

Complaint

88 F.T.C.

IN THE MATTER OF

E. & J. GALLO WINERY

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

Docket C-2836. Complaint, Aug. 26, 1976—Decision, Aug. 26, 1976

Consent order requiring a Modesto, Calif. winery, among other things to cease, for a ten-year period, establishing and maintaining exclusionary marketing policies and enforcing them through coercion of wholesalers. The order diminishes respondent's involvement in the operations of its wholesalers by limiting its ability to obtain financial information from its wholesalers and prohibits respondent from becoming involved in the financial obligations of such wholesalers. Further, respondent is prohibited from imposing certain conditions which could operate to the exclusion of competing wineries.

Appearances

For the Commission: *Rafe H. Cloe.*

For the respondent: *Elliot S. Kaplan, Robins, Davis & Lyons,*
Minneapolis, Minn.

COMPLAINT

The Federal Trade Commission, having reason to believe that the corporate respondent has violated the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C. §45) by its various acts and practices described herein, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint and states its charges as follows:

I

DEFINITIONS

1. For purposes of this complaint, the following definitions apply.

A. Table wines are still (noneffervescent) wines. Their alcohol content is not over 14 percent by volume.

B. Dessert or sweet ("dessert") wines are still wines. Their alcohol content is over 14 percent but not over 24 percent by volume.

C. Sparkling wines are effervescent wines. Their alcohol content usually ranges from 10 to 14 percent by volume.

D. Wholesaler is a duly licensed person or entity (other than a governmental purchaser or an entity or division owned in whole or in part by respondent or any officer(s) or director(s) of respondent) authorized by respondent to sell or distribute its wines to others.

E. Operating costs of doing business shall not include services performed by a wholesaler for respondent at respondent's request, such as, but not limited to, market surveys, local placement of respondent's advertising, display installation services, employment of campus representatives, training of salesmen whom respondent intends to employ, product sampling, gifts of wine, stenographic and office services requested by respondent's employees, officers and agents, when they are away from respondent's Modesto, California offices, or expenses incurred by a wholesaler in connection with breakage, off-conditioned wine and services in transferring wines to other wholesalers.

F. Management Services are staff consulting services performed by respondent at the request of a wholesaler with regard to one or more areas of such wholesaler's operations, which may include, where respondent's recommendations are adopted by such wholesaler, temporary assistance in training and implementation.

II

RESPONDENT

2. Respondent Gallo is a corporation organized, existing and doing business under and by virtue of the laws of the State of California with its principal office and place of business located at 600 Yosemite Boulevard, Modesto, California. Respondent's primary function is the production and sale of wines. Respondent currently sells more than 40 different wines through over 300 independent wholesalers.

3. At all times relevant herein, respondent has sold wines in interstate commerce and engaged in "commerce" within the meaning of Section 5 of the Federal Trade Commission Act.

III

TRADE AND COMMERCE

4. For purposes of this complaint, the relevant product market is the distribution and sale of wines. The relevant geographic market is the United States.

5. Wine sales in the United States have experienced a major expansion. They have increased from 145,186,000 gallons in 1955 to 347,268,000 gallons in 1973. Except for 1962, there has been a constant increase in total wine sales. During the years 1969 through 1972, increases in sales were dramatic, with annual rates of growth exceeding 10 percent. However, in 1973, the annual rate of growth was less than 10 percent.

6. Table wine sales have generally followed the pattern of total industry sales. They increased steadily between 1955 and 1973. With the exception of 1972 and 1973, sparkling wine sales have constantly increased during this period. Dessert wine sales have decreased since 1955.

7. The wine industry is marked by increasing concentration. In 1968, the Nation's four largest wineries had 48 percent of wine sales in the United States. By 1972, top four concentration had increased to approximately 55 percent. The top 10 wineries in 1972 accounted for almost 70 percent of the wine sold in this country. Remaining sales were divided among over 300 United States wineries and many importers.

8. Respondent is the largest seller of wine in the United States. Its share of total wine sales increased from 22.7 percent in 1967 to 28.8 percent in 1973. During this period, respondent's increase in gallonage sales represented 38 percent of the growth of total industry sales. In 1973 respondent's sales of approximately 100 million gallons were twice those of its nearest competitor.

9. Respondent's share of table wine sales increased from 25.2 percent in 1967 to 38.6 percent in 1971 and declined to 31 percent in 1973. Although respondent was not among the four largest producers of sparkling wine in 1967, by 1973 it was the largest with 34.8 percent. Respondent's share of dessert wine sales increased from 22.9 percent in 1967 to 24.8 percent in 1973.

10. There are barriers to entry to any firm wishing to make a significant entrance into the wine business. Obtaining the services of viable wholesalers may be a barrier. Wineries affiliated with sellers of other alcoholic beverages have an advantage in obtaining distribution for their wines.

11. Laws regulating alcoholic beverage distribution are a barrier to entry. Each State, the District of Columbia and the Federal government have their own laws regulating alcoholic beverage distribution. With a few exceptions, wines must be distributed through wholesalers. In addition, wholesalers may not distribute their wines across state lines. Thus, a winery is more limited in the distribution channels it may select than is a company not producing alcoholic beverages.

IV

CHARGE

12. Respondent has used its dominant position, size and power to lessen, hinder or restrain competition in the sale and distribution of wines in the United States by engaging in various unfair acts, practices

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and methods of competition including, but not limited to, the establishment and maintenance of exclusionary marketing policies and their enforcement through coercion of distributors. Beginning in 1970 respondent ceased many of said unfair acts, practices and methods of competition.

V

EFFECTS

13. The effects of respondent's acts, practices and methods of competition may be, among others, to:

- A. Discourage, limit and/or prevent the growth of new wineries.
- B. Lessen, hinder and restrain competition in the sale of wines in the United States.
- C. Preserve, maintain and further: (1) levels of concentration and (2) barriers to entry.

VI

VIOLATIONS

14. Through unfair methods of competition, respondent has lessened, hindered and restrained competition in the sale and distribution of wines in the United States in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER*

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the bureau proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorney and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, 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; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has

violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent E. & J. Gallo Winery is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located in Modesto, California.

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

ORDER

I

It is ordered, That respondent, its subsidiaries, divisions, affiliates, successors, assigns, officers, directors, agents, representatives or employees, directly or indirectly on behalf of respondent or through any corporate or other device acting on behalf of respondent in connection with the distribution, offering for sale or sale of its wines within any or all of the fifty (50) States of the United States of America and the District of Columbia, for a period of ten (10) years from the date of issuance of this order shall cease and desist from:

1. Requiring the submission of financial statements from any wholesaler, except for credit or management services purposes; or conditioning the granting or extension of credit to any wholesaler on such wholesaler's submitting of financial statements which disclose the operating results and financial position specifically attributable to any segment of such wholesaler's business. *Provided, however*, respondent may require financial statements from an applicant not then purchasing wine from respondent, who desires to become a wholesaler of respondent's wines.

2. Guaranteeing all (or any part) of any loan for any wholesaler, assuming all (or any part) of the capital expenses of any wholesaler, or assuming all (or any part) of the operating costs of doing business of any wholesaler.

3. Prohibiting any wholesaler from, or punishing such wholesaler for: (1) selling respondent's wines in any area in which such wholesaler

is permitted to operate by state license, or (2) dealing in wines produced by other companies.

4. Requiring any wholesaler to distribute any of respondent's wines in order to obtain any other wine produced or imported by respondent.

5. Entering into distribution agreements or other contracts with its wholesalers with a provision(s) for crediting or charging the wholesaler with respect to respondent's wines in such wholesaler's warehouse or in transit to such wholesaler to reflect any new price(s) charged by respondent. Respondent agrees to offer to all of its wholesalers operating pursuant to a contract having such a provision(s) on the date of issuance of this order an amended contract without such a provision(s) and request that it be accepted.

II

It is further ordered, That:

1. For a period of ten (10) years from the date of issuance of this order, respondent shall maintain a separate file in Modesto, California, that will be available to employees of the Federal Trade Commission for inspection and copying upon ten (10) days written notice. The file shall contain the following and the enumerated items will be retained in the file during the period covered by this order.

(a) A written description of the facts surrounding each instance in which respondent did not comply with any of the provisions in this order because of a conflict with Federal or State laws and/or regulations as well as copies of any applicable documentation.

(b) A written description of the facts surrounding each instance in which respondent, as permitted by Order Provision I, reviewed a wholesaler's financial data in order to provide management services. A copy of such wholesaler's request for services must be attached as well as copies of any documents prepared by respondent in performing the services.

(c) A list containing an itemized listing of the financial statements respondent received from wholesalers and the name and address of each such wholesaler. Respondent shall retain copies of such financial statements during the period covered by this order.

(d) A list of all terminated wholesalers. In addition to the name and address of each wholesaler, the list shall include a written description of the reason(s) for termination. Respondent shall retain copies of any relevant documents relating to terminated wholesalers during the period covered by this order.

(e) A list of all new wholesalers, including each wholesaler's name and address.

2. If no other provision of this order or State or Federal law is

violated thereby, respondent: (1) may appoint one or more additional duly licensed wholesaler(s) to distribute one or more of its wines in any geographical area in which another wholesaler is then distributing respondent's wines; (2) shall not be required to sell any of its wines to a wholesaler who is purchasing other wines from respondent; or (3) may terminate any wholesaler for cause or in accordance with the terms and conditions of the agreement of distributorship between respondent and that wholesaler.

3. Within fifty (50) days after service upon it of this order, respondent shall distribute a copy of such order to each of its existing wholesalers. All wholesalers appointed by respondent within ten (10) years after the date of this order are to be furnished copies of this order. If this order is modified, all then existing wholesalers are to receive copies of the modification.

4. For a period of ten (10) years respondent shall notify the Commission at least thirty (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, or the creation or dissolution of subsidiaries, if such change may affect compliance obligations arising out of this order.

5. Within sixty (60) days after service upon it of this order, respondent shall file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order, including a list of all wholesalers to whom it has sent a copy of this order, and shall file such other reports as may, from time to time, be required in order to assure compliance with the terms and conditions of this order.

Commissioner Clanton not participating; Commissioner Dole not participating by reason of absence.

IN THE MATTER OF

LEVITZ FURNITURE CORPORATION

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

Docket C-2835. Complaint, Aug. 30, 1976 — Decision, Aug. 30, 1976

Consent order requiring a Miami, Fla., furniture retailer, among other things to cease misrepresenting and/or failing to disclose pertinent information regarding prices, sales, limited offers, warranties, construction, composition and use of its products; failing to make timely repairs, adjustments, and refunds; and failing to maintain appropriate records. Additionally, respondent must provide its advertising agencies with copies of the F.T.C.'s news release concerning this order for a one-year period.

Appearances

For the Commission: *Richard F. Kelly* and *Alan L. Cohen*.

For the respondent: *Henry P. Sailer, Theodore L. Garrett, Covington & Burling*, Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Levitz Furniture Corporation, a corporation, hereinafter sometimes referred to as respondent, has 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. Respondent Levitz Furniture Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, with its principal office and place of business located at 1400 N.W. 167th St., Miami, Florida.

Said respondent formulates, directs and controls the acts and practices of its organizational division, Classic House, and its wholly-owned subsidiary corporations, Levitz Furniture Company of the Eastern Region, Inc., Levitz Furniture Company of the Midwest, Inc., Levitz Furniture Company of the Pacific, Inc., Levitz Furniture Company of Arizona, Inc., Levitz Furniture Company of Texas, Inc. and Levitz Furniture Company of Washington, Inc.

Respondent formulates, directs and controls, directly or through its wholly-owned subsidiaries, the acts and practices of a chain of some