

Complaint

103 F.T.C.

IN THE MATTER OF
GENERAL FOODS CORPORATION

DISMISSAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION
OF SEC.5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 2(a) OF
THE CLAYTON ACT

Docket 9085. Complaint, July 14, 1976—Final Order, April 6, 1984

In this Final Order, the Commission denied complaint counsel's appeal against an ALJ's Initial Decision dated Jan. 25, 1982, sustained the ID for reasons set forth in its accompanying Opinion, and dismissed the Complaint charging a leading processed food manufacturer with violating Section 5 of the Federal Trade Commission Act and Section 2(a) of the Clayton Act, in connection with the marketing of Regular Maxwell House Coffee.

Appearances

For the Commission: *Edward J. Carnot, Michael Goldenberg, Jane Seymour, Wayne Kaplan and Richard F. Silvestri.*

For the respondent: *Paul C. Warnke, John F. Kovin, John G. Candler, Robert P. Reznick and Don Scott DeAmicis, Clifford & Warnke, Washington, D.C. and Robert Y. Fox, in-house counsel, White Plains, N.Y.*

COMPLAINT

The Federal Trade Commission, having reason to believe that General Foods Corporation is in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45) and Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C. 13(a)), and believing that a proceeding by it in respect thereof is in the public interest, hereby issues its Complaint charging as follows:

DEFINITIONS

1. For the purpose of this Complaint, the following definitions shall apply:

(a) *Regular coffee* is coffee processed from unroasted coffee beans by means of blending, roasting, and grinding into varying granular sizes and which must be heated and steeped in water before being consumed. It is generally packed and sold in vacuum tin containers and paper bags. It is to be distinguished from soluble (instant) coffee.

(b) *Consumer promotions* are discounts or other offerings to the consumer to encourage him to purchase the brand promoted.

(c) *Trade promotions* are discounts or other financial incentives to the grocer or wholesaler. [2]

RESPONDENT

2. General Foods Corporation (hereinafter "General Foods") is a Delaware corporation with its executive office located at 250 North Street, White Plains, New York.

3. Coffee is one of General Foods' principal product lines. Coffee sales make up approximately 29% of the total revenues of General Foods and regular coffee constitutes a substantial portion of such coffee sales.

4. In fiscal year 1975 General Foods had total sales of approximately \$3.7 billion, in fiscal year 1974, \$3.0 billion, in fiscal year 1973, \$2.6 billion, in fiscal year 1972, \$2.4 billion and in fiscal year 1971, \$2.3 billion.

5. The Maxwell House Division of General Foods is principally responsible for the manufacture, distribution and sale of coffee. Sales volume for the Maxwell House Division approximated \$900 million in fiscal year 1974, \$763 million in fiscal year 1973, \$703 million in fiscal year 1972 and \$662 million in fiscal year 1971.

6. The relevant market is the production, distribution and sale of regular coffee packaged for sale at retail in Maxwell House Division's eastern region. Relevant geographic submarkets include the Cleveland and Pittsburgh market areas of Maxwell House Division's Youngstown, Ohio District, the Wilkes Barre and Philadelphia market areas of Maxwell House Division's Philadelphia, Pennsylvania District and each market area of Maxwell House Division's Syracuse, New York District.

7. Concentration of sales for regular coffee packaged for sale at retail in the United States has increased from approximately 66% for the four largest producers in 1971 to approximately 72% in 1974.

8. General Foods, through its Maxwell House Division, is the largest seller of regular coffee packaged for sale at retail in the United States. It accounted for approximately 31% of such sales in the United States in 1972, 34% in 1973, and 35% in 1974. [3]

9. The Maxwell House Division of General Foods was the dominant seller of regular coffee packaged for sale at retail in the relevant market and each relevant submarket during the years 1971 through 1975, accounting, in each year, for approximately 45% or more of sales of regular coffee packaged for sale at retail in the relevant market and approximately 50% or more of such sales in the relevant submarkets.

OFFENSES ALLEGED

10. General Foods, through its Maxwell House Division, has used and is using its dominant position, size and economic power to frustrate the growth of smaller regular coffee producers and to frustrate entry of other regular coffee producers into the relevant market and submarkets and to prevent, hinder or lessen competition in the production, distribution or sale of regular coffee packaged for sale at retail in the relevant market and submarkets.

More particularly, General Foods, through its Maxwell House Division, since at least October, 1971, has adopted and placed into effect and carried out various policies, acts, practices, or methods of competition to foreclose entry and to lessen, restrain, eliminate or prevent the production, distribution or sale of regular coffee packaged for sale at retail by others engaged in the production, distribution or sale of such product in each market and submarket identified and alleged herein. Among such policies, acts, practices or methods of competition, General Foods, through its Maxwell House Division, has engaged in one or more of the following:

- (a) Selling regular coffee packaged for sale at retail below cost or at unreasonably low prices;
- (b) Using extensive consumer and trade promotions and advertising to forestall or foreclose market entry or to lessen competition; [4]
- (c) Engaging in geographically discriminatory pricing and promotional and advertising practices to forestall or foreclose entry or lessen competition;
- (d) Foreclosing and deterring new entry by increasing advertising and promotional expenditures in previously established marketing areas of the new entrant in retaliation for entry into the relevant market and submarkets.
- (e) Using a fighting brand of regular coffee to forestall or foreclose entry or lessen competition.

EFFECTS

11. The aforesaid policies, acts, or practices have or may have the following effects in one or more of the relevant market and submarkets alleged herein, among other things:

- (a) Monopolizing the production, distribution or sale of regular coffee packaged for sale at retail;
- (b) Increasing entry barriers in the production, distribution or sale of regular coffee packaged for sale at retail;
- (c) Preserving, maintaining, or furthering highly concentrated market structures;

(d) Hindering, restraining, foreclosing or frustrating competition in the production, distribution or sale of regular coffee packaged for sale at retail;

(e) Depriving consumers of the benefits of free and open competition.

JURISDICTION

12. The policies, acts and practices of General Foods' Maxwell House Division as alleged herein at all times relevant hereto have been in or have affected commerce within the meaning of the Federal Trade Commission Act. [5]

13. In the course and conduct of its business, General Foods' Maxwell House Division is now, and for many years past has been, engaged in commerce, as "commerce" is defined in the Clayton Act, in that it has sold and distributed, and is now selling and distributing, regular coffee packaged for sale at retail to purchasers thereof located in States other than the State of origin of shipments and has, either directly or indirectly, caused such products, when sold, to be shipped and transported from the State of origin to purchasers located in other States, as part of a constant course and flow of trade and commerce in such products between General Foods' Maxwell House Division in the State of origin and purchasers thereof located in other States and the District of Columbia.

General Foods, through its Maxwell House Division, has shipped and sold regular coffee packaged for sale at retail to purchasers with places of business located throughout the several States of the United States and the District of Columbia for resale to customers within the United States.

VIOLATIONS

14. In the relevant market and in one or more of the relevant submarkets, General Foods, through its Maxwell House Division, has maintained monopoly power over the production, distribution or sale of regular coffee packaged for sale at retail through all or some of the policies, acts and practices set out and alleged in Paragraph 10 in violation of Section 5 of the Federal Trade Commission Act.

15. In the relevant market and in one or more of the relevant submarkets, General Foods, through its Maxwell House Division, has attempted to monopolize the production, distribution or sale of regular coffee packaged for sale at retail through all or some of the policies, acts and practices set out and alleged in Paragraph 10 in violation of Section 5 of the Federal Trade Commission Act.

16. General Foods, through its Maxwell House Division, has engaged in a course and pattern of conduct which constitutes unfair

methods of competition or unfair acts or practices in violation of Section 5 of the Federal Trade Commission Act. [6]

17. In the course and conduct of its business in commerce, General Foods, through its Maxwell House Division, has since October 1971 discriminated and is now discriminating in price in the sale of regular coffee packaged for sale at retail by selling such products of like grade and quality at different prices to different purchasers.

Included in, but not limited to, the discriminations in price as above alleged, respondent has discriminated in price in the sale of said products to retailers and other purchasers in the Cleveland and Pittsburgh market areas of its Youngstown, Ohio District and in the Wilkes Barre and Philadelphia market areas of its Philadelphia, Pennsylvania District, and in each market area of its Syracuse, New York District by charging said retailers and other purchasers substantially lower prices than charged by said respondent for the sale of said products of like grade and quality to retailers and other purchasers located in other of respondent's trading areas throughout the nation, including at times other of the market areas described herein.

The effect of such discriminations in price by respondent in the sale of regular coffee packaged for sale at retail has been or may be substantially to lessen competition or to tend to create a monopoly in the line of commerce in which said respondent is engaged, or to injure, destroy or prevent competition between respondent and its competitors in the production, distribution or sale of such products.

The discrimination in price as herein alleged violate subsection 2(a) of the Clayton Act, as amended.

INITIAL DECISION BY

LEWIS F. PARKER, ADMINISTRATIVE LAW JUDGE

JANUARY 25, 1982

I. HISTORY OF THE PROCEEDING

The Commission issued its complaint in this case on July 14, 1976. It charges General Foods Corporation with violations of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45 and Section 2(a) of the Robinson-Patman Act, 15 U.S.C. 13(a).

The complaint alleges that General Foods, through its Maxwell House Division, has used and is using its dominant position in regular coffee and its size and economic power to frustrate the growth of smaller regular coffee producers, to frustrate the entry of other regular coffee producers into certain relevant markets, and to prevent,

hinder or lessen competition in the production, distribution or sale of regular coffee packaged for sale at retail in the relevant markets. The complaint claims that General Foods achieved these results by selling regular coffee below cost or at unreasonably low prices, [2] by using extensive consumer and trade promotions and advertising to forestall or foreclose market entry or to lessen competition, by engaging in geographically discriminatory pricing, promotional and advertising practices, by increasing advertising and promotional expenditures in previously established marketing areas of a new entrant to deter its entry into the relevant markets, and by using a fighting brand to forestall or foreclose entry or lessen competition.

According to the complaint, the effects of these practices have been the monopolization of the production, distribution or sale of ground coffee packaged for sale at retail, the increase of entry barriers, the preservation of highly concentrated market structures, the hindering of competition and the deprivation to consumers of the benefits of free and open competition.

After extensive discovery, hearings began on August 20, 1979. They ended on June 19, 1981. Over twelve thousand pages of testimony were recorded and several thousand pages of documents were received in evidence. The record was closed on June 26, 1981. Complaint counsel filed their proposed findings of fact and conclusions of law on August 27, 1981. General Foods filed its answer to the findings on October 26, 1981 and complaint counsel filed their reply on December 2, 1981. At my request, the Commission granted me an extension of time to January 26, 1982 to file this initial decision.

This decision is based on the transcript of testimony, the exhibits which I received in evidence, and the proposed findings of fact and answers thereto filed by the parties. I have adopted verbatim several findings proposed by complaint counsel and counsel for General Foods. Others have been adopted in substance. All other findings are rejected either because they are not supported by the record or because they are irrelevant.

II. FINDINGS OF FACT

A. *General Foods Corporation*

1. General Foods Corporation is a Delaware corporation with its principal executive offices located at 250 North Street, White Plains, New York (Complaint ¶2, Answer ¶3). It is one of the world's leading processors of packaged grocery products and [3] markets a variety of these products in the United States under more than thirty major

brand names (CX 438B).¹

2. In fiscal year 1972 (year ending April 1, 1972),² General Foods had net world-wide sales of over \$2.5 billion and net earnings (from continuing operations) of approximately \$113 million. In fiscal year 1976, General Foods had net world-wide sales of approximately \$4 billion and net earnings of over \$150 million (CX 438F).

3. Coffee is one of General Foods' principal product lines (Complaint ¶3; Answer ¶4). From April 1971 through April 3, 1976, General Foods' domestic coffee sales made up from 26% to 30% of its consolidated net sales (CX 438B). Regular coffee (coffee processed from unroasted coffee beans, as distinguished from soluble (instant) coffee) (Complaint ¶11(a); Answer ¶2) constituted a substantial portion of such coffee sales (Complaint ¶3; Answer ¶4). The sales volume of the regular coffee products sold by General Foods' Maxwell House Division approximated \$380 million in fiscal year 1971, \$386 million in fiscal year 1972, \$433 million in fiscal year 1973, \$504 million in fiscal year 1974, \$529 million in fiscal year 1975, \$567 million in fiscal year 1976, and \$900 million in fiscal year 1977. In these years, earnings before taxes for all ground coffee products approximated: \$26 million in 1971, \$24 million in 1972, \$13 million in 1973, \$17 million in 1974, \$5 million in 1975, \$25 million in 1976, and \$51 million in 1977 (CX 991A-N).

4. General Foods' largest selling regular coffee brand during the relevant time period was Regular Maxwell House. For the following fiscal years, the sales volume and earnings before taxes (in parentheses) for that brand approximated: \$303 [4] million (\$21 million) in 1971, \$293 million (\$19 million) in 1972, \$300 million (\$9 million) in 1973, \$351 million (\$4 million) in 1974, \$369 million (loss of over \$1 million) in 1975, \$395 million (\$22 million) in 1976, and \$654 million (\$35 million) in 1977 (CX 991A-N).

B. *Interstate Commerce*

5. In the conduct of its business, General Foods' Maxwell House Division distributes regular coffee packaged for sale at retail to purchasers located in states other than the state in which the shipments originated as part of a constant course of trade and commerce in

¹ The following abbreviations are used in this decision:

CX	-	Commission Exhibit
RX	-	Respondent's Exhibit
Tr.	-	Transcript of testimony
CPF	-	Complaint counsel's proposed findings
CLA	-	Complaint counsel's legal argument
RPF	-	Respondent's proposed findings
RLA	-	Respondent's legal argument
CRF	-	Complaint counsel's reply findings
CRLA	-	Complaint counsel's reply legal argument

² General Foods' fiscal years run from April through March of the following year (CX 438B).