

Interlocutory Order

122 F.T.C.

IN THE MATTER OF

COCA-COLA BOTTLING CO. OF THE SOUTHWEST

*Docket 9215. Interlocutory Order, September 9, 1996*ORDER RETURNING MATTER TO ADJUDICATION
AND DISMISSING COMPLAINT

In 1984, Coca-Cola Bottling Company of the Southwest ("CCSW") acquired the Dr Pepper and Canada Dry carbonated soft drink franchises for the San Antonio, Texas area from the San Antonio Dr Pepper Bottling Company, a wholly-owned subsidiary of the parent Dr Pepper concentrate company. On July 29, 1988, the Commission issued an administrative complaint alleging, *inter alia*, that this acquisition was likely substantially to lessen competition, in violation of Section 5 of the FTC Act, 15 U.S.C. 45, and Section 7 of the Clayton Act, 15 U.S.C. 18. The Notice of Contemplated Relief in the administrative complaint included a provision that would have required divestiture of the Dr Pepper and Canada Dry licenses.

Hearings on the complaint were held before an administrative law judge ("ALJ") from July to October 1990. On June 14, 1991, the ALJ issued an initial decision dismissing the complaint. Applying Clayton Act standards, the ALJ concluded that the relevant product market included all carbonated soft drinks and other similar non-carbonated beverages; that the relevant geographic market was broader than the 10-county San Antonio area pleaded in the complaint; that entry was not difficult; that competition had been significant; that no customer had complained; and that there was accordingly no likelihood of anticompetitive effects from the transaction.

FTC counsel for the complaint appealed that decision to the full Commission. On August 31, 1994, the Commission issued a Final Order and Opinion in which the Commission concluded, *inter alia*, that CCSW's acquisition of the Dr Pepper franchise violated the FTC Act and the Clayton Act, and reversed the ALJ's initial decision. The Commission concluded that the relevant product market was branded carbonated soft drinks; that the relevant geographic market was the 10-county San Antonio area; that entry into the market was difficult; that the acquisition had raised CCSW's market share from 44.7% to 54.5%; that the market was highly concentrated; and that the acquisition substantially increased the likelihood of collusion among

soft drink bottlers. For reasons differing from those of the ALJ, the Commission also concluded that CCSW's acquisition of the Canada Dry franchise did not violate the FTC Act or the Clayton Act.

In its decision, the Commission expressly rejected CCSW's contention that the legality of the transaction should be judged under the Soft Drink Interbrand Competition Act of 1980 ("SDICA"), 15 U.S.C. 3501-3503. That Act provides that "[n]othing contained in any antitrust law shall render unlawful the inclusion and enforcement in any [soft drink] trademark licensing contract" of "provisions granting the licensee the sole and exclusive right to manufacture, distribute, and sell such product in a defined geographic area," so long as "such product is in substantial and effective competition with other products of the same general class in the relevant market or markets." 15 U.S.C. 3501. The Commission concluded, however, that the SDICA was designed to establish the standard for judging the legality of a concentrate manufacturer's grant of exclusivity to a licensee, rather than to establish the legality of a bottler's acquisition of licenses to bottle competing soft drink brands. The Commission issued a Final Order requiring CCSW to divest the Dr Pepper license and related assets, and requiring CCSW to obtain prior Commission approval for future soft drink license acquisitions.

Following issuance of the Commission's opinion, CCSW filed a petition for review with the United States Court of Appeals for the Fifth Circuit. On June 10, 1996, the Fifth Circuit entered a decision vacating and remanding the Commission's decision. The Court of Appeals held that the standards of the SDICA governed the transaction, and hence that the Commission had used the wrong legal standard in concluding that Section 5 of the FTC Act prohibited this change in distribution. The court vacated the Commission's divestiture order and remanded the case to the Commission for further proceedings to determine the transaction's validity under the SDICA's "substantial and effective competition" standard.

The Commission disagrees with the Fifth Circuit's application of the SDICA in this case. The SDICA -- an amendment to the antitrust laws passed in 1980 -- was designed to terminate the Commission's 1970's challenge to the use of exclusive territories in soft drink bottling licenses, and to govern any future challenges to the use of exclusivity provisions in soft drink franchises. The statute has accomplished that purpose. *See, Coca-Cola Co. v. FTC*, 642 F.2d 1387 (D.C. Cir. 1981). Nothing in the language or legislative history

of the statute suggests that it was intended to govern Clayton Act challenges to the acquisition by a soft drink bottler of the license to bottle a competing brand, where the challenge is not premised on the exclusivity of the license whose acquisition is being challenged. Notwithstanding our view that the Court of Appeals has misapplied the SDICA in this case, the Commission has determined not to seek further review of the court's decision. The court's decision, by its express terms, "hold[s] only that the Soft Drink Act applies in a case such as this one in which the manufacturer sells its wholly-owned bottling subsidiary and then enters the downstream market by licensing an independent distributor for the first time" (emphasis added). Given market conditions in the soft drink bottling industry, the circumstances described in the court's holding are not likely to present themselves in any future case. For this reason, the Court of Appeals's decision is highly unlikely to affect the Commission's future enforcement of the Clayton Act against combinations of competing soft drink brands, even in markets within the Fifth Circuit. Accordingly, the Commission has concluded that seeking further review of the decision would be unwarranted.

With respect to the present case, the Commission has concluded that, in light of the age of the challenged transaction, the limited size of the market, and the age of the record evidence regarding the competitive impact of the challenged acquisition, further expenditure of resources on this case would not be in the public interest.

For these reasons, the Commission has determined not to seek further judicial review, to return the matter to adjudication, and to dismiss the complaint. Therefore,

It is ordered, That this matter be, and it hereby is, returned to adjudication, and

It is further ordered, That the complaint in this matter be, and it hereby is, dismissed.

— Commissioner Azcuenaga and Commissioner Starek recused.

IN THE MATTER OF

HARPER & ROW PUBLISHERS, INC.

*Docket 9217. Interlocutory Order, September 10, 1996*ORDER RETURNING MATTERS TO ADJUDICATION
AND DISMISSING COMPLAINTS

The complaints in these matters, issued on December 20, 1988, allege that the respondents -- six of the country's largest book publishers -- violated Sections 2(a), 2(d), and 2(e) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. 13(a),(d),(e), and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. The core of the complaints is that the respondents gave certain national bookstore chains price and promotional concessions that they did not make available to independent bookstores, to the detriment of competition and consumers.

On November 12, 1992, the Secretary issued an order withdrawing these matters from adjudication so that the Commission could evaluate non-public proposed consent agreements signed by complaint counsel and each of the respondents. Since that time, the Commission has considered additional information concerning developments in the industry and what, if any, Commission action is appropriate. Having examined the proposed consent agreements, and having considered significant developments that have occurred in the industry since the complaints were issued -- including the initiation of private litigation addressing many of the same issues -- the Commission has concluded that it is in the public interest to reject the proposed consent agreements and dismiss the complaints.

Although the proposed consent agreements prohibit most of the practices that led to the complaints, the industry has changed appreciably since the consent agreements were signed. For example, the dynamics and structure of the book distribution market have evolved in significant ways, reflecting the growth of "superstores" and warehouse or "club" stores. Moreover, it appears that major book publishers generally have modified pricing and promotional practices. Finally, the respondents generally have replaced the principal forms of alleged price discrimination that prompted the complaints -- unjustified quantity discounts on trade books and secret discounts on mass market books -- with other pricing strategies. These