

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

