

Complaint

91 F.T.C.

IN THE MATTER OF

PEPSICO, INC.

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

Docket 8856. Complaint, July 15, 1971 — Final Order, April 7, 1978.

This order, among other things, requires a Purchase, N.Y. soft drink manufacturer to cease imposing in any manner territorial limitations or class of customer restrictions on its licensed Pepsi-Cola or allied product bottlers, in connection with the sale or distribution of soft drink products sold in other than refillable containers. The firm is additionally required to provide protection for confidential commercial information submitted by its bottlers.

Appearances

For the Commission: *Raymond L. Hays, Martin A. Rosen, Michael Joel Bloom, Duncan J. Farmer and Jeffrey F. Shaw.*

For the respondent: *Milton Handler, Fred A. Freund, Elizabeth Head and Richard M. Steuer, Kaye, Scholer, Fierman, Hays & Handler, New York City. James G. Frangos for PepsiCo, Inc., Purchase, N.Y.*

For the intervenors: *Robert J. Sisk and James B. Kobak, Hughes, Hubbard & Reed, New York City.*

COMPLAINT

The Federal Trade Commission, having reason to believe that PepsiCo, Inc., hereby made and sometimes hereinafter referred to as respondent, or PepsiCo, has violated the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45), 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. For the purposes of this complaint, the following definitions shall apply:

(a) Bottler — any individual, partnership, corporation, association or other business or legal entity which purchases respondent's concentrate for use in the manufacture and sale, primarily at wholesale, of respondent's pre-mix or post-mix syrups or soft drink products, or who purchases respondent's pre-mix or post-mix syrups or soft drink products for resale, primarily at wholesale;

(b) Central warehousing — a method of distribution in which soft drink products are received at a storage facility and either resold or

(c) Concentrate – the basic soft drink ingredient sold to bottlers by respondent, which is combined with water and other ingredients for packaging in bottles or cans for sale and distribution as soft drink products, or is used to make post-mix and pre-mix syrups; [2]

(d) Consignment – a form of distribution in which the consignor retains title, dominion, bears all risks of loss and delivers his products to the consignee who is indistinguishable from a salesman or agent;

(e) Place of business – the location of any facilities available to a bottler without regard to customers or geographic area for production or service in the conduct of business operations, to include but not limited to business headquarters, branch sales offices, warehouses and garages, but specifically excluding the plant at which a bottler combines concentrate with water, and possibly other ingredients, for the packaging of soft drink products;

(f) Post-mix syrup – soft drink concentrate which is used in fountain dispensing or vending equipment and is usually sold by bottlers in steel tanks. A typical post-mix system draws one ounce of syrup from a five-gallon tank and mixes it at the point of sale with five ounces of carbonated water to produce 600 six-ounce finished soft drink servings per tank;

(g) Pre-mix syrup – although essentially the same syrup as post-mix, a pre-mix system differs from a post-mix system in that it draws from a five-gallon tank a serving of soft drink products containing both syrup and carbonated water to produce 100 six-ounce finished soft drink servings per tank; and

(h) Soft drink products – nonalcoholic beverages and colas, carbonated and uncarbonated, flavored and nonflavored, sold in bottles and cans, or through pre-mix or post-mix systems or the like.

PAR. 2. Respondent is a corporation organized, existing and conducting its business under and pursuant to the laws of the State of Delaware. It maintains its executive offices and principal place of business at Anderson Hill Road, Purchase, New York. Respondent had sales of \$848,265,196 and assets of \$471,915,996 in 1969. In 1968, PepsiCo made domestic sales to over 500 bottlers located in every State of the United States.

PAR. 3. Respondent is engaged principally in the manufacture and sale of concentrate which it sells to its over 500 bottlers who purchase the concentrate under a license to produce and sell soft drink products under respondent's trade names such as "Pepsi-Cola," "Diet Pepsi-Cola," "Mountain Dew," "Teem" and "Patio." PepsiCo bottlers combine the concentrate with water and other ingredients and package the mixture in bottles and cans for resale as soft drink products to retailers. In addition to manufacturing and selling concentrate to its

bottlers, PepsiCo operates bottling plants in 25 areas of the United States and sells soft drink products to retailers. [3]

PAR. 4. Respondent is engaged in "commerce" within the meaning of the Federal Trade Commission Act (15 U.S.C. 44) in that a continuous flow of interstate commerce in concentrate and soft drink products exists between its headquarters and production facilities and the numerous bottlers located throughout the United States which purchase their products.

PAR. 5. In the course and conduct of its business, respondent, except to the extent limited by the acts, practices and methods of competition hereinafter alleged, has been and is now in competition with other corporations, firms, partnerships and persons engaged in the manufacture, processing, distribution and sale of soft drink products in commerce.

PAR. 6. PepsiCo has hindered, frustrated, lessened and eliminated competition in the distribution and sale of pre-mix and post-mix syrups and soft drink products sold under its trade names by restricting its bottlers from selling outside of a designated geographical area. This restriction is set forth in the agreements between respondent and its bottlers. A typical agreement between respondent and its bottlers provides that the bottler is permitted "to bottle and distribute the carbonated beverage (herein called the 'Beverage'), sold under the trademarks Pepsi and Pepsi-Cola (herein collectively called the 'Beverage trademark'), in the following described territory (herein referred to as the 'Territory'), and nowhere else, bounded as follows:

PAR. 7. The aforesaid agreements used by respondent have had, and may continue to have, the following effects:

(a) Competition between and among respondent's bottlers in the distribution and sale of "Pepsi-Cola," "Diet Pepsi-Cola," "Mountain Dew," "Teem" and "Patio" brands of soft drink products has been eliminated;

(b) Competition between and among PesiCo's bottling operations and its bottlers in the distribution and sale of PepsiCo soft drink products at the wholesale level has been eliminated;

(c) Innumerable retailers and other customers have been deprived of the right to purchase "Pepsi-Cola," "Diet Pepsi-Cola," "Mountain Dew," "Teem" and "Patio" brands of soft drinks products from the bottler of their choice at a competitive price; and [4]

(d) Consumers of "Pepsi-Cola," "Diet Pepsi-Cola," "Mountain Dew," "Teem" and "Patio" brands of soft drink products have been deprived of the opportunity of obtaining such products in an unrestricted

PAR. 8. Respondent's contracts, agreements, acts, practices and methods of competition aforesaid have had, and may continue to have, the effect of lessening competition in the advertising, merchandising, distribution, offering for sale and sale of pre-mix and post-mix syrups and soft drink products; deprive, and may continue to deprive, the public of the benefits of competition in the purchase of soft drink products; and constitute unfair methods of competition and unfair acts or practices, in commerce, in violation of Section 5 of the Federal Trade Commission Act.

INITIAL DECISION BY JOSEPH P. DUFRESNE, ADMINISTRATIVE LAW
JUDGE

OCTOBER 3, 1975

PRELIMINARY STATEMENT

In a complaint dated July 15, 1971, the Commission charged PepsiCo, Inc. with violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45). The crux of the charges was that the territorial exclusivity provisions in trademark licensing contracts PepsiCo enters with its [2] bottlers impose an illegal restraint on competition. The provision limits the geographical territory in which a bottler may manufacture and sell Pepsi-Cola products.

It was alleged that the illegal effects of the provision were that competition had been eliminated:

- (a) between independent bottlers of PepsiCo products;
- (b) at the wholesale level between independent bottlers of PepsiCo products and PepsiCo's own bottlers;
- (c) in that retailers and other customers had been deprived of the right to purchase PepsiCo products from the bottler of their choice at a competitive price; and
- (d) in that consumers of PepsiCo products had been deprived of the opportunity of obtaining PepsiCo products in an unrestricted market and at competitive prices.

In its answer, PepsiCo admitted that it is engaged in "commerce" within the meaning of the Federal Trade Commission Act (15 U.S.C. 44) (Answer, pp. 4-5).

In summary, as affirmative defenses, PepsiCo stated that:

- (a) the bottling appointments are valid exclusive representation agreements creating lawful ancillary restraints which are essential, fair and reasonable and not in violation of Section 5 of the Federal Trade Commission Act (Answer, p. 6);

(b) the complaint was fatally defective because it did not join the bottlers as respondents (Answer, pp. 6-7);

(c) the complaint was barred by laches and the statute of limitation (Answer, p. 7); and

(d) the complaint failed to state a claim upon which relief could be granted (Answer, p. 7). [3]

Because of the time which has elapsed since the complaint issued, it is appropriate to set forth a listing of significant actions by both sides which took place after July 15, 1971. These were:

1. On July 30, 1971, a Motion for Consolidation of this case with Dkts. 8853-8859, which pertain to exclusive territory provisions in the bottler licensing contracts used for other national brands of soft drinks, was filed by complaint counsel. That motion was denied by the administrative law judge on September 28, 1971.

2. On October 12, 1971, a Motion to Dismiss the complaint for nonjoinder of indispensable parties was filed by PepsiCo. The administrative law judge denied the motion on January 20, 1972. The appeal to the Commission was denied on March 23, 1972 (80 F.T.C. 1023). The appeal from that decision to the United States District Court for the Southern District of New York was denied on June 8, 1972 (343 F. Supp. 396). PepsiCo's complaint to the court sought a preliminary injunction to bring a halt to the Commission's proceeding. The court granted the Commission's request that the complaint be dismissed. The Court of Appeals for the Second Circuit affirmed on November 20, 1972 (472 F.2d 179) and the Supreme Court denied certiorari on October 9, 1973 (414 U.S. 876).

3. On November 22, 1971, the petitions of Pepsi-Cola Bottler's Association and of several bottlers of Pepsi-Cola to intervene in the proceedings were granted. As a result, there were three (3) individual bottler intervenors ((1) Pepsi-Cola Albany Bottling Company Inc. (2) Pepsi-Cola Bottling Company of Central Virginia and (3) Pepsi-Cola Bottling Company of Tampa) plus the Association, of which five hundred twelve (512) of the five hundred thirteen (513) of the Pepsi-Cola bottlers are members, who had standing to participate in the proceedings.

4. On July 31, 1972, former complaint counsel filed a motion for partial summary decision. That motion was denied by the administrative law judge on May 3, 1973.

5. On November 28, 1973, counsel for PepsiCo filed a motion to notify or join bottlers and requested that it be certified to the Commission. The motion was certified to the Commission by the administrative law judge on April 1, 1974. The motion was denied by

6. On January 14, 1974, a motion to discontinue the proceedings and for certification of the motion to the Commission was filed by counsel for PepsiCo. The administrative law judge certified the motion to the Commission on April 1, 1974. The Commission denied the motion on May 14, 1974.

7. Various requests for orders to protect confidential information of PepsiCo and others who supplied such information, were filed and granted during 1974 and 1975.

8. On December 17, 1974, counsel for PepsiCo filed a motion for informative disclosure of complaint counsel's affirmative case. This motion was denied by the administrative law judge on January 22, 1975.

9. On May 19, 1975, a motion to establish matters not at issue was filed by counsel for PepsiCo. The motion was denied by the administrative law judge on May 30, 1975.

10. The litigative hearings began on August 4, 1975, but on August 5, 1975, after several stipulations had been agreed upon and made a part of the record, the parties requested time to negotiate a stipulation which would obviate the need for further evidentiary hearings. Such a stipulation was executed on August 6, 1975. The text follows:

STIPULATION

It is hereby stipulated and agreed by and among respondent, intervenors and complaint counsel in the Matter of PepsiCo, Inc. (Docket No. 8856), subject to the approval of the Administrative Law Judge and the Federal Trade Commission, as follows:

1. All signatories agreed that the purpose of this stipulation is to obviate the need for a separate and lengthy trial record on the merits in PepsiCo, Inc. (Docket No. 8856) because the completed trial record in a companion matter. The Coca-Cola Company, et al. (Docket No. 8855, hereinafter "Coca-Cola proceeding"), is deemed by all signatories as an appropriate basis for an adjudication on the merits in this proceeding. All signatories further agree that use of the trial record of the Coca-Cola proceeding, and [5] all agreements, admissions and waivers in paragraphs 1 through 9 of this Stipulation, shall be for the purpose of this proceeding only and shall have no effect in any other proceeding. As used in this Stipulation, "this proceeding" means Matter of PepsiCo, Inc. (Docket No. 8856) and all appeals, reviews and procedures, both before the Commission and in the federal judiciary system, with respect thereto.

2. Respondent and the intervenors admit all of the jurisdictional facts set forth in the complaint in this proceeding. In the signing of this Stipulation, respondent's answer and all pleadings inconsistent with this admission are deemed to be amended to conform to such admission for the purpose of this proceeding only.

3. Respondent and intervenors agree and admit that the Federal Trade Commission has jurisdiction of this proceeding (Docket No. 8856) and of the respondent and intervenors and that this proceeding is in the public interest.

4. All signatories waive all provisions of the Commission's Rules of Practice and the provisions of all federal statutes including, but not restricted to, the Federal Trade

Commission Act and the Administrative Procedure Act, which are inconsistent with the procedures established in this Stipulation.

5. All signatories agree that they will accept the following actions or determination by the Administrative Law Judge:

a. The Administrative Law Judge's findings of ultimate facts, conclusions of law and order issued in the Coca-Cola proceeding may be incorporated by reference and made a part of this proceeding by the Administrative Law Judge in whole or to the extent determined by him to be applicable to the [6] acts and practices charged in the Complaint in this proceeding.

b. The Administrative Law Judge may accord respondent's relevant agreements the same construction as accorded to those comparable agreements in the Coca-Cola proceeding.

c. The entire trial record in the Coca-Cola proceeding shall be incorporated by reference and made a part of this proceeding. The Administrative Law Judge may select or designate portions thereof which are or are not applicable in this proceeding as bearing upon the ultimate determination of the legality or illegality of respondent's agreements which he deems to be comparable to those in issue in the Coca-Cola proceeding, and the acts and practices pertinent thereto.

d. As so incorporated in full, and as may be thereafter selected or designated by the Administrative Law Judge, such trial record may have equal force, effect and validity as a full trial record in an adversary hearing before the Administrative Law Judge on the allegations of the Commission's complaint in this proceeding.

e. The ultimate acts, practices and failures to act, with the results and effects thereof, as found by the Administrative Law Judge in his findings and decision in the Coca-Cola proceeding to be the acts or omissions of respondents and intervenors therein may be deemed, in whole or in part, by the Administrative Law Judge to be the ultimate acts, practices and failures to act, with the results and effects thereof, of PepsiCo and intervenors in this proceeding. [7]

f. In issuing his findings of fact, conclusions of law and order in this proceeding, the Administrative Law Judge may make such technical evidentiary amendments and adaptations with respect to the trial record in this proceeding as may be necessary to effect the purposes of this Stipulation.

6. All signatories agree that:

a. If the Administrative Law Judge's findings and conclusions shall be adverse to respondent or intervenors in this proceeding, respondent and intervenors reserve the right to make application to be heard as to the matter of the relief or the form of an order. In the event such an application to be heard is made, any signatory shall have the right to oppose such application, both as to form and substance, and to further contest and challenge the procedures and merits of any proceedings which ensue as a result of the granting of any such application in whole or in part.

b. If the Administrative Law Judge dismisses the complaint in full in the Coca-Cola proceeding, then a like order, founded upon appropriate findings of fact and conclusions of law in this proceeding, shall be deemed by all signatories to be entered herein, subject to the full and complete rights of complaint counsel to appeal and seek review of such order entered in this proceeding.

7. The procedural rights of the signatories with respect to review or appeal to the Commission or any court from any decision, findings of fact, conclusions of law, order or other ruling, which may be entered in this proceeding [8] by the Administrative Law Judge, including the implementation of this Stipulation, shall not be impaired.

8. At the time when the Administrative Law Judge's decision on the merits in this proceeding comes before the Commission for review, or at such other time as the

sole discretion and without notice to the signatories, may reject this Stipulation and the procedures adopted thereunder. Any ordered remand to the Administrative Law Judge shall be without prejudice to the signatories.

9. In the event that the Commission elects to confirm this Stipulation and the procedures and action taken pursuant thereto, the procedural rights of respondent and intervenors with respect to review of, or appeal from, any decision or order which the Commission may issue shall not be impaired.

10. It is further stipulated and agreed by and between respondent and intervenors only, and not complaint counsel, that to the extent the restraint which is challenged in this proceeding is upheld, respondent will construe all its Exclusive Bottling Appointments as imposing upon all its bottler trademark licensees thereunder a vertical territorial limitation confining their sales thereunder within the respective territories defined therein and prohibiting direct or indirect sales by them outside such defined territories.

We are proceeding on the basis of the understandings recited in the stipulation because it is apparent that if witnesses had been called to testify at a litigative hearing of this matter, their testimony would have been substantially the same as that of the witnesses who testified in the Coca-Cola hearings. Bottlers of Coca-Cola, Pepsi-Cola, Dr Pepper and of other national brand soft drinks testified in the Coca-Cola [9] hearings and it is clear that the interests and experiences of these bottlers were sufficiently similar to warrant reliance on that testimony in deciding this matter.

11. On August 14, 1975, the testimony of Walter S. Mack, former president of the Pepsi-Cola Company, was taken before me in order to preserve it for possible introduction into the record of this matter in the event the litigative hearings are resumed. Thereafter, the parties agreed to the testimony being added to the limited record of the case.

The findings of fact following are based on a review of the allegations made in the complaint, respondent's answers and the four stipulations entered by counsel which are a part of the evidentiary record of this proceeding. The testimony of Victor A. Bonomo, the current president of PepsiCo, was not considered because he did not finish his direct testimony and was not cross-examined.

In accordance with the stipulation quoted above, certain portions of the initial decision of In the Matter of Coca-Cola Company (Dkt. 8855), a copy of which is appended hereto, have been incorporated in this decision and made applicable to PepsiCo. Reference should be made to that document for a complete understanding of the decision in this proceeding.

For the convenience of the Commission and other readers of this initial decision, the findings of fact include references to supporting evidentiary items in the PepsiCo (Dkt. 8856) and Coca-Cola (Dkt. 8855) records. Such references are intended to serve as guides to the testimony, evidence and exhibits supporting the findings of fact. They

do not necessarily represent complete summaries of the evidence considered in arriving at such findings. The following abbreviations have been used:

CX – Commission's Exhibit, followed by number of exhibit being referenced.

RX – Respondent's Exhibit, followed by number of exhibit being referenced.

Tr. – Transcript preceded by the name of the witness and followed by the page number. [10]

Mack Tr. – Transcript of the deposition of Walter S. Mack.

FINDINGS OF FACT

PepsiCo, Inc.

1. PepsiCo, Inc. is a corporation organized, existing and conducting its business under and pursuant to the laws of the State of Delaware. It maintains its executive offices and principal place of business at Anderson Hill Road, Purchase, New York. PepsiCo, Inc. had consolidated sales of \$848,265,196 and consolidated assets, including non-soft drink and foreign sales and assets, of \$471,915,966 in 1968. In 1968, PepsiCo, Inc. made domestic sales to approximately 500 bottlers in the United States. (Admitted in Answer; Stipulation No. 2, Tr. 285-86)

2. PepsiCo, Inc. is engaged, through its Pepsi-Cola Company division, in the manufacture and sale of concentrates and syrups which it sells to approximately 500 bottlers in the United States who purchase such concentrates or syrups under the terms of exclusive bottling appointment agreements licensing such bottlers to manufacture and sell soft drink products under PepsiCo, Inc.'s trademarks such as "Pepsi-Cola," "Pepsi," "Diet Pepsi-Cola," "Mountain Dew," "Teem," and "Patio." PepsiCo, Inc.'s licensed bottlers manufacture, can and/or bottle and package the soft drink products sold under PepsiCo's trademarks. In addition, subsidiaries of PepsiCo, Inc. operate approximately 20 bottling plants in various parts of the United States and sell the products of such plants. (Admitted in Answer; Stipulation No. 2, Tr. 286)

3. PepsiCo, Inc. has been and is now in competition with others engaged in the manufacture and sale of concentrates, syrups or soft drink products in commerce. (Admitted in Answer)

4. The Pepsi-Cola Company was a relatively late entrant into a soft drink market dominated by The Coca-Cola Company. (Mack. Tr. 82) In 1931, Pepsi-Cola was bankrupt and its assets had been sold by the trustee for \$10.500. At the end of 1933, Pepsi-Cola hit upon a successful

marketing strategy — sale of Pepsi in 12-ounce [11] bottles for the same 5¢ price charged for 6 1/2-ounce bottles of Coca-Cola and a vigorous drive to recruit independent franchisees. (Stipulation No. 3, Tr. 295)

5. In 1932 and 1933, Pepsi-Cola had been bottled for the Pepsi-Cola Company and was sold principally in the New York metropolitan area. Arrangements were made for bottling Pepsi-Cola in a few other cities in 1934. But by the end of 1934, it became apparent that Pepsi-Cola's new found success with its "twice as much for a nickel" strategy could become permanent only if it were possible to build a large nationwide sales volume quickly. Pepsi-Cola Company, with its limited resources and distribution facilities, could not itself capitalize on the impact of its 12-ounce drink. (Mack, Tr. 15) Franchising local independent businessmen to bottle Pepsi provided a solution to the problem. (Stipulation No. 3, Tr. 295-96)

6. By promising exclusive territorial rights, which granted to the licensee, among other rights, the exclusive right to manufacture, distribute and sell trademarked soft drink products in a defined geographical area, Pepsi-Cola representatives were able to persuade local bottlers across the country to become Pepsi-Cola franchisees. (Stipulation No. 3, Tr. 296; Mack, Tr. 13, 16)

7. The emergence of Pepsi as a nationally recognized cola drink depended on the network of independent bottler appointments issued in the mid-1930's. The franchise system was the cornerstone of Pepsi-Cola's steady campaign to become a viable, aggressive competitor to Coca-Cola. The effectiveness of this campaign was in turn dependent on the determination, business acumen and financial stability of Pepsi-Cola's franchisees. In order to induce individuals with the requisite financial and managerial resources to establish a local bottling plant, effectively exploit market potential and win consumer approval of its relatively unknown cola drink, the Pepsi-Cola Company had to demonstrate its commitment to the franchisee's success. (Stipulation No. 3, Tr. 297)

8. This it did by granting the bottlers the exclusive right to bottle and sell Pepsi in their designated franchise areas. Appointment as a Pepsi-Cola franchisee meant that the local bottler must make a substantial capital investment in plant, bottling machinery, bottles, cases, trucks, [12] equipment and supplies. He had to be willing to devote substantial personal and financial resources on behalf of a relatively unknown drink, the ultimate acceptance of which in the national market was far from certain, and to battle Coca-Cola which had been even further entrenched by the recent bankruptcy of the predecessor Pepsi-Cola Company. Without exclusive territorial fran-

chises Pepsi-Cola Company would have been unable to achieve the nationwide sales volume essential to enable it to compete successfully with Coca-Cola. (Stipulation No. 3, Tr. 297; Mack, Tr. 11-13, 16-16A, 29)

9. The domestic Pepsi-Cola bottling appointment agreements of PepsiCo, Inc. provide that the bottler is appointed as PepsiCo, Inc.'s "exclusive bottler, to bottle and distribute the carbonated beverage (herein called the 'Beverage'), sold under the trademarks Pepsi and Pepsi-Cola (herein collectively called the 'Beverage trademark'), in the following described territory (herein referred to as the 'Territory'), and nowhere else, bounded as follows: . . ." and refers to said agreement for the complete terms thereof. (Stipulation No. 2, Tr. 287)

10. As part of the effort to establish Pepsi as a nationally accepted cola drink, eight wholly-owned subsidiaries of Pepsi-Cola Company were formed during the period 1931-1937 for the purpose of operating Pepsi-Cola franchises in their states of incorporation. Some of these franchises were later granted to local businessmen, while franchises for the New York, Newark, Pittsburgh, Philadelphia, and Boston metropolitan areas were retained. They served to insure the presence of Pepsi-Cola in these important markets, to promote consumer acceptance in those markets, and contributed to the goal of making the product available everywhere. (Stipulation No. 3, Tr. 298)

11. Following World War II, the ratio of Pepsi sales to sales of Coca-Cola began an upward climb; and by the mid-1950's the latter's commanding lead in bottle sales of 5 to 1 over Pepsi in 1940 had been reduced to 2.5 to 1. By 1960, Pepsi had become a strong contender to Coca-Cola, having further reduced its lead in the total market to 2 to 1 and in food stores, where consumers can pick and choose freely between competing brands, Pepsi was outsold by Coca-Cola only 1.2 to 1. (Stipulation No. 3, Tr. 298-99) [13]

Interstate Commerce

12. PepsiCo, Inc. is engaged in "commerce" within the meaning of the Federal Trade Commission Act (15 U.S.C. 44). (Admitted in Answer; Stipulation No. 2, Tr. 286)

The Soft Drink Industry and the Exclusive Territorial Franchise System

13. In accordance with the stipulation of the parties (see pp. 4-8, *supra*), the following findings of fact from the initial decision of *In the Matter of The Coca-Cola Company* (Dkt. 8855) are deemed applicable to

herein: Nos. 27-55, 58-59, 63-70, 72-122, 124-127, 129-149, 151-195 (pp. 15-24, 25, 28-29, 29-50, 50-52, 53-60, 60-76). Where the words "Coca-Cola" (the company) and Coca-Cola (the drink) appear, they should be read, as appropriate, PepsiCo and Pepsi-Cola.

DISCUSSION AND CONCLUSIONS OF LAW

In accordance with the stipulation of the parties (see pp. 4-8, *supra*), the discussion of the applicable legal principles and the conclusions of law from the initial decision of *In the Matter of The Coca-Cola Company* (Dkt. 8855) are incorporated by reference herein.

ORDER

It is ordered, That the complaint in this matter be, and it hereby is, dismissed.

DISSENTING STATEMENT OF COMMISSIONER CLANTON

For the reasons expressed in my dissenting statement in the companion case involving the Coca-Cola Company, Dkt. 8855, I dissent from the Commission's decision with respect to PepsiCo, Inc.

OPINION

BY DOLE, *Commissioner*:

The complaint in this matter charges PepsiCo, Inc., with imposing territorial restrictions on the sale of Pepsi-Cola and allied products produced by independent bottlers, in violation of Section 5 of the Federal Trade Commission Act.

In 1968 PepsiCo had consolidated sales of \$848,265,196 and consolidated assets, including non-soft drink and foreign sales and assets, of \$471,915,966. Respondent's Pepsi-Cola Company division manufactures and sells soft drink concentrates and syrups to approximately 500 bottlers in the United States under the terms of exclusive bottling appointment agreements which authorize the bottlers to manufacture and sell soft drink products under PepsiCo trademarks, including "Pepsi-Cola," "Mountain Dew," "Teem," and "Patio." In addition to independent Pepsi-Cola and allied product bottlers, subsidiaries of PepsiCo operate approximately 20 bottling plants in various parts of the United States. (Admitted in Answer; Stipulation 2, Tr. 286).

I. STIPULATION OF FACTS

The trial of this case before the judge commenced shortly after the conclusion of the trial involving similar charges alleged in the

complaint against *The Coca-Cola Company, et al.*, Dkt. 8855. Following two [2] days of hearings, the parties and intervenors stipulated, *inter alia*, that:

... the completed trial record in a companion matter, *The Coca-Cola Co., et al.*, (Docket No. 8855, hereinafter "Coca-Cola proceeding"), is deemed by all signatories as an appropriate basis for an adjudication on the merits of this proceeding.

The stipulation further provides that, "The entire trial record in the Coca-Cola proceeding shall be incorporated by reference and made part of this proceeding." As so incorporated:

... such trial record may have equal force, effect and validity as a full trial record in an adversary hearing before the Administrative Law Judge on the allegation of the Commission's complaint in this proceeding. (Stipulation ¶5d).

Shortly after this stipulation was entered into the record, the testimony of Walter S. Mack, former President of PepsiCo, was taken before the judge in order to preserve it for possible introduction into the record in the event further litigation became necessary. Thereafter, the judge ordered that Mr. Mack's testimony be added to the record, along with certain exhibits which were offered and received with Mr. Mack's testimony. (Order Placing the Deposition of Walter S. Mack in the Record, entered September 4, 1975, Docket Binder 8856-1-3-2; Supplemental Order to Order of September 4, 1975, entered September 9, 1975). The judge further ordered, pursuant to the stipulation of the parties and intervenors, that the trial record in the Coca-Cola proceedings be incorporated into, and made a part of, the record of this proceeding. The case is now before us on appeal by complaint counsel from an initial decision of the judge dismissing the complaint. The oral arguments of counsel in this matter and in the matter of *The Coca-Cola Company, et al.*, Dkt. 8855, were received at a consolidated hearing on appeal.

The Commission, having reviewed the record in its entirety, has determined that the order entered by the judge dismissing the complaint be vacated. The Commission has further determined that certain findings and conclusions in the opinion of the Commission in the matter of *The Coca-Cola Company, et al.*, Dkt. 8855, as hereinafter noted, shall be adopted as the findings and conclusions [3] of the Commission in this case. In addition, the findings of fact as set forth in the judge's initial decision shall be adopted by the Commission to the extent that they are not inconsistent with the findings and conclusions

II. HISTORY OF PEPSICO AND THE RESTRAINT

The record shows that the Pepsi-Cola Company had a difficult period of entry into the soft drink market. In 1931 Pepsi-Cola was bankrupt; a trustee sold its assets for \$10,500. By 1934, however, the tide began to turn in its favor. It employed a new marketing strategy pursuant to which it sold Pepsi-Cola in 12-ounce bottles for the same price then being charged for 6 1/2-ounce bottles of Coca-Cola.

Prior to 1935, Pepsi-Cola was sold principally in the New York metropolitan area and a few other cities. Despite the success of its "twice as much for a nickel" strategy, respondent lacked the resources and distribution facilities to capitalize on the impact of its 12-ounce drink. (Mack, Tr. 15). Thus it initiated a drive to recruit independent entrepreneurs to bottle its product. (Stipulation No. 3, Tr. 295-96).

As an inducement to attract and encourage individual investors to establish local bottling plants, respondent granted them the exclusive right to bottle and sell "Pepsi" in designated geographic areas. Consequently, the bottling agreements provide that each bottler is appointed as PepsiCo's:

. . . exclusive bottler, to bottle and distribute the carbonated beverage (herein called the "Beverage"), sold under the trademarks Pepsi and Pepsi-Cola (herein collectively called the "Beverage trademark"), in the following described territory (herein referred to as the "Territory"), and nowhere else, bounded as follows: . . ." (Stipulation No. 2, Tr. 287; *See also* RX 99, incorporated exhibit from Dkt. 8855).

It is undisputed that a network of independent bottlers was an important part of respondent's plan 40 years ago to expand the sales of Pepsi-Cola in competition nationwide with the bottlers of Coca-Cola. (Stipulation No. 3; Tr. 297, Mack, Tr. 11-13, 16-16A, 29). In addition to the recruitment of independent bottlers, respondent established, [4] during the period of 1931-1937, eight wholly-owned bottling subsidiaries. While some of these franchises were later granted to local businessmen, respondent retained the franchises for the New York, Newark, Pittsburgh, Philadelphia, and Boston metropolitan areas. (Stipulation No. 3, Tr. 298).

Following World War II, the ratio of Pepsi sales to sales of Coca-Cola began an upward climb: in 1940 Coca-Cola's lead in bottle sales was 5 to 1 over Pepsi; by the mid-1950's the lead was 2.5 to 1; by 1960 it was 2 to 1. (Stipulation No. 3, Tr. 298-99). The record further shows that by 1971 Pepsi-Cola had overtaken Coca-Cola as the leading brand in numerous cities (RX 2Y-Z39 incorporated exhibits from Dkt. 8855) and in several regions of the country. (RX 2Y-Z39-40, incorporated exhibits from Dkt. 8855). Thus, while territorial restrictions may have assisted a faltering new entrant into the market four decades ago,

those same restrictions certainly cannot be justified as necessary on that basis today.

Respondent PepsiCo is a well-established, dominant soft drink syrup and concentrate producer; its bottlers are firmly entrenched in the fabric of the bottling industry; and PepsiCo brands are established, widely recognized soft drink beverages. Thus the evidence introduced into the record leads us to conclude that these brands could continue to be a viable interbrand competitive force in the market if the bottlers who now sell them are permitted to compete interbrand among themselves.

III. CONTINUING USE OF THE RESTRICTIONS

As we noted previously, the contract between PepsiCo and each of its bottlers provide, and bottlers understand their contracts to mean, that each bottler may sell Pepsi-Cola and allied products exclusively within the territory described in his license agreement and nowhere else.¹ (Mack, Tr. 16-A; *See also* incorporated testimony Dkt. 8855, Tr. 2859, 2861, 2918-20; 2958, 2993; 3108-09). It is arguable that the mere existence of such a provision in a contract between PepsiCo and Pepsi-Cola bottlers constitutes a threat to competition. Pepsi's syrups, concentrates and trademarks are vital to [5] the business of its bottlers, and there is always some danger that PepsiCo will seek to enforce the agreement or that the bottlers, as the record shows, will feel obliged to adhere to it.² Yet we need not rely solely upon the mere existence of these agreements; there is evidence in the record of PepsiCo's resolve to enforce compliance with the restriction.

According to respondent's former President, PepsiCo, "would protect their [the bottlers] franchise . . . and do everything we could to protect both the trademark and the name and their territory for them on an exclusive basis." (Mack, Tr. 17; *see also* Mack, Tr. 19, 38, 83, 91-94, 96).

Mr. Mack testified further:

Q. . . . were there sometimes complaints received by the Pepsi-Cola Company from bottlers that Pepsi-Cola product produced by another bottler was crossing into the complaining bottler's territory?

A. We had very little of that. The bottlers knew that the value of the Pepsi-Cola franchise was his exclusive in this area. And where those things happened inadvertently a letter or one bottler talking to another straightened it out. We had very little of that. The bottlers were a good group. They helped each other.

¹ Unlike The Coca-Cola Co., respondent PepsiCo also imposes territorial restrictions on the sale of its fountain syrup. (Mack, Tr. 34, 35, 87-89). Whether the restraint is also applicable to the sale and distribution of post-mix systems by Pepsi-Cola bottlers is unclear on this record. The order, however, will cover both post-mix syrup and pre-mix systems as a prophylactic measure. (*See* Opinion in Dkt. 8855 at 64.)

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Q. And they understood and knew the value of the exclusive franchise?

A. Right.

Q. And in those few instances you have described where a letter was written, that was a letter from the Pepsi-Cola Company to the offending bottler?

A. I don't remember ever having to write a letter. The field man usually would talk to him. And if there was an infraction, it was very easily straightened out. We had very little of that sort of trouble. [6]

Q. The field man would be a Pepsi-Cola employee who would talk to the offending bottler and it would be straightened out?

A. Yes. If there was any. We had no problems along that line. (Mack, Tr. 28-29).

The record also shows that respondent's concern for preserving the integrity of its territorial policy was a key consideration in its decision to abandon an innovative Pepsi-Cola canning experiment. The concern arose when a retailer was found transshipping the canned product from its central warehouse to its retail outlets located within the territories of various Pepsi-Cola bottlers.

Thus Mr. Mack testified:

Q. In the post-World War II period did you at some point enter into an experiment in the selling of Pepsi-Cola in cans?

A. Yes.

Q. Would you tell Judge Dufresne about that experiment?

A. It seems to me that we ought to test and find out how it fitted in the picture.

So I started an experiment with Pepsi-Cola in cans. It was difficult to get a can that had the lining . . . the ingredients didn't affect (and which did not) . . . affect the flavor by the lining, by the metal. And finally Continental Can worked out a can for me that had a crown top . . . And I started an experiment in three areas because I wanted to test the different consumers.

* * * * *

The parent company did the manufacturing. The parent company did the canning. And we shipped it to those three test areas.

Q. What were the results of the test?

A. Well, they were good and they were bad. The good part of it is that we found that the consumer was interested in it. The bad part of it was that it was an expensive operation. And that in some instances it couldn't be confined to the territory that the bottler was in. And we finally withdrew it and took [7] it off the market. We found it wouldn't go with the franchise system.

Q. Will you tell us specifically what the instances were in which you received reports of cans crossing franchise lines?

MR. FREUND: Objection. I don't know that he said he received reports.

JUDGE DUFRESNE: Before you ask that, what did you mean when you said you had problems confining the cans, Mr. Mack?

THE WITNESS: Well, I meant by that that in some instances due to the fact that they didn't have to go back to pick up the empties, they crossed territorial lines.

JUDGE DUFRESNE: You mean the licensee would sell canned product outside of the territory you had agreed upon he would serve, or what?

THE WITNESS: No I mean by that, specifically what happened particularly in the New Rochelle area was that the New Rochelle bottler sold to A&P.

JUDGE DUFRESNE: They might ship it outside?

THE WITNESS: That is right. They had a distribution system in which they went and distributed the way they do Campbells Soup or Heinz Beans or something to their chain stores. And their chain stores might get from a warehouse and be outside the franchise area and therefore cans in New Rochelle might get up into Stamford, Connecticut.

JUDGE DUFRESNE: This was an action by the reseller rather than the Pepsi-Cola?

THE WITNESS: Oh, yes. The bottler didn't do it. It was the reseller. The retailer did that.

JUDGE DUFRESNE: All right. [8]

By Mr. Sisk:

Q. Did the Pepsi-Cola Company receive complaints from the bottlers adjoining the New Rochelle franchise?

A. Yes, we got some complaints, and we withdrew the whole operation.

Q. That was the end of the canning operation as far as you were concerned?

A. Yes. (Mack, Tr. 24-28).

Pepsi-Cola is available today, of course, in both cans and bottles, but the extra-territorial sale or trans-shipment of it is still restricted. The bottlers testified that they do not engage in such sales or shipments, and if they did, it would constitute a breach of the territorial provisions of their bottling appointment agreements. (Testimony of Pepsi-Cola bottlers, Dkt. 8855, Tr. 2875-76, 2992-93, 3108-09).

Consequently, the evidence is uncontroverted that PepsiCo has imposed, by contract, and enforced, in practice, geographic exclusivity, using such methods as may have been necessary to preserve the territorial restrictions challenged in this proceeding. (Mack, Tr. 16, 16-A, 17, 28-29). The evidence further shows that it will, absent an order, continue to do so in the future. (Stipulation ¶10, Tr. 437-38).

IV. EFFECTS OF THE RESTRICTIONS

In accordance with the stipulation of the parties and intervenors, the following findings and conclusions set forth in the text of our opinion in the matter of *The Coca-Cola Company, et al.*, Dkt. 8855, are hereby adopted by the Commission and incorporated herein by reference: Section II through Section III, subsection B (Text at 6-19); Section III, subsection B2 through Section VI, subsection B4 (Text at 21-78); Section VI, subsection B5c and Conclusion (Text at 83-84). Our discussion of the anticompetitive effects of the territorial restriction imposed by The Coca-Cola Company, in the above noted portions of our opinion in Dkt. 8855, is equally applicable here. [9]

In addition, we note that, as a dual-distributing trademark licensor, PepsiCo, like The Coca-Cola Company, has access to competitively sensitive commercial information about each of its bottler's business

Therefore, we adopt and hereby incorporate by reference Section VI, subsections 5 and 5a of our Opinion in *The Coca-Cola* case, Dkt. 8855. (Text at 79-81). Section III of our order will provide ancillary safeguards which will prevent PepsiCo from exploiting such information to the detriment of the independent Pepsi-Cola or allied product bottlers.

Respondent and intervenors have reserved the right to be heard as to matters of relief or the form of an order, and they have been afforded the opportunity to be heard on these issues before the Commission. Neither has suggested, however, that relief entered here should be different from the relief in the *Coca-Cola* Case. No distinctions of any significance pertinent to the issues of relief, either with respect to the factual context in which the restraint is imposed by PepsiCo upon its bottlers or with respect to the potential impact lifting the restriction might have upon Pepsi-Cola bottlers, have been brought to our attention. The record supports uniform relief in these companion cases. Accordingly,

An appropriate order is attached.

FINAL ORDER

This matter having been heard by the Commission upon the appeal of complaint counsel from the initial decision, and upon briefs and oral argument in support thereof and in opposition thereto, and the Commission, for reasons stated in the accompanying opinion, having granted the appeal:

It is ordered, That the entire record in the matter of *The Coca-Cola Company, et al.*, Dkt. 8855; be, and it hereby is, incorporated into, and made part of, the record in this proceeding.

It is further ordered, That the findings of fact set forth in the initial decision of the administrative law judge be, and they are, adopted by the Commission to the extent they are consistent with the findings of fact and conclusions of law contained in the accompanying opinion of the Commission in this matter.

It is further ordered, That the order dismissing the complaint entered by the administrative law judge be, and it hereby is, vacated.

Accordingly, the following cease and desist order is hereby entered:

[2]

ORDER

I

It is ordered, That the following definitions shall apply in this order:

A. Allied products – the soft drink products of PepsiCo, Inc., other

than "Pepsi-Cola" including "Teem," "Mountain Dew," and "Patio," among others;

B. Bottler – any individual, partnership, corporation, association, or other business or legal entity which purchases respondents' syrups or concentrates for use in the manufacture and sale, primarily at wholesale, of finished soft drink beverages;

C. Central warehousing – a method of distribution in which soft drink products are received at a storage facility and either resold or delivered to retail outlets or wholesalers;

D. Concentrate – the basic soft drink ingredients, either dry or liquid, to which sugar is added to prepare a syrup;

E. Confidential commercial information – facts, data, statistics, or other material which concern the business of licensed Pepsi-Cola or allied product bottlers including, but not limited to, trade secrets, customer lists, plant equipment or production capacities, or syrup and concentrate purchases obtained by or available to, respondent pursuant to, or as a result of, any agreement, understanding, or provision of a trademark license, and which could, if disclosed to a competitor, cause substantial harm to the competitive position of the bottler from whom the material was obtained;

F. Nonrefillable – a special container designed to be filled only once with finished Pepsi-Cola or allied soft drink beverages;

G. Post-mix syrup – a soft drink ingredient which is used in fountain-dispensing or vending equipment and which is usually sold by bottlers and other wholesalers in steel tanks. A typical post-mix system draws one ounce of syrup from a tank, usually having about a five-gallon capacity, and mixes it at the point of sale with five ounces of carbonated water to produce finished soft drink beverages; [3]

H. Pre-mix system – a system which draws from a tank, usually having about a five-gallon capacity, a finished serving of a soft drink product containing both syrup and carbonated water, "pre-mixed," to produce finished soft drink beverages;

I. Soft drink products – nonalcoholic beverages and colas, carbonated and uncarbonated, flavored and nonflavored, sold in bottles or cans, or through pre-mix or post-mix systems or the like;

J. Syrup – a mixture of ingredients in liquid form which, when mixed with carbonated water, becomes a finished soft drink product.

II

It is further ordered, That respondent PepsiCo, Inc., and the officers, agents, representatives, employees, successors, and assigns of respondent, directly or through any corporate or other device, in connection with the advertising, merchandising, offering, or sale of

distribution of soft drink products, including syrups and concentrates, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from directly or indirectly:

A. Attempting to enter into, entering into, continuing, maintaining, enforcing, or renewing any contract provision, combination, understanding, or agreement to limit, allocate, or restrict the territory in which, or the persons or class of persons to whom, licensed Pepsi-Cola or allied product bottlers may sell or distribute post-mix syrup or finished soft drink beverages packaged in pre-mix containers or in nonrefillable bottles or cans.

B. Imposing or attempting to impose any limitations or restrictions respecting the territories in which, or the persons or class of persons to whom, bottlers may sell or distribute post-mix syrup or finished soft drink beverages packaged in pre-mix containers or in nonrefillable bottles or cans. [4]

C. Refusing to sell, threatening to refuse to sell, or impairing sales to any bottlers, operating pursuant to a license consented to, granted by, approved by, or ratified by PepsiCo, Inc., for the duration of the license, anything used in the manufacture and sale of soft drink products, including, but not limited to, syrups and concentrates or the container in which they are sold, or otherwise in any way penalizing any such bottler because of the territory in which, or the persons or class of persons to whom, the bottler sells or distributes post-mix syrup or finished soft drink beverages packaged in pre-mix containers or nonrefillable bottles or cans.

D. Refusing to deliver all of a licensed Pepsi-Cola or allied product bottler's order for syrups, flavoring, or concentrates because the bottler has made, or intends to make, sales of post-mix syrup or soft drinks packaged in pre-mix containers or nonrefillable bottles or cans to customers outside of the territory granted to the bottler, or because the bottler has made, or intends to make, such sales to customers within the territory granted to the bottler, with knowledge that the customer has transshipped or will transship such soft drinks outside of the territory.

E. Impeding, hindering, or preventing, either directly or indirectly, the methods, including, but not limited to central warehousing, by which licensed bottlers may distribute Pepsi-Cola or allied products, *Provided, however*, that respondents may (1) establish quality standards, including standards for the rotation of Pepsi-Cola and allied product inventories in the central warehouse and at retail delivery locations, irrespective of whether the soft drinks are redelivered from a warehouse or delivered directly to the retail outlet by a bottler; (2)

require the bottlers to use a uniform container dating system so that bottlers and retailers will recognize the date without reference to a code; (3) require the bottlers to be responsible, directly or indirectly, for the maintenance of such standards of quality; and (4) require each bottler to place an identification mark of origin on each bottle, bottle cap, or can for the purpose of monitoring compliance with such quality control standards.

F. Enforcing or aiding in the enforcement of any contract provision, agreement, or understanding providing for entry into or examination of the plant and facilities of any independent bottler by another independent bottler. [5]

III

It is further ordered, That respondent shall provide for the protection of confidential commercial information acquired from bottler licensees of Pepsi-Cola or allied product brands as follows:

A. Access to or use of confidential commercial information obtained by respondent, its officers, employees, or agents concerning the production, packaging, distribution, promotion, or sale of Pepsi-Cola or allied product brands by any licensed bottler shall be restricted to those of respondent's officers, employees, or agents who are neither involved in nor responsible for the production, marketing, promotion, or sale of finished soft drink products by respondent's bottling or canning operations, divisions, subsidiaries, or affiliates.

B. Such officers, employees, or agents who receive, process, or evaluate package-approval requests; process or fill syrup or concentrate purchase orders; conduct on-site inspections of independent bottling plants and facilities; or receive or review confidential commercial information obtained from any independent Pepsi-Cola or allied product bottler in the course of carrying out the provisions of any soft drink trademark licensing agreement, shall refrain from making any such confidential information available to, or communicating or discussing any such information with, any person involved in or responsible for the production, marketing, promotion, or sale of finished soft drinks by respondent's bottling or canning operations, divisions, subsidiaries, or affiliates.

C. Such officers, employees, or agents who receive, process, or have access to confidential information concerning the business of individual independent Pepsi-Cola or allied product bottler licensees, shall refrain from suggesting, influencing, or making recommendations to any person concerning the production, distribution, marketing, promotion, or sale of finished soft drinks by respondent's bottling or canning operations, divisions, subsidiaries, or affiliates.

this provision shall not apply to respondent's officers, employees, or agents who receive, review, or evaluate data, information, or statistics only in aggregate form or quality control inspection reports which include such information as bacteriological tests, water analyses, water carbonation and syrup content tests, sanitation inspection checks, or bottle washing solution analyses, so long as such reports do not also contain information concerning the bottler's plant equipment, production capacity, or similar types of confidential commercial information.

[6]

D. Respondent shall provide each officer, employee, or agent who receives, reviews, or has access to confidential information as set forth in subparagraphs A. through C. above with a copy of this order and an explanation, in writing, of the restrictions this order imposes on access to and the use of such information.

E. Subparagraphs A. through C. above shall not apply (1) to data or information which is in the public domain or which has entered the public domain from a source other than respondent or its officers, employees, or agents; or (2) to transactions involving orders from licensed Pepsi-Cola or allied product bottlers for finished canned or bottled soft drink products prepared by respondent for a bottler pursuant to an agency canning or bottling agreement.

IV

It is further ordered, That within sixty (60) days from the date respondent receives service of this order, it shall service a copy of this order upon all bottlers of its soft drink products.

V

It is further ordered, That respondent shall forthwith distribute a copy of this order to each of its subsidiaries and operating divisions.

VI

It is further ordered, That respondent shall notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in the corporate respondent, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change which may affect compliance obligations arising out of the order.

It is further ordered, That respondent shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this order.

Chairman Pertschuk did not participate in the consideration of this matter. Commissioner Clanton dissents.

Interlocutory Order

IN THE MATTER OF

HOWARD ENTERPRISES, INC.

Docket 9096. Interlocutory Order, April 7, 1978

Order directing that oral argument not be set down without a further order of the Commission.

ORDER GRANTING MOTION TO OMIT ORAL ARGUMENT

On March 13, 1978, complaint counsel filed with the Secretary a motion dated March 8 to omit oral argument pursuant to Rule Section 3.52(f). The grounds urged for the motion were that the case presented essentially legal issues and that these were fully discussed in complaint counsel's brief. Counsel for the respondents, contacted telephonically by the Secretary, declined to oppose the motion.

That the issues presented by a case are legal rather than factual bears no necessary relationship to the value of oral argument, which serves as an opportunity to sharpen and define the opposing positions of the parties, and to probe the implications of their arguments, whatever the nature of the issues. However, we will defer provisionally to the evident judgment of both counsel that the issues here will be fully elaborated in the briefs. If the Commission should determine, once all the briefs are available, that oral argument would nonetheless be useful, it can so order at that time.

Accordingly, *it is ordered*, That no date for oral argument in this matter shall be set down without a further order of the Commission.

Interlocutory Order

91 F.T.C.

IN THE MATTER OF

KELLOGG COMPANY, ET AL.

Docket 8883. Interlocutory Order, April 19, 1978

Denial of Kellogg's applications (1) for review of ALJ's order denying motion to nullify subpoenas duces tecum for taking of depositions and production of documents, and (2) for stay of deposition program pending resolution of application for review.

ORDER DENYING APPLICATIONS OF KELLOGG COMPANY FOR
REVIEW AND FOR A STAY

On April 13, 1978, respondent Kellogg Company ("Kellogg"), filed with the Commission an Application for Review of Order Denying Its Motion to Nullify Subpoenas Duces Tecum for the Taking of Depositions and Production of Documents. With that Application, Kellogg also filed an Application for a Stay of the Commencement of Complaint Counsel's Deposition Program Pending Resolution of Kellogg Company's Application for Review. For the reasons briefly outlined below, the Commission denies both Applications.

Kellogg's Application for Review comes to the Commission without the certification of the Administrative Law Judge pursuant to Commission Rule 3.23(b). Under the Commission's Rules, that certification is essential for interlocutory review unless the matter is one which falls within the provisions of Rule 3.23(a). Kellogg cites to Reorganization Plan No. 4 of 1961, H. Doc. No. 159, 87th Cong., 1st Sess., as support for its appeal without certification. Even that Plan, however, provides that the Commission shall retain its discretionary right to review "within such time and in such manner as the Commission shall by rule prescribe . . ." In this instance, the Commission has explicitly provided for review under Rule 3.23(b) or after issuance of the Administrative Law Judge's initial decision.

The Commission's Rules are designed to provide for the orderly and efficient conduct of a hearing. That process would be seriously undercut if the Commission were to interject itself into every dispute between the parties and the law judge. Interlocutory review is the exception to the rule that the Administrative Law Judge is vested with broad discretionary powers to conduct the proceeding. Rule 3.42(c).¹ In fact, this is precisely the kind of matter which is peculiarly within the province of the Administrative Law Judge as the trier of fact. Accordingly,

¹ As we have noted on other occasions, *Kellogg Co., et al.*, 83 F.T.C. 1756 (1974); *Warner-Lambert Co.*, 83 F.T.C. 485

Interlocutory Order

It is ordered, That the Application of Kellogg Company for Review of Order Denying Its Motion to Nullify Subpoenas Duces Tecum for the Taking of Depositions and Production of Documents, and the Application of Kellogg Company for a Stay of the Commencement of Complaint Counsel's Deposition Program Pending Resolution of Kellogg Company's Application for Review be, and the same hereby is, denied.

Complaint

91 F.T.C.

IN THE MATTER OF

INSILCO CORPORATION, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket C-2919. Complaint, April 19, 1978 — Decision, April 19, 1978

Consent order requiring a Meriden, Conn., distributor of pre-cut housing products and its subsidiary, among other things, to cease misrepresenting or failing to make relevant disclosures with regard to product assembly, delivery costs, legal building requirements, need for skilled building tradesmen, mortgage liens, and cancellation rights—in Spanish, if applicable. The order further requires the firm to acknowledge and resolve complaints in a prescribed manner. Additionally, the firm must cease failing to provide consumers, in connection with the extension of credit, such material disclosures as required by Federal Reserve Board regulations.

Appearances

For the Commission: *Blanche Stein, Richard A. Palewicz and Walter R. Baron.*

For the respondent: *William G. Dillon, Simpson, Thacher & Bartlett, New York, N.Y.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and of the Truth in Lending Act and the implementing regulation promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Insilco Corporation, a corporation, and Miles Homes, Inc., a corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Acts and the implementing regulation promulgated under the Truth in Lending Act, and it now 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. For purposes of this complaint, the following definitions shall apply:

a) The term "pre-cut housing" means homes sold to the general public by any of the Miles Homes Companies in the form of unassembled or partially assembled materials and components other than a package.

b) The term "package" means the materials and components for the

with pre-cut housing, or tile or paint which any of the Miles Home Companies offer to purchasers of pre-cut housing.

PAR. 2. Respondent Insilco Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Connecticut, with its office and principal place of business located at 1000 Research Parkway, Meriden, Connecticut.

Respondent Insilco Corporation has numerous wholly-owned subsidiaries in various States of the United States which it collectively terms "Miles Homes Companies" and which includes, among others, Miles Homes, Inc.

Respondent Miles Homes, Inc. is a wholly-owned subsidiary of respondent Insilco Corporation, and is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota, with its office and principal place of business located at 4500 Lyndale Ave., North, Minneapolis, Minnesota.

Respondent Insilco Corporation by reason of its ownership of Miles Homes, Inc. has the power to and does control the acts and practices of Miles Homes, Inc.

PAR. 3. Respondents are now and for some time in the past have been engaged in the advertising, offering for sale and sale of pre-cut housing and packages for such housing to the general public.

PAR. 4. In the course and conduct of its business, as aforesaid, and by virtue of the control it exercises over respondent Miles Homes, Inc. by formulating, establishing and monitoring the financial and sales policies and operations of this subsidiary; through its wholly-owned corporate subsidiaries engaged in the sale of pre-cut housing in various States of the United States; and, through its other wholly-owned corporate subsidiaries which are distribution centers for pre-cut housing sold by respondents, respondent Insilco Corporation now causes, and for some time last past has caused, pre-cut housing to be transported from the states in which such distribution centers are located directly to purchasers located in various other States of the United States.

In the course and conduct of its business, as aforesaid, respondent Miles Homes, Inc. now causes, and for some time last past has caused, business papers and advertisements to be transmitted through the United States mail from respondent's place of business in Minnesota to members of the public located in various other States of the United States, and certain other advertisements to be inserted in newspapers of interstate circulation.

Therefore, each of the respondents now maintain, and at all times mentioned herein has maintained, a substantial course of trade in or

affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

COUNT I

Alleging violations of Section 5 of the Federal Trade Commission Act, as amended, the allegations of Paragraphs One, Two, Three and Four hereof are incorporated by reference in Count I as if fully set forth verbatim.

PAR. 5. In the course and conduct of their housing business, as aforesaid, and for the purpose of inducing the public to purchase respondents' products, respondents have made, or are now making, certain statements and representations in advertising brochures and in advertising inserted in newspapers of interstate circulation.

Typical and illustrative of such statements and advertising representations, but not all inclusive thereof, are the following:

The only houses actually designed so they can be built by anyone who can drive a nail and follow simple instructions.

* * * * *

Build in spare hours without costly hired labor.

* * * * *

Your materials come pre-cut, ready to nail, with an excellent set of instructions designed for people with little or no previous building experience.

* * * * *

You can start the nailing and assembly within five minutes after you receive your home.

* * * * *

MILES PRECISION CUT HOMES

* * * * *

...a plan which combined financial assistance, all the materials, and easy to understand instructions. . .making it possible for any family to build their own home.

* * * * *

...We furnish precut building materials, step-by-step instructions, everything you need. . .inside and outside. Free delivery.

* * * * *

...You do not run out of material after you start building.

Our own fleet of trucks delivers your home in several loads, as you need it.

PAR. 6. By and through the use of the above-quoted statements and representations and others of similar import and meaning not expressly set out herein, respondents have represented, or are now representing, directly or by implication that:

1. Pre-cut housing sold by respondents is easy to assemble and can be completely constructed by anyone.

2. Anyone can assemble respondents' pre-cut housing without utilizing the services of skilled building tradesmen during the course of construction.

3. Pre-cut housing sold by respondents is delivered to purchasers with all parts pre-cut to exact size with such accuracy that a purchaser need only to nail the parts in place.

4. Instructions furnished to purchasers by respondents for the assembly of pre-cut housing are designed for the specific style house ordered by each purchaser.

5. Instructions furnished to purchasers by respondents for the assembly of pre-cut housing are so simple that they can be easily followed by anyone.

6. Deliveries of materials and components of pre-cut housing sold by respondents are timed to meet the individual construction schedule needs of each purchaser.

7. Purchasers of respondents' pre-cut housing will be furnished adequate supplies of building materials to assure that the purchaser will not run short of materials or components during the course of construction.

8. Purchasers of respondents' pre-cut housing are not required to pay delivery charges for any of the materials or components for such housing purchased from respondents.

PAR. 7. In truth and in fact:

1. Pre-cut housing sold by respondents is not easy to assemble and cannot be completely constructed by any ordinary purchaser. In many instances purchasers, including those who have previous building construction experience, must hire skilled tradesmen to lay the foundation for the house.

2. Anyone cannot assemble respondents' pre-cut housing without using the services of skilled building tradesmen during the course of construction. In many instances, purchasers find it necessary to hire a carpenter, electrician or plumber for the construction of the house.

3. Pre-cut housing sold by respondents is not delivered to purchasers with all parts pre-cut to exact size with such accuracy that the parts need only to be nailed in place. Door and window openings, stairways, interior partition plates, interior wall studs, and hip, valley

and jack rafters are not pre-cut and must be measured and cut by purchasers during the construction of such housing.

4. Instructions furnished to purchasers by respondents for the assembly of pre-cut housing are not designed for the specific style house ordered by each purchaser. The instructions furnished are general in nature, and all purchasers receive an identical set of instructions regardless of the style house ordered.

5. Instructions furnished to purchasers by respondents for the assembly of pre-cut housing are not so simple that they can be easily followed by anyone. In many instances, purchasers are unable to interpret the instructions without the assistance of a carpenter, and instructions are not set out in the sequence of construction practice normally followed in the industry.

6. Deliveries of materials and components of pre-cut housing sold by respondents are not timed to meet the individual construction schedule needs of each purchaser. In many instances, deliveries are late, are made ahead of schedule, or are made at respondents' own convenience without regard to the schedule of delivery dates requested by purchasers.

7. Purchasers of respondents' pre-cut housing are not always furnished adequate supplies of building materials or components to assure that the purchaser will not run short of such materials or components during the course of construction. In some instances, an inadequate supply of nails, plywood or insulation is furnished. Respondents frequently delay, neglect, refuse or ignore making replacements of materials or components that are delivered to purchasers in damaged condition or where the delivery of the materials or components are not in accord with the purchaser's orders.

8. Purchasers of respondents' pre-cut housing are required to pay delivery charges for some of the materials or components for such housing. Delivery charges are added to purchasers' accounts when materials or components are shipped by carriers other than respondents' own trucks.

Therefore, the statements and representations as set forth in Paragraph Six above were and are false, misleading and deceptive.

PAR. 8. In the further course and conduct of their business, as aforesaid, and for the purpose of inducing the public to purchase respondents' pre-cut housing, respondents have made, or are now making, statements and representations in advertising brochures and in advertising inserted in newspapers of interstate circulation concerning the financial arrangements for the purchase of such housing.

Typical and illustrative of such statements and representations, but

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Complaint

You may build on your own lot. . .

* * * * *

Land need not be paid in full.

* * * * *

No Cash Needed. Monthly Payments: \$84, including custom kitchen cabinets, plumbing, heating, electrical, tile and paint. . .

* * * * *

MILES PRECISION-CUT HOMES are recommended by banks, lending institutions and mortgage companies throughout the United States.

By and through the use of such statements and representations, respondents have failed to disclose the following material facts which, if known to consumers would be likely to affect their decision to respond to said advertising or to enter into negotiations with respondents which results, in many instances, in the purchase of pre-cut housing offered for sale by respondents:

1. That, in addition to the requirement that purchasers enter into a written agreement for the purchase of pre-cut housing, purchasers are also required to give respondents a mortgage note and first mortgage lien on the land used as the building site.

2. That the plumbing, heating or electrical systems, tile and paint, and kitchen cabinets are optional items for which respondents make substantial additional charges.

3. That respondents add delivery charges for materials and components shipped by carriers other than respondents' own trucks, and that such delivery charges always will be made for any "packages" ordered.

4. That respondents do not arrange long-term financing for individual purchasers from institutions that customarily furnish mortgage loans.

5. That the monthly payments are essentially in payment of the interest on the mortgage note purchasers are required to give respondents and reflect little or no reduction in the principal amount of the amount financed.

Therefore, respondents' failure to disclose such material facts were and are unfair, false, misleading and deceptive acts and practices.

PAR. 9. In the course and conduct of their aforesaid business and at all times mentioned herein, respondents have been and are now in substantial competition, in or affecting commerce, with corporations, firms and individuals in the sale of housing of the same general kind and nature as that sold by respondents.

