
IN THE MATTER OF

DELTOWN FOODS, INCORPORATED, ET AL.

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

Docket 8951. Complaint, Jan. 18, 1974 - Decision, Mar. 14, 1975

Consent order requiring a Yonkers, N.Y., producer of packaged fluid milk, among other things to divest itself of the milk processing plant in New York City that it purchased from Kraftco Corp., in Nov., 1973, and also to divest one-half of the acquired customer volume. Further, the order places a ten-year ban on future acquisitions by respondent of fluid milk processing facilities without prior Commission approval.

Appearances

For the Commission: *John J. Mathias, Peter Brickfield and Alan I. Leibowitz.*

For the respondents: *Bruce L. Montgomery, Arnold & Porter, Wash., D. C., Howard T. Milman, Sullivan & Cromwell, New York City, Sydney C. Winton, Botein, Hays, Sklar & Herzberg, New York City and J. M. Costigan, Glenview, Ill.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Deltown Foods, Inc., (hereinafter "Deltown") and Kraftco Corp. (hereinafter "Kraftco") have violated the provisions of Section 7 of the Clayton Act (15 U.S.C. §18) and Section 5 of the Federal Trade Commission Act (15 U.S.C. §45) through the acquisition by Deltown of certain Kraftco assets and intangible rights, and that a proceeding in respect thereof would be in the public interest, issues this complaint, stating its charges as follows:

I

Definitions

1. For the purposes of this complaint, the following definitions are applicable:

(a) "Packaged fluid milk" consists of milk and other packaged milk and related products, such as whole milk, skim milk, cream, half & half and other products referred to as Class I milk products in the Federal Milk Marketing Order applicable to the New York City Metropolitan District.

(b) The "New York City Metropolitan District" consists of the five boroughs of New York City and Nassau, Suffolk, Westchester and Rockland Counties of the State of New York, or portions thereof.

II

Respondents

2. Respondent Deltown is a corporation organized and existing under the laws of the State of New York with its office and principal place of business at 170 Saw Mill River Rd., Yonkers, N.Y.

3. Deltown, directly and through various wholly-owned subsidiaries, is a large producer of packaged fluid milk in the New York City area. The company operates two dairy products plants and distributes its milk throughout the New York City Metropolitan District. Prior to the

acquisition described hereinbelow, Deltown was approximately the fourth largest dairy in the New York City Metropolitan District with about 11 percent of the market.

4. Respondent Kraftco is a corporation organized and existing under the laws of the State of Delaware with its office and principal place of business at Kraftco Court, Glenview, Ill.

5. Kraftco, directly and through various wholly-owned subsidiaries or divisions, is a large national producer of packaged fluid milk and other dairy products and nondairy food products. Kraftco owns dairy plants throughout the eastern half of the country and distributes packaged fluid milk in various parts of the country, including until recently the New York City Metropolitan District. Kraftco has trademarked and heavily promoted the "Sealtest" and "Light 'n Lively" labels, the latter applicable to products of low fat content. Kraftco was approximately the sixth largest dairy in the New York City Metropolitan District with about 8 percent of the market.

6. Respondents Kraftco and Deltown are and for many years have been engaged in "commerce" within the meaning of the Clayton and Federal Trade Commission Acts.

III

Trade and Commerce

7. The packaged fluid milk industry consists of dairies primarily engaged in the processing and distribution of fresh whole milk and packaged fluid milk.

8. Packaged fluid milk is sold by dairies (1) to retail food stores for resale, (2) to institutions, (3) direct to homes, (4) to jobbers. Sales by dairies to retail stores and institutions represent "wholesale" sales. Sales by dairies directly to homes represent retail sales.

9. The New York City Metropolitan District is one of the largest markets in the United States for the consumption of packaged fluid milk.

10. Prior to the acquisition described hereinbelow, the four largest dairy companies in the New York City Metropolitan District accounted for 45.9 percent of the sales of packaged fluid milk. The top eight companies accounted for 71.5 percent of sales of packaged fluid milk.

11. In 1972, Kraftco, including its Muller Dairy division, was one of the largest distributors of packaged fluid milk in the New York City Metropolitan District with approximately 8-10 percent of the market. Sealtest sold packaged fluid milk in high volume to several food chains and, in addition, served almost every chainstore in the New York area with its low fat Light 'n Lively trademarked milk.

12. In 1972, Deltown was also one of the largest distributors of packaged fluid milk in the New York City Metropolitan District with 10-11 percent of the market. It was a supplier to the A&P stores in Manhattan and the Bronx, to part of the Food Fair retail chain in the New York City Metropolitan District and supplied numerous small retail food chains.

13. Wholesale packaged fluid milk sales, especially sales to supermarkets, are highly sought after by the large dairy companies in the New York City Metropolitan District. Because such business produces a high volume of sales, supermarket chains are regarded as choice outlets and essential for successful operation of the larger dairies. In the New York City Metropolitan District, competition for retail food store chains has been vigorous and the business of the various chains has been awarded to eight or nine dairy companies. These dairies are relatively closely bunched in terms of size and share of market, no single dairy being dominant.

14. Over the past several years, the number of fluid milk processors active in the New York City Metropolitan District has decreased from 35 in 1966 to 23 in 1973.

IV

Violations Charged

15. On or about Nov. 11, 1973, Deltown and Kraftco entered into an agreement, whereby Kraftco would sell to Deltown its plants, equipment, and other assets located in New York City, including its Muller Dairy division. In addition, a separate agreement provides that Deltown will be able to use the "Sealtest" and "Light 'n Lively" trademark and trade names in the sale of packaged fluid milk.

16. The effect of Deltown's acquisition of the Kraftco assets in New York City may be to lessen competition substantially or tend to create a monopoly in violation of Section 7 of the Clayton Act, and the contract and combination by which Kraftco and Deltown undertook to eliminate the independent competition of Kraftco and entrench Deltown as dominant in the market is in unreasonable restraint of trade, and may hinder or have a dangerous tendency to hinder competition unduly, thereby constituting an unfair act and practice in commerce, in violation of Section 5 of the Federal Trade Commission Act, in that:

(a) Actual or potential competition in sale and distribution of packaged fluid milk in the New York City Metropolitan District will be eliminated or prevented;

(b) Deltown will become the dominant competitive factor in a market

now noted for competitors of relatively equal size, none of whom has a commanding market share in the New York City Metropolitan District;

(c) Concentration in the sale and distribution of packaged fluid milk in the New York City Metropolitan District will be increased and deconcentration will be prevented;

(d) Deltown, now possessing the "Sealtest" and "Light 'n Lively," trademarks for which there is high consumer demand, will be in a position to force competing dairies out of retail chains by convincing store managers that the stores, already being served with "Light 'n Lively," do not need a different dairy supplier for other packaged fluid milk products;

(e) The New York City Metropolitan District, which has witnessed vigorous competition between dairies, will become dominated by the Deltown-Kraftco combination, thereby reducing the competitive atmosphere in the market area and threatening the elimination of competitors who are not able to maintain their present sales contracts with retail store chains.

(f) The members of the consuming public in the New York City Metropolitan District will be denied the benefits of free and open competition in the sale and distribution of packaged fluid milk.

Notice of Contemplated Relief

Should the Commission conclude from the record developed in any adjudicative proceeding in this matter that the respondents Deltown and Kraftco are in violation of Section 5 of the Federal Trade Commission Act and/or Section 7 of the Clayton Act as alleged in the complaint, the Commission may order such relief as is supported by the record and is necessary and appropriate including, but not limited to:

1. Divestiture of ownership of all former Kraftco stock, assets and other property in the New York City Metropolitan District owned or under the control of Deltown or total rescission of the agreement or contract of purchase and sale entered into between Deltown and Kraftco.

2. Revocation of Kraftco's license to Deltown to use Kraftco's trademarks "Sealtest" and "Light 'n Lively" to Deltown, such licenses must be granted on a nonexclusive basis and made available to all dairies in the New York City Metropolitan District on the same reasonable terms.

3. Any other provisions appropriate to correct or remedy the effects of anticompetitive practices engaged in by respondent.

4. Requirement that appropriate persons be notified of the terms of the order and that periodic compliance reports be filed with the Commission.

DECISION AND ORDER

The Federal Trade Commission, having initiated a complaint charging that the respondents named in the caption hereof have violated the provisions of Section 7 of the Clayton Act, as amended, 15 U.S.C. §18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. §45; and

Upon joint motion of the parties and certification of such motion to the Commission by the administrative law judge, the Commission, by order of Dec. 5, 1974, having withdrawn the matter from adjudication pursuant to Section 2.34(d) of the rules of practice; and

Respondents and complaint counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all jurisdictional facts set forth in the complaint, 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, and waivers and other provisions as required by the Commission's rules; and

The Commission having considered the agreement and having provisionally accepted it by unanimous vote on Dec. 17, 1974, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, and no comments having been filed pursuant to Section 2.34(b) of the rules;

Now, in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Deltown Foods, Incorporated (Deltown) is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its executive offices and principal place of business located at 170 Saw Mill River Road, Yonkers, N.Y.

2. Respondent Kraftco Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at Kraftco Court, Glenview, Ill.

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

ORDER

I

For the purposes of this order, the following definitions shall apply:

- A. The "Base Period" is the six day period Nov. 12 to Nov. 17, 1973, both dates inclusive.

B. The "Plant" is the milk processing plant located at 132-05 Atlantic Ave., Richmond Hill, Queens, N.Y.

C. An "Acquired Customer" is any customer who "bought or obtained" "Class I Packaged Fluid Milk Products" from the "Plant" on Nov. 12, 1973. An "Acquired Customer" is a particular store, delivery stop or plant pick up rather than the purchasing entity as a whole; "bought or obtained" shall include milk of customers in quarts or quart equivalents processed or packaged for their account.

D. "Acquired Volume" is the total volume of "Class I Packaged Fluid Milk Products" in quarts or quart equivalents "bought or obtained" from the "Plant" by an "Acquired Customer" during the "Base Period."

E. "Class I Packaged Fluid Milk Products" consist of whole milk, skim milk, 1 percent low-fat milk and all other products defined as Class I milk products for the purposes of Federal Milk Marketing Order No. 2.

F. "Volume Discontinued" is the total volume of "Class I Packaged Fluid Milk Products," in quarts or quart equivalents, "bought or obtained" by a discontinued "Acquired Customer" during the "Base Period" from the "Plant" or from Deltown's processing facilities in Yonkers, N.Y. or Copiague, N.Y. A discontinued "Acquired Customer" shall be any "Acquired Customer" with respect to whom service has been discontinued for any reason on or after Nov. 13, 1973.

II

It is ordered, That the Trademark License Agreement dated Nov. 20, 1973, between Sealtest Foods Division of Kraftco Corporation and Deltown Foods, Incorporated, (License Agreement) and all rights and interests thereunder, (except for the obligations of Deltown set forth in paragraphs 5(d), 8, 9, 10, 15(b), including the last sentence of 15, 16 and 17 of the license agreement, the obligation of Deltown pursuant to paragraph 6 of the License Agreement to pay royalties on sales made prior to the date of termination, and the obligations of Kraftco set forth in paragraph 13 of the license agreement), shall terminate on Mar. 31, 1976, unless Deltown shall, on or before Mar. 31, 1976, the exact date to be as determined by Deltown, assign its right and interest as licensee of the trademarks "Sealtest" and "Light 'n Lively," to a purchaser previously approved by Kraftco pursuant to the license agreement and approved by the Federal Trade Commission (the "Commission").

III

It is further ordered, That Deltown, on or before Mar. 31, 1976, the

exact date or dates to be determined by Deltown, shall have ceased service to "Acquired Customers" in sufficient number such that the total "Volume Discontinued" is not less than one-half (1/2) of the "Acquired Volume." Discontinuance or cessation of service may have been effected for any reason including, without limitation, sale (for monetary consideration) of the patronage of such "Acquired Customers" to a purchaser or purchasers other than Dairylea Cooperative Inc., Pearl River, N.Y., hereinafter "Dairylea," Elmhurst Milk and Cream Co./Honeywell Farms Inc., 155-25 Styler Rd., Jamaica, N.Y., hereinafter "Elmhurst/Honeywell," Queens Farms Inc./Liberty Farms Inc., 103-45 98th Street, Ozone Park, N.Y., hereinafter "Queens Farms/Liberty Farms" or their parents, divisions, affiliates or related companies; *Provided*, That any discontinuance of service as part of a swap or exchange of customers' patronage shall not be considered to be a discontinuance within the meaning of this order. Deltown shall maintain, until Jan. 1, 1979, and make available upon request by the Commission staff, sufficient records to reflect the identity of "Acquired Customer" and sufficient records from which "Volume Discontinued" can be calculated.

IV

It is further ordered, That Deltown shall file an Initial Report as hereinafter provided and thereafter shall file successive reports for each calendar quarter to and including the quarter ending Mar. 31, 1976, identifying "Acquired Customers" whose patronage has been discontinued during the reporting quarter and identifying any wholesale customers acquired in the reporting quarter and such customer's previous supplier and, in the case of customers whose patronage was sold, stating to whom such customer's patronage was sold and the consideration therefor. Sixty days after this order shall become effective, Deltown shall file its Initial Report covering all calendar quarters since Nov. 12, 1973, to and including the calendar quarter ending on or before the date of the Initial Report. For a period of one year after the filing of the quarterly report identifying a discontinued "Acquired Customer," or in the case of the Initial Report, one year after the end of the quarter during which the "Acquired Customer" was reported as discontinued, Deltown shall not solicit, canvass, sell to or in any other way attempt to obtain the patronage or business of the "Acquired Customer" listed as discontinued on such quarterly or Initial Report. Deltown shall, if requested, file such additional reports as may be required by the Commission's staff on reasonable notice.

V

It is further ordered, That Deltown shall divest itself of the "Plant" no later than Mar. 31, 1975, *Provided*, That it shall be deemed sufficient divestiture hereunder if Deltown takes such actions, including but not limited to a sale or lease, the effect of which shall be that Deltown no longer operates that "Plant" as a milk processing facility; *Provided*, That any sale or lease to a firm engaged in processing and/or distribution of "Class I Packaged Fluid Milk Products" shall have prior Commission approval.

Nothing in this order shall be deemed to prohibit Deltown from retaining, accepting and enforcing in good faith any security interest in the "Plant" or equipment contained therein for the sole purpose of securing to Deltown full payment, with interest, of the price at which the "Plant" or equipment is sold.

VI

It is further ordered, That for a period of ten years from the effective date of this order, Deltown shall be prohibited from acquiring, directly or indirectly, without the prior approval of the Commission, (1) the whole or any part of the stock or share capital of any corporation or other business entity engaged in the processing and/or distribution of "Class I Packaged Fluid Milk Products" within the five boroughs of New York City and Nassau, Suffolk and Westchester Counties, in the State of New York, (the "New York City Metropolitan District"), or (2) a fluid milk processing plant or fluid milk distribution route of any corporation or other business entity if such plant or route is involved in the processing and/or distribution of "Class I Packaged Fluid Milk Products" in the "New York City Metropolitan District"; *Provided*, *however*, That subject to the provisions in subdivision IV, *supra*, as to discontinued "Acquired Customers," nothing contained herein shall prohibit Deltown from competing for the sale or processing of "Class I Packaged Fluid Milk Products" to or for dealers or jobbers whether or not served by Deltown on the date this order becomes final; *And provided further*, that Deltown may, without prior approval of the Commission, acquire the whole or any part of the stock, share capital or assets of any concern to which it may be selling or for which it may be processing "Class I Packaged Fluid Milk Products" to prevent loss of accounts receivable owing from such concern; *Provided*, That Deltown shall, within ten (10) days after such acquisition, report the transaction to the Commission, thereafter provide such information concerning the acquisition as may be required by the Commission's staff, and shall, if so required by the Commission, divest such acquired tangible and/or

intangible property within six months of the Commission's decision. Deltown shall be further prohibited for a period of ten years from acquiring, directly or indirectly, without the prior approval of the Commission, any fluid milk processing plant within 150 miles of New York City which processed 26 million pounds of milk in the twelve (12) months prior to the proposed acquisition.

VII

It is further ordered, That prior to Jan. 1, 1979, Kraftco shall not:

A. enter into any agreement which has the effect of:

- (i) licensing anyone to process and distribute; or
- (ii) authorizing "Dairylea," Deltown Foods, Inc., "Elmhurst/Honeywell," "Queens Farms/Liberty Farms" or their parents, divisions, affiliates or related companies to process; or
- (iii) authorizing any one person or company or its parents, divisions, affiliates or related companies to distribute; or
- (iv) authorizing less than five persons or companies or their parents, divisions, affiliates or related companies if any of them are "Dairylea," Deltown Foods, Inc., "Elmhurst/Honeywell" or "Queens Farms/Liberty Farms" to distribute;

"Light 'n Lively" or "Sealtest" "Class I Packaged Fluid Milk Products" in the "New York City Metropolitan District" until thirty (30) days after the Commission receives either a copy of the proposed agreement (in the case of a written agreement) or has been notified in writing of the substance of the agreement (in the case of an oral agreement).

B. enter into any agreement not covered by paragraph A above which results in the sale of "Light 'n Lively" or "Sealtest" "Class I Packaged Fluid Milk Products" in the "New York City Metropolitan District" unless the Commission receives either a copy of the agreement (in the case of a written agreement) or has been notified in writing of the substance of the agreement (in the case of an oral agreement) within ten (10) days of said agreement.

C. *Provided, however,* That in the event that a then existing processor is unable to process "Light 'n Lively" or "Sealtest" "Class I Packaged Fluid Milk Products" in the "New York City Metropolitan District" Kraftco may enter into an agreement for emergency processing for a period not to exceed sixty (60) days; *Provided,* That the Commission is notified within forty-eight (48) hours of the entering into of such agreement.

Complaint

85 F.T.C.

IN THE MATTER OF
CAMBRIDGE CAMERA EXCHANGE, INC., ET AL.

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

Docket 8971. Complaint, June 10, 1974 - Decision, Mar. 17, 1975

Consent order requiring a New York City mail-order distributor of photographic equipment and supplies, among other things to cease using unfair and deceptive practices in connection with the delivery of prepaid mail order merchandise.

Appearances

For the Commission: *Larry B. Feinstein* and *Herbert S. Forsmith*.
For the respondents: *Harvey M. Greene, Lotwin, Goldman, Rosen & Greene*, New York, N.Y.

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 Cambridge Camera Exchange, Inc., a corporation, Andrew Elbogen, individually, and as an officer of said corporation, and Robert Lindenblatt, individually, and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, 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. Cambridge Camera Exchange, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of New York, with its principal place of business and executive offices located at 47 Seventh Ave., N.Y., N.Y.

PAR. 2. Andrew Elbogen is an individual and is president of the corporate respondent, and formulates, directs and controls its acts and practices, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 3. Robert Lindenblatt is an individual and is the vice president of the corporate respondent, and formulates, directs and controls its acts and practices, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 4. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale, and distribution by mail order of photographic equipment and supplies.