

Complaint

—97 F.T.C.

IN THE MATTER OF

THE PILLSBURY COMPANY, ET AL.

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

Docket C-3065. Complaint, April 28, 1981—Decision, April 28, 1981

This consent order requires, among other things, that a Minneapolis, Minnesota manufacturer of refrigerated bakery dough ("RBD") products and its major distributor, Kraft, Inc., cease from entering into or enforcing any agreement which bars either party from freely dealing with competitive firms. The order further requires that a prescribed amendment eliminating exclusive dealing requirements be incorporated into the companies' current distribution contract relating to RBD products.

Appearances

For the Commission: *James C. Egan, Jr., and Debra Simmons.*

For the respondent: *Edward C. Stringer*, General Counsel, The Pillsbury Company, *John D. French, Faegre & Benson*, Minneapolis, Minn., *O. E. Swain*, Kraft, Inc., *C. Lee Cook, Jr., Chadwell, Kayser, Ruggles, McGee & Hastings, Ltd.*, Chicago, Ill.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and in the exercise of authority vested in it by the Act, the Federal Trade Commission, having reason to believe that the above-named respondents have violated Section 5 of the Federal Trade Commission Act (15 U.S.C. 45), and that a proceeding in respect thereof would be in the public interest, hereby issues this complaint charging as follows:

I. DEFINITION

PARAGRAPH 1. For the purpose of this complaint the following definition shall apply:

Refrigerated dough bakery products (RDB) means dough-based, unbaked, packaged food products that are chemically leavened. Such products require refrigeration during distribution and storage, and must be heated before consumption to fully activate the chemical leavening.

II. THE PILLSBURY COMPANY

PAR. 2. The Pillsbury Company ("Pillsbury") is a Delaware corporation with its general office located at 608 Second Ave. South, Minneapolis, Minnesota.

PAR. 3. Pillsbury is an international food company operating in three major segments of the food industry. The Restaurant Group prepares and sells food through Burger King, and limited menu and specialty restaurants. The Consumer Products Group manufactures and sells, among other things, a broad range of dry, refrigerated and frozen grocery products. The Agri-Products Group processes grain by milling it into flour for sale to commercial users or to the Consumer Products Group.

PAR. 4. In its fiscal year ending May 31, 1979, Pillsbury had total sales and revenues of \$2.166 billion, net earnings after taxes of \$83.5 million, and total assets of \$1.805 billion. According to Fortune magazine, in 1978 Pillsbury was the 176th largest in sales and 172nd largest in assets among the nation's industrial corporations.

PAR. 5. The Refrigerated Foods Division of Pillsbury's Consumer Products Group, an unincorporated division of Pillsbury, manufactures and sells refrigerated dough bakery products under various brand names, including Pillsbury, Hungry Jack, 1869 Brand, and Big Country. Pillsbury entered the refrigerated dough bakery products business in 1951, when it acquired Ballard and Ballard Company of Louisville, Kentucky.

PAR. 6. Pillsbury is the nation's largest manufacturer of refrigerated dough bakery products, with over 55% of total industry sales in its fiscal year ended May 31, 1978.

PAR. 7. At all times relevant herein, Pillsbury sold and shipped refrigerated dough bakery products throughout the United States and was, and is now, engaged in commerce or affects commerce as "commerce" is defined in the amended Federal Trade Commission Act.

III. KRAFT, INC.

PAR. 8. Kraft, Inc. (hereinafter "Kraft") is a Delaware corporation with its principal office located at Kraft Court, Glenview, Illinois.

PAR. 9. Kraft is an international manufacturer and marketer of food products, and is one of the nation's largest manufacturers and distributors of refrigerated dairy products. Its Retail Foods Group manufactures and sells cheese and related products; vegetable oil-based products such as salad dressings, margarine, cooking oils and shortening; jellies and preserves; and other products. The Dairy

Group manufactures and sells fluid milk, cream and manufactured dairy products, including cottage cheese, yogurt and sour cream. Kraft manufactures and sells under various brand names, including Kraft cheese, Miracle Whip salad dressing, Sealtest milk and ice cream, Philadelphia brand cream cheese, and Breakstone yogurt. Kraft also manufactures and sells non-food items, including chemicals, paper containers, aluminum cookware and toys.

PAR. 10. In the year ended December 31, 1979, Kraft had total sales to unaffiliated customers of \$6.433 billion; net income after taxes of \$188.1 million, and total assets of \$2.523 billion. According to Fortune magazine, in 1978 Kraft was the 39th largest in sales and 91st largest in assets among the nation's industrial corporations.

PAR. 11. In addition to products manufactured by it, Kraft also distributes Pillsbury's refrigerated dough bakery products. In 1979, Kraft's sales of Pillsbury's refrigerated dough bakery products totaled more than \$200 million.

PAR. 12. At all times relevant herein, Kraft distributed and sold refrigerated dough bakery products throughout the United States and was, and is now, engaged in commerce as "commerce" is defined in the amended Federal Trade Commission Act.

IV. VIOLATION

PAR. 13. Since July 2, 1951, Pillsbury and Kraft have entered into a series of written agreements and amendments thereto by which Pillsbury has appointed Kraft its principal distributor, with certain limited exceptions, of refrigerated dough bakery products. The agreements between Kraft and Pillsbury allow Pillsbury to sell refrigerated dough bakery products to additional other distributors should Kraft manufacture or sell competitive refrigerated dough bakery products.

PAR. 14. Pursuant to these agreements, Kraft has purchased substantially all of Pillsbury's refrigerated dough bakery products since July 2, 1951. In Pillsbury's fiscal year ended May 31, 1978, more than 99% of Pillsbury's sales of refrigerated dough bakery products were to Kraft, representing approximately 10% of Pillsbury's total consolidated net sales to unaffiliated customers.

PAR. 15. Since 1953, when Kraft closed its own refrigerated dough bakery products manufacturing plant in California, Kraft has not sold or distributed in the United States refrigerated dough bakery products manufactured by any company other than Pillsbury.

PAR. 16. The purpose or effect of these agreements has been to create an exclusive agreement between Pillsbury and Kraft, whereby

Pillsbury, the largest manufacturer of refrigerated dough bakery products in the nation, sells substantially all of these products to Kraft; and Kraft, one of the nation's largest manufacturers and distributors of refrigerated dairy products, purchases these products only from, and distributes these products only for, Pillsbury.

PAR. 17. The purpose or effect of the aforesaid acts and practices has been, or may be, to substantially lessen, hinder, restrain or suppress competition in the sale, distribution and purchase of refrigerated dough bakery products in interstate commerce.

PAR. 18. The acts, practices and methods of competition alleged in Paragraphs Thirteen, Fourteen, Fifteen and Sixteen are unfair and constitute a violation of Section 5 of the Federal Trade Commission Act.

Acting Chairman Clanton voted in the negative.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of 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 violation of the Federal Trade Commission Act; and

The respondents, their attorneys, 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 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 days, 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:

1. Respondent The Pillsbury Company 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 608 Second Ave. South, in the City of Minneapolis, State of Minnesota.

Respondent Kraft, 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 Kraft Court, in the City of Glenview, State of 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

I.

For the purpose of this Order, the following definition shall apply:

Refrigerated dough bakery products (RDB products) means dough-based, unbaked, packaged food products that are chemically leavened. Such products require refrigeration during distribution and storage, and must be heated before consumption to activate fully the chemical leavening.

II.

It is ordered, That respondents Kraft, Inc. ("Kraft"), a corporation, and The Pillsbury Company ("Pillsbury"), a corporation, their successors and assigns, and their officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the sale, purchase or distribution of RDB products in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended do forthwith cease and desist from hereafter entering into or enforcing any written or oral contract with one another for the sale or distribution of RDB products to the retail trade by which:

(a) Pillsbury shall appoint Kraft its sole and exclusive distributor of RDB products; or

(b) Kraft shall be restricted in any manner from distributing the RDB products of a manufacturer other than Pillsbury.

III.

It is further ordered, That concurrent with the issuance of this Order, Kraft and Pillsbury shall make effective the attached

amendment to their current distribution contract dated July 1, 1976, relating to RDB products. This amendment is to be considered part of the Order. The purpose of this amendment is to allow:

(a) Pillsbury, in its sole discretion, to sell or distribute RDB Products to the retail trade through any means in addition to Kraft. Pillsbury will give Kraft at least sixty days' prior written notice of its intention to begin selling or distributing its RDB Products to the retail trade through any means in addition to Kraft;

(b) Kraft, in its sole discretion, to sell or distribute to the retail trade RDB Products manufactured by a person or persons in addition to Pillsbury. Kraft will give Pillsbury at least sixty days' prior written notice of its intention to sell or distribute competitive products;

(c) Pillsbury, in its sole discretion and upon prior written notice of at least one year, to terminate Kraft as a distributor to the retail trade of RDB Products in any area of the United States or in the entire United States; and

(d) Kraft, in its sole discretion and upon prior written notice of at least one year, to cease selling to the retail trade RDB Products manufactured by Pillsbury in any area of the United States or in the entire United States.

Provided, however that nothing in this Order shall be construed as requiring Pillsbury to sell or distribute its RDB products to or through any company or person other than Kraft; and Pillsbury shall be free, if it deems it advisable in its sole discretion, to continue selling its RDB products only to Kraft and its other existing distributors; and *Provided further*, that nothing in this Order shall be construed as requiring Kraft to sell, distribute, or otherwise deal in the RDB products manufactured by someone other than Pillsbury; and *Provided further*, that Kraft shall be free, if it deems it advisable in its sole discretion, to continue selling only the RDB products of Pillsbury.

IV.

It is further ordered, That thirty days after date of issuance of this Order, Kraft and Pillsbury shall each file with the Commission a written report setting forth in detail the manner and form in which it has complied with the Order. During the term of this Order, Kraft and Pillsbury shall each file with the Commission a written report setting forth in detail any change in their contract, or in any

amendments thereof relating to the provisions of this Order sixty days prior to the effective date of such change.

V.

It is further ordered, That Kraft and Pillsbury shall notify the Commission at least thirty days prior to any fundamental change in either respondent corporation which may affect compliance obligations arising out of this Order.

VI.

It is further ordered, That this Order shall expire ten years from the date of issuance of this Order.

Acting Chairman Clanton voted in the negative.

AMENDMENT

THIS AMENDMENT, entered into this 21st day of May, 1981, by and between The Pillsbury Company, a Delaware corporation (hereinafter referred to as "Pillsbury"), and Kraft, Inc., a Delaware corporation (hereinafter referred to as "Kraft"), shall become effective upon issuance of the Final Order arising from the Federal Trade Commission's investigation, File No. 741-0024.

WITNESSETH

WHEREAS, Pillsbury and Kraft are parties to an Agreement dated July 1, 1976 (hereinafter referred to as "the Agreement"), whereunder Pillsbury has appointed Kraft its exclusive distributor (except for five other specified distributors) of certain Pillsbury refrigerated dough bakery products (all of which products are hereinafter collectively called "RDB Products") to the retail trade; and

WHEREAS, Pillsbury and Kraft have entered into a consent agreement with the Federal Trade Commission requiring that the above-cited Agreement be amended; Accordingly, Pillsbury and Kraft do hereby amend the Agreement as follows:

1. (a) Notwithstanding any other provisions of the Agreement, Pillsbury, in its sole discretion, may in any geographic area (or in the entire United States) begin selling its RDB Products to the retail trade through any means in addition to Kraft. Pillsbury will give Kraft at least sixty (60) days' prior written notice of its intention to begin selling its RDB Products to the retail trade through any means in addition to Kraft.

(b) Notwithstanding any other provision of the Agreement, Kraft, in its sole discretion, may sell to the retail trade products competitive with the Pillsbury RDB Products in any geographic area (or in the entire United States). Kraft will give

Pillsbury at least sixty (60) days' prior written notice of its intention to sell competitive products.

(c) Notwithstanding any other provisions of the Agreement, upon at least one (1) year's prior written notice, Pillsbury, in its sole discretion, may in any geographic area (or in the entire United States) terminate Kraft as a distributor; and upon at least one (1) year's prior written notice, Kraft, in its sole discretion, may in any geographic area (or in the entire United States) cease selling the RDB Products of Pillsbury to the retail trade.

(d) In the event any notice referred to in subparagraph (a), (b), or (c) above refers to an area less than the entire United States, a separate notice shall be given with respect to each geographic area and shall identify the area to the degree practicable.

2. As used herein, the phrase "through any means in addition to Kraft" shall mean the use of one or more distributors or brokers, Pillsbury's own sales force, or any other means chosen by Pillsbury, in addition to Kraft. The term "competitive products" as used herein shall include products made by any existing or future manufacturer, including but not limited to Kraft. The term "geographic area" shall mean any definable part of the United States and may include parts not contiguous to one another.

3. In the event that any time after Pillsbury has commenced selling its RDB Products through means other than Kraft, Kraft remains a distributor of RDB Products in some geographic areas and the supply or availability of Pillsbury's RDB Products is insufficient to fill the orders of Kraft and the other means chosen by Pillsbury, Pillsbury shall reasonably and fairly allocate the supply of RDB Products among Kraft and such other means, taking into account all relevant circumstances, including historical purchases by the retailers being served by each of them.

4. In any geographic area in which RDB Products of Pillsbury are being sold by Kraft as well as through some other means (other than the distributors through which Pillsbury presently sells its RDB Products), Kraft shall not have the obligation set forth in paragraph 11 of the Agreement to assume all loss resulting from spoilage of products in that geographic area, and instead Pillsbury shall reimburse Kraft for all credits or discounts which Kraft must give its customers by reason of spoils or distress product in such area.

5. Paragraphs 6, 17, 18, 19, 20, and 25 of the Agreement dated July 1, 1976 (and the phrase "sole and exclusive" in paragraph 4 thereof) are hereby canceled and rescinded.

6. Paragraph 21 of the Agreement dated July 1, 1976, is hereby canceled and rescinded, excepting only that the definition of "best efforts" contained therein shall remain in full force and effect and be applicable only during such times as Kraft is the sole distributor of RDB Products.

7. All references in paragraphs 6, 17 and 25 of the Agreement to a consent order then contemplated to be entered into between Pillsbury, Kraft, and the FTC, and all provisions of the Agreement which are in any way dependent upon or arise from the operation of that consent order which was contemplated but never became effective, are hereby nullified and rescinded in their entirety.

8. All other provisions of the Agreement which are not modified hereby shall remain in full force and effect.

9. This Amendment shall become effective when the FTC has formally concluded the aforementioned investigation by issuing a Final Order.

Decision and Order

97 F.T.C.

IN WITNESS WHEREOF, the parties hereto have caused this instrument to be duly executed by their respective officers thereunto duly authorized on the date first above written.

THE PILLSBURY COMPANY

By _____

KRAFT, INC.

By _____

IN THE MATTER OF
MONTGOMERY WARD & COMPANY, INC.

FINAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED
VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT
AND THE MAGNUSON-MOSS WARRANTY ACT

Docket 9117. Complaint, Sept. 14, 1978—Decision, April 29, 1981

This order requires, among other things, a Chicago, Illinois operator of retail stores and catalog houses to make the text of written warranties readily available to prospective buyers prior to sale, and to prominently display signs advising consumers of such availability. Further, for a period of three years respondents are required to conduct semiannual audits to ensure continuing compliance with the provisions of the order.

Appearances

For the Commission: *Benita A. Sakin, Carlton Lowe and Kenneth B. Drost.*

For the respondent: *Bonnie B. Wan, Spencer H. Heine and T. E. Grace,* in-house counsel.

COMPLAINT

Pursuant to the provisions of the Magnuson-Moss Warranty Act and Rule 702, 16 CFR 702 promulgated thereunder, and the Federal Trade Commission Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission having reason to believe that Montgomery Ward & Co., Inc., a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Acts and Rule 702 promulgated under the Magnuson-Moss Warranty 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 charge in that respect as follows:

PARAGRAPH 1. The definitions of terms contained in Section 101 of the Magnuson-Moss Warranty Act Pub. Law No. 93-637, 15 U.S.C. 2301 (Supp. 1975) and in Rule 702, 16 CFR 702.1 promulgated thereunder shall apply to the terms used in this complaint.

PAR. 2. Respondent Montgomery Ward & Co., Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business located at One Montgomery Ward Plaza, Chicago, Illinois.

PAR. 3. Respondent is now and has been in the operation of a chain of retail department stores and catalog houses throughout the