

IN THE MATTER OF

CONSOLIDATED CHEMICAL CORPORATION, INC., ET AL.

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

Docket C-2535. Complaint, Sept. 5, 1974—Decision, Sept. 5, 1974

Consent order requiring a now bankrupt Houston, Tex., seller and distributor of hot beverage dispensing machines and dried beverage cartridges, routes, licenses, franchises and distributorships, among other things to cease misrepresenting the nature of franchises or distributorships, the security of investment, earnings and profits a prospective purchaser may expect, and the quality or durability of its machines or product. Further respondents are required to furnish prospects with full particulars on the franchise operation in writing at the first contact, and allow future purchasers a 10-day cooling-off period to cancel the contract with full refund rights.

Appearances

For the Commission: *Andre Trawick, Jr.*

For the respondents: *Robert A. Markowitz and Larry G. Myers,*
Houston, Tex.

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 Trade Commission, having reason to believe that Consolidated Chemical Corporation, Inc., a corporation, and David E. Worthington, William F. Wilson, and Judyann Duffala, individually and as officers of said corporation, and Harold L. Thornton and Thomas Norton, individually and as former officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, (15 U.S.C. Section 45) 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 in that respect as follows:

PARAGRAPH 1. Respondent Consolidated Chemical Corporation, Inc., is a corporation that was organized, existed and did business under and by virtue of the laws of the State of Texas, and is presently in liquidating bankruptcy, pending in the U.S. District Court for the Southern District of Texas, Houston Division, in Bankruptcy No. 73-H-134, and its address is 730 Bankers Mortgage Building, in care of Daniel E. O'Connell, Trustee in Bankruptcy, in the city of Houston, State of Texas.

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Respondents David E. Worthington, William F. Wilson, and Judyann Duffala are individuals and are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

Respondents Harold L. Thornton and Thomas Morton are individuals and are former officers of the corporate respondent. They formulated, directed and controlled the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. The address of Harold L. Thornton is 2635 Parana Street, Houston, Tex. and the address of Thomas Norton is in care of Joe McHale and Associates, 3930 Kirby Drive at Southwest Freeway, Houston, Texas.

PAR. 2. Respondents are now or have been and for some time last past have been engaged in the advertising, offering for sale, sale and distribution of hot beverage dispensing machines and dried beverage cartridges, and routes, licenses, franchises and distributorships in relation thereto to franchisees or distributors for resale to members of the general public.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said products, when sold, to be shipped from respondents' place of business in the State of Texas to purchasers thereof located in various other states of the United States. Respondents maintain, and at all times mentioned hereinabove have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their aforesaid business, and for the purpose of inducing the purchase of their products and the other aforesaid business opportunities, respondents have made numerous statements and representations in oral sales presentations to prospective purchasers and in newspaper advertisements and promotional literature respecting profits, locations of routes, character of business, business success, security of investment, the quality of the machines and the quality of the products.

Typical and illustrative of the statements and representations contained in said advertising and promotional material, but not all inclusive thereof, are the following:

* * * YOU SERVICE COMPANY ESTABLISHED ACCOUNTS. The company establishes all accounts to insure that you get a fast moving return on your investment which can be as little as \$1595.00. Get started early with Selecta Master. It's outstanding and so is the profit potential, earnings grow to \$25,000 or more per year.

**WHOLESALE DISTRIBUTORS WANTED
NO SELLING * * * KEEP YOUR PRESENT JOB!**

Simply service company established all cash accounts in this area. This is not a coin operated vending route. Fine Nestle's products sold in locations such as offices, employee lounges in retail stores, financial institutions, small manufacturing plants, warehouses and small institutional accounts. The distributor we select will be responsible for maintaining these locations and restocking inventory. All locations are established by our company. We need a dependable distributor, male or female, in this area with \$900.00 minimum to invest in equipment and inventory which can turn over up to two times monthly. Earnings can grow to \$45,000 annually and up. We will consider part-time applicants. Write for number and Area Code. All inquiries confidential.

PAR. 5. By and through the use of the above quoted statements and representations, and others of similar import and meaning, but not specifically set forth herein, and through oral statements and representations to prospective purchasers, respondents now represent, and have represented, directly or by implication, orally, in writing or visually, that:

1. Exclusive distributorships or franchises for established retail accounts are offered.
2. Any amount invested is secured by an inventory worth the amount invested and there is no risk of losing any part of the investment.
3. Profitable accounts and routes are established.
4. Persons who purchase any such products or services and engage in business can expect to receive substantial earnings up to \$25,000 or \$45,000 per year.
5. Persons who purchase any such products or services and engage in business must be specially selected to qualify for purchases of any such products or services and engage in business.
6. Continuing assistance and advice to distributors and franchisees is offered.
7. Any such machines are well constructed and are durable.
8. Any such products are top quality merchandise and have a long life.

PAR. 6. In truth and in fact:

1. Exclusive distributorships or franchises for established retail accounts are not available.
2. Invested sums of money are not secured by an inventory worth the amount invested and there is a real and substantial risk assumed by the purchaser of losing all or a substantial portion of the money invested.
3. Profitable accounts or routes are not established.
4. Persons who purchase any such products or services and engage in business do not make substantial earnings up to \$25,000 or \$45,000 per year.

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5. An offer is not made to specially selected persons only, but to anyone who has the money to purchase any such products or services and engage in business.

6. Little or no assistance or advice is given once the purchase price is paid.

7. Any such machines are not of top quality and durable.

8. Any such products are not of a long life, but tend to spoil or become stale in a short period of time.

Therefore, the statements and representations as set forth in Paragraph Five hereof were and are false, misleading and deceptive.

PAR. 7. Respondents offered for sale franchises, distributorships, licenses, routes, and products or services intended to establish franchisees or distributors in a lucrative business without disclosing in advertising or through their sales representative: (1) the business experience and background of the franchisor and various key personnel; (2) the number of franchises or distributorships which operated at a loss during the previous year; (3) other material facts relating to the success of the franchises or distributorships sold by the respondents. Knowledge of such facts would indicate the possibility of success and risk involved in the franchises and distributorships. Thus, respondents have failed to disclose material facts, which if known to potential franchisees or distributors would be likely to affect their consideration of whether or not to purchase such franchise or distributorship. Therefore, the aforesaid acts and practices were, and are, false, misleading and deceptive acts or practices.

PAR. 8. (a) Respondents as aforesaid have been, and are now using, false, misleading or deceptive acts or practices, which a reasonably prudent person should have known, under all the facts and circumstances, were false, misleading, deceptive or unfair, to induce persons to pay over to respondents substantial sums of money to purchase products or services whose value to the said persons for a business opportunity was virtually worthless. Respondents have received the said sums and have failed to offer to refund and refused to refund such money to purchasers who were unable to recover all or any part of their investment.

The use by respondents of the aforesaid practices and their continued retention of the said sums, as aforesaid, is an unfair act or practice.

(b) In the alternative and separate from Paragraph Eight (a) herein, respondents, who are in substantial competition, in commerce, with corporations, firms and individuals engaged in the sale of business opportunities have been and are now using, as aforesaid, false, mislead-

ing, deceptive or unfair acts or practices, to induce persons to pay over to respondents substantial sums of money to purchase products or services.

The effect of using the aforesaid acts and practices to secure substantial sums of money is or may be to substantially hinder, lessen, restrain, or prevent competition between respondent and the aforesaid competitors.

Therefore, the said acts and practices constitute an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act.

PAR. 9. In the course and conduct of their business, and at all times mentioned herein, respondents have been and now are in substantial competition, in commerce, with corporations, firms and individuals engaged in the sale of franchises, distributorships and products or services of the same general kind and nature as those sold by respondents.

PAR. 10. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were, and are, true and into the purchase of substantial numbers of respondents' franchises, distributorships, and products or services by reason of said erroneous and mistaken belief.

PAR. 11. The aforesaid acts and practices of respondents as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. Section 45).

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereto with violation of the Federal Trade Commission Act, and the respondents having been 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; 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 complaint to issue herein, a statement that the signing of said agreement is for

settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Consolidated Chemical Corporation Inc., is a corporation that was organized, existed and did business under and by virtue of the laws of the State of Texas, and is presently in liquidating bankruptcy pending in the U.S. District Court for the Southern District of Texas, Houston Division, in Bankruptcy No. 73-H-134, and its address is 730 Bankers Mortgage Building, in care of Daniel E. O'Connell, Trustee in Bankruptcy, in the city of Houston, State of Texas.

Respondents David E. Worthington, William F. Wilson and Judyann Duffala are officers of said corporation. They formulated, directed, and controlled the policies, acts and practices of said corporations and their addresses are as follows: David E. Worthington, 2100 Tanglewood, Houston, Tex.; Judyann Duffala, 9642 Richmond Avenue, Houston, Tex.; William F. Wilson, 812 Glenhollow, Conroe, Tex.

Respondents Harold L. Thornton and Thomas Norton are former officers of said corporation. They formulated, directed and controlled the policies, acts and practices of said corporation, and their addresses are as follows: Harold L. Thornton, 5723 Old Lodge Drive, Houston, Tex.; Thomas Norton, c/o Joe McHale and Associates, 3930 Kirby Drive at SW Freeway, Houston, Tex.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I

It is ordered, That respondents Consolidated Chemical Corporation, Inc., a corporation, and its officers, David E. Worthington, William F. Wilson, and Judyann Duffala, individually and as officers of said corporation and its successors and assigns and Harold L. Thornton and Thomas Norton, individually and as former officers of said corporation,

and respondents' representatives, agents and employees directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of hot beverage dispensing machines and dried beverage cartridges and routes, licenses, franchises, or distributorships in relation thereto, or any other route, franchise, license, distributorship, or product or service, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing directly or by implication, orally, in writing or visually, that:

1. Exclusive franchises or distributorships are being offered for established retail accounts or misrepresenting, in any manner, the nature of the franchises or distributorships.

2. Any amount invested is secured by an inventory worth the amount invested and there is no risk of losing all or any part of the investment or misrepresenting, in any manner, the amount of security provided by the inventory or the risk of losing all or any part of the investment.

3. Profitable accounts and routes are established or misrepresenting, in any manner, the profitability of the accounts and routes.

4. Persons who purchase any such products or services and engage in business can or will derive any stated amount of sales, profits or earnings, or representing directly or by implication, the past or present sales, profits or earnings of purchasers of any such products or services, routes, licenses, franchises or distributorships unless in fact the past sales, or the profits and earnings represented, are those of a substantial number of purchasers and accurately reflect the average sales, profits or earnings of such purchases under circumstances similar to those of the franchisee or distributor or prospective franchisee or distributor to whom the representation is made or misrepresenting, in any manner, the past, present, or future sales, profits or earnings from the engagement in business and resale of any such products or services.

5. Persons who purchase any such products or services to engage in business must be specially selected to qualify for purchases of any such products and engagement in business, or misrepresenting, in any manner, the qualifications for purchasing any such products or services and engaging in business.

6. Continuing assistance and advice to their franchisees or distributors is offered, or misrepresenting, in any manner, the nature, amount and duration of assistance and advice offered.

7. Any such machines are well constructed and are durable, or

misrepresenting, in any manner, the quality and durability of the machines.

8. Any such products are top quality merchandise and have a long life, or misrepresenting, in any manner, the quality and durability of the products.

It is further ordered, That respondents maintain accurate records which substantiate that the past or present sales, profits or earnings represented are accurate and are those of a substantial number of franchisees or distributors and accurately reflect the average sales, profits or earnings, of such franchisees or distributors under circumstances similar to those of the franchisee or distributor or prospective franchisee or prospective distributor to whom the representation is being made.

II

It is further ordered, That the respondents named in the preamble to Section I of this order shall furnish any prospective purchaser of its routes, licenses, franchises or distributorships, at the time when contact is first established between such prospective purchaser and such respondents, a written statement in a clear, permanent and straightforward form with the following information and none other in the indicated order:

1. A distinctive and conspicuous cover sheet with the following notice and none other in bold face type of not less than 12 point size:

INFORMATION FOR PROSPECTIVE PURCHASERS REQUIRED BY
FEDERAL TRADE COMMISSION DECISION AND ORDER

This information is provided for your own protection. It is in your best interest to study it carefully before making any commitment. If you do sign a contract, you may cancel it, and obtain a full refund of any money paid, for any reason, within ten business days after either signing such contract or receiving this disclosure statement, whichever occurs later. Details appear on the contract itself.

2. A factual description of the route, license, franchise or distributorship offered or to be sold.

3. The business experience, stated individually, of each of the respondents' directors, stockholders owning more than ten percent of the stock, and the chief executive officers for the past ten years; and biographical data concerning all such persons.

4. The business experience of the respondents, including the length of time the respondents have conducted a business of the type to be operated by the purchaser; has granted routes, licenses, franchises or distributorships for such business, and has granted

routes, licenses, franchises or distributorships in other lines of business.

5. Where such is the case, a statement that the respondents or any of their directors or stockholders owning more than ten percent of the stock, or chief executive officers:

a. have been held liable in a civil action, convicted of a felony, or pleaded nolo contendere to a felony charge in any case involving fraud, embezzlement, fraudulent conversion, or misappropriation of property; or

b. are subject to any currently effective injunctive or restrictive order or ruling relating to business activity as a result of action by any public agency or department; or

c. have filed bankruptcy or been associated with management of any company that has been involved in bankruptcy or reorganization proceedings; or

d. are, or have been, a party to any cause of action brought by purchasers against the respondent.

Such statement shall set forth the identity and location of the court, date of conviction or judgment, any penalty imposed or damages assessed, and the date, nature, and issuer of each such order or ruling.

6. The financial history of the respondent, including balance sheets and profit and loss statements for the most recent five-year period; and a statement of any material changes in the financial condition of the respondent since the date of such financial statements.

7. A description of the fee to be paid by the purchaser; and a statement indicating whether all or part of the fee may be returned to the purchaser and the conditions under which the fee will be refunded.

8. The formula by which the amount of such fee is determined if the fee is not the same in all cases.

9. A statement of the number of routes, licenses, franchises or distributorships presently operating and the number proposed to be sold, indicating which existing routes, licenses, franchises or distributorships, if any, are company owned and their addresses.

10. A statement of the number of franchises, if any, that operated at a loss during the previous year.

11. A statement that the prospective purchaser may inspect the profit and loss statements of all existing operators. (The names and addresses of the operators may be deleted from these profit and loss statements.)

12. A statement whether, by the terms of the agreement or by other device or practice, the purchaser is required to purchase or lease from the respondent or affiliated persons or their designee, services, supplies, products, signs, fixtures, or equipment relating to the establishment or operation of the business.

13. A statement of the amount and basis for any revenue received by the respondent from suppliers to its operators during the past 12 months.

14. A statement of the conditions under which the agreement may be terminated or renewal refused or repurchased at the option of the respondent, and a statement of the number of routes, licenses, franchises, or distributorships that fell into each of these categories during the past 12 months.

15. A statement of the conditions and terms under which the respondents allow the operator to sell, lease, assign, or otherwise transfer his interests, or any part therein.

16. A statement whether, by the terms of the agreement or other device or practice, the purchaser is limited in the goods or services he may offer for sale.

17. A statement whether the respondent requires the purchaser to participate personally in the direct operation of the business.

18. A statement of the terms and conditions of any financing arrangement offered directly or indirectly by the respondents or affiliated persons, and a description of any payments received by the respondents from any persons for the placement of financing with such persons.

19. A list of at least ten representative operators with addresses and telephone numbers, similarly situated to the interests offered and located in the same geographic area, if possible.

20. A statement of the territorial protection granted by the respondents, in which the respondents will not establish another operator who is permitted to use the same trade name or trademark; in which the respondents will not establish a company-owned outlet using the same trade name or trademark; and in which the respondents or its parent will not establish other operators or company-owned outlets selling or leasing similar products or services under a different trade name or trademark.

21. If the respondents use the name of a "public figure," a statement of the promotional assistance the "public figure" is committed to provide to the respondents for the next year and the promotional assistance that the "public figure" will provide specif-

ically to the new purchaser, and a description of any fees or conditions attendant upon such assistance.

22. A statement of the average length of service of personnel who are responsible for assisting the purchaser at his location, and the average number of hours such personnel spent during the past year with each purchaser that was in business for less than one year.

23. If the respondents inform the prospective purchaser that they intend to provide him with training, the respondents must state the number of hours of instruction and furnish the prospective purchaser with a brief biography of the instructors who will conduct the training.

24. A statement explaining clearly the terms and effects of any covenant not to compete which a purchaser may be required to enter into.

III

It is further ordered, That the respondents named in the preamble to Section I of this order shall not make any representations, directly or indirectly:

1. In any advertising, promotional material, or disclosure statement, or in any oral sales presentation, solicitation, or discussion between respondents' representatives and prospective purchasers, for which the respondents do not have substantiation in its possession, which substantiation shall be made available to prospective purchasers upon demand. This provision applies, but is not limited, to statements concerning the experience or qualifications, or lack of experience or qualifications, needed for success as an operator.

2. In any advertising or promotional material, or in any oral sales presentation, solicitation, or discussion between a respondent's representatives and prospective purchasers which contradicts or exceeds any of the statements required to be disclosed by Section II of this order.

IV

It is further ordered, That the respondents named in the preamble to Section I of this order, in connection with the sale of routes, licenses, franchises or distributorships, shall:

1. Inform orally all persons to whom solicitations are made and provide in writing immediately above and on the same page as the purchaser's signature line or any contract establishing or confirming a route, license, franchise or distributorship, the following

statement in bold face print at least 50 percent larger than any other print in the body of such contract, or in bold face print of a contrasting color:

NOTICE: YOU ARE ENTITLED TO CERTAIN IMPORTANT INFORMATION CONCERNING THIS TRANSACTION ENTITLED, "INFORMATION FOR PROSPECTIVE PURCHASERS REQUIRED BY FEDERAL TRADE COMMISSION DECISION AND ORDER." IT IS IN YOUR BEST INTEREST TO DEMAND AND STUDY SUCH INFORMATION. *YOU MAY CANCEL THIS CONTRACT FOR ANY REASON WITHIN TEN BUSINESS DAYS AFTER EITHER SIGNING THIS CONTRACT OR RECEIVING THE REQUIRED INFORMATION, WHICHEVER OCCURS LATER.* If you do choose to cancel, you will be entitled to receive a full refund within ten business days after the seller receives notice of your cancellation. You may use any reasonable method to notify him of your cancellation within the grace period. For your own protection you may wish to use certified mail with return receipt requested, or a telegram, either of which should be sent to the address below. (Respondent will insert here the address and telephone number to which such notices should be sent.)

2. Cancel any contract for which a notice of cancellation was sent by any reasonable means within ten business days after either the contract's execution, or the purchaser's receipt of all required information, whichever occurs later, and refund any money paid by the purchasers within ten business days after the date of receipt of such notice of cancellation.

3. Furnish the prospective purchaser upon request at any time, and in the absence of any request, before consummation of any agreement, with a copy of the agreement proposed to be used.

V

It is further ordered, That the respondents named in the preamble to Section I of this order 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.

It is further ordered, That such individual respondents promptly notify the Commission of the discontinuance of their present business or employment and of their affiliation with a new business or employment. Such notice shall include respondents' current business address and a statement as to the nature of the business or employment in which they are engaged as well as a description of their duties and responsibilities.

It is further ordered, That such respondents notify the Commission at least thirty (30) days prior to any proposed change in any of the corporate respondents 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 this order.

Notwithstanding any other provision contained herein, Daniel E. O'Connell, Trustee in re Consolidated Chemical Corporation, Inc., Bankrupt, Bankruptcy No. 73-H-134, United States District of Texas, Houston Division, is executing this order as trustee on behalf of Consolidated Chemical Corporation under authority of an order entered in said Bankruptcy No. 73-H-134, and nothing in this order shall limit or restrict his activities as trustee or individually nor shall anything in this order broaden his obligations individually or as trustee.

IN THE MATTER OF

THOMAS L. POGUE, TRADING AS TOM POGUE STUDIOS

IN REGARD TO ALLEGED VIOLATION OF THE