

Order denying respondent's motion to dismiss the complaint.

*Appearances*

For the Commission: *A. R. Richter, S. G. Stoker, Ira Nordlicht and J. E. Egan.*

For the respondent: *Edward Howrey of Howrey, Simon, Baker & Murchison, Washington, D. C., and James G. Frangos, John Kirby of Mudge, Rose, Guthrie & Alexander, New York, New York.*

ORDER DENYING MOTION TO DISMISS

On June 22, 1973, respondent ("PepsiCo") filed a motion with the administrative law judge seeking dismissal of the complaint herein essentially on two grounds: (1) the Commission's action,

through its general counsel, in seeking an injunction under the All Writs Act against certain acts of PepsiCo, evidenced prejudgment and disqualified the Commission in this case; and (2) respondent believes there may have been *ex parte* communications by the Bureau of Competition to the Commission contrary to Commission Rules and the Administrative Procedure Act.

Complaint counsel filed on July 2, 1973, a reply in opposition to the motion to dismiss. On July 5, 1973, the administrative law judge certified the motion to the Commission on the ground he lacked authority to rule on it. See Section 3.22(a) of the Rules of Practice.

Although the administrative law judges have authority to rule on nearly all issues during the time the proceedings are before them, including most questions of due process that may be raised, we agree that the issues presented here should probably be ruled on in the first instance by the Commission since they arose as the result of actions taken by the Commission itself after the complaint was issued.

However, upon review of the motion and supporting documents, we find no basis in law or fact to grant the motion.

#### I. ALLEGED DISQUALIFYING PREJUDGEMENT BY THE COMMISSION.

The undisputed facts are as follows: On October 25, 1972, respondent PepsiCo published an offer to purchase common stock of Rheingold Corporation with an announced view to gain control of that company. On November 15, 1972, the Commission issued the complaint in this matter, challenging PepsiCo's tender offer and the acquisition of any shares pursuant thereto as violating Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act. The following day, PepsiCo and the Commission entered into an agreement under which the parties agreed to discuss a hold-separate agreement, and pending such discussion PepsiCo agreed that if the tender offer were successful it would take no steps to assume or exercise actual control of Rheingold nor take any steps to make any change in the corporate structure, board of directors, or management of Rheingold, before December 4, 1972, and thereafter without giving the Commission ten (10) days' notice.

In return, the Commission agreed that it would not file any action seeking to have a court order PepsiCo to hold the Rheingold

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assets separate until on or after December 4, 1972. (Subsequently, respondent promised that it would take no action to abrogate the November 16, 1972, agreement until February 7, 1973, and thereafter only upon giving ten (10) days' notice to the Commission.)

On March 2, 1973, PepsiCo notified the Commission that it was terminating the hold-separate agreement. In order to prevent respondent from exercising control over Rheingold the Commission directed its general counsel to seek an injunction from the Second Circuit Court of Appeals under the All Writs Act, 28 U.S.C. § 1651(a).

On March 13, 1973, upon application of the Commission, through its general counsel, the Court of Appeals issued a temporary restraining order against PepsiCo prohibiting it from exercising any control over Rheingold pending its determination of the Commission's petition filed the same day for a preliminary injunction to preserve the *status quo pendente lite* of Rheingold in aid of the court's potential jurisdiction under Section 11(c) of the Clayton Act and Section 5(c) of the Federal Trade Commission Act.

On April 3, 1973, the Court issued its opinion on that petition, *Federal Trade Commission v. PepsiCo, Inc.*, 1973 Trade Cases ¶ 74,450. Although the Court denied the injunction sought, it did so on the condition that PepsiCo enter into a new hold-separate agreement of Rheingold's soft drink operation (one that would not be terminable upon notice by PepsiCo) and that the new management of Rheingold agree not to divest any of its beer business or assets pending the Commission's administrative proceeding. The Court continued its temporary restraining order until the time such hold-separate agreement was entered into and retained jurisdiction to enforce the agreement. Subsequently, on April 16, 1973, such an agreement was entered into by PepsiCo and the Commission.

Respondent argues that in seeking the injunction, the Commission prejudged this case so as to prejudice the fairness and appearance of fairness of future hearings. This contention is based primarily on the fact that the general counsel advised the Second Circuit there was a "reasonable probability" that a violation of law occurred and made assertions about Rheingold and the soft drink industry which are contested issues in the case.

There is no merit in the argument that such assertions were in excess of the Commission's authority to make, either directly or through its general counsel, to the Court of Appeals or that

the Commission will not be able to render a fair and impartial judgment in any future appeal in this matter.

Prior to seeking the injunction, the Commission had already issued its complaint stating that it had reason to believe that the tender offer and acquisition of Rheingold stock violated antitrust laws. Respondent does not (and indeed could not) claim that such assertion constituted "prejudgment" or otherwise denied it due process of law. Yet it was basically on the same information that led it to issue its complaint, that the Commission directed the General Counsel to seek an injunction *pendente lite* from the court. Such an application for a court order to protect the court's potential appellate jurisdiction is a procedure specifically sanctioned by the Supreme Court in *Federal Trade Commission v. Dean Foods*, 384 U.S. 597 (1966).

The Commission's general counsel in applying to the Court of Appeals did not argue that the acquisition violated the law, nor did it ask the Court to make such a ruling. The general counsel's argument was that the Commission had commenced administrative proceedings to determine that question and that on the basis of the information then available there was a "reasonable probability" of violation of law.<sup>1</sup> A showing of "reasonable probability" is often required before a preliminary injunction will be granted.<sup>2</sup> Indeed, the Second Circuit, on the basis of the affidavits submitted, held that such a showing was necessary and had been made in that case. For other reasons it denied the injunction.

The general counsel's representation to the Court that there was a "reasonable probability" of violation was not to be taken as a conclusive or final judgment by the Commission on the ultimate merits of its administrative complaint or any factual issues therein. That statement as well as other representations were based only on information then available. It was fully understood that all such assertions were tentative and yet to be tested in a full adversary proceeding. That this was the context in which the statements were made is evident from the Second Circuit's opinion which, while agreeing there was a showing of "reasonable

<sup>1</sup> Additionally, of course, the general counsel set forth arguments as to why the Commission felt that a take-over of Rheingold by PepsiCo might make it difficult to assure that any later divestiture order would be adequate.

<sup>2</sup> See *Federal Trade Commission v. PepsiCo, Inc.*, 1973 Trade Cases ¶ 74,450 at 94,024 and authorities cited there. But cf. *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740 (2d Cir. 1953); *Semmes Motors, Inc. v. Ford Motor Co.*, 1970 Trade Cases ¶ 73,263 (2d Cir. 1970).

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probability" of law violation, noted that "at this stage of the proceeding" important questions of fact were still in dispute and could be finally determined only on a full record. *Id.* at 94,024 m.4.

To say that the Commission action seeking the aid of the Court of Appeals to preserve its ability to affirm and enforce an effective order should a violation of law be later determined, had the effect of disqualifying the Commission from proceeding further in the matter would be to nullify the *Dean Foods* holding. It would be equivalent to saying that a judge disqualifies himself from presiding at a trial on the merits if earlier he had issued a preliminary injunction against a party. Yet this clearly is not the law. *NLRB v. Kaase*, 346 F.2d 24, 28 (6th Cir. 1965). Heads of administrative agencies are similarly entitled to draw conclusions on the basis of preliminary data presented to them and institute appropriate actions within the framework of the law to carry out their enforcement responsibilities without being charged with prejudging the case.<sup>3</sup>

We also reject respondent's argument that the Commission in assuring the Court of Appeals that it would endeavor to conclude administrative proceedings by September 10, 1973, if the injunction were issued, demonstrated prejudgment. As respondent itself recognizes, these assurances were made to assure the Court that the injunctive relief sought would not impose undue injury upon PepsiCo's ownership rights in the stock it had acquired. In prior cases where All Writ injunctions have been issued at the request of the Commission, such assurances have been given for similar reasons. *Dean Foods*, 70 F.T.C. 1761

<sup>3</sup> In the leading case on disqualification of administrative officials, *Federal Trade Commission v. Cement Institute*, 333 U.S. 683, 702-03 (1948), the Supreme Court assumed that the Commission, prior to filing its complaint, had formed an opinion on the legality of the basing point system challenged in the complaint. Indeed, the Commission had made reports to Congress and the President to that effect. The Court held that:

"[T]he fact that the Commission had entertained such views as the result of its prior *ex parte* investigations did not necessarily mean that the minds of its members were irrevocably closed on the subject of respondents' basing point practices.

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"\* \* \* [No] decision of this Court would require us to hold that it would be a violation of procedural due process for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law. In fact, judges frequently try the same case more than once and decide identical issues each time, although these issues involve questions both of law and fact. Certainly, the Federal Trade Commission cannot possibly be under stronger constitutional compulsions in this respect than a court."

See also *Dean Foods Co.*, 70 F.T.C. 1146, 1226-1237 (1966).

(1966), and *OKC Corp.* [77 F.T.C. 1635], 3 CCH Trade Reg. Rep. ¶ 19,293 (1970) at 21, 460.

Notwithstanding these considerations, respondent argues that the expedited hearing schedule established by the Commission by order of April 12, 1973, for completion of Commission proceedings by September 10, was without justification and no longer necessary in view of the Court's decision denying the injunction. But this overlooks the fact that as of April 12, 1973, a new hold-separate agreement had not yet been reached, a condition imposed by the Court on PepsiCo before the injunction would be denied and the restraining order lifted. Furthermore, the Court's opinion seemed to anticipate that some sort of expedited schedule would be ordered by the Commission. Once the agreement had been reached, on April 16, the Commission, on motion of PepsiCo, rescinded its April 12 order, noting that "PepsiCo has now entered into a hold-separate agreement that is unrestricted in duration and in its motion clearly waives any insistence that these proceedings be completed by September 10 of this year" (Order of April 18, 1973) [82 F.T.C. 1233]. The Commission directed a new, expedited hearing schedule in accordance with the time frame suggested by PepsiCo.<sup>4</sup>

In the circumstances, we think it is obvious that respondent's argument is without merit.

## II. ALLEGED EX PARTE CONTRACTS WITH PROSECUTORIAL STAFF.

Finally, respondent seeks dismissal of the complaint on the ground that *ex parte* oral arguments "may have been" made to the Commission at the time it met to consider the staff's request that an All Writs injunction be issued.<sup>5</sup> It also states that representatives of the Bureau of Competition "may have communicated" with the Commission with respect to its April 12, 1973, order.

Assuming for purposes of this motion that any such alleged communications would have been improper, the allegation that the staff was present at meetings during which these matters were discussed and decided by the Commission has been fully denied

<sup>4</sup> Respondent seems to argue that even this later modification of the time schedule constituted an unwarranted interference with functions of the administrative law judge. Nothing in our order, however, prevents the administrative law judge from certifying to the Commission, with his recommendation, a motion by any of the parties for a change in the schedule because of supervening circumstances.

<sup>5</sup> PepsiCo was provided, on March 7, 1973, with a copy of the staff's memorandum of March 5, 1973, urging the Commission to seek an All Writs injunction.

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in affidavits filed by the Director of the Bureau of Competition, assistant directors, and Commission counsel in charge of the case. As to memoranda by the staff submitted to the general counsel concerning possible trial schedules, these have been turned over to respondent and contained no improper or prejudicial *ex parte* matters.

Accordingly, the Commission, having found no merit to respondent's motion,

*It is ordered*, That respondent's motion to dismiss the complaint herein be, and it hereby is, denied.

Commissioner Thompson not participating.