

IN THE MATTER OF
BENTON & BOWLES, INC.

VACATING ORDER IN REGARD TO ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT

Docket C-2403. Consent Order, May 22, 1973—Vacating Order, Dec. 28, 1983

On Dec. 28, 1983 the Federal Trade Commission vacated the Decision and Order issued against Benton & Bowles on May 22, 1973 (82 F.T.C. 1444).

ORDER GRANTING REQUEST TO REOPEN THE PROCEEDING
AND VACATE THE DECISION AND ORDER

Respondent, Benton & Bowles, Inc., requested on August 30, 1983, that the Commission reopen the proceeding in Docket No. C-2403 and vacate the Decision and Order entered in that matter on May 22, 1973.

The Commission placed this request upon the public record, for a period of thirty days, pursuant to Section 2.51 of its Rules of Practice.

The Commission is of the opinion that the public interest would be served by reopening the proceeding and vacating the Decision and Order. The charges against Benton & Bowles in this proceeding were based upon certain advertisements for Vanquish, a non-prescription internal analgesic product manufactured by Sterling Drug, Inc. In its decision in the matter of *Sterling Drug, Inc.*, Docket No. 8919 (July 5, 1983) [102 F.T.C. 395], the Commission dismissed similar charges against Sterling Drug and Lois Holland Callaway, Inc., that were based on advertisements for Vanquish nearly identical to those that were the subject of the complaint against Benton & Bowles. Thus, the Commission's decision in *Sterling Drug, Inc.*, constitutes a change in law which requires that the Order against Benton & Bowles be vacated.

Now therefore, it is ordered, That the proceeding in Docket No. C-2403 is hereby reopened, and the Decision and Order issued on May 22, 1973, is hereby vacated.

Divestiture of a subsidiary of an acquired company to a newly-formed joint venture would satisfy the requirements of a proposed consent agreement entered to resolve an alleged anticompetitive acquisition. [821 0100, *The Coca-Cola Company*]

July 22, 1983

Dear Mr. Dreyer:

This is in response to Coca-Cola's request dated April 22, 1983, for a Commission advisory opinion. In June, 1982, Coca-Cola signed a consent agreement that required Coca-Cola to divest Doric Foods Corporation ("Doric"), a subsidiary of a company acquired by Coca-Cola, to an acquirer approved in advance by the Commission. The Commission provisionally has accepted that consent agreement and Coca-Cola is asking whether, if the proposed consent order becomes final, divestiture of Doric to the proposed acquirer would constitute compliance with the proposed order. The Commission has determined that divestiture of Doric to Doric Holdings, Inc., a newly-formed joint venture ("Doric Holdings"), would constitute compliance with the proposed order. In making its determination, the Commission has relied upon the information submitted and the representations made by Coca-Cola and Doric Holdings and has assumed the same to be accurate and complete.

Coca-Cola characterizes its submission of materials to the Commission as a voluntary submission in place of compulsory process in an ongoing investigation and requests confidentiality for its submission under Section 4.10(a)(8) of the Commission's Rules of Practice. The Commission has determined that Coca-Cola's submission was voluntarily made in connection with an advisory opinion request and not in lieu of compulsory process and thus is not protected under Section 4.10(a)(8). With respect to Coca-Cola's alternate request for confidentiality for portions of the agreement between Coca-Cola and Doric Holdings, portions of the supplement to the agreement, Doric's financial statements, and the summary of transactions during the last year between Coca-Cola and companies related to the parties forming the joint venture, the Commission has concluded that Articles III, VI, IX and X of the agreement, the financial statements, the summary, Mr. Sherman's letter dated June 16, 1983, and pages 2-4, 7-10, 12-22, 24-39, 44-46, and 48-51 of the supplement to the agreement contain confidential commercial and financial information within the meaning of Section 6(f) of the Federal Trade Commission Act. The Commission will not disclose this information without affording Coca-Cola ten days' notice of its intent to do so, except as provided in Sections 6(f) and 21 of the Federal Trade Commission Act.

Coca-Cola has requested that after the Commission has reviewed the materials Coca-Cola submitted, the Commission return the documents to Coca-Cola. Section 4.12(a) of the Commission's Rules of Practice provides that the Commission will return material submitted to the Commission that has not been received into evidence (1) after the close of the proceeding in connection with which the documents were submitted or (2) when no proceeding in which the material may be used has been commenced within a reasonable time after completion of the examination of all relevant information. Since the matter is still pending, the Commission has determined that Commission action at this time on your request for the return of documents would be premature. Additionally, Section 4.12(b) of the Rules provides that even after the proceeding has closed, the Commission will retain copies it has made of the materials submitted by Coca-Cola unless, upon a showing of extraordinary circumstances, the Commission determines that return would be required by the public interest.

By direction of the Commission.

Letter of Request

April 22, 1983

Dear Mr. Berman:

This is a request pursuant to Section 1.1(a)(2) of the Rules of the Federal Trade Commission, 16 C.F.R. 1.1(a)(2), for an advisory opinion confirming that the proposed sale by The Coca-Cola Company ("Company") of Doric Foods Corporation ("Doric") to a joint venture would constitute compliance with the order envisaged in the Agreement containing Consent Order to Divest and Other Relief, dated June 16, 1982 (Consent Order Agreement) if the sale were to occur before that order became final. The Company asks that this request receive expedited treatment.

I. QUESTION ON WHICH ADVISORY OPINION IS SOUGHT

The Coca-Cola Company seeks an advisory opinion from the Commission on the following question:

Assuming that the order envisaged in the Consent Order Agreement would be entered by the Federal Trade Commission and become final, will the sale of Doric prior thereto to the joint venture described herein be to an "acquiror approved in advance by the Federal Trade Commission" within the meaning of Article II of that order and in compliance with all other requirements thereof?

II. BACKGROUND OF THE REQUEST

The Company and the staff of the Commission entered into the Consent Order Agreement in connection with an investigation by the Commission of the proposed acquisition by the Company of Associated Coca-Cola Bottling Co., Inc. ("Associated") and its subsidiaries, which included Doric. The order envisaged therein provides in relevant part that:

It is ordered, That within one year from the date on which this Order becomes final Coca-Cola shall divest itself absolutely and in good faith of all of its right, title and interest in Doric including any additions to Doric that may have occurred since its acquisition by Coca-Cola. Divestiture shall be made only to an acquiror approved in advance by the Federal Trade Commission.

At present, the Consent Order Agreement is before the Commission, but as of yet it has not been provisionally accepted by the Commission nor placed on the public record for the 60 day comment period pursuant to the procedure for accepting consent order agreements set forth in Section 2.32 *et seq* of the Commission's Rules, 16 C.F.R. 2.32 *et seq*.

Subsequent to the execution of the Consent Order Agreement, the Company diligently sought a purchaser for Doric who would be acceptable to the Commission. In March 1983, two firms which proposed to form a joint venture for that purpose presented the only acceptable offer to purchase Doric thus far received by the Company. The Company accepted the offer and an understanding was reached for the acquisition of Doric by the joint venture. A definitive acquisition agreement pursuant to which The Coca-Cola Company would sell all the capital stock of Doric to the joint venture is being finalized. The parties hope to complete and execute that definitive acquisition agreement such that all conditions precedent to the sale are fulfilled by April 30, 1983, thereby clearing the way for the sale to be consummated promptly upon receipt of the advisory opinion requested hereby.

III. DESCRIPTION OF THE BUYER

The facts set forth in this Part III of this request have been furnished to the Company by Skadden, Arps, Slate, Meagher & Flom, counsel to the joint venture. Though it has no independent knowledge of them, the Company believes that those facts are true and correct.

The proposed acquisition of Doric is to be by a newly formed Delaware joint venture corporation to be called Doric Holdings, Inc. ("Holdings"). Holdings will be owned 45% by American Fruit Juice Company, Inc. ("AFJC"), also a newly formed Delaware company; 45% in some combination by Luctor B.V., a Netherlands company ("Luctor"), and certain officers of Charterhouse Group International, Inc., a Delaware company ("Charterhouse International") and 10%

by Doric's management. AFJC will be a wholly-owned subsidiary of Asfika, B.V., a Netherlands holding company. Asfika is part of a group of related foreign corporations. Luctor and Charterhouse International are both wholly-owned subsidiaries of the Charterhouse Group, p.l.c., a United Kingdom company ("Charterhouse").

Asfika and its related corporations, all of which are non-United States companies, conduct no business in the United States except as described below. Related companies are engaged in a wide variety of businesses outside the United States, including: hops farming; barley malting; beer brewing and bottling; wine and spirits production and wholesaling; liquor retailing; fruit juice processing and marketing; hotel ownership and operation; variety discount retailing; furniture retailing; footwear retailing; television and appliance repair service; furniture and upholstery manufacturing; bedding manufacturing; textile manufacturing; particle board manufacturing; appliance manufacturing; footwear manufacturing; and leather goods manufacturing.

The Charterhouse companies are engaged in a wide variety of businesses both within and outside the United States. Subsidiaries of Charterhouse, all of which are non-United States companies, are engaged in the following businesses: banking, merchant banking, management and venture capital; hydraulic products manufacturing; office design; insurance; concrete product manufacturing; property development; tool rental; control and instrumentation manufacturing; pipe coupling manufacturing; wholesale cash and carry of groceries and various hard goods; film processing; generator manufacturing; marine propulsion manufacturing; power and hand tool distributing; electrical and refrigeration engineering; freight forwarding; advertising; and personnel recruiting. Non-United States companies associated with Charterhouse are engaged in the following businesses: providing development capital in the United Kingdom; oil exploration and production; towel rental; and electronics and hi-fi distribution. United States companies associated with Charterhouse are engaged in the following businesses: woolen fabric manufacturing; ice cream manufacturing and distribution; meat product manufacturing; garden product distributing; pharmaceutical packaging; and bedroom and bathroom textile furnishing manufacturing.

In addition, Charterhouse has, either directly or through an associated (45% owned) United Kingdom company, minority investments in more than 55 other companies in the U.K., France and Canada. None of these investee companies is engaged in the manufacture, sale or distribution of beverages and all of the investee companies' business activities are primarily outside of the United States.

Asfika, its related companies and the companies in the Charterhouse group are not engaged in the manufacture, sale or distribution

of beverages in the United States. Companies related to Asfika have interests ranging from 21-60% in four non-United States companies which are bottlers and distributors of brand Coca-Cola and other soft drinks and mixers outside the United States. Another company related to Asfika (which is not a subsidiary of it) is primarily engaged in the sale of 100% fruit juice outside the United States.*

IV. CONCLUSION

The nature of the businesses in which the participants in the joint venture currently are engaged in such that the proposed sale is free of any potential anticompetitive effect of significance.

By the proposed sale of Doric to the joint venture the Company will absolutely divest itself of all right, title and interest in Doric. Doric presently is a wholly-owned subsidiary of the Company. The proposed sale would assume the form of a transfer of all of the capital stock of Doric to the joint venture. Any additions to Doric that may have occurred since Doric was acquired by the Company have remained as assets of Doric, and ownership of such would perforce pass to the joint venture.

We understand that as a prerequisite to its determination whether or not to issue the advisory opinion requested herein, the Commission will place this request upon the public record for a period not to exceed 30 days to provide interested parties an opportunity to comment. We urge the Commission to do this as soon as possible so as to minimize the delay in closing. A delay between the execution of the acquisition agreement and the closing could result in the occurrence of an unforeseen or intervening development that could weaken Doric's competitive position.

We are confident that if any comments are received, they will provide no basis for the Commission to withhold issuance of the advisory opinion requested herein.

Respectfully,

/s/ William M. Dreyer
Senior Staff Counsel
The Coca-Cola Company

* That related company sells a small amount of pure fruit juice concentrate to importers, for sale to manufacturers in the United States for use in making juices, jams and sauces. These imports constitute less than 1% of total 1982 fruit juice imports into the United States based on U.S. Department of Agriculture statistics. In 1981 an independent United States importer test marketed a carbonated fruit juice produced by that related company on a limited basis in the United States. The total value of the product sold in that test was approximately \$10,000. This project was not successful and the product was never introduced to the United States on a commercial basis. (It may be mentioned that the Consent Order Agreement defines the relevant product market as "drinks, punches and ades" which are described as *non-carbonated drinks with less than 50% fruit juice, sold under refrigeration.*)

Export association's participation in a proposed barter program involving exchange between the association's members and the governments of Mexico and Poland would pose no restraint of trade or competitive problems. [833 0007, *Phosphate Rock Export Association*]

Aug. 1, 1983

Dear Mr. Fogt:

This is in response to your request on behalf of the Phosphate Rock Export Association ("Phosrock") for an advisory opinion concerning a proposed barter program. By letter of March 18, 1983, you requested the Commission's approval of participation by Phosrock in a plan involving the exchange of phosphate rock on behalf of Phosrock members for products available from Phosrock's foreign customers. In that letter and in a subsequent letter dated May 9, 1983, addressed to Joseph M. Mattingly, an attorney in the Commission's Bureau of Competition, you mentioned in particular the opportunity to exchange phosphate rock for sulfur with the Governments of Mexico and Poland. In a later telephone conversation with Mr. Mattingly, you stated that Phosrock would be satisfied if the Commission were to limit its advisory opinion to participation by Phosrock in the exchange with the Governments of Mexico and Poland of phosphate rock for up to 400,000 metric tons of sulfur on an annual basis. Since your request raises a novel question of fact or law for which there is no clear Commission or court precedent, under Section 1.1 of the Commission's Rules of Practice an advisory opinion by the Commission is warranted.

Based on the information provided, the Commission understands that Phosrock is an export association formed pursuant to Section 5 of the Webb-Pomerene Act (the "Act"), 15 U.S.C. 65, membership in which is open to any person, firm or corporation engaged in the mining of phosphate rock in the United States. The Commission also understands that Phosrock is engaged solely in "export trade," as that term is defined in Section 1 of the Act, 15 U.S.C. 61; that Phosrock makes no sales for United States domestic use or consumption; and that Phosrock has nothing to do with determining the price of phosphate rock or any other product sold for consumption or use in the United States. The Commission further understands that the proposed barter program would work as follows. Each Phosrock member would determine individually whether it wished to participate in the barter transactions. Phosrock would negotiate the exchange ratio for the products involved and arrange for barter receipts to be transferred to Phosrock members on the basis of each member's proportionate contribution of the exported phosphate rock. Each member

company would then either consume the product received in exchange for the phosphate rock internally in its manufacturing operations or resell the received product individually on terms it chooses to domestic or foreign purchasers. Phosrock itself would neither consume nor resell the received product.

The Commission is of the opinion that as long as Phosrock limits its participation in the proposed barter program to that described above, its participation would constitute an "act done in the course of export trade," as that phrase is used in Section 2 of the Act, 15 U.S.C. 62, and Phosrock would remain engaged solely in "export trade" as that term is defined in Section 1 of the Act, 15 U.S.C. 61. Based on an examination of the world and United States markets for phosphate rock and sulfur, the Commission is of the further opinion that the proposed barter program, if limited to the exchange with the Governments of Mexico and Poland of phosphate rock for up to 400,000 metric tons of sulfur on an annual basis, would not be in restraint of trade in phosphate rock or sulfur within the United States or in restraint of the export trade of any of Phosrock's domestic competitors. The proposed barter program, if so limited, would also, in the Commission's opinion, neither artificially enhance or depress phosphate rock prices in the United States nor substantially lessen competition or otherwise restrain trade in the United States markets for phosphate rock and sulfur.

This advisory opinion, like all those the Commission issues, is limited to the proposed conduct your submission describes. Thus, Phosrock should be careful not to enlarge its participation in the proposed barter program beyond that described above.

Finally, the Commission reserves the right to reconsider the questions involved and to rescind or revoke its opinion in accordance with Section 1.3(b) of the Rules of Practice if implementation of the proposed barter program results in substantial anticompetitive effects, if Phosrock enlarges its role in the proposed barter program beyond that described above, or if the public interest otherwise so requires.

By direction of the Commission.

Letter of Request

March 18, 1983

Dear Mr. Thomas:

We are submitting this request on behalf of the Phosphate Rock Export Association ("Phosrock" or the "Association") and its members for an advisory opinion from the Federal Trade Commission pursuant to its Rules of Practice regarding a proposed barter pro-

gram. We set out below the pertinent background facts, an outline of the transactions Phosrock proposes and our view of the program's legality under the antitrust laws.

Phosrock was formed in 1970 pursuant to Section 5 of the Webb-Pomerene Act.¹ Its Articles of Incorporation, By-Laws, form of Membership Agreement and current Annual Report are on file at the Federal Trade Commission.² The Association engages in all aspects of export sales activity in phosphate rock as a non-exclusive agent of its members. Its responsibilities include market research and analysis, technical assistance, solicitation, negotiation and conclusion of export sales contracts, traffic coordination, invoicing, order processing and collection and distribution of the proceeds of sale. Phosrock is headquartered in Tampa, Florida, and has offices in Paris, France and Tokyo, Japan.

Phosrock is engaged solely in "export trade." The Association makes no sales for United States domestic use or consumption; it has nothing to do with determining the price of phosphate rock or any other product sold for consumption or use in the United States. Not only does Phosrock not control the amount of phosphate rock available either for sale in the United States or for export, it does not control the amount of rock its members will export. Under the Association's Membership Agreement, each member, acting individually, determines the amount of disposable phosphate rock it will make available for sale each year through the Association. A member's share of Association sales is the proportion its nominated tonnage bears to the disposable phosphate rock nominated for sale by all members through the Association. Each member, in addition, retains the unfettered right to sell phosphate rock on terms and conditions which it determines individually, to any domestic person for whatever purpose, including exportation.³ Phosrock has no involvement in export sales by a member company to any affiliated company abroad.⁴

The phosphate rock exported by Phosrock is a mined raw material used in various phosphorous derivative industries, particularly in the manufacture of complex phosphatic fertilizers.⁵ Apart from the phosphate rock miners operating in the United States, virtually all other phosphate rock miners in the world are government owned or controlled.⁶ For example, Morocco, which has a commanding share of

¹ 15 U.S.C. 65.

² The members of Phosrock are: Agrico Chemical Company, AMAX Chemical Corporation, American Cyanamid Company, Freeport Phosphate Rock Company, Gardinier, Inc., International Minerals & Chemical Corporation, Occidental Chemical Company and W.R. Grace & Co. Membership in Phosrock is open to any person, firm or corporation engaged in the United States mining of phosphate rock.

³ In addition, subject to availability and mutual agreement on terms and conditions, Phosrock will sell and has sold phosphate rock to domestic persons for exportation.

⁴ The term "affiliated company" is defined in Phosrock's Membership Agreement to be a corporation in which a member has a 20% ownership interest.

⁵ See generally *Fertilizer Technology and Use* (2d Ed. 1972).

⁶ Countries in which phosphate rock miners are government controlled include Morocco, Algeria, Egypt, Senegal, Tunisia, Jordan, Syria, China, Viet Nam, Ocean Islands, U.S.S.R., Brazil and Mexico.

international phosphate trade, derives over one-third of its gross national product from the export sale of phosphate rock. Furthermore, many actual and potential customers of Phosrock are foreign governments or companies that are totally or substantially owned or controlled by their governments.

Phosrock's efforts to promote American international trade in competition with foreign governmental units have been severely undercut by the worldwide recession in the fertilizer industry. U.S. production and exports of phosphate rock have each declined by more than one-third since 1980. The industry is currently operating at roughly 50% capacity; unemployment exceeds 25% and inventories have recently been at the highest levels ever recorded.⁷ According to the United Nations, world phosphate supply will far exceed demand until at least the end of 1987.

In such a depressed market, Phosrock's problems have been compounded by the inability of its customers—almost always foreign governments—to pay hard currency for phosphate rock. This is particularly true in the East Bloc where American producers, acting through Phosrock, have a great chance to increase export sales and penetrate markets previously dominated by Russia and Morocco. It is also increasingly true with respect to developing countries, particularly Mexico, who are experiencing significant financial difficulties.

In order to maintain its market share in certain countries and have any chance of expanding phosphate rock sales, Phosrock must be able to accept some alternative to hard currency as compensation for the phosphate rock it sells in the export market. The situation in Mexico provides a useful example of this issue. For many years, Phosrock sold Mexico's only privately-owned fertilizer company approximately 700,000 M/T each year. The phosphate rock was sold on open account with payment in dollars due 45 days after receipt of documents; the other principal supplier to this customer was the Government of Morocco. In 1977, the Mexican fertilizer industry was nationalized. Now the Mexican Government controls all purchases of fertilizer components as well as fertilizer production and sale in Mexico. After nationalization, Phosrock continued to sell phosphate rock to Mexico on open account, but in diminished amounts. Morocco increased its tonnage position.

In April, 1982, the severe financial difficulties which Mexico was encountering forced Phosrock to alter its payment terms from open account to confirmed letter of credit. At that time, a Phosrock invoice in the amount of one million four hundred thousand dollars

⁷ Attached is a copy of a March 5, 1983 *New York Times* article entitled "Phosphate Slumps In Bone Valley". Products other than phosphate rock have been similarly affected. Exports of diammonium phosphate (DAP) have declined 25% from 1980 levels. [Not reproduced herein. Copies of all attachments are available for inspection in Room 130, Public Reference Branch, Federal Trade Commission, 6th St. and Pa. Ave., N.W., Washington, D.C. 20580.]

(\$1,400,000) came due but was not paid for over ten months. During this period, Phosrock was in frequent contact with the Mexican Government and the U.S. Embassy in Mexico City, and was only recently able to establish a timetable for the payment of this receivable in dollars. Moreover, since changing its payment terms last April Phosrock has been able to confirm only one letter of credit for Mexico and there is no prospect that adequate letters of credit will be available to provide assured payment for the phosphate rock Mexico desires. Unless an alternative to hard currency is found, Phosrock will make no sales of phosphate rock to Mexico in 1983.

The Mexican Government continues to desire to have Phosrock as a supplier, but it is clear that some form of compensation for the phosphate rock other than dollars will have to be found if this important export trade relationship is to continue. Mexico produces a number of products, including sulphur and petroleum, which the Mexican Government has indicated are available to exchange for phosphate rock. These products are particularly appealing since they could be consumed by Phosrock's members in connection with their fertilizer production activities. It would be highly desirable from a commercial point of view if Phosrock could arrange barter transactions, involving the exchange of phosphate rock for products which Association members regularly purchase for internal consumption in their manufacturing operations. In this way, Phosrock could promote export trade by making sales of phosphate rock that otherwise would not occur. There are many other customers (the Government of Poland, for example) where barter provides the only realistic prospect of export sales.

We are requesting the Federal Trade Commission to render an advisory opinion with regard to Phosrock's participation in the following proposed barter program. The plan contemplates the exchange of phosphate rock on behalf of Phosrock members for products available from the Association's foreign customers. The Association would negotiate the exchange ratio for the products involved and arrange for the barter receipts to be transferred to Association members on the basis of each member's proportionate contribution of the exported phosphate rock. As is the case with all the Association's export operations, each member would determine individually whether it wished to participate in the transaction. Each member of Phosrock would then consume the product received internally in its manufacturing process; but if the product were not suitable for member company consumption or if the company chose not to do so for some reason, it could resell individually the product to foreign or domestic purchasers on whatever terms it determined. For the reasons set forth below, we view the program as a permissible activity of a Webb-Pomerene

association which, in any event, does not raise concerns under U.S. antitrust law.

It is well-established that the Webb-Pomerene Act confers a qualified antitrust immunity upon "acts of an association entered into for the sole purpose of engaging in export trade and actually engaged solely in export trade, or an agreement made or act done in the course of export trade by such association."⁸

The first question raised by this proposal is whether export transactions involving the Association's receipt of a bartered product rather than cash in exchange for its phosphate rock is an action which can qualify for antitrust immunity under the Webb-Pomerene Act. The statute's extension of protection to acts done "solely in export trade" or to an act "done in the course of export trade" suggests that immunity is available for trade by barter.

As a matter of definition, the exchange of goods for goods universally is recognized to be as much an act of trade as is the exchange of goods for currency. Even if the phrase "solely in export trade" is construed so narrowly as to exclude the exporter's receipt of barter from the concept of an export transaction, this receipt of the barter product must be considered nevertheless to be an "act done in the course of export trade." It is one of a variety of ways of implementing an export sale; in some circumstances, it may be the only available way.

The conclusion that Congress expected the Webb-Pomerene Act to apply to export trade via barter is supported by the Act's history and purpose as well as its language. The clear and overriding objective of this legislation was to promote export trade by permitting American companies to combine in export associations without fear of antitrust exposure, so that they could be better matches for their powerful rivals in international markets where barter—as it is today—was an important trade method. Accordingly, it would be unwarranted to attribute to Congress the desire to constrain the *form* of the receipts that American firms could take in exchange for their exported goods. Such a limitation would too greatly undercut the legislative purpose of expanding export trade to be read into the Act without some clear evidence that it was intended to accomplish some identified goal.

It is quite true that Congress sought to foreclose the potential for the abuse of this grant of immunity if export associations were to turn around and sell in domestic channels the same commodities that they had been permitted to band together to export. In order to safeguard

⁸ 15 U.S.C. 62. See generally *United States v. United States Alkali Export Association*, 325 U.S. 196 (1945), *aff'd* 58 F.Supp. 785 (S.D.N.Y. 1944); *United States v. Minnesota Mining and Mfg. Co.*, 92 F.Supp. 942 (D. Mass. 1950).

The immunity is qualified because the Association may still be found to violate the antitrust laws if it is found that the Association acted in restraint of trade within the United States; in restraint of the export trade of a domestic competitor of the Association; to artificially enhance or depress prices within the United States of commodities of the class exported by the Association; or to substantially lessen competition within the United States. See text at notes 11 and 12.

the domestic market, Congress added the following qualification to the definition of "export trade" in Section 1 of the Webb-Pomerene Act:

but the words "export trade" shall not be deemed to include the production, manufacture or *selling* for consumption or for resale within the United States or any Territory thereof, *of such goods, wares or merchandise*, or any act in the course of such production, *manufacture* or reselling for consumption or for resale. (Italics added)⁹

The phrase "such goods, wares or merchandise" refers to those products being "exported, or in the course of being exported from the United States."

While this proviso directly addresses the congressional concern to prevent members of export associations from colluding to restrain domestic trade in the class of products they are selling overseas,¹⁰ it does not foreclose the receipt by members of a Webb-Pomerene association of other products in exchange for exported products.¹¹ The limitation to the definition of export trade in Section 1 of the Webb-Pomerene Act thus offers no support for an artificial interpretation of the Act which categorically would make exportation by barter ineligible for Webb-Pomerene immunity. Barter is export trade.

In any event, according to the language of the Webb-Pomerene Act, even if the proposed barter program were considered to be an act "solely in export trade" or one undertaken "in the course of export trade," it would be subject, nonetheless, to antitrust attack if it had any of the following effects: it restrained trade within the United States; it restrained the export trade of any domestic competitor of the Association; it served artificially or intentionally to enhance or depress prices with the United States of commodities of the class exported by the Association; or it substantially lessened competition within the United States.¹²

Pointing to the foregoing qualifications which appear as provisos in Section 2 of the Webb-Pomerene Act, U.S. antitrust officials have observed that because an action having none of these four effects would fall outside the application of the Sherman Act anyway, it

⁹ 15 U.S.C. 61. Congress provided in the same vein that if any conduct, whether an act of export trade or not, substantially restrained domestic trade or lessened competition in the United States, it would be subject to antitrust attack. See 15 U.S.C. 62.

¹⁰ This purpose is also evident in the following excerpt from the Senate Interstate Commerce Committee Report that accompanied the present Webb-Pomerene Act of "export trade:"

We desire, of course, to authorize associations for the sole purpose of selling abroad. In order to do this, they must have the right to acquire or buy within the United States for the foreign market, but in the view of the settled domestic policy of the United States under the Sherman law, clearly these associations should not be permitted to organize for the purpose of making sales abroad and use their organizations to sell for consumption within the United States.

S. Rep. No. 1056, 64th Cong., 2d Sess., February 14, 1917, p. 2.

¹¹ It deserves emphasis that Phosrock's proposal does not contemplate either the introduction or the reintroduction for the export product—phosphate rock—into domestic commerce. Under the plan, the product that reaches U.S. shores would be that proffered by a foreign customer in exchange for phosphate rock.

¹² 15 U.S.C. 62.

would not have to be immunized from antitrust liability in the first place.¹³ Whether Phosrock's direct participation in barter transactions is analyzed strictly on the basis of the provisos of Section 2 of the Webb-Pomerene Act or it is considered in terms of the subject matter jurisdiction of the Sherman Act, however, the proposal does not yield anticompetitive effects that would make it subject to antitrust challenge.

With or without a program of direct participation in barter, Phosrock has no role whatsoever in determining the price of phosphate rock within the United States. Thus, there is no feature of the barter program that might serve "artificially or intentionally to enhance or depress prices within the United States" of Phosrock's export product. With respect to the possible restraint of the export trade of a competitor of the Association, we can contemplate no ill effect on an American rival of Phosrock from the Association's engaging directly in barter. Just as is the case when Phosrock trades its export product for currency, a nonmember American company selling in the same foreign market is free to compete with the Association on whatever terms it chooses to offer.¹⁴

Finally, no aspects of Phosrock's proposed barter program will restrain trade within the United States or substantially lessen competition within the United States. The bulk of the product that would be received in the United States in exchange for the phosphate rock exports would be received directly from the foreign customer and consumed by the individual members of Phosrock. With respect to that portion of the product received in barter which might be sold in the United States, the proposed barter program hypothesizes that such domestic sales would be undertaken only by a Phosrock member individually, both independently of the Association and in competition with any other Phosrock member who might elect to sell its bartered receipts in the United States. Under no circumstances would

¹³ On the basis of the clauses qualifying Webb-Pomerene immunity in Section 2 of the Act, the Department of Justice has taken the view that the Webb-Pomerene Act is unnecessary legislation. According to a long line of spokesmen for the Department, unless joint activity in foreign commerce does have effects on commerce in the United States that are direct, substantial and reasonably foreseeable, the joint activity will not raise problems under the United States antitrust laws anyway. See, e.g., Shenefield, *Antitrust & Trade Reg. Rep. (BNA)* No. 875, at A3 (August 3, 1978); Turner, *International Aspects of Antitrust, Hearings Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. 124 (1967). This view of the jurisdictional reach of the Sherman Act has been incorporated in a new Section 7 which reads:

This act shall not apply to conduct involving trade or commerce other than import trade or import commerce with foreign nations unless . . . such conduct has a direct, substantial and reasonably foreseeable effect on [commerce in the United States or the export commerce of a U.S. resident]. [Section 402 of the Export Trading Company Act of 1982.]

¹⁴ It is difficult to see how the results of the proposed barter program would differ from those occasioned by Phosrock's traditional operations involving the receipt of money in exchange for phosphate rock. The Association divides this money among its members in proportion to the amount of phosphate rock they each have contributed. The amount of the bartered product that the members could buy with their share of this money would be likely to correspond quite closely to the amount they could obtain under the barter proposal. This is true because even if the Association's economic power in the foreign market for phosphate rock may enable it to extract a fair price (or a premium) for this product, the Association's power vis-a-vis the exchanged product is so limited that its combined efforts would be unlikely to produce any significant price concession in this market.

the Association sell for consumption or resale within the United States any product on behalf of its members or for its own account. Indeed, any sale of the bartered goods in U.S. commerce by a Phosrock member would be made under exactly the same circumstances of unrestrained competition that would exist irrespective of an association engaging in the joint exportation of some other product.

Even if Phosrock's proposed barter program is viewed as a joint buying arrangement whereby each member of the Association consumes or individually resells the purchased commodity, it is well-established that such cooperative buying arrangements in and of themselves are not *per se* illegal. They raise antitrust concerns only when the group has substantial economic power in the market for the commodity to be purchased or when the arrangement is accompanied by anticompetitive restrictions on the members' ability to resell the commodity purchased.¹⁵ Neither of those conditions would be present under Phosrock's proposal.

In *United States v. Topco Associates, Inc.*,¹⁶ the Supreme Court scrutinized the practices of a cooperative buying association composed of 25 small- and medium-sized regional supermarket chains. It was apparent from the practices reviewed that the association possessed considerable "economic muscle."¹⁷ Notwithstanding the existence of this joint power, nowhere in the entire course of the litigation all the way up to the Supreme Court was an issue made of any perceived anticompetitive consequences flowing from the group-buying arrangement itself. Instead, what troubled the Department of Justice and the Court about the Topco arrangement were the restrictions placed on the territories in which members could resell their jointly-purchased products and on their ability to resell products at wholesale as well as the members' veto power over the admission of new members, factors which together appeared to facilitate a horizontal division of markets.

Indeed, once the Court ruled that the foregoing practices violated the antitrust laws, the parties entered into a court-approved consent judgment, which established Topco's continued viability as a group-buying association and permitted Topco to utilize areas of primary responsibility to determine the business locations of its trademark licensees and to formulate and implement profit passovers, unless

¹⁵ The courts have frequently held that the operations of buying groups (e.g., of theatre owners jointly purchasing films; of small grocers purchasing food-stuffs in bulk; and of greeting card buyers using a buying corporation) do not violate the antitrust laws. See *Central Retailer-Owner Groceries, Inc. v. FTC*, 319 F.2d 410 (7th Cir. 1963) (small grocers); *Arkansas Brokerage Co. v. Dunn & Powell, Inc.*, 173 F. 899 (8th Cir. 1909) (mercantile jobbers); *G & P Amusement Co. v. Regent Theatre Co.*, 107 F.Supp. 453 (N.D. Ohio 1952), *aff'd*, 216 F.2d 749 (6th Cir. 1954) (theatres); *Mid-West Theatres Co. v. Cooperative Theatres, Inc.*, 43 F.Supp. 216 (E.D. Mich. 1941) (theatres); *Associated Greeting Card Distrib.*, 50 F.T.C. 631 (1954). See also *National Macaroni Manufacturing Ass'n v. FTC*, 345 F.2d 421, 427 (9th Cir. 1965).

¹⁶ 405 U.S. 594 (1972). The association's primary function was to serve as a joint purchasing agent for its members. As is true of Phosrock, it was run by a board of directors which consisted, generally, of high-ranking executive officers of the member chains.

¹⁷ *Id.* at 600.

such practices maintained the territorial exclusivity which the Supreme Court had earlier determined to be illegal.¹⁸

In contrast, Phosrock's proposed barter program places no restrictions whatsoever on the reselling of the bartered-for product. It expressly contemplates that if an Association member chooses to resell the product obtained from the barter rather than consume it, it will do so independently of or in competition with the other Association members and the numerous other sellers of the product.

In passing the Webb-Pomerene Act, Congress sought to provide American companies with the flexibility for combating foreign buying and selling cartels in order to expand U.S. export trade. Phosrock's proposed barter program promotes this objective without endangering U.S. commerce in any respect. Domestic commerce in either phosphate rock or the exchanged product will not be even affected, let alone substantially restrained.¹⁹

We would be happy to meet with you to discuss this matter in greater detail or to provide you with any further written information you may require. We look forward to hearing from you and, we would hope, your response could be available as expeditiously as possible.

Thank you for your consideration of this matter.

Very truly yours,

/s/ Howard W. Fogt, Jr.
Counsel to the Phosphate Rock
Export Association

Supplement To Request For Advisory Opinion

May 9, 1983

Dear Mr. Mattingly:

This letter supplements the March 18, 1983 request of the Phosphate Rock Export Association ("Phosrock" or the "Association") for an advisory opinion and provides additional market information which you requested regarding the products which Phosrock is likely to obtain through its proposed exchange of phosphate rock. Under this program, Phosrock would barter phosphate rock for other products, which would be transferred directly to Phosrock's members for their internal consumption or individual resale. As is the case with

¹⁸ See 1973-1 (CCH) Trade Cas. ¶ 74,391 (N.D. Ill. 1972) and 1973-1 (CCH) Trade Cas. ¶ 74,485 (N.D. Ill. 1973), *aff'd*, 414 U.S. 801 (1973).

¹⁹ Because the proposed barter program would not violate Section 1 of the Sherman Act, it would not run afoul of the Wilson-Tariff Act, 15 U.S.C. 8, either. As Judge Becker held in *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 513 F.Supp. 1100, 1163-64 (E.D. Pa. 1981), "the Wilson-Tariff Act sought to make clear that import trade was subject to the scrutiny of the antitrust laws" and, as such, is coterminous with Section 1 of the Sherman Act. See also *Outboard Marine Corp. v. Petzel*, 461 F.Supp. 384, 407 (D. Del. 1978).

11 the Association's export operations, each member will determine individually whether it desires to participate in the transaction.

In Phosrock's view, the receipt of bartered products, rather than cash, in consideration for the phosphate rock sold to foreign customers does not alter the basic character of the Association's transaction from one of "export trade" or "an act in the course of export trade." We believe the proposed product exchanges fall within the protective immunity accorded by the Webb-Pomerene Act for concerted export trade activity. Thus, the program's ultimate legality depends upon the question whether the barter transactions will substantially lessen domestic commerce or restrain the export trade of a domestic competitor of the Association. Phosrock submits that the proposed barter program will not have these prohibited effects.

In substance, the competitive consequences of the program are no different than Phosrock's sales of phosphate rock for cash. The Association will divide the receipts of product, just as it does currency, among its members according to the amount of phosphate rock each member contributes. Each member then will individually dispose of the bartered product as it sees fit. Thus, no feature of the proposed barter program could be expected to result in a substantial restraint of domestic competition in either the sale or export of phosphate rock or in the market for the product obtained via barter.

While Phosrock believes that there are a large variety of potential products that could be exchanged, the Association has immediate opportunities to exchange phosphate rock for sulfur. The Governments of Mexico and Poland, two of the Association's largest customers, are volume producers of sulfur and have expressed a desire to exchange sulfur for phosphate rock. Barter of sulfur may be the only effective way to do business with them. On an annual basis, no more than 400,000 metric tons of sulfur would be involved. In addition, sulfur is an appealing commodity for Phosrock to obtain in exchange for phosphate rock because its individual members could consume the product in their respective phosphate fertilizer operations.¹

No prohibited restraint of trade could result from such a phosphate rock/sulfur exchange. Sulfur is one of the most abundant of the elements in the earth, ranking 13th in amount and one of the few that is found in a native state.² Accordingly, sulfur is produced world-wide, with no one country being a predominate producer or supplier to world markets.

In 1981, world production of sulfur in all forms amounted to 52

¹ Sulfur is critically important to most sectors of the fertilizer industry. Approximately 60% of the sulfur consumed world-wide is used in the manufacture of fertilizers because it provides the most satisfactory method of producing these essential products in useable form. The remainder is used in a wide range of applications in industry. See "Sulfur," A Chapter from Mineral Facts and Problems, 1980 ed. (Bureau of Mines preprinted from Bulletin 671) p. 1.

² "Sulfur," A Chapter from Mineral Facts and Problems, 1980 ed. (Bureau of Mines preprinted from Bulletin 671) p. 1.

million metric tons. The United States was the leading producer, accounting for 12.145 million metric tons or 22.5% of world output.³ Notwithstanding the large amount of sulfur produced domestically, the United States has been a net importer of sulfur since 1968.⁴ The Bureau of Mines estimates that demand for sulfur is expected to increase at an annual rate of about 4.6% through 1990. It also estimates that in 1983, domestic production of sulfur will be approximately 10.5 million metric tons and that U.S. apparent consumption will be at 11.5 million metric tons.⁵ The amounts of sulfur involved in the proposed Phosrock transactions (400,000 metric tons) could, thus, have only the most *de minimus* impact on domestic sulfur trade.

Not only is there an abundant supply of the sulfur for which Phosrock would most likely be bartering, but there is fierce competition in, and a more than adequate supply of, phosphate rock in the world market. In 1981, 137,839,000 metric tons of phosphate rock were produced, 138,962,000 metric tons were sold and 45,837,300 metric tons were exported in the world market.⁶ Phosrock's exports amounted to 5,412,000 metric tons or just under 4% of world sales. Thus, it is difficult to imagine that competition in phosphate rock could be substantially restrained by Phosrock's proposed barter transactions.⁷

For these reasons and those stated in our initial letter, we urge the Commission to approve Phosrock's proposed barter program. If you have any questions about the foregoing or if we can provide you with any further information, please let us know. As I mentioned above, Phosrock has current opportunities to do business with the Governments of Mexico and Poland. Accordingly, the Association's ability to increase 1983 phosphate rock exports will be materially assisted by the Commission's prompt response to the Association's request.

Sincerely yours,

/s/ Howard W. Fogt, Jr.

³ "Sulfur," Bureau of Mines Yearbook (Preprinted 1981).

⁴ "Sulfur," *supra* n.1 at pp. 203.

⁵ 1983 Sulfur Data, Bureau of Mines (Prerelease).

⁶ International Fertilizer Association, 1981 Phosphate Rock Statistics (Paris 1982).

⁷ Another commodity for which Phosrock might barter and for which these conclusions are equally applicable is petroleum. As with sulfur, any proposed barter involving petroleum would literally constitute a "drop in the bucket" of domestic or world oil supply. For example, in 1981, the United States consumed 11,788,000 barrels of crude oil condensate and natural gas liquids *per day*. American Petroleum Institute, Discussion Paper O-14R, October 1982, Market Shares and Industry Co. Data for U.S. Energy Markets 1950-81. By contrast, the *annual* number of barrels which Phosrock would anticipate receiving in barter transactions would probably not exceed 500,000 barrels.

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