

Complaint

96 F.T.C.

IN THE MATTER OF
NATIONAL TEA COMPANY, ET AL.

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

Docket 9126. Complaint, April 17, 1979—Decision, July 23, 1980

This consent order dismisses the complaint against Applebaums' Food Markets, Inc., and requires, among other things, a Rosemont, Ill. operator of a retail grocery store chain to divest itself, within six months from the effective date of the order, of all its right, title and interest in seven specified retail grocery stores in the Minneapolis-St. Paul area, to a Commission-approved acquirer. Further, for a ten-year period, the company (with certain minor exceptions) is prohibited from acquiring any retail grocery store business located in designated geographic areas without prior Commission approval.

Appearances

For the Commission: *Joseph Tasker, Jr., Richard K. Kudo and Chauncey Hopkins.*

For the respondents: *James T. Halverson, Sherman & Sterling, New York City and Victor S. Friedman, Fried, Frank, Harris, Shriver & Jacobson, New York City.*

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondents have entered into an agreement which, if consummated, would result in 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), and that said agreement therefore constitutes a violation of Section 5(a)(1) of the Federal Trade Commission Act, as amended, (15 U.S.C.45 (a)(1)), and having found that a proceeding with respect to said violation is in the public interest, issues its complaint stating its charges as follows:

Definitions

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

(a) "retail food stores" are defined as retail establishments primarily engaged in selling food for home preparation and consumption;

(b) "retail grocery stores" are defined as retail food stores, including supermarkets, convenience stores, and delicatessens, selling: (1) a wide variety of canned or frozen foods, such as vegetables, fruits, and soups; (2) dry groceries, either packaged or in bulk, such as tea, coffee, cocoa, dried fruits, processed food and non-edible grocery items. In addition, these establishments often sell smoked and prepared meats, and fresh fish and poultry, fresh vegetables and fruits, and fresh or frozen meats.

(c) "National Tea Company" is defined herein to include National Tea Company and all of its wholly-owned and partially-owned subsidiaries.

NATIONAL TEA COMPANY

2. Respondent National Tea Company (National) is an Illinois corporation with its principal office at 9701 West Higgins Road, Rosemont, Illinois.

3. In 1978, National operated a chain of approximately 200 retail grocery stores located primarily in the central part of the United States, including the States of Alabama, North Dakota and Wisconsin.

4. National's total sales for the year ending December 31, 1977 were approximately \$835,604,312. National ranks among the twenty largest retail grocery chains in the United States.

5. In 1978, National operated a chain of approximately 19 retail grocery stores in Metropolitan Minneapolis/St. Paul, Minnesota.

6. At all times relevant herein, National has engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, and Section 4 of the Federal Trade Commission Act, as amended.

APPLEBAUMS' FOOD MARKETS, INC.

7. Respondent Applebaums' Food Markets, Inc. (Applebaums') is a Minnesota corporation with its principal office at 222 East Plato Blvd., P. O. Box 43509, St. Paul, Minnesota.

8. In 1978, Applebaums' operated a chain of approximately 29 retail grocery stores located in the State of Minnesota.

9. Applebaums' total net sales for the year ending April 29, 1978 amounted to approximately \$127,991,000. The total retail sales of its grocery stores for the year ending January 31, 1979 amounted to approximately \$134,927,000.

10. In 1978 Applebaums' operated a chain of approximately 28

retail grocery stores in Metropolitan Minneapolis/St. Paul, Minnesota.

11. At all times relevant herein, Applebaums' has engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, and Section 4 of the Federal Trade Commission Act, as amended.

MERGER AGREEMENT

12. On or about January 29, 1979, National and Applebaums' entered into an "Agreement and Plan of Merger and Reorganization" under the terms of which a wholly-owned subsidiary of National will be merged into Applebaums' and National will purchase all of Applebaums' outstanding stock for cash. Applebaums' will, by the terms of this agreement, become a wholly-owned subsidiary of National. The practical result of this agreement, if consummated, would be the acquisition of Applebaums' by National.

TRADE AND COMMERCE RELEVANT LINE OF COMMERCE

13. A relevant line of commerce in which to assess National's proposed acquisition of Applebaums' is retail grocery store sales.

14. Concentration in the relevant line of commerce is high in the relevant section of the country alleged below.

RELEVANT SECTION OF THE COUNTRY

15. A relevant section of the country is Metropolitan Minneapolis/St. Paul, Minnesota (MPLS/St. Paul), which is defined herein to mean the five contiguous Minnesota counties of Anoka, Dakota, Hennepin, Ramsey and Washington.

16. In 1978, Applebaums' operated approximately 28 retail grocery stores in MPLS/St. Paul; it ranked as the third largest firm in the market, with a market share, based on currently available information, of approximately 10%.

17. In 1978, National operated approximately 19 retail grocery stores in MPLS/St. Paul; it ranked as the fifth largest firm in the market, with a market share, based on currently available information, of approximately 4 1/2%.

18. National and Applebaums' have been for many years and are now direct and substantial competitors of one another in the relevant line of commerce in MPLS/St. Paul.

19. National's proposed acquisition of Applebaums' would make

National the largest operator of retail grocery stores in MPLS/St. Paul.

EFFECTS OF THE MERGER

20. The effects of the proposed merger set forth in Paragraph 12 herein may be substantially to lessen competition or tend to create a monopoly in the relevant market, in violation of Section 7 of the Clayton Act, as amended, (15 U.S.C. 18), and the acquisition constitutes an unfair method of competition and an unfair act or practice within the meaning of Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. 45), in the following ways among others:

- a) The elimination of actual competition between National and Applebaums' in MPLS/St. Paul;
- b) increased concentration in the retail grocery store business in MPLS/St. Paul;
- c) potentially weakening competition from independent retail grocery competitors of Applebaums' and National in the MPLS/St. Paul market by impairing the ability of their wholesale supplier to maintain existing levels of price and service; and
- d) the encouragement of further acquisitions and mergers by and among other leading firms in the retail grocery store business.

VIOLATION CHARGED

21. The merger between National and Applebaums', if consummated, would for the reasons set forth herein constitute 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).

22. By entering into the agreement which would give rise to the violation described in Paragraph 24, herein, National and Applebaums' have violated 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 violation of Section 5 of the Federal Trade Commission Act, as amended, and Section 7 of the Clayton Act, as amended, and the respondents

having been served with a copy of that complaint, together with a notice of contemplated relief; and

Respondent National Tea Company, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by National Tea Company 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 National Tea Company 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 having placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure described in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent National Tea Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 9701 West Higgins Road, in the City of Rosemont, State of Illinois.

2. Respondent Applebaums' Food Markets, Inc., was once a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota, with its office and principal place of business located at 222 Plato Blvd., in the City of St. Paul, State of Minnesota. Applebaums' Food Markets, Inc., ceased to exist as a corporation when it was merged on July 27, 1979, into a wholly-owned subsidiary of National Tea Company.

3. 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 TO DIVEST AND OTHER RELIEF

I

As used in this order:

(A) "National" means National Tea Co., a corporation organized under the laws of Illinois with its principal executive offices at 9701

West Higgins Road, Rosemont, Illinois, and its directors, officers, agents and employees, and its subsidiaries, successors and assigns.

(B) "Applebaums" means Applebaums' Food Markets, Inc., a corporation once organized under the laws of Minnesota with its principal executive offices at 222 Plato Blvd., St. Paul, Minnesota, and which was merged on July 27, 1979 into a wholly-owned subsidiary of National, at which time Applebaums as a corporation ceased to exist.

(C) "Retail grocery stores" are retail food stores classified under Bureau of Census Industry Classification No. 541, including supermarkets, convenience stores and delicatessens, which primarily sell a wide variety of canned or frozen foods, such as vegetables, fruits and soups; dry groceries, either packaged or in bulk, such as tea, coffee, cocoa, dried fruits, processed food, and non-edible grocery items. In addition, these stores often sell smoked and prepared meats, and fresh fish and poultry, fresh vegetables and fruits, and fresh or frozen meats.

(D) "The Minneapolis-St. Paul Area" means the area encompassed by the Minnesota counties of Anoka, Dakota, Hennepin, Ramsey and Washington.

(E) "Applebaums stores" means those retail grocery stores in the Minneapolis/St. Paul area formerly owned by Applebaums, all of which were acquired by National on July 27, 1979.

(F) "National stores" means those retail grocery stores in the Minneapolis/St. Paul area owned by or operated by National on or after the date on which this Order becomes final, including the Applebaums stores.

(G) The "disposition stores" means the following National ("N") stores and Applebaums ("A") stores:

1. N-80 (2326 Louisiana, St. Louis Park)
2. N-91 (3115 E. 38th St., Minneapolis)
3. N-99 (150 Apache Plaza, St. Anthony Village)
4. N-210 (4300 Xycon Ave., New Hope)
5. N-803 (8948 University Ave., St. Paul)
6. N-130 (1901 W. 80th St., Bloomington)
7. A-8 (900 E. Maryland, St. Paul)

(H) "May Brothers" means May Brothers Company, a wholesale supplier of groceries and related products with its principal office located at 3501 Marshall St., Northeast, Minneapolis, Minnesota.

(I) "Acquisition," "acquire," "merger," or "merge with" includes all other forms of arrangement by which National may obtain all or

any part of the market share of any other retail grocery store or stores.

II

It is ordered, That within six months from the date on which this Order becomes final, National shall divest itself of all of its right, title and interest in the disposition stores. During this period, National shall continue to operate said properties as retail grocery stores. Divestiture shall be made only to an acquiror or acquirors approved in advance by the Federal Trade Commission. The purpose of the divestiture required by this paragraph is to assure the continued operation of the disposition stores as retail grocery stores and their survival as viable competitors in the Minneapolis-St. Paul area.

III

It is further ordered, That at the request of May Brothers National shall do the following:

(A) For a period of one year from the date on which this Order becomes final, National shall continue to purchase from May Brothers, when averaged over the one-year period, at least fifty percent of the dry grocery products purchased by National for the Applebaums stores;

(B) For a period of five years from the date on which this order becomes final, National shall make annual purchases of no less than six million dollars (\$6,000,000.00) of dry groceries from May Brothers for the National stores, and, for a period of five years from the date on which this order becomes final, National shall maintain May Brothers as the first alternative source for the dry grocery products requirements of the National stores; and

(C) For a period of five years from the date on which this order becomes final May Brothers shall be the exclusive frozen food supplier of the National stores;

provided, however, that this paragraph shall have effect only so long as May Brothers continues to offer National competitive quality and prices for such purchases.

IV

It is further ordered, That for a period of ten (10) years from the date on which this order becomes final, National shall not merge

with or acquire, or merge with or acquire and thereafter hold, directly or indirectly through subsidiaries or in any other manner, without the prior approval of the Federal Trade Commission, the whole or any part of the stock or assets of any individual, firm, partnership, corporation or other legal or business entity which directly or indirectly owns or operates any retail grocery store, where such acquisition or merger involves five or more such retail grocery stores, any one of which is located in any of the following areas:

(A) In Minnesota, Wisconsin, Indiana, Missouri, Illinois, Louisiana or Mississippi; or

(B) Within five hundred (500) miles of any warehouse owned or operated by National at the time of such acquisition or merger and which is engaged in the shipment of products to retail grocery stores; or

(C) Within three hundred (300) miles of any retail grocery store owned or operated by National at the time of such acquisition or merger.

V

It is further ordered, That, in the event National withdraws from the business of operating retail grocery stores in the Minneapolis/St. Paul area prior to the expiration of paragraph IV of this order, National shall divest all of its right, title and interest in the National stores to an acquiror or acquirors approved in advance by the Federal Trade Commission. The purpose of this paragraph is to assure that National's withdrawal from the Minneapolis/St. Paul area is accomplished in a manner which, in the opinion of the Federal Trade Commission, will best promote, preserve, and protect competition among retail grocery stores in that area.

VI

It is further ordered, That within sixty (60) days from the date on which this order becomes final and every sixty (60) days thereafter until the divestiture required by paragraph II of this order is completed, National shall submit to the Federal Trade Commission a written report setting forth in detail the manner and form in which National intends to comply, is complying, and has complied with the terms of this order and such additional information relating thereto as may from time to time be required. In addition, upon written request of the staff of the Federal Trade Commission, National shall

submit such reports in writing with respect to the other requirements of this order as may from time to time be requested.

VII

It is further ordered, That National notify the Federal Trade Commission at least thirty (30) days prior to any proposed corporate changes, 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 with the obligations arising out of this order.

VIII

It is further ordered, That the complaint against Applebaums' Food Markets, Inc., be, and it hereby is, dismissed.

IN THE MATTER OF
CLINIQUE LABORATORIES, INC.

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

Docket C-3027. Complaint, July 23, 1980—Decision, July 23, 1980

This consent order requires, among other things, a New York City manufacturer and distributor of cosmetics and related products to cease establishing, fixing or maintaining resale prices for its products and compelling adherence to suggested prices through coercion or otherwise. The firm is prohibited from seeking the identity of dealers who fail to conform to established prices and taking adverse action against them. The order further bars the company from restricting the lawful use of brand names and trademarks in the advertising and sale of its products, and withholding earned cooperative advertising credits or allowances from recalcitrant dealers. Additionally, respondent is prohibited from suggesting retail prices for its products for a specified period.

Appearances

For the Commission: *Jeffrey Klurfeld* and *Karen Chandler*.

For the respondent: *Joshua F. Greenburg* and *Louis A. Shapiro*, New York City, and *Saul H. Magram*, House Counsel, New York City.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Clinique Laboratories, Inc., 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 as follows:

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

A. "Product"

"Product" is defined as any item of cosmetic, fragrance or soap, any accessory containing any item of cosmetic, fragrance or soap, or any related accessory, including but not limited to, any applicator or brush, which is manufactured, offered for sale or sold by respondent.