

Opinion

IN THE MATTER OF
BEATRICE FOODS CO.

ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 7
OF THE CLAYTON ACT AND THE FEDERAL TRADE COMMISSION ACT

*Docket 6653. Complaint, Oct. 16, 1956—Decision, Dec. 10, 1965***

Order directing Beatrice Foods Co. of Chicago, Ill., to sell as going concerns, to purchasers approved by the Federal Trade Commission, four dairy companies it has acquired since 1953, and prohibits respondent from acquiring any domestic manufacturer, processor, distributor or seller of fluid milk, ice cream or frozen dessert within the next 10 years without prior Federal Trade Commission approval.

OPINION ACCOMPANYING FINAL ORDER

By the Commission:

On April 26, 1965 [67 F.T.C. 473], the Commission determined that respondents' acquisitions of Creameries of America, Inc., Greenbrier Dairy Products Company, Durham Dairy Products, Inc., Community Creamery, and Dahl-Cro-Ma, Ltd.,¹ were unlawful under Section 7 of the Clayton Act, as amended (15 U.S.C. § 18). However, the Commission deferred entry of a final order pending receipt of the parties' views on the form and content of an appropriate order. Those views have been received and the Commission is now ready to formulate a final order that will provide effective and equitable relief against the adverse consequences of respondents' unlawful conduct.

In formulating relief, the Commission has considered the public interest in the restoration and maintenance of competition in the dairy industry, and in the markets directly affected by the illegal acquisitions, the need to harmonize, insofar as the facts permit and the public interest requires, the order entered against respondent with those which have already become effective against other leading dairy firms, and the practical problems and difficulties which might be involved in using the remedy of divestiture to restore and maintain competition.

The Commission has concluded, first, that to provide effective relief, divestiture of the assets acquired from Creameries of America, Inc., Durham Dairy Products, Inc., Greenbrier Dairy Products Company, and Community Creamery is essential. Divestiture is the normal, and usually the most appropriate, remedy

* The name of the respondent is incorrectly stated in the complaint as Beatrice Foods Company, see the initial decision, 67 F.T.C. 473, 486.

** Modified June 7, 1967, 71 F.T.C. 797.

¹ The assets of Dahl-Cro-Ma, Ltd., were destroyed by a tidal wave subsequent to their acquisition.

for removing the adverse consequences of Section 7 violations. (*United States v. E. I. DuPont de Nemours & Co.*, 366 U.S. 316, 326-31) The Commission finds that remedy especially appropriate here. As pointed out in our decision, the acquisitions of Creameries of America, Inc., Durham Dairy Products, Inc., and Greenbrier Dairy Products Company eliminated from already concentrated local markets just the kind of substantial and viable local dairy companies whose continued existence is so vital to competition in this industry. This was true of all the local markets involved in these acquisitions. The acquisitions, by substituting respondent, a powerful national organization already well entrenched in many markets, are also likely to substantially increase the difficulty of new entry into these concentrated markets. Moreover, in each of the markets involved, except possibly the Hawaii market involved in the Creameries acquisition,² these acquisitions eliminated substantial and important potential competition. The acquisition of Community Creamery, a horizontal acquisition, increased concentration in an already concentrated market. In these circumstances, we find that divestiture of the acquired properties and the reestablishment of the acquired firms as independent, viable competitors is the only remedy likely to dispel the anticompetitive effects of the acquisitions in each of the markets involved.

We have considered the problems which respondent suggests would be involved in divestiture of some of the properties, but we do not think that any of them is sufficient either to outweigh the need for divestiture or to pose a barrier to the practical effectuation of divestiture. We note that in each market involved respondent is maintaining and using the acquired facilities in substantially the same manner as acquired, or where it has rebuilt or substituted other facilities, has nevertheless maintained them as separate operations. There appear to be two exceptions. In California, respondent has apparently completely divested itself of part of the business and facilities acquired from Creameries. With respect to the facilities acquired from Durham Dairy, respondent informs us that it maintains the fluid milk operations as acquired, but has divested itself of the local ice cream facilities, and now services the ice cream market in that area from its own plants. The order requires only that respondent divest itself of assets and additions thereto now

² The acquisition of Creameries' Hawaiian assets had other substantial and equally important anticompetitive effects. The market was already highly concentrated. The Creameries' subsidiary acquired had 60% and 50% of the fluid milk and ice cream markets respectively. The substitution of respondent is likely to further increase the difficulty of new entry, as well as to diminish the desire of the few existing local firms to offer vigorous competition. Moreover, the substantial market power acquired by respondent in Hawaii adds to respondent's capacity to repel competition and new entry in other markets.

1003

Opinion

in use, and necessary to reestablish the acquired firm as a going concern in the fluid milk, ice cream and frozen dessert lines. The order would thus raise no problems with respect to those California operations from which respondent has apparently withdrawn, but would only require the divestiture of assets which are currently being used. With respect to Durham Dairy, the order would, of course, require divestiture of the fluid milk operations which respondent has operated and maintained as originally acquired; if it appears during the course of compliance proceedings that respondent is unable to reestablish Durham as a going concern in the ice cream business, the Commission could relieve respondent of its obligation to do so.

Respondent also suggests that a variety of problems will render it difficult to divest, or, in some circumstances, to find a purchaser satisfactory to the Commission. At the present time, we think these contentions are too speculative; under the order respondent will be entitled to raise these problems with the Commission in the event that its diligent and good faith efforts to effectuate a sale to a satisfactory purchaser should prove unavailing.

Finally, respondent urges that divestiture of the Hawaii assets acquired from Creameries' subsidiary would inflict a hardship upon it and would not be in the public interest because these operations are part of respondent's commitment to the Department of Defense to furnish dairy products to the armed forces in the Far East. Respondent entered into this commitment in 1964; it runs for approximately four more years. The hearing examiner's order which would have required respondent to divest these assets was filed on March 2, 1964. Although it is not clear whether respondent entered into its commitment with the Department of Defense before or after the order was filed by the examiner, respondent was obviously aware of the contingency of divestiture when it entered into its commitment with the Department of Defense. In any event, we are not convinced, and respondent does not state, that should it be required to divest its Hawaiian assets, its military commitments could not otherwise be fulfilled. We find that on balance the public interest requires divestiture of these assets.

The Commission also finds that full and adequate protection of the public interest requires the imposition of a 10-year ban on all future acquisitions by respondent of firms engaged in the manufacture, processing, sale or distribution of fluid milk, ice cream, or other frozen desserts, except upon prior approval of the Commission. As pointed out in our decision, respondent and several

other large national dairy companies have embarked on extensive and far-reaching programs of acquisitions whose effect has been the substantial increase of concentration in the industry, and the elimination of a middle tier of local or regional companies capable of furnishing effective competition. The mergers also eliminated respondent and other leading dairy firms as sources of potential competition in these concentrated local markets. If competition in this industry is to be restored and maintained, it is essential that this continuing elimination of viable local or regional competitors through acquisition be halted now and that respondent be restored as a potential competitor by precluding it from entering local markets by acquisition. See *Ekco Products Co.*, Docket No. 8122 (Opinion Accompanying Final Order, issued June 30, 1964) [65 F.T.C. 1163, 1204]. Moreover, as respondent itself points out, there are many practical barriers to the restoration of acquired firms as effective competitors through divestiture, years after a merger has occurred. Prophylactic relief, not merely the after-the-fact remedy of divestiture, is essential if the Congressional policy expressed in Section 7 of the Clayton Act is to be effectively carried out in this industry. In recognition of these facts, the Commission has already imposed bans on future acquisitions by respondent's leading competitors. *Foremost Dairies, Inc.*, Docket No. 6495 (Modified Order, issued March 5, 1965) [67 F.T.C. 282]; *Borden Company*, Docket No. 6652 (Order Accepting Agreement Containing Order to Cease and Desist, issued April 15, 1964) [65 F.T.C. 296]; *National Dairy Products Corporation*, Docket No. 6651 (Order Waiving Notice and Accepting Agreement Containing Order to Cease and Desist, issued January 30, 1963) [62 F.T.C. 120]. Such a ban, especially in view of respondent's demonstrated proclivity to expansion through acquisition, is no less necessary here.

Commissioners MacIntyre and Jones do not participate.

FINAL ORDER

Pursuant to the Commission's order of April 26, 1965 [67 F.T.C. 473], complaint counsel and respondent have submitted their views on the form and content of an appropriate order. The Commission has fully considered these views and has concluded, for the reasons stated in the accompanying opinion, that the following order is appropriate in the light of the Commission's decision in this matter and is required by the public interest, and that it should be adopted and issued forthwith as the Commission's final order. Accordingly,

It is ordered, That:

I

Respondent Beatrice Foods Company, within a period not exceeding eighteen (18) months after the service upon it of this order, shall divest itself absolutely and in good faith of all stock, assets, properties, rights, and privileges, tangible or intangible, including but not limited to all contract rights, plants, machinery, equipment, trade names, trademarks and good will, acquired by respondent as the result of its acquisitions of the stock, share capital, or assets of Creameries of America, Inc., and its subsidiaries, Greenbrier Dairy Products Company, Community Creamery, and Durham Dairy Products, Inc., which are now used in the businesses so acquired, together with all plants, machinery, buildings, improvements, equipment, and other property of whatever description, which have been added to the property of the above-named acquired firms, or placed on such premises by respondent, and which are now used in the businesses so acquired, in such manner as to restore each of them as going concerns in the manufacture, processing, distribution and sale of fluid milk, ice cream, and frozen desserts, to the extent that each of said acquired firms was engaged in any of those lines of commerce at the time of its acquisition.

II

By such divestitures, as set forth in Section I above, respondent shall not sell or transfer, directly or indirectly, any of said stock or assets to anyone who is at the time of divestiture an officer, director, employee or agent of, or under the control or direction of, respondent or any of its subsidiaries or affiliates, or to any person who owns or controls more than one percent (1%) of the outstanding shares of common stock of respondent, or any of its subsidiaries or affiliates, or to anyone who is not approved as a purchaser by the Federal Trade Commission in advance.

III

Pending divestiture, respondent shall not make any changes in the plants, machinery, buildings, equipment, or other properties of whatever description, which would impair their capacity for the manufacture, processing, distribution or sale of fluid milk, ice cream or frozen desserts, or their market value, unless said capacity or value is restored prior to divestiture.

IV

Respondent shall divest itself of the above-identified assets in the following manner and subject to the following conditions:

Syllabus

68 F.T.C.

A. Beginning promptly after the effective date of this order, respondent shall make diligent efforts in good faith to sell the above-identified assets in the manner set forth in Section I above and shall continue such efforts to the end that the sale thereof shall be effected within the aforesaid period of eighteen (18) months.

B. Within sixty (60) days from the effective date of this order, and every sixty (60) days thereafter until it has fully complied with this order, respondent shall submit in writing, to the Federal Trade Commission, a report setting forth in detail the manner and form in which it intends to comply, is complying, or has complied with this order. All compliance reports shall include, but not be limited to, a summary of all contacts and negotiations with potential purchasers of the stock and/or assets to be divested, the identity of all such potential purchasers, and copies of all written communications to and from all such potential purchasers.

C. If complete divestiture shall not have been accomplished within the aforesaid period of eighteen (18) months, the Commission will give respondent notice and afford it an opportunity to be heard before the Commission issues any further order or orders which may be necessary or appropriate to achieve full compliance with this order.

V

For a period of ten (10) years from the effective date of this order respondent shall cease and desist from acquiring, directly or indirectly, by any device, or through subsidiaries or otherwise, the whole or any part of the stock, share capital, or assets (other than products sold in the course of business), of any firm engaged in any state of the United States or in the District of Columbia, in the manufacture, processing, distribution or sale of fluid milk, ice cream or other frozen desserts, without the prior approval of the Federal Trade Commission.

Commissioners MacIntyre and Jones not participating.