

IN THE MATTER OF
CPC INTERNATIONAL INC., ET AL.

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

Docket C-2955. Complaint, Feb. 22, 1979 — Decision, Feb. 22, 1979

This order, among other things, requires an Englewood Cliffs, N.J. food products manufacturer and its wholly-owned Danville, Ill. subsidiary, Peterson/Puritan, Inc., to divest, within 18 months from the date of the order, the aerosol packaging facility in Atlanta, Ga. acquired from the Capitol Packaging Company. Additionally, the order prohibits respondents from competing with the facility for two years following divestiture, and bars them from acquiring any contract aerosol packaging concern without prior Commission approval for a five-year period.

Appearances

For the Commission: *Robert W. Doyle, Jr.*

For the respondents: *Robert F. Finkle, Mayer, Brown & Platt,*
Chicago, Ill.

COMPLAINT

The Federal Trade Commission having reason to believe that the above-named respondents, each subject to the jurisdiction of the Commission, have acquired the assets, as hereinafter described, of a corporation subject to the jurisdiction of the Commission, in violation 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 that a proceeding in respect thereof would be in the public interest, hereby issues its complaint pursuant to Section 11 of the Clayton Act (15 U.S.C. 21), and Section 5(b) of the Federal Trade Commission Act (15 U.S.C. 45(b)) stating its charges as follows:

I. DEFINITIONS

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

(a) An "aerosol product" is any personal care product, household product, coating or finish, food product, insect spray, automotive product, or animal product that is packaged in a pressurized aerosol container together with a liquefied or compressed gas propellant necessary to expel the product from the container.

(b) A "contract aerosol packager" is any firm that packages

aerosol products, pursuant to contract or otherwise, for one or more firms to which it is unaffiliated.

II. RESPONDENTS

A. CPC International Inc.

PAR. 2. Respondent CPC International Inc. (hereinafter "CPC") is a corporation chartered and operating under the laws of the State of Delaware, with a principal place of business located at the International Plaza, Englewood Cliffs, New Jersey.

PAR. 3. CPC manufactures and sells to industrial users in the United States products derived principally from the refining of corn, and also manufactures and sells domestically a variety of consumer products, mainly food products.

PAR. 4. In 1976, CPC worldwide had revenues of almost \$2.7 billion, assets of almost \$1.5 billion, and net income in excess of \$120 million. In 1976, CPC ranked 79th on Fortune Magazine's list of the 500 largest industrial corporations.

PAR. 5. CPC achieved entry into contract aerosol packaging in 1966 through the acquisition of Peterson Filling and Packaging Co. (hereinafter "Peterson").

PAR. 6. In 1968, Peterson acquired the Puritan Aerosol Corporation (hereinafter "Puritan"), a corporation chartered and operating under the laws of the Commonwealth of Massachusetts, with a principal place of business located at Martin St., Cumberland, Rhode Island.

PAR. 7. Prior to its acquisition by Peterson, Puritan was a leading contract packager of aerosol products, with aerosol packaging facilities in Cumberland, Rhode Island and Santa Fe Springs, California.

PAR. 8. On or about October 13, 1971, Peterson merged Puritan into Peterson to form Peterson/Puritan, Inc.

PAR. 9. At all times relevant hereto, CPC sold and shipped its products and services throughout the United States, was engaged in commerce within the meaning of the Clayton Act, as amended, and was engaged in or affected commerce within the meaning of the Federal Trade Commission Act, as amended.

B. Peterson/Puritan, Inc.

PAR. 10. Respondent Peterson/Puritan, Inc. (hereinafter "P/P"), a wholly-owned domestic subsidiary corporation of respondent CPC, is chartered and operates under the laws of the State of Delaware, with

a principal place of business located at Hegeler Lane, Danville, Illinois.

PAR. 11. P/P is the leading contract aerosol packager in the United States, with aerosol packaging facilities located in Danville, Illinois; Cumberland, Rhode Island; Santa Fe Springs, California; Atlanta, Georgia; and Momence, Illinois.

PAR. 12. P/P packaged 218 million units of aerosol products in 1976, accounting for almost 22 percent of the aerosol units produced by contract aerosol packagers in that year.

PAR. 13. At all times relevant hereto, P/P sold and shipped its products and services throughout the United States, was engaged in commerce within the meaning of the Clayton Act, as amended, and was engaged in or affected commerce within the meaning of the Federal Trade Commission Act, as amended.

III. THE ACQUISITION

PAR. 14. On or about April 1, 1977, P/P purchased for approximately \$2.5 million substantially all of the aerosol packaging assets of Capitol Packaging Co. (hereinafter "Capitol"), a corporation chartered and operating under the laws of the State of Illinois as a wholly-owned subsidiary of the Alberto-Culver Co.

PAR. 15. Prior to the aforementioned acquisition, Capitol was a leading contract aerosol packager, having packaged 62 million units of aerosol products in 1976, and accounting for approximately 6 percent of the aerosol units produced by contract aerosol packagers in that year.

PAR. 16. At all times relevant hereto, Capitol sold and shipped its products and services throughout the United States, and was engaged in commerce within the meaning of the Clayton Act, as amended.

IV. TRADE AND COMMERCE

PAR. 17. The relevant geographic market is the United States as a whole.

PAR. 18. The relevant line of commerce is the packaging of aerosol products by contract aerosol packagers (hereinafter "the relevant line of commerce").

PAR. 19. Approximately 2.0 billion aerosol units were packaged in the United States in 1976. Of these, approximately 1.0 billion units were packaged by contract aerosol packagers.

PAR. 20. Concentration in the relevant line of commerce is high.

PAR. 21. Barriers to entry into the relevant line of commerce are substantial.

PAR. 22. Prior to the subject acquisition, as hereinbefore described, P/P and Capitol were substantial actual competitors in the relevant line of commerce.

V. EFFECTS OF THE ACQUISITION

PAR. 23. The effect of the aforesaid acquisition may be substantially to lessen competition or to tend to create a monopoly in the relevant line of commerce throughout the United States in violation 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) in the following ways, among others:

(a) Substantial actual potential competition in the relevant line of commerce between P/P and Capitol, and other firms in the relevant line of commerce has been eliminated;

(b) Concentration in the relevant line of commerce has been and/or may be increased to the detriment of actual and potential competition;

(c) The substantial likelihood of lessening concentration in the relevant line of commerce has been diminished and/or eliminated;

(d) The position of P/P in the relevant line of commerce has been and/or may be further strengthened and entrenched; and

(e) The ability of P/P's competitors to compete in the relevant line of commerce has been and/or may be substantially diminished.

VI. THE VIOLATIONS CHARGED

PAR. 24. The aforesaid acquisition constitutes a violation of Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of an acquisition by the respondents named in the caption hereof, and the respondents 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 respondents with a violation of the Federal Trade Commission Act and the Clayton Act; 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

aforesaid draft of 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 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 respondents have violated the said Acts, and that a 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, now in further conformity with the procedure prescribed in Section 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent CPC International Inc. 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 International Plaza, Englewood Cliffs, New Jersey.

Respondent Peterson/Puritan, Inc. 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 Hegeler Lane, Danville, Illinois.

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

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

(a) "Respondents" refers to CPC International Inc., a corporation; Peterson/Puritan, Inc., a corporation; and said corporations' subsidiaries, affiliates, successors and assigns.

(b) "Person" means any individual, corporation, partnership, association, firm, or other business or legal entity.

(c) "Aerosol product" means any personal care product, household product, coating or finish, food product, insect spray, automotive product, or animal product that is packaged in a pressurized aerosol container together with a liquefied or compressed gas propellant necessary to expel the product from the container.

(d) "Aerosol packaging facilities" means any plant, machinery, or equipment used to package aerosol products in the United States, and also includes the whole or any part of the stock, share capital, or

any interest in any person engaged in the packaging of aerosol products in the United States.

I

It is ordered, That, within eighteen (18) months after the date of this order and subject to the prior approval of the Federal Trade Commission, respondents shall divest the aerosol packaging facility in Atlanta, Georgia (hereinafter "the Atlanta facility") acquired from the Capitol Packaging Company, together with any and all additions and improvements thereto, as a viable business concern.

II

It is further ordered, That, for a period of two (2) years after the Atlanta facility is divested, respondents shall not package aerosol products in the U.S. for:

(a) any persons (other than the Alberto-Culver Co.) who, as of March 30, 1977, were customers of the Atlanta facility but were not aerosol packaging customers of respondents;

(b) any persons who, between March 31, 1977 and March 31, 1978, were aerosol packaging customers of respondents at only the Atlanta facility; and

(c) any persons who first became aerosol packaging customers of respondents after March 31, 1978 and for whom respondents packaged a greater number of aerosol units at the Atlanta facility between March 31, 1978 and the date of divestiture than at all of their other facilities combined.

III

It is further ordered, That, for a period ending two (2) years after the Atlanta facility is divested, respondents shall neither directly nor indirectly solicit any persons who have been customers of the Atlanta facility at any time since March 31, 1977 to divert any of their aerosol packaging requirements from the Atlanta facility to one or more of respondents' other facilities.

IV

It is further ordered, That the Atlanta facility shall not be divested to any person who, as of the date of divestiture, is an officer, director, employee or agent of respondents, or who directly or indirectly owns or controls more than one (1) percent of the outstanding stock of respondents.

V

It is further ordered, That, pending divestiture of the Atlanta facility, respondents shall neither make nor permit any deterioration in said facility, other than normal wear and tear, which may impair its market value on the date of this order.

VI

It is further ordered, That, for a period of five (5) years from the date of this order, respondents shall neither directly nor indirectly acquire, without the prior approval of the Federal Trade Commission, any aerosol packaging facilities from any person engaged in the business of packaging aerosol products for one or more persons that are unaffiliated with the owner of said facilities.

VII

It is further ordered, That, within sixty (60) days after the date of this order and every sixty (60) days thereafter until the divestiture ordered by Paragraph I hereof is effected, respondents shall submit to the Federal Trade Commission a detailed written report setting forth the manner and form in which they have complied with this order. All such compliance reports shall include, among other things, that are from time to time required, a summary of all discussions and negotiations with any persons who are potential owners of the assets to be divested, the identity of all such persons, copies of all communications to and from such persons, and all internal memoranda, reports and recommendations concerning divestiture.

VIII

It is further ordered, That respondents shall notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in their corporate structures, such as dissolution, assignment or sale resulting in the emergence of successor corporations, the creation or dissolution of subsidiaries, or any other change in said respondents which may affect compliance obligations arising out of this order.

IN THE MATTER OF
THE KROGER COMPANY

Docket 9102. Interlocutory Order, Feb. 26, 1979

ORDER DENYING MOTION FOR RECONSIDERATION AND DENYING
MOTION TO DISQUALIFY ADMINISTRATIVE LAW JUDGE

Respondent has moved for reconsideration of our recent order affirming the administrative law judge's ("ALJ") denial of respondent's motion for discovery of certain documents in the files of the Commission. Respondent has also moved to disqualify the ALJ, Montgomery K. Hyun, on the ground that because he had access to many of these same documents during his prior employment as attorney-advisor to former Chairman Engman, his continued participation creates an actual or apparent impropriety. Respondent perceives an impropriety because "it appears that [Judge Hyun] may decide the case or have his reaction to evidence preconditioned by ex-record material and discussion on pertinent issues arising from his activities engaged in before becoming an administrative law judge." Affidavit of Stuart J. Land at 6. Judge Hyun declined to disqualify himself and certified respondent's motion to the Commission, pursuant to Section 3.42(g) of our Rules of Practice.

The Issue of Disqualification

This case concerns, *inter alia*, allegations that respondent, which owns a chain of supermarkets, made comparative price claims about the relative costs to consumers of its products, which claims were based upon methodologically unsound price surveys. Judge Hyun accepted an assignment to this matter only on the basis, which he has expressly reaffirmed, that he had no recollection of advising former Chairman Engman on, or otherwise dealing with, any matter pertaining to respondent or to retail food advertising generally during his tenure as an attorney-advisor. Respondent has not suggested that the contrary is true. Thus, the only question with which we are presented here is whether disqualification of an administrative law judge is mandated where in his prior employment he had access to, but does not recall reviewing, materials which, respondent contends, might influence his reaction to record evidence and thus lead him to render a biased decision.

The Nature of the Claim

Judge Hyun resigned from the Commission in September 1973; the