from imposing upon its distributors certain non-price vertical restraints, including territorial restrictions. However, the Commission has concluded that Coors has made a satisfactory showing that reopening the order and setting aside the non-price vertical restraints provisions is in the public interest.

The Commission's 1973 decision in this case, after finding that Coors engaged in unlawful resale price maintenance, called the territorial restraints "an obvious adjunct to Coors' efforts to control the prices at which its distributors and their retail accounts dispose of the product". 83 FTC at 192. Consequently, the Commission condemned Coors' territorial restraints as *per se* unlawful because they were part of the unlawful RPM scheme, but determined that it

⁶ 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., 1st Sess. 9-10 (1979).

was not necessary to conclude that the restrictions in themselves were unlawful *per se*.⁷ The court of appeals held the restraints in themselves *per se* unlawful, citing *Schwinn*, albeit with substantial criticism. 497 F.2d 1178 at 1186-87.

Sylvania, which was decided shortly after the Commission issued the final order in this case, recognized that exclusive territories and other non-price vertical restraints are not inherently anticompetitive and must thus be judged under the rule of reason.⁸ *Sylvania* replaced the *per se* test for non-price vertical customer and territorial restraints outside RPM with a rule of reason test, but the Court did not change the *per se* rule for non-price vertical restraints that are part of a RPM scheme. See *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 760, n. 6 (1984). *Sylvania*, therefore, is not a change in law as to the order in this matter.

Although non-price vertical restraints are still *per se* unlawful as part of a RPM scheme, Coors does not request elimination of the order's prohibitions on RPM. Therefore, any territorial or other non-price vertical restrictions imposed as part of a resale price maintenance scheme would be *per se* unlawful and would violate this order even if modified as Coors requests. The non-price provisions of the order, apart from the RPM provisions, are thus best viewed as fencing-in provisions, intended to prevent the recurrence of resale price fixing. Coors has shown that the benefits of those provisions, when viewed under the rule of reason approach in *Sylvania*, are outweighed by the costs they impose, and may now be set aside in the public interest.

V.

Coors has made a threshold showing that the order provisions it requests be set aside impede and deter Coors (in states that do not permit or require territorial restrictions) from correcting impaired distribution problems and from adopting efficiency-maximizing distribution arrangements that would intensify interbrand competition.⁹

⁷ The Commission noted that "[a]s the court in *Schwinn* recognized, whatever the status of vertical restrictions unaccompanied by price-fixing, the presence of price-fixing as part and parcel of a system of territorial restrictions renders the entire package illegal *per se*." *Id.* at 194.

⁸ See *Beltone Electronics Corporation*, 100 FTC 68 (1982).

⁹ For example, any steps Coors might take to increase distributor emphasis on providing a consistently fresh, quality product to the consuming public or to improve geographic market coverage may subject Coors to the risk of being accused of violating the order and, consequently, the risk of a civil penalty suit and judgment. By not being able to correct these distribution problems effectively, Coors is injured in its competition with other brewers. In fact, this order may injure Coors more than it would other brewers because of Coors' unique

(footnote cont'd)

These arrangements are available to Coors' competitors, and these order provisions therefore injure Coors' ability to compete effectively with other breweries.

Setting aside the non-price vertical restraints provisions of the order would enable Coors to employ distribution methods that likely would be reasonable under the rule of reason standard, because Coors lacks the necessary market power to raise its prices to supracompetitive levels. It would also allow Coors to take advantage of certain efficiencies in the distribution of its products, which, in turn, would promote interbrand competition. *Sylvania, supra*, at 54-55.

Allowing Coors to use what it considers the most efficient and cost effective distribution of its products, including agreeing with distributors in certain states to dedicate their sales efforts to designated geographic areas, would put Coors on an equal footing with other brewers and should make Coors and its distributors more effective competitors. This is consistent with the recognition that in competitive markets consensual non-price vertical arrangements can benefit both competition and the consumer. Coors' inability to impose non-price vertical restraints that its competitors are using places Coors at a competitive disadvantage. Because of the competitive nature of the beer industry, the costs of the prohibitions on non-price vertical restraints outweigh the continued need for these provisions. That balancing therefore supports modifying the order in the public interest.

VI.

With respect to Coors' request that the Commission set aside paragraph 11 of the order, the Commission has concluded that that paragraph's general prohibition against Coors "[h]indering, suppressing or eliminating competition . . . between or among distributors . . .," 85 FTC at 189-90, is overly restrictive and broad. This language may have a chilling effect on Coors' ability to take advantage of certain efficiencies in the distribution of its products. Moreover, in view of the current legal framework for analyzing vertical restraints, and the retention of the order's resale price maintenance prohibitions, paragraph 11 is no longer necessary to fence-in Coors' conduct concerning non-price vertical restraints it may impose upon its distributors.

brewing and distribution methods. See Bureau of Economics, Federal Trade Commission, *The Brewing Industry* at 111-13 (1978).

Finally, the Commission has also concluded that Coors has not made a satisfactory showing that changed conditions of fact or law or the public interest require that the Commission set aside the part of paragraph 7 of the order that concerns conduct involving resale price maintenance. Setting aside this part of paragraph 7 would be inconsistent with Coors' request that the Commission set aside "the order . . . except insofar as that order prohibits price fixing or resale price maintenance." Petition at 3.¹⁰ Additionally, retention of the resale price maintenance part of paragraph 7 is consistent with the primary objective of the order.

VII.

Accordingly, *it is ordered*, that this matter be reopened and that the Commission's order in Docket No. 8845, issued on February 4, 1975, be, and it hereby is, modified, as of the date of service of this order, by setting aside paragraphs 4(c), 5, 6, 8, and 11, and by modifying paragraph 7 to read:

7. Refusing to deliver all of a distributor's order because the distributor or the distributor's customer is selling Coors beer at prices, markups or profits lower than those approved by respondent.

Commissioner Strenio not participating.

¹⁰ Coors has not asked to be relieved from Subparagraphs 4(a) and (b), which prohibit Coors from terminating a distributor because that distributor or its customers resell at other than approved prices.

IN THE MATTER OF

PROMODES, S.A., ET AL.

Docket 9228. Interlocutory Order, August 10, 1989

ORDER

By motion dated August 4, 1989, the parties have jointly moved that respondent The Kroger Company ("Kroger") be dismissed from this action. In connection therewith, Kroger, along with Promodes S.A. and Red Food Stores, Inc. (collectively "Red Food"), and complaint counsel agree to the following provisions regarding discovery in this matter:

1. Kroger will respond in a timely manner to reasonable discovery requests, including document requests and interrogatories; and
2. Kroger documents, Kroger interrogatory responses and the sworn testimony of Kroger officials will be admissible to the same extent as if Kroger were a party. Complaint counsel and Red Food will not object to the introduction of Kroger documents, Kroger interrogatory responses or the sworn testimony of Kroger officials on the grounds that Kroger is no longer a party to this litigation.

The motion to dismiss is granted.