

FEDERAL TRADE COMMISSION DECISIONS

Complaint

94 F.T.C.

IN THE MATTER OF

NESTLE ALIMENTANA, S.A., ET AL.

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

Docket 9003. Complaint, Jan. 7, 1975 — Decision, July 9, 1979

This consent order, among other things, requires a Vevey, Switzerland food processor and an affiliated Panamanian holding company to divest, within one year, the entire frozen prepared foods facility located in Darien, Wisconsin, together with the associated frozen bulk vegetable processing facility and adjoining cold storage warehouse. Additionally, for ten years, effective from January 7, 1975, the date of the complaint, Nestle is prohibited from making any large acquisition in the frozen prepared foods industry without prior Commission approval.

Appearances

For the Commission: *Raymond L. Hays, Carl J. Batter, Jr. and Chauncey Hopkins.*

For the respondents: *Allen F. Maulsby, Cravath, Swaine & Moore, New York City.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Nestle Alimentana S.A. and its affiliated company, Unilac Inc., have acquired the Stouffer Corporation in violation of Section 7 of the Clayton Act, as amended, (15 U.S.C. 18), and in violation of Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. 45), hereby issues this complaint pursuant to Section 11 of the Clayton Act, as amended, (15 U.S.C. 21) and Section 5(b) of the Federal Trade Commission Act, as amended, (15 U.S.C. 45(b)), charging in that respect as follows:

I

Definitions

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

(a) *Frozen Prepared Foods* consist of frozen foods which have been cooked or processed in some manner beyond the blanching of vegetables and fruits in the freezing process or beyond the freezing of cut or cut meats and seafoods. Frozen prepared foods include, for example,

frozen (TV) dinners, desserts, meat (pot) pies, baked goods (such as cakes), breaded shrimp, snacks (such as pizzas and hors d'oeuvres), soups, breaded and precooked poultry, prepared vegetables, and entrees.

(b) *Frozen entrees* consist of frozen prepared foods which are usually served as the main dish of the principal meal of the day. Generally served with entrees to complete the meal are other home prepared or separately purchased items such as a salad, vegetable or soup.

(c) *Quality frozen entrees* are those entrees which are advertised and marketed as quality or superior food products and which are generally able to command higher than average per-ounce retail prices.

II

Respondents

2. Nestle Alimentana S.A. (Nestle) is a publicly held company organized and existing under the laws of Switzerland. Its principal offices are located in Vevey, Switzerland.

3. Unilac Inc. is a company affiliated and associated with Nestle, organized and existing under the laws of the sovereign Republic of Panama. Its principal offices are located in Panama City, Panama. The shares of Nestle and Unilac are traded together, and the stockholders of the two companies are identical. References to Nestle hereinafter shall be understood to include Unilac Inc.

4. Nestle is a leading processor of food products throughout much of the world, with plants in approximately seventy (70) countries, employing close to ninety thousand (90,000) persons. Nestle is ranked twelfth on Fortune's list of the 300 largest foreign companies for 1972.

5. In 1973, Nestle worldwide sales (in U.S. dollars) were approximately \$5.5 billion and its profits were about \$230.7 million. Its principal worldwide products include sweetened condensed milk, evaporated milk, pasteurized, skimmed, or sterilized milk and cream, milk powder, cheese, butter, and yogurt, dietetic milk foods, dietetic specialties without milk, cereal foods for infants, strained and junior foods, coffee and tea extracts, instant chocolate drinks, liquid drinks chocolate, cocoa, and confectionery products, soups, bouillon, seasonings and condiments, prepared dishes, frozen foods and ice cream. In 1971, Nestle purchased approximately 5 percent of the world's total cocoa exports and about 7.7 percent of the world's total coffee export.

6. Nestle's main United States subsidiary is The Nestle Company (referred to by Nestle as "TNCo"), with its principal offices located White Plains, New York. In 1972 TNCo had sales of about \$48

million, primarily in chocolate products and instant coffee and tea drinks.

7. Nestle was a minority shareholder in Libby, McNeill and Libby (Libby), with its principal offices located in Chicago, Illinois, beginning in 1960, and has been the majority shareholder in Libby since 1970. Libby's major product lines include canned vegetables, canned meats, canned fruits, canned juices and drinks, and frozen foods, including frozen vegetables, fruits juices, and prepared foods. Libby's sales worldwide for the year ending June 30, 1973 were about \$434 million.

8. Nestle, directly or through its subsidiaries and affiliates, ranks among the nation's leading manufacturers of branded consumer food products, including Taster's Choice freeze dried instant coffee, Nescafe instant coffee, Nestle instant tea, Nestle's Quik, Nestle's Crunch, Libby canned vegetables, canned fruits, and canned meats, Libbyland frozen dinners for children, Maggi bouillon cubes, and Crosse and Blackwell preserved foods. In the United States, Nestle was and is, directly or through its subsidiaries, or affiliates, (i) a company engaged in the manufacture of grocery products, (ii) a company with assets in excess of \$250 million, (iii) a company involved in extensive promotional efforts, selling highly differentiated consumer products, and producing a number of products in some of which it holds a strong market position.

9. At all times relevant herein, Nestle, directly or through its subsidiaries or affiliates, sold and shipped and is now selling and shipping products in interstate commerce throughout the United States and in foreign commerce. Nestle was at the time of the acquisition challenged herein and is now engaged in commerce as "commerce" is defined in the Clayton Act and in the Federal Trade Commission Act.

III

The Acquired Company

10. Prior to 1973, the Stouffer Corporation (Stouffer), a corporation organized and existing under the laws of the State of Ohio, with principal offices located in Solon, Ohio, was a wholly-owned subsidiary of Litton Industries, which had acquired it in 1967. Prior thereto, Stouffer had been an independent publicly-held corporation, Stouffer Foods Corporation. It was and is a food processor or manufacturer which was and is engaged in the operation of restaurants and inns, and the production and distribution of frozen food products to the institutional and consumer markets. The Stouffer Corporation is the continuation of a family restaurant business started

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by Vernon Stouffer and A. E. Stouffer in 1924. It was incorporated in 1929.

11. Stouffer's sales have risen for its fiscal years 1968-1973, from about \$95.5 million to about \$144.2 million. Its sales of prepared frozen food rose during the same period about \$29.4 million to about \$66.9 million. Its assets at the time of the acquisition were about \$67 million.

12. Stouffer frozen prepared consumer food products include entrees, side dishes, bakery products, and soups.

13. Stouffer has a strong position and is the leading firm in the quality frozen entree market and the second ranking factor in the frozen entree market. Stouffer (i) is and was engaged in the manufacture of grocery products, and (ii) is and was among the top eight producers of one or more important grocery products and has more than a 5 percent share of the frozen entree market.

14. Stouffer is engaged in promotional efforts, and sells highly differentiated consumer products.

15. At all times relevant herein, Stouffer sold and shipped and is now selling and shipping products in interstate commerce throughout the United States. Stouffer was at the time of the acquisition challenged herein and is now engaged in commerce as "commerce" is defined in the Clayton Act and the Federal Trade Commission Act.

IV

The Acquisition

16. On or about March 5, 1973, Nestle purchased all the outstanding shares of the Stouffer Corporation, for approximately \$105 million cash, from Litton Industries, Inc. This acquisition falls within the criteria set forth in the Commission's May 15, 1968 enforcement policy with respect to product extension mergers in grocery products manufacturing.

V

Trade and Commerce

17. The frozen entree market and the quality frozen entree market each has four-firm concentration in excess of 50 percent, high product differentiation, and high barriers to entry.

18. In the food industry generally since World War II there have been trends toward market concentration and dominance by large, multi-product companies with vast financial resources, accompanied by declining trends in the number of competitors. Trends toward concentration are also apparent in the frozen entree market. This market has

been transformed from one composed largely of independent, medium-size companies to one dominated by a small number of multi-product companies of large absolute size which entered the market by acquisition.

VI

Effects of the Acquisition

19. The effect of the acquisition of Stouffer by Nestle has been or may be substantially to lessen competition or to tend to create a monopoly or to restrain trade in the manufacture, distribution and sale of frozen entrees and quality frozen entrees, or either of these, in the United States or sections thereof, in violation of Section 7 of the Clayton Act, as amended, and in violation of Section 5 of the Federal Trade Commission Act, as amended, in the following ways, among others:

(a) Nestle has been eliminated as an actual competitor in the frozen entree market.

(b) Nestle has been eliminated as a potential competitor in the frozen entree market and in the quality frozen entree market.

(c) The dominant position of Stouffer in the quality frozen entree market has been, or may be, further strengthened and Stouffer's dominance has been, or may be, further entrenched.

(d) Concentration has been further increased in the frozen entree market, and the segments thereof.

(e) Barriers to entry in the frozen entree market and the quality frozen entree market, already high, have been or may be further raised.

(f) Forbearance of competition in the frozen entree market as well as in the food industry generally has resulted or may result or has been or may be increased.

VII

Violation

20. The acquisition of Stouffer by Nestle as alleged herein constitutes a 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).

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the

respondents named in the caption hereof with violations of Section 7 of the Clayton Act, as amended, and of Section 5 of the Federal Trade Commission Act, as amended, and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

Respondent Nestle, 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 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 Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter 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 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Nestle S.A. is a corporation organized, existing and doing business under and by virtue of the laws of the Swiss Confederation, with its office and principal place of business located at 1800 Vevey, Switzerland, and Unilac Inc., a holding company affiliated with Nestle S.A., is a corporation organized and existing under the laws of the Republic of Panama, with its principal office located in Panama City, Panama.

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, within one (1) year from the date on which this order becomes final, respondent Nestle S.A. (hereinafter respondent), its subsidiaries, affiliates, successors or assigns, shall divest the entire frozen prepared foods facility, together with the associated frozen bulk vegetable processing facility and adjoining cold storage warehouse,

located in Darien, Wisconsin, such divestiture to be made by sale to a third party to be approved in writing by the Commission.

II

It is further ordered, That, for a period of ten (10) years from the date of the issuance of the Commission's complaint on January 7, 1975, respondent, its subsidiaries, affiliates, successors and assigns, shall not, without the prior written approval of the Federal Trade Commission, acquire or acquire and hold, directly or indirectly, the whole or any part of the assets or voting securities of any corporation, firm or partnership that manufactures, processes, handles, distributes, sells or brokers frozen prepared foods and which activities are in or affect United States commerce ("Acquired Person"); *provided, however,* that the foregoing provision shall not apply to any merger, acquisition or other such transaction (i) which shall have been publicly announced prior to the date of service upon respondent of this order or (ii) which involves an Acquired Person the gross sales of which of frozen prepared foods in the fiscal year immediately preceding such merger, acquisition or other such transaction shall have been less than \$10 million.

III

It is further ordered, That respondent 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, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

IV

It is further ordered, That, during the period described in Paragraph II, respondent shall notify the Commission of any acquisition of any material assets of, or any equity interest in, any Acquired Person (as defined herein) for which no Commission approval is required under Paragraph II of this order, by the filing, at least sixty (60) days prior to closing any such transaction, of the completed Notification and Report Form as promulgated under Section 7A of the Clayton Act, 15 U.S.C. 18A, and the Rules thereunder, regarding each such transaction; *provided, however,* that this paragraph shall not apply to (i) any acquisition of assets which results in respondent's holding less than 2.5 million of assets of an Acquired Person or (ii) any purchase of any

equity interest which results in respondent's holding less than five percent of the outstanding voting securities of an Acquired Person.

V

It is further ordered, That respondent shall, within sixty (60) days from the date of service of this order, and every sixty (60) days thereafter until the divestiture is fully affected, submit to the Commission a detailed written report of its actions, plans and progress in complying with the divestiture provisions of this order. All reports shall include, among other things that may be from time to time required, a summary of all contacts and negotiations with any person or persons interested in acquiring the assets to be divested under this order, the identity of each such person or persons, and copies of all written communications to and from each such person or persons relating to such divestiture. Annual reports of compliance with the remaining provisions of this order shall be submitted to the Commission on the anniversary date of the service of this order.

It is further ordered, That the complaint against Unilac Inc., is dismissed.

Interlocutory Order

94 F.T.C.

IN THE MATTER OF
AMREP CORPORATION

Docket 9018. Interlocutory Order, July 12, 1979

ORDER DENYING MOTION FOR A STAY OF THE INITIAL
DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

On June 14, 1979, respondent, AMREP Corporation, filed a motion with the Commission requesting that the Commission stay the Initial Decision of the administrative law judge so that respondent could have an opportunity to address the Commission on the matter of *ex parte* communications prior to the issuance of the Initial Decision.¹

Respondent makes two arguments in support of its motion. Respondent first argues that Section 7(c) of the Administrative Procedure Act, 5 U.S.C. 556(c), and Rule 3.41(c) of the Commission's Rules of Practice, require that the comments regarding *ex parte* communications be made on the record prior to the Initial Decision. Respondent also argues that Rule 3.54(c) limits the Commission's authority to take evidence in that the Commission has no authority to hear evidence regarding the *ex parte* communications unless such evidence is brought up in the hearings below. However, we find nothing in the text of any of these citations to support respondent's arguments.

Indeed, the respondent has previously sought injunctive relief on this same issue from the United States District Court for the District of Columbia. That relief was denied by Judge Gasch on April 9, 1979, for failure of the respondent to exhaust its administrative remedies. In his opinion, Judge Gasch ruled that respondent "... will have full opportunity to address the Commission on the matter of the *ex parte* communications. Furthermore, the Commission, if necessary, is empowered to take additional evidence, if indeed the Administrative Law Judge's initial decision goes to the Commission." Opinion at page 8.

We fully agree with the opinion of Judge Gasch. The Commission's appellate procedures provide respondent with an adequate mechanism to address the issue of *ex parte* communications should it be necessary.² Under the circumstances, it is unnecessary to stay the Initial Decision.³ Accordingly,

¹ Respondent also filed a motion to extend time for filing the Initial Decision because of the unlikelihood that the Commission could decide the motion for a stay before what had been a June 22, 1979 filing date. Inasmuch as that date was extended by the Commission to July 13, 1979, and a decision is now being made on the motion for a stay, the motion for an extension of time is denied as moot.

² Moreover, Rule 3.54(a) of the Commission's Rules allows the Commission to hear and take additional evidence on appeal from, or review of, an Initial Decision. See also 5 U.S.C. 557(b).

³ Since our decision not to grant respondent's motion is based on the fact that adequate procedures exist on appeal, we intimate no opinion on complaint counsel's assertion that the motion should be denied as a dilatory abuse of the Commission's Rules of Practice.