

IN THE MATTER OF

PEPSICO, INC.

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 C-3347. Complaint, Oct. 15, 1991—Decision, Oct. 15, 1991

This consent order requires, among other things, a soft drink concentrate manufacturer and bottler to divest, within a nine-month period, the soft drink business of the Twin Ports Bottling Company, which respondent acquired from MEI Corporation in 1986. Respondent is also required, for a period of ten years, to seek prior Commission approval before acquiring any soft drink distribution rights to non-Pepsi brands, in the Duluth, Minnesota area.

Appearances

For the Commission: *Constance M. Salemi* and *Marc G. Schildkraut*.

For the respondent: *Richard T. Colman*, *Raymond A. Jacobson*, *Howrey & Simon*, Washington, D.C. *Gerald W. Casey*, Vice President & General Counsel, *PepsiCo, Inc.*, Purchase, N.Y.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act ("FTC 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, PepsiCo, Inc., a corporation subject to the jurisdiction of the Commission, has acquired the Twin Ports Seven-Up Bottling Company from the MEI Corporation in violation of the provisions of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, 15 U.S.C. 45; that it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, the Commission hereby issues its complaint pursuant to Section 11 of the Clayton Act, 15 U.S.C. 21, and Section 5(b) of the FTC Act, 15 U.S.C. 45(b), stating its charges as follows:

I. DEFINITIONS

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

a. "*PepsiCo*" means PepsiCo, Inc., its predecessors, subsidiaries, divisions, groups and affiliates controlled by PepsiCo, and their respective directors, officers, employees, agents, representatives, successors and assigns.

b. "*Twin Ports*" means Twin Ports Seven-Up Bottling Company, an unincorporated division of the Pepsi-Cola Bottling Company of Minneapolis and St. Paul, a wholly-owned subsidiary of PepsiCo.

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

d. "*CSD*" means a carbonated soft drink, as presently classified under the four-digit Standard Industrial Classification industry code 2086.

e. "*Brand*" means the trademarked name of any type of CSD, excluding warehouse, private label and house brands.

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

g. "*Bottler*" refers to a person that is engaged in distributing and selling branded CSDs pursuant to an exclusive bottling appointment by any manufacturer of CSD syrup or concentrate.

h. "*Non-PepsiCo brand*" product means a CSD sold under a trademark owned by a person other than PepsiCo.

II. THE RESPONDENT

2. PepsiCo is a corporation organized and existing under the laws of the State of North Carolina, with its executive offices located at 700 Anderson Hill Road, Purchase, New York.

3. In 1988, PepsiCo's net CSD sales were \$4.69 billion.

4. PepsiCo is, and at all times relevant herein, has been engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

III. THE ACQUISITION

5. About 1986, PepsiCo acquired the assets of Twin Ports from MEI. PepsiCo is a manufacturer of concentrate and a bottler of CSDs in several markets. MEI, through Twin Ports and other divisions or subsidiaries, had also been a bottler of CSDs in several local markets. After the acquisition, MEI ceased bottling CSDs in the relevant section of the country and PepsiCo began bottling CSDs in the relevant section of the country.

IV. RELEVANT MARKETS

6. A relevant line of commerce is branded CSDs. Another relevant line of commerce is no broader than all CSDs.

7. A relevant section of the country is a 12-county area in Wisconsin and Minnesota in which Twin Ports bottles CSDs. The counties or portions of counties may include, but are not limited to, the following: Douglas, Bayfield, and Ashland Counties in Wisconsin, and Cook, Lake, Carlton, Aitkin, St. Louis, Itasca, Cass, Crow Wing, and Koochiching Counties in Minnesota.

V. MARKET STRUCTURE

8. The bottling of CSDs in the relevant market is highly concentrated.

VI. ENTRY CONDITIONS

9. Competitively significant entry into the relevant market is difficult.

VII. COMPETITION

10. PepsiCo is a supplier of concentrate to a bottler of PepsiCo and non-PepsiCo brands in the relevant market. The acquisition made PepsiCo a bottler of non-PepsiCo brands in the relevant market. As a result of the acquisition, therefore, PepsiCo is a bottler in actual competition with a bottler of PepsiCo brands in the relevant market.

VIII. EFFECTS

11. The acquisition may lessen or may have substantially lessened competition in the relevant lines of commerce in the relevant section of the country in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the FTC Act, 15 U.S.C. 45, in the following ways, among others:

- a. By diminishing direct competition between Twin Ports and a bottler of PepsiCo and other brands; and
- b. By increasing the likelihood of, or facilitating, collusion in the relevant market, thus increasing the likelihood that the bottlers will increase prices and restrict output of branded CSDs in the relevant market.

IX. VIOLATIONS CHARGED

12. The acquisition of Twin Ports by PepsiCo violates Section 5 of the FTC Act, 15 U.S.C. 45, and Section 7 of the Clayton Act, 15 U.S.C. 18.

Commissioner Azcuenaga and Commissioner Starek recused.

DECISION AND ORDER

The Federal Trade Commission (the "Commission") having initiated an investigation of the acquisition of Twin Ports Seven-Up Bottling Company ("Twin Ports") by PepsiCo, Inc., ("PepsiCo"), from MEI Corporation ("MEI") and PepsiCo having been furnished with a copy of a draft complaint that the Bureau of Competition has presented to the Commission for its consideration; and which, if issued by the Commission, would charge PepsiCo with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. 18; and

PepsiCo, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by the respondent that the law has been violated as alleged in the complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission, having thereafter considered the matter and having determined that it had reason to believe that PepsiCo has violated the said Acts, and that the complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedures

prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

PepsiCo is a corporation organized, existing, and doing business under the laws of the State of North Carolina, with its executive offices located at 700 Anderson Hill Road, Purchase, New York.

The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I.

For purposes of this order, the following definitions shall apply:

A. "*PepsiCo*" means PepsiCo, Inc., a North Carolina corporation, its predecessors, any other corporations, partnerships, joint ventures, companies, subsidiaries, divisions, groups and affiliates controlled by PepsiCo, and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

B. "*Twin Ports*" means the Twin Ports Seven-Up Bottling Company, an unincorporated division of the Pepsi-Cola Bottling Company of Minneapolis and St. Paul, a wholly-owned subsidiary of PepsiCo, which unincorporated entity is engaged in the soft drink business.

C. "*Acquisition*" means PepsiCo's acquisition of Twin Ports.

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

E. "*Duluth area*" means the Duluth, Minnesota area as described in Exhibit 2 to this order.

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

G. "*Twin Ports Soft Drink Business*" means the carbonated and noncarbonated soft drink assets, as described in Exhibit 1 to this order, acquired by PepsiCo through the Acquisition.

H. "*Soft drink*" means a carbonated soft drink, as classified under the four-digit Standard Industrial Classification industry code 2086.

I. "*Primary bottler of PepsiCo-brand soft drinks*" means the bottler that distributes or sells more PepsiCo-brand soft drinks by volume than any other bottler in the area.

J. "*Obligations*" means all actual and contingent liabilities of Twin Ports.

II.

It is ordered, That:

A. Within nine (9) months from the date this order becomes final, PepsiCo shall divest, absolutely and in good faith, the Twin Ports Soft Drink Business. The purpose of the divestiture is to reestablish Twin Ports as an independent competitor and to remedy the alleged lessening of competition resulting from the Acquisition, as stated in the draft complaint.

B. The divestiture shall be made 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.

C. Pending divestiture, PepsiCo shall take all measures necessary to maintain the Twin Ports Soft Drink Business and to prevent any deterioration, except for normal wear and tear, of any part of the Twin Ports Soft Drink Business, so as not to impair the operating or competitive viability or market value of the Twin Ports Soft Drink Business.

III.

It is further ordered, That:

A. At the time of the divestiture required by this order or at any time thereafter, PepsiCo shall not interfere with any attempt by the acquirer of the Twin Ports Soft Drink Business to employ, in connection with the operation of the business to be divested, any personnel previously or currently employed by Twin Ports, or currently employed by PepsiCo and having significant responsibilities for the Twin Ports Soft Drink Business in the Duluth area, nor seek to enforce any employment contract against such personnel.

B. The Twin Ports obligations transferred by PepsiCo, if any, shall be either those carried by Twin Ports at the time of its acquisition by PepsiCo, or those carried by Twin Ports at the time of its divestiture by PepsiCo, whichever is smaller in amount.

IV.

It is further ordered, That:

A. If PepsiCo has not divested the Twin Ports Soft Drink Business within the nine-month period provided in paragraph II of this order, PepsiCo shall consent to the appointment of a trustee by the Commission to divest the Twin Ports Soft Drink Business. 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, PepsiCo shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties and any other relief available to it, including a court-appointed trustee, pursuant to Section 5(1) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by PepsiCo to comply with this order.

B. PepsiCo shall execute the trust agreement within sixty (60) days of the appointment of a trustee.

C. If a trustee is appointed by the Commission or a court pursuant to this paragraph, PepsiCo shall consent to the following terms and conditions regarding the trustee's powers, authority, duties, and responsibilities:

(1) The Commission shall select the trustee, subject to the consent of PepsiCo, 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 Twin Ports Soft Drink Business. The trustee shall have fifteen (15) months from the date of appointment to accomplish the divestiture. If, however, at the end of the fifteen-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 by the Commission and, in the case of a court-appointed trustee, by the court.

(3) The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to PepsiCo's absolute and unconditional

obligation to divest and the purpose of the divestiture as stated in paragraph II of this order and subject to the prior approval of the Commission. 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 PepsiCo from among those approved by the Commission.

(4) The trustee shall have full and complete access to the personnel, books, records and facilities of the Twin Ports Soft Drink Business, or any other information relevant to the Twin Ports Soft Drink Business, as the trustee may reasonably request. PepsiCo 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 PepsiCo shall extend the time for divestiture under this paragraph in an amount equal to the delay, as determined by the Commission or the court for a court-appointed trustee.

(5) The trustee shall serve, without bond or other security, at the cost and expense of PepsiCo on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have authority to employ, at the cost and expense of PepsiCo, such consultants, 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 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 to PepsiCo, 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 Twin Ports Soft Drink Business.

(6) PepsiCo shall 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, except for any losses, claims, damages, or liabilities resulting from the trustee's negligence or willful misconduct.

(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, PepsiCo shall, consistent with provisions of this order, transfer to the trustee all rights and powers

necessary to permit the trustee to effect the divestiture 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 and, 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 Twin Ports Soft Drink business.

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

V.

It is further ordered, That, for a period commencing on the date this order becomes final and continuing for ten (10) years, PepsiCo shall not acquire, without the prior approval of the Commission, directly or indirectly, through subsidiaries or otherwise, (1) any right to distribute any soft drink in the Duluth area; (2) any interest in, or any stock or share capital of any entity that owns or otherwise has any right to distribute any soft drink in the Duluth area. *Provided, however,* the prohibitions of this paragraph V. shall not apply to any right to distribute any soft drink held by, or any interest in, or any stock or share capital of the primary bottler of PepsiCo-brand soft drinks in the Duluth area.

VI.

It is further ordered, That on the first anniversary of the date this order becomes final, on every anniversary thereafter for the following ten (10) years, and at such other times as the Commission or its staff may request, PepsiCo shall submit a verified written report setting forth in detail the manner and form of its compliance with paragraph V. of this order. Such reports filed by PepsiCo shall include a listing of all acquisitions in the Duluth area made by PepsiCo without the prior approval of the Commission under paragraph V. of this order.

VII.

It is further ordered, That PepsiCo shall notify the Commission at least thirty (30) days prior to any proposed corporate change in respondent, 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 the corporation, that may affect compliance with the obligations arising out of this order.

Commissioner Azcuenaga and Commissioner Starek recused.

EXHIBIT 1

Twin Ports Soft Drink Business

The Twin Ports Soft Drink Business includes all franchises, licenses, bottling appointments, distribution and other agreements with respect to the Seven-Up, Dr Pepper, A&W, Squirt, and Lipton brands distributed or sold in the Duluth area; together with four (4) trucks, three (3) forklifts, three (3) vans, vending machines, visi-coolers, fountain equipment, full goods inventory, and point-of-sale marketing materials dedicated to those products in the Duluth area; funded employee benefit pension plans for employees of the Twin Ports Soft Drink Business in the Duluth area; supply arrangements; customer lists; trade names and goodwill relating to the Twin Ports Soft Drink Business in the Duluth area. The Twin Ports Soft Drink Business in the Duluth area also includes all customer agreements or understandings, whether formal or informal in effect at the time of divestiture, and all customer records and files existing at the time of divestiture.

EXHIBIT 2

DULUTH, MINNESOTA AREA

The Duluth, Minnesota area shall consist of: (1) Cook County and Lake County, Minnesota; (2) Douglas County, Wisconsin; (3) Carlton County, Minnesota, except for the town of Moose Lake for A&W, Dr Pepper, Lipton, and Seven-Up; and the following additional counties or portions thereof for the products specified:

A. *Lipton*

1. Aitkin County, Minnesota—That portion east of a line commenc-

ing at the junction of the south boundary of Lakeside township and Mille Lacs, drawn north to the northwest corner of Lakeside township; thence east to the northeast corner of Lakeside township, thence north to the northwest corner of Jevne township; thence east to the northeast corner of McGregor township; thence north to the Aitkin-Itasca County line.

2. St. Louis County, Minnesota—That portion south and east of an east west line from the junction of the St. Louis-Lake County line and the south boundary of Easset township, due west to the northwest corner of Colvin township, thence south to the southeast corner of Ellsburg township, thence west to the St. Louis-Itasca County line.

B. *Squirt*

1. Aitkin County, Minnesota—That portion of Aitkin county north of an east-west line drawn through a point two miles south of the town of Aitkin.

2. St. Louis County, Minnesota—That portion of St. Louis County south of an east-west line drawn through a point two miles north of the town of Cotton.

3. Bayfield County, Wisconsin—All of Bayfield County, except that portion east of a line beginning at a point where Highway #13 crosses the Ashland-Bayfield county line and extending from this point north along with highway to the town of Red Cliff and excepting the town of Red Cliff and all stops, towns and outlets on said highway.

C. *A&W*

1. Itasca County, Minnesota

2. Cass County, Minnesota—All of Cass county except that portion bounded on the south by the southern boundary of Deerfield, Powers, and Ponto Lake townships and on the east by the eastern boundary of Ponto Lake, Woodrow and Pike Lake townships and a continuation of this north-south line to the northern boundary of the county.

3. Crow Wing County, Minnesota—All of Crow Wing County except the Village of Fort Ripley.

4. Koochiching County, Minnesota—The town of Cragville only.

5. St. Louis County, Minnesota—That portion of St. Louis County south and east of a line starting at a point on the northern boundary of St. Louis due north of east edge of Finsted Lake, thence south to the east edge of Finsted Lake, thence southwest to a point two miles due south of Gheen Corner, then due west to Koochiching-St. Louis Line.

6. Bayfield County, Wisconsin

7. Ashland County, Wisconsin—The townships of Ashland, Gingles, La Pointe, Marengo, Morse, Sanborn, and White River only.

D. *Dr Pepper*

1. Itasca County, Minnesota

2. Aitkin County, Minnesota—That portion north of an east-west line running through the most northern point on the boundary of the town of McGregor. It is intended by this description to exclude from the Duluth territory the town of McGregor and all other dealer outlets located on the east-west line described herein. This description is as so located on February 3, 1965.

3. St. Louis County, Minnesota—That portion south of an east-west line drawn through the most southern point on the boundary of the town of Cotton, Minnesota. It is intended by this description to exclude from the Duluth franchised territory the towns of Ore, Cotton, and Toivola and all other towns and dealer outlets located on the above described east-west line. This description is as so located on September 24, 1963.

4. Cass County, Minnesota—That portion north of an east-west line running through the most northern point on the boundary of the town of Walker and east of a line beginning at the most northern point on the boundary of the town of Walker; thence, northeast on a straight line to the point U.S. Highway No. 2 intersects the west boundary of Bena; thence, northwest on a straight line to the Beltrami County line due east of the town of Pennington. It is intended by this description to exclude from the Duluth territory the towns of Walker and Bena and all other dealer outlets located on the line described herein. This entire description is as so located on February 3, 1965.

E. *Seven-Up*

1. Aitkin County, Minnesota—That portion east of a line commencing at the junction of the south boundary of Lakeside township and Mille Lacs, drawn north to the northwest corner of Lakeside township; thence east to the northeast corner of Lakeside township; thence north to the northwest corner of Jevne township; thence east to the northeast corner of McGregor township; thence north to the Aitkin-Itasca County line.

2. Itasca County, Minnesota—Goodland and Wawina townships only.

3. St. Louis County, Minnesota—That portion south and east of an east-west line from the junction of the St. Louis-Lake County line and the south boundary of Basset township, due west to the northwest corner of Colvin township, thence south to the southwest corner of Ellsburg township, thence west to the St. Louis-Itasca County line.

4. Bayfield County, Wisconsin

5. Ashland County, Wisconsin—That portion north of the northern boundary of Gordon Township.

IN THE MATTER OF
SENTINEL GROUP, INC.

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 C-3348. Complaint, Oct. 23, 1991—Decision, Oct. 23, 1991

This consent order requires, among other things, a Stamford, Connecticut, based corporation to divest, to Commission-approved acquirers, one of its funeral homes in each of three separate markets and to obtain Commission approval, for a period of ten years, before acquiring any additional funeral homes in these and three other markets.

Appearances

For the Commission: *Mark Taylor.*

For the respondent: *Sutton Keany, Winthrop, Stimson, Putnam, & Roberts, 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 Sentinel Group, Inc., a corporation subject to the jurisdiction of the Commission, has acquired the assets of certain corporations subject to the jurisdiction of the Commission, 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, as amended, 15 U.S.C. 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges as follows:

I. DEFINITIONS

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

a. "*Sentinel*" refers to the respondent Sentinel Group, Inc., its parents, subsidiaries, divisions, groups controlled by Sentinel, succes-