

Complaint

101 F.T.C.

IN THE MATTER OF

CONAGRA, INC.

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 C-3103. Complaint, Feb. 16, 1983—Decision, Feb. 16, 1983

This consent order requires an Omaha, Neb. manufacturer and seller of bakery and hard wheat flour, among other things, to timely divest seven specified flour production facilities to a Commission-approved buyer(s), capable of maintaining the facilities as competitive entities. Additionally, the order prohibits the company from acquiring, for a period of ten years, any interest in any flour milling plant in eleven western states without prior Commission approval.

Appearances

For the Commission: *John Peterson.*

For the respondent: *Bertram M. Kantor, Wachtell, Lipton, Rosen & Katz, New York City.*

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named Respondent, subject to the jurisdiction of the Commission, has acquired stock and assets of Peavey Company 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:

Definitions

For purposes of this complaint the following definitions shall apply:

Bakery Flour means hard wheat flour, soft wheat flour and whole wheat flour sold generally to bakeries and institutional users.

Hard Wheat Bakery Flour means flour milled from hard wheat, which is sold generally to bakeries and institutional users to make white pan bread.

ConAgra Incorporated

1. Respondent ConAgra, Inc. (ConAgra) is a corporation organized under the laws of the State of Delaware, with its principal place of business at 200 Kiewit Plaza, Omaha, Nebraska.

2. ConAgra manufactures and sells bakery flour and hard wheat bakery flour from 15 mills located throughout the United States.

3. In its fiscal year ended May 31, 1981, ConAgra had total sales of approximately \$1,376,808,000. Its sales of bakery flour for 1981 totaled \$280,375,338.

Peavey Company

4. Prior to the merger, Peavey Company was a corporation organized under the laws of the State of Minnesota, with its principal place of business at Peavey Building, 730 Second Avenue South, Minneapolis, Minnesota.

5. Prior to the merger, Peavey manufactured and sold bakery flour from eight mills located throughout the United States.

6. In its fiscal year ended July 31, 1981, Peavey had total sales of approximately \$820,884,000. Its 1981 sales of bakery flour were \$301,735,606.

Jurisdiction

7. At all times relevant herein ConAgra and Peavey were engaged in the manufacture and sale of bakery flour in interstate commerce and were engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and each was a corporation whose business was in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

The Merger Agreement

8. On or about April 18, 1982, ConAgra and Peavey entered into an agreement in principle which provides, *inter alia*, for the acquisition by ConAgra of the stock and assets of Peavey. The transaction was consummated on or about July 20, 1982.

Trade and Commerce

9. A relevant line of commerce is the manufacture and sale of bakery flour.

10. A relevant line of commerce is the manufacture and sale of hard wheat bakery flour.

11. A relevant section of the country or geographic market is the Western States market, divided by the Eastern border of the States of Montana, Wyoming, Colorado and New Mexico and consisting of the States of Montana, Wyoming, Colorado, New Mexico, Idaho, Utah, Arizona, Nevada, California, Oregon and Washington.

12. The manufacture and sale of bakery flour in the Western States market is highly concentrated, with the combined market share of the four largest manufacturers estimated to be approximately 65%. Peavey is the largest firm with approximately 24.3% of the market. ConAgra ranks fourth with approximately an 8.5% share of the market. Subsequent to the acquisition, the Herfindahl-Hirschman Index will be approximately 1794.4, having increased as a result of the merger by 413.

13. The manufacture and sale of hard wheat bakery flour in the Western States market is highly concentrated, with the combined market share of the four largest manufacturers estimated to be approximately 64.3%. Peavey is the largest firm with approximately 23.1% of the market. ConAgra ranks third with approximately an 11.1% share of the market. Subsequent to the acquisition, the Herfindahl-Hirschman Index will be approximately 1845.0, having increased as a result of the merger by 512.8.

14. There are barriers to entry into the manufacture and sale of bakery flour and hard wheat bakery flour.

Actual Competition

15. Prior to the merger, ConAgra and Peavey were for many years actual competitors of each other in the manufacture and sale of bakery flour and hard wheat bakery flour and actual competitors of others engaged in the manufacture and sale of bakery flour and hard wheat bakery flour throughout the Western States market.

Effects; Violations Charged

16. The effects of the acquisition may be to substantially 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 Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, in the following ways, among others:

(a) actual competition between ConAgra and Peavey in the manufacture and sale of bakery flour and hard wheat bakery flour has been eliminated;

(b) actual competition between competitors generally in the manufacture and sale of bakery flour and hard wheat bakery flour may be lessened;

(c) Peavey has been eliminated as an actual substantial independent competitor in the manufacture and sale of bakery flour and hard wheat bakery flour.

Commissioner Bailey voted in the negative. Commissioner Douglas did not participate.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of the acquisition of the stock and assets of Peavey Company ("Peavey") by ConAgra, Inc. ("ConAgra"), and ConAgra 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 ConAgra with violations of the Federal Trade Commission Act and the Clayton Act; and

ConAgra, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by ConAgra 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 ConAgra 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 has reason to believe that ConAgra has violated the said Acts, and that the 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 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. ConAgra is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal offices at One Central Plaza, Omaha, Nebraska.
2. The Federal Trade Commission has jurisdiction of the subject

matter of this proceeding and of ConAgra and the proceeding is in the public interest.

ORDER

For purposes of this Order,

(a) *ConAgra* means ConAgra, Inc., its subsidiaries, affiliates, divisions, successors and assigns, together with any of their officers, directors and employees;

(b) *Peavey* means Peavey Company, its subsidiaries, affiliates, divisions, successors and assigns, together with any of their officers, directors and employees;

(c) *Salt Lake City Plant* means the assets acquired by ConAgra from Peavey that are located in Salt Lake City, Utah, and that are used in the production of wheat flour;

(d) *Ogden Plant* means the assets acquired by ConAgra from Peavey that are located in Ogden, Utah, and that are used in the production of wheat flour;

(e) *Billings Plant* means the assets acquired by ConAgra from Peavey that are located in Billings, Montana, and that are used in the production of wheat flour;

(f) *Great Falls Plant* means the assets of ConAgra that are located in Great Falls, Montana, and that are used in the production of wheat flour;

(g) *San Francisco Terminal* means the bulk flour terminal, acquired by ConAgra from Peavey that is located at 790 Pennsylvania Street, San Francisco, California;

(h) *Standard Flour* means the flour distribution plant known as Standard Flour, acquired by ConAgra from Peavey, that is located at 6414 Gayhart Street, City of Commerce, California;

(i) *Coast-Dakota* means the baking mix plant and flour distribution plant, acquired by ConAgra from Peavey, that are located at 2430 Union Street, Oakland, California, and 400 Oak Street, Oakland, California;

(j) *Facilities* means the Salt Lake City Plant, the Ogden Plant, the Billings Plant, the Great Falls Plant, the San Francisco Terminal, Standard Flour and Coast-Dakota; and

(k) *Western Region* means the States of Oregon, Washington, California, Arizona, New Mexico, Nevada, Utah, Wyoming, Colorado, Idaho and Montana.

I

It is ordered, That within fifteen (15) months of the date on which this Order becomes final and subject to the prior approval of the Federal Trade Commission, ConAgra shall divest the Facilities absolutely and in good faith to one or more third parties that represent that they intend to use the Facilities in the production of wheat flour. Pending divestiture, ConAgra shall neither make nor permit any deterioration of the Facilities, except for normal wear and tear, that might impair their operating abilities, competitive viability or market value.

II

It is further ordered, That, for a period of ten (10) years from the date on which this Order becomes final, ConAgra shall not acquire, without the prior approval of the Federal Trade Commission, directly or indirectly, any stock, assets, or interest in any flour milling plant located in the Western Region; *provided, however,* that nothing in this Paragraph II shall prohibit ConAgra from acquiring in the ordinary course of business used equipment for the milling of wheat flour.

III

It is further ordered, That within sixty (60) days after the date this Order becomes final, and every sixty (60) days thereafter until ConAgra has fully complied with the provisions of Paragraph I of this Order, ConAgra shall submit to the Federal Trade Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying with, or has complied with that provision. All compliance reports shall include, among other things that are required from time to time, a full description of contacts or negotiations with any party for the sale of plants pursuant to Paragraph I of this order, and the identity of all such parties. ConAgra shall furnish to the Federal Trade Commission copies of all written communications to and from such parties, and all internal memoranda, reports, and recommendations concerning divestiture.

On the first anniversary of the date this Order becomes final and on every anniversary date thereafter for the following nine (9) years, ConAgra shall submit to the Federal Trade Commission a verified written report setting forth the manner and form in which it has complied or is complying with Paragraph II of this Order.

IV

It is further ordered, That ConAgra notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in ConAgra, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, or any other proposed change in the corporation, which may affect compliance obligations arising out of this Order.

Commissioner Bailey voted in the negative; Commissioner Douglas did not participate.

IN THE MATTER OF

INDIANA FEDERATION OF DENTISTS

FINAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket 9118. Complaint, Oct. 18, 1978—Final Order, Feb. 17, 1983*

This Final Order, among other things, prohibits an Anderson, Ind. dental association ("IFD") from engaging in any action or course of conduct having the effect of requiring or organizing dentists to refuse to submit radiographs or other materials requested by third-party payers for use in benefit determinations or to deal with a third-party payer in a certain way. The order also forbids IFD from engaging in any action that compels a third-party payer to deal with or to operate in a certain way in connection with dental health care benefits programs; or whose purpose is to influence a consumer's choice of dentists based on the degree of non-cooperation between such dentists and a third-party payer. Additionally, the association is required to timely mail to each of its members a copy of the Commission order together with a letter advising that IFD has abandoned all policies and guidelines that fail to conform to the provisions of the order, and that members are free to deal with dental health care programs and payers as they see fit.

Appearances

For the Commission: *L. Barry Costilo, M. Elizabeth Gee, James McCarty and Laurel Brandt.*

For the respondent: *Ronald K. Fowler, Anderson, Ind. and Bruce W. Graham, West Lafayette, Ind., intervenor for State of Indiana.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended (15 U.S.C. 41 *et seq.*), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the respondent named in the caption hereof has violated the provisions of Section 5 of the Federal Trade Commission Act and that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, stating its charges as follows:

PARAGRAPH 1. The following definition shall apply in this Complaint. *Third-party payer* or *payer* means any entity that provides a program of reimbursement for dental health care services to employees or members of any business organization, and any person, such as an independent claims adjuster, who provides evaluative services in connection with any such reimbursement program.