UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: Robert Pitofsky, Chairman
Mary L. Azcuenaga
Janet D. Steiger
Roscoe B. Starek, III
Christine A. Varney

In the Matter of	)	
PENDLETON WOOLEN MILLS, INC., a corporation.	)	Docket No. C-2985

ORDER GRANTING IN PART REQUEST TO REOPEN AND MODIFY ORDER ISSUED JULY 31, 1979

On April 1, 1996, Pendleton Woolen Mills, Inc. ("Pendleton"), filed its "Request To Reopen" ("Petition") in Docket No. C-2985, pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b), and Section 2.51 of the Commission's Rules of Practice, 16 C.F.R. § 2.51 ("Rules"). Pendleton asks the Commission to reopen and modify the consent order issued by the Commission on July 31, 1979 ("Order"), in Pendleton Woolen Mills, Inc., 94 F.T.C. 229 (1979).

In its Petition, Pendleton asks the Commission to reopen the Order and modify provisions that limit Pendleton's ability to restrict the prices advertised by its dealers for Pendleton apparel and unilaterally to terminate a dealer for failure to adhere to previously announced resale prices. In support of its Petition, Pendleton maintains that reopening and modification is warranted by changed conditions of fact and the public interest. Pendleton's Petition was placed on the public record for thirty days; no comments were received.

I.

[1] See also United States v. Louisiana-Pacific Corp., 967 F.2d 1372, 1376-77 (9th Cir. 1992) ("A decision to reopen does not necessarily entail a decision to modify the order.

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

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[2] Because the Commission has determined that the Order should be reopened and modified in the public interest, it need not and does not consider whether Pendleton has shown changed conditions that would require reopening the Order.

[3] More than 60 percent of all apparel sold in the United States is now manufactured abroad, according to the Petition at 4.

[4] Similar changes in retailing were cited in Levi Strauss & Co., Docket No. 9081, Order Reopening and Modifying Order Issued on July 12, 1978 (December 20, 1994) (apparel manufacturers

(continued...)

[4](...continued)
integrating into retailing to showcase their products, market their complete lines and demonstrate to their retailer-customers the benefits of promoting the manufacturer's products). See also Interco Incorporated, Docket No. C-2929, Order Granting in Part and Denying in Part Request To Reopen and Modify Order Issued September 26, 1978 (March 27, 1995) at 5 ("discount advertising is harming London Fog's quality image and affecting its ability to market its product through certain retailers.").

[5] Pendleton does not offer its products to discount or warehouse operations. See Affidavit of Dick Poth, President of Pendleton Woolen Mills, Inc. (August 14, 1995) ¶ 7 ("Poth Affidavit").

reluctant to suggest that its customers refrain from "excessive or inappropriate promotion of its products" that "ultimately results in decreased profitability" for its customers. Petition at 7. Pendleton believes that the use of these marketing controls would increase its sales and increase the profitability of the line for its customers. Poth Affidavit ¶¶ 12-15; Stine Affidavit ¶¶ 6-7 & 9. The ability to use price restrictive cooperative advertising programs and unilaterally to terminate a retailer for failure to adhere to previously announced resale prices would encourage service-oriented stores to compete with the discount stores with respect to these brands, according to Pendleton. Finally, Pendleton asserts that the requested modifications would enable it to compete more effectively for sales to retailers that stress quality over price and that provide a high level of service to consumers.[9] Pendleton has found that such retailers do best with Pendleton merchandise. Petition at 6.

Pendleton has shown that the public interest warrants reopening the Order to consider whether it should be modified. Pendleton has shown that the Order prohibits conduct that by itself may not be unlawful and that the prohibition inhibits its ability to compete with firms that are free to and do engage in price-restrictive cooperative advertising and promotional programs and that are free to choose those with whom they will deal.

III. The Order Should Be Modified

Pendleton requests that the Order be modified to permit Pendleton to implement price restrictive cooperative advertising programs and unilaterally to terminate a reseller that refuses to sell Pendleton products at Pendleton's previously announced resale prices. For these purposes, Pendleton has requested that the following proviso be added to Paragraph I of the Order:

> PROVIDED THAT nothing in this order shall be construed to prohibit the implementation of a lawful, price restrictive, cooperative advertising program or the unilateral termination of a reseller for failure to adhere to previously announced resale prices or sale periods.

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[8](...continued)
Karen Decasperis (May 31, 1995), ¶¶ 1-2.

[9] Pendleton traditionally has sold its products through retailers that have a "quality image and who provide a high level of service to the consumer." Poth Affidavit ¶ 2.

[10] See also Interco Incorporated, Docket No. C-2929, Order Granting in Part and Denying in Part Request To Reopen and Modify Order Issued September 26, 1978 (March 27, 1995); Clinique Laboratories, Inc., Docket No. C-3027 (Feb. 8, 1993), reprinted in [1987-1993 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 23,330; U.S. Pioneer Electronics Corp., Docket No. C-2755 (April 8, 1992), reprinted in [1987-1993 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 23,172; The Magnavox Co., 113 F.T.C. 255 (1990).

competition or to reduce output. Of course, any cooperative advertising program implemented by Pendleton as part of a scheme to fix resale prices would be per se unlawful and would violate Paragraph I.1. of the Order. In addition, the proviso's limitation to a "lawful price restrictive cooperative advertising program" will retain the Order's prohibition against such programs if they are part of a plan to implement resale price maintenance.

The new proviso to Paragraph I also would permit Pendleton unilaterally to terminate a reseller for failure to adhere to previously announced prices. This conduct is lawful under United States v. Colgate Co., 250 U.S. 300, 307 (1919), which permits a supplier to "announce its resale prices in advance and refuse to deal with those who do not comply." Accordingly, the Commission has determined to add the proviso quoted above to Paragraph I of the Order. The modification would permit Pendleton to engage in conduct that is lawful if not a part of a resale price maintenance scheme.

[13] Paragraph I.1. prohibits Pendleton from:

> Fixing, establishing, controlling or maintaining, directly or indirectly, the resale price at which any dealer may advertise, promote, offer for sale or sell any product.

[14] Paragraph I.4. prohibits Pendleton from:

acting on any reports or information so obtained by threatening, intimidating, coercing or terminating any dealer" should be deleted from Paragraph I.4. of the Order.[15] Deleting these words is consistent with the decision of the Commission in Lenox, Inc., 111 F.T.C. 612, 617-18 & 620 (1989). In Lenox, the Commission modified the order by deleting the words "or acting on reports so obtained by refusing or threatening to refuse sales to the dealers so reported" from a provision barring Lenox from requesting its dealers to report any retailer that did not observe the resale prices suggested by Lenox. The conduct prohibited by the deleted words in Lenox included termination of a dealer. As the Supreme Court explained in Monsanto, dealers "are an important source of information for manufacturers," dealer complaints about price cutters "arise in the normal course of business and do not indicate illegal concerted action" and a manufacturer's termination of a dealer following complaints from other dealers would not, by itself, support an inference of concerted action. 465 U.S. at 763-64. To the extent that this portion of Paragraph I.4 may inhibit Pendleton from legitimate unilateral conduct, it may cause competitive injury. Any conduct that would be unlawful under this part of Paragraph I.4 would be prohibited by other provisions of the Order.

Paragraph I.5. -- Pendleton asks the Commission to delete the words "advertising" and "or advertised" from Paragraph I.5. of the Order.[16] Pendleton claims that inclusion of these words in Paragraph I.5., notwithstanding the Paragraph I proviso, may interfere with its ability to address legitimate concerns about the advertising and marketing of its products. The words should be deleted from Paragraph I.5. The references to "advertising"

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[15] See Monsanto v. Spray-Rite Service Corp., 465 U.S. 752, 763-764 (1984) (per se unlawful agreement could not be inferred from nothing more than a dealer termination following competitors' complaints); see also Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717 (1988) (vertical agreement to terminate a price-cutting dealer is not per se unlawful unless there is also an agreement on price or price levels).

[16] Paragraph I.5. prohibits Pendleton from:

> Conducting any surveillance program to determine whether any dealer is advertising, offering for sale or selling any product at a resale price other than that which respondent has established or suggested, where such surveillance program is conducted to fix, maintain, control or enforce the retail price at which any product is sold or advertised.

in Paragraph I.5. of the Order could hinder Pendleton's ability to institute a lawful, price restrictive cooperative advertising program. Deleting these words makes clear that Pendleton can impose price restrictions on its dealers in connection with a lawful cooperative advertising program, consistent with the Commission's conclusion that price restrictions in cooperative advertising programs, standing alone, are not per se unlawful. See Statement of Policy Regarding Price Restrictions in Cooperative Advertising Programs -- Rescission, 6 Trade Reg. Rep. (CCH) ¶ 39,057 (May 21, 1987).

Paragraph I.6. -- Pendleton has asked the Commission to delete Paragraph I.6. in its entirety, or, in the alternative, delete the words "Terminating or" from Paragraph I.6. of the Order.[17] Pendleton believes that this provision, but especially the word "Terminating," prohibits Pendleton from unilaterally terminating "a dealer because of the dealer's pricing practices . . . ." Petition at 12. According to Pendleton, such conduct is "clearly . . . lawful action." Id.

The prohibition in Paragraph I.6. against "terminating . . . any dealer" restricts Pendleton from unilaterally terminating such a dealer even if the termination is consistent with the Colgate doctrine. Deleting the word "terminating" from Paragraph I.6 will make the Order consistent with the proviso language that restores Pendleton's Colgate rights. Unilateral termination of a dealer for discounting is not in itself unlawful. See Interco Incorporated, Docket No. C-2929, Order Granting in Part and Denying in Part Request To Reopen and Modify Order Issued September 26, 1978 (March 27, 1995) at 10. The request to delete the word "terminating" from Paragraph I.6. of the Order is

[17] Paragraph I.6. prohibits Pendleton from:

> Terminating or taking any other action to restrict, prevent or limit the sale of any product by any dealer because of the resale price at which said dealer has sold or advertised, is selling or advertising, or is suspected of selling or advertising any product.

granted.[18] For clarity, the words "(other than termination)" should be added to the paragraph following the word "action."

Paragraph II -- Pendleton requests that the Commission delete Paragraph II from the Order.[19] Pendleton states that "if [Pendleton] remains subject to paragraph II, it will be reluctant to take lawful action which might be construed as contrary to representations required by that provision." Petition at 12.

Paragraph II relates to Pendleton's use of suggested retail prices. Under the Order, Pendleton could not suggest retail prices for a period that expired in 1982. The remaining provisions of Paragraph II restrict the use of suggested retail prices. Specifically, Pendleton must "[c]learly and conspicuously state on any material on which such suggested price is stated that such price is suggested only," Order ¶ II.a, and

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[18] Paragraph I.6., as modified, would bar Pendleton from threatening to terminate dealers for failure to adhere to resale prices. Threats to obtain dealer acquiescence in resale prices are "plainly relevant and persuasive to a meeting of the minds" that could result in an unlawful agreement to fix resale prices. Pendleton may, consistent with the Order, as modified, announce in advance its intention to terminate any dealer who fails to adhere to its previously announced resale prices and it may terminate any such dealer, but "it may not threaten a dealer to coerce compliance with or agreement to suggested retail prices." See Interco Incorporated, Docket No. C-2929, Order Granting in Part and Denying in Part Request To Reopen and Modify Order Issued September 26, 1978 (March 27, 1995), at 10.

[19] Paragraph II of the Order prohibits:

> Publishing, disseminating, circulating, providing or communicating, orally or in writing or by any other means, any suggested retail price from the date of service of this order until April 20, 1982; *provided, however,* that if, after April 20, 1982, respondent suggests any retail price, respondent shall:
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> a. Clearly and conspicuously state on any material on which such suggested price is stated that such price is suggested only.
>
> b. Mail to all dealers a letter stating that no dealer is obligated to adhere to any suggested retail price and that such suggested retail price is advisory only.

notify its customers that they are not obligated to adhere to suggested retail prices and that "such suggested retail price is advisory only." Order ¶ II.b. The Commission considered modification of a similar provision in Clinique[20] and set the provision aside in the public interest. The Commission concluded that the provision in the Clinique order addressed conduct (suggested prices) that by itself may not be unlawful and was no longer necessary to ensure compliance with the law. Consistent with Clinique, Paragraph II should be set aside.

V. Conclusion

Pendleton has shown that reopening the Order is in the public interest and that the Order should be modified as described above. The Order as modified bars Pendleton from engaging in resale price maintenance and permits Pendleton to engage in otherwise lawful conduct.

Accordingly, IT IS ORDERED that this matter be, and it hereby is, reopened and that the Commission's Order in Docket No. C-2985 be, and it hereby is, modified, as of the effective date of this order, as follows:

(a) Paragraph I is modified by adding the following proviso:

> PROVIDED THAT nothing in this Order shall be construed to prohibit the implementation of a lawful, price restrictive, cooperative advertising program or the unilateral termination of a reseller for failure to adhere to previously announced resale prices or sale periods.

(b) Paragraph I.4. is modified by deleting the words "or acting on any reports or information so obtained by threatening, intimidating, coercing or terminating any dealer," as follows:

> Requiring, requesting, or soliciting any dealer to report the identity of any other dealer, because of the price at which such dealer is advertising, offering to sell or selling any product.

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[20] Clinique Laboratories, Inc., Docket No. C-3027 (Feb. 8, 1993), reprinted in [1987-1993 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 23,330.

(c) Paragraph I.5. is modified to delete the words "advertising" and "or advertised," as follows:

> Conducting any surveillance program to determine whether any dealer is offering for sale or selling any product at a resale price other than that which respondent has established or suggested, where such surveillance program is conducted to fix, maintain, control or enforce the retail price at which any product is sold.

(d) Paragraph I.6. is modified by deleting the words "Terminating or" and "other" and adding "(other than termination)," as follows:

> Taking any action (other than termination) to restrict, prevent or limit the sale of any product by any dealer because of the resale price at which said dealer has sold or advertised, is selling or advertising, or is suspected of selling or advertising any product.

(e) Paragraph II is set aside.

(f) Pendleton's request to modify Paragraph I.1. to delete the words "advertise, promote" is denied.

By the Commission, Commissioner Starek concurring in the result only.

Donald S. Clark
Secretary

SEAL

ISSUED: September 30, 1996

STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III
CONCURRING IN THE RESULT

In the Matter of Pendleton Woolen Mills, Inc.

Docket No. C-2985

I concur in the Commission's decision to reopen and modify the order in this matter. Respondent Pendleton Woolen Mills, Inc. has shown that the order prohibits conduct that by itself may not be unlawful, and that the prohibition inhibits its ability to compete with firms that are free to (and do) engage in price-restrictive advertising programs and can freely choose with whom they will deal.

As I have stated elsewhere, however, I cannot concur fully in the reasoning expressed in today's order because I do not share in the view that respondent "must demonstrate as a threshold matter some affirmative need to modify the Order" when a petition to reopen is judged under the public interest standard. *Order Granting in Part Request to Reopen and Modify Order*, Docket No. C-2985, at 2. Neither the statute[1] nor the Commission rule[2] governing our consideration of petitions to reopen provides for an "affirmative need" requirement that a petitioner must meet. I would therefore prefer that such language be deleted from this and future Commission rulings granting or denying petitions to reopen existing orders.

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[1] Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b).

[2] Rule 2.51(b) of the Commission's Rules of Practice, 16 C.F.R. § 2.51(b).