

IN THE MATTER OF

BORDEN, INC.

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

Docket 8978. Final Order, Nov. 7, 1978—Modified Final Order, Sept. 16, 1983

In settlement of judicial review proceedings resulting from the entry of a Commission cease and desist order after full adjudicatory proceedings, this agreed-to modification requires a producer of processed lemon juice to refrain, for a period of seven years, from pricing its product below its variable costs for the product in any sales district. "Variable costs" are defined as all costs which the firm could have chosen not to incur during the relevant time period. The relevant time period consists of all consecutive fiscal quarters in which the firm's prices failed to cover its total costs, and thus vary with the duration of any price reduction. The firm is also required to file annual compliance reports detailing its market share, costs and net revenues. The Modified Final Order takes the place of an order previously entered by the Commission (92 F.T.C. 669), which was affirmed by a court of appeals in a judgment that was the subject of a petition for a writ of certiorari in the Supreme Court. *Borden, Inc. v. FTC*, 674 F.2d 498 (1982).

MODIFIED FINAL ORDER

The Commission having considered the proposal of Borden, Inc., to terminate the proceedings for judicial review of the order to cease and desist entered herein on November 7, 1978; the Commission and Borden, after receiving public comments on a proposed order, having agreed upon the provisions of a final order modifying the order of November 7; and the Court of Appeals for the Sixth Circuit, in accordance with an order of the Supreme Court, having remanded the case to the Commission for entry of the order to which the parties agreed; accordingly,

It is hereby ordered, That the Commission's Order in this matter, dated November 7, 1978, is hereby revised to read as follows:

ORDER

It is ordered, that Respondent, in connection with the production, marketing and sale of processed lemon juice in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from:

Selling ReaLemon brand reconstituted lemon juice at a price or prices so that Respondent's net revenue during any fiscal quarter for

any sales district is below Respondent's variable cost of the product sold in that quarter and sales district.

For purposes of this Order only, the following definitions shall apply:

A. *Total cost* means the sum of all costs properly attributable to sales made by Respondent of ReaLemon brand reconstituted lemon juice during the relevant fiscal quarter in the relevant sales district.

1. *Total costs*, and its various elements, shall be calculated in the same manner as reflected in Respondent's accounting records as of January 1, 1983. With respect to elements of cost incurred over geographic markets that do not coincide with Respondent's sales districts, such elements of cost shall be allocated to a sales district on the basis of unit volume sold during the relevant quarter in the relevant sales district, or on the basis of identifiable factors that make allocation to a particular sales district proper, or on the basis of a combination of these two approaches. Similarly, with respect to allocations of elements of cost which, as of January 1, 1983, were made only annually, such elements of cost shall be apportioned to the relevant quarter on the basis of the unit volume sold during that quarter in the relevant sales district, or on the basis of identifiable factors that make allocation to a particular quarter proper, or on the basis of a combination of these two approaches. The methods of allocation chosen shall be uniform for all sales districts and for all quarters for which an annual compliance report must be submitted. The methods shall not be changed without prior notice to the Commission.

2. The cost of spot television advertising purchased for a station in a particular sales district shall be allocated to the sales district in which the station is located. The costs of all television advertising other than spot television shall be allocated to the relevant sales district for the relevant time period on the basis of the volume of unit sales in that district.

B. *Variable cost* means the sum of all costs included within total cost which Respondent could have avoided during the relevant time period.

1. A cost, whether an element of cost or a portion of an element of cost, shall be considered as one which Respondent could have avoided if, during any part of the relevant time period, Respondent could have chosen not to incur that cost consistent with prudent business practices, and without violating contractual or other legal commitments.

2. The relevant time period, for any fiscal quarter and sales district in which Respondent's net revenue in that quarter and sales district was below its total cost, shall be the period composed of that quarter

and any consecutive preceding quarters in which Respondent's net revenue in that sales district was also below its total cost. The relevant time period for any other fiscal quarter and sales district shall be the period composed of that quarter.

C. *Net revenue* means gross revenue to Respondent resulting from sales of ReaLemon brand reconstituted lemon juice, net of returns and allowances, cash discounts, and trade promotions. "Net revenue" and its various elements shall be calculated in the same manner as reflected in Respondent's accounting records as of January 1, 1983.

D. *Fiscal quarter* means the period which coincides with Respondent's standard accounting quarters.

E. *Sales district* means each of the geographic subdivisions of the country, designated, identified and used as such by Respondent in its sales and accounting records [currently twenty-two (22)]. If the sales districts are changed, the Commission will be notified.

F. *Trade promotions* means discounts or other financial incentives to the grocer or wholesaler, such as buying allowances or retailer coupons. *Trade promotions* (regardless of the manner in which that term is used by Borden in its accounting records) shall not be considered as a *cost* and shall be considered a reduction in net revenue.

G. *Unit* means one case of 12 bottles of ReaLemon brand reconstituted lemon juice in the 32 ounce size, or an equivalent volume of ReaLemon brand reconstituted lemon juice bottled in different sizes.

H. *Respondent* means Borden, Inc., its successors and assigns, officers, agents, representatives, and employees, directly or indirectly, or through any corporation, subsidiary, affiliate, division, or other device.

It is further ordered, that this Order shall remain in effect for seven years from the date it becomes final. During that period, Respondent shall file annual compliance reports with the Commission within 60 days of the end of its fiscal year. Each annual report shall include, for each sales district in which Respondent sold ReaLemon brand reconstituted lemon juice: (a) Copies of A.C. Nielsen market survey reports, or substantially similar market survey reports, detailing the quarterly and annual market shares of ReaLemon brand reconstituted lemon juice and the quarterly and annual market shares of its branded and private label competitors, (b) an accounting quarterly of its total costs for ReaLemon brand reconstituted lemon juice, and (c) an accounting quarterly of its net revenue from sales of ReaLemon brand reconstituted lemon juice.

Each annual report shall also include, for each sales district and fiscal quarter in which Respondent's net revenue for such sales district and fiscal quarter was below its total cost, proof that Respond-

ent's net revenue in that district and quarter exceeded Respondent's variable costs of the product sold in that district and quarter.

SEPARATE STATEMENT OF COMMISSIONER PERTSCHUK

I have voted to enter this order upon instruction of the court of appeals. Nevertheless, as I stated in opposing the Commission's decision not to support our 1978 order before the Supreme Court, this modified order represents for all practical purposes an abandonment of the Commission's role in policing predatory pricing by a monopolist. Although the Commission is today issuing a document with order provisions written on it, they are so lenient and so unenforceable that it is highly unlikely we could ever establish a violation no matter what Borden did.

It is well recognized that rules against predatory pricing must be carefully circumscribed to avoid prohibiting or deterring healthy competitive pricing. Thus, the Commission has been selective in bringing monopolization cases and finding liability over the last decade or more. On the other hand, as small businesses will readily attest, dominant firms sometimes do punish or attempt to destroy a smaller rival through predatorily low prices and the result is to destroy competition, not make it more vigorous. One of the most likely situations for this to occur is when a monopolist prices below cost with the intent to destroy a small new entrant and there are significant barriers to future entry by others. These were the circumstances in Borden and resulted in a unanimous finding of liability.

There have been no monopolization cases brought by the Commission under this administration, and its most significant policy decision in this area has been to undercut this order after it was affirmed by the court of appeals. It is one thing to enforce cautiously predatory pricing rules so as to stop only anticompetitive behavior. It is quite another to abandon concern about predatory pricing altogether.

IN THE MATTER OF

DAIRYMEN, INC.

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

Docket 9143. Complaint, July 31, 1980—Final Order, Sept. 20, 1983*

This Final Order dismisses the complaint issued against one of the nation's largest raw milk processors. The Commission found that the record did not support a finding that Dairymen's 1978 acquisition of Farmbest Foods, Inc. violated Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act.

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 Dairymen, Inc., a corporation subject to the jurisdiction of the Commission, has violated 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 Munford, Inc., a corporation subject to the jurisdiction of the Commission, has violated Section 5 of the Federal Trade Commission Act, as amended, (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.

DEFINITIONS

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

a. The term *fluid milk* refers to the following products (including products sold in large container sizes to hotels, restaurants and institutions): (i) packaged fluid whole milk, partially skim milk (approximately two percent butterfat or less) and skim milk, (ii) buttermilk and cultured fluid milk products (excluding yogurt) and (iii) flavored milk and flavored milk drinks. These products are generally referred to by the dairy industry as Class I milk products.

b. The term *SMSA* refers to *Standard Metropolitan Statistical Area* as designated by the Office of Management and Budget. [2]

c. The *Tri-City market* refers to the Johnson City-Kingsport-Bristol, Tennessee SMSA. This area is composed of the Tennessee counties of

* Complaint as to Munford, Inc. dismissed 100 F.T.C. 533.