

Complaint

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IN THE MATTER OF
NATIONAL INDUSTRIES, INC., ET AL.

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

Docket 8859. Complaint, July 15, 1971 — Dismissal Order, June 18, 1979

This order dismisses a complaint charging a Louisville, Ky. firm and its wholly-owned subsidiary with illegally imposing geographic restrictions on licensed bottlers of their soft drink products, on the grounds that the companies are no longer engaged in the soft drink business or the practices which were the focus of the complaint.

Appearances

For the Commission: *Ronald L. Bloch.*

For the respondents: *Charles Kadish, Breed, Abbott & Morgan,*
New York City and *Paul N. Kiel,* Fuqua Industries, Inc., Atlanta, Ga.

COMPLAINT

The Federal Trade Commission, having reason to believe that National Industries Inc. and its wholly-owned subsidiary, Cott Corporation, each hereby made and sometimes hereinafter referred to as respondent(s), have violated the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C. 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. For the purposes of this complaint, the following definitions shall apply:

(a) Bottler — any individual, partnership, corporation, association or other business or legal entity which purchases respondents' concentrate for use in the manufacturing and sale, primarily at wholesale, of pre-mix or post-mix syrups or soft drink products or who purchases pre-mix or post-mix syrups or soft drink products for resale, primarily at wholesale;

(b) Central warehousing — a method of distribution in which soft drink products are received at a storage facility and either resold or delivered to retail outlets or wholesalers;

(c) Concentrate — the basic soft drink ingredient sold to bottlers by respondents, which is combined with water and other ingredients

for packaging in bottles or cans for sale and distribution as soft drink products, or is used to make post-mix and pre-mix syrups;

(d) Consignment — a form of distribution in which the consignor retains title, dominion, bears all risks of loss and delivers his products to the consignee who is indistinguishable from a salesman or agent;

(e) Place of business — the location of any facilities available to a bottler without regard to customers or geographic area for production or service in the conduct of business operations, to include but not limited to business headquarters, branch sales offices, warehouses and garages, but specifically excluding the plant at which a bottler combines concentrate with water, and possibly other ingredients, for the packaging of soft drink products;

(f) Post-mix syrup — soft drink concentrate which is used in fountain dispensing or vending equipment and is usually sold by bottlers in steel tanks. A typical post-mix system draws one ounce of syrup from a five-gallon tank and mixes it at the point of sale with six ounces of carbonated water to produce 600 six-ounce finished soft drink servings per tank;

(g) Pre-mix syrup — although essentially the same syrup as post-mix, a pre-mix system differs from a post-mix system in that it draws from a five-gallon tank a serving of soft drink products containing both syrup and carbonated water to produce 100 six-ounce finished soft drink servings;

(h) Soft drink products — nonalcoholic beverages and colas, carbonated and uncarbonated, flavored and non-flavored, sold in bottles and cans, or through pre-mix and post-mix systems or the like.

PAR. 2. Respondent National Industries Inc., is a corporation organized, existing and conducting its business under and pursuant to the laws of the Commonwealth of Kentucky. It maintains its office and principal place of business at 510 West Broadway, Louisville, Kentucky. In 1968, respondent National Industries Inc. had net sales of \$353,310,000 and assets of \$283,771,000.

Respondent Cott Corporation, a wholly-owned subsidiary of National Industries Inc., is a corporation organized, existing and conducting its business pursuant to the laws of the State of New Hampshire. It maintains its office and principal place of business at 197 Chatham St., New Haven, Connecticut; owns and operates a concentrate manufacturing plant at Hamden, Connecticut; and operates soft drink bottling plants at South Portland, Maine, Millis and Somerville, Massachusetts, Pawtucket, Rhode Island, New

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Haven, Connecticut, Manchester, New Hampshire, Bronx, New York, Elizabeth, New Jersey, Braddock, Pennsylvania and Miami, Florida. In 1968, respondent made sales to over 100 domestic bottlers located in 29 States throughout the United States.

PAR. 3. Respondent National Industries Inc., through various subsidiaries, is engaged in diverse businesses including sale of soft drink products and concentrate, dairy products, laboratory furniture, energy products and steel service centers. Its Consumer Products Division, with which respondent Cott Corporation is affiliated, accounted for \$215,383,000, or 57% of total revenue in 1969.

Respondent Cott Corporation is engaged principally in the manufacture and sale of soft drink products and concentrate under its name, Cott, and under the names of its wholly-owned subsidiaries, Clicquot Club Company and Mission of California, Inc. In addition to its business as a bottler, respondent Cott sells soft drink products and concentrate to over 100 bottlers, who purchase under license to produce and sell soft drink products under such trade names of respondent as "Cott," "Clicquot Club," "Mission," "Quiky," "Ener-gade" and "Big Giant Cola." Bottlers combine the concentrate with water and other ingredients and then package the mixture in bottles and cans for resale as soft drink products to retailers.

PAR. 4. Respondents are engaged in "commerce" within the meaning of the Federal Trade Commission Act (15 U.S.C. 44) in that National Industries Inc., through its wholly-owned subsidiary Cott Corporation, causes a continuous flow of interstate commerce in soft drink products and concentrate to exist between Cott Corporation headquarters and production facilities in New Haven and Hamden, Connecticut, and the numerous bottlers and retailers located throughout the United States which purchase their products.

PAR. 5. In the course and conduct of their businesses, respondents, except to the extent limited by the acts, practices and methods of competition hereinafter alleged, have been and are now in competition with other corporations, firms, partnerships and persons engaged in the manufacture, processing, distribution and sale of soft drink products in commerce.

PAR. 6. Respondents have hindered, frustrated, lessened and eliminated competition in the distribution and sale of pre-mix concentrates and soft drink products sold under their trade names by restricting their bottlers from selling outside of a designated geographical area. This restriction is set forth in the franchise agreement between respondents and their bottlers.

A typical agreement between respondent Cott Corporation and its bottlers provides that the bottler agrees:

To aggressively merchandise, promote, advertise and maintain the sales and distribution of Products in the territory covered by this Franchise Agreement, and to restrict distribution of Products produced by BOTTLER within the territory covered by this Franchise Agreement, and not permit the shipment, either directly or indirectly, of Products produced by BOTTLER into territories outside of the territory covered by this Franchise Agreement. In the event any other authorized franchisee of Products should, without authority of COMPANY, ship or permit to be shipped, any Product or Product Base into the exclusive territory covered by this Franchise Agreement, (except where said other authorized franchisee sold and delivered said Product Base to a customer within their territorial limits) COMPANY agrees to take appropriate action to prevent the continuation of such unauthorized acts, but shall not be liable in damages to the BOTTLER by reason of such unauthorized shipments, COMPANY'S obligations in this respect being limited to the exercising of the highest good faith to prevent such act or acts.

PAR. 7. The aforesaid agreements used by respondent Cott have had, and may continue to have, the following effects:

(a) Competition between and among respondent Cott's bottlers in the distribution and sale of "Cott," "Clicquot Club," "Mission," "Quiky," "Energade" and "Big Giant Cola" brands of soft drink products has been eliminated;

(b) Competition between and among Cott's bottling operations and its bottlers in the distribution and sale of Cott soft drink products at the wholesale level has been eliminated;

(c) Innumerable retailers and other customers have been deprived of the right to purchase "Cott," "Clicquot Club," "Mission," "Quiky," "Energade" and "Big Giant Cola" brands of soft drink products from the bottler of their choice at a competitive price; and

(d) Consumers of "Cott," "Clicquot Club," "Mission," "Quiky," "Energade" and "Big Giant Cola" brands of soft drink products have been deprived of the opportunity of obtaining such products in an unrestricted market and at competitive prices.

PAR. 8. Respondents' contracts, agreements, acts, practices and methods of competition aforesaid have had and may continue to have, the effect of lessening competition in the advertising, merchandising, distribution, offering for sale and sale of pre-mix concentrates and soft drink products; deprive, and may continue to deprive, the public of the benefits of competition in the purchase of soft drink products; and constitute unfair methods of competition and unfair acts or practices, in commerce, in violation of Section 5 of the Federal Trade Commission Act.

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Initial Decision

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(Official National Industries Inc. Stationery)

(Date)

Dear

The Federal Trade Commission has entered an order against National Industries Inc. and Cott Corporation which among other things prohibits them from limiting, allocating or restricting the territory, persons or class of persons to whom our bottlers may sell. In addition, the order prohibits National Industries Inc. and Cott Corporation from restricting the location of the bottler's place of business or requiring an allocation of fees between one bottler and other bottlers for sales to any particular customer or in any geographical area.

National Industries Inc. and Cott Corporation are also prohibited from refusing to sell or threatening to refuse to sell to any bottler anything used in the manufacture and sale of soft drink products. Furthermore, National Industries Inc. and Cott Corporation are prohibited from requiring or requesting any bottler to, in any manner, inform them of the territories in which, or the person or class of persons (including but not limited to central warehousing customers) to whom the bottler sells, or attempts to sell, soft drink products, or pre-mix or post-mix syrups. A copy of the order is attached.

The Federal Trade Commission has expressed its intention to determine the effect upon the marketing of soft drink products caused by the attached order by ascertaining at some future date the extent to which sales of soft drink products by bottlers extend to customers outside of previously established, but now prohibited, territorial restrictions.

Very truly yours,

INITIAL DECISION DISMISSING COMPLAINT BY JOSEPH P.
DUFRESNE, ADMINISTRATIVE LAW JUDGE

APRIL 23, 1979

PRELIMINARY STATEMENT

The complaint in this matter is one of eight which issued against bottlers of soft drinks on July 15, 1971, challenging the geographic restrictions on franchisees established by the bottler/franchisors. Of these complaints, those against *The Coca-Cola Company, et al.* (Dkt. 8855) and *PepsiCo, Inc.* (Dkt. 8856) have been litigated and decisions [2] by the administrative law judge and the Commission have issued. The decisions against *The Coca-Cola Company, et al.* and *PepsiCo* presently are on appeal to the U.S. Circuit Court of Appeals for the District of Columbia.

The proceedings in connection with the complaints against the six other bottlers charged (*i.e.* *Crush International Limited, et al.* (Dkt. 8853) *Dr Pepper Company* (Dkt. 8854), *The Seven-Up Company* (Dkt. 8857), *Royal Crown Cola Company* (Dkt. 8858), *National Industries/Cott* (Dkt. 8859) and *Norton Simon, Inc./Canada Dry* (Dkt.

8877)) have been held in abeyance pending the outcome of the appeals in the *Coke* and *Pepsi* cases. No adjudicative hearings have been held in these six matters. (See "ORDER RE INTENTIONS OF RESPONDENTS IN UNLITIGATED 'BOTTLER' CASES" dated December 15, 1975, and "ORDER RE SUSPENDING HEARINGS IN SIX REMAINING 'BOTTLER' CASES PENDING APPELLATE COURT REVIEW OF COMMISSION'S COCA-COLA AND PEPSICO DECISIONS" dated September 19, 1978.)

DISCUSSION

In a letter/motion requesting dismissal of this complaint as to National, counsel for respondents National Industries, Inc. and Cott Corporation advised that neither firm is engaged any longer in the soft drink business or in the practices which are the subject of this matter. Commission counsel does not oppose the letter/motion. Counsel for respondents advised that the acquirer of Cott is dissolving it. (See letter from Charles Kadish, Esq. to me dated February 14, 1979, and "ORDER PLACING LETTER APPLICATION FOR DISMISSAL ON THE PUBLIC RECORD" dated February 27, 1979.) Commission counsel has advised that there is no information as to whether a "New Cott Corporation," which is reported to be conducting the soft drink business of respondent Cott, is engaging in the challenged practices. (See "COMPLAINT COUNSEL'S RESPONSE TO RESPONDENT'S MOTION TO DISMISS THE COMPLAINT AS TO NATIONAL INDUSTRIES, INC.," dated April 18, 1979.)

In these circumstances, it would be to the interest of the public, the Commission and respondents if the complaint were dismissed. Accordingly, and pursuant to authority contained in Commission Rules 3.22(a)(e), 3.24(a)(2), 3.42(c) and 3.51, [3]

ORDER

It is ordered, That the complaint in Dkt. 8859 against respondents National Industries, Inc., and Cott Corporation be, and it is hereby, dismissed.

FINAL ORDER

The administrative law judge filed his initial decision in this matter on April 23, 1979, dismissing the complaint against respondents National Industries, Inc. and Cott Corporation on grounds that neither respondent is now engaged in the soft drink business nor in

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the practices which were the focus of the complaint. No appeal from the initial decision was filed.

The Commission having now determined that the matter should not be placed on its own docket for review, and that the initial decision should become effective as provided in Section 3.51(a) of the Commission's Rules of Practice,

It is ordered, That the initial decision and order contained therein shall become effective on June 18, 1979.

IN THE MATTER OF
COOPER INDUSTRIES, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT AND
SECTION 7 OF THE CLAYTON ACT

Docket C-2970. Complaint, June 18, 1979 — Decision, June 18, 1979

This consent order, among other things, requires a Houston, Texas manufacturer of hand tools, compressors and other products used by the oil and gas industries to timely divest, subject to FTC approval, its Rotor Tool Division and the gas compressor business acquired through its merger with the Gardner-Denver Company. Additionally, the firm is barred for ten years from acquisitions in the two product areas without prior Commission approval.

Appearances

For the Commission: *Tom D. Smith, Harry L. Hobgood, Marilyn L. Richmond, Robert C. Jones and Dennis F. Johnson.*

For the respondent: *Richard P. Keeton, Vinson & Elkins, Houston, Texas.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Cooper Industries, Inc. ("Cooper"), a corporation subject to the jurisdiction of the Commission, has entered into a merger agreement which, if consummated, would violate 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; that said agreement constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended; and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. Definitions

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

(a) "Compressors" means machines which elevate gaseous materials (including air, natural gas, and process gases such as oxygen and nitrogen) to higher pressures.

(b) "Reciprocating gas compressors" means machines which are used to elevate natural gas to higher pressures by confining successive volumes of the gas within a closed space, and in which the