

Modifying Order

119 F.T.C.

IN THE MATTER OF

THE COCA-COLA COMPANY

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT*Docket 9207. Final Order, June 13, 1994--Modifying Order, May 25, 1995*

This order reopens a 1994 final order that requires the respondent to obtain Commission approval before acquiring stock or interest in any company that manufactures or sells concentrate, syrup, or carbonated soft drinks in the U.S. This order modifies the final order in settlement of the petitions for review filed by the respondent in the U.S. Court of Appeals.

ORDER REOPENING AND MODIFYING FINAL ORDER

The Commission issued a Final Order in this proceeding on June 13, 1994, and an Order Reopening and Modifying Final Order on December 5, 1994. Respondent, The Coca-Cola Company, filed in the United States Court of Appeals for the District of Columbia Circuit a petition for review of the Commission's Final Order on August 26, 1994, and on February 3, 1995, a petition for review of the Final Order, as modified by the Commission's Order of December 5, 1994. On May 17, 1995, the Commission approved the terms of a modified final order in settlement of the petitions for review; and on May 18, 1995, the Commission and The Coca-Cola Company filed a Stipulation of Dismissal in the court of appeals pursuant to Fed. R. App. P. 42(b).

Now therefore, *It is hereby ordered*, That the aforesaid Final Order, as modified, be, and it hereby is, modified to read as follows:

I. DEFINITIONS

It is ordered, That, for purposes of this order, the following definitions shall apply:

A. "*Coca-Cola*" means The Coca-Cola Company, a corporation organized under the laws of Delaware, with its headquarters located at One Coca-Cola Plaza, N.W., Atlanta, Georgia, and its directors,

officers, agents, employees, and representatives, and its subsidiaries, divisions, affiliates, successors, and assigns.

B. "*Concentrate*" means the base element, flavors, or essences mixed according to a formula which, when added to carbonated water and nutritive or non-nutritive sweetener, is a carbonated soft drink.

C. "*Syrup*" means the concentrate and nutritive or non-nutritive sweetener which, when added to carbonated water, is a carbonated soft drink.

D. "*Branded concentrate or branded syrup*" means concentrate or syrup used to produce carbonated soft drinks that are identified with any nationally or regionally recognized label, name, or trademark and that, in general, are heavily advertised, widely available in the take-home and cold drink channels, and distributed by bottlers that provide store-door service or services to retailers in the cold drink channel. This definition does not include a label, name, or trademark associated solely with a single grocery or restaurant retailer, or with a generic flavor.

E. "*Branded concentrate soft drink*" means a drink made by combining carbonated water with branded syrup or with nutritive sweetener or non-nutritive sweetener and branded concentrate.

II.

It is further ordered, That Coca-Cola, for a period of ten (10) years from the date this order becomes final, shall not acquire, directly or indirectly, through subsidiaries, partnerships or otherwise, without the prior approval of the Federal Trade Commission:

A. Any rights to the Dr Pepper® or diet Dr Pepper® brand in the United States, or any brand, name, or trademark associated with the production, marketing, sale or distribution of Dr Pepper® or diet Dr Pepper® carbonated soft drinks in the United States;

B. The whole or any part of the stock, share capital, equity or other interest in any concern, corporate or non-corporate, that holds, owns, or otherwise controls the Dr Pepper® or diet Dr Pepper® brand, name, or trademark in the United States.

Provided however, that this prior approval requirement shall not apply to any acquisition by Coca-Cola of only physical assets involved in the production, sale, or distribution of Dr Pepper® and/or

diet Dr Pepper® syrups, concentrates, or carbonated soft drinks, or from acquiring a bottler of Dr Pepper® and/or diet Dr Pepper® carbonated soft drinks, so long as the bottler is engaged in the manufacture and sale of Dr Pepper® or diet Dr Pepper® concentrates or syrups solely as a holder of a Dr Pepper® or diet Dr Pepper® trademark, license, or franchise agreement and is not the owner of the Dr Pepper® or diet Dr Pepper® brand, name, or trademark.

III.

It is further ordered, That Coca-Cola, for a period of ten (10) years from the date this order becomes final, shall not acquire, directly or indirectly, through subsidiaries, partnerships or otherwise, without providing advance written notification to the Federal Trade Commission:

A. The whole or any part of the stock, share capital, equity or other interest in any concern, corporate or non-corporate:

1. Engaged in the manufacture and sale in the United States of branded concentrate or branded syrup; or

2. Engaged in the franchising or licensing of any brand, name, or trademark used in the United States in connection with the production, marketing, or sale of branded concentrate, branded syrup, or branded carbonated soft drinks.

B. Any brand, name, or trademark associated with the production, sale, or distribution of branded concentrate, branded syrup, or branded carbonated soft drinks in the United States.

Provided however, that this advance notification requirement shall not apply to any acquisition by Coca-Cola of only physical assets involved in the production, sale, or distribution of concentrate, syrup, or carbonated soft drinks, or from acquiring a bottler of carbonated soft drinks, so long as the bottler is not engaged in the manufacture and sale of branded concentrate or branded syrup, or in the franchising or licensing of any brand, name, or trademark of any branded carbonated soft drinks or is engaged in the manufacture and sale of branded concentrate or branded syrup solely in its capacity as

a licensee, bottler, or franchisee under carbonated soft drink trademark rights issued by another firm.

Advance notification of any transaction covered by this paragraph III shall be provided to the Federal Trade Commission when Coca-Cola's Board of Directors, or any individual or entity that is authorized to act on Coca-Cola's behalf in such acquisitions, authorizes issuance of a letter of intent or enters into an agreement to make an acquisition covered by this paragraph III, whichever is earlier.

The notification required of Coca-Cola by this paragraph shall be the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations, as amended, and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification need not be given to the United States Department of Justice and notification is required only of Coca-Cola and not of any other party to the transaction. Coca-Cola shall comply with reasonable requests by the Commission staff for additional information within fifteen (15) days of service of such requests.

The notification required of Coca-Cola by this paragraph III shall not require additional notification by Coca-Cola to the Federal Trade Commission of any acquisition for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a, or for which prior approval by the Federal Trade Commission is required, and has been requested, pursuant to paragraph II of this order.

Provided further, that the requirements of this paragraph III shall not apply to any acquisition by Coca-Cola of any company or firm where such company or firm has sales of less than ten million (10,000,000) 192-oz. case-equivalents of carbonated soft drinks in each of the three years preceding such acquisition.

IV.

It is further ordered, That one (1) year from the date this order becomes final, and annually on the anniversary of the date this order becomes final until the prior approval and prior notification requirements of paragraphs II and III expire, and at other times as the Commission may reasonably require, Coca-Cola shall file a verified

written report with the Federal Trade Commission setting forth in detail the manner and form in which it has complied and is complying with this order.

V.

It is further ordered, That, for the purposes of determining or securing compliance with this order, and subject to any legally recognized privilege, upon written request and on reasonable notice to Coca-Cola made to its principal office, Coca-Cola shall permit any duly authorized representatives of the Federal Trade Commission:

A. During office hours and in the presence of counsel, to have access to, inspect and copy all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of Coca-Cola relating to any matters contained in this order; and

B. Upon five days' notice to Coca-Cola and without restraint or interference from Coca-Cola, to interview officers or employees of Coca-Cola, who may have counsel present, regarding such matters.

VI.

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

Commissioner Azcuenaga and Commissioner Starek recused.

IN THE MATTER OF

GATEWAY EDUCATIONAL PRODUCTS, LTD., ET AL.

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

Docket C-3581. Complaint, June 1, 1995--Decision, June 1, 1995

This consent order prohibits, among other things, a California-based corporation and two officers from making reading and comprehension claims for their "Hooked on Phonics" reading program or any other educational program or product without possessing and relying upon competent and reliable substantiating evidence. In addition, it prohibits them from representing that any endorsement represents the typical or ordinary experience of consumers with any educational program or product without possessing and relying upon competent and reliable substantiating evidence.

Appearances

For the Commission: *Toby M. Levin and Dean C. Forbes.*

For the respondents: *Michael Denger, Gibson, Dunn & Crutcher,* Washington, D.C. and *Scott R. Miller, Rordan McKinzie,* Los Angeles, CA.

COMPLAINT

The Federal Trade Commission, having reason to believe that Gateway Educational Products, Ltd., a corporation, and John Shanahan and John Herlihy, individually and as officers of said corporation ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Gateway Educational Products, Ltd. is a Delaware corporation, with its principal office or place of business at 1050 Katella Ave., Suite D, Orange CA.

Respondents John Shanahan and John Herlihy are officers of the corporate respondent. Individually or in concert with others, they formulate, direct, and control the acts and practices of the corporate respondent, including the acts and practices alleged in this complaint.

Their principal office or place of business is the same as that of the corporate respondent.

PAR. 2. Respondents have manufactured, advertised, labelled, offered for sale, sold, and distributed educational products, including Hooked on Phonics and Hooked on Phonics/SRA Reading Power (collectively "HOP"), to consumers. HOP is an instructional reading program consisting of color-coded workbooks, cassette tapes, and flash cards.

PAR. 3. The acts and practices of respondents alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

PAR. 4. Respondents have disseminated or have caused to be disseminated advertisements and promotional materials for HOP, including but not necessarily limited to the attached Exhibits A through L. These advertisements contain the following statements:

A. "We've Made Learning to Read Easy & Fun! 'We're Hooked on Phonics' and Here's Why... [ellipses in original ad] [headline]

* * *

Hooked on Phonics helps new readers every step of the way. By learning the sounds of the alphabet, students can sound out and read most of the words in the English language.

* * *

Good reading comprehension is essential to success in all subjects and is the very heart and soul of education. Dr. Don Parker adapted his highly acclaimed SRA Reading Laboratory for use with Hooked on Phonics. The result: Hooked on Phonics plus SRA Reading Power...the reading program that's sweeping the nation. [ellipses in original ad]

* * *

If instruction is fun, learning is easy. This is the basic principle behind the Hooked on Phonics reading program, and it has proven true with students from most every culture, every walk of life, and every age group throughout the country. Hooked on Phonics is ideal for children or adults who are beginning readers or those who need remedial help. Hooked on Phonics is your own personal, friendly and uncritical private teacher.

[Consumer] 'This program worked for me and Tyler! I never learned to read in school, and I've tried a lot of reading programs that didn't help. I would have given anything for Hooked on Phonics when I was Tyler's age.' -- Eric Fisher and Tyler

[Text in box] It's Easy! You can listen to your Hooked on Phonics tapes: at home...in your car...or anywhere you choose! This is very important for older learners who desire their privacy. [ellipses in original ad]

Many teachers and parents have reported that Hooked on Phonics has helped those with learning disabilities such as dyslexia and attention deficit disorders. The

lessons can be repeated as often as necessary giving students the personalized repetition they need.

We're so confident of your success that we give you a 30-day written money back guarantee. If you don't see dramatic reading results within 30 days, return the program for a full refund. It's as simple as that." [Exhibit A]

B. "With Hooked on Phonics you will 'Learn to Read' [headline]

Hooked on Phonics helps teach children and adults how to read. Because all the lessons are set to music, learning to read becomes simple and fun. With Hooked on Phonics most students can work alone at their own pace and review the lessons at any time.

* * *

With SRA Reading Power you will 'Read to Learn' [headline]

* * *

SRA Reading Power includes 100 exciting stories followed by exercises to help with comprehension, vocabulary and grammar. This program will strengthen your reading skills and lead to better comprehension of all subjects." [Exhibit B, p.1]

* * *

'What Educational Experts & Parents Say About Hooked on Phonics [headline]

[Consumer] Dr. Don Parker, Ph.D., Author of SRA Reading Laboratories, California [headline]

'As author of the SRA Reading Laboratories, which is used by 61 million people in 62 countries around the world, I can say that Hooked on Phonics is a program I will recommend unconditionally for any age, in any culture around the world, seeking to learn to read.'

[Consumer] Sister Nancy Lynn McNamara, teacher, New York [headline]

'I started using Hooked on Phonics in my classroom in late October and saw phenomenal results in just a few weeks. There was success right away! I would recommend Hooked on Phonics for any age level, any nationality, anybody - because it works!'

* * *

[Consumer] Sissy Paradis, Teacher/Tutor, Massachusetts [headline]

'When I tutored one particular student, his reading was at a 1st grade level. Recently he was retested and now he's at an 8th grade level...amazing, all this in four months. Hooked on Phonics is the best thing I've ever found.' [ellipses in original ad]

* * *

[Consumer] Joan & Matt Nelson, Nebraska [headline]

'I thought our son's future was at stake because of his reading problem. But after we got Hooked on Phonics, his reading skills improved incredibly. He has so much more confidence in himself.'

[Consumer] Dr. & Mrs. R.A. Livingston, Michigan [headline]

'We purchased Hooked on Phonics when our son was four and one half years old. Within three months he was reading fluidly. Just after entering kindergarten, his reading skills were tested and showed that his reading and comprehension skills were on a 5th grade level. After his kindergarten year, he was put straight into 2nd grade and he's thriving. Believe me, people who know us know about Hooked on Phonics.'

