

IN THE MATTER OF

HAROLD HONICKMAN, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT*Docket 9233. Complaint, Nov. 2, 1989—Decision, July 25, 1991*

This consent order requires, among other things, a major Pepsi bottler for the New York metropolitan area and his beverage corporation, for a ten year period, to seek prior Commission approval before making certain soft drink acquisitions in the New York metropolitan area; or else hold the newly acquired assets separate and apart from ongoing bottling operations. However, the addendum to the agreement would allow Mr. Honickman to distribute and sell the products of Seven-Up Brooklyn to another bottler for a limited time period.

Appearances

For the Commission: *Constance M. Salemi* and *Ronald B. Rowe*.

For the respondents: *Andrew L. Sandler, Skadden, Arps, Slate, Meagher & Flom*, Washington, D.C. and *Peter E. Greene, Skadden, Arps, Slate, Meagher & Flom*, New York, N.Y.

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 ("Commission"), having reason to believe that the respondent, Harold Honickman, individually or by or through the Long Island Acquisition Company, a partnership, or its partners, the Brooklyn Beverage Acquisition Corporation, a corporation, MGGR Corporation, a corporation, Taunton Corporation, a corporation, LTF Brooklyn, Inc., a corporation; Melville Beverage Partners Limited Partnership, a limited partnership; and the Berriman Cozine Corporation, a corporation; subject to the jurisdiction of the Commission, has acquired the assets of the Seven-Up Brooklyn Bottling Company, Inc., from the Seven-Up Brooklyn Bottling Company, Inc., and that said acquisition may be in violation of the provisions of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45; and that said acquisition

constitutes a violation of Section 5 of the Federal Trade Commission Act, 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 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:

I. DEFINITIONS

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

a. "*Honickman*" means Harold Honickman.

b. "*BBAC*" means the Brooklyn Beverage Acquisition Corporation, and its subsidiaries, divisions and groups controlled by BBAC and their respective directors, officers, employees, agents and representatives, and their successors and assigns.

c. "*MGGR*" means MGGR Corporation, and its subsidiaries, divisions and groups controlled by MGGR and their respective directors, officers, employees, agents and representatives, and their successors and assigns.

d. "*Taunton*" means Taunton Corporation, and its subsidiaries, divisions and groups controlled by Taunton and their respective directors, officers, employees, agents and representatives, and their successors and assigns.

e. "*LTF Brooklyn*" means LTF Brooklyn, Inc., and its subsidiaries, divisions and groups controlled by Taunton and their respective directors, officers, employees, agents and representatives, and their successors and assigns.

f. "*LIA*" means the L.I. Acquisition Company, its subsidiaries, divisions, and groups controlled by LIA and their respective partners, officers, employees, agents or representatives, and their successors and assigns.

g. "*Melville*" means the Melville Beverage Partners Limited Partnership, its subsidiaries, divisions, and groups controlled by Melville and their respective partners, officers, employees, agents or representatives and their successors and assigns.

h. "*Berriman*" means the Berriman Cozine Corporation and its subsidiaries, divisions and groups controlled by Berriman and their respective directors, officers, employees, agents and representatives, and their successors and assigns.

i. The “*acquiring entities*” means LIA or its partners, BBAC, MGGR, Taunton, and LTF Brooklyn; Melville; and Berriman.

j. “*Seven-Up Brooklyn*” means the Seven-Up Brooklyn Bottling Company (the post-acquisition firm), and its subsidiaries, divisions, and groups, controlled by Seven-Up Brooklyn and their respective directors, partners, officers, employees, agents or representatives, and their successors and assigns.

k. “*Seven-Up Brooklyn, Inc.*,” means the Seven-Up Brooklyn Bottling Company, Inc. (the seller), and its subsidiaries, divisions and groups controlled by Seven-Up Brooklyn, Inc., and their respective directors, officers, employees, agents and representatives, and their successors and assigns.

l. “*Pepsi New York*” means the Pepsi-Cola Bottling Company of New York, Inc., and its subsidiaries, divisions and groups controlled by Pepsi New York, and their respective directors, officers, employees, agents and representatives, and their successors and assigns.

m. “*Canada Dry New York*” means the Canada Dry Bottling Company of New York and its subsidiaries, divisions, and groups controlled by Canada Dry New York and their respective partners, officers, employees, agents or representatives, and their successors and assigns.

n. “*Soft drink*” means a carbonated soft drink or “CSD,” as classified under the four-digit Standard Industrial Classification industry code 2086.

o. “*Branded*” soft drink or CSD means the trademarked name of any type of soft drink product commonly delivered by a store-door or bottler distribution system, such as Coca Cola[™], Pepsi-Cola[™], Seven-Up[™], Dr Pepper[™], and Royal Crown[™] products.

p. “*Bottler*” refers to a person that is engaged in bottling soft drinks or that has been granted an exclusive bottling appointment or distribution agreement by any manufacturer of soft drink syrup or concentrate.

q. “*Bottles*”, “*bottling*” or “*bottled*” means the process of putting syrup or concentrate and other ingredients together as a soft drink in a bottle or can, regardless of the sources of the syrup or concentrate.

r. “*Territory*” means an area for which a bottler has been granted an exclusive bottling appointment or distribution agreement.

s. “*Store-door delivery*” means the delivery of soft drinks by a bottler to all types and sizes of outlets, including, but not limited to, supermarkets, mom and pop stores, vending machines and fountain

accounts. Store-door delivery does not include delivery of CSD through a warehouse system serving only stores, with high CSD volumes, but not mom and pop stores, vending and fountain.

II. THE PARTIES

2. Honickman is an individual with a place of residence at 951 Frazier Road, Rydal, PA. Honickman owns, controls, or guaranteed most of the financing for each of the acquiring entities.

3. BBAC is a Honickman-controlled corporation organized and existing under the laws of the State of Pennsylvania with a principal place of business at 1500 The Fidelity Building, Philadelphia, PA.

4. MGGR is a corporation organized and existing under the laws of the State of Pennsylvania with a principal place of business at 1500 The Fidelity Building, Philadelphia, PA.

5. Taunton is a corporation organized and existing under the laws of the State of Pennsylvania with a principal place of business at 1500 The Fidelity Building, Philadelphia, PA.

6. LTF Brooklyn is a corporation organized and existing under the laws of the State of Delaware with a principal place of business at 1520 Locust Street, Philadelphia, PA.

7. LIA was a Honickman-controlled partnership, organized and existing under the laws of the State of New York with a principal place of business at 112-02 Fifteenth Avenue, College Point, New York.

8. Melville is a Honickman-controlled limited partnership organized and existing under the laws of the State of New York with its principal place of business located at 135 Baylis Road, Melville, New York.

9. Berriman is a Honickman-guaranteed corporation organized and existing under the laws of the State of New York with its principal place of business located at c/o CT Corporation System, 1633 Broadway, New York, New York.

10. Seven-Up Brooklyn was a Honickman-controlled partnership organized and existing under the laws of the State of New York with its principal place of business located at 112-02 Fifteenth Avenue, College Point, New York.

11. In 1986, before its acquisition by Honickman and his controlled entities in 1987, Seven-Up Brooklyn Inc's gross sales totaled approximately \$28 million and its sales volume was in excess of eight million cases of soft drinks.

12. The acquiring entities and Honickman individually or by or through the acquiring entities and at all times relevant herein have been engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and have businesses in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

III. THE ACQUISITION

13. On or about August 3, 1987, Honickman individually or by or through the acquiring entities acquired most of the assets of Seven-Up Brooklyn, Inc., paying approximately \$18 million. These assets included the following franchises: the Seven-Up, the A&W Root Beer, the Perrier, the Hawaiian Punch, the Brownie, the Canfield's and the Lipton Tea franchises. Honickman, individually or by or through the acquiring entities, also acquired other assets. These assets included production, equipment; food service, merchandising and post-mix dispensing equipment related to the franchises; vending machines and visi-coolers; office furnishings; office equipment and real estate. After the acquisition, the acquiring entities continued to bottle, distribute and sell soft drinks under the name of Seven-Up Brooklyn.

14. At the time of the acquisition, Seven-Up Brooklyn, Inc., bottled, distributed and sold soft drinks in the New York City area. At the time of the acquisition, Honickman owned and controlled Pepsi New York and Canada Dry New York. At the time of the acquisition Pepsi New York and Canada Dry New York bottled, distributed and sold soft drinks in the New York metropolitan area. After the acquisition, Honickman individually or by or through the acquiring entities also owned or controlled Seven-Up Brooklyn.

15. On or about December 13, 1988, LTF Brooklyn purchased the rights of BBAC, MGGR and Taunton in the LIA partnership in order to lessen the likelihood of a Commission enforcement action; and the LIA partnership was dissolved.

IV. OTHER ACQUISITIONS

16. On or about December 1986, Honickman individually or by or through Canada Dry New York, acquired the assets of Galler Seven-Up Bottling Company ("Seven-Up Galler") holding franchises in New Jersey counties. These counties include, but are not limited to, Bergen, Hudson and Passaic. On or about September 1987, Honickman individually or by or through Canada Dry New York acquired the

Seven-Up Bottling Company of Essex, Inc. ("Seven-Up Essex"). Seven-Up Essex holds franchises in at least the New Jersey county of Essex. These acquisitions and the acquisition of Seven-Up Brooklyn are located in the New York metropolitan area and may be part of a Honickman plan to acquire the bottlers holding Seven-Up franchises in that area.

V. TRADE AND COMMERCE

Relevant Line of Commerce

17. A relevant line of commerce in which to analyze the acquisition of most of the assets of Seven-Up Brooklyn, Inc., is branded soft drinks. Another relevant line of commerce in which to analyze the acquisition is no broader than all soft drinks.

Relevant Sections of the Country

18. A relevant section of the country is the New York metropolitan area. The metropolitan area encompasses territories where Pepsi New York, Canada Dry New York and Seven-Up Brooklyn and other Pepsi and Seven-Up bottlers do business. Another relevant section of the country may be a three-county area of Richmond (Staten Island), Kings (Brooklyn) and Queens in the State of New York. The three-county area encompasses only territories where Pepsi New York, Canada Dry New York and Brooklyn Seven-Up do business.

VI. MARKET STRUCTURE

19. The production, distribution and sale of soft drinks in each relevant section of the country is highly concentrated, whether measured by the Herfindahl-Hirschmann indices or two-firm and four-firm concentration ratios.

VII. ENTRY CONDITIONS

20. Entry into the relevant sections of the country is difficult or unlikely.

VIII. COMPETITION

21. Seven-Up Brooklyn, Inc., and Honickman individually or by or through Pepsi New York and Canada Dry New York were actual competitors in the production, distribution and sale of soft drinks in the metropolitan and the three-county area.

IX. EFFECTS

22. The effect of the acquisition may be substantially to lessen competition in the relevant lines of commerce and the relevant sections of the country in the following ways, among others:

- a. By eliminating direct competition from Seven-Up Brooklyn, Inc.;
- b. By reducing competition among soft drink brands produced, distributed and sold by the remaining bottlers;
- c. By increasing the likelihood of, or facilitating, actual or tacit collusion; and
- d. By increasing the difficulty of entering the market.

23. Any or all of the above increase the likelihood that firms will increase prices and restrict output both in the near future and in the long term.

24. The acquisition by Honickman individually or by or through the acquiring entities of the assets of Seven-Up Brooklyn, Inc., violates Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and Section 7 of the Clayton Act, 15 U.S.C. 18.

Commissioner Azcuenaga recused and Commissioner Owen not participating.

DECISION AND ORDER

The Commission having theretofore issued its complaint charging Harold A. Honickman and Brooklyn Beverage Acquisition Corporation with violation of Section 5 of the Federal Trade Commission Act, as amended, and Section 7 of the Clayton Act, and respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by 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 Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25 of its Rules; and

The Commission having considered the matter 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 3.25 (f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

ORDER

I.

It is ordered, That for purposes of this order, the following definitions shall apply:

A. "*Honickman*" means Harold A. Honickman, individually, and all entities controlled by Honickman, including but not limited to, Brooklyn Beverage Acquisition Corporation, their predecessors, subsidiaries, divisions, groups and affiliates controlled by Honickman, and their respective directors, officers, employees, agents, representatives, successors and assigns.

B. "*BBAC*" means Brooklyn Beverage Acquisition Corporation, its predecessors, subsidiaries, divisions, groups and affiliates controlled by BBAC, and their respective directors, officers, employees, agents, representatives, successors and assigns.

C. "*Commission*" means the Federal Trade Commission.

D. "*Person*" means any natural person or any corporate entity, partnership, association, joint venture, governmental entity, trust or other organization or entity.

E. "*CSDs*" means carbonated soft drinks that are produced by adding carbonated water to a syrup consisting of a concentrate flavoring and a sweetener and are classified under the four-digit Standard Industrial Classification industry code 2086. For purposes of this order, CSDs shall not include non-carbonated products, carbonated or still water, iced tea, lemonade, products containing in finished form more than ten (10) percent fruit juice, or isotonic or sport drinks.

F. "*Bottling Operation*" means any business, person, or other entity that distributes and sells CSDs directly using company-owned or equity distribution to supermarkets pursuant to a franchise, license, distribution contract, or other similar agreement; provided, however, a Bottling Operation shall not include any business, person or other entity that distributes and sells CSDs only by warehouse delivery or

through a beer distributor that does not hold a CSD franchise, license or similar distribution agreement.

G. "*Warehouse delivery*" means the distribution and sales of soft drinks by any business, person or entity other than a Bottling Operation.

H. "*Existing Honickman Bottling Operation*" means all or any part of the stock, share capital, equity interest or assets of any Bottling Operation owned or controlled by Honickman.

I. "*New York Metropolitan Area*" means, for purposes of this order, the counties of Westchester, New York, Bronx, Richmond (Staten Island), Kings (Brooklyn), Queens, Nassau, Suffolk, Rockland, Orange, Putnam and Dutchess in the State of New York; and Bergen, Hudson, Passaic, Essex, Union, Morris, Somerset and Sussex in the State of New Jersey.

J. "*Equity distributor*" means an independent contractor that distributes and sells CSDs on behalf of a Bottling Operation in a specified geographic territory that is within the exclusive licensed territory of that Bottling Operation for such CSD.

II.

It is further ordered, That for a period of ten (10) years after the date this order becomes final, respondents shall not, without the prior approval of the Commission, acquire directly or indirectly all or any part of the stock of, share capital of, equity interest in, assets of or rights related to any Bottling Operation in any county in the New York Metropolitan Area where at the time of such acquisition any Existing Honickman Bottling Operation distributes CSDs directly using company-owned or equity distributors to supermarkets; provided, however, that such prior approval shall not be required if respondents satisfy the conditions set forth in paragraph III of this order; and provided further that nothing contained in the foregoing provisions shall prohibit respondents from (i) acquiring stock or share capital for investment purposes only that does not exceed five (5) percent of the outstanding stock or share capital of any Bottling Operation, (ii) acquiring rights to equity territories ("equity distributor routes") for any territory in which Honickman holds the right to bottle or distribute CSDs distributed through such equity distributor rights, (iii) acquiring production or distribution equipment, or (iv) acquiring business supplies or raw materials in the ordinary course of business.

III.

It is further ordered, That:

A. Prior approval of the Commission under paragraph II of this order shall not be required if respondents satisfy the conditions of this paragraph III. In order to make such an acquisition without paragraph II prior approval, respondents shall:

1. Notify the Commission at least thirty (30) days prior to such acquisition. Such notification shall follow the format for filings under Section 7A of the Clayton Act, 15 U.S.C. 18a, and the Commission's Premerger Reporting Rules promulgated thereunder, 16 CFR 801 *et seq.* Such notification shall be in addition to any reporting requirements applicable to the transaction under said statute and rules; and

2. Divest, absolutely and in good faith within six (6) months after the date of any such acquisition, its business of bottling, distributing and selling CSDs and non-carbonated drinks, except for carbonated and non-carbonated waters, that it then conducts through any Existing Honickman Bottling Operation in those counties in the New York Metropolitan Area in which such newly-acquired Bottling Operation also operates (such Existing Honickman Bottling Operation is hereinafter referred to as "Paragraph III Operation"). Such divestiture may be accomplished by sale, full and complete and irrevocable sublicense agreement, full and complete assignment of rights or otherwise; provided it shall include a transfer of all rights held by such Paragraph III Operation to bottle, distribute and sell CSDs and non-carbonated drinks, except for carbonated and non-carbonated waters, in those New York Metropolitan Area counties in which the Newly-Acquired Bottling Operation also operates (hereinafter the "Geographic Area of Competition"), including without limitation and to the extent such rights pertain to the Geographic Area of Competition, all rights to bottle, distribute and sell CSDs and non-carbonated drinks, except for carbonated and non-carbonated waters, in the Geographic Area of Competition held pursuant to franchises, licenses, bottling appointments, distribution or other agreements; together with all assets that are dedicated to or necessary for such Paragraph III Operation's business of bottling, distributing and selling CSDs and non-carbonated drinks, except for carbonated and non-carbonated waters, in the Geographic Area of Competition, including without limitation, vehicles, vending machines,

visi-coolers, fountain equipment, funded employee benefit plans, if any, full-goods inventory, point of sale marketing equipment, supply agreements, customer lists, customer agreements or understandings (whether formal or informal), all customer records and files and all other assets, interests, rights and privileges owned by, dedicated to, or necessary for such Paragraph III Operation.

B. Respondents shall comply with all of the terms of the Agreement to Hold Separate, attached hereto and made a part hereof as Appendix I. If respondents shall be required to make any divestiture pursuant to paragraph III.A.2 of this order, said Agreement to Hold Separate shall become effective as of the date of the acquisition that gave rise to the paragraph III.A.2 divestiture obligations and shall continue in effect until such time as respondents' divestiture obligations under paragraph III of this order are satisfied or until such other time as the Agreement to Hold Separate provides.

C. Respondents shall divest all Paragraph III Operations only to an acquirer that receives the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission. The purpose of paragraphs III-A through III-B of this order is to ensure that respondents' acquisition of any Bottling Operation in the New York Metropolitan Area is not likely to result in any lessening of competition.

D. Pending divestiture respondents shall take such action as is necessary to maintain the viability and marketability of all Paragraph III Operations and shall not cause or permit the destruction, removal or impairment of any Paragraph III Operation or any part thereof, except in the ordinary course of business and except for ordinary wear and tear.

IV.

It is further ordered, That:

A. If respondents have not divested, as required by paragraph III, all Paragraph III Operations within six months from the date of the acquisition that gave rise to the paragraph III.A.2 divestiture obligations, respondents shall consent to the appointment of a trustee by the Commission to divest the Paragraph III Operations. In the event the Commission or the Attorney General brings an action pursuant to Section 5(1) of the Federal Trade Commission Act, 15 U.S.C. 45(1), or any other statute enforced by the Commission or the

Department of Justice for violation of this order, respondents shall similarly consent to the appointment of a trustee in such action to divest the Paragraph III Operation, if any. Neither the appointment of a trustee nor a decision not to appoint a trustee shall preclude the Commission or the Attorney General from seeking civil penalties and any other relief available, including a court-appointed trustee, pursuant to Section 5(1) of the Federal Trade Commission Act, 15 U.S.C. 45(1), or any other statute enforced by the Commission or the Department of Justice, for any failure by respondents to comply with this order.

B. If a trustee ("trustee") is appointed by the Commission or a court pursuant to this paragraph IV, the following terms and conditions shall apply:

(1) The Commission or a court shall select the trustee, subject to the consent of respondents, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures.

(2) The trustee shall have the exclusive power and authority, subject to the prior approval of the Commission, to divest the Paragraph III Operations. The trustee shall have eighteen (18) months from the date of appointment to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the eighteen-month period, the trustee has submitted a plan of divestiture or believes that divestiture can be accomplished within a reasonable time, the divestiture period may be extended for another eighteen-month period by the Commission, and, in the case of a court-appointed trustee, by the court; *provided, however*, that the Commission or court may only extend the divestiture period for one additional eighteen-month period.

(3) Respondents shall make available to the trustee, and the trustee shall have full and complete access to, the personnel, books, records and facilities relating to the Paragraph III Operations that the trustee has the duty to divest. Respondents shall develop such financial or other information as the trustee may reasonably request, and respondents shall cooperate with the trustee and shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by respondents shall extend the time for divestiture under this paragraph IV in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

(4) Subject to respondents' absolute and unconditional obligation to divest at no minimum price and the purpose of the divestiture as stated in paragraph III-C of this order, the trustee shall use his or her best efforts to negotiate the most favorable price and terms available with each acquiring entity for the divestiture of the Paragraph III Operations. If the trustee receives bona fide offers from more than one prospective acquirer, and if the Commission approves more than one such acquirer, the trustee shall divest to the acquirer selected by respondents from among those approved by the Commission.

(5) The trustee shall serve, without bond or other security, at the cost and expense of respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have authority to retain, at the cost and expense of respondents, such consultants, accountants, attorneys, investment bankers, business brokers, accountants, appraisers and other representatives and assistants as are reasonably necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestiture(s) and for all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of respondents, and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee divesting the Paragraph III Operation(s).

(6) Except for cases of misfeasance, negligence, wilful or wanton acts or bad faith by the trustee, the trustee shall not be liable to respondents for any action taken or not taken in the performance of the trusteeship. Respondents shall, consistent with the provisions of this order, indemnify the trustee and hold the trustee harmless against any losses, claims, damages, or liabilities arising in any manner out of, or in connection with, the trustee's duties under this order.

(7) Within sixty (60) days after appointment of the trustee, and subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, respondents shall execute a trust agreement consistent with the provisions of this order that transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture(s) required by this order.

(8) If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in this order.

(9) The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this order.

(10) The trustee shall have no obligation or authority to operate or maintain the Paragraph III Operations.

(11) The trustee shall report in writing to respondents and to the Commission every sixty (60) days after the date of appointment concerning the trustee's efforts to accomplish the divestiture(s).

V.

It is further ordered, That

A. Within ninety (90) days after the date this order becomes final, and every ninety (90) days thereafter until respondents have fully complied with the provisions of paragraph II of this order—and if respondents elect to follow the provisions of paragraph III of this order, within ninety (90) days after the notification required by paragraph III-A(1) of this order, and every ninety (90) days thereafter until respondents have fully complied with the provisions of paragraph III of this order—respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, or have complied with those provisions. Respondents shall include in any report concerning compliance with paragraph III of this order, among other things that are required from time to time, a full description of all contacts or negotiations with prospective acquirers for the divestiture(s) of the Paragraph III Operations, including the identity of all parties contacted. Respondents shall also include in such compliance reports copies of all written communications to and from such parties, and all internal memoranda, reports and recommendations concerning divestiture(s).

B. One year after the date this order becomes final and annually thereafter for nine (9) years, respondents shall file with the Commission a verified written report of their compliance with paragraph II of this order.

VI.

It is further ordered, That:

A. For a period of ten (10) years after the date this order becomes final, respondents shall notify the Commission at least thirty (30) days prior to any proposed corporate change, such as dissolution, assignment or sale resulting in the emergence of a successor entity, the creation or dissolution of subsidiaries or any other change in respondents or in any entity controlled by Honickman that may affect compliance with the obligations arising out of this order.

B. Respondents shall promptly notify the Commission of the name and address of any successor to Peter E. Greene, Skadden, Arps, Slate, Meagher & Flom, 919 Third Avenue, New York, New York 10022, with a statement that such successor is empowered on respondents' behalf to accept service for purposes of this order.

VII.

It is further ordered, That for a period of ten (10) years after the date this order becomes final and for the purpose of determining or securing compliance with this order, subject to any legally recognized privilege, and upon written request and with reasonable notice to respondents, respondents shall permit any duly authorized representative or representatives of the Commission: (1) access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in their respective possession relating to any matters contained in this order; and (2) upon five (5) days written notice to respondents and without restraint or interference from respondents, to interview management personnel of any Bottling Operation that they control, who may have counsel present, regarding any matters contained in this order.

Commissioner Azcuenaga recused, Commissioner Owen dissenting, and Commissioner Starek recused.*

AGREEMENT TO HOLD SEPARATE

This Agreement to Hold Separate (the "Agreement") is by and between Harold A. Honickman ("Honickman"), an individual, with a place of residence at 66 Bayview Drive, Loveladies ("BBCA"), New Jersey; Brooklyn Beverage Acquisition Corporation, a corporation, with a principal place of business located at 1500 The Fidelity Building, Philadelphia, Pennsylvania; and the Federal Trade Commis-

*Prior to leaving the Commission, Commissioner Strenio registered his vote in the affirmative for the Commission Decision and Order in this matter. Commissioner Yao did not register a vote in this matter.

sion (the "Commission"), an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.* (Honickman and BBAC individually, the "respondents"; Honickman BBAC and the Commission collectively, the "Parties").

Premises

Whereas, on or about July 30 and August 3, 1987, respondents acquired interests in certain assets acquired from Seven-Up Brooklyn Bottling Company, Inc. ("Acquisition"), which assets were operated under the name of Seven-Up Brooklyn Bottling Company; and

Whereas, on or about December 13, 1988, respondents divested all their interests in Seven-Up Brooklyn Company to LTF 1987-3, Inc.; and

Whereas, respondents and Seven-Up Brooklyn Bottling Company, Inc., were both engaged and respondents and Seven-Up Brooklyn Bottling Company are still engaged in the bottling of carbonated soft drinks ("CSDs") in certain counties within the New York Metropolitan Area; and

Whereas, the Commission issued a Complaint alleging that the Acquisition was unlawful under Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act; and

Whereas, if the Commission accepts the attached Agreement Containing Consent Order ("Consent Order"), respondents may acquire any bottling operation in any county in the New York Metropolitan Area (the "Newly-Acquired Honickman Bottling Operation") only if they divest the Existing Honickman Bottling Operations in such county; and

Whereas, the Commission is concerned that if an understanding is not reached, preserving the *status quo ante* of assets and businesses during the time period provided by the Consent Agreement for divestiture, divestiture might be a less than effective remedy; and

Whereas, the purpose of this Agreement and the Consent Order is to:

(i) Preserve the Newly-Acquired Honickman Bottling Operation as a viable independent business pending the divestiture of the Existing Honickman Bottling Operation to be divested, and

(ii) Remedy any anticompetitive effects of the Acquisition; and

Whereas, respondents' entering into this Agreement shall in no way

be construed as an admission by respondents that the Acquisition is unlawful; and

Whereas, respondents understand that no act or transaction contemplated by this Agreement shall be deemed immune or exempt from the provisions of the antitrust laws or the Federal Trade Commission Act by reason of anything contained in this Agreement.

Now, therefore, the parties agree, in consideration of the Commission's agreement that, unless the Commission determines to reject the Consent Order, the Commission will not seek further relief from respondents with respect to the Acquisition, except relief pursuant to Section 7A(g)1 of the Clayton Act, 15 U.S.C. 18a(g)1, and except that the Commission may exercise any and all rights to enforce this Agreement and the Consent Order to which it is annexed and made a part thereof, as follows:

1. Respondents agree to execute and be bound by the attached Consent Order.

2. If the Commission issues the Consent Order and in the event that respondents acquire a Newly-Acquired Honickman Bottling Operation, until the date the divestiture(s) required by the Consent Order is (are) accomplished, respondents shall hold and operate the assets and businesses associated with Newly-Acquired Honickman Bottling Operations in the New York Metropolitan Area as they are constituted and operated at the time that respondents acquire them, separate and apart on the following terms and conditions:

- a. The Newly-Acquired Bottling Operation, as it is constituted at the time of acquisition, shall be held separate and apart from and shall be operated independently of all Existing Honickman Bottling Operations owned or controlled by respondents in the New York Metropolitan Area.

- b. Except as provided herein and as is necessary to assure compliance with this Agreement and the Consent Order, respondents shall not exercise direction or control over, or influence directly or indirectly, the Newly-Acquired Honickman Bottling Operation or any of its operations or businesses.

- c. Respondents shall maintain the viability and marketability of the Newly-Acquired Honickman Bottling Operation, shall maintain separate financial and operating records for it, and shall not sell, transfer, encumber (other than in the normal course of business), or otherwise impair its marketability or viability.

d. Respondents shall not permit any director, officer, employee or agent of respondents to be a director, officer, or employee of the Newly-Acquired Honickman Bottling Operation held separate under this Agreement, except as provided in subparagraph h of this paragraph 2.

e. Except as required by law, and except to the extent that necessary information is exchanged in defending investigations or litigation or in negotiating agreements to dispose of assets, respondents shall not receive or have access to any confidential or proprietary information of the Newly-Acquired Honickman Bottling Operation.

f. Respondents shall not change the composition of the management of the Newly-Acquired Honickman Bottling Operation except to the extent necessary to comply with the Agreement.

g. All material transactions, out of the ordinary course of business and not precluded by subparagraphs a - f of this paragraph 2 shall be subject to a majority vote of the New Management Committee (as defined in subparagraph h of this paragraph 2).

h. Respondents shall establish an entity to conduct the Newly-Acquired Honickman Bottling Operation in accordance with this Agreement. Respondents shall also select a new three-person Management Committee ("Management Committee") to govern such entity; *provided, however*, that such Management Committee shall consist of no more than one Honickman or BBAC director, officer, employee, or agent of any Existing Honickman Bottling Operation. Except as permitted by this Agreement, the member of the Management Committee who is also a director, officer, employee or agent of an Existing Honickman Bottling Operation, shall not receive material confidential information as to profitability and sales and shall not disclose any such information received under this Agreement to respondents or use it to obtain any advantage for respondents. Said member of the Management Committee who is also a director, officer, employee or agent of an Existing Honickman Bottling Operation, shall enter into a confidentiality agreement prohibiting disclosure of confidential information. Such Management Committee member shall participate in matters which come before the Management Committee only for the limited purpose of considering a capital investment or other transactions exceeding \$200,000 and carrying out respondents responsibility to assure that the Newly-Acquired Honickman Bottling Operations are maintained in such manner as will permit their

divestiture as ongoing, viable assets. Except as permitted by this Agreement, such Management Committee member shall not participate in any matter, or attempt to influence the votes of the other Management Committee members with respect to matters that would involve a conflict of interest if respondents and the Newly-Acquired Honickman Bottling Operation were separate and independent entities. Meetings of the Management Committee during the term of this Agreement shall be stenographically transcribed and the transcripts retained for two (2) years after the termination of this Agreement.

(i) All earnings and profits of the Newly-Acquired Honickman Bottling Operation shall be retained separately in that Operation. If necessary, respondents shall provide the Newly-Acquired Honickman Bottling Operation with sufficient working capital to operate at the current rate of operation.

3. For the purpose of determining or securing compliance with this Agreement, subject to any legally recognized privilege, and upon written request with reasonable notice to respondents made to their counsel, respondents shall permit any duly authorized representative or representatives of the Commission:

a. Access during the office hours of any entity owned or controlled by respondents and in the presence of counsel to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of respondents relating to compliance with this Agreement;

b. Upon five (5) days notice to respondents, and without restraint or interference from them, to interview officers or employees of respondents, who may have counsel present, regarding any such matters.

4. This agreement shall not be binding until approved by the Commission.

ADDENDUM TO AGREEMENT CONTAINING CONSENT ORDER
TO PRESERVE SEVEN-UP BROOKLYN FRANCHISES

This Addendum to Agreement Containing Consent Order to Preserve Seven-Up Brooklyn Franchises ("Addendum") is by and between Harold A. Honickman ("Honickman"), an individual, with a place of residence at 66 Bayview Drive, Loveladies, New Jersey; Brooklyn Beverage Acquisition Corporation ("BBAC"), a corporation, with a principal place of business located at 1500 The Fidelity

Building, Philadelphia, Pennsylvania; and the Federal Trade Commission (the "Commission"), an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.* (Honickman and BBAC individually, the "respondents"; Honickman, BBAC and the Commission collectively, the "Parties").

Premises

Whereas, on or about July 30 and August 3, 1987, respondents acquired interests in certain assets acquired from Seven-Up Brooklyn Bottling Company, Inc. ("Acquisition"), which assets were operated under the name of Seven-Up Brooklyn Bottling Company; and

Whereas, on or about December 13, 1988, respondents divested all of their interests in the operating assets of Seven-Up Brooklyn Bottling Company ("Seven-Up Brooklyn") to LTF 1987-3, Inc.; and

Whereas, respondents and Seven-Up Brooklyn were both engaged, and respondents are still engaged, in the bottling or distribution of carbonated soft drinks ("CSDs"), noncarbonated soft drinks, still waters and carbonated waters in certain counties within the New York Metropolitan Area; and

Whereas, Seven-Up Brooklyn is now in a bankruptcy proceeding that has made it incapable of manufacturing or distributing CSDs, noncarbonated soft drinks, still waters and carbonated waters; and

Whereas, the Commission issued a Complaint alleging that the Acquisition was unlawful under Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45; and

Whereas, the Commission is concerned that if temporary provision is not made to continue the manufacture and distribution of the CSDs, previously manufactured and distributed by Seven-Up Brooklyn in the franchise territories it served, such product temporarily would be unavailable to consumers in such territories; and

Whereas, the purpose of this Addendum is to:

- (i) Maintain the uninterrupted competitive presence of the brands of CSDs previously manufactured or distributed by Seven-Up Brooklyn in the franchise territories previously serviced by it;
- (ii) Preserve the CSD businesses of Seven-Up Brooklyn as independent and viable businesses; and
- (iii) Prevent anticompetitive effects that might result from any interim arrangement; and

Whereas, respondents' entering into this Addendum shall in no way be construed as an admission by respondents that the Acquisition is unlawful; and

Whereas, respondents understand and agree that no act or transaction contemplated by this Addendum shall be deemed immune or exempt from the provisions of the antitrust laws or the Federal Trade Commission Act by reason of anything contained in this Addendum.

Now, therefore, the parties agree, in consideration of the Commission's agreement that, unless the Commission determines to reject the Consent Order, the Commission will not seek further relief from Respondents with respect to the Acquisition, except relief pursuant to Section 7A(g)1 of the Clayton Act, 15 U.S.C. 18a(g)1, and except that the Commission may exercise any and all rights to enforce this Addendum and the Consent Order to which it is annexed and made a part thereof, as follows:

1. Respondents agree to execute and be bound by the Agreement Containing Consent Order, signed by respondents on January 9, 1991.

2. Respondents waive all rights to contest the validity of this agreement.

3. Respondents may enter into an interim manufacturing and distribution arrangement covering the CSDs previously manufactured and distributed by Seven-Up Brooklyn on the following terms and conditions:

- a. The franchisors shall approve respondents' interim manufacturing and distribution arrangements and may rescind the arrangements, at any time for competitive or other reasons;

- b. The manufacturing and distribution arrangement shall continue for a period not to exceed 90 days, unless extended by the Commission;

- c. For all brands distributed on an interim basis, respondents shall use all reasonable efforts to maintain the viability, marketability, market share, and separate identity of all Seven-Up Brooklyn businesses and franchises and the distinct brand identification of Seven-Up Brooklyn brands and shall not sell, transfer, encumber (other than in the normal course of business), or otherwise impair the marketability, viability, or separate identity of the Seven-Up Brooklyn businesses and franchises.

- d. For all brands distributed on an interim basis, respondents shall

use all reasonable efforts to maintain and preserve the shelf space of all Seven-Up Brooklyn businesses and franchises and shall not sell, transfer, encumber (other than in the normal course of business), or otherwise impair the shelf space of the Seven-Up Brooklyn businesses and franchises. Respondents shall raise no objections to, impose no conditions on returning or refuse to return the shelf space to any new owners of the Seven-Up Brooklyn businesses and franchises, provided that respondents did not pay a fee for the shelf space or used the shelf space for respondents' existing brands and businesses before the date that this Addendum was signed.

4. Upon ten days notice, the Federal Trade Commission may rescind this Addendum, and respondents shall not raise any objections based on the fact that the Commission has approved the manufacturing and distribution arrangement.

5. For the purpose of determining or securing compliance with this Addendum, subject to any legally recognized privilege, and upon written request with reasonable notice to respondents made to their counsel, respondents shall permit any duly authorized representative or representatives of the Commission:

a. Access during the office hours of any entity owned or controlled by respondents and in the presence of counsel to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of respondents relating to compliance with this Addendum;

b. Upon five (5) days notice to respondents, and without restraint or interference from them, to interview officers or employees of respondents, who may have counsel present, regarding any such matters.

6. This agreement shall not be binding until approved by the Commission.

DISSENTING STATEMENT OF COMMISSIONER DEBORAH K. OWEN

Unlike the overwhelming majority of our consent orders in cases of this nature, this consent order does not require Harold Honickman to obtain prior Commission approval before acquiring soft drink bottling companies that compete with him in the product and geographic markets at issue in this case. When the Commission considered whether to accept this order for public comment, I felt compelled to dissent because I believed that the need for a prior approval provision

in this order was substantial. Nothing has been brought to my attention during the public comment period to alter this conviction, and I still believe that the order settling this case should require Mr. Honickman to obtain prior Commission approval before making any acquisition of a competing bottler in the markets in question. I therefore dissent from the final acceptance of the consent order.

IN THE MATTER OF
FIRESTONE TIRE & RUBBER CO., ET AL.

SET ASIDE ORDER IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 6487. Final Order, Mar. 9, 1961—Set Aside Order, Aug. 2, 1991

The Federal Trade Commission has set aside a 1961 order with the Firestone Tire & Rubber Co. and Shell Oil Co., (58 FTC 371), thus terminating provisions, as to Shell Oil, that prohibited the use of certain sales commission agreements and related practices with Firestone and other suppliers of tires, batteries, and accessories. The Commission concluded that significant changes of law since the entry of the final order warranted reopening and setting aside the entire order as it applies to Shell.

ORDER REOPENING AND SETTING ASIDE
FINAL ORDER ISSUED ON MARCH 9, 1961

On April 4, 1991, the Shell Oil Company ("Shell") filed a request to reopen and set aside ("request") the Final Order that was entered in Docket No. 6487 on March 9, 1961 ("order"). 58 FTC 371 (1961). The request was filed pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b) and Section 2.51 of the Federal Trade Commission Procedures and Rules of Practice, 16 CFR 2.51 (1991). The request was on the public record for thirty days. No comments were received.

The order Shell seeks to have set aside was based on a finding by the Commission that agreements between Shell and the Firestone Tire and Rubber Company ("Firestone") and between Shell and the Goodyear Tire and Rubber Company ("Goodyear") constituted unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act. Under the agreements, Shell received commissions on the sale of Firestone and Goodyear "TBA products"¹ to designated Shell franchisees.

The order prohibits Shell from continuing the sales commission agreements and related business practices with Firestone or other Shell suppliers. The order also prohibits Firestone from maintaining such agreements with Shell or any other marketing oil company. Goodyear was prohibited from engaging in such practices in a similar

¹ TBA products are tires, batteries, and other automotive accessories.