

Interlocutory Order

91 F.T.C.

IN THE MATTER OF

VERRAZZANO TRADING CORPORATION, ET AL.

*Docket 9038. Interlocutory Order, Mar. 17, 1978*

Order directing the filing of a memorandum and answer thereto setting forth further arguments as to unconstitutionality of certain provisions of the Wool and Textile Acts.

## ORDER WITH RESPECT TO BRIEFING OF CONSTITUTIONAL ISSUES

In preparation for oral argument in this matter, the Commission has noted that respondents take the position in their appeal brief that certain provisions of the Wool Products Labeling Act, 15 U.S.C. 68 and the Textile Fiber Products Identification Act, 15 U.S.C. 70 are unconstitutional insofar as they may require posting of a bond as a condition of continued importation by an importer found to have violated the Acts.

Respondents contend that they did not argue the constitutional issue before the administrative law judge because of his alleged position that the constitutional issue was not a proper one for consideration by the agency, a position that complaint counsel have maintained in their reply brief. Respondents contend that this matter should be remanded to the administrative law judge to consider their constitutional arguments.

While the Commission has made no final determination with respect to the contentions raised by the parties in their briefs regarding whether or not the Commission should review the constitutionality of laws it enforces, the Commission does believe that the constitutional issue is a question of law and can be adequately considered by the Commission if it determines to take it up, upon written briefs, without the need for further proceedings before an administrative law judge.<sup>1</sup> Accordingly, respondents should submit within 20 days from the date of this order a memorandum setting forth their constitutional arguments, if they desire that such further arguments be considered by the Commission. Complaint counsel shall respond within 15 days. Therefore,

*It is ordered,* That if respondents desire that the Commission consider further arguments as to the unconstitutionality of certain provisions of 15 U.S.C. 68 and 15 U.S.C. 70, they shall file a

<sup>1</sup> In reaching this determination the Commission has reviewed respondents' Motion received May 17, 1976; complaint counsel's "Reply to Respondents' Motion for a Subpoena Duces Tecum" received June 2, 1976; complaint counsel's "Motion to Strike" received May 18, 1976; respondents' reply thereto received June 14, 1976; respondents' "Reply to Complaint Counsel's Reply. . ." dated June 21, 1976; and Judge Teetor's "Ruling on Motion to Strike" of July 14, 1976.

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memorandum within 20 days of service of this order setting forth such further arguments. Complaint counsel shall thereupon file an answer within 15 days of receipt of respondents' memorandum.

Modified Order

91 F.T.C.

IN THE MATTER OF

## JOHNSON PRODUCTS COMPANY, INC.

MODIFIED ORDER, IN REGARD TO ALLEGED VIOLATION OF SECS.  
5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-2788. Complaint, Feb. 10, 1976 — Modified Order, Mar. 20, 1978*

This order modifies a consent order issued February 10, 1976, 41 FR 11172, 87 F.T.C. 206, which was remanded to the Commission for reconsideration by the Court of Appeals for the Seventh Circuit. Modifications in the order exclude references to the advertising firm, restrict provisions of the order to hair straightening products, and are designed to eliminate the significant differences between the original order and that of a competitive company (*Revlon, Inc.*).

## ORDER MODIFYING ORDER TO CEASE AND DESIST

On February 10, 1976 the Commission rejected an attempt by respondent Johnson Products Co., Inc. to withdraw from an executed consent order agreement and, on that date, the Commission entered a final cease and desist order. Thereafter, respondent petitioned the Court of Appeals for the Seventh Circuit to review and set aside the order, contending, *inter alia*, that the Commission patently abused its discretion by refusing to permit respondent to withdraw from the consent agreement in the face of its claim that the Commission had engaged in an "unfair and arbitrary discrimination between similarly situated competitors. . ." (*i.e.*, *Revlon, Inc.* and respondent). The Court stayed enforcement of the order and remanded the matter to the Commission, noting the prospect that the proceeding might be reopened and modified to eliminate some or all of the critical disparities between the *Revlon* and *Johnson* orders.

After extended negotiations, the parties executed an agreement, which will be treated as a petition to reopen this proceeding, containing an order to cease and desist. The modifications contained in this agreement substantially eliminate the significant differences between the *Revlon* and *Johnson* orders.

The Commission has duly considered the modifications encompassed in the agreement and has determined that the order should be so modified. Accordingly,

*It is ordered*, That the proceeding be, and it hereby is, reopened.

*It is further ordered*, That the order to cease and desist, as it applies to respondent Johnson Products Company, Inc., be, and it hereby is, modified by striking the section entitled "Order" and substituting therefor the following:

## ORDER

I. *It is ordered*, That respondent Johnson Products Company, Inc., a corporation, 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, or distribution of Ultra Sheen Creme Relaxer (Ultra Sheen Relaxer) or any hair care product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

A. Representing in writing, orally, visually, or in any other manner, directly or by implication, that:

1. Any hair straightening product is comfortable, gentle or safe.
2. Any hair straightening product is easy to use or to apply.
3. Any hair straightening product feels cool to skin or scalp.

B. Representing, in any manner, directly or by implication, the efficacy of any hair straightening product or the ingredients therein, unless, at the time such representation is made, respondent has in its possession a reasonable basis, consisting of competent and reliable controlled tests to support such representation; or misrepresenting in any manner the nature of any such product or its ingredients or the effect of any such product or its ingredients on hair or skin or any other structure of the body.

C. Representing, in any manner, directly or by implication, the safety of any hair care product or the ingredients therein, unless at the time such representation is made, respondent has in its possession a reasonable basis, consisting of competent and reliable controlled tests, to support such representation. For purposes of this provision, failure to disclose facts shall not constitute a representation.

D. Disseminating or causing to be disseminated any advertisement of Ultra Sheen Relaxer or any hair straightening product of similar composition, which fails to disclose, clearly and conspicuously, with nothing to the contrary or in mitigation thereof, the following statement exactly as it appears below:

WARNING: Follow directions carefully to avoid skin and scalp irritation, hair breakage and eye injury.

II. *It is further ordered*, That respondent Johnson Products Company, Inc., a corporation, 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, or distribution of Ultra Sheen Relaxer or any hair care product, do forthwith cease and desist from:

A. Disseminating or causing to be disseminated by United States mail or by any means in or having an effect upon commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase of any such product, any advertisement which contains a representation prohibited by Paragraph I of this order or which omits a disclosure for such product required by Paragraph I of this order.

B. Disseminating or causing to be disseminated by any means, for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase of any such product in or having an effect on commerce as "commerce" is defined in the Federal Trade Commission Act, as amended, any advertisement which contains a representation prohibited by Paragraph I of this order or which omits a disclosure for such product required by Paragraph I of this order.

III. *It is further ordered.* That respondent Johnson Products Company, Inc., a corporation, 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 offering for sale, sale, or distribution of Ultra Sheen Relaxer or any hair straightening product of similar composition in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from failing to include clearly and conspicuously on the information panel of the product package (*i.e.*, the package containing the immediate container of the professional or home use hair straightening product), on the package insert, and on the label of the relaxer container of any such product, with nothing to the contrary or in mitigation thereof, the following disclosures exactly as they appear below:

WARNING:

1. This product contains sodium hydroxide (lye). You must follow directions carefully to avoid skin and scalp burns, hair loss, and eye injury.
2. Do not use if scalp is irritated or injured.
3. Do not use on bleached hair. Do not use on permanently colored hair which is breaking, splitting or otherwise damaged. For hair that has been permanently colored and shows no sign of damage, use only mild strength formula.
4. If you have previously relaxed your hair, relax only the new growth, as described in the directions.
5. If the relaxer causes skin or scalp irritation, rinse out immediately and wash with shampoo in the kit. If irritation persists or if hair loss occurs, consult a physician.

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6. If the relaxer gets into eyes, rinse immediately and consult a physician.

*Provided, however,* that if such hair straightening product is offered for sale, sold or distributed without a neutralizing shampoo, respondent will disclose the following in place of Warning No. 5 above:

5. If the relaxer causes skin or scalp irritation, rinse out immediately and wash with a non-alkaline shampoo (ph below 7). If irritation persists, or if hair loss occurs, consult a physician.

*Provided further, however,* that respondent may use existing retail product packages, package inserts, and container labels if such packages, inserts and labels conform to the order entered in this matter on February 10, 1976.

IV. *It is further ordered,* That respondent shall distribute a copy of this order to its present and future officers, directors, and operating division and that respondent secure from each such person a signed statement acknowledging receipt of the order.

V. *It is further ordered,* That respondent maintain complete business records relative to the manner and form of its continuing compliance with the terms and provisions of this order. Each record shall be retained by respondent for at least three years after it is made.

VI. *It is further ordered,* That respondent notify the Commission at least thirty days prior to any proposed change in respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation or corporations, the creation or dissolution of subsidiaries, a change in the corporate name or address, or any other change in the corporation which may affect compliance obligations arising out of this order.

VII. *It is further ordered,* That the respondent herein shall, within sixty (60) days after service of this order, file with the Commission a written report setting forth in detail the manner and form of its compliance with this order; *provided, however,* that such compliance report need not contain materials or information previously submitted to the Commission to demonstrate compliance with the order entered in this matter on February 10, 1976.

Complaint

91 F.T.C.

IN THE MATTER OF  
FERRARA IMPORTS, LTD., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF  
THE FEDERAL TRADE COMMISSION AND WOOL PRODUCTS  
LABELING ACTS

*Docket C-2918. Complaint, Mar. 24, 1978—Decision, Mar. 24, 1978*

This consent order, among other things, requires a New York City importer and manufacturer of men's clothing to cease misrepresenting, or failing to affix to their products, required fiber disclosure labels. The firm is additionally required to furnish affected customers with a copy of the order.

*Appearances*

For the Commission: *Jerry R. McDonald.*

For the respondents: *Melvin Kynter, New York City.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and the Wool Products Labeling Act of 1939, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Ferrara Imports, Ltd., a corporation, and Louis Ferrara, individually and as an officer of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Acts and the rules and regulations promulgated under the Wool Products Labeling Act of 1939, and it now appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Ferrara Imports, Ltd. 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 655 Madison Ave., New York, New York.

Respondent Louis Ferrara 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 is the same as that of the corporate respondent.

Respondents are engaged in the business of manufacturing men's clothing, including but not limited to men's suits, and the sale and distribution of said items of clothing.

PAR. 2. Respondents, now and for some time last past, have imported for introduction into commerce, introduced into commerce,

sold, transported, distributed, delivered for shipment, shipped, and offered for sale, in commerce, as "commerce" is defined in the Wool Products Labeling Act of 1939, wool products as "wool product" as defined therein.

PAR. 3. Certain of said wool products were misbranded by respondents within the intent and meaning of Section 4(a)(1) of the Wool Products Labeling Act of 1939 and the rules and regulations promulgated thereunder, in that they were falsely and deceptively stamped, tagged, labeled, or otherwise identified with respect to the character and amount of the constituent fibers contained therein.

Among such misbranded wool products, but not limited thereto, were samples, swatches or specimens used to effect sales of certain wool blend men's suits stamped, tagged, labeled or otherwise identified by respondents as "35% wool, 50% polyester and 15% other fibers," whereas, in truth and in fact, said products contained substantially different fibers and amounts of fibers than represented.

PAR. 4. Certain of said wool products were further misbranded by respondents in that they were not stamped, tagged, labeled, or otherwise identified as required under the provisions of Section 4(a)(2) of the Wool Products Labeling Act of 1939 and in the manner and form as prescribed by the rules and regulations promulgated under said Act.

Among such misbranded wool products, but not limited thereto, were wool products, namely samples, swatches or specimens used to effect sales of wool blend men's suits, with labels on or affixed thereto, and wool blend men's suits, with no labels on or affixed thereto, which failed to disclose the percentage of the total fiber weight of the said wool products, exclusive of ornamentation not exceeding 5 per centum of said total fiber weight, of (1) wool, (2) reprocessed wool, (3) reused wool, (4) each fiber other than wool, when said percentage by weight of such fiber is 5 per centum or more, and (5) the aggregate of all other fibers.

PAR. 5. The acts and practices of the respondents as set forth above were, and are, in violation of the Wool Products Labeling Act of 1939 and the rules and regulations promulgated thereunder, and constituted, and now constitute, unfair methods of competition and unfair and deceptive acts and practices, in or affecting commerce, under the Federal Trade Commission Act, as amended.

#### 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 New York 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, as amended, and the Wool Products Labeling Act of 1939; 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 Acts, 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 sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Ferrara Imports, Ltd. 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 655 Madison Ave., New York, New York.

Respondent Louis Ferrara is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation, 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 Ferrara Imports, Ltd., a corporation, its successors and assigns, and its officers, and Louis Ferrara, individually and as an officer of said corporation, and respondents' representatives, agents, and employees, directly or through and corporation, subsidiary, division or any other device, in connection with the introduction or importing for introduction, or manufacture for introduction, into commerce, or the offering for sale, sale,

transportation, distribution, delivery for shipment or shipment, in commerce, of wool products as "commerce" and "wool product" are defined in the Wool Products Labeling Act of 1939, do forthwith cease and desist from misbranding such products by:

1. Falsely and deceptively stamping, tagging, labeling, or otherwise identifying such products.
2. Failing to securely affix to or place on, each such product a stamp, tag, label, or other means of identification showing in a clear and conspicuous manner each element of information required to be disclosed by Section 4(a)(2) of the Wool Products Labeling Act of 1939.

*It is further ordered,* That respondents mail a copy of this order to each of their customers that purchased the wool products which gave rise to this complaint.

*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 each change in business or employment status, which includes discontinuance of his present business or employment and each affiliation with a new business or employment, for ten (10) years following the effective date of this order. Such notice shall include respondent's current business address and a description of the business or employment in which he is engaged as well as a description of his duties and responsibilities. The expiration of the notice provision of this paragraph shall not affect any other obligations arising under this order.

*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.

Interlocutory Order

91 F.T.C.

IN THE MATTER OF

## JIM WALTER CORPORATION

*Docket 8986. Interlocutory Order, Mar. 30, 1978*

Denial of respondent's petition for reconsideration of final order and accompanying opinion, for reopening the proceeding for issuance of an environmental impact statement, for tolling statutory time for filing petition for review, and for oral argument.

ORDER DENYING PETITION FOR RECONSIDERATION AND OTHER  
RELIEF

Respondent, Jim Walter Corporation ("Jim Walter") has filed a petition for reconsideration of the Commission's Final Order and accompanying Opinion, for reopening the proceeding to receive certain affidavits, for issuance of an environmental impact statement, for tolling the statutory time for filing a petition for review in the court of appeals, and finally, for oral argument on these issues.

Jim Walter's petition for reconsideration seeks modification of the Commission's Final Order so that it may retain Carey-Canadian Mines, Ltd. ("Carey-Canadian"), a Canadian subsidiary of Panacon Corporation ("Panacon"), engaged in the mining of asbestos fiber, as well as the Philip Carey Division plant at Elizabethtown, Kentucky, which is engaged in the manufacture of urethane foam insulation.

The threshold question which must be faced in connection with a petition for reconsideration filed pursuant to Rule 3.55 is whether the petition raises issues which petitioner had a prior opportunity to address before the Commission. Respondent has been on notice since the commencement of this proceeding that, if liability were found, effective relief might encompass divestiture of all of the Panacon assets acquired by the Celotex Corporation.<sup>1</sup> Allowing respondent yet another opportunity to suggest an appropriate remedy in this case would serve to bifurcate the Commission's adjudicative proceedings into a liability phase, concluding upon issuance of a final order, and a remedy phase, commencing with a petition for reconsideration. Hence, for reasons of administrative efficiency and fairness to all parties, respondent's petition for reconsideration and for reopening of the record may be denied as not in accordance with Rule 3.55.

<sup>1</sup> The Administrative Law Judge's order would have required respondent to divest all of the assets of the Philip Carey Division of Panacon, including the Elizabethtown plant. I.D. P. 64-65. Although the Law Judge did not order divestiture of Carey-Canadian, complaint counsel urged on appeal that the Commission order divestiture of Celotex's new Goldsboro plant, as well as all Panacon assets, including Carey-Canadian. CAB at 26-27. Thus, respondent has been on notice from the onset of this litigation that Carey-Canadian might be divested and of possible obstacles to such divestiture, stemming from Canada's Foreign Investment Review Act, 21-22 Eliz. II, c. 46 (Can.), which was enacted on September 12, 1973, more than ten months prior to the issuance of the complaint.

Even considering the merits of respondent's petition, our decision remains the same. Only restoration of a viable competitive entity can mitigate the substantial harm to competition brought about by respondent's acquisition. As we have recently emphasized in a related context, the Commission must typically rely upon an inference that the acquired firm, which was a viable entity prior to its acquisition, is likely to be an effective future competitor after divestiture. *Fruehauf Corporation, Inc.*, Dkt. No. 8972 (Slip Op. at 35-36) (Feb. 22, 1978 [91 F.T.C. 132]); *RSR Corporation*, 88 F.T.C. 873, 894 (1976). Since the passage of time might weaken this inference, it is essential that divestiture incorporate all additions and improvements made to the original assets. That the Elizabethtown plant was under construction by Philip Carey at the time of the acquisition and had not yet begun operations is therefore of little consequence. Its value to a healthy, independent Philip Carey must be presumed in the absence of convincing proof to the contrary.

With respect to Carey-Canadian, Jim Walter highlights in its petition the percentage of Carey-Canadian sales to Philip Carey roofing plants. While such data is clearly material to formulation of an effective remedy, (see Commission Opinion at 49), it only represents part of the picture. As we noted previously, the Philip Carey division has purchased as much as 40 to 55 percent of its fiber needs from Carey-Canadian. Since most of this asbestos is apparently utilized for production of asphalt and tar roofing products, divestiture of Carey-Canadian is necessary to insure Philip Carey's ready access to supply of an essential raw material in addition to its successful reinstatement as a vigorous competitor in the product market found relevant in this case.<sup>2</sup>

Petitioner further argues that divestiture of Carey-Canadian cannot be accomplished without the approval of the Canadian Government and that political developments in the Province of Quebec, including the threat of nationalization, will be a "substantial negative factor" for prospective purchasers. We do not understand Jim Walter to contend that divestiture of Carey-Canadian is impossible, only that it cannot be accomplished in a facile manner. It is clearly inappropriate at this time to prognosticate on the likelihood of finding a Canadian purchaser for the subject assets or on the possibility of obtaining Canadian approval in the event a non-Canadian purchaser is found. Any insurmountable difficulties which do arise are best considered in the context of compliance.

<sup>2</sup> Even if the percentage of Philip Carey's output attributed to asphalt and tar roofing products utilizing asbestos is relatively small, the contribution to profit may be proportionately greater. And, of course, that does not take into account Carey-Canadian's own substantial contribution to the viability of Panacan prior to the acquisition by Jim Walter. (See CX-39-0)

Jim Walter has also petitioned the Commission for issuance of a detailed environmental impact statement or a statement as to why an environmental impact statement is not required. In support of its petition, respondent argues that the Commission's order could result in violation of antipollution laws in the event respondent divests to a "notorious polluter." At the outset, we do not believe an environmental impact statement need be prepared in connection with an order issued in an adjudicative proceeding. See Rule 1.82(d). Even were that rule inapplicable, we find nothing here to justify the filing of an impact statement.

Respondent's argument necessarily requires several difficult assumptions. We are required first to assume that potential purchasers will violate the law and second that Federal, state, and local environmental agencies are powerless to prevent transgressions of the law. We are also asked to assume that Jim Walter would divest to such a purchaser and that the Commission would concur in the transaction.

Further, a review of the case law confirms our view that the Commission's order cannot by any stretch of the imagination be characterized as a "major Federal action significantly affecting the quality of the human environment" 42 U.S.C. 4332(2)(c)(1970). The order here represents a partial return to the status quo existing prior to the acquisition. And like divestiture orders generally, the order affects only the ownership of existing plants and facilities; it does not necessarily entail the creation of new capacity or the consumption of additional environmental resources. See *Gifford-Hill & Co., Inc v. FTC*, 389 F. Supp.167, 175 (D.D.C. 1974), *aff'd*, 523 F.2d 730 (D.C. Cir. 1975); *National Ass'n of Gov't Employees v. Rumsfeld*, 413 F. Supp. 1224, 1229-30 (D.D.C. 1976); *Duke City Lumber Co. v. Baty*, 382 F. Supp. 362, 375 (D.D.C. 1974), *aff'd in part*, 539 F.2d 220 (D.C. Cir. 1976).

*It is ordered*, therefore, that respondent's petition for reconsideration of the Final Order and accompanying Opinion in this proceeding for reopening the proceeding for issuance of an environmental impact statement, for tolling the statutory time for filing a petition for review, and for oral argument is hereby denied.

Chairman Pertschuk did not participate.

IN THE MATTER OF  
THE COCA-COLA COMPANY, ET AL.

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

*Docket 8855. Complaint, July 15, 1971 — Final Order, April 7, 1978*

This order, among other things, requires an Atlanta, Ga. soft drink manufacturer and three parent bottlers to cease imposing in any manner territorial limitations or class of customer restrictions on its licensed Coca-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 information submitted by its bottlers.

*Appearances*

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

For the respondents: *Gordon B. Spivack, Harry G. Sklarsky and Thomas D. Brislin, Lord, Day & Lord, New York City.*

*J. Guy Beatty, Jr., Miller, Martin, Hitching, Tipton, Lenihan & Waterhouse, Chattanooga, Tenn. for Coca-Cola Bottling Co. (Thomas), Inc. and Coca-Cola Bottling Works (Thomas), Inc.*

For the intervenors: *Willis B. Snell, William M. Hames, Michael L. Denger, Stephen S. Cowen and Robert W. Clark, III, Sutherland, Asbill & Brennan, Washington, D.C. for The Coca-Cola Bottlers' Association, The Scioto Coca-Cola Bottling Company, Roddy Manufacturing Company, Elberton Coca-Cola Bottling Company, Westminster Coca-Cola Bottling Company, Inc. and Texas Coca-Cola Bottling Company.*

*Thomas Matthews, Wald, Harkrader & Ross, Washington, D.C. for Coca-Cola Bottling Company of Los Angeles, Quaker State Coca-Cola Bottling Co. and Detroit Coca-Cola Bottling Company.*

*Bartlett H. McGuire, Davis, Polk & Wardwell, New York City for The Coca-Cola Bottling Company of New York.*

*Theodore Kleinman, Zuckert, Scoutt & Rasenberger, Washington, D.C. for Associated Coca-Cola Bottling Co.*

*John P. Gaither, Witt, Gaither, Richardson, Henniss & Whitaker, Chattanooga, Tenn. for Consolidated Coca-Cola Bottling Co.*

*Robert N. Nanovic, Nanovic & McKinley, Jim Thorpe, Pa. for Coatesville Coca-Cola Bottling Works, Inc.*

*William H. Sanders, Blackwell, Sanders, Matheny, Weary & Lombardi, Kansas City, Mo. for The Coca-Cola Bottling Company of Mid-America.*

*Joe A. Walters, O'Conner & Hannan*, Minneapolis, Minn. for Coca-Cola Bottling Midwest, Inc.

## COMPLAINT

The Federal Trade Commission, having reason to believe that the parties named in the caption hereof, each of which is hereby made and is sometimes hereinafter referred to as respondent(s), have 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 public interest, hereby issues its complaint, stating its charges in this 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 respondents' concentrate for use in the manufacture and sale, primarily at wholesale, of respondents' pre-mix or post-mix syrups or soft drink products, or who purchases respondents' 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 delivered to retail outlets or wholesalers;

(c) Concentrate – the basic soft drink ingredient sold to bottlers by respondent, usually as a syrup, and 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 tank, usually having about a five-gallon capacity, and mixes it at the point of sale with five ounces of carbonated water to produce approximately 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 tank, usually having about a five-gallon capacity, a finished serving of soft drink product containing both syrup and carbonated water, “pre-mixed,” to produce a 100 six-ounce soft drink servings per tank; and

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

PAR. 2. Respondent The Coca-Cola Company, sometimes hereinafter referred to as Coca-Cola, is a corporation organized, existing and conducting its business under and pursuant to the laws of the State of Delaware. It maintains its office and principal place of business at 310 North Ave., N.W., Atlanta, Georgia. The Coca-Cola Company and subsidiaries had net sales of \$1,185,808,864 (approximately 45 percent of which is accountable to foreign operations), and assets of \$802,100,548 in 1968. In 1968, Coca-Cola made sales to over 900 domestic bottlers located throughout the United States. [3]

Respondent Coca-Cola Bottling Co. (Thomas), Inc., sometimes hereinafter referred to as Thomas Company, is a corporation organized, existing and conducting its business under and pursuant to the laws of the State of Delaware. It maintains its office and principal place of business at 1600 American Bank Building, Chattanooga, Tennessee. In 1968, Thomas Company made sales to over 196 bottlers located principally in Indiana, Maryland, Mississippi, New Jersey, New York, Ohio, Pennsylvania, Virginia and West Virginia.

Respondent Coca-Cola Bottling Works (Thomas), Inc., sometimes hereinafter referred to as Thomas Works, is a corporation organized, existing and conducting its business under and pursuant to the laws of the State of Delaware. It maintains its office and principal place of business at 1600 American Bank Building, Chattanooga, Tennessee. In 1968, Thomas Works made sales to over 65 bottlers located principally in the States of Kentucky and Tennessee.

Respondent Coca-Cola Bottling Works 3rd, Inc., sometimes hereinafter referred to as Works 3rd, is a corporation organized, existing and conducting its business under and pursuant to the laws of the State of Delaware. It maintains its office and principal place of business at 1600 American Bank Building, Chattanooga, Tennessee. In 1968, Works 3rd made sales to over 25 bottlers located principally in the States of Pennsylvania and New Jersey.

PAR. 3. Respondent Coca-Cola, through its Coca-Cola U.S.A. division, is engaged principally in the manufacture and sale of soft drink products and concentrate which it sells to over 900 bottlers who

purchase the concentrate under a license to produce and sell soft drink products under such trade names of respondent Coca-Cola as "Coca-Cola" ("Coke"), "TAB," "Sprite," "Fresca," "Fanta" and "Simba." 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 soft drink products and concentrate to its bottlers, Coca-Cola operates bottling plants in 27 areas of the United States and sells soft drink products to retailers. [4]

Respondent Thomas Company has operated for many years as a parent bottler under an agreement with Coca-Cola by which Thomas Company was granted certain rights from Coca-Cola with respect to the sale of Coca-Cola soft drink products in certain designated territories. Thomas Company is engaged principally in the purchase of concentrate from Coca-Cola for resale by Thomas Company to numerous bottlers which have obtained licenses from it to bottle and resell certain specified trade name soft drink products of Coca-Cola.

Respondent Thomas Works has operated for many years as a parent bottler under an agreement with Coca-Cola by which Thomas Works was granted certain rights from Coca-Cola with respect to the sale of Coca-Cola soft drink products in certain designated territories. Thomas Works is engaged principally in the purchase of concentrate from Coca-Cola for resale by Thomas Company to numerous bottlers which have obtained licenses from it to bottle and resell certain specified trade name soft drink products of Coca-Cola.

Respondent Works 3rd has operated for many years as a parent bottler under an agreement with Coca-Cola by which Works 3rd was granted certain rights from Coca-Cola with respect to the sale of Coca-Cola soft drink products in certain designated territories. Works 3rd is engaged principally in the purchase of concentrate from Coca-Cola for resale by Works 3rd to numerous bottlers which have obtained licenses from it to bottle and resell certain specified trade name soft drink products of Coca-Cola.

PAR. 4. Respondents are 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 their 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 their businesses, respondents, except to the extent limited by the acts, practices and methods of competition hereinafter alleged, have been and are now in competition with other corporations, firms, partnerships and persons engaged in

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the manufacture, processing, distribution and sale of concentrate and soft drink products in commerce.

PAR. 6. Respondents have hindered, frustrated, lessened and eliminated competition in the distribution and sale of pre-mix and post-mix syrups and soft drink products [5] sold under their trade names by restricting their bottlers from selling outside of a designated geographical area. This restriction is set forth in the agreement between respondents and their bottlers.

A typical license between respondent Coca-Cola and its bottlers provides that as to a specifically described geographic territory:

. . . COMPANY agrees to furnish to BOTTLER, and only to furnish for the territory herein referred to, sufficient syrup for bottling purposes to meet the requirements of BOTTLER in the territory herein described.

\* \* \* \* \*

. . . COMPANY does hereby select BOTTLER as its sole and exclusive customer and licensee for the purpose of bottling the Bottlers' bottle syrup, COCA-COLA, in the territory described.

[BOTTLER agrees] . . . not to use trade-marks COCA-COLA or COKE, nor bottle nor vend said product except in the territory herein referred to. This limitation, however, is not to prevent BOTTLER from acquiring similar rights for other territory.

\* \* \* \* \*

[BOTTLER agrees] . . . not to use said distinctive [COCA-COLA] bottle for any other purpose than the bottling of COCA-COLA, and not in any territory except as herein referred to.

A typical license between respondents Coca-Cola Bottling Co. (Thomas), Inc. and Coca-Cola Bottling Works (Thomas), Inc. and the bottlers of each provides in part that licensor, wishing to assign to the bottler certain rights as to a specifically described geographic territory which has been received by approved transfer from The Coca-Cola Company, agrees:

. . . to obtain and furnish to party of the second part [bottler] and only to obtain, for the territory herein referred to, sufficient syrup for bottling purposes to meet the requirements of party of the second part in the territory herein described, provided [6] party of the first [licensor] can obtain the delivery to it of such syrup from The Coca-Cola Company under the contract existing between party of the first part and The Coca-Cola Company.

\* \* \* \* \*

[To select bottler] . . . as its sole and exclusive customer and licensee for the purpose of bottling Bottlers' Coca-Cola syrup, and using the name Coca-Cola thereon in the territory herein described.

In consideration therefor, bottler agrees:

. . . Not to use the name Coca-Cola nor bottle nor vend said product except in the territory herein referred to without the written consent of party of the first part and The Coca-Cola Company. This limitation, however, is not to prevent party to the second part from obtaining such rights from parties authorized to use the name Coca-Cola and to bottle and vend said product.

\* \* \* \* \*

. . . To order, for the purpose of bottling Coca-Cola, the distinctive bottle, and none other, adopted or that may be adopted by party of the first part; to use said distinctive bottle and none other, in bottling Coca-Cola, and not to use said distinctive bottle for any other purpose than the bottling of Coca-Cola, and not in any territory except as herein referred to without the written consent of party to the first part and The Coca-Cola Company.

The license restrictions between Coca-Cola Bottling Works 3rd, Inc. and its bottlers are substantially similar to that of Coca-Cola, Coca-Cola Bottling Co. (Thomas), Inc. and Coca-Cola Bottling Works (Thomas) Inc. Coca-Cola is a party to the agreement between Coca-Cola Bottling Co. (Thomas), Inc., Coca-Cola Bottling Works (Thomas), Inc. and Coca-Cola Bottling Works 3rd, Inc. and their bottlers.

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

(a) Competition between and among respondents' bottlers in the distribution and sale of "Coca-Cola" ("Coke"), "TAB," "Sprite," "Fresca," "Fanta" and "Simba" brands of soft drink products has been eliminated; [7]

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

(c) Competition between and among Coca-Cola's bottling operations and bottlers licensed by Coca-Cola Bottling Co. (Thomas), Inc., Coca-Cola Bottling Works (Thomas), Inc. and Coca-Cola Bottling Works 3rd, Inc. in the sale and distribution of Coca-Cola's soft drink products at the wholesale level has been eliminated;

(d) Competition between and among bottlers licensed by Coca-Cola and bottlers licensed by Coca-Cola Bottling Co. (Thomas), Inc., Coca-Cola Bottling Works (Thomas), Inc. and Coca-Cola Bottling Works 3rd, Inc. in the sale and distribution of Coca-Cola soft drink products at the wholesale level has been eliminated;

(e) Innumerable retailers and other customers have been deprived of the right to purchase "Coca-Cola" ("Coke"), "TAB," "Sprite," "Fresca," "Fanta" and "Simba" brands of soft drink products from the bottler of their choice at competitive prices; and

(f) Consumers of "Coca-Cola" ("Coke"), "TAB," "Sprite," "Fresca," "Fanta," and "Simba" brands of soft drink products have been deprived of the opportunity of obtaining such products in an unrestricted market and at competitive prices.

PAR. 8. Respondents' 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 pre-mix, post-mix and 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 respondents 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 The Coca-Cola Company (hereinafter "Coca-Cola") enters with its bottlers impose an illegal restraint on competition. The provision limits the geographical territory in which a bottler may manufacture and sell "Coca-Cola" products.

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

- (a) between independent bottlers of "Coca-Cola" products;
- (b) at the wholesale level between independent bottlers of "Coca-Cola" products and "Coca-Cola's" own bottlers;
- (c) at the wholesale level between "Coca-Cola's" own bottling operations and bottlers licensed by the other respondents; and
- (d) at the wholesale level between bottlers licensed by "Coca-Cola" and those licensed by the other respondents.

It also was alleged that retailers and other customers had been deprived of the right to purchase "Coca-Cola" products from the bottler of their choice at competitive prices.

Lastly, it was alleged that consumers of "Coca-Cola" products have been deprived of the opportunity of obtaining "Coca-Cola" products in an unrestricted market and at competitive prices. [4]

In their answers, "Coca-Cola" and the three other respondents (Coca-Cola Bottling Co. (Thomas), Inc. (hereinafter Thomas Company), Coca-Cola Bottling Works (Thomas), Inc. (hereinafter Thomas Works), and Coca-Cola Bottling Works 3rd, Inc. (hereinafter Works 3rd)) admitted that they are "in commerce" within the meaning of the Federal Trade Commission Act. They denied that the territorial exclusivity provisions have any illegal anticompetitive effects.

As an affirmative defense, respondents stated that in *The Coca-Cola Bottling Co. v. The Coca-Cola Co.*, 269 F. 796 (D. Del. 1920), the District Court held in an opinion which has not been rescinded, vacated or modified, that the restraints included in the contracts between respondents and the bottlers are lawful and valid under federal and state antitrust laws and not in unreasonable restraint of trade.

They also asserted the defense that the Commission had failed to include indispensable parties, the bottlers, who were the other parties to the contracts, and that to the extent the Commission's proceeding sought to eliminate or abridge the respondents' and bottlers' contractual property rights, the proceeding would impose a penalty or forfeiture barred by the statute of limitations (28 U.S.C. 2462).

Lastly, in summary, they asserted (1) that a Commission order would place them in the position of violating either that order or the District Court's order, depending on which they complied with; (2) that the effect of a Commission order would be unfair to consumers and small businessmen bottlers and anticompetitive by increasing prices and accelerating the demise of small grocers; (3) that respondents' constitutional right to due process would be violated; and (4) that there is no public interest in the proceeding.

Because of the time which has elapsed since the complaint issued, it is appropriate to set forth a listing of significant events which have taken place in this proceeding since July 15, 1971. These were: [5]

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 August 27, 1971, September 8, 1971, and December 14, 1971, motions to dismiss the complaint for non-joinder of indispensable parties (*i.e.*, all of the licensee bottlers) were filed by "Coca-Cola," the other respondents, and the intervenors participating in the proceedings at that time. These motions were denied by the administrative law judge on January 7 and 12, 1972.

3. On April 21, 1972, the respondents filed a complaint for injunctive relief and a declaratory judgment against the Commission

in the United States District Court for the Northern District of Georgia. The Court dismissed the complaint on May 22, 1972. That dismissal was appealed to the United States Court of Appeals for the Fifth Circuit on June 6, 1972. The appellate court affirmed the decision of the District Court on February 20, 1973. On May 8, 1973, respondents sought *certiorari* to the Supreme Court; however, the Court denied the writ on October 9, 1973 (*Coca-Cola Co. v. Federal Trade Commission*, 342 F. Supp. 670 (N.D. Ga. 1972), *aff'd*, 475 F.2d 299 (5th Cir. 1973), *cert. denied*, 414 U.S. 877 (1973)).

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 April 5, 1973.

5. On March 15, 1974, intervenors Association, Scioto, Elberton, Roddy, Westminster, and Texas filed a motion to require complaint counsel to file an environmental impact statement and to stay the proceedings until such a statement is filed. The administrative law judge denied that motion on April 2, 1974. The intervenors then filed a motion to reconsider or to certify the motion to the Commission on April 10, 1974. That motion was denied by the administrative law judge on May 30, 1974. [6]

6. On July 30, 1974, complaint counsel filed a motion to authorize disclosure of documents containing nonpublic business information to be used at the hearings. On October 3, 1974, the administrative law judge authorized the disclosure.

7. On August 12, 1974, respondents and intervenors filed a motion for issuance of a subpoena duces tecum to the Secretary of the Commission to have him produce materials in the Commission's nonpublic files. Briefs in support and opposition were filed on December 9 and 10, 1974. The subpoena was quashed by order of the Commission dated March 4, 1975.

It also should be pointed out that in addition to the intervenors identified above a number of petitions to intervene were filed by a variety of other, small and large Coca-Cola bottlers beginning on September 3, 1971, with the last filed on March 11, 1975. All such petitions were granted. As a result, there were 14 individual bottler intervenors plus the Coca-Cola Bottlers' Association. In early 1971, 99 percent of the domestic bottlers of Coca-Cola, accounting for about 815 productive facilities, were members of the Association.

The adjudicative hearings were held in Washington, D.C., from May 5 through June 11, 1975. The record was closed for the reception of evidence on July 7, 1975.

The findings of fact following are based on a review of the allegations made in the complaint, respondents' answers, stipulations

entered by counsel, the evidentiary record and upon a reading of the transcript record of the testimony and consideration of the demeanor of the witnesses at the hearings. In addition, the proposed findings of fact, conclusions and orders, together with reasons and briefs in support thereof filed by both sides have been given careful consideration. To the extent not adopted by this decision in the form proposed or in substance, they are rejected as not supported by the record or as immaterial. [7]

For the convenience of the Commission and other readers of this initial decision, the findings of fact include references to supporting evidentiary items in the record. Such references are intended to serve as guides to the testimony, evidence and exhibits supporting the findings of fact. They do not necessarily represent complete summaries of the evidence considered in arriving at such findings. The following abbreviations have been used:

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

RX - Respondents' Exhibit, followed by number of exhibit being referenced.

Tr. - Transcript preceded by the name of the witness and followed by the page number.

#### FINDINGS OF FACT

##### *The Coca-Cola Company*

1. In 1886 Mr. John S. Pemberton invented a formula for a soft drink syrup and first prepared and sold a soft drink made pursuant to that formula under the trademark Coca-Cola (Stipulation No. 1, RX 1A, Tr. 555; Smith Tr. 677).

2. In 1891 Mr. Asa G. Candler acquired Mr. Pemberton's rights to the secret formula for Coca-Cola and to the trademark Coca-Cola. In 1892 Mr. Candler formed The Coca-Cola Company, a Georgia corporation, predecessor in interest to the respondent "Coca-Cola" (Smith, Tr. 678; Stipulation No. 1, RX 1A-B, Tr. 555). [8]

3. Respondent, "Coca-Cola," is a corporation organized, existing and conducting its business under and pursuant to the laws of the State of Delaware. "Coca-Cola" maintains an office and its principal place of business at 310 North Ave., NW., Atlanta, Georgia. "Coca-Cola" and its subsidiaries in 1968 had consolidated net sales of \$1,185,808,864 and consolidated assets of \$802,100,548. Approximately one-third and more of the sales are accountable to foreign operations. In 1968 "Coca-Cola" sold or shipped syrup or concentrates to

approximately 900 domestic bottlers located throughout the United States. (Admitted in Answer; Stipulation No. 2, CX 1243A-B, Tr. 465.) When the complaint issued in July 1971, there were 726 bottlers operating 804 bottling plants (Smith, Tr. 687).

#### Respondents' Business

4. "Coca-Cola," through its Coca-Cola U.S.A. division, is engaged principally in the manufacture and sale of syrup (a mixture of ingredients in liquid form which, when properly mixed with pure carbonated water, becomes the finished soft drink product (Smith, Tr. 569)) and concentrates (a mixture of basic ingredients to which sugar must be added by the bottler to prepare a syrup (Smith, Tr. 570)). The syrup and concentrate are used in the processing and sale of soft drinks under one or more of the trade names Coca-Cola or Coke, TAB, Sprite, Fresca, Fanta, Simba, Santiba, and Mr. PiBB. (Admitted in Answer; Smith, Tr. 584-586.)

5. Coca-Cola is a cola type drink. TAB is a low calorie cola drink. Fresca is a citrus base, low calorie drink. Sprite is a lemon-lime drink. Fanta is a trademark which is applied to a line of flavored drinks including orange, root beer, gingerale, and strawberry. Simba is no longer on the market. Santiba is a trademark which is applied to a line of mixers such as carbonated water, gingerale and Tom Collins mix. Mr. PiBB, a relatively new product, is a pepper type drink. Products other than Coca-Cola are referred to as "allied products" (Smith, Tr. 584-586). [9]

6. Beginning in 1955, "Coca-Cola" from time to time authorized its licensed bottlers to bottle and sell Coca-Cola and allied products (as they were introduced) in an increasingly wide variety of sizes and types of containers. Coca-Cola and allied products currently are offered in returnable bottles, non-returnable bottles, and cans. Package sizes include 6 1/2-ounce, 10-ounce, 12-ounce, 16-ounce, 32-ounce, 48-ounce, and 64-ounce containers. It is being test marketed in a 72-ounce size (Smith, Tr. 714).

7. "Coca-Cola's" Foods Division manufactures other beverage products, including Maryland Club coffee, Hi-C fruit drinks, Minute Maid orange juice, Snow Crop orange juice, and other citrus products (Smith, Tr. 573, 580). Its Temco subsidiary produces private label spray and freeze dried instant coffee (Smith, Tr. 573) and its Aqua-Chem, Inc., subsidiary manufactures steam boilers and water purification equipment (Smith, Tr. 573).

8. In July 1971, "Coca-Cola" had 8 subsidiaries which operated 27 bottling plants in various cities of the United States and sold soft drink products to retailers in the areas thereof (Smith, Tr. 687-688).

9. The bottler subsidiaries of "Coca-Cola" today are:

The Coca-Cola Company of New England (Dedham, Mass.);  
 The Coca-Cola Bottling Company of Baltimore (Maryland);  
 The Coca-Cola Bottling Company of Ohio (Columbus, Ohio);  
 The Coca-Cola Bottling Company of Michigan (Lansing, Mich.);  
 The Coca-Cola Bottling Company of Wisconsin (Milwaukee, Wis.);  
 The Coca-Cola Bottling Company of Chicago (Illinois);  
 The Coca-Cola Bottling Company of California (San Francisco);  
 and  
 The Pacific Coca-Cola Bottling Company (Bellevue, Wash.).

In 1971, these companies served areas containing approximately 14 percent of the population of the United States (Ogden, Tr. 828, 844).

[10]

10. Most of the subsidiary bottling plants were acquired years ago to assure the availability of Coca-Cola in territories when bottlers in those territories had to sell out or did not have the financial resources and independent firms with money and know-how were unavailable in those areas (Susong, Tr. 913, 922). The policy of the company for over a decade has been that such a subsidiary bottler is to be sold when the company acquires one so that the number of subsidiaries remains stable (Susong, Tr. 914, 921).

11. Another subsidiary, Canners of Coca-Cola Bottlers, Inc. (hereinafter Canners), constructed canning plants in the 1960's to provide Coca-Cola and allied products in cans to bottlers under agency agreements in areas where there was inadequate canning capacity (Ogden, Tr. 825, 837).

12. Canners' plants are located at Nashua, New Hampshire; Baltimore, Maryland; College Park, Georgia; Columbus, Ohio; Alsip, Illinois; and San Leandro, California (Ogden, Tr. 824). As independent bottlers in some areas desire to invest in them, the company has sold canning plants, *e.g.*, in Salt Lake City, Utah; Plymouth, Florida; Greensboro, North Carolina; Houston, Texas; and Phoenix, Arizona (Ogden, Tr. 825-826).

13. Total dollar sales of soft drink syrup by "Coca-Cola" to bottlers in the United States for the indicated years were as follows:

1964	\$173,961,477
1965	184,959,054
1966	211,629,426
1967	227,844,768
1968	246,962,024

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(CX 4F). [11]

14. Total dollar sales and total assets of "Coca-Cola" for the indicated years were as follows:

	Sales	Assets
1968	\$1,185,808,864	802,100,548
1969	1,365,443,068	802,100,548
1970	1,606,401,160	1,005,777,214
1971	1,728,827,572	1,107,873,472
1972	1,876,192,397	1,231,612,887

(CX 51 - CX 54).

15. In July of 1971, "Coca-Cola" produced its full line of soft drink syrups and concentrates in plants at the following locations which supplied all of the licensed Coca-Cola and allied product bottlers in the United States:

Atlanta, Georgia  
 Baltimore, Maryland  
 Chicago, Illinois  
 Columbus, Ohio  
 Dallas, Texas  
 Ewa Beach, Hawaii  
 Houston, Texas  
 Kearny, New Jersey  
 Los Angeles, California  
 Nashua, New Hampshire  
 New Orleans, Louisiana  
 Plymouth, Florida  
 Portland, Oregon  
 St. Louis, Missouri  
 San Francisco, California

(Ogden, Tr. 811-815). [12]

*The Other Respondents*

16. In 1899 "Coca-Cola" granted to Mr. B. F. Thomas and Mr. Joseph B. Whitehead the exclusive right to bottle Coca-Cola and to sell Coca-Cola in bottles throughout the United States with the exception of the six New England States and the States of Mississippi and Texas where local jobbers were already bottling Coca-Cola on a very small scale, with the permission of "Coca-Cola" but without a contractual agreement. The sale of fountain syrup was specifically reserved to

