

IN THE MATTER OF

QUALITY TRAILER PRODUCTS CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3403. Complaint, Nov. 5, 1992--Decision, Nov. 5, 1992*

This consent order prohibits, among other things, a Texas manufacturer, seller, and distributor of axle products from requesting, suggesting, urging, or advocating that its competitors raise, fix or stabilize prices or price levels, or cease providing discounts. It also prohibits the respondent from entering into agreements that fix, raise, or stabilize prices. In addition, the order requires the respondent to provide a copy of the order to all of its directors, officers, and management employees.

Appearances

For the Commission: *Michael E. Antalics.*

For the respondent: *Paul B. Hewitt. Akin, Gump, Hauer & Feld,*
Washington, D.C.

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 Quality Trailer Products Corporation, a corporation, hereinafter sometimes referred to as respondent or "Quality Trailer Products," has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Quality Trailer Products Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas with its office and principal place of business located at 633 Northwest Parkway, Azle,

Texas and its headquarters mailing address at P.O. Box 1349, Azle, Texas.

PAR. 2. Respondent is now, and for some time has been, engaged in the manufacture, advertising, offering for sale, sale and distribution of axle products. Axle products means axles of any size, hubs, spindles, brakes, and any other products used in making axles.

PAR. 3. Respondent maintains and has maintained a substantial course of business, including the acts and practices as hereinafter set forth, which are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the fall of 1990, two representatives of Quality Trailer Products visited the headquarters of a competitor and met with an officer of the firm. During the course of the meeting, they invited the competitor to fix prices. They told the competitor that its price for certain axle products was too low, that there was plenty of room in the industry for both firms, and that there was no need for the two companies to compete on price. They also provided assurances to the competitor that Quality Trailer Products would not sell certain axle products below a specified price. The invitation, if accepted, would have constituted an agreement in restraint of trade.

PAR. 5. The aforesaid acts and practices constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. The acts and practices herein alleged are continuing and will continue in the absence of the relief herein requested.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order,

an admission by respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Quality Trailer Products Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas with its office and principal place of business located at 633 Northwest Parkway, Azle, Texas and its headquarters mailing address at P.O. Box 1349, Azle, Texas.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I.

For purposes of this order, the following definitions shall apply:

A. "*Respondent*" means Quality Trailer Products Corporation, its predecessors, subsidiaries, divisions, groups, and affiliates controlled by Quality Trailer Products Corporation, and all their respective directors, officers, employees, agents and representatives, and all their respective successors and assigns.

B. "*Axle products*" means axles of any size, hubs, spindles, brakes, and any other products used in making axles.

II.

It is ordered, That respondent, directly or indirectly, through any corporation, subsidiary, division or other device, in connection with the manufacture, advertising, offering for sale, sale or distribution of any axle products in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, forthwith cease and desist from:

A. Requesting, suggesting, urging, or advocating that any other producer or seller of axle products raise, fix or stabilize prices or price levels, cease providing discounts, or engage in any other pricing action; and

B. Entering into, threatening or attempting to enter into, adhering to, maintaining, or carrying out any combination, conspiracy, agreement, understanding, plan or program with any other producer or seller of axle products to fix, raise, establish, control, maintain or stabilize prices or price levels.

Provided, That nothing in this order shall prohibit respondent from: (1) agreeing to purchase or distribute any competitor's axle products, and (2) negotiating or agreeing upon the price under which any competitor's axle product will be purchased by respondent.

III.

It is further ordered, That respondent shall:

A. Within thirty (30) days after the date on which this order becomes final, provide a copy of this order to all of its directors, officers, and management employees;

B. For a period of five (5) years after the date on which this order becomes final, and within ten (10) days after the date on which any person becomes a director, officer, or management employee of respondent provide a copy of this order to such person; and

C. Require each person to whom a copy of this order is furnished pursuant to subparagraphs III. A. and B. of this order to sign and submit to Quality Trailer Products Corporation within thirty (30)

days of the receipt thereof a statement that: (1) acknowledges receipt of the order; (2) represents that the undersigned has read and understands the order; and (3) acknowledges that the undersigned has been advised and understands that non-compliance with the order may subject respondent to penalties for violation of the order.

IV.

It is further ordered, That respondent shall:

A. File with the Commission a verified written report setting forth in detail the manner and form in which respondent has complied and is complying with this order within sixty (60) days from the date on which this order becomes final, annually thereafter for five (5) years on the anniversary date of this order, and at such other times as the Commission may by written notice to the respondent require; and

B. Notify the Commission at least thirty (30) days prior to any change in respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, or any other change in the corporation, including the creation or dissolution of subsidiaries, that may affect compliance obligations arising out of this order.

CONCURRING STATEMENT OF COMMISSIONER MARY L. AZCUNAGA

The available evidence shows that officers of Quality Trailer Products Corporation made an uninvited visit to the headquarters of a competitor and, in a face-to-face meeting with an officer of that competitor, made an unambiguous offer to fix the prices of certain products. No justification or excuse has been advanced for this conduct. In these limited circumstances, and based on evidence independent of any testimony or material within the control of the competitor who received the offer, I have voted to accept this consent agreement.

CONCURRING STATEMENT OF COMMISSIONER DEBORAH K. OWEN

The complaint in this matter alleges that two of respondent's representatives invited an officer of a competitor to fix prices.

Specifically, they told the competitor that certain of its prices were too low and that there was "no need" for the companies to compete on price, and provided assurances that respondent would not sell below a specified price. The invitation was not accepted. The conduct did not relate to any proposed, bona fide integration between the parties.

If the alleged invitation had been accepted, it clearly would have constituted a restraint of trade. However, in this case, the invitation to collude itself -- the attempt to engage in a naked price restraint -- is alleged to be an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act. No allegation is made in the complaint as to respondent's market power.

The order in this case prohibits the respondent from: (1) suggesting or advocating that any other producer or seller fix prices or engage in any other pricing action; and (2) entering, or attempting to enter, into any agreement with another producer or seller to fix prices. Purchasing, or negotiating the purchase of, a competitor's product is expressly not prohibited.

Enforcement actions with respect to invitations to collude on price are no longer novel. See *United States v. American Airlines*, 743 F.2d 1114 (5th Cir. 1984). However, the conduct in *American Airlines* was challenged as an illegal attempt to monopolize in violation of Section 2 of the Sherman Act. Under Section 2, proof of market power was required. Here, the complaint does not allege market power or dangerous probability of monopolization. The issue is whether Commission action is appropriate with respect to unaccepted invitations to collude on price in oligopolistic or unconcentrated markets.

Invitations to collude on price in such markets fall outside the parameters of the Sherman Act, and require invocation of Section 5 of the FTC Act. Although the reach of Section 5 has been argued vigorously, legislative history and case law support its extension beyond the strict purview of the Sherman and Clayton Acts, and preventing monopolization in its incipiency enjoys special recog-

dition.¹ Nonetheless, invoking the penumbra of the antitrust laws through the use of Section 5 warrants cautious analysis.²

With respect to oligopolistic markets, Professors Areeda and Turner have argued that "a solicitation to raise prices in concert may reduce [firms'] uncertainty, either by setting a target price or by raising confidence that rivals will follow."³ The invitation to collude may, by its very existence, and whether or not it is accepted, facilitate pricing coordination among rivals. Areeda and Turner suggest Section 5 of the FTC Act as one avenue for attacking such solicitations,⁴ and the Ethyl case makes clear that under circumstances of "oppressive" behavior Section 5 covers certain unilateral conduct in an oligopolistic setting.⁵

Another possibility, in a market with relatively few competitors, is that the invitation to collude comes from a representative of a broader group of competitors, who are now colluding, or who wish to collude in the future. If the group is sufficiently broad, acceptance of the offer will clearly injure consumers. However, having to allege and prove some broader conspiracy or other alternative to market power can be difficult. There may be no clear, observable manifestation of such conduct, and those engaged in it will usually take precautions to avoid leaving a paper trail to any agreement.

¹ For a general discussion of the scope of the statute, see Averitt, The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act, 21 B.C.L.Rev. 227 (1980).

² As noted in the 1989 Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission (at 20 n.11), "[although it is well established that Section 5's ban on 'unfair methods of competition' permits the FTC to proscribe conduct not reached by prevailing interpretations of the Sherman and Clayton Acts, there is a debate about how far Section 5 reaches beyond those Acts." The Report generally cautions that the "Commission should file a case only when it can anticipate relief that is practical, likely to remedy the perceived harm, and not unduly burdensome," *Id.* at 17, thus implying that some sort of demonstration of injury is appropriate.

³ P. Areeda & D. Turner, 6 Antitrust Law 117 (1986).

⁴ *Id.* at 118.

⁵ *E.I. DuPont de Nemours & Co. v. FTC*, 729 F.2d 128, 139 (2d Cir. 1984).

Apparently unconcentrated markets present the most difficult cases to analyze. Nonetheless, various theories of harm from solicitations to collude in such markets have been posited. First, invitations to collude on price may cause injury even in an unconcentrated market. For instance, as the recently issued Department of Justice and Federal Trade Commission Horizontal Merger Guidelines make clear, a firm may have the ability to price discriminate as to certain customers, or within certain smaller geographic regions.⁶ Under those circumstances, injury from acceptance of the invitation may be foreseeable since an apparently unconcentrated market may actually be narrower than would first seem. Furthermore, parties to the invitation may have differentiated products that are the first and second choices of certain buyers in the market, or they may share relative advantages in serving some buyers.⁷ Similarly, in a given bidding situation, the potential for harm to an individual customer may exist.⁸

The question then becomes: is it reasonable to assume from the solicitation to collude, in and of itself, that acceptance would injure consumers? Economists frequently tell us that firms do not usually engage in irrational acts. This could suggest that a party who solicits price collusion harbors some expectation that its acceptance will actually produce anticompetitive gains: why would anyone risk going to jail for price-fixing if he would not even benefit if the invitation were accepted? It may therefore be appropriate to begin with a rebuttable inference that acceptance of the solicitation would have harmed consumers. Requiring a showing of market power, or equivalent alternative, may shield attempts to reach such collusive

⁶ Sections 1.12 & 1.22. 5 (CCH) Trade Reg. Rep. ¶ 13,104 (Apr. 2, 1992) ("Merger Guidelines").

⁷ Merger Guidelines, Section 2.21.

⁸ The theory behind the cases brought by the Justice Department, in which market power has not been alleged, is that the solicitation is an attempted fraud on the customer because it is "an attempt to inflate prices [that] customers would be deceived into believing ... were governed by market forces, not the secret agreement of competitors." See, "Report from Official Washington," Remarks of James F. Rill, Assistant Attorney General, Antitrust Division, before the 39th Annual Antitrust Spring Meeting of the Section of Antitrust Law, American Bar Association (Apr. 12, 1991), at 9 (quoting *U.S. v. Critical Industries Co.*).

agreements from antitrust penalties. In a sense, the offender may be given a free bite at the apple -- if its solicitation is spurned, it is not subject to antitrust penalties, and if the invitation is accepted, an agreement may be consummated that presumptively harms consumers, but might never be detected.

While I find these arguments in favor of deterring invitations to collude on price compelling, it is not without a reservation. If it is objectively unlikely that the firms in question would succeed in exercising market power, or if some other theory of harm cannot be proffered, one might question whether the participants indeed anticipated any anticompetitive gains. This raises the concern that the solicitation that is being characterized as a solicitation to price-fix may in fact be something else, perhaps a solicitation to embark on a broader joint venture or some other efficient agreement. Some procompetitive joint ventures necessarily involve ancillary agreements that affect prices. Accordingly, we do not want to prohibit attempts to implement procompetitive joint activities simply because one of the terms the joint venturers must agree on is price, such as in the BMI situation.⁹ Otherwise, we could deprive consumers of efficient new forms of marketing or new products. This consideration imposes on us a duty to ensure that the conduct involved is indeed an invitation to join in a naked price restraint, and not an efficient agreement. Thus, while an iron-clad demonstration of harm is not, in my view, a prerequisite to prosecuting a Section 5 case against attempted price-fixing, the absence of potential injury compels us to check our facts on the issue of whether a pure naked restraint alone is involved.¹⁰ It is from this perspective that I believe we should also view the remedies in this case. Where the Commission finds reason to believe that the law has been violated, it will frequently "fence-in" the challenged conduct, prohibiting conduct that would otherwise be legal. This can ensure against future violations, facilitate enforcement of its order, and remedy any

⁹ *Broadcast Music Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1 (1979). See also *National Bancard Corp. v. Visa, U.S.A., Inc.*, 779 F.2d 592 (11th Cir. 1986).

¹⁰ In this case, I believe that at least one of the theories of harm applies and no *bona fide*, proposed integration was involved.

lingering effect of the violation. The order in this case, by imposing a blanket prohibition on urging any price action by a competitor, or attempting to enter into an agreement to fix prices, could be interpreted to prohibit, in addition to naked price-fixing invitations, a solicitation to enter into a procompetitive joint venture that incidentally involved the setting of prices. While such a prohibition might be acceptable in this case for fencing-in and enforcement purposes, I do not interpret this action to mean that the Commission intends to discourage solicitations to joint venture, or any other legitimate activity that may involve price discussions. Indeed, the Analysis of Proposed Consent Order to Aid Public Comment expressly notes that the facts in this case did not involve any *bona fide* integration, and the proviso expressly permits the discussion of prices with respect to certain sales between competitors.¹¹

In sum, I voted in favor of this consent agreement because the facts of the case compel a conclusion that an attempt was made to engage in hard-core, price-fixing. On that basis, and because of the Commission's unique enforcement needs here, I do not interpret our action to stifle legitimate efforts to joint venture. Finally, I believe that the conduct of the respondent was not harmless.

¹¹ In light of the respondent's consent to these broad prohibitions, it is fair to assume that this particular company does not anticipate any future joint venture, or joint bid activity, that would be prohibited under this order. This would not necessarily be true of other companies, and more tailored relief might be appropriate under different facts. Furthermore, in the event that the respondent's plans change, they could petition the Commission for an order modification pursuant to 16 CFR 2.5.

IN THE MATTER OF

NIKKI FASHIONS, LTD., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE
TEXTILE FIBER PRODUCTS IDENTIFICATION ACT,
THE WOOL PRODUCTS LABELING ACT OF 1939 AND
THE FEDERAL TRADE COMMISSION ACT

Docket C-3404. Complaint, Nov. 13, 1992--Decision, Nov. 13, 1992

This consent order prohibits, among other things, a Massachusetts-based retailer of designer clothing and its owner from selling misbranded textile fiber and wool products, and from selling wearing apparel from which the required labels have been removed or mutilated.

Appearances

For the Commission: *Kristie A. Wood* and *Phoebe D. Morse*.

For the respondents: *Donald M. Bloch, Lane & Altman*, Boston, MA.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, 15 U.S.C. 41 *et seq.* (hereinafter "FTC Act"), the Textile Fiber Products Identification Act, 15 U.S.C. 70 *et seq.* (hereinafter "TFPI Act"), and the Rules and Regulations promulgated thereunder 16 CFR Part 303, and the Wool Products Labeling Act of 1939, as amended, 15 U.S.C. 68 *et seq.* (hereinafter "Wool Act"), and the Rules and Regulations promulgated thereunder, 16 CFR Part 300, and by virtue of the authority vested in it "by said Acts, the Federal Trade Commission (hereinafter "Commission"), having reason to believe that Nikki Fashions Ltd., a corporation, and Nicolina P. Varrichione, individually and as an officer of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Acts, and it appearing to the Commission that a proceeding by