

IN THE MATTER OF

COTT CORPORATION ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
SEC. 2 (d) OF THE CLAYTON ACT

Docket C-1052. Complaint, March 23, 1966—Decision, March 23, 1966

Consent order requiring a Manchester, N. H., distributor of soft drinks and producer of soft drink concentrates to cease violating Sec. 2(d) of the Clayton Act by paying discriminatory promotional allowances to favored retail customers selling its carbonated soft drink beverages.

COMPLAINT

The Federal Trade Commission, having reason to believe that the parties respondent named in the caption hereof and more particularly designated and described hereinafter, have violated the provisions of Section 2(d) of the Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C. 13), hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Cott Corporation is a corporation organized, ex-

isting and doing business under and by virtue of the laws of the State of New Hampshire with its principal office and place of business located at 177 Granite Street, Manchester, New Hampshire. Cott Beverage Corporation was a corporation organized and existing under and by virtue of the laws of the State of Delaware. Its principal office and place of business was located at 197 Chatham Street, New Haven, Connecticut. On November 18, 1963 Cott Beverage Corporation was merged with Cott Corporation, which corporation, prior to the merger, was named Cott Bottling Co. of New England, Inc.

PAR. 2. Until the date of the merger, Cott Corporation was a franchised bottler of Cott Beverage Corporation, distributing and selling soft drink beverages in Maine, Vermont, New Hampshire, Massachusetts, New York and New Jersey. Until the date of its merger with Cott Corporation, Cott Beverage Corporation was engaged in the production of soft drink concentrate for distribution and sale to its franchised bottlers and in bottling soft drink beverages for distribution and sale to customers in New York, Massachusetts and Connecticut. Cott Corporation is the legal successor through merger to Cott Beverage Corporation and thereby has added to its previously described activity that business activity above ascribed to Cott Beverage Corporation. In 1963, their combined dollar sales volume was approximately \$22,000,000.

PAR. 3. In the course and conduct of their business, respondents have engaged, and Cott Corporation is now engaged, in commerce, as "commerce" is defined in the Clayton Act, as amended, by shipping their products or causing them to be shipped from their places of business to customers located in the same and in other States of the United States.

PAR. 4. In the course and conduct of their business in commerce, respondents have been in the past, and Cott Corporation is now, in competition with other corporations, partnerships, individuals and firms engaged in the production, bottling, distribution and sale of carbonated soft drink beverages. Their customers did compete, and Cott Corporation's customers do now compete, with each other within the various trading areas in which they are engaged in business.

PAR. 5. Respondents have paid or contracted to pay something of value to or for the benefit of certain of their customers in consideration for advertising or other services and facilities furnished by or through such customers in connection with the offering for sale and sale of respondents' carbonated soft

drink beverages without making such payments available on proportionally equal terms to all customers competing in the offering for sale and sale of such products.

Specifically, respondents have made payments or granted free goods to or for the benefit of favored customers in consideration for certain promotional services and facilities performed by said customers in connection with their resale of respondents' carbonated soft drink beverages. These payments and free goods were not made available on proportionally equal terms to all other customers competing in the distribution of such products with said favored customers. The services and facilities performed by the favored customers included, but were not necessarily limited to, in-store displays and demonstrations of respondents' carbonated soft drink beverages as well as the advertising of respondents' carbonated soft drink beverages through radio, television and newspapers.

PAR. 6. The acts and practices of respondents, as alleged above, are in violation of Section 2(d) of the Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C. 13).

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of Cott Bottling Co. of New England, Inc., a corporation whose name was changed in November, 1963, to Cott Corporation, and of Cott Beverage Corporation, a corporation; and Cott Corporation and Cott Beverage Corporation, respondents named in the caption hereof, having been furnished thereafter with a copy of a draft of complaint which the Bureau of Restraint of Trade proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of Section 2(d) of the Clayton Act, as amended; 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 recital that Cott Corporation is responsible for and subject to the duties and liabilities of Cott Beverage Corporation, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by the respondents that the law has been violated as alleged in such complaint, and waivers and provisions as required by the Commission's rules; and

Order

The Commission, having reason to believe that the respondents have violated said Act, and having determined that complaint should issue stating its charges in that respect, hereby issues its complaint, accepts said agreement, makes the following jurisdictional findings and enters the following order:

1. Respondent Cott Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Hampshire, with its office and principal place of business located at 177 Granite Street, Manchester, New Hampshire.

Respondent Cott Beverage Corporation, 197 Chatham Street, New Haven, Connecticut, was a corporation organized and existing under and by virtue of the laws of the State of Delaware.

On November 18, 1963, Cott Beverage Corporation was merged into Cott Bottling Co. of New England, Inc., which firm thereupon changed its name to Cott Corporation. Cott Corporation is the legal successor through merger to Cott Beverage Corporation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents.

ORDER

It is ordered, That respondents Cott Corporation, a corporation, and Cott Beverage Corporation, a corporation, their officers, employees, agents and representatives, directly or through any corporate or other device in connection with the distribution and sale of carbonated soft drink beverages in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

Paying or contracting for the payment of anything of value to or for the benefit of any customer of respondents as compensation or in consideration for advertising or any other services or facilities furnished by or through such customer in connection with the processing, handling, sale or offering for sale of respondents' carbonated soft drink beverages unless such payment or consideration is made available on proportionally equal terms to all other customers competing in the distribution of such products.

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.

Opinion

69 F.T.C.

IN THE MATTER OF

PILLSBURY MILLS, INC.*

ORDER OF DISMISSAL, OPINION, ETC., IN REGARD TO THE ALLEGED
VIOLATION OF SEC. 7 OF THE CLAYTON ACT*Docket 6000. Complaint, June 16, 1952—Decision, March 28, 1966*

Order dismissing pursuant to a Court remand, 354 F. 2d 952 (1966), 8 S. & D. 5, the Commission has determined that it would not be in the public interest to proceed further in its antimerger case against respondent; however, the Commission pointed out that it will maintain continuing surveillance of future developments in this industry and will give careful attention to any future acquisitions by respondent.

OPINION OF THE COMMISSION

On January 7, 1966, the Court of Appeals for the Fifth Circuit vacated the Commission's order and decision in this matter (57 F.T.C. 1274, 1389-1415), and remanded the case in order that the Commission, as now constituted, could "determine what steps should [now] appropriately be taken in view of both the lapse of time and the present state of the case law applying Section 7." (*Pillsbury Co. v. Federal Trade Commission*, 354 F.2d 952 (5th Cir. 1966) [8 S.&D. 5].)

This proceeding has had a long, complex history, which is detailed in the opinion of the Court of Appeals and need not be repeated here. The case is fourteen years old. The record exceeds 40,000 pages in length. The evidence contained in the record pertains to market conditions which existed more than a decade ago. Whether the Commission could properly adjudicate the merits on the basis of the present record, without taking further evidence, is at least highly doubtful. Passage of time has also created serious uncertainty as to the availability of effective relief, even if the challenged acquisitions should be found unlawful. There are also in the case a number of procedural problems; thus, it is not unlikely that, upon a further court review, the substantive questions on the merits may not be reached.

Accordingly, in the light of all these considerations, the Commission, mindful of its responsibility to "develop that enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate [the Commission's] available funds

*Now known as The Pillsbury Company.