

IN THE MATTER OF

U.S. PIONEER ELECTRONICS CORP.

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

*Docket C-2755. Consent Order, Oct. 24, 1975--Modifying Order and
Order to Show Cause, April 8, 1992*

This order reopens the proceeding and modifies, in part, the Commission's consent order issued in 1975 [86 FTC 1002], by allowing the company to withhold cooperative advertising allowances from dealers and to unilaterally terminate dealers who have advertised its products at prices other than those suggested by the company. In addition, the Commission ordered the respondent to show cause why additional modification to paragraph I.10. should not be made.

ORDER GRANTING IN PART AND DENYING IN PART REQUEST
TO REOPEN AND MODIFY ORDER ISSUED OCTOBER 24, 1975,
AND ORDER TO SHOW CAUSE

Pioneer Electronics (USA) Inc., the successor corporation to U.S. Pioneer Electronics ("Pioneer"), has filed a "Petition to Reopen Proceedings and to Modify Consent Order ("Petition")¹ in Docket No. C-2755, 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. Pioneer asks the Commission to reopen and modify the consent order issued by the Commission on October 25, 1975 ("order"), *U.S. Pioneer Electronics Corp.*, 86 FTC 1002 (1975). The order was previously reopened by the Commission on November 5, 1982, 100 FTC 526 (1982), pursuant to an order to show cause and modified on March 18, 1983, 101 FTC 372 (1983).²

¹ Pioneer submitted a Memorandum in Support of Petition to Reopen Proceedings and to Modify Consent Order ("Petition Memo") with its Petition.

² The Commission modified paragraph I.11. to allow Pioneer to prevent transshipment of its products to outlets that do not provide adequate point of sale promotions and service.

Pioneer asks the Commission to set aside and modify several provisions contained in paragraph I of the order, each of which limits Pioneer's ability to impose restrictions on its dealers' advertised prices in connection with the sale of consumer electronics products. In support of its Petition, Pioneer argues that the modifications are warranted by changed conditions of law and fact, and by the public interest. Pioneer's Petition was placed on the public record for thirty days, pursuant to Section 2.51 of the Commission's Rules. No public comments were received.

For the reasons discussed below, the Commission has determined that Pioneer has not shown that changed conditions of law or fact require reopening the order but that Pioneer has demonstrated that it is in the public interest for the order to be reopened and modified in part. The Commission has, therefore, reopened and modified the order. Also, pursuant to Section 3.72 of the Commission's Rules, the Commission is issuing an Order to Show Cause why it is not in the public interest for the Commission to modify the order further to remove restrictions regarding Pioneer's ability to terminate a dealer who does not comply with suggested resale prices.

I.

The Complaint and Order

The complaint in this case alleged that Pioneer violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, by engaging, in combination with its dealers, in courses of action to unlawfully fix, establish, stabilize or maintain the suggested retail prices at which its products were resold.³ The complaint listed seven specific acts and practices in which Pioneer engaged in "furtherance of" those courses of action, including, for example, establishing agreements, under-

³ At about this same time, the Commission issued a number of similar vertical price fixing complaints and orders against Pioneer's competitors. See *United Audio Products, Inc.*, C-2828, 88 FTC 24 (1976); *Nikko Electronic Corporation of America*, C-2829, 88 FTC 31 (1976); *Sansui Electronics Corporation*, C-2754, 86 FTC 995 (1975); *Sherwood Electronic Laboratories, Inc.*, C-2753, 86 FTC 988 (1975); *TEAC Corporation of America*, C-2752, 86 FTC 981 (1975).

standings, or arrangements with its dealers, as a condition precedent to granting or retaining a dealership, that such dealers will maintain certain resale or retail prices, and soliciting and obtaining its dealers' cooperation and assistance in identifying and reporting any dealer who advertises, offers to sell, or sells products at prices lower than certain resale prices, 86 FTC at 1003. The order prohibits Pioneer, its successors and assigns, from engaging in any of twelve specified acts and practices related to vertical price fixing. *Id.* at 1005-6. Pioneer consented to the Commission's order.

II.

Pioneer's Petition

The prohibitions at issue in the Petition relate to the advertising restrictions in paragraphs I.2., I.5., I.6., I.8., and I.10. of the order. Specifically, Pioneer requests the Commission to delete paragraph I.6.⁴ (which refers to cooperative advertising restrictions) and modify

⁴ Paragraph I.6. prohibits Pioneer from:

Threatening to withhold or withholding earned cooperative advertising credits or allowances from any dealer because said dealer advertises respondent's products at retail prices other than that which respondent deems appropriate or has approved.

paragraphs I.2., I.5., I.8., and I.10.⁵ by removing all other advertising restrictions.

Pioneer argues that the relief it is seeking is required by changed conditions of law and fact, and by the public interest. Pioneer asserts that Minimum Advertising Price ("MAP") programs prohibited by the order "are not by themselves agreements to fix prices. Instead they are merely 'fencing-in' provisions. As long as there is no resale price maintenance behavior, and there cannot be given the clear case law from the Supreme Court as well as the provisions of the order which remain in effect, these 'fencing-in' provisions are no longer necessary." Petition Memo at 15. Pioneer asserts that under decisions rendered by the Supreme Court and the Commission since entry of the order in 1975, non-price vertical restrictions are to be governed by the rule of reason, and are no longer considered *per se* violations of the law.

Pioneer states that the requested modifications are necessary because it is "one of only a few manufacturers in the home electronics industry that cannot adopt" MAP programs, *i.e.*, Pioneer cannot compete on a level playing field. That unequal playing field

⁵ Pioneer requests that the Commission delete the bracketed words from the following order paragraphs. Paragraph I.2.:

Fixing, establishing, controlling or maintaining the prices at which dealers may [advertise, promote, offer for sale or] sell respondent's products.

Petition at 1. Paragraph I.5.:

Refusing to sell or threatening to refuse to sell to any dealer who desires to engage in the sale of respondent's products for the reason that such dealer will not enter into an understanding or agreement with respondent to [advertise or] sell said products at respondent's established or suggested retail price.

Petition at 2. Paragraph I.8.:

Securing or attempting to secure any promises or assurances from dealers or prospective dealers regarding the prices at which such dealers will [advertise or] sell respondent's products [or requesting or requiring any dealer or prospective dealer to obtain approval from respondent for prices offered by said dealers in advertisements for respondent's products].

Petition at 2-3. Paragraph I.10.:

Terminating, threatening, intimidating, coercing, delaying shipments, or taking any other action to prevent the sale of respondent's products by a dealer because said dealer has [advertised or] sold, is [advertising or] selling, or is suspected of [advertising or] selling such products at other than prices that respondent may deem to be appropriate or has approved.

Petition at 3.

impairs interbrand competition by disadvantaging Pioneer when competing for dealers because dealers find Pioneer brands less profitable than those of manufacturers with MAP programs, and damaging competition for consumers because the public "often forms an incorrect impression of the quality of Pioneer products because the advertised Pioneer price is often well below the advertised price of the comparable product . . . , though the actual sales prices for the products are nearly the same." Petition Memo at 7.

Pioneer states that dealers must invest a large amount of money, space and resources when adding a new brand of electronics for sale. These investments will only be made if "there is a reasonable assurance of a profitable, long term relationship with the new supplier." Petition Memo at 8. This relationship depends upon getting consumers to the store. In the electronics field, that is done predominantly through advertising.

Pioneer claims that the use of "blow-out" advertisements -- advertisements of well-known products that are offered near dealer cost to build store traffic -- destroys the attractiveness of Pioneer as a product line for "virtually all dealers." Petition Memo at 9. As a result, Pioneer alleges, "dealers either refuse to carry Pioneer or simply do not carry it in quantities or promote it as heavily as competing products which have MAP programs." *Id.* Retailers are harmed by the low advertised prices because the customers "will" buy the products at the stores with the lower price, whether or not another retailer would have matched the price, and customers may decide that the higher priced retailer is not competitive generally and refuse to shop there. Petition Memo at 10.

Pioneer states that MAP programs are especially important for "'high-end' 'big ticket' products" such as projection televisions because of the greater need for retailer investment in sales and service training. Petition Memo at 10. Pioneer also cites the lack of MAP programs as harming its ability to distribute through "channels of trade other than retail dealers." *Id.* The only different retail channel Pioneer discusses is a nation-wide catalog distributed thrice yearly. The catalog chooses to limit the Pioneer products it carries to "step-up" products because they are less often "blow-out" advertisement targets.

Pioneer also claims that "controlling advertising prices allows a manufacturer to position and promote high-end products properly and to introduce new products." Petition Memo at 11. Pioneer states that a damaged reputation in the electronics industry is especially difficult to rehabilitate because of the constant inflow of entirely new products onto the market. Pioneer and its customers have been harmed the most because, Pioneer alleges, it is a leading innovator in the home electronics industry and it "has lost many sales and its reputation as a high quality innovator has been seriously damaged by advertisements of these new products at prices at, or below, dealer cost." *Id.* As a result, dealers will shy away from investing in the products and, Pioneer claims, customers ultimately will be harmed. Finally, Pioneer notes that the "inconsistent treatment of manufacturers is magnified by the fact that consumers are not aware of the unlevel field." Petition Memo at 13. Consumers, therefore, incorrectly conclude that Pioneer products are "lower quality or less technologically sophisticated" when they see them advertised at only sales prices. Petition Memo at 13 (citing affidavit of Mark Smith, Senior Manager, Planning and Coordination, for the Home Electronics Division of Pioneer ("Smith Aff.") at ¶9 and ¶10).

III.

Standards for Reopening and Modification

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. 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. *Id.* The Commission will also consider whether the particular modification sought is appropriate to remedy the identified harm.

Whether the request to reopen is based on changed conditions or on public interest considerations, the burden is on the respondent to make the requisite satisfactory showing. The language of Section 5(b) plainly anticipates that 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 repose and the finality of Commission orders.⁷

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). See also Rule 2.51(b), which requires affidavits in support of petitions to reopen and modify.

⁷ See *Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

IV.

Pioneer Has Failed to Demonstrate Changed Conditions of Law or Fact That Require Reopening of the Order

Pioneer has failed to show that the modifications it seeks are required by changes of law. The provisions that Pioneer seeks to have set aside are part of the order's overall prohibition on resale price maintenance. Nothing in the complaint or order suggests that the cooperative advertising restrictions or any of the other advertising restrictions were imposed because the prohibited conduct itself, absent resale price maintenance, was *per se* unlawful.⁸ The Pioneer order is, in that sense, virtually identical to the order in *The Magnavox Company*, 78 FTC 1183 (1971). In its modification of the order in Magnavox ("1990 Magnavox Modification"), the Commission denied Magnavox's request for a reopening and modification of the "fencing-in" provisions of the order on the basis of changed conditions of law. The Commission's denial of Pioneer's Petition based on change of law is consistent with the Commission's analysis in the 1990 Magnavox Modification.

Resale price maintenance schemes remain *per se* unlawful. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), which was decided two years after the Commission issued the order in this case, recognized that non-price vertical restraints are not inherently anticompetitive and must thus be judged under the rule of

⁸ Cf. *Sharp Electronics Corporation*, 112 FTC 303 (1989), in which the Commission set aside the order based on change of law. The Sharp Electronics order prohibited Sharp from engaging in only non-price vertical restraints, such as territorial restrictions; the non-price vertical restrictions were not a part of an overall order prohibiting resale price maintenance. At the time the order was entered all vertical restrictions were *per se* unlawful under *U.S. v. Arnold Schwinn & Co.*, 388 U.S. 365 (1977). The Commission vacated the order based upon the change in law in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977) and its progeny, which changed the test from *per se* to rule of reason analysis for non-price vertical restraints. The Commission noted that GTE Sylvania did not "change the *per se* rule against resale price maintenance." 112 FTC at 306 fn. 3. The Pioneer order differs from the Sharp Electronics order in that the complaint against Pioneer was concerned with non-price conduct that was a part of resale price maintenance and the order prohibited non-price vertical restraints as a part of the prohibitions on resale price maintenance.

reason.⁹ The Supreme Court, in *GTE Sylvania*, replaced the *per se* test for non-price vertical customer restraints outside resale price maintenance 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 resale price maintenance scheme. Pioneer has failed to show that any of the actions in which it wishes to engage as a result of the proposed modification have become lawful if part of resale price maintenance. Because the provisions of paragraph I generally prohibit conduct that is unlawful if engaged in as part of resale price maintenance, and because *GTE Sylvania* did not change the law as to such conduct, Pioneer has failed to show that its request should be granted based upon a change in law.

Pioneer has similarly not made the necessary showing that changed conditions of fact require the Commission to reopen and modify the order. Although Pioneer has alleged that the United States consumer electronic products market today appears to be competitive, Petition Memo at 16-17, just as *Magnavox* did in its request, the record does not contain any evidence of market structure at the time the Commission issued the order, because the complaint was premised on a *per se* theory of resale price maintenance. Thus, based only upon Pioneer's description of today's consumer electronic products market, Pioneer has not shown that changed conditions of fact make those provisions for which it requests a modification no longer necessary or harmful to competition. Indeed, resale price maintenance would be unlawful today, even if Pioneer had shown that the market had changed from a concentrated to unconcentrated one since the order was issued.

V.

The Cooperative Advertising Restrictions (Paragraph I.6.)

Although Pioneer has failed to demonstrate changed conditions of law or fact that require reopening of the order, Pioneer has shown

⁹ See *In the Matter of Beltone Electronics Corporation, et al.*, 100 FTC 68 (1982) (illustrating that *GTE Sylvania* has significantly affected the Commission's analysis of non-price vertical restraints).

that the public interest warrants reopening and modifying the order to delete paragraph I.6. The provision Pioneer seeks to have deleted prohibits conduct that may be lawful if engaged in outside of a resale price maintenance scheme, and Pioneer has shown that it is being injured in competing with other firms that are free to and do engage in cooperative advertising programs.

Pioneer has requested that paragraph I.6. be deleted from the order to allow it to offer certain price-restrictive cooperative advertising programs. Pioneer has shown that its ability to compete is adversely affected by the order's restrictions concerning price-restrictive cooperative advertising programs. Pioneer has demonstrated that many of its competitors currently use such programs with respect to consumer electronic product lines that are directly competitive with the Pioneer lines. For example, Mark Smith, Pioneer's Senior Manager, Planning and Coordination, for the Home Electronics Division of Pioneer Electronics (USA), states that Pioneer's competitors, Sony, Mitsubishi, Hitachi, JVC, and RCA, use MAPs to build dealer support. *See* Smith Aff. at ¶15. The competitors generally receive cooperative advertising allowances for maintaining MAP. According to the evidence submitted by Pioneer, some dealers are less inclined to carry a full line of Pioneer products because of the lack of a Pioneer price-restrictive cooperative advertising program. In light of Pioneer's competitors' use of programs that Pioneer cannot offer and the resulting injury caused to Pioneer's ability to attract and keep dealers, Pioneer has made a threshold showing of an affirmative need for paragraph I.6. to be deleted.

The reasons in favor of a modification to delete paragraph I.6. outweigh the reasons not to modify the order. The Commission reopened and modified the Magnavox order in 1990 to delete similar provisions relating to the restrictions on cooperative advertising allowances.¹⁰ In making that decision, the Commission followed the

¹⁰ The Commission, among other things, deleted paragraph I.H. from the Magnavox order, which read as follows:

I.H. Threatening to withhold or withholding earned cooperative advertising credits from dealers for the reason that they advertise its products at retail prices other than established or suggested retail prices.

The Magnavox Company, 78 FTC 1183, 1189 (1971).

reasoning in its 1987 decision to vacate the order in *The Advertising Checking Bureau, Inc.*, 93 FTC 4 (1979). The 1979 Advertising Checking Bureau, Inc. order had prohibited the respondent from auditing cooperative advertising programs that required dealers to advertise at a specified price, or not to advertise at discount prices, as a condition of receiving advertising allowances or credits. In support of its determination to set aside The Advertising Checking Bureau, Inc. order, the Commission relied on 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), noting, among other things, that those decisions "make it clear that the rule of reason should be applied in determining whether non-price vertical restraints unreasonably restrain competition and violate the antitrust laws." *The Advertising Checking Bureau, Inc.*, No. C-2947, 109 FTC 146 (1987).¹¹ The Commission also noted that "[t]he 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." *Id.* With respect to price-restrictive cooperative advertising programs specifically, the Commission held that such programs "would not by themselves constitute agreements to fix resale prices." *Id.* Moreover, the Commission recognized that price restrictive cooperative advertising programs are in fact "likely to be procompetitive . . . in most cases . . . by . . . channeling the retailer's advertising efforts in directions that the manufacturer believes consumers will find more compelling and beneficial . . . [t]his, in turn, may stimulate dealer promotion and investment and, thus, benefit interbrand competition." *Id.* at 3.¹²

In conjunction with the Commission's decision to set aside the order in *The Advertising Checking Bureau, Inc.*, the Commission also announced that it had withdrawn its 1980 policy statement regarding price restrictions in cooperative advertising programs, which had stated the Commission's intention to challenge as *per se*

¹¹ Of course, Sylvania did not change the *per se* rule against resale price maintenance, the conduct that the orders against Magnavox and Pioneer were designed to end.

¹² The Commission set aside *The Advertising Checking Bureau, Inc.* order on public interest grounds.

unlawful cooperative advertising programs restricting reimbursement for the advertising of discounts. The Commission announced its new policy as to price restrictions in cooperative advertising programs as follows:

The Commission now concludes that price restrictions in cooperative advertising programs, standing alone, are not *per se* unlawful. The *per se* rule applies to conduct that is so plainly anticompetitive that it is conclusively presumed to be unreasonable without an elaborate inquiry into competitive effects. Cooperative advertising programs that restrict reimbursement for the advertising of discounts do not appear to fall into this category

6 Trade Reg. Rep. (CCH) ¶ 39,057.

This change in Commission policy is further supported by recent court decisions. In *in re Nissan Antitrust Litigation*, 577 F.2d 910 (5th Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979), the court held that agreements that withhold cooperative advertising allowances from dealers that advertise discounted prices are analyzed under the rule of reason. Additionally, the Supreme Court's recent decision in *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988), supports the Commission's decision. That decision sought to draw a clear line between vertical restraints concerning price, which are *per se* illegal, and non-price vertical restraints, which are judged under the "rule of reason standard," by holding that an agreement or conspiracy between a manufacturer and a complaining retailer to terminate a discounter because of his price cutting was not sufficient to constitute conduct which is *per se* unlawful unless the agreement included some agreement on price or price levels.

The approach followed by the Commission in the 1990 Magnavox Modification and in adopting the new cooperative advertising policy by setting aside the order in The Advertising Checking Bureau, Inc. is equally applicable to Pioneer's request that the Commission set aside paragraph I.6. of the order. This provision prohibits price restrictions that Pioneer might want to impose on its dealers in connection with its cooperative advertising programs. Such restrictions may not necessarily be part of an illegal resale price maintenance scheme and have now been recognized as reasonable in many circumstances. Of course, any cooperative advertising program

implemented by Pioneer as part of a resale price maintenance scheme would be *per se* unlawful and would violate paragraph I.1. of the order.

Pioneer has further shown that setting aside this provision is not likely to result in Pioneer's engaging in unlawful conduct. The markets for most of the consumer electronic products sold by Pioneer appear to be competitive and fragmented with numerous competitors. See Petition Memo at Mark Smith Affidavit; and 1990 Magnavox Modification at 9. In those markets, Pioneer's use of price-restrictive cooperative advertising programs, without further agreement on the price or price levels to be charged by retailers, is not likely to restrict interbrand competition or reduce output. It is unlikely that the competitors in any of the unconcentrated markets would exercise market power through collusive activities because, as the Commission recognized, "collusion is unlikely to be successful in an unconcentrated market." *TEAC Corp. of America*, 104 FTC 634, 635 (1984).¹³ Moreover, there have been numerous new entrants into all the markets for consumer electronic products since the Commission issued the order in this case,¹⁴ and there has been an influx of new products made by a number of manufacturers, *e.g.*, CD players, laser disc players, large screen projection televisions.¹⁵ Thus, "the absence of barriers to entry is also likely to prevent successful collusion." *Id.* at 637. Setting aside the order's restrictions on Pioneer's adoption and implementation of price-restrictive cooperative advertising programs would allow Pioneer to compete more effectively to the benefit of the consumers of Pioneer's electronic products.

To the extent that price-restrictive cooperative advertising conduct -- now allowed by the removal of in paragraph I.6. pursuant to this Order Modifying Order -- might be in furtherance of an

¹³ See 1990 Magnavox Modification at 9 ("The markets for most of the consumer electronic products sold by Magnavox appear to be competitive and fragmented and have numerous competitors, none of which have a controlling market share.").

¹⁴ See Petition Memo at 17 (citing to the 1990 Magnavox Modification). Additionally, Pioneer states that Onkyo and Denon have entered the markets since the Commission entered the order in 1975.

¹⁵ In the projection screen television market, Pioneer's principal competitors are Sony, Mitsubishi, Magnavox, Hitachi, RCA and Zenith.

unlawful scheme to fix resale prices, such conduct would be prohibited by the other provisions of the order. The Commission disagrees, however, that paragraph I.2. also should be modified.¹⁶ The Commission addressed this specific concern in the 1990 Magnavox Modification. In deleting the cooperative advertising restriction paragraph in the Magnavox order, which was nearly identical to paragraph I.6. of this order, the Commission did not disturb the language of paragraph I.B. of the Magnavox order which prohibited Magnavox from "[f]ixing, establishing, controlling, maintaining . . . the retail prices at which its dealers may advertise, promote, offer for sale or sell its products." 78 FTC at 1189. In granting Magnavox the right to have restrictions in its cooperative advertising programs, the Commission stated that it would:

not construe the remaining portions of the modified order to prohibit Magnavox from establishing and maintaining cooperative advertising programs that included conditions as to the prices at which Magnavox offered consumer electronic products, so long as such advertising program were not a part of a resale price maintenance scheme.

1990 Magnavox Modification at 10. For those reasons, the Commission need not modify paragraph I.2. of the Pioneer order to make the deletion of paragraph I.6. effective.

For the above reasons, therefore, the Commission has determined that Pioneer has demonstrated an affirmative need to reopen the order, and that the reasons to set aside paragraph I.6. of the order outweigh any reasons to retain it. *See Lenox Inc.*, Docket No. 8718, 111 FTC 612 (1989), Order Granting in Part and Denying in Part Request to Reopen and Modify.

¹⁶ Pioneer requests that the Commission delete the bracketed words from paragraph I.2.:

Fixing, establishing, controlling or maintaining the prices at which dealers may [advertise, promote, offer for sale] or sell respondent's products.
Petition at 1.

VI.

The Modifications Concerning
Paragraphs I.2., I.5., I.8. and Most of I.10.

Pioneer has requested that the order be modified to allow it to, among other things, fix the prices at which its products are advertised, refuse to deal with a dealer who does not enter into an agreement to advertise products at the established or suggested resale price and obtain dealers' promises on the prices they will advertise for Pioneer's products. Additionally, Pioneer requests relief from the prohibition on threatening, intimidating, coercing or delaying shipments to a dealer who advertises Pioneer products at prices other than those Pioneer deems appropriate.¹⁷ For the reasons discussed in Section IV, above, the Commission has determined that Pioneer has not shown changed conditions of law or fact that require reopening the order to modify these provisions. Also, for the reasons discussed, below, Pioneer has failed to show that it would be in the public interest to modify these provisions.

Pioneer has not Demonstrated that the
Modifications are in the Public Interest.

Pioneer has failed to show the threshold injury required under the public interest standard. Even if Pioneer had made that showing, Pioneer failed to show that the reasons for modifying these provisions outweigh the reasons for not modifying them.

Pioneer has Failed to Show an Affirmative
Need for the Modifications.

Under the public interest standard for modification of paragraphs I.2., I.5., I.8. and most of I.10., Pioneer has not shown an affirmative

¹⁷ See Footnote 5, above, for the modifications Pioneer seeks.

need for the requested modifications.¹⁸ Pioneer has not shown that its competitors use similar advertising restrictions and sanctions or that it is harmed by any such program. Although Pioneer has shown that its inability to employ some price-restrictive advertising program may be causing competitive injury, Pioneer has not demonstrated that it needs to institute MAP programs that require the fixing of advertised prices and that explicit agreements are required to remedy the alleged erosion of its dealer base.¹⁹ Pioneer, therefore, has not made a satisfactory showing of harm from the existing provisions and has not satisfied its burden of demonstrating why modification of the order would serve the public interest.

Moreover, Pioneer has not demonstrated that the use of a price-restrictive cooperative advertising program would not adequately address its competitive concerns. Pioneer's Petition is unclear whether removal of the cooperative advertising restriction would be sufficient to remedy the alleged harm. Pioneer asserts that it should not be penalized for not gaining information on how its competitors enforce their MAP programs. Nevertheless, neither should Pioneer be rewarded for failing to meet its burden to make the adequate showing of need. Based upon Pioneer's submission, the information gained from the Commission's analysis of this Petition, and the Commission's determinations in the 1990 Magnavox Modification, Pioneer has not met its burden of showing an affirmative need for the reopening and modification of paragraphs I.2., I.5., I.8. and most of I.10.

Even if Pioneer had Shown an Affirmative Need, the Reasons Against Such a Modification Outweigh the Reasons for a Modification.

Even if Pioneer had shown an affirmative need for the reopening, the reasons against modifying the order outweigh those in favor of a

¹⁸ Pioneer has shown, however, that it is in the public interest for paragraph I.10. to be modified to remove the prohibitions on Pioneer unilaterally terminating a dealer for failing to follow a suggested advertised price. See Part VII of this Order Modifying Order.

¹⁹ In contrast, in the area of cooperative advertising restrictions, Pioneer has presented some evidence of its competitors' practices to demonstrate its competitive injury.

modification. Paragraphs I.2., I.5., I.8. and most of I.10. prohibit actions that, if used in the context of resale prices, as opposed to advertised prices, could be prohibited as *per se* unlawful resale price maintenance agreements depending on whether the conduct was found to be part of an agreement or conspiracy to fix resale prices at some level. In *United States v. Colgate & Co.*, 250 U.S. 300 (1919), the Supreme Court held that a manufacturer can unilaterally announce its resale prices in advance and refuse to deal with those who fail to comply. Court decisions, however, have found coercion or threats by a manufacturer against a discounting retailer, even in the absence of complaining third-party retailers, to form the basis of *per se* unlawful resale price maintenance agreements. For example, in *Isaken v. Vermont Castings, Inc.*, 825 F.2d 1159 (7th Cir. 1987) (Posner, J.) *cert. denied*, 486 U.S. 1005 (1988), the court found a manufacturer's threat to mix up a retailer's orders if the retailer did not raise prices to have resulted in an implicit, yet nonetheless *per se* unlawful, agreement.

Similarly, fixing advertised prices, entering into advertised price agreements with dealers, sanctioning dealers that fail to enter into advertising agreements and threatening, intimidating or coercing dealers that do not comply with suggested advertised prices are all conduct which, depending on the circumstances, could fall within the *per se* ban. Although advertising price arrangements standing alone may not be *per se* unlawful, restrictions on advertising similar to those identified in paragraphs I.2., I.5., I.8. and most of I.10. may come dangerously close to or be used in conjunction with resale price maintenance activities. If the MAP agreements are such that they are used to gain the "retailers' adherence to its suggested retail price," *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960), it is possible for them to be part of the *per se* illegal combination. In *Parke, Davis & Co.*, Parke, Davis believed that selling at a discount would be deterred if all advertising of discount prices was discontinued. The Court noted that the agreement not to advertise prices was part of the combination that contained the price agreement. *Business Electronics Corp. v. Sharp Electronics Corp.*, 717 U.S. at 735 (citing *Parke, Davis*). Although the conduct relating to advertising proscribed by paragraphs I.2., I.5., I.8. and most of I.10. may fall outside the *per se* ban, the very purpose of such "fencing-in"

provisions is to steer a company found to have violated the law away from activities which could reasonably be found to constitute unlawful conduct.²⁰ Pioneer has not shown that the danger of such agreements leading to resale price maintenance no longer exists.

The advertising restrictions in this case are part of the order's core resale price maintenance prohibitions, unlike the restrictions on cooperative advertising programs in paragraph I.6. It is reasonable for the Commission to deny the proposed modifications at this time to avoid the possibility of Pioneer using the freedom to fix all advertising prices -- through agreements, coercion, intimidations or sanctions -- as a way to circumvent the resale price maintenance prohibitions of the order. Pioneer alleges that advertising plays a big part in whether and at what price audio and video electronics products are ultimately sold. Pioneer asserts that mass media advertising is very important for the consumer in making his choice of electronics products (Smith Aff. at ¶ 7). Pioneer also strongly asserts that consumers make decisions as to the quality of electronics products by virtue of their advertised prices. Because of the importance of advertising in this market, allowing Pioneer to fix advertised prices by agreement, to sanction dealers for non-compliance, or to intimidate or coerce dealers into complying with suggested advertised prices could be a precursor or a part of a resale price maintenance agreement.²¹

²⁰ See *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470, 473 (1952), where the Supreme Court affirmed the Federal Trade Commission's authority to use fencing-in provisions in orders to prevent illegal practices in the future:

In carrying out this function the Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity.

²¹ The Commission recently included restrictions on advertising, similar to those in the Pioneer order, in the *Nintendo of America, Inc.* order, Docket No. C-3350 (November 14, 1991). The advertising agreements, in that case, were part of an overall resale price maintenance scheme. Pioneer argued in its Petition Memo that Nintendo is different from the Pioneer case because Nintendo, unlike Pioneer, has the ability to interfere with interbrand pricing because of its high market share. The Commission

Accordingly, this issue raises enough of a question to deny the modification, especially because Pioneer has not shown that its alleged competitive injury cannot be remedied by setting aside paragraph I.6., and modifying paragraph I.10. as discussed in Part VII of this Order Modifying Order.²² Because of the on-going competitive concerns about these arrangements and because Pioneer failed to make a showing of an affirmative need for these modifications, the Commission has denied Pioneer's request to modify the order as to paragraphs I.2.,²³ I.5., I.8. and most of I.10.

VII.

Pioneer has Shown that Paragraph I.10. Should be
Modified to Allow Pioneer to Terminate Dealers
Who Advertise Below a Suggested Advertised Price

Paragraph I.2. of the order prohibits Pioneer from fixing, establishing, controlling or maintaining advertised prices. Under paragraph I.3. of the order, Pioneer may suggest a resale price for its home electronics products. Additionally, nothing in the order prohibits Pioneer from suggesting an advertised price for its home electronics products. Paragraph I.10., however, prohibits Pioneer from:

Terminating, threatening, intimidating, coercing, delaying shipments, or taking any other action to prevent the sale of respondent's products by a dealer because said dealer has advertised or sold, is advertising or selling, or is suspected of advertising or selling such products at other than prices that respondent may deem to be appropriate or has approved.

is not persuaded, however, that advertised price agreements in home electronics products could not be used in furtherance of resale price maintenance agreements.

²² The Commission considers, as part of the modification decision, whether the particular modification sought is appropriate to remedy the identified harm. *See* 1990 Magnavox Modification at 5.

²³ In the 1990 Magnavox Modification, the Commission did not remove, nor did Magnavox seek removal of, its prohibition on fixing, establishing, maintaining or controlling the retail prices at which its dealers may advertise, promote, offer for sale or sell its products (Paragraph I.B.).

Pioneer's Petition requests the removal of the advertising restrictions in paragraph I.10. As discussed in Section VI, above, the Commission has determined that Pioneer has not made a showing sufficient to warrant a modification of paragraph I.10. to remove the prohibition on threatening, intimidating, coercing, delaying shipments, or taking any other action to prevent the sale of Pioneer's products by a dealer because the dealer has advertised or is advertising Pioneer home electronics products at a price other than that suggested by Pioneer. Pioneer has made a showing, however, that it would be in the public interest to modify paragraph I.10. to remove the prohibition on Pioneer terminating a dealer for not following a suggested advertised price.

Other than the termination of a dealer, the conduct in paragraph I.10. involves conduct that if engaged in with regard to resale prices could be considered resale price maintenance, and with regard to suggested advertised prices could be sufficiently close to resale price maintenance that it could lead to or be used as part of a resale price maintenance scheme.²⁴ Instead of granting Pioneer's request to delete the term "advertising" from paragraph I.10., the Commission believes that it is in the public interest for paragraph I.10. to be modified to delete the word "terminating" only as it relates to advertising.²⁵

Pioneer alleges that it is losing dealers who will supply a full line of its products, *i.e.*, the products are widely distributed but also thinly distributed.²⁶ Because of constant sales, Pioneer dealers are not likely to recover much of a profit on each item and, as a result, the dealers are not inclined to invest in Pioneer inventory, promotions and pre-sale services on Pioneer products.²⁷

²⁴ See 1990 Magnavox Modification at 12, fn. 20 ("The remaining part of subparagraph (T) will continue to prohibit Magnavox from harassing, threatening, or coercing its dealers (all actions which still may lead to agreements and which therefore remain unlawful)."). See also discussion in Section VI of this Order Modifying Order.

²⁵ The Commission, however, is issuing an Order to Show Cause why the order should not be further modified to remove the restriction on Pioneer to unilaterally terminate a dealer for not following suggested resale prices.

²⁶ Petition Memo at Smith Aff. at ¶ 8.

²⁷ Petition Memo and declarations attached thereto.

It is not unreasonable for Pioneer to want to protect the pre-sale services of its products, especially the high-end products and the new products through a plan that allows Pioneer to terminate a dealer who does not follow suggested advertised prices. Unilaterally terminating a dealer for advertising below suggested prices is less competitively threatening to interbrand competition than unilaterally terminating a dealer for failing to follow a suggested resale price. The latter, of course, is explicitly allowed under the teachings of Colgate, Monsanto and Sharp. Allowing Pioneer unilaterally to terminate a dealer for not following a suggested advertised price, however, does not venture nearly as close to resale price maintenance behavior as would granting Pioneer's request for modifications of paragraphs I.2., I.5., I.8. and most of I.10. Modifying those provisions would allow Pioneer to engage in conduct that is not unilateral and, instead, enter into agreements on advertised prices which could, depending on the circumstances, fall within the *per se* ban.

The Commission, therefore, has determined that it is the public interest to modify paragraph I.10. to remove the restrictions on Pioneer terminating a dealer for not following suggested advertised prices. See *Colgate, Sharp, Monsanto, and Lenox, Inc.*, Docket No. 8718, 111 FTC 612 (1989). To the extent that the conduct being allowed by the modifications might be in furtherance of an unlawful scheme to fix resale prices, such conduct would continue to be prohibited by the other provisions of the order.

VIII.

The Commission Issues an Order to Show Cause to Allow Pioneer to Terminate Dealers Who Sell Below a Suggested Resale Price

The Commission is also issuing an Order to Show Cause why paragraph I.10. of the order should not further be modified so that Pioneer would not be prohibited from unilaterally terminating a dealer who sells Pioneer home electronics products at a price other than the suggested resale price. If this modification is to be made, an Order to Show Cause is necessary because Pioneer's Petition did not request this additional modification. The Commission generally will not use show cause proceedings to grant broader relief than requested

by a respondent, and respondents have no right to obtain an Order to Show Cause.²⁸ However, an Order to Show Cause is appropriate in this case given the particular showings made by Pioneer and the similarities between this case and the modification of the Magnavox order in 1990.

In this case the Commission has already considered the language of paragraph I.10. in deciding Pioneer's requested changes to the scope of that paragraph concerning unilateral dealer terminations for not following suggested advertised prices. Pioneer's showing in support of its request to remove the prohibition allowing it unilaterally to terminate a dealer for not following suggested advertised prices also strongly supports a finding that it would be in the public interest to remove the prohibition on terminating a dealer for failing to follow suggested resale prices. Pioneer has shown that its dealer base has been depleted and that those dealers carrying its products generally do not provide pre-sale and post-sale services suggested by Pioneer.

The change intended in the show cause proceeding is consistent with, and similar to, the modification made to the Magnavox order in 1990. Magnavox directly competes with Pioneer in most electronics markets and alleged similar competitive problems. Because of these particular factors, and because the conduct to be allowed is lawful under the Colgate doctrine, the Commission believes it is appropriate in this particular situation to grant somewhat broader relief than Pioneer has requested.²⁹ The Commission's reasoning in Magnavox is equally applicable in this case:

This modification will allow Magnavox to announce its resale prices for consumer electronic products in advance and refuse to deal with any dealer who fails to comply. It should therefore enable Magnavox to protect its full-service dealers from the activities of "free-riding" dealers and encourage its full-service dealers to provide the

²⁸ Respondents' route to request relief through petitions to reopen and modify is set out in Section 5(b) of the Federal Trade Commission Act and Section 2.51 of the Commission's Rules of Practice.

²⁹ See "Order Reopening and Modifying Order Issued September 26, 1978, and Order to Show Cause," *Interco Inc., et al.*, Docket No. C-2929, 110 FTC 153, 156 (1988).

promotion and sales-related services that it believes are necessary to market Magnavox consumer electronic products efficiently. This modification retains all the order's provisions that prohibit Magnavox from engaging in resale price maintenance. The Commission may invoke them if Magnavox engages in conduct that goes beyond what is lawful under Monsanto.

1990 Magnavox Modification at 12 (emphasis added). Consistent with the 1990 Magnavox Modification, the modification of paragraph I.10. -- to allow termination both for not following suggested advertising or sales prices -- is in the public interest. The unique circumstances of this case, therefore, have created a situation in which it is appropriate for the Commission not only to grant the requested modification of paragraph I.10. regarding unilateral termination of dealers not following suggested advertised prices, but also to issue an Order to Show Cause why the order should not also be modified to allow unilateral termination for not following suggested resale prices.

IX.

Conclusion

Accordingly, *It is ordered*, That this matter be reopened and that the Commission's modified order in Docket No. C-2755 be, and hereby is, modified, as of the effective date of this order, as follows:

- (a) Paragraph I.6. of the order is deleted; and
- (b) Paragraph I.10. of the order is modified to delete the word "terminating" as it relates to advertising, and paragraph I.10. is rewritten in two parts as follows:

Threatening, intimidating, coercing, delaying shipments, or taking any other action (other than terminating) to prevent the sale of respondent's products by a dealer because said dealer has advertised, is advertising, or is suspected of advertising such products at other than prices that respondent may deem to be appropriate or has approved; or

Terminating, threatening, intimidating, coercing, delaying shipments, or taking any other action to prevent the sale of respondent's products by a dealer because said dealer has sold, is selling, or is suspected of selling such products at other than prices that respondent may deem to be appropriate or has approved.

X.

Order to Show Cause

It is further ordered, That respondent Show Cause why paragraph I.10. should not be additionally modified to read as follows:

Threatening, intimidating, coercing, delaying shipments, or taking any other action (other than terminating) to prevent the sale of respondent's products by a dealer because said dealer has advertised or sold, is advertising or selling, or is suspected of advertising or selling such products at other than prices that respondent may deem to be appropriate or has approved.

In accordance with Section 3.72 of the Commission's Rules of Practice, 16 CFR 3.72, respondent has thirty (30) days from the date of service of this order to file an answer to this Order to Show Cause or be deemed to have accepted the action proposed herein.

Commissioner Azcuenaga concurring in the result.

IN THE MATTER OF

TEXAS BOARD OF CHIROPRACTIC EXAMINERS

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3379. Complaint, Apr. 21, 1992--Decision, Apr. 21, 1992*

This consent order requires, among other things, the Texas licensing Board to repeal existing rules that prohibit truthful, nondeceptive advertising, and certain types of solicitation, and also prohibits respondent from adopting similar rules or policies in the future. In addition, respondent is prohibited from taking or threatening disciplinary action against any person or organization that advertises truthfully.

Appearances

For the Commission: *Gary Kennedy and Thomas Carter.*

For the respondent: *Frank Knapp, Jr.,* Assistant Attorney General, Austin, TX.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the Texas Board of Chiropractic Examiners has violated Section 5 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, stating its charges in that respect as follows:

RESPONDENT

PARAGRAPH 1. Respondent Texas Board of Chiropractic Examiners ("the Board") is organized, exists and transacts business under the laws of the State of Texas, and has its principal office and place of business at Building C, Suite 245, 1300 East Anderson,