IN THE MATTER OF

HOOSIER PIANO AND ORGAN CO., INC., ET AL.

CONSENT ORDER IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2423. Complaint, July 12, 1973—Decision, July 12, 1973.

Consent order requiring a Shelbyville, Indiana, piano retailer, among other things to cease misrepresenting the manner in which merchandise has been reacquired from former purchasers or the terms and conditions under which such merchandise is being offered for sale for the unpaid balance of the original purchase price; making sale offers which are not bona fide offers; representing retail prices as usual and customary unless such is the case; misrepresenting prices as reduced from respondents' former price; and using false, misleading or deceptive sales plans or programs.

Appearances

For the Commission: *R. A. Palewicz.*

For the respondents: *Robert Adams, Adams & Cramer,* Shelbyville, Indiana.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Hoosier Piano and Organ Co., Inc., a corporation, and William A. Donica, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Hoosier Piano and Organ Co., Inc.,

is a corporation organized, existing and doing business under and by virtue of the laws of the State of Indiana with its principal office and place of business located at 1221 Jefferson Avenue, Shelbyville, Indiana.

Respondent William A. Donica is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent including the acts and practices hereinafter set forth. His address in the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale, and distribution of new pianos to the public at retail.

PAR. 3. In the course and conduct of their business as aforesaid, pianos, when sold, to be shipped from their place of business in the State of Indiana to purchasers thereof located in various other States of the United States, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their aforesaid business, and for the purpose of inducing the purchase of said pianos respondents have made, and are now making, numerous statements and representations in advertisements inserted in newspapers of general circulation and in oral sales presentations made by their salesmen to prospective purchasers and to purchasers with respect to the quality, condition, characteristics, and price of said pianos, the terms and conditions of sale, and of the status and position of their salesmen.

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

SPINET PIANO BARGAIN WANTED—Responsible party to take over low monthly payments on a spinet piano. Can be seen locally. Write Credit Manager, P. O. Box 276, Shelbyville, Indiana 46176.

SPINET-CONSOLE PIANO BARGAIN Can be seen locally. Will transfer to responsible party. Cash or liberal terms. Write Credit Manager, P. O. Box 276, Shelbyville, Indiana 46176.

SPINET-CONSOLE PIANO Wanted responsible party to take over spinet piano. Easy terms. Can be seen locally. Write Credit Manager, P. O. Box 276, Shelbyville, Indiana 46176.

PAR. 5. By and through the use of the above-quoted statements and representations, and others of similar import and meaning,

but not expressly set out herein, and in connection with oral statements and representations of respondents and their salesmen, respondents have represented, and are now representing directly or by implication:

1. That pianos, partially paid for by previous purchasers, have been repossessed and may be purchased for the unpaid balance of the original purchase price.

2. That they are making bona fide offers to sell the pianos described in said advertisements.

3. That the advertised pianos are being offered for sale at special or reduced prices and that purchasers will thereby be afforded savings from respondents' regular selling prices.

4. That persons responding to said advertisements will deal with credit department or other personnel not compensated by sales commissions.

PAR. 6. In truth and in fact:

1. Few, if any, repossessed pianos are shown or made available for the unpaid balance of the original purchase price to persons responding to said advertisements. To the contrary, most, if not all, of the pianos shown or made available to such persons are new.

2. Respondents' offers are not bona fide offers. To the contrary, they are made for the purpose of obtaining leads to prospective purchasers. Respondents' salesmen, thereafter, call upon such persons and attempts to, and do, sell new pianos to them.

3. The advertised pianos are not being offered for sale at special or reduced prices, nor are purchasers thereby afforded savings from respondents' regular selling prices for new pianos. To the contrary, the prices at which respondents sell said pianos are their regular selling prices.

4. Persons responding to said advertisements do not ordinarily deal with the credit department or other personnel. To the contrary, they are induced to purchase pianos by sales personnel compensated by sales commissions.

Therefore, the statements and representations as set forth in Paragraph Four and Paragraph Five hereof were and are false, misleading, and deceptive.

PAR. 7. 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 commerce, with corporations, firms, and individuals in the sale of pianos of the same general kind and nature as those sold by respondents.

PAR. 8. The use by respondents of aforesaid false, misleading and deceptive statements, representations, and practices, has had,

and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of said pianos by reason of said erroneous and mistaken belief.

PAR. 9. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof and the respondents having been furnished thereafter with a copy of a draft of complaint which the Chicago Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent's with violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, and having duly considered the comments filed thereafter pursuant to Section 2.34(b) of its rules, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Hoosier Piano and Organ Co., Inc., is a corporation organized, existing and doing business under and by virtue

of the laws of the State of Indiana, with its office and principal place of business located at 1221 Jefferson Avenue, Shelbyville, Indiana.

Respondent William A. Donica is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation and his principal office and place of business is located at the above-stated address.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Hoosier Piano and Organ Co., Inc., a corporation, its successors and assigns, and William A. Donica, individually, and as an officer of said corporation (hereinafter sometimes referred to as "respondents"), and respondents' officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale, or distribution of pianos or other merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, orally, visually, in writing, or in any other manner, directly or indirectly that:

1. Pianos or other merchandise have been repossessed or in any manner reacquired from a former purchaser, or are being offered for sale for the unpaid balance, or any portion thereof, of the original purchase price, or for the amount or any portion of the amount owed by a former purchaser; however, it shall be a defense hereunder for respondents to show that said advertised products actually are of the character stated and are offered for sale and sold on the terms and conditions represented.

2. Any pianos or other merchandise are being offered for sale when such offer is not a bona fide offer to sell the advertised merchandise on the terms and conditions stated.

3. Any amount is respondents' usual and customary retail price for merchandise unless such amount is the price at which the merchandise has been usually and customarily sold at retail by respondents in the recent regular course of business.

4. Any price is reduced from respondents' former price if respondents' business records fail to establish and show

that such price constitutes a significant reduction from the price at which such merchandise has been sold in substantial quantities or offered for sale in good faith for a reasonably substantial period of time, by respondents in the recent, regular course of their business.

5. Any savings is afforded in the purchase of merchandise from the respondents' retail price unless the price at which the merchandise is offered constitutes a reduction from the price at which said merchandise is usually and customarily sold at retail by the respondents in the recent regular course of business.

6. Persons responding to advertisements will be dealing with credit department personnel, or will be dealing with any other person than sales personnel.

It is further ordered, That respondents shall cease and desist from using any sales plan or procedure involving the use of false, misleading, or deceptive statements to induce the sale of pianos or other merchandise offered by respondents or to obtain leads or prespects for the sale of pianos or other merchandise.

It is further ordered, That respondents, for a period of one year from the effective date of this order, shall furnish each newspaper or other advertising medium which is utilized by the respondents to obtain leads for the sale of pianos or other merchandise, or to advertise, promote, or sell pianos or other merchandise, with a copy of the Commission's news release setting forth the terms of this order.

It is further ordered, That respondents serve a copy of this order upon each present and every future agent, representative, salesman, and employee engaged in the sale of pianos or other merchandise; that respondents obtain from each such person so served a written acknowledgement of the receipt thereof and an agreement in writing to abide by the terms of this order; and that respondents discharge any such person so served for failure to abide by the terms of this order.

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

It is further ordered, That the respondents shall notify the Commission, at least thirty (30) days prior to any proposed change in their business organization such as dissolution, assignment, incorporation, or sale resulting in the emergence of a successor firm, partnership, or corporation, or any other change

which may affect compliance obligations arising out of this order.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondents' current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

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

IN THE MATTER OF

RJR FOODS, INC., ET AL.

CONSENT ORDER IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2424. Complaint, July 13, 1973—Decision, July 13, 1973.

Consent order requiring a New York City manufacturer, seller and distributor of beverages designated "Hawaiian Punch," and its New York City advertising agency, among other things to cease misrepresenting the natural fruit juice content of fruit-flavored beverages, and depicting fruit or juice in labeling. In addition, the firm must make certain affirmative disclosures for a period of one (1) year and thereafter until a consumer survey is taken which gauges the need for continuing the disclosures.

Appearances

For the Commission: *C. O. Cook.*

For the Respondents: *David Grossberg, Cohen & Grossberg,* New York, New York, *Eugene L. Lambert, Covington & Burling,* Washington, D. C., and *G. A. Avram,* secretary and general counsel, RJR Foods, Inc., Winston Salem, North Carolina.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commision Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that RJR

Foods, Inc., a corporation, and William Esty Company, Inc., a corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent RJR Foods, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 750 Third Avenue, New York, New York.

PAR. 2. Respondent William Esty Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business located at 100 East 42nd Street, New York, New York.

PAR. 3. Respondent RJR Foods, Inc., is now, and for some time last past has been, engaged in the manufacture, sale and distribution of beverages designated "Hawaiian Punch" which come within the classification of a "food," as said term is defined in the Federal Trade Commission Act.

PAR. 4. Respondent William Esty Company, Inc., is now, and for some time last past has been, an advertising agency of RJR Foods, Inc., and now for some time last past, has prepared and placed for publication and has caused the dissemination of advertising material, including but not limited to the advertising referred to herein, to promote the sale of "Hawaiian Punch" beverages, which come within the classification of "food," as said term is defined in the Federal Trade Commission Act.

PAR. 5. Respondent RJR Foods, Inc., causes the said product, when sold, to be transported from its places of business in various States of the United States to purchasers located in various other States of the United States and in the District of Columbia. Respondent RJR Foods, Inc., maintains, and at all times mentioned herein has maintained, a course of trade in said product in commerce as "commerce" is defined in the Federal Trade Commission Act. The volume of business in such commerce has been and is substantial.

PAR. 6. In the course and conduct of their said businesses, respondents have disseminated, and caused the dissemination of certain advertisements concerning the said beverages by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including

but not limited to, advertisements inserted in magazines and other advertising media, and by means of television broadcasts transmitted by television stations located in various States of the United States, and in the District of Columbia, having sufficient power to carry such broadcasts across state lines, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said product; and have disseminated, and caused the dissemination of, advertisements concerning said product by various means, including but not limited to the aforesaid media, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said beverages in commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 7. Typical of the statements and representations in said advertisements, disseminated as aforesaid, but not all inclusive thereof, are the following:

A) The featuring of fresh fruits and fruit trees prominently and repeatedly in television commercials, sometimes continually throughout the television commercial, and often in conjunction with the audio message "Those seven natural fruit juices in Hawaiian Punch" and the video message "7 natural fruit juices." Sometimes but not always, the aforesaid messages are given in answer to questions, including but not limited to, the following:

1. What makes this [flavor] punch so great?
2. What makes Hawaiian Punch a natural with peanut butter?
3. What gives Hawaiian Punch its Punch?

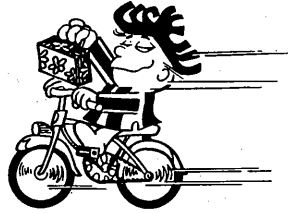
B) The following print advertisements:

PAR. 8. Through the use of said advertisements and others similar thereto not specifically set out herein, disseminated as aforesaid, respondents have represented and are now representing, directly and by implication, that Hawaiian Punch beverages consist predominantly of natural fruit juices.

PAR. 9. In truth and in fact, the predominant ingredients in Hawaiian Punch beverages are water and sweetening agents which are added to fruit juices and other ingredients to produce the final products.

Therefore, the advertisements referred to in Paragraph Eight were and are misleading in material respects and constituted, and now constitute, "false advertisements" as that term is defined in the Federal Trade Commission Act, and the statements and representations set forth in Paragraphs Seven and Eight were, and are, false, misleading and deceptive.

a new taste experience
NEW SUNSHINE ORANGE
Made healthy and more delicious by a blend of 7 natural fruit juices.
NEW!
HAWAIIAN PUNCH
SUNSHINE ORANGE
WITH 7 REAL FRUIT
Hawaiian Punch Sunshine Orange is much more than
bination with Valencia orange juice plus six other natural
sult is a uniquely sweet orange that kids love. And it's
Sunshine Orange has as much Vitamin C as an equival
without the pulp, without any bitter taste. Serve Hawaiian
your kids and you'll all be happy.



"Pack their lunch with a fruit juicy surprise"

Now
HAWAIIAN PUNCH®
comes in 8 ounce
single serving cans.

Now your kids don't have to be home to enjoy their favorite Hawaiian Punch flavor treats. Hawaiian Punch true fruit punches now come in handy, go-anywhere eight ounce easy-open cans.

Just pop them into the freezer overnight. Next morning put one into their lunch box. By the time noon rolls around, it's thawed and ready to drink; a cold, delicious lunch-time surprise.

Remember, Hawaiian Punch is made with seven natural fruit juices. You'll find your favorite flavor in our new eight ounce cans: Apple-Red, Great Grape, Sunshine Orange, and, of course, Fruit Juicy-Red.

Visit the Hawaiian Punch Pavilions at Sea World/San Diego and Sea World/Ohio... see Shamu, the killer whale.

STORE COUPON

Save 10¢

TO GROCER: Upon compliance with terms of this offer, you will be refunded 10¢ toward the purchase of one pack of six 8-oz. cans of Hawaiian Punch, any flavor, plus 3¢ handling cost if you mail this coupon to address below. Coupon not to be assigned or transferred by you. Any other application constitutes fraud. Invoice proving purchase of stock within 90 days, to cover coupons accepted, must be shown on request. Void when presented by outside agency or where prohibited, taxed or otherwise restricted. Consumer must pay applicable sales tax. Good only in U.S.A. Cash value 1/20 of one cent. RJR Foods, Inc., Box 1003, Clinton, Iowa 52732. Redeem this coupon today.

HP-59

RJR Foods, Inc.

This advertisement prepared by
WILLIAM ESTY COMPANY
INCORPORATED

SAVE
on Hawaiian Punch® Grape

Hawaiian Punch Grape is the great grape punch—a blend of seven natural fruit juices for breakfast, lunch-time, anytime.

7¢ 7¢

SAVE 7¢ ON A 46 OZ. CAN OF HAWAIIAN PUNCH GRAPE

STORE COUPON

Mr. Grocer: You will be refunded 7¢ on one 46 oz. can of Hawaiian Punch Grape plus 3¢ for handling if you receive and handle it strictly in accordance with the terms of this offer and if, upon request, you submit evidence thereof satisfactory to R. J. Reynolds Foods. Void when presented by outside agency or where prohibited, taxed or otherwise restricted. Good only in U.S.A. Cash value 1/20 of 1¢. R. J. Reynolds Foods, Inc. Box 1003, Clinton, Iowa 52732.

R. J. REYNOLDS FOODS, INC.

HP-3

STORE COUPON

7¢ 7¢

To capture the sun
In fun drenched tumblers
Spilling sweet goodness
With a child's laughter

All the vitamin C of
orange juice.
Made with seven
natural fruit juices.

This advertisement prepared by:
WILLIAM ESTY COMPANY, INC.
Ad No. P55-176A
This advertisement appears in:
Family Circle, October, Digest Page Bleed

PERFECT FOR BREAKFAST
NEW!
HAWAIIAN PUNCH.
SUNSHINE ORANGE
WITH 7 REAL FRUIT JUICES
WITH 7 NATURAL FRUIT JUICE

PAR. 10. In the course and conduct of its aforesaid business, and at all times mentioned herein, respondent RJR Foods, Inc., has been, and now is, in substantial competition, in commerce, with corporations, firms and individuals in the sale of food products of the same general kind and nature as that sold by respondents.

PAR. 11. In the course and conduct of its aforesaid business, and at all times mentioned herein, respondent William Esty Company, Inc., has been, and now is, in substantial competition in commerce with other advertising agencies.

PAR. 12. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices and the dissemination of the aforesaid "false advertisements" has had, and now has, the capacity and tendency to mislead members of the consuming public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of "Hawaiian Punch" by reason of said erroneous and mistaken belief.

PAR. 13. The aforesaid acts and practices of respondents including the dissemination of "false advertisements," as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair and deceptive acts and practices in commerce and unfair methods of competition in commerce in violation of Section 5 and 12 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been

violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed agreement, placed such agreement on the public record for a period of thirty (30) days, and received and considered comments, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission thereby issues its complaint, makes the following jurisdictional findings, and enters the following order.

1. Respondent RJR Foods, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal office and principal place of business located at 750 Third Avenue, New York, New York.

Respondent William Esty Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 100 East 42nd Street, New York, New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I. *It is ordered,* That respondent, RJR Foods, Inc., a corporation, and William Esty Company, Inc., a corporation, their successors and assigns, and their officers, agents, representatives and employees, directly, or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any fruit-flavored, non-carbonated beverage under the "Hawaiian Punch" trademark, as a frozen concentrate, liquid, liquid concentrate, powder, or in any other physical state, whether or not containing natural fruit juice, forthwith cease and desist for a period of one year after service of the order upon RJR Foods, Inc. and William Esty Company, Inc., and thereafter until respondents submit to the Commission the results of a survey conforming in protocol, procedure and results to Appendix A to this order, from:

1. Disseminating or causing the dissemination of, any

advertisement by means of the United States mails or by any other means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which depicts fruit or juice unless (a) the total percentage of single strength fruit juice contained in a concentration at which the product is intended to be served is clearly and conspicuously disclosed; or (b) the said product contains 100 percent single-strength fruit juice in a concentration at which the product is intended to be served.

It is provided, however, That the use of the word "fruit" or the use of the name of a fruit(s) to describe the taste or flavor of said product shall not, solely on the basis of such use, be deemed a violation of this order.

It is further provided, That for purposes of compliance with this order, the disclosure required above will be deemed clear and conspicuous in television advertising if (a) it appears at least once in each television commercial; (b) it is presented simultaneously in both the video and audio portions of the commercial; (c) the video portion (i) is of a sufficient size so that it can be easily read on all commercially available tube sizes, and (ii) it appears on the screen for a sufficient period to permit it to be read by the viewer, but not for less time than the audio portion; and (d) any other video or audio material accompanying the disclosure is not inconsistent with normal artistic and technical standards.

2. Disseminating, or causing the dissemination of, any advertisement by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of any such product, in commerce, as "commerce" is defined in the Federal Trade Commission Act, which contains any of the representations, acts or practices prohibited in subparagraph 1 above.

For the purposes of compliance with this order, respondent William Esty Company, Inc., may rely in good faith upon information concerning the composition of any such product supplied by the manufacturer or processor of said product, *Provided,* That respondent neither knows nor has reason to know that any claim covered by this part is false or deceptive.

II. *It is further ordered,* That respondent, RJR Foods, Inc., a corporation, and William Esty Company, Inc., a corporation, their successors and assigns, and their officers, agents, representa-

tives and employees, directly, or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale or distribution of any fruit-flavored beverage, as a frozen concentrate, liquid concentrate, powder or in any other physical state, whether or not containing natural fruit juice, forthwith cease and desist from:

1. Disseminating, or causing the dissemination of, any advertisement by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which represents, through the manner of the use of words or depictions, photographs, or other representations of fruit, that the natural fruit content of any product is greater than its actual fruit juice content.

2. Disseminating, or causing the dissemination of, any advertisement by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of any such product, in commerce, as "commerce" is defined in the Federal Trade Commission Act, which contains the representations prohibited in subparagraph 1 above.

It is provided, however, That the use of the word "fruit" or the use of the name of a fruit(s) to describe the taste or flavor of said product shall not, solely on the basis of such use, be deemed a violation of this order.

It is further provided, That respondents shall not be deemed in violation of Part II of this order with respect to any such fruit-flavored beverage so long as (a) they are in compliance with Part I above as to such fruit-flavored beverage, or (b) they have available a survey conforming in protocol, procedure (other than the independence of the survey supervisor) and results to Appendix A to this order as to such fruit-flavored beverage.

For the purposes of compliance with this order, respondent William Esty Company, Inc., may rely in good faith upon information concerning the composition of any such product supplied by the manufacturer or processor of said product, *Provided,* That respondent neither knows nor has reason to know that any claim covered by this part is false or deceptive.

III. *It is further ordered,* That respondent, RJR Foods, Inc., its successors and assigns, and its officers, agents, representatives and employees directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale, distribution or labeling of the products

described in Part I above in commerce, as "commerce" is defined in the Federal Trade Commission Act, forthwith cease and desist for a period of one year, and thereafter until respondents submit to the Commission the results of a survey conforming in protocol, procedure and results to Appendix A to this order, from depicting fruit or juice in labeling, as "labeling" is defined in the Federal Food, Drug, and Cosmetic Act, unless (a) the total percentage of single strength fruit juice contained in a concentration at which the product is intended to be served is clearly and conspicuously disclosed in any labeling containing such use; or (b) the said product contain 100 percent single-strength fruit juice in a concentration at which the product is intended to be served.

It is provided, however, That conformity to any affirmative regulation or standard issued under the Federal Food, Drug, and Cosmetic Act providing for the disclosure of fruit juice content on the label or labeling of said product will be deemed compliance with the requirements of this Paragraph III; and that the use of the word "fruit" or the use of the name of a fruit(s) to describe the taste or flavor of said product shall not, solely on the basis of such use, be deemed a violation of this order.

For purposes of compliance with this order, the disclosure required above shall be deemed clear and conspicuous in labeling if (a) it appears on any appropriate information panel as that term is used in 21 C.F.R. 1.10(h); (b) it appears in numbers of a color or shade that readily contrast with the background; (c) it appears in a type face of not less than 6 points on a 46-fluid ounce container, 4 point on a 12-fluid ounce container, and in proportional type sizes for other container sizes; and (d) it appears as part of any tabular, charted or graphic presentation if the label bears a compositional comparison between said product and any other product.

It is further ordered, That respondents shall forthwith distribute a copy of this order to each of their operating divisions engaged in the advertising, offering for sale, sale, distribution or labeling of any aforementioned product.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporations which may affect compliance obligations arising out of the order, including but not limited to the sale or acquisition of the

business of advertising, offering for sale, sale, distribution, or labeling of fruit flavored beverages by affiliated corporations of respondent, RJR Foods, Inc.

It is further ordered, That respondents shall, within sixty (60) days after service of the order upon them, each file with the Commission a report in writing, signed by such respondents, setting forth in detail the manner and form of their compliance with the order to cease and desist.

It is provided, however, That RJR Foods, Inc., will be deemed in compliance with Part III of this order if the required disclosure appears on labels placed into production within sixty (60) days after service of the order upon RJR Foods, Inc., or September 1, 1972, whichever is later.

Appendix A

A. *Survey Results:*

If a survey conducted in accordance with Section B shows that (a) 67 percent of current purchasers of fruit-flavored beverages (see Para. B.2.a. below); or (b) 80 percent of current or prospective purchasers of Hawaiian Punch products (see Para. B.2.b.); or (c) 95 percent of current purchasers of Hawaiian Punch products (see Para. B.2.c.) think that Hawaiian Punch products contain no more than 20 percent natural fruit juice, then the disclosure described in Sections I and III of the order will no longer be required after one year from the date of serving of this order upon RJR Foods, Inc. and William Esty Company, Inc.

B. *Survey Protocol & Procedure:*

1. This survey, including the processes of sampling, data, generation analysis, and interpretation of results, shall be conducted by independent experienced interviewers and supervisors.

2. Using telephone directories representing the entire United States, a national probability sample will be drawn; within the limitations of this method of sample selection, the sample will be projectable to the total population. Interviewers will call the numbers to locate 500 individuals who have (a) purchased fruit-flavored noncarbonated beverages in the last month; or (b) purchased Hawaiian Punch brand fruit-flavored beverages in the last month, or express an intent to do so within the succeeding month or so; or (c) purchased Hawaiian Punch brand fruit-flavored beverages in the last month. If there is no answer when a selected telephone number is called, the number will be tried again, up to two additional times, at different times of day and on different days of the week. Approximately 20 percent of each interviewer's work will be validated by telephone.

3. Only the following questions will be asked in these interviews:

A. "Hello, my name is __________, and I am calling for a national research company that is conducting a survey about beverages. Do you ever buy fruit drinks?"

B. If answer to "A" is "no," or if the respondent is a child, ask, "May I please speak to the main food purchaser in your home?" Then start again at question "A" with the main food purchaser.

C. "In the past month, have you bought any canned fruit drinks?"

D. "What brand or brands do you usually buy?"

E. How likely would you say that you are to buy one or more cans of (name of brands named in "D") in the next month or so? Would you say you are . . . 1. "Sure that you won't," ——

2. "Not likely", ——

3. "Fairly likely", ——

or 4. "Quite likely" ——

to buy (name of brand)

In the event that a respondent has not named Hawaiian Punch in response to "D", insert this brand as follows: If one, two, or three other brands are mentioned, insert Hawaiian Punch as the second brand; if four or more brands are mentioned, insert Hawaiian Punch as the *third* from last brand.

Responses 1 and 2 to question "E" will not be counted in population option B.2.b.; responses 3 and 4 will be counted in that option.

F. In the case of population options B.2.b. and B.2.c., ask only respondents who name Hawaiian Punch in "D" or "E", and in the case of population option B.2.a., ask *all* respondents: "Now I would like to ask you to rate the fruit *juice* content of some canned fruit drinks. If you think the brand is composed entirely of fruit juice, rate it 100 percent. If you think it has no fruit juice, rate it as 0 percent. Please pick a figure from 0 to 100 that expresses the brand's fruit juice content. How would you evaluate (brand name)?"
Repeat last sentence for each brand mentioned in response to "D" and "E", in order used by respondent. In the event that a respondent in population option B.2.a. has not mentioned Hawaiian Punch, insert this brand as follows: If one, two, or three other brands are mentioned, insert Hawaiian Punch as the second brand, if four or more brands are mentioned, insert Hawaiian Punch as the *third* from last brand.

G. "Thank you very much for your help."

4. The completed questionaires will be edited and coded, with the punching verified for approximately 20 percent of the punched columns.

IN THE MATTER OF

BOISE TIRE COMPANY, ET AL.

CONSENT ORDER IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2425. Complaint, July 16, 1973—Decision, July 16, 1973.

Consent order requiring a Boise, Idaho, seller and distributor of automotive tires and other automotive accessories, principally Uniroyal products, among other things to cease misrepresenting the quality, design, or

service of its products; and misrepresenting scientific tests and their results.

Appearances

For the Commission: *R. H. Brook.*
For the respondents: *pro se.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Boise Tire Company, a corporation, and Richard E. Larson, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated Section 5 of the Federal Trade Commission Act, and that a proceeding in respect thereof would be in the public interest, issues this complaint, stating its charges as follows:

PARAGRAPH 1. Respondent Boise Tire Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Idaho, with its office and principal place of business located at 1601 Front Street, Boise, Idaho.

Respondent Richard E. Larson is an officer of Boise Tire Company. He formulates, directs and controls the policies, acts and practices of Boise Tire Company, including those hereinafter set forth. His address is the same as that of Boise Tire Company.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the business of selling and distributing tires and other automotive accessories, principally Uniroyal products.

PAR. 3. In the course and conduct of their business, respondents advertise extensively in media of interstate circulation and broadcast. Respondents have maintained, and do now maintain, a course and conduct of business in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, and for the purpose of inducing the purchase of Uniroyal Zeta Steel Radial Tires ("Zeta Tires"), respondents have made certain statements and representations concerning such tires in media of interstate circulation. Said statements include the following:

[Zeta Tires are] Rated #1
[Zeta Tires are] #1 in quality
#1 in design
#1 in service
it's just plain * * * #1

PAR. 5. Through the use of the above statements, respondents have represented, directly or by implication, that Zeta tires had been compared with all other tires, in an objective manner, using an industrywide, government or other accepted system of quality standards or grading, by independent scientific testing of contemporary applicability, and that Zeta tires had been found therein to be superior in a general category ("Rated #1") and in specific rating categories for "quality," "design" and "service." Respondents further represented, by implication, that they had evidence, in their possession or immediately available to them, adequate to support these claims.

PAR. 6. In truth and in fact, Zeta tires had not been rated or compared with all other tires, and there exists no industrywide, government or other accepted system of quality standards or grading of tires; and Zeta tires had not been rated by any independent scientific testing against all other tires in any general or specific categories. Moreover, respondents have never had evidence, in their possession or immediately available to them, to support these claims.

Therefore, the statements, representations, and practices set forth in Paragraphs Four and Five were and are false, misleading and deceptive.

PAR. 7. The use by respondents of the aforesaid false, misleading and deceptive statements and representations has had, and now has, the tendency and capacity to mislead and deceive members of the public into the purchase of substantial quantities of Zeta tires under the erroneous and mistaken belief that these statements and representations are true.

PAR. 8. In the course and conduct of their business, and at all times mentioned herein, respondents have been and are now in substantial competition in commerce with corporations, firms and individuals engaged in the sale and distribution of tires and other automotive accessories of the same kind and nature as those sold by respondents.

PAR. 9. The aforesaid alleged acts and practices of respondents were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition and unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Seattle Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Boise Tire Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Idaho, with its office and principal place of business located at 1601 Front Street, Boise, Idaho.

Respondent Richard E. Larson is an officer of Boise Tire Company. He formulates, directs and controls the policies, acts and practices of Boise Tire Company, and his address is the same as that of said corporation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Boise Tire Company, a corporation, its successors and assigns, and its officers, and Richard E.

Larson, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale, or distribution of tires or any other automotive accessories, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing in writing, orally, visually or in any other manner, directly or by implication:

A. That Zeta tires have been rated "#1" as to quality, design or service;

B. That any tires or other automotive accessories have been rated or compared as to quality, grade, line, level, design, performance or other characteristics (except in conformance with a government approved or industrywide standard, if and when such is developed) unless:

1. The representation is fully substantiated by controlled scientific tests, the results and methodology of which are available for public inspection; and

2. The representation is accompanied by a clear and conspicuous statement that there are no industrywide or other accepted standards of quality or grading, that representation relates only to the private standard of the seller or manufacturer, and that the test results and methodology on which the representation is based are available for public inspection.

It is further ordered, That respondents cause the publication in the sports section of the Idaho Statesman, in large bold face type, of a retractive advertisement one quarter page in size. It shall be devoted exclusively to a clear and conspicuous statement that, contrary to previous advertisements of Boise Tire Company, neither Uniroyal Zeta Steel Radial Tires nor those of any other manufacturer have been rated by any government or accepted industrywide system, and that in fact no such system for rating or grading tires exists. This advertisement shall also include the following sentence, in 14-point block capital letters:

THIS ADVERTISEMENT IS PUBLISHED PURSUANT
TO ORDER OF THE FEDERAL TRADE COMMISSION

Said advertisement shall be published within sixty (60) days after service upon them of this order.

It is further ordered, That the respondent corporation shall

forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That respondents notify the 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 in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment, and of his affiliation with a new business or employment, in the event of such discontinuance or affiliation. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

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

IN THE MATTER OF

PEPSICO, INC.

Docket 8903. Interlocutory Order, July 17, 1973.

Order denying respondent's motion to dismiss the complaint.

Appearances

For the Commission: *A. R. Richter, S. G. Stoker, Ira Nordlicht* and *J. E. Egan.*

For the respondent: *Edward Howrey of Howrey, Simon, Baker & Murchison,* Washington, D. C., and *James G. Frangos, John Kirby* of *Mudge, Rose, Guthrie & Alexander,* New York, New York.

ORDER DENYING MOTION TO DISMISS

On June 22, 1973, respondent ("PepsiCo") filed a motion with the administrative law judge seeking dismissal of the complaint herein essentially on two grounds: (1) the Commission's action,

through its general counsel, in seeking an injunction under the All Writs Act against certain acts of PepsiCo, evidenced prejudgment and disqualified the Commission in this case; and (2) respondent believes there may have been *ex parte* communications by the Bureau of Competition to the Commission contrary to Commission Rules and the Administrative Procedure Act.

Complaint counsel filed on July 2, 1973, a reply in opposition to the motion to dismiss. On July 5, 1973, the administrative law judge certified the motion to the Commission on the ground he lacked authority to rule on it. See Section 3.22(a) of the Rules of Practice.

Although the administrative law judges have authority to rule on nearly all issues during the time the proceedings are before them, including most questions of due process that may be raised, we agree that the issues presented here should probably be ruled on in the first instance by the Commission since they arose as the result of actions taken by the Commission itself after the complaint was issued.

However, upon review of the motion and supporting documents, we find no basis in law or fact to grant the motion.

I. ALLEGED DISQUALIFYING PREJUDGEMENT BY THE COMMISSION.

The undisputed facts are as follows: On October 25, 1972, respondent PepsiCo published an offer to purchase common stock of Rheingold Corporation with an announced view to gain control of that company. On November 15, 1972, the Commission issued the complaint in this matter, challenging PepsiCo's tender offer and the acquisition of any shares pursuant thereto as violating Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act. The following day, PepsiCo and the Commission entered into an agreement under which the parties agreed to discuss a hold-separate agreement, and pending such discussion PepsiCo agreed that if the tender offer were successful it would take no steps to assume or exercise actual control of Rheingold nor take any steps to make any change in the corporate structure, board of directors, or management of Rheingold, before December 4, 1972, and thereafter without giving the Commission ten (10) days' notice.

In return, the Commission agreed that it would not file any action seeking to have a court order PepsiCo to hold the Rheingold

assets separate until on or after December 4, 1972. (Subsequently, respondent promised that it would take no action to abrogate the November 16, 1972, agreement until February 7, 1973, and thereafter only upon giving ten (10) days' notice to the Commission.)

On March 2, 1973, PepsiCo notified the Commission that it was terminating the hold-separate agreement. In order to prevent respondent from exercising control over Rheingold the Commission directed its general counsel to seek an injunction from the Second Circuit Court of Appeals under the All Writs Act, 28 U.S.C. § 1651(a).

On March 13, 1973, upon application of the Commission, through its general counsel, the Court of Appeals issued a temporary restraining order against PepsiCo prohibiting it from exercising any control over Rheingold pending its determination of the Commission's petition filed the same day for a preliminary injunction to preserve the *status quo pendente lite* of Rheingold in aid of the court's potential jurisdiction under Section 11(c) of the Clayton Act and Section 5(c) of the Federal Trade Commission Act.

On April 3, 1973, the Court issued its opinion on that petition, *Federal Trade Commission* v. *PepsiCo, Inc.*, 1973 Trade Cases ¶ 74,450. Although the Court denied the injunction sought, it did so on the condition that PepsiCo enter into a new hold-separate agreement of Rheingold's soft drink operation (one that would not be terminable upon notice by PepsiCo) and that the new management of Rheingold agree not to divest any of its beer business or assets pending the Commission's administrative proceeding. The Court continued its temporary restraining order until the time such hold-separate agreement was entered into and retained jurisdiction to enforce the agreement. Subsequently, on April 16, 1973, such an agreement was entered into by PepsiCo and the Commission.

Respondent argues that in seeking the injunction, the Commission prejudged this case so as to prejudice the fairness and appearance of fairness of future hearings. This contention is based primarily on the fact that the general counsel advised the Second Circuit there was a "reasonable probability" that a violation of law occurred and made assertions about Rheingold and the soft drink industry which are contested issues in the case.

There is no merit in the argument that such assertions were in excess of the Commission's authority to make, either directly or through its general counsel, to the Court of Appeals or that

the Commission will not be able to render a fair and impartial judgment in any future appeal in this matter.

Prior to seeking the injunction, the Commission had already issued its complaint stating that it had reason to believe that the tender offer and acquisition of Rheingold stock violated antitrust laws. Respondent does not (and indeed could not) claim that such assertion constituted "prejudgment" or otherwise denied it due process of law. Yet it was basically on the same information that led it to issue its complaint, that the Commission directed the General Counsel to seek an injunction *pendente lite* from the court. Such an application for a court order to protect the court's potential appellate jurisdiction is a procedure specifically sanctioned by the Supreme Court in *Federal Trade Commission* v. *Dean Foods*, 384 U.S. 597 (1966).

The Commission's general counsel in applying to the Court of Appeals did not argue that the acquisition violated the law, nor did it ask the Court to make such a ruling. The general counsel's argument was that the Commission had commenced administrative proceedings to determine that question and that on the basis of the information then available there was a "reasonable probability" of violation of law.[1] A showing of "reasonable probability" is often required before a preliminary injunction will be granted.[2] Indeed, the Second Circuit, on the basis of the affidavits submitted, held that such a showing was necessary and had been made in that case. For other reasons it denied the injunction.

The general counsel's representation to the Court that there was a "reasonable probability" of violation was not to be taken as a conclusive or final judgment by the Commission on the ultimate merits of its administrative complaint or any factual issues therein. That statement as well as other representations were based only on information then available. It was fully understood that all such assertions were tentative and yet to be tested in a full adversary proceeding. That this was the context in which the statements were made is evident from the Second Circuit's opinion which, while agreeing there was a showing of "reasonable

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[1] Additionally, of course, the general counsel set forth arguments as to why the Commission felt that a take-over of Rheingold by PepsiCo might make it difficult to assure that any later divestiture order would be adequate.

[2] See *Federal Trade Commission* v. *PepsiCo, Inc.*, 1973 Trade Cases ¶ 74,450 at 94.024 and authorities cited there. But *cf. Hamilton Watch Co.* v. *Benrus Watch Co.*, 206 F.2d 738, 740 (2d Cir. 1953); *Semmes Motors, Inc.* v. *Ford Motor Co.*, 1970 Trade Cases ¶ 73,263 (2d Cir. 1970).

probability" of law violation, noted that "at this stage of the proceeding" important questions of fact were still in dispute and could be finally determined only on a full record. *Id.* at 94,024 m.4.

To say that the Commission action seeking the aid of the Court of Appeals to preserve its ability to affirm and enforce an effective order should a violation of law be later determined, had the effect of disqualifying the Commission from proceeding further in the matter would be to nullify the *Dean Foods* holding. It would be equivalent to saying that a judge disqualifies himself from presiding at a trial on the merits if earlier he had issued a preliminary injunction against a party. Yet this clearly is not the law. *NLRB* v. *Kaase,* 346 F.2d 24, 28 (6th Cir. 1965). Heads of administrative agencies are similarly entitled to draw conclusions on the basis of preliminary data presented to them and institute appropriate actions within the framework of the law to carry out their enforcement responsibilities without being charged with prejudging the case.[3]

We also reject respondent's argument that the Commission in assuring the Court of Appeals that it would endeavor to conclude administrative proceedings by September 10, 1973, if the injunction were issued, demonstrated prejudgment. As respondent itself recognizes, these assurances were made to assure the Court that the injunctive relief sought would not impose undue injury upon PepsiCo's ownership rights in the stock it had acquired. In prior cases where All Writ injunctions have been issued at the request of the Commission, such assurances have been given for similar reasons. *Dean Foods,* 70 F.T.C. 1761

[3] In the leading case on disqualification of administrative officials, *Federal Trade Commission* v. *Cement Institute,* 333 U.S. 683, 702–03 (1948), the Supreme Court assumed that the Commission, prior to filing its complaint, had formed an opinion on the legality of the basing point system challenged in the complaint. Indeed, the Commission had made reports to Congress and the President to that effect. The Court held that:

"[T]he fact that the Commission had entertained such views as the result of its prior *ex parte* investigations did not necessarily mean that the minds of its members were irrevocably closed on the subject of respondents' basing point practices.

* * * * * * *

"* * * [No] decision of this Court would require us to hold that it would be a violation of procedural due process for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law. In fact, judges frequently try the same case more than once and decide identical issues each time, although these issues involve questions both of law and fact. Certainly, the Federal Trade Commission cannot possibly be under stronger constitutional compulsions in this respect than a court."

See also *Dean Foods Co.,* 70 F.T.C. 1146, 1226–1237 (1966).

(1966), and *OKC Corp.* [77 F.T.C. 1635], 3 CCH Trade Reg. Rep. ¶ 19,293 (1970) at 21, 460.

Notwithstanding these considerations, respondent argues that the expedited hearing schedule established by the Commission by order of April 12, 1973, for completion of Commission proceedings by September 10, was without justification and no longer necessary in view of the Court's decision denying the injunction. But this overlooks the fact that as of April 12, 1973, a new hold-separate agreement had not yet been reached, a condition imposed by the Court on PepsiCo before the injunction would be denied and the restraining order lifted. Furthermore, the Court's opinion seemed to anticipate that some sort of expedited schedule would be ordered by the Commission. Once the agreement had been reached, on April 16, the Commission, on motion of PepsiCo, rescinded its April 12 order, noting that "PepsiCo has now entered into a hold-separate agreement that is unrestricted in duration and in its motion clearly waives any insistence that these proceedings be completed by September 10 of this year" (Order of April 18, 1973) [82 F.T.C. 1233]. The Commission directed a new, expedited hearing schedule in accordance with the time frame suggested by PepsiCo.[4]

In the circumstances, we think it is obvious that respondent's argument is without merit.

II. ALLEGED EX PARTE CONTRACTS WITH PROSECUTORIAL STAFF.

Finally, respondent seeks dismissal of the complaint on the ground that *ex parte* oral arguments "may have been" made to the Commission at the time it met to consider the staff's request that an All Writs injunction be issued.[5] It also states that representatives of the Bureau of Competition "may have communicated" with the Commission with respect to its April 12, 1973, order.

Assuming for purposes of this motion that any such alleged communications would have been improper, the allegation that the staff was present at meetings during which these matters were discussed and decided by the Commission has been fully denied

[4] Respondent seems to argue that even this later modification of the time schedule constituted an unwarranted interference with functions of the administrative law judge. Nothing in our order, however, prevents the administrative law judge from certifying to the Commission, with his recommendation, a motion by any of the parties for a change in the schedule because of supervening circumstances.

[5] PepsiCo was provided, on March 7, 1973, with a copy of the staff's memorandum of March 5, 1973, urging the Commission to seek an All Writs injunction.

in affidavits filed by the Director of the Bureau of Competition, assistant directors, and Commission counsel in charge of the case. As to memoranda by the staff submitted to the general counsel concerning possible trial schedules, these have been turned over to respondent and contained no improper or prejudicial *ex parte* matters.

Accordingly, the Commission, having found no merit to respondent's motion,

It is ordered, That respondent's motion to dismiss the complaint herein be, and it hereby is, denied.

Commissioner Thompson not participating.

IN THE MATTER OF

ADOLPH COORS COMPANY

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

Docket 8845. Complaint, June 7, 1971—Decision, July 24, 1973.*

Order requiring a Golden, Colorado, brewery, among other things to cease illegally restraining competition by fixing prices, imposing territorial and customer restrictions upon its distributors, and using unfair short-term termination provisions in its contracts with distributors.

Appearances

For the Commission: *A. J. Joseph, T. Vakerics.*

For the respondent: *Leo N. Bradley, Earl K. Madsen, Bradley, Campbell & Carney,* Golden, Colorado.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act (Title 15, U.S.C. Section 41 *et seq.*) and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the party identified in the caption hereof and more particularly described and referred to hereinafter as respondent, has violated the provisions of Section 5 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the interest of the public, hereby issues its complaint stating its charges as follows:

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* Petition for Review was filed by respondent on August 15. 1973 in the Court of Appeals, 10th Circuit.