

dismissed.

IN THE MATTER OF

FALSTAFF BREWING CORPORATION ET AL.

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

Docket 8618. Complaint, Feb. 20, 1964—Decision, Dec. 3, 1964

Order requiring three brewers and their trade association to cease carrying out any planned common course of action to fix and maintain the price of beer, including keg beer, and that said trade association be dissolved.

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

*It appears that the White machines which the witnesses purchased had not been repossessed. In most cases, the attachments had not been unwrapped. In addition, the conditional sales contracts indicated that these machines were new, and the purchasers received a manufacturer's guarantee. However, there is some indication that the machines had been used for demonstration purposes by respondent's salesmen and thus in this sense were not completely unused.

Complaint

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Trade Commission having reason to believe that the party respondents named in the caption hereof, and hereinafter more particularly designated and described, have violated and are now violating Section 5 of the Federal Trade Commission Act (U.S.C., Title 15, Section 45) and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, the Commission hereby issues its complaint, stating its charges as follows:

PARAGRAPH 1. Respondent Falstaff Brewing Corporation 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 5050 Oakland Avenue, St. Louis 10, Missouri. Respondent owns and operates a total of eight breweries in the cities of St. Louis, Missouri, Omaha, Nebraska, New Orleans, Louisiana, San Jose, California, Fort Wayne, Indiana, Galveston, Texas, and El Paso, Texas. Under the trade name "Falstaff," it markets the products of these breweries in approximately twenty-five States. In 1960, respondent achieved gross sales of approximately \$160,000,000, and ranked as the third largest brewer in the nation.

Respondent Jackson Brewing Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Louisiana with its principal office and place of business located at 620 Decatur Street, New Orleans, Louisiana. Under the trade name "Jax," respondent sells its beer manufactured in New Orleans throughout a nine State area in the nation's South and Southwest. In 1962, respondent's gross dollar volume of sales exceeded \$35,000,000.

Respondent Dixie Brewing Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Louisiana. Respondent owns and operates a brewery located at 2401 Tulane Avenue, New Orleans, Louisiana. Under the trade name "Dixie," it sells its beer in the States of Louisiana, Mississippi and Alabama. In 1962, respondent's gross dollar volume of sales exceeded \$4,300,000.

Respondent New Orleans Brewers Association, hereinafter referred to as respondent NOBA, is an unincorporated trade association maintaining an office at 2401 Tulane Avenue, New Orleans, Louisiana. Organized in the late thirties, respondent NOBA is financed by assessments made on the monthly sales of its brewery members. Respondent NOBA's membership, once numbering seven brewers, is presently limited to the aforementioned respondent manufacturers. During the period from 1939 to 1962, the American Brewing Company, a corporation that maintained offices at 717 Bienville Street, New Orleans,

Louisiana, was a member of respondent NOBA. The sole officer of respondent NOBA is respondent Elitha Kelly.

Respondent Elitha Kelly is a resident of the State of Louisiana with a residence at 884 Pontalba Street, New Orleans, Louisiana, and as Secretary of respondent NOBA is named herein as a respondent.

All of the respondents named herein, other than respondent NOBA, are collectively referred to hereinafter as "respondent manufacturers." Each of said respondent manufacturers is a member of respondent NOBA, and has for a number of years, through such membership and otherwise, directly or indirectly, participated in the cooperative and collective action of all those named herein as respondents in formulating, engaging in and making effective the methods, acts, practices and policies which are alleged herein to be unlawful.

PAR. 2. Respondent manufacturers are engaged in the manufacture, sale and distribution of beer. Each of the respondent manufacturers maintain, and at all times mentioned herein have maintained, a substantial and continuous course of trade in said product in commerce, as "commerce" is defined in the Federal Trade Commission Act, between and among the various States of the United States.

Respondent NOBA has been and now is engaged in aiding respondent manufacturers in carrying out the unlawful methods, acts and practices as alleged herein, which directly and substantially have affected and now affect competition between and among said respondent manufacturers.

PAR. 3. Respondent manufacturers have been and now are in competition with each other, and with others, in the manufacture, sale and distribution of beer to purchasers thereof, except insofar as actual and potential competition has been hindered, lessened, restrained, suppressed or eliminated by the unlawful and unfair methods, acts and practices hereinafter alleged.

PAR. 4. Respondent manufacturers, acting between and among themselves, and with American Brewing Company, a recently liquidated corporation, and others, and through and by means of respondent NOBA, for many years last past, and particularly since approximately 1941, and continuing to the present time, have maintained, and now maintain and have in effect, an understanding, agreement, combination and conspiracy to pursue, and they have pursued, a planned common course of action between and among themselves to adopt and adhere to certain practices and policies to hinder, lessen, restrict, restrain, suppress and eliminate competition in the manufacture, sale and distribution of beer in the course of the aforesaid commerce.

PAR. 5. Pursuant to and in furtherance of said understanding, agree-

ment, combination, conspiracy and planned common course of action, respondent manufacturers, acting between and among themselves and with others, and through and by means of respondent NOBA, for many years last past, and continuing to the present time, in connection with the sale and distribution of beer, have done and performed, *inter alia*, the following:

- (1) Fixed and maintained prices, terms and conditions of sale.
- (2) Agreed to adopt, and have adopted, maintained and continued in effect, a common plan or policy concerning rebates, refunds, discounts and exchanges.
- (3) Agreed to adopt, and have adopted, maintained and continued in effect, common policies concerning the provision of services to customers.
- (4) Agreed to refrain, and have refrained from soliciting the keg beer trade of each other's customers.

PAR. 6. The acts and practices of the respondents, as herein alleged, have had and do have the effect of hindering, lessening, restricting, restraining and eliminating competition among the respondents in the manufacture, sale and distribution of beer; are all to the prejudice of customers of respondents and to the public; and constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

Mr. Eugene Kaplan, Mr. Robert E. Liedquist and Mr. Anthony J. DePhillips supporting the complaint.

Mr. James S. McClellan of *Willson, Cunningham & McClellan*, St. Louis, Mo., counsel for respondent Falstaff Brewing Corporation.

Mr. M. Truman Woodward, Jr., of *Milling, Saal, Saunders, Benson & Woodward*, New Orleans, La., counsel for respondent Jackson Brewing Company.

Mr. Arthur A. de la Houssaye, New Orleans, La., counsel for respondents Dixie Brewing Company, Inc., New Orleans Brewers Association, and its members, and *Elitha Kelly*, as secretary of the New Orleans Brewers Association.

INITIAL DECISION BY ELDON P. SCHRUP, HEARING EXAMINER

OCTOBER 23, 1964

STATEMENT OF PROCEEDINGS

The Federal Trade Commission on February 20, 1964, issued its complaint charging the above-named respondents with violation of

Section 5 of the Federal Trade Commission Act in the sale and distribution of beer in the course of interstate commerce. The alleged competitive respondent manufacturers are charged in the complaint to have acted with each other and through and by means of the respondent brewers association pursuant to an understanding, agreement, combination, conspiracy and planned common course of action which, *inter alia*, effected the following:

- (1) Fixed and maintained prices, terms and conditions of sale.
- (2) Agreed to adopt, and have adopted, maintained and continued in effect, a common plan or policy concerning rebates, refunds, discounts and exchanges.
- (3) Agreed to adopt, and have adopted, maintained and continued in effect, common policies concerning the provision of services to customers.
- (4) Agreed to refrain, and have refrained from soliciting the keg beer trade of each other's customers.

The complaint charges the said acts and practices of the respondents to have had and now have the effect of hindering, lessening, restricting, restraining and eliminating competition among the respondents in the manufacture, sale and distribution of beer; to be to the prejudice of customers of the respondents and to the public; and to constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

Pursuant to Section 3.8 of the Federal Trade Commission Rules of Practice for Adjudicative Proceedings, a prehearing conference was held herein on June 25, 1964, following the filing of respondents' answers to the complaint. During the course of this conference, respondents proposed the filing with the Commission of a motion to reopen consent procedure, and with the assent of complaint counsel the prehearing conference was adjourned pending Commission action on such motion. Respondents' motion and an answer by complaint counsel joining in respondents' motion were filed July 6, 1964. Order by the Commission denying respondents' motion to reopen consent procedure issued July 20, 1964. The Commission order, in denying respondents' proposed disposition, added that respondents had further failed to show wherein the filing of an amended admission answer or submission of the case to the hearing examiner on a stipulation of facts and agreed order, as expressly provided by Section 2.4(d) of the Rules of Practice, would not constitute an appropriate disposition of this proceeding.

Under date of September 15, 1964, respondents and complaint coun-

sel entered into an "Agreement Containing Stipulation of Facts and Agreed Order" and subsequently submitted the same to the hearing examiner as provided by Section 2.4(d) of the Rules of Practice. The stipulated facts corresponded with the factual allegations of the complaint served on the respondents, and the agreed order to be entered herein followed in substance the form of order proposed as appropriate in the attached notice to the complaint. The agreement between the parties provided that the record on which the decisions of the hearing examiner and the Federal Trade Commission were to be based shall consist solely of the complaint and said agreement, and respondents waived:

(a) any further procedural steps before the hearing examiner and the Commission;

(b) the making of findings of fact and conclusions of law; and

(c) all rights to seek judicial review or otherwise to challenge or contest the validity of the order entered pursuant to this agreement.

Order directing the filing of record herein of the foregoing "Agreement Containing Stipulation of Facts and Agreed Order" and closing the record in this proceeding issued October 9, 1964. Based on the foregoing agreed record, the following Findings of Fact and Conclusions therefrom are made, and the following Order is issued.

FINDINGS OF FACT

1. Respondent Falstaff Brewing Corporation 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 5050 Oakland Avenue, St. Louis 10, Missouri. Respondent owns and operates a total of eight breweries in the cities of St. Louis, Missouri, Omaha, Nebraska, New Orleans, Louisiana, San Jose, California, Fort Wayne, Indiana, Galveston, Texas, and El Paso, Texas. Under the trade name "Falstaff," it markets the products of these breweries in approximately twenty-five States. In 1960, respondent achieved gross sales of approximately \$160,000,000, and ranked as the third largest brewer in the nation.¹

2. Respondent Jackson Brewing Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Louisiana with its principal office and place of business located at 620 Decatur Street, New Orleans, Louisiana. Under the trade name "Jax," respondent sells its beer manufactured in New

¹ Paragraph A of Stipulation of Facts, page 2 of Agreement Containing Stipulation of Facts and Agreed Order.

Orleans throughout a nine State area in the nation's South and Southwest. In 1962, respondent's gross dollar volume of sales exceeded \$35,000,000.²

3. Respondent Dixie Brewing Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Louisiana. Respondent owns and operates a brewery located at 2401 Tulane Avenue, New Orleans, Louisiana. Under the trade name "Dixie," it sells its beer in the States of Louisiana, Mississippi and Alabama. In 1962, respondent's gross dollar volume of sales exceeded \$4,300,000.³

4. Respondent New Orleans Brewers Association, hereinafter sometimes referred to as respondent NOBA, is an unincorporated trade association maintaining an office at 2401 Tulane Avenue, New Orleans, Louisiana. Organized in the late thirties, respondent NOBA is financed by assessments made on the monthly sales of its brewery members. For many years last past, respondent NOBA has held and now holds meetings on a regular basis, usually once each month, at which each member brewery has been and is now represented by one of its corporate officers.

Respondent NOBA's membership, once numbering seven brewers, is presently limited to the aforementioned respondent manufacturers.⁴

5. Respondent Elitha Kelly, who maintains a residence at 884 Pontalba Street, New Orleans, Louisiana, holds the position of Secretary of respondent New Orleans Brewers Association and is presently the sole officer of said Association.⁵

6. Each of the aforementioned respondent manufacturers maintains, and has maintained for many years last past, a substantial and continuous course of trade in the manufacture, sale and distribution of beer in commerce, as "commerce" is defined in the Federal Trade Commission Act, between and among the various States of the United States.⁶

7. For many years last past and particularly since 1941, respondent manufacturers have been and are now in substantial competition with each other, and with others in the course of their aforesaid trade in commerce.⁷

8. Each of the aforementioned respondent manufacturers is a member of respondent NOBA, and has for many years last past and par-

² Paragraph B of Stipulation, page 2 of Agreement, *supra*.

³ Paragraph C of Stipulation, page 2 of Agreement, *supra*.

⁴ Paragraph D of Stipulation, page 2 of Agreement, *supra*.

⁵ Paragraph E of Stipulation, page 3 of Agreement, *supra*.

⁶ Paragraph F of Stipulation, page 3 of Agreement, *supra*.

⁷ Paragraph G of Stipulation, page 3 of Agreement, *supra*.

ticularly since 1941, through such membership and otherwise, directly or indirectly, participated in the cooperative and collective action of all those named as respondents in the Commission's complaint in formulating, engaging in and making effective the acts, practices and policies set forth in said complaint and which are alleged therein to be unlawful.⁸

9. For many years last past and particularly since 1941, respondent New Orleans Brewers Association and its officers have been and are now engaged in aiding the respondent manufacturers in carrying out the acts and practices set forth in the Commission's complaint, which acts and practices substantially affected and now affect competition in the manufacture, sale and distribution of beer in commerce between and among the respondent manufacturers and other manufacturers of beer.⁹

10. As a means, *inter alia*, of effectuating the acts and practices which are set forth in the Commission's complaint and which are alleged therein to be unlawful, the respondent manufacturers, in conjunction with respondent NOBA, agreed to, adopted and carried into effect the New Orleans Brewers Association Code. This code, which for many years last past has governed the selling practices of the respondent manufacturers, is as follows:

Code—New Orleans Brewers Association

That all members of this association will work in harmony and cooperation in adherence to the following rules; for the betterment of the INDUSTRY, and that each individual company representative will hold himself accountable for the infraction of any of these rules by any of the personnel of his member company:

(1) That the personnel of all member companies refrain from speaking derogatorily of any company or its product.

(2) That there be no concessions, rebates, refunds, or discounts to any licensed dealers or anyone directly or indirectly connected with a licensed dealer.

(3) That there be no accommodation of licensed dealers as far as cashing of checks is concerned, or lending of money to licensed dealers for the purpose of cashing checks.

(4) That no partitions, lunch counters or oyster counters shall be furnished nor shall any plumbing, carpentering or electrical work be done in the establishment of licensed dealers, except such as is incident to the installation of Brewery Advertising or Brewery furnished equipment.

(5) That there be no painting inside or outside of customer's premises, other than the space actually covered by such advertising as may be done by the Brewery.

⁸ Paragraph H of Stipulation, page 3 of Agreement, *supra*.

⁹ Paragraph I of Stipulation, page 3 of Agreement, *supra*.

(6) That there shall be no mechanically refrigerated equipment of any kind furnished to licensed dealers.

(7) That there shall be an interchange of credit information on customers.

(8) That outside or regular routes, truck deliveries will be made only to

Licensed Dealers
Company Organizations
Religious Institutions
Fraternal Organizations

(9) That all private orders for either keg or bottle beer shall be channeled through selected Beverage Services to Homes.

(10) That no outside privilege electric signs shall be furnished.

(11) That no payment or rental shall be made for sign privilege of any kind at dealer point of distribution.

(12) That no payment shall be made for electric current to operate signs at dealer point of distribution except those as are presently installed.

(13) That the current policy of recognition accorded draft beer customers be continued.

"Under the current policy applying to Keg Beer Customers, no member shall solicit Keg Beer trade of any establishment while such establishment is using the Keg Beer of another member. Should any dealer discontinue the use of Keg Beer, but still retain any Keg Beer equipment such as counter, back bar, sink, or any other equipment incident to the sale and dispensing of Keg Beer such establishment as long as it keeps such equipment is to be recognized as the customer of the member by whom such equipment is owned. Where a current loan is being made within the limitation of these rules the customer, as far as Keg Beer is concerned, to whom the loan is being made, is considered to be the customer of the member making the loan."

(14) That our current policy of not furnishing music, flowers, except in case of deaths, paint, co-operative advertisements, etc., incident to openings and special occasions shall be continued.

(15) No loans of any kind shall be made to licensed dealers.

(16) That nothing in these rules shall be construed to mean that any member has the right to exclusive sign privileges or on any dealer's place of business, but that all signs of any member on such places shall be strictly within the limitation prescribed by these rules.

(17) Replacement of a brewery's outdoor Neon sign by another brewer will not be permitted until approved by the brewery whose sign is to be taken down.

(18) In the event any of the foregoing rules are found to be impractical through operation after the effective date, no Member will undertake to initiate any changes without first submitting proposed change or changes to all other Members.¹⁰

11. Each of the aforementioned manufacturers and other respondents herein are and have been mutually engaged in the foregoing stipulated acts and practices¹¹ in the sale and distribution of beer in the course of commerce,¹² and through and by means of such acts and prac-

¹⁰ Paragraph J of Stipulation, pages 3, 4, 5 and 6 of Agreement, *supra*.

¹¹ Findings Nos. 4, 5, 8, 9, 10, *supra*.

¹² Findings Nos. 6, 7, *supra*.

Initial Decision

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tices as is alleged by the complaint in this proceeding,¹³ the said respondents have done and performed,¹⁴ *inter alia*, the following:

- (1) Fixed and maintained prices, terms and conditions of sale.
- (2) Agreed to adopt, and have adopted, maintained and continued in effect, a common plan or policy concerning rebates, refunds, discounts and exchanges.
- (3) Agreed to adopt, and have adopted, maintained and continued in effect, common policies concerning the provision of services to customers.
- (4) Agreed to refrain, and have refrained from soliciting the keg beer trade of each other's customers.

12. The aforesaid acts and practices of the respondents, as charged by the complaint in this proceeding,¹⁵ have had and do have the effect of hindering, lessening, restricting, restraining and eliminating competition among the respondents in the manufacture, sale and distribution of beer;¹⁶ are all to the prejudice of customers of the respondents and to the public;¹⁷ and constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction of the respondents and the subject matter of this proceeding.
2. The complaint herein states a cause of action and this proceeding is in the public interest.
3. The acts and practices of the respondents, as found in the foregoing Findings of Fact, have been and are unfair methods of competition and unfair acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act, and the following agreed order to cease and desist¹⁸ is appropriate in substance and form and should issue in this proceeding.

ORDER

It is ordered. That respondents, Falstaff Brewing Corporation, Jackson Brewing Company, Dixie Brewing Company, Inc., and the New Orleans Brewers Association and its members, their respective of-

¹³ Paragraph Five of the complaint.

¹⁴ Findings Nos. 8, 10. *supra*.

¹⁵ Paragraph Six of the complaint.

¹⁶ Finding No. 9. *supra*.

¹⁷ Finding No. 10. *supra*.

¹⁸ Agreed Order, pages 6, 7, 8 of Agreement Containing Stipulation of Facts and Agreed Order, *supra*.

officers, agents, representatives, employees, successors and assigns, directly or through any corporate or other device, in or in connection with the manufacture, offering for sale, sale or distribution of beer in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from entering into, continuing, cooperating in, or carrying out any planned common course of action, agreement, understanding, combination, or conspiracy between or among any two or more of the said respondents, or between any one or more of the said respondents and any others not parties hereto, to do or perform any of the following acts and practices:

A. Establish or fix prices or adopt and place in effect or carry out any policy, plan or program for the purpose or with the effect of establishing or fixing prices.

B. Establish or fix or adopt and place in effect or carry out any policy concerning the provisions of services, or the granting of concessions, to customers, consumers or distributors.

C. Allocate or designate the business of customers to or for a particular respondent or competitor.

D. Refrain from soliciting or refuse to solicit the keg beer trade of establishments or outlets purveying or dispensing keg beer manufactured by any respondent manufacturer or any competitor.

E. Exchange, distribute or circulate with, between or among respondents any information concerning prices, discounts, allowances, terms or conditions of sale, rebate, refund and exchange policies, or any other pricing policies.

F. Exchange, distribute or circulate with, between or among respondents, any information concerning the provision of services to customers, the granting of concessions to customers, and the solicitation of customers.

It is further ordered. That each manufacturing respondent, and subsidiary thereof, shall forthwith, individually and independently, review its prices, price lists, discounts, allowances, rebate, refund and exchange policies, and other pricing policies, on the basis of its own costs, the margin of profit individually desired, and other lawful considerations. Thereafter, within ninety (90) days after the service of this order, each of said manufacturing respondents shall file in these proceedings its verified statement that its prices, price lists, discounts, allowances, rebate, refund and exchange policies, and other pricing policies in effect as of the date of said verified statement were individually and independently arrived at and established in full compliance with this order.

It is further ordered. That each of the manufacturing respondents,

Final Order

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their officers, representatives, agents, employees, subsidiaries, successors and assigns, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of beer in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Disseminating any information or data as to prices, discounts, allowances, terms or conditions of sale, rebate, refund and exchange policies, or any other pricing policies to any other of the respondents, or to any other competitor, before announcement thereof to respondent's customers or to the public.

B. Attending any meeting with another respondent or respondents, or another competitor or competitors, at which prices, discounts, allowances, terms or conditions of sale, rebate, refund and exchange policies, or any other pricing policies are discussed or considered.

C. Attending any meeting with another respondent or respondents, or another competitor or competitors, at which customer services and concessions are discussed or considered.

D. Allocating or designating the business of customers to or for a particular respondent or competitor.

E. Refraining from, or abstaining from, soliciting the keg beer trade of establishments or outlets purveying or dispensing keg beer manufactured by any respondent or any competitor.

It is further ordered. That respondent New Orleans Brewers Association be forthwith discontinued, liquidated, and dissolved, and that any successor or assign or any new entity, corporate or otherwise formed by the manufacturing respondents do permanently refrain from planning or performing any of the following things:

A. Obtaining or disseminating any information as to prices, discounts, allowances, terms or conditions of sale, rebate, refund and exchange policies, or any other pricing policies or customer services and concessions.

B. Acting as an instrument or medium for promoting, aiding or rendering more effective any cooperative or concerted effort to suppress or eliminate competition, or to cooperate with any of the other respondents herein in carrying out any of the acts prohibited by this order.

FINAL ORDER

No appeal from the initial decision of the hearing examiner having been filed, and the Commission having determined that the case should not be placed on its own docket for review and that pursuant to Section 3.21 of the Commission's Rules of Practice (effective August 1,

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Complaint

1963), the initial decision should be adopted and issued as the decision of the Commission :

It is ordered, That the initial decision of the hearing examiner shall, on the 3d day of December, 1964, become the decision of the Commission.

It is further ordered, That Falstaff Brewing Corporation, a corporation, and Jackson Brewing Company, a corporation, and Dixie Brewing Company, Inc., a corporation, by their appropriate corporate officers, and New Orleans Brewers Association, an association, and its members, by Elitha Kelly as Secretary of the New Orleans Brewers Association, shall, within ninety (90) days after service of this order upon them, file with the Commission a report in writing, setting forth in detail the manner and form of their compliance with the order to cease and desist.
