

IN THE MATTER OF

THE AMERICAN SOCIETY OF ANESTHESIOLOGISTS,
INC.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT*Docket C-2952. Complaint, Jan. 22, 1979 — Decision, Jan. 22, 1979*

This consent order, among other things, requires a Park Ridge, Ill. medical society, composed mainly of physicians who have limited their professional activities to the practice of anesthesiology, to cease including statements relating to compensation arrangements in membership documents; conditioning membership privileges on such arrangements; or engaging in any act or practice which would serve to influence the prices members charge for their services. The Society is further required to delete from its files any record of disciplinary sanctions imposed upon members for failure to adhere to past pricing policies, and advise affected parties of such deletion. Additionally, the Society would be required to revoke the charter of any component society which fails to comply with the terms of the order.

Appearances

For the Commission: *M. Elizabeth Gee* and *James E. McCarty*.

For the respondent: *Squire, Sanders & Dempsey*, Washington, D. C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. 41, *et. seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that The American Society of Anesthesiologists, Inc. has violated the provisions of Section 5 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 as follows:

PARAGRAPH 1. Respondent, The American Society of Anesthesiologists, Inc. ("ASA"), is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 515 Busse Highway, Park Ridge, Illinois.

PAR. 2. ASA has approximately 15,000 members, which amounts to approximately 90 percent of all anesthesiologists practicing in the United States. Its members are comprised mainly of those physicians who have completed post-graduate training in, and who have limited their professional activities to, the practice of anesthesiology or are otherwise especially interested in anesthesiology. The members elect

the officers of ASA, who, together with the Board of Directors, manage the affairs of ASA.

PAR. 3. Anesthesiologists are licensed physicians who specialize in rendering a patient insensitive to pain. They are generally engaged in the private practice of medicine and derive substantial portions of their professional income from fees for medical treatment charged to patients or to insurers.

PAR. 4. ASA has engaged in activities relating to the economic aspects of the practice of anesthesiology, including the development and distribution of relative value guides and the promulgation of the *Guidelines to the Ethical Practice of Anesthesiology* and *Statement of Policy* which relate in part to the financial aspects of anesthesia practice, as a result of which ASA is organized for the profit of its members within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

PAR. 5. In the course and conduct of their business, the members of ASA:

(a) charge and collect fees which, in substantial part, are paid or reimbursed to patients directly or indirectly with Federal funds through Medicare, Federal Employees Health Benefits Program, Civilian Health and Medical Program of the Uniformed Services, and other federal programs;

(b) charge and collect fees which, in substantial part, are paid or reimbursed to patients directly or indirectly by Blue Shield Plans and by commercial insurance carriers pursuant to group contracts covering insureds in two or more states; and

(c) practice anesthesiology and charge and collect fees therefor in the District of Columbia;

as a result of which the acts and practices of ASA and its members are in and affect commerce within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

PAR. 6. Since at least 1968, ASA, individually and in collusion with its component societies and members, promulgated, published, approved and enforced documents entitled *Guidelines to the Ethical Practice of Anesthesiology* and *Statement of Policy*. Said documents include provisions which provide that anesthesiologists should be compensated only on a fee-for-service basis and that ASA members should not practice as salaried employees of organizations such as hospitals.

PAR. 7. The acts, practices and methods of competition alleged in Paragraph Six above have had the effect of:

- (a) fixing, establishing, maintaining or otherwise influencing the prices which anesthesiologists charge for their services;
- (b) limiting the ability of hospitals to freely negotiate and conclude contracts with ASA members and others;
- (c) otherwise restraining, limiting, and foreclosing competition among anesthesiologists; and
- (d) depriving consumers of the benefits of competition;

and are in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

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 of Competition 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 attorneys, 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 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

Counsel for the Commission having thereafter submitted a revised order, and respondent and its counsel having submitted letters of agreement dated December 28, 1978, and January 8, 1979, assenting to the terms of the order, as modified; and

The Commission having duly considered the recommendations of its staff and the assent of respondent to the revised order, 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, as modified:

1. Respondent, The American Society of Anesthesiologists, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 515 Busse Highway, in the City of Park Ridge, State of Illinois.

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

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

A. The term "ASA" means The American Society of Anesthesiologists, Inc., its successors or assigns, its committees or organizational subdivisions, and, in their capacities as such or while representing the Society, its officers, agents, representatives, employees or authorized delegates;

B. The term "Membership Document" means any document the acceptance of which or adherence to the terms of which is a condition of membership privileges;

C. The term "Official Position" means an oral or written statement which is made by ASA or any of its Component Societies;

D. The term "Component Society" means any organization duly chartered as such by ASA, any successor or assign to any Component Society, any committee or organizational subdivision of any Component Society, and, in their capacities as such or while representing a Component Society, any officers, agents, representatives, employees or authorized delegates; and

E. The term "Effective Date of This Order" means the date of service of this order.

II

It is ordered, That ASA directly or through any corporation, subsidiary, division or other device, or through employment of any method, act, practice or procedure, shall cease and desist from:

A. Importuning or engaging in threats or acts of reprisal, coercion, or intimidation with the purpose or effect of restraining or impeding anesthesiologists individually or as a class of practitioners from engaging in the practice of anesthesiology other than on a fee-for-service arrangement;

B. Including within any Membership Document any statement which relates to the fee-for-service, salary or any other compensa-

tion arrangement of anesthesiologists individually or as a class of practitioners; and

C. Conditioning any privilege of membership upon the fee-for-service, salary or any other compensation arrangement of anesthesiologists individually or as a class of practitioners.

III

It is further ordered, That, except as required by subpoena or other legal process, ASA is prohibited from publishing, disseminating or distributing in any manner any list, compilation, document or statement that refers to censure or other sanction against any present or former member, the grounds for which was failure of such member to accept or to adhere to the terms of any Membership Document or Official Position which prohibited anesthesiologists individually or as a class of practitioners from engaging in the practice of anesthesiology on other than a fee-for-service arrangement, and ASA shall advise any such members (if living) of this prohibition.

IV

It is further ordered, That ASA shall for a period of ten (10) years following the Effective Date of This Order cease and desist from making any statement which contains an Official Position which relates to the fee-for-service, salary or other compensation arrangement of anesthesiologists individually or as a class of practitioners, unless such statement contains and is not inconsistent with the following language:

It is the official policy of The American Society of Anesthesiologists, Inc. that an anesthesiologist is free to choose whatever arrangement he prefers for compensation of his professional services. The Society does not consider the compensation arrangement so chosen to be a matter of professional ethics.

This part does not modify the requirements of Part II of this order.

V

It is further ordered, That ASA shall:

A. At the first Annual Meeting of ASA's House of Delegates subsequent to 180 days after the Effective Date of This Order, revoke the charter of any Component Society which, prior to the meeting of ASA's Board of Directors immediately preceding such Annual Meeting, has not informed ASA by a sworn statement of an

authorized officer that the Component Society has (1) agreed to comply with the requirements of Part II of this order, and brought its own Membership Documents and Official Positions into conformity with the requirements of that part, (2) agreed to the prohibition of Part III of this order, so that, except as required by subpoena or other legal process, the Component Society is prohibited from publishing, disseminating or distributing in any manner, any list, compilation, document or statement that refers to censure or other sanction against any present or former Component Society or ASA member, the ground for which was failure of such member to accept or to adhere to the terms of any Membership Document or Official Position which prohibited anesthesiologists individually or as a class of practitioners from engaging in the practice of anesthesiology on other than a fee-for-service arrangement, and (3) agreed to abide by the requirements of Part IV of this order, so that every statement of the Component Society which contains an Official Position which relates to the fee-for-service, salary or other compensation arrangement of anesthesiologists individually or as a class of practitioners, contains and is not inconsistent with the following language:

It is the official policy of [name of Component Society] that an anesthesiologist is free to choose whatever arrangement he prefers for compensation of his professional services. The [name of Component Society] does not consider the arrangement so chosen to be a matter of professional ethics.

B. Within 60 days after the Effective Date of This Order, distribute by first class mail a copy of the Commission's complaint and order in this matter to each of the aforesaid Component Societies and to each of ASA's then current members, together with a letter on ASA's regular letterhead in the form shown in the Appendix attached hereto.

VI

It is further ordered, That nothing in this order shall prohibit or limit the organizations and persons subject to this order from petitioning the government for a redress of grievances by:

A. Preparing or furnishing testimony, information or advice to, or negotiating with, any government body or agency or furnishing drafts thereof to any organization which is preparing or furnishing testimony, information or advice to, or negotiating with, any government body or agency with respect to the same subject matter;

B. Advising its members and others of legislation, programs,

policies, regulations, procedures or interpretations of any government body or agency and soliciting their views thereon;

C. Informing members and others of any testimony, information or advice supplied to, or negotiations with, any government body or agency; and

D. Suggesting or recommending that members or others undertake the activities enumerated in subparagraphs (A), (B) and (C) above; but only as long as the activities enumerated in this Part VI are not undertaken with the purpose or intent of achieving a result prohibited by Part II of this order through means other than the action of a government body or agency.

VII

It is further ordered, That ASA shall, within sixty (60) days following the Effective Date of This Order, and thereafter on the first anniversary date of the Effective Date of This Order, and at such other times as the Commission may by written notice to the respondent require, file or cause to be filed with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with this order. All compliance reports shall include such other information and documentation as may be required to show compliance with this order.

VIII

It is further ordered, That ASA shall notify the Commission at least thirty (30) days prior to any proposed change in its structure resulting in the emergence of a successor corporation, or any other change in its structure, which may affect obligations arising out of this order.

APPENDIX

[ASA REGULAR LETTERHEAD]

To the Members and Component Societies of the American Society of Anesthesiologists, Inc.:

As some of you have been aware, the Federal Trade Commission ("FTC") in September 1977 initiated an investigation of the extent to which members and component societies of ASA were required to accept or adhere to certain principles, contained in documents approved by the ASA House of Delegates, which related to the fee-for-service, salary or other compensation arrangements of anesthesiologists.

The Board of Directors and House of Delegates have determined that they do not desire to impose any such condition nor to impose any sanction against an ASA member for failure to accept or adhere to such principles. Accordingly, ASA has with approval of its House of Delegates reached agreement with the FTC, resulting in the issuance by the FTC of a complaint on ———, and the entry of a consent order.

Decision and Order

93 F.T.C.

The complaint and the order are attached to this letter. The order, rather than this letter, is the document which legally binds ASA and others. You should carefully review it.

The complaint alleges that the promulgation and enforcement of those provisions of the Statement of Policy and Guidelines to the Ethical Practice of Anesthesiology which relate to compensation arrangements have had the effect of:

- (a) fixing, establishing, maintaining or otherwise influencing the prices which anesthesiologists charge for their services;
- (b) limiting the ability of hospitals to freely negotiate and conclude contracts with ASA members and others;
- (c) otherwise restraining, limiting and foreclosing competition among anesthesiologists; and
- (d) depriving consumers of the benefits of competition.

The agreement containing the consent order states that it is for settlement purposes only and does not constitute an admission by ASA of the charges in the complaint or that the law has been violated. The consent order itself requires, in summary, that ASA:

- (a) Refrain from importuning or engaging in threats or acts of reprisal, coercion, or intimidation with the purpose or effect of restraining or impeding anesthesiologists individually or as a class of practitioners from engaging in the practice of anesthesiology other than on a fee-for-service arrangement;
- (b) Not include within any membership document any statement which relates to the fee-for-service, salary or any other compensation arrangement of anesthesiologists;
- (c) Not condition any privilege of membership upon the fee-for-service, salary or any other compensation arrangement of anesthesiologists;
- (d) Not publish, disseminate or distribute (unless required to do so by subpoena or other legal process) any list, compilation, document or statement that refers to censure or other sanction imposed upon any member for failure to accept or adhere to any position or policy which prohibited anesthesiologists from practicing on other than a fee-for-service arrangement, and notify any such member of this prohibition;
- (e) For a period of ten years, refrain from making any statement which contains an ASA official position which relates to the fee-for-service, salary or other compensation arrangement of anesthesiologists unless the statement contains and is not inconsistent with the following language:

It is the official policy of The American Society of Anesthesiologists, Inc. that an anesthesiologist is free to choose whatever arrangement he prefers for compensation of his professional services. The Society does not consider the compensation arrangement so chosen to be a matter of professional ethics;

and

- (f) Revoke the charter of any component society which does not (1) agree to abide by the provisions of the order, and (2) bring its own membership documents, guidelines, policies and statements into conformity with these provisions.

The order also provides that nothing in it shall prohibit or limit the organizations and persons subject to the order from petitioning the government for a redress of grievances by:

(a) Preparing or furnishing testimony, information or advice to, or negotiating with, any government body or agency or furnishing drafts thereof to any organization which is preparing or furnishing testimony, information or advice to, or negotiating with, any government body or agency with respect to the same subject matter;

(b) Advising its members and others of legislation, programs, policies, regulations, procedures or interpretations of any government body or agency and soliciting their views thereon;

(c) Informing members and others of any testimony, information or advice supplied to, or negotiations with, any government body or agency; and

(d) Suggesting or recommending that members or others undertake the activities enumerated in subparagraphs (a), (b) and (c) above;

but only as long as the activities enumerated above are not undertaken with the purpose or intent of achieving a result which is prohibited by the order through means other than the action of a government body or agency.

Henceforth, it will be the official policy of ASA that an anesthesiologist is free to choose whatever method he prefers for compensation of his professional services, and that the compensation arrangement so chosen will not be a matter of professional ethics. The financial arrangements between an anesthesiologist and a hospital or other institutional provider of health care will not be the basis for the denial to an anesthesiologist of ASA membership or any privilege of ASA membership.

Sincerely,

Complaint

93 F.T.C.

IN THE MATTER OF

COCA-COLA BOTTLING COMPANY OF NEW YORK, INC.

DISMISSAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED
VIOLATION OF THE FEDERAL TRADE COMMISSION AND CLAYTON
ACTS*Docket 8992. Complaint, Sept. 10, 1974 — Final Order, Jan. 23, 1979*

This order dismisses a complaint issued against a New York City producer and marketer of various products, including soft drinks and wine, for alleged violations of Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act. The Commission, in dismissing the complaint, held that evidence failed to establish that the firm's merger with Franzia Bros. Winery would substantially lessen competition.

Appearances

For the Commission: *Joseph S. Brownman, John F. Stephens, Jr., Charles G. Brown and Elizabeth M. Brown.*

For the respondent: *Christopher Crowley, Arthur F. Golden, Michael Mills and Susan K. Jackson, Davis, Polk & Wardwell, New York City.*

COMPLAINT

The Federal Trade Commission having reason to believe that Coca-Cola Bottling Company of New York, Inc. (hereafter New York Coca-Cola), a corporation and the respondent herein, has violated the provisions of Section 7 of the amended Clayton Act (15 U.S.C. 18) and Section 5 of the Federal Trade Commission Act (15 U.S.C. 45) by its acquisition of Franzia Brothers Winery (hereafter Franzia), hereby issues this complaint stating its charges as follows.

I. ACQUIRING COMPANY

PARAGRAPH 1. Respondent New York Coca-Cola is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 425 East 34th St., New York, New York.

PAR. 2. New York Coca-Cola is a major industrial corporation engaged in three lines of business: (i) the production and sale of soft drinks, (ii) the production and sale of wines, and (iii) the manufacture and marketing of picnic chests, beverage coolers and extruded plastic sheet. New York Coca-Cola sales doubled during the last five years. Net sales for its fiscal years ending December 31 were: