

FEDERAL TRADE COMMISSION DECISIONS

FINDINGS, OPINIONS, AND ORDERS, JANUARY 1, 1970,
TO DECEMBER 31, 1970

IN THE MATTER OF JOS. SCHLITZ BREWING CO.

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

Docket C-1665. Complaint, Jan. 5, 1970—Decision, Jan. 5, 1970

Consent order requiring a major brewery headquartered in Milwaukee, Wisc., to cease discriminating in price between competing resellers of its beer in violation of Section 2(a) of the Clayton Act.

COMPLAINT

The Federal Trade Commission, having reason to believe that Jos. Schlitz Brewing Co., a corporation, sometimes hereinafter referred to as respondent, has violated and is now violating Section 2(a) of the Clayton Act, as amended, U.S.C., Title 15, Section 13, 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 with respect thereto as follows:

PARAGRAPH 1. Jos. Schlitz Brewing Co. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Wisconsin, with its office and principal place of business located at 235 West Galena Street, Milwaukee, Wisconsin.

PAR. 2. Jos. Schlitz Brewing Co. is now and for many years last past has been, primarily engaged in the domestic production, sale, and distribution of beer and related products under various brand names, including "Schlitz" and "Old Milwaukee."

Respondents annual sales of beer are substantial, and it was the Nation's second largest seller of beer in 1964 with total net sales of \$238,667,655 after deduction of Federal excise taxes.

Complaint

77 F.T.C.

PAR. 3. Jos. Schlitz Brewing Co. produces its various brands of beer at breweries located in Milwaukee, Wisconsin; Brooklyn, New York; Kansas City, Missouri; San Francisco, California; Van Nuys, California; Tampa, Florida; Honolulu, Hawaii, and Longview, Texas.

PAR. 4. Respondent sells and distributes its brands of beer, including "Schlitz" and "Old Milwaukee," as draught beers, *i.e.*, in kegs, and as packaged beers, *i.e.*, in bottles and cans.

It sells and distributes its various brands of beer in draught and in packages through many wholesaler-distributors located throughout the United States who resell the commodity to dealers and dispensers in their trade areas. In some metropolitan areas such as Milwaukee, Wisconsin; Chicago, Illinois; Cleveland, Ohio, and New York, New York, respondent sells and distributes its various brands of beer in draught and in packages through wholly owned branches directly to liquor stores, chain grocery stores, taverns, etc., generally termed "retailers."

PAR. 5. Jos. Schlitz Brewing Co., in the normal course and conduct of its business, is now, and for many years last past has been, selling and distributing its various brands of beer, including "Schlitz" and "Old Milwaukee," produced at its brewery located in Milwaukee, Wisconsin, to customers and purchasers located in the State of Wisconsin and in States other than the State of Wisconsin, and there is now, and has been for many years, a constant current of trade in commerce, as "commerce" is defined in the Clayton Act, in the sale of beer between and among the various States of the United States and the District of Columbia.

PAR. 6. Jos. Schlitz Brewing Co., in the course and conduct of its business in commerce, is now, and for many years has been, in substantial competition with other brewers and distributors variously engaged in the production, sale, and distribution of beer.

PAR. 7. Jos. Schlitz Brewing Co., in the course and conduct of its business in commerce, has been and is now discriminating in price, directly or indirectly, between different purchasers of its beer of like grade and quality by selling it to some of its purchasers at higher prices than to other of its purchasers.

PAR. 8. As an example of discriminations in price alleged in Paragraph Seven above, respondent Jos. Schlitz Brewing Co. is now, and for several years last past has been, discriminating in price between different purchasers of "Old Milwaukee" beer by selling it to retail-

ers in some markets at delivered prices substantially higher than delivered prices charged retailers in Milwaukee County, Wisconsin. Included among, but not limited to, the aforesaid discriminations in price were the following:

During the period of March 19, 1962, through December 31, 1964, respondent sold, or offered to sell, "Old Milwaukee" beer in cases of twenty-four twelve ounce returnable bottles to retailers in Milwaukee County, Wisconsin, at a delivered price of \$2.10 per case plus deposit. This price of \$2.10 per case was substantially below the delivered price of \$2.90 per case plus deposit charged by respondent to retailers in Cleveland, Ohio, during the period from October 1, 1962, through February 27, 1964.

PAR. 9. As and for an additional example of the discriminations in price alleged in Paragraph Seven above, respondent is now, and for several years last past has been, discriminating in price between different purchasers of "Old Milwaukee" beer by selling it to independent wholesalers in many markets throughout the United States at f.o.b. Milwaukee prices which are substantially higher than f.o.b. Milwaukee prices charged to retailers in Milwaukee County, Wisconsin. Included among, but not limited to, the aforesaid discriminations in Price were the following:

During the period from March 19, 1962, through December 31, 1964, respondent sold, or offered to sell, "Old Milwaukee" beer in cases of twenty-four twelve ounce returnable bottles to retailers in Milwaukee County, Wisconsin, at a delivered price of \$2.10 per case plus bottle deposit of \$.60 per case. Not including respondent's costs of sale and distribution per case in Milwaukee County during 1962, 1963 and 1964, and the Wisconsin beer tax of \$.07258 per case, prices to Milwaukee retailers at respondent's Milwaukee dock amounted to \$2.29 per case in 1962, \$2.16 per case in 1963 and \$2.21 per case in 1964. These f.o.b. Milwaukee prices were substantially below f.o.b. Milwaukee prices charged by respondent to independent wholesalers in many markets throughout the United States into which "Old Milwaukee" beer was shipped from respondent's Milwaukee brewery in cases of twenty-four twelve ounce returnable bottles during the period from March 19, 1962, through December 31, 1964.

PAR. 10. The effect of respondent's discriminations in price, as alleged in Paragraphs Seven, Eight and Nine above, has been or may be to substantially disrupt those markets in which "Old Milwaukee" beer was sold at discriminatory prices by diverting substan-

Decision and Order

77 F.T.C.

tial business from competitors of respondent in those markets to respondent, to further disrupt those markets by diverting substantial business from competitors of respondent in those markets to respondent in the future, to create the reasonable probability that the effect of respondent's said discriminations in price may be substantially to lessen competition in the line of commerce in which respondent and its competitors are engaged, or tend to create a monopoly in the line of commerce in which respondent and its competitors are engaged, or to injure, destroy, or prevent competition with respondent in the manufacture, sale, and distribution of beer.

PAR. 11. The foregoing alleged discriminations in price made by respondent Jos. Schlitz Brewing Co. are in violation of Section 2(a) of the Clayton Act, as amended.

DECISION AND ORDER

The Commission heretofore determined to issue its complaint charging the respondent named in the caption hereof with violation of subsection (a) of Section 2 of the Clayton Act, as amended, and the respondent was served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order.

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

The Commission considered the agreement and provisionally accepted it. The agreement containing consent order was thereupon placed on the public record for a period of thirty (30) days, pursuant to the procedure prescribed in § 2.34(b) of the Commission's Rules. During this period and a subsequent ten (10) days extension, the Commission received several comments from interested members of the public concerning the adequacy of the order. All comments have become part of the public record of the proceeding.

The consensus of the commentators was that the proposed order, which is limited to respondent's sales as a wholesaler directly to re-

tailers, through its own marketing branches located in or near a number of major metropolitan markets, was inappropriate in that it would not cover respondent's sales to independent wholesalers who, in turn, re-sell respondent's products to retailers.

The Commission has reconsidered the proposed agreement, in light of the comments submitted thereon, and has decided to accept said agreement, having determined that if the facts so warrant, Schlitz' pricing practices to wholesalers may more appropriately be made the subject of a separate investigation.

Now, in further conformity with the procedure prescribed in § 2.34(b) of its Rules, the Commission hereby issues its complaint in the form contemplated by the aforementioned agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Jos. Schlitz Brewing Co. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Wisconsin, with its office and principal place of business located at 235 West Galena Street, in the city of Milwaukee, State of Wisconsin.

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

ORDER

It is ordered, That the respondent, Jos. Schlitz Brewing Co., a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the sale or offering for sale of beer, as "beer" is defined in Title 26 U.S.C. § 5052(a), in commerce as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

Discriminating, directly or indirectly, in the price of beer of like grade, quality and packaging by selling such packages as a wholesaler to any retailer in any city or definable market area served by one of respondent's breweries in which respondent is in competition with another seller at a price (exclusive of freight, State taxes and State bottle charges) which is lower than the price for such package charged by respondent to any other retailer in that or any other city or definable market area within the primary plant pattern of the same brewery, when respondent knows or should know that such lower price is less than the price at which the retailer charged the lower price may purchase beer from another seller in the same package produced by a regional or national brewer having a substan-

Order

77 F.T.C.

tially smaller annual volume of sales of beer than respondent: *Provided, however*, That in addition to the defenses set forth in Sections 2(a) and 2(b) of the statute it shall be a defense in any enforcement proceeding instituted hereunder for respondent to establish that its lower price was the result of a promotional offer involving a price concession which does not undercut, or which respondent reasonably believed did not undercut, the lowest net price and/or the terms and conditions of sale resulting from a promotional offer made, within the previous six months, to the purchaser receiving the lower price by any other seller of a competitive product produced by a regional or national brewer.

This order shall not apply to respondent's "Burgermeister" brand of beer during such period of time as respondent is subject to judicially decreed divestiture of the "Burgermeister assets," or to the purchaser or purchasers of such assets from respondent pursuant thereto.

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

It is further ordered, That respondent notify the Commission at least 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 respondent herein shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF

BEST HOMES, ET AL.

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

Docket C-1666. Complaint, Jan. 6, 1970—Decision, Jan. 6, 1970

Consent order requiring six contractors in the custom-built residential housing business located in Pennsylvania and New Jersey to cease using bait tactics, failing to quote terms on houses illustrated in brochures, implying