FEDERAL TRADE COMMISSION DECISIONS

Findings, Opinions and Orders

IN THE MATTER OF

RUSSELL STOVER CANDIES, INC.

FINAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9140. Complaint, July 1, 1980—Final Order, July 1, 1982

This order requires a Kansas City, Mo. manufacturer, seller and distributor of candy products to cease, among other things, entering into, maintaining, or enforcing any agreement, understanding or arrangement to fix resale prices for its products; suggesting resale prices, by any means, without clearly stating that they are merely suggested; and seeking information relating to recalcitrant retailers. The respondent is prohibited from terminating, suspending or taking any other adverse action against retailers who fail to conform to company's suggested prices; and required to reinstate those retailers who had been terminated for non-conformance to designated prices. The order additionally requires respondent to pay for a survey to ascertain what percentage of its products is sold at manufacturer-designated prices, and to cease suggesting resale prices if that percentage exceeds 87.4%.

Appearances

For the Commission: *Eugene Kaplan, Jayma M. Meyer* and *Warren Josephson.*

For the respondent: *Lawrence R. Brown* and *David Everson, Stinson, Mag & Fizzell,* Kansas City, Mo. and *Tom Franklin,* in-house counsel, Kansas City, Mo.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Russell Stover Candies, Inc., a corporation, hereinafter referred to as respondent, 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 is a corporation organized, existing and doing business under and by virtue of the laws of the state of Missouri, with its offices and principal place of business located at 1004 Baltimore Ave., Kansas City, Missouri.

PAR. 2. Respondent is now and for some time has been engaged in the manufacture, advertising, offering for sale, sale and distribution of chocolates and other candies ("products") in and affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 3. Respondent's net sales for fiscal years 1978 and 1979 were in excess of $117 and $128 million, respectively.

PAR. 4. Respondent sells and distributes its products directly to more than 18,000 retail dealers, located throughout the United States, who in turn resell respondent's products to the general public.

PAR. 5. In connection with the sale and distribution of its products, respondent:

(a) designates resale prices for all of its products and communicates those prices to its retailers;

(b) has a policy of not dealing with retailers who sell its products at less than the designated resale prices; and

(c) communicates to retailers the policy set forth in subparagraph (b) of this paragraph. [2]

PAR. 6. As a result of the acts and practices set forth in Paragraph Five, respondent's products are sold, with few exceptions, at or above retail prices designated by respondent.

PAR. 7. Respondent has unlawfully contracted, combined or conspired with its retail dealers to fix resale prices and thereby unreasonably restrain trade in the resale of its products within the meaning of Section 1 of the Sherman Act and has, therefore, violated Section 5 of the Federal Trade Commission Act, as amended.

INITIAL DECISION BY

MORTON NEEDELMAN, ADMINISTRATIVE LAW JUDGE

MARCH 16, 1981

I.

STATEMENT OF THE CASE

The complaint in this proceeding, which was issued on July 1, 1980, charges that Russell Stover Candies, Inc. (hereinafter

"Respondent" or "Russell Stover") has violated Section 5 of the Federal Trade Commission Act, as amended, by (a) designating resale prices for its candies and communicating those prices to its retailers; (b) adopting a policy of refusing [2]to deal with retailers who sell its candies at less than the designated prices; and (c) communicating to retailers its policy of refusing to deal with those who sell its candies at less than the designated resale prices.[1] The complaint further alleges that as a result of these practices respondent's candies are sold, with few exceptions, at or above resale prices designated by Russell Stover.[2] These practices are characterized as follows in the charging paragraph of the complaint:

> Respondent has unlawfully contracted, combined or conspired with its retail dealers to fix resale prices and thereby unreasonably restrain trade in the resale of its products within the meaning of Section 1 of the Sherman Act and has, therefore, violated Section 5 of the Federal Trade Commission Act, as amended.[3]

Respondent's answer, which was received by the Secretary of the Commission on August 7, 1980, admits certain jurisdictional facts but denies all of the substantive allegations of the complaint. Respondent asserts as an affirmative defense that the complaint fails to state facts upon which relief can be granted because it alleges a course of [3]conduct that has been approved by the Supreme Court of the United States.

At a prehearing conference held on September 12, 1980, the parties agreed to submit the case on the basis of a stipulated record. The factual stipulation was filed on November 12, 1980, accepted by the Administrative Law Judge, and the record was closed for the receipt of evidence. Thereafter, proposed findings and briefs were submitted. Oral argument on the briefs was heard on March 6, 1981.

The entire evidentiary record in this proceeding consists of Paragraphs 1 through 24 of the Stipulation,[4] which are incorporated below verbatim as the Findings of Fact: [4]

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[1] Complaint, Paragraph Five.

[2] Complaint, Paragraph Six.

[3] Complaint, Paragraph Seven.

[4] The stipulation, which appears in the record as Joint Exhibit 1A through 1P, has 26 paragraphs. Paragraph 25 provides:

> It is further stipulated and agreed that all stipulations set forth in paragraphs 1 through 24 hereof are for the purposes of this proceeding only and are not admissions by Russell Stover for any other purpose nor may they be used against Russell Stover in any other proceeding.

Paragraph 26 relates to the terms of a cease and desist order which Russell Stover would accept should it finally be determined that respondent's practices are illegal.

II.

FINDINGS OF FACT

1. For the purpose of [these findings], the following definitions apply:

a. *Product* means any candy item which Russell Stover manufactures or sells to retailers.

b. *Retailer* means each location of any person, partnership or corporation, not owned by Russell Stover, which purchases candy directly from Russell Stover and resells it to the public.

c. *Designates* or *designated* means the selection by Russell Stover of the prices at which it desires that its retailers sell Russell Stover products.

d. *Retail price* and *resale price* are used interchangeably.

2. Russell Stover Candies, Inc. ("Russell Stover," "Stover" or "Respondent"), is a publicly held corporation organized, existing and doing business under the laws of the state of Missouri. Respondent's principal office and place of business is 1004 Baltimore Ave., Kansas City, Missouri.[5]

3. In fiscal years 1978 and 1979, Russell Stover had net sales of approximately 117.0 and 128.8 million dollars, respectively, and net incomes of 10.9 and 14.6 million dollars, respectively.[6]

4. Russell Stover's manufacturing plants are located in Lincoln, Nebraska; Marion, South Carolina; Clarksville, Virginia; Montrose, Colorado; and Cookeville, Tennessee. It has warehouse facilities at these five plants and at Allentown, Pennsylvania; Norcross, Georgia; Dallas, Texas; Aurora, Colorado; Indianapolis, Indiana; Olathe, Kansas; and North Sacramento, California. [5]

5. Russell Stover sells and ships its products from these factories and warehouses to more than 18,000 retailers. These stores, primarily drug, card and gift and department stores, are located in every state and the District of Columbia.[7]

6. Russell Stover is therefore engaged "in commerce" and its business activities "affect commerce" within the meaning of the Federal Trade Commission Act.[8]

7. Russell Stover is one of the major United States manufacturers of boxed chocolates.

8. Russell Stover competes with, among other companies, Whitman's, Schrafft Candy Company, Fanny Farmer Candy Shops, Inc.,

[5] See also Complaint and Answer, Paragraph One.

[6] See also Complaint and Answer, Paragraph Three.

[7] See also Complaint and Answer, Paragraph Four.

[8] See also Complaint and Answer, Paragraph Two.

Barton's Candy Corporation, Fannie May Candy Shops, Inc., M & M/Mars and E.J. Brach & Sons, some of which are also major United States manufacturers of boxed chocolates.

9. Russell Stover manufactures or sells to retailers more than sixty (60) seasonal and nonseasonal candy items, including boxed assortments, candy bars, hard candies, bulk candies and other confectionary items.

10. Russell Stover has more than 3,000 full-time employees.

11. Russell Stover employs approximately eighty field sales personnel.

12. The "agency division" manages the sale of Russell Stover candy to card and gift shops and drug stores. The "department store division" manages the sales of Russell Stover candy to department stores.

13. The agency division is organized into five geographic districts. Each district is serviced by a district manager and approximately fifteen sales representatives. The sales representatives report weekly to their district manager; and in turn the district managers report weekly to sales administrators located in Kansas City at the company's headquarters.

14. The sales representatives each service between 200 and 300 retailers and visit each retailer at least four times a year for normal, legitimate business purposes. **[6]**

15. The department store division is organized into two regions. Each region is serviced by a manager located in Kansas City, Missouri, and three district managers located in the region.

16. Russell Stover's corporate management supervises the sales personnel in order to assure implementation of all of the company's sales policies.

17. Russell Stover designates resale prices for all of its products. Stover communicates those prices to retailers by price lists, invoices, order forms and pre-ticketing all of its products.

18. All Russell Stover retailers are thus aware of the prices designated for each Stover product.

19. Russell Stover announces to each prospective retailer before an initial order is placed that among the circumstances under which Stover will refuse to sell are: whenever Stover reasonably believes that a prospective retailer will resell Stover products at less than designated prices; and whenever an existing retailer has resold Stover products at less than designated prices. These circumstances are widely and generally known to Stover retailers. Stover, however, neither requests nor accepts express assurances from prospective or existing retailers respecting resale prices. Other circumstances

under which Russell Stover refuses to sell are not related to resale prices and are not relevant for purposes of this case.

20. Consistent with the announced policy described in paragraph 19, Stover has refused to open retailers which it thought would sell its products at less than designated prices and has ceased selling to existing retailers because they sold Stover products at less than designated prices.

21. The practices and policies described in paragraphs 17, 18 and 19 existed for a period of at least five years before issuance of the complaint by the Federal Trade Commission in this matter. Refusals and terminations referred to in paragraph 20 have also occurred during this five year period.

22. Stover officers are aware that the vast majority of retailers regularly sell and have sold Russell Stover candy at or above prices designated by Stover. However, the company has not collected or received data from which to accurately determine the degree of adherence to its designated prices. Therefore, the Federal Trade Commission contracted with Louis Harris and Associates, Inc., ("Louis Harris") to conduct a survey to ascertain retail prices and related information concerning Stover candy sold by Stover's retailers. Louis Harris is qualified to conduct this type of survey. [7]

23. The Louis Harris official responsible for the conduct of the survey would be qualified as an expert witness in the field of statistics and survey research and would testify:

a. That the survey was conducted in April 1980, in accordance with accepted and established procedures and techniques designed to insure accuracy, reliability and statistical validity and using a random sample of 819 retailers;

b. That Louis Harris collected data on which 47 specified nonseasonal products were available for sale at each retailer;

c. That Louis Harris collected data on the price at which each product was available for sale at each retailer; and

d. That based on the data collected, 97.4% of the products available were priced at or above the price designated for each product.

Respondent would not offer evidence to rebut that testimony.

24. A number of witnesses would testify that they represent a substantial number of retail locations in which Russell Stover products are currently sold, that they desire regularly or occasionally to sell Stover products in those locations at less than designated prices, and that they do not do so because of the price-related refusal to sell announcement referred to in paragraph 19. Respondent would not offer any evidence to rebut that testimony. [8]

III.

DISCUSSION

Over 60 years ago in *Colgate,* the Supreme Court upheld a district court decision quashing a criminal price-fixing indictment which merely alleged that a manufacturer refused to sell to dealers who sold below the manufacturer's suggested retail prices. In the course of sustaining the lower court determination that the indictment had failed properly to charge an illegal agreement, the Supreme Court said:

> In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell.[9]

Colgate itself involved resale price maintenance or vertical price-fixing, and subsequently the case has been followed in those rare instances in which a nonmonopolistic manufacturer did no more than announce in advance its suggested prices, and dealers either acquiesced in the manufacturer's policy, or were cut off if they did not. Thus relying on *Colgate,* it has been held that if all that is involved is an announcement of pricing policy and compliance with that policy, the essential element of a conspiracy case is missing, namely, [9]there is no *agreement* between manufacturer and dealer which obligates the dealer to resell at prices suggested by the manufacturer. *Quinn v. Mobil Oil Co.,* 375 F.2d 273 (1st Cir. 1967); *Dart Drug Corp. v. Parke, Davis & Co.,* 344 F.2d 173 (D.C. Cir. 1965); *Klein v. American Luggage Works, Inc.,* 323 F.2d 787 (3d Cir. 1963).

Complaint counsel have come up with a test case which has as its purpose a direct challenge to the continued viability of *Colgate.*[10] According to the stipulated record, Russell Stover, a manufacturer of boxed chocolates and other candies, announces in advance that it will refuse to deal with retailers who resell below designated prices appearing on lists, invoices, order forms, and respondent's boxed candy which is all preticketed. In carrying out this policy, respondent does not sell initially to retailers who it believes will sell at less than designated prices, and eliminates established retailers whenever it becomes apparent that they have sold Russell Stover products

[9] *United States v. Colgate & Co.,* 250 U.S. 300, 307 (1919).

[10] Address by Benjamin S. Sharp, Assistant Director for Regional Operations of FTC Bureau of Competition, Vertical Restraints And the FTC: Finding Pro-Competitive Answers to Today's Enigmas, at 4, ALI-ABA Course of Study, "The FTC After The Storm" (Washington, D.C., Nov. 21, 1980) ("The *Russell Stover* case was pleaded as a Sherman Act § 1 violation alleging the existence of an agreement, so as to confront directly the *Colgate* doctrine").

at less than designated prices. This policy is effective in accomplishing respondent's objective. A reliable survey shows [10]that Russell Stover candy is almost universally sold at respondent's designated prices.

While Russell Stover's announcement accomplishes its purpose—to assure sales at designated prices—and respondent's volume of business is not insubstantial, there is nothing in the record about the size of respondent's market share, or the uniqueness of its products, or the importance of the products to retailers who stock the Russell Stover line along with a large variety of other products. In effect, *Colgate* notwithstanding, complaint counsel are pressing the proposition that respondent's practices are illegal *per se* under the Sherman Act on the theory that respondent's announcement and the subsequent acquiescence of the dealers constitutes a vertical agreement to fix retail prices.[11]

Complaint counsel's effort to dispose of the *Colgate* doctrine, which says the exact opposite, that is, that no agreement or conspiracy may be inferred solely from an announcement of a pricing policy followed by compliance with that policy, proceeds on several grounds. First, complaint counsel make much ado about the procedural provenance of *Colgate,* especially the purported difference between the holding and the dictum of the [11]case. According to complaint counsel, the Supreme Court never directly ruled that the manufacturer and the dealers had not engaged in a conspiracy; the Court merely upheld a district court decision sustaining a motion to quash an indictment for failure properly to charge an agreement. But even if complaint counsel are correct, and the Court's limited responsibility under the Criminal Appeals Act could have been discharged without promulgating the *Colgate* doctrine, the significance of these humble beginnings is obscure. That there is a body of law known as the *Colgate* doctrine ("a basic part of antitrust law concepts since it was first announced in 1919" and "part of the economic regime of the country upon which the commercial community and the lawyers who advise it have justifiably relied"[12]) cannot be gainsaid—the very point of this case is to have the doctrine thrown out.

Second, complaint counsel cite a string of cases which have held that the express agreement, which apparently both lower and upper courts were looking for in *Colgate,* is not now required in order to establish a conspiracy. As complaint counsel would have it, since it is well-accepted under modern conspiracy law that no explicit agree-

[11] Section 1 of the Sherman Act prohibits "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce. . . ." 15 U.S.C.A. 1.

[12] *United States v. Parke, Davis & Co.,* 362 U.S. 29, 49, 57 (1960) (Harlan, J., dissenting).

ment is necessary, a tacit conspiracy should be inferred from Russell Stover's prior [12]announcement of its policy, and the subsequent acquiescence in that policy by retailers.

While complaint counsel are undoubtedly right about the ability of the courts and the Commission to draw inferences of conspiracy from interdependent conduct implicating competitors, this argument overlooks the point that since *Colgate* a vertical price-fixing agreement (an agreement between non-competing supplier and customer) is exactly what may not be inferred if all that the record shows is a manufacturer's announcement of a refusal to deal with non-complying dealers. Moreover, contrary to the position of complaint counsel, *Colgate* has not been interpreted as applying only to those instances in which there is no express agreement. Almost from the time the doctrine was first announced, it has been the rule that a unilateral announcement standing alone cannot be used to establish *any* agreement, implied or express. *Frey & Son, Inc. v. Cudahy Packing Co.,* 256 U.S. 208 (1921).

Since this gap in the law relating to inferential evidence of conspiracy is premised on the right of traders to pick and choose their customers at will, by definition it applies only to policies originating with a manufacturer, as alleged in the instant complaint. There is nothing in the doctrine which shelters any form of horizontal pricing arrangement among competing dealers, no matter how such an arrangement may have come about. Undoubtedly with this limitation in mind, [13]complaint counsel argue next that Russell Stover has put together a horizontal combination by extending to its dealers an invitation to sell at designated prices. According to complaint counsel, this horizontal combination is consummated when the dealers signal (by compliance) acceptance of the invitation in contemplation that similarly situated retailers will do the same. Putting aside some obvious difficulties with the application of this theory to this case—there is no horizontal conspiracy at any level alleged in the complaint, and the pricing policy at issue here did not originate with the dealers, *see, e.g., Interstate Circuit, Inc. v. United States,* 306 U.S. 208 (1939)—no court has yet invoked the rationale of "invitation and acceptance" to hold that a declaration of pricing policy initiated by the manufacturer represents an invitation to dealers to participate in either a vertical or horizontal price-fixing agreement forbidden by the Sherman Act. To the contrary, when a similar argument was last presented to the Third Circuit, the court concluded that there was neither an agreement nor an invitation to agree. *Klein v. American Luggage Works, Inc.,* 323 F.2d 787 (3d Cir. 1963).

Klein is consistent with the Supreme Court's ruling in *Parke, Davis* that a seller's pricing announcement which engenders "confidence in each customer that if he complies his competitors will also" is *not* a basis for inferring agreement if the manufacturer takes no affirmative coercive action to achieve [14]compliance. *United States v. Parke, Davis & Co.,* 362 U.S. 29, 46 (1960). As for *United States v. Bausch & Lomb Co.,* 321 U.S. 707 (1944), which relies on both *Interstate Circuit and Colgate,* more was involved there than just acquiescence of wholesalers in Soft-Lite's published resale price list. At issue was a multi-level system and a combination which arose when "[t]he wholesalers accepted Soft-Lite's proffer of a plan of distribution by cooperating in prices, limitation of sales to and approval of retail licensees." 321 U.S. at 723.[13]

Turning from its misplaced reliance on conspiracy cases which either included horizontal activity or did not involve mere unilateral announcements originating with manufacturers, complaint counsel say that the *Colgate* doctrine itself has been whittled down, or as complaint counsel would have it, overruled, by a series of cases in which the courts have held that from coercive conduct which goes beyond *Colgate* [15]it will be inferred that the retailers did not act independently, but instead were compelled to agree to resell at the manufacturer's prices. While the Supreme Court has never satisfactorily explained why coercion which induces acquiescence is stronger evidence of agreement than just acquiescence itself, the post-*Colgate* cases have largely evolved into an exercise in finding some element of coercion, however slight it may be, which can be identified as the triggering device for an agreement.[14] Under this line of cases, the doctrine is not available if the manufacturer threatens a price-cutter, and then resumes selling subject to the tacit or implied understanding that the reformed dealer will toe the pricing line. *Parke, Davis & Co.,* 362 U.S. at 34–35, 45 n.6. Nor is the doctrine available if the manufacturer sets up a policing mechanism to uncover violations, and then reinstates price-cutters who satisfactorily demonstrate a willingness to comply with designated prices in the future. *FTC v. Beech-Nut Co.,* 257 U.S. 441, 450–451 (1922). Similarly, if the manufacturer uses customers at one level of distribution to coerce price compliance by dealers at another level of

[13] The *Interstate Circuit* rationale may apply if the manufacturer solicits compliance in the form of an understanding from retailers that they will not discount if others likewise agree. In those circumstances, however, the "invitation-acceptance" concept seems hardly necessary since there exists an agreement between manufacturer and retailer although expressed in conditional terms. *See Parke, Davis* 362 U.S. at 35–36, 46–47. As I indicate later in this discussion, the "unfairness" jurisdiction of the Commission under Section 5 might have been invoked to charge respondent with using an invitation and acceptance in putting together an anti-competitive arrangement among retailers without regard to whether a Sherman Act "agreement" was proven. See discussion, *infra,* at n.24.

[14] *Simpson v. Union Oil,* 377 U.S. 13, 16 (1964) (". . . it matters not what the coercive device is.")

distribution, *Parke, Davis,* 362 U.S. 29 at 45–46, or if the manufacturer uses the threat of its own direct competition or retaliation from others **[16]**to obtain compliance, *Colgate* does not apply. *Albrecht v. Herald Co.,* 390 U.S. 145, 150 n.6 (1968). The results in the "coercion" cases are also supportable on the alternative theory that in a multi-level distribution system the wholesaler or jobber who either cooperates by informing on price-cutting retailers, or refuses to resell to such retailers, should be considered as forming the requisite combination with the manufacturer. *Beech-Nut,* 257 U.S. at 454–455; *Bausch & Lomb,* 321 U.S. at 723; *Parke, Davis,* 362 U.S. at 45–46.[15]

Going beyond coerced acquiescence or inferences of combinations following multi-level coercion or cooperation, several cases have suggested that the business setting alone may create a coercive environment which induces an agreement or combination and thereby shuts off recourse to *Colgate.* To illustrate, if a car muffler or newspaper franchisee who for all practical purposes is dependent for his livelihood on one source which cannot be easily substituted, and after investing money and effort in developing a market is given to understand that his supplier is firm and resolute in its insistence on observance of stated prices (say, by evidence of a strict policy **[17]**of cancellations), it is doubtful that the dealer's "independence" is very real, and under these circumstances, too, the *Colgate* doctrine may not apply. *See, Perma Life Mufflers, Inc. v. International Parts Corp.,* 392 U.S. 134, 142 (1968); *Albrecht,* 390 U.S. at 150 n.6.[16]

The cases discussed above have the effect of severely limiting the *Colgate* doctrine to its precise terms. Not content with this result, complaint counsel settle on *Parke, Davis* as purportedly overruling *Colgate, "de facto".* Given the language in *Parke, Davis* which explicitly discourages such an interpretation ("So long as *Colgate* is not overruled . . ." 362 U.S. at 44),[17] complaint counsel might have argued more persuasively that the following discussion in footnote 6 of *Albrecht,* rather than *Parke, Davis,* accomplished the deed: **[18]**

Under *Parke, Davis* petitioner could have claimed a combination between respondent and himself, at least as of the day he unwillingly complied with respondent's advertised price. Likewise, he might successfully have claimed that respondent had

[15] See also *Cernuto, Inc. v. United Cabinet Corp.,* 595 F.2d 164 (3d Cir. 1979), which held that a combination may be found in a single-level distribution system on the basis of a refusal to deal following complaints from the competitor of a discounter. This activity was characterized as primarily horizontal in nature as contrasted with a manufacturer's unilateral refusal to deal protected by *Colgate.* 595 F.2d at 167 n.12.

[16] In *Yentsch v. Texaco, Inc.,* 630 F.2d 46 (2d Cir. 1980), it was held that a jury could reasonably infer a combination from the following facts indicative of a coercive environment: the dealer's business was subject to a one year lease with Texaco; the dealer was threatened with cancellation unless prices were maintained; and surveillance was undertaken to determine what prices were being charged.

[17] Complaint counsel explain away this "troublesome dictum" as indicative of the Supreme Court's hesitancy "to expressly overrule its past decisions." (Brief for Complaint Counsel at 45). See, however, *Continental T.V., Inc. v. GTE Sylvania, Inc.,* 433 U.S. 36 (1977)

combined with other carriers because the firmly enforced price policy applied to all carriers, most of whom acquiesced in it. See *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 372 (1967).[18]

While footnote 6 comes perilously close to overruling *Colgate,* the citations to *Parke, Davis* and *Schwinn,* both of which expressly affirmed *Colgate,* indicate that this is not what the Supreme Court intended. The Court seems, instead, to have carved out the barest sliver of permissible conduct—a simple, unadorned, unilateral announcement followed by a refusal—while indicating that the doctrine is not available if compliance is brought about by any affirmative action exceeding an announcement, such as the coerced agreements and multi-level threats in *Parke, Davis,* or the coercive pressures brought to bear on franchisees who are especially vulnerable to the danger of termination, as in *Albrecht* itself and *Schwinn.*[19] This **[19]**reading of footnote 6 is also consistent with the recent action of the Court in again turning to *Colgate* to reaffirm the right of a trader "freely to exercise his own independent discretion as to parties with whom he will deal." *Reeves, Inc. v. William Stake,* 48 U.S.L.W. 4746, 4749 (U.S. June 19, 1980).

While the exercise of the discretion "as to parties with whom he will deal" may take the form of an announcement of a refusal to deal with price-cutters, there is now so little left of *Colgate,* that the doctrine might not even apply to the actual facts of the *Colgate* case itself. There, coerced acquiescence or an agreement could have been inferred from use of "suspended lists," and requests to offending dealers for assurances or promises of future adherence to prices. *Colgate,* 250 U.S. at 303. In contrast, the instant stipulation tracks **[20]**the precise terms of the doctrine, rather than the facts of the earlier case, and avoids any mention of tactics (surveillance, investigations, suspended lists, wholesaler boycotts, threats to non-compliers, or solicitation of promises of future adherence), or

[18] *Albrecht,* 390 U.S. at 150 n.6.

[19] By the time it reached the Supreme Court *Schwinn* did not involve resale price maintenance; however, the case has been cited for the proposition that vertical agreements (there customer and territorial restraints) may be grounded upon "the communicated danger of termination" and a "firm and resolute" insistence upon observance of the manufacturer's policies. 388 U.S. at 372. The concurring and dissenting opinion of Mr. Justice Stewart takes issue with this formulation because on its face it offends *Colgate.* 388 U.S. at 391 n.12. Since the majority reaffirmed *Colgate,* it must be assumed that the Court believed that Schwinn had gone beyond a mere unilateral announcement of policy. As it happens, there is some evidence that Schwinn obtained actual agreements, or at least explicit approval, from the distributors. 237 F. Supp. 323, 340–342 (N.D. Ill. 1965). But even without this evidence, Schwinn's announcement of its territorialization policies may have been deemed to be coercive in the context of its cancellation of thousands of dealers and its decision to concentrate distribution among a relatively small group of franchisees. Those who remained on Schwinn's dealer rolls stood to gain enormously from the bicycle boom, and although the Supreme Court may believe that all bicycles are interchangeable, many dealers may have been reluctant to lose the Schwinn brand which they had promoted extensively. 388 U.S. at 365. While the Court does not dwell in *Schwinn* on the coercive element implicit in some franchising situations, it is significant that just one year later it expressed deep skepticism about how "perfectly free" franchised dealers are to reject the demands of a supplier when their very livelihood is at stake. *FTC v. Texaco,* 393 U.S. 223, 229 (1968).