

IN THE MATTER OF

HAROLD HONICKMAN, ET AL.

Docket 9233. Show Cause Order, Nov. 16, 1992

ORDER TO SHOW CAUSE

The Commission's final order in this matter requires respondents Harold Honickman and the entities he controls (hereafter collectively "Mr. Honickman"), for a ten year period, to obtain the Commission's prior approval before acquiring certain assets of or rights related to bottling operations in the New York metropolitan area. The order defines "bottling operation" to mean, *inter alia*, an entity that distributes and sells carbonated soft drinks ("CSDs"). Mr. Honickman filed, on October 24, 1991, a Request for a Declaration or in the Alternative for Approval to Obtain Certain Assets of New York Seven-Up ("Application") to acquire, among other things, the Hawaiian Punch and Perrier franchises owned by New York Seven-Up. That Application raises issues concerning whether the Commission's order applies to the acquisition of franchise rights for Hawaiian Punch, Perrier, and other non-CSD products. For the reasons set out below, the Commission is issuing this Order to Show Cause why the final order should not be modified to exclude from the coverage of Paragraph II. the acquisition of the right to distribute or sell non-CSD products.

The Commission's November 2, 1989, complaint charged that Mr. Honickman's acquisition of Seven-Up Brooklyn Bottling Company, Inc., violated 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, by eliminating competition in the CSD market in certain New York City area counties.¹ After the complaint was issued, but before trial, Mr. Honickman agreed to settle the matter. The consent order was issued

¹ The product markets alleged in the complaint are "branded soft drinks" and "all soft drinks." Complaint ¶ 17. "Soft drink" is defined as "a carbonated soft drink or 'CSD.'" Complaint ¶ 1.n.

on July 25, 1991, and became final on August 5, 1991, the date the order was served.

Paragraph II. of the order prohibits Mr. Honickman, for ten years, from acquiring interests in, assets of, or rights related to bottling operations without the Commission's prior approval, unless he satisfies certain hold separate and divestiture requirements of Paragraph III. Specifically, Paragraph II. provides 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; ...

Paragraph I. F. of the order defines "Bottling Operation" as, 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.

Finally, Paragraph I.E. of the order defines "CSDs" as, 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.

In his Application, and other materials, Mr. Honickman asserts that Paragraph II. of the order does not cover certain of the proposed acquisitions, and in the alternative requests that any required approval be granted. Mr. Honickman asserts that it was not his

understanding that the order would apply to non-CSD acquisitions,² and he urges that understanding as a reason either to interpret the order not to apply, or, if the order does apply, to grant approval to the acquisitions of several non-CSD franchises. The Commission's letter responding to the Application explains why the respondent's understandings or purposes are not controlling for purposes of order interpretation. The Commission has concluded that the order covers these acquisitions of Hawaiian Punch and Perrier. However, given other circumstances, the Commission has considered whether the order should be modified to exclude such coverage.

Mr. Honickman also asserts that the Commission's staff likewise believed, when it negotiated the consent agreement, that the resulting order would not cover such acquisitions. He has included some of the materials supporting that assertion in his June 24, 1992, submission, and has argued the point in the litigation relating to the Commission's previous denial of his request for approval to acquire the assets of the Seven-Up Brooklyn system.

The staff's memoranda to the Commission recommending acceptance of the consent agreement did not set out a detailed explanation of the order's coverage, but there are statements in some of those memoranda indicating that some of the staff shared Mr. Honickman's view of the order's coverage. Although the record does not show how the Commission itself interpreted the language when it accepted the consent agreement, the record does show that both the staff that considered the question and respondent believed at the time that these acquisitions would not be covered.³

² In a June 24, 1992, submission, Mr. Honickman cites to contemporaneous statements by his counsel showing that at the time the consent agreement was being considered by the Commission Mr. Honickman believed that non-CSD franchise acquisitions would not be covered by the order.

³ This is not a case in which the staff or Commission simply did not consider an issue regarding order coverage. Rather, staff considered the issue but reached an incorrect conclusion, and communicated that conclusion to the Commission.

Also, most important, this is not a case in which respondent alone misinterpreted the order when accepting a settlement. Respondents remain responsible for understanding their obligations under orders, and cannot avoid those obligations by later asserting that they did not intend to undertake them.

In this case, considerations of fairness and the public interest warrant modifying the order to eliminate possibly unintended coverage. The Commission notes that it will retain its general statutory authority to review horizontal acquisitions by Mr. Honickman, without specific coverage in the order.⁴

Accordingly, the Commission hereby issues this Order to Show Cause why the proceeding in Docket No. 9233 should not be reopened to modify the order to add the following language to the end of Paragraph II:

Provided, further, however, that Paragraph II. of this order shall not apply to the acquisition of the right to distribute or sell solely any product that is not a CSD.

In accordance with Section 3.72 of the Commission's Rules of Practice and Procedure, 16 CFR 3.72, respondent has thirty (30) days from the date of service of this order to file an answer to this Order to Show Cause or be deemed to have accepted the action proposed herein.

Commissioner Azcuenaga and Commissioner Starek recused.

⁴ The Commission reserves the right to decline to modify an order, notwithstanding the interpretations by counsel for respondent and the Commission's staff, if the competitive protections afforded by the order serve the public interest.

IN THE MATTER OF

REALTY COMPUTER ASSOCIATES, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3405. Complaint, Nov. 23, 1992--Decision, Nov. 23, 1992*

This consent order prohibits, among other things, Realty Computer Associates, Inc., d/b/a Computer Listing Service, a Missouri-based real-estate multiple listing service (MLS), from refusing to publish exclusive-agency listings, or restricting its members from offering such listings. In addition, the respondent is prohibited from requiring, as a condition of membership or use of its MLS, that any applicant or member engage in real-estate brokerage full time, or that any applicant or member maintain an office located on commercially zoned property or within the respondent's service area.

Appearances

For the Commission: *Michael T. Miller and C. Steven Baker.*

For the respondent: *Michael P. Keleher, Keleher & Eastman,*
Gladstone, MO.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that respondent Realty Computer Associates d/b/a Computer Listing Service ("CLS"), a corporation, has violated and is violating 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 this complaint stating its charges as follows:

PARAGRAPH 1. As used in this complaint: