IN THE MATTER OF

CRUSH INTERNATIONAL LIMITED, ET AL., DKT. NO. 8853

DR. PEPPER COMPANY, DKT. NO. 8854

THE SEVEN-UP COMPANY, DKT. NO. 8857

THE ROYAL CROWN COLA COMPANY, DKT. NO. 8858

NORTON SIMON, INC., ET AL., DKT. NO. 8877

FINAL ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Complaints, July 15, 1971 and March 3, 1972**—Order, Sept. 15, 1981*

This order dismisses without prejudice the complaints issued by the Commission in 1971-1972, against five major soft drink manufacturers charged with attempting to restrict where bottlers may sell, by including "territorial exclusivity" provisions in their licensing agreements. The Commission concluded that since the instant complaints were based on the same legal standards utilized in the matters of Coca-Cola Co. and Pepsico Co. which were subsequently set aside due to changes wrought by the 1980 Soft Drink Interbrand Competition Act, further proceedings would not be in the public interest at this time.

Appearances

For the Commission: *Ronald A. Bloch* and *David I. Wilson.*

For the respondents: *Louis J. Keating, Kirkland & Ellis*, Chicago, Ill., for Crush International, Ltd., *W. D. White, Sr., Rain, Harrell, Emery, Young & Doke*, Dallas, Tex., for Dr. Pepper Co., *Eugene J. Meigher, Arent, Fox, Kintner, Plotkin & Kahn*, Washington, D.C., for The Seven-Up Co., *James H. Wallace, Jr., Kirkland & Ellis*, Washington, D.C., for The Royal Crown Cola Co., and *Edwin S. Rockefeller, Bierbower & Rockefeller*, Washington, D.C., for Norton Simon, Inc., and Canada Dry Corp.

COMPLAINT

The Federal Trade Commission, having reason to believe that the parties named in the caption hereof, each of which separately is made and sometimes hereinafter referred to as respondent(s), or respectively as Crush International Limited, Beverages International-

* Crush International Limited, et al., Dr. Pepper Co., The Seven-Up Co., and The Royal Crown Cola Co.

** Norton Simon, Inc., et al.

al Inc. or Crush International Inc., have violated the provisions 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, stating its charges in that respect as follows:

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

(a) *Bottler* - any individual, partnership, corporation, association or other business or legal entity which purchases respondents' concentrate for use in the manufacture and sale, primarily at wholesale, of respondents' pre-mix or post-mix syrups or soft drink products, or who purchases respondents' pre-mix or post-mix syrups or soft drink products for resale, primarily at wholesale;

(b) *Central warehousing* - a method of distribution in which soft drink products are received at a storage facility and either resold or delivered to retail outlets or wholesalers;

(c) *Concentrate* - the basic soft drink ingredient sold to bottlers by respondents, which is combined with water and other ingredients for packaging in bottles or cans for sale and distribution as soft drink products, or is used to make post-mix and pre-mix syrups; [2]

(d) *Consignment* - a form of distribution in which the consignor retains title, dominion, bears all risks of loss and delivers his products to the consignee who is indistinguishable from a salesman or agent;

(e) *Place of business* - the location of any facilities available to a bottler without regard to customers or geographic area for production or service in the conduct of business operations, to include but not limited to business headquarters, branch sales offices, warehouses and garages, but specifically excluding the plant at which a bottler combines concentrate with water, and possibly other ingredients, for the packaging of soft drink products;

(f) *Post-mix syrup* - soft drink concentrate which is used in fountain dispensing or vending equipment and is usually sold by bottlers in steel tanks. A typical post-mix system draws one ounce of syrup from a five-gallon tank and mixes it at the point of sale with five ounces of carbonated water to produce 600 six-ounce finished soft drink servings per tank;

(g) *Pre-mix syrup* - although essentially the same syrup as post-mix, a pre-mix system differs from a post-mix system in that it draws from a five-gallon tank a serving of soft drink products containing both syrup and carbonated water to produce 100 six-ounce finished soft drink servings per tank; and

(h) *Soft drink products* - nonalcoholic beverages and colas, carbonated and uncarbonated, flavored and nonflavored, sold in bottles and cans, or through pre-mix and post-mix systems or the like.

PAR. 2. Respondent Crush International Limited is a corporation organized, existing and conducting its business under and pursuant to the laws of the Province of Ontario, Canada. It maintains its office and principal place of business at 1590 O'Connor Drive, Toronto 16, Canada. In the United States, an office is maintained at 2201 Main St., Evanston, Illinois.

Respondent Beverages International Inc., a wholly-owned subsidiary of Crush International Limited, is a corporation organized, existing and conducting its business under and pursuant to the laws of the State of Illinois. It maintains its office and principal place of business at 2201 Main St., Evanston, Illinois. **[3]**

Respondent Crush International Inc., a wholly-owned subsidiary of Crush International Limited, is a corporation organized, existing and conducting its business under and pursuant to the laws of the State of Delaware. It maintains its office and principal place of business at 2201 Main St., Evanston, Illinois.

PAR. 3. Respondent Crush International Limited is engaged principally in the manufacture and sale of concentrate which it sells to its bottlers who purchase the concentrate under a license to produce and sell soft drink products under such trade names as "Orange Crush," "Gurd's Ginger Ale," "American Dry Ginger Ale," "Hires Root Beer," "Kick-Kola," "Grape Crush," "Lime Crush," "Grapefruit Crush," "Lemon-Lime Crush Cola," "Crush Cream Soda," "Bitter Lemon," "Brio Chinotto," and "India Express."

Plants for the manufacture of concentrate are located in Canada at Toronto and Ottawa, Ontario and Montreal, Quebec, and in the United States at Evanston, Illinois and Trenton, New Jersey. Approximately 300 United States and 30 Canadian bottlers are franchised to sell its Orange Crush and/or Hires Root Beer soft drink products. Bottlers combine the concentrate with water and other ingredients and package the mixture in bottles for resale as soft drink products to retailers.

For the year ending October 30, 1968, Crush International Limited had sales of $33,069,442, and assets of $21,178,277 (Canadian dollars). As to its wholly-owned United States subsidiaries, Beverages International Inc. and Crush International Inc., sales of concentrate and Orange Crush and Hires Root Beer soft drink products were made to over 300 domestic bottlers in 1968. In the

United States, agreements for Orange Crush and Hires Root Beer trademarked concentrate and soft drink products are between the bottler and Crush International Inc. and Beverages International Inc.

Corporate officers of Beverages International Inc. and Crush International Inc., are identical; and Mr. Louis Collins is President of these respondents as well as of respondent Crush International Limited.

PAR. 4. Respondents are engaged in "commerce" within the meaning of the Federal Trade Commission Act (15 U.S.C. 44) in that a continuous flow of interstate and foreign commerce regarding concentrate and soft drink products [4]exists between offices in Evanston, Illinois and Toronto, Ontario, and production facilities in Canada at Toronto and Ottawa, Ontario, and Montreal, Quebec, and in the United States at Evanston, Illinois, and Trenton, New Jersey, and the numerous bottlers located throughout the United States which purchase their products.

PAR. 5. In the course and conduct of their businesses, respondents, except to the extent limited by the acts, practices and methods of competition hereinafter alleged, have been and are now in competition with other corporations, firms, partnerships and persons engaged in the manufacture, processing, distribution and sale of concentrate and soft drink products in commerce.

PAR. 6. Respondents have hindered, frustrated, lessened and eliminated competition in the distribution and sale of pre-mix and post-mix syrups and soft drink products sold under their trade names by restricting bottlers from selling outside of a designated geographical area. This restriction is set forth in the agreements between respondents Beverages International Inc., or Crush International Inc., and their bottlers. A typical agreement between respondents Beverages International Inc., or Crush International Inc., and their bottlers provides that:

> Bottler shall use its best efforts to sell [CRUSH/HIRES] within TERRITORY and not deliver or sell [CRUSH/HIRES] outside of TERRITORY. Bottler shall not knowingly sell [CRUSH/HIRES] within TERRITORY for resale or delivery outside of TERRITORY or sell or deliver [CRUSH/HIRES] to any person after having been notified by COMPANY that such person is reselling or delivering [CRUSH/HIRES] outside TERRITORY.

PAR. 7. The aforesaid agreements used by respondents, Beverages International Inc. and Crush International Inc., the wholly-owned subsidiaries of respondent Crush International Limited, have had, and may continue to have, the following effects:

(a) Competition between and among respondents' bottlers in the distribution and sale of "Hires Root Beer" and "Orange Crush" brands of soft drink products has been eliminated;

(b) Innumerable retailers and other customers have been deprived of the right to purchase "Hires Root Beer" and "Orange Crush" brands of soft drink products from the bottler of their choice at a competitive price; and [5]

(c) Consumers of "Hires Root Beer" and "Orange Crush" brands of soft drink products have been deprived of the opportunity of obtaining such products in an unrestricted market and at competitive prices.

PAR. 8. Respondents' contracts, agreements, acts, practices and methods of competition aforesaid have had, and may continue to have, the effect of lessening competition in the advertising, merchandising, distribution, offering for sale and sale of pre-mix and post-mix syrups and soft drink products; deprive, and may continue to deprive, the public of the benefits of competition in the purchase of soft drink products; and constitute unfair methods of competition and unfair acts or practices, in commerce, in violation of Section 5 of the Federal Trade Commission Act.

COMPLAINT

The Federal Trade Commission, having reason to believe that the Dr. Pepper Company, hereby made and sometimes hereinafter referred to as respondent, or Dr. Pepper, has violated the provisions 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, stating its charges in that respect as follows:

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

(a) *Bottler* - any individual, partnership, corporation, association or other business or legal entity which purchases respondent's concentrate for use in the manufacture and sale, primarily at wholesale, of respondent's pre-mix or post-mix syrups or soft drink products, or who purchases respondent's pre-mix or post-mix syrups or soft drink products for resale, primarily at wholesale;

(b) *Central warehousing* - a method of distribution in which soft drink products are received at a storage facility and either resold or delivered to retail outlets or wholesalers;

(c) *Concentrate* - the basic soft drink ingredient sold to bottlers by

respondent, which is combined with water and other ingredients for packaging in bottles or cans for sale and distribution as soft drink products, or is used to make post-mix and pre-mix syrups;

(d) *Consignment* - a form of distribution in which the consignor retains title, dominion, bears all risks of loss and delivers his products to the consignee who is indistinguishable from a salesman or agent; [2]

(e) *Place of business* - the location of any facilities available to a bottler without regard to customers or geographic area for production or service in the conduct of business operations, to include but not limited to business headquarters, branch sales offices, warehouses and garages, but specifically excluding the plant at which a bottler combines concentrate with water, and possibly other ingredients, for the packaging of soft drink products;

(f) *Post-mix syrup* - soft drink concentrate which is used in fountain dispensing or vending equipment and is usually sold by bottlers in steel tanks. A typical post-mix system draws one ounce of syrup from a five-gallon tank and mixes it at the point of sale with five ounces of carbonated water to produce 600 six-ounce finished soft drink servings per tank;

(g) *Pre-mix syrup* - although essentially the same syrup as post-mix, a pre-mix system differs from a post-mix system in that it draws from a five-gallon tank a serving of soft drink products containing both syrup and carbonated water to produce 100 six-ounce finished soft drink servings per tank; and

(h) *Soft drink products* - nonalcoholic beverages and colas, carbonated and uncarbonated, flavored and nonflavored, sold in bottles and cans, or through pre-mix and post-mix systems or the like.

PAR. 2. Respondent is a corporation organized, existing and conducting its business under and pursuant to the laws of the State of Colorado. It maintains its office and principal place of business at 5523 Mockingbird Lane, Box 5986, Dallas, Texas. Respondent had sales of $41,883,072 and assets of $19,479,696 in 1969. In 1968, Dr. Pepper made sales to over 482 bottlers located in every state of the United States.

PAR. 3. Respondent is engaged principally in the manufacture and sale of concentrate which it sells to its over 482 bottlers who purchase the concentrate under a license to produce and sell soft drink products under respondent's trade names such as "Dr. Pepper," "Dietetic Dr. Pepper" and "Salute." Dr. Pepper bottlers combine the concentrate with water and other ingredients and

package the mixture in bottles and cans for resale as soft drink products to retailers. In addition to manufacturing and selling concentrate to its bottlers, Dr. Pepper operates bottling plants in three areas of the United States and sells soft drink products to retailers. [3]

PAR. 4. Respondent is engaged in "commerce" within the meaning of the Federal Trade Commission Act (15 U.S.C. 44) in that a continuous flow of interstate commerce in pre-mix concentrate and soft drink products exists between its headquarters and production facilities located in Dallas, Texas, and the numerous bottlers located throughout the United States which purchase its products.

PAR. 5. In the course and conduct of its business, respondent, except to the extent limited by the acts, practices and methods of competition hereinafter alleged, has been and is now in competition with other corporations, firms, partnerships and persons engaged in the manufacture, processing, distribution and sale of soft drink products in commerce.

PAR. 6. Dr. Pepper has hindered, frustrated, lessened and eliminated competition in the distribution and sale of pre-mix and post-mix syrups and soft drink products sold under its trade names by restricting its bottlers from selling outside of a designated geographical area. This restriction is set forth in the agreements between respondent and its bottlers. A typical agreement between respondent and its bottlers provides that the bottler ". . . at all times agrees not to sell bottled Dr. Pepper outside the said licensed territory and not to sell such product knowingly to any purchaser who intends to place such product for sale outside the said licensed territory . . ."

PAR. 7. The aforesaid agreements used by respondent have had, and may continue to have, the following effects:

(a) Competition between and among respondent's bottlers in the distribution and sale of "Dr. Pepper," "Dietetic Dr. Pepper" and "Salute" brands of soft drink products has been eliminated;

(b) Competition between and among Dr. Pepper's bottling operations and its bottlers in the distribution and sale of Dr Pepper soft drink products at the wholesale level has been eliminated;

(c) Innumerable retailers and other customers have been deprived of the right to purchase "Dr. Pepper," "Dietetic Dr. Pepper" and "Salute" brands of soft drink products from the bottler of their choice at a competitive price; and [4]

(d) Consumers of "Dr. Pepper," "Dietetic Dr. Pepper" and "Salute" brands of soft drink products have been deprived of the

opportunity of obtaining such products in an unrestricted market and at competitive prices.

PAR. 8. Respondent's contracts, agreements, acts, practices and methods of competition aforesaid have had, and may continue to have, the effect of lessening competition in the advertising, merchandising, distribution, offering for sale and sale of pre-mix and post-mix syrups and soft drink products; deprive, and may continue to deprive, the public of the benefits of competition in the purchase of soft drink products; and constitute unfair methods of competition and unfair acts or practices, in commerce, in violation of Section 5 of the Federal Trade Commission Act.

COMPLAINT

The Federal Trade Commission, having reason to believe that The Seven-Up Company, hereby made and sometimes hereinafter referred to as respondent, or Seven-Up, has violated the provisions 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, stating its charges in that respect as follows:

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

(a) *Bottler* - any individual, partnership, corporation, association or other business or legal entity which purchases respondent's concentrate for use in the manufacturing and sale primarily at wholesale, of respondent's pre-mix or post-mix syrups or soft drink products or who purchases respondent's pre-mix or post-mix syrups or soft drink products for resale, primarily at wholesale;

(b) *Central Warehousing* - a method of distribution in which soft drink products are received at a storage facility and either resold or delivered to retail outlets or wholesalers;

(c) *Concentrate* - the basic soft drink ingredient sold to bottlers by respondent, which is combined with water and other ingredients for packaging in bottles or cans for sale and distribution as soft drink products, or is used to make post-mix and pre-mix syrups;

(d) *Consignment* - a form of distribution in which the consignor retains title, dominion, bears all risks of loss and delivers his products to the consignee who is indistinguishable from a salesman or agent; [2]

(e) *Place of business* - the location of any facilities available to a bottler without regard to customers or geographic area for produc-

tion or service in the conduct of business operations, to include but not limited to business headquarters, branch sales offices, warehouses and garages, but specifically excluding the plant at which a bottler combines concentrate with water, and possibly other ingredients, for the packaging of soft drink products;

(f) *Post-mix syrup* - soft drink concentrate which is used in fountain dispensing or vending equipment and is usually sold by bottlers in steel tanks. A typical post-mix system draws one ounce of syrup from a five-gallon tank and mixes it at the point of sale with six ounces of carbonated water to produce 600 six-ounce finished soft drink servings;

(g) *Pre-mix syrup* - although essentially the same syrup as post-mix, a pre-mix system differs from a post-mix system in that it draws from a five-gallon tank a serving of soft drink products containing both syrup and carbonated water to produce 100 six-ounce finished soft drink servings; and

(h) *Soft drink products* - nonalcoholic beverages and colas, carbonated and uncarbonated, flavored and nonflavored, sold in bottles and cans, or through pre-mix and post-mix systems or the like.

PAR. 2. Respondent is a corporation organized, existing and conducting its business under and pursuant to the laws of the State of Missouri. It maintains its office and principal place of business at 121 South Meramec, St. Louis, Missouri. Respondent had sales of $83,255,014 and assets of $38,894,206 in 1969. In 1968, Seven-Up made sales to over 470 domestic bottlers located in every State of the United States.

PAR. 3. Respondent is engaged principally in the manufacture and sale of concentrate which it sells to its over 470 bottlers who purchase the concentrate under a license to produce and sell soft drink products under respondent's trade names such as "7-Up," "Diet 7-Up," "LIKE" and "Howdy." Seven-Up bottlers combine the concentrate with water and other ingredients and package the mixture in bottles and cans for resale as soft drink products to retailers.

PAR. 4. Respondent is engaged in "commerce" within the meaning of the Federal Trade Commission Act (15 U.S.C. 44) in that a continuous flow of interstate [3]commerce in concentrate and soft drink products exists between its headquarters and production facilities located in St. Louis, Missouri, and the numerous bottlers located throughout the United States which purchase its products.

PAR. 5. In the course and conduct of its business, respondent,

except to the extent limited by the acts, practices and methods of competition hereinafter alleged, has been and is now in competition with other corporations, firms, partnerships and persons engaged in the manufacture, processing, distribution and sale of soft drink products in commerce.

PAR. 6. Seven-Up has hindered, frustrated, lessened and eliminated competition in the distribution and sale of pre-mix concentrates and soft drink products sold under its trade names by restricting its bottlers from selling outside of a designated geographical area. This restriction is set forth in the agreements between respondent and its bottlers.

A typical agreement between respondent and its bottlers provides that the ". . . Bottler shall not directly or indirectly sell or distribute 7-Up in any territory other than hereinbefore described."

PAR. 7. The aforesaid agreements used by respondent have had, and may continue to have, the following effects:

(a) Competition between and among respondent's bottlers in the distribution and sale of "7-Up," "Diet 7-Up," "LIKE" and "Howdy" brands of soft drink products has been eliminated;

(b) Innumerable retailers and other customers have been deprived of the right to purchase "7-Up," "Diet 7-Up," "LIKE" and "Howdy" brands of soft drink products from the bottler of their choice at a competitive price; and

(c) Consumers of "7-Up," "Diet 7-Up," "LIKE" and "Howdy" brands of soft drink products have been deprived of the opportunity of obtaining such products in an unrestricted market and at competitive prices. [4]

PAR. 8. Respondent's contracts, agreements, acts, practices and methods of competition aforesaid have had, and may continue to have, the effect of lessening competition in the advertising, merchandising, distribution, offering for sale and sale of pre-mix concentrates and soft drink products; deprive, and may continue to deprive, the public of the benefits of competition in the purchase of soft drink products; and constitute unfair methods of competition and unfair acts or practices, in commerce, in violation of Section 5 of the Federal Trade Commission Act.

COMPLAINT

The Federal Trade Commission, having reason to believe that the Royal Crown Cola Company, hereby made and sometimes hereinafter referred to as respondent, or Royal Crown, has violated the

provisions 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, stating its charges in that respect as follows:

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

(a) *Bottler* - any individual, partnership, corporation, association or other business or legal entity which purchases respondent's concentrate for use in the manufacture and sale, primarily at wholesale, of respondent's pre-mix or post-mix syrups or soft drink products, or who purchases respondent's pre-mix or post-mix syrups or soft drink products for resale, primarily at wholesale;

(b) *Central warehousing* - a method of distribution in which soft drink products are received at a storage facility and either resold or delivered to retail outlets or wholesalers;

(c) *Concentrate* - the basic soft drink ingredient sold to bottlers by respondent, usually as a syrup, and which is combined with water and other ingredients for packaging in bottles or cans for sale and distribution as soft drink products, or is used to make post-mix and pre-mix syrups;

(d) *Consignment* - a form of distribution in which the consignor retains title, dominion, bears all risks of loss and delivers his products to the consignee who is indistinguishable from a salesman or agent; [2]

(e) *Place of business* - the location of any facilities available to a bottler without regard to customers or geographic area for production or service in the conduct of business operations, to include but not limited to business headquarters, branch sales offices, warehouses and garages, but specifically excluding the plant at which a bottler combines concentrate with water, and possibly other ingredients, for the packaging of soft drink products;

(f) *Post-mix syrup* - soft drink concentrate which is used in fountain dispensing or vending equipment and is usually sold by bottlers in steel tanks. A typical post-mix system draws one ounce of syrup from a tank, usually having about a five-gallon capacity and mixes it at the point of sale with five ounces of carbonated water to produce approximately 600 six-ounce finished soft drink servings per tank;

(g) *Pre-mix syrup* - although essentially the same syrup as post-mix, a pre-mix system differs from a post-mix system in that it draws from a tank, usually having about a five-gallon capacity, a finished serving of soft drink product containing both syrup and carbonated

water, "pre-mixed," to produce 100 six-ounce soft drink servings per tank; and

(h) *Soft drink products* - nonalcoholic beverages and colas, carbonated and uncarbonated, flavored and nonflavored, sold in bottles and cans, or through pre-mix and post-mix systems or the like.

PAR. 2. Respondent is a corporation organized, existing and conducting its business under and pursuant to the laws of the State of Delaware. It maintains its office and principal place of business at 1000 10th Ave., Box 1440, Columbus, Georgia. Respondent had sales of $80,059,394 and assets of $23,873,489 in 1969. In 1968, Royal Crown Cola made sales to over 333 domestic bottlers located in every state of the United States.

PAR. 3. Respondent is engaged principally in the manufacture and sale of concentrate which it sells to its over 333 bottlers who purchase the concentrate under a license to produce and sell soft drink products under respondent's trade names such as "Royal Crown," "Diet Rite," "Nehi," "Par-T-Pak," "Kick," "Lift" and "Gatorade." Royal Crown bottlers combine the concentrate with water and other ingredients and package the mixture in bottles and cans for resale as soft drink products to retailers. In addition, to manufacturing and selling concentrate to its bottlers, it operates bottling plants in seven areas of the United States and sells soft drink products to retailers. [3]

PAR. 4. Respondent is engaged in "commerce" within the meaning of the Federal Trade Commission Act (15 U.S.C. 44) in that a continuous flow of interstate commerce in concentrate and soft drink products exists between its headquarters and production facilities located in Columbus, Georgia, and the numerous bottlers located throughout the United States which purchase its products.

PAR. 5. In the course and conduct of its business, respondent, except to the extent limited by the acts, practices and methods of competition hereinafter alleged, has been and is now in competition with other corporations, firms, partnerships and persons engaged in the manufacture, processing, distribution and sale of concentrate and soft drink products in commerce.

PAR. 6. Royal Crown has hindered, frustrated, lessened and eliminated competition in the distribution and sale of pre-mix and post-mix syrups and soft drink products sold under its trade names by restricting its bottlers from selling outside of a designated geographical area. This restriction is set forth in the agreements between respondent and its franchised bottlers. A typical agreement

between respondent and its bottlers provides that "The license of the bottler to sell Royal Crown beverages and to use the company's Royal Crown trademark is limited to the described territory, and the bottler shall not sell Royal Crown beverages to any person for resale without the limits of said territory."

PAR. 7. The aforesaid agreements used by respondent have had, and may continue to have, the following effects:

(a) Competition between and among respondent's bottlers in the distribution and sale of "Royal Crown," "Diet Rite," "Nehi," "Par-T-Pak," "Kick," "Lift" and "Gatorade" brands of soft drink products has been eliminated;

(b) Competition between and among Royal Crown's bottling operations and its bottlers in the distribution and sale of Royal Crown soft drink products at the wholesale level has been eliminated;

(c) Innumerable retailers and other customers have been deprived of the right to purchase "Royal Crown," "Diet Rite," "Nehi," "Par-T-Pak," "Kick," "Lift" and "Gatorade" brands of soft drink products from the bottler of their choice at a competitive price; and [4]

(d) Consumers of "Royal Crown," "Diet Rite," "Nehi," "Par-T-Pak," "Kick," "Lift" and "Gatorade" brands of soft drink products have been deprived of the opportunity of obtaining such products in an unrestricted market and at competitive prices.

PAR. 8. Respondent's contracts, agreements, acts, practices and methods of competition aforesaid have had, and may continue to have, the effect of lessening competition in the advertising, merchandising, distribution, offering for sale and sale of pre-mix and post-mix syrups and soft drink products, deprive, and may continue to deprive, the public of the benefits of competition in the purchase of pre-mix, post-mix and soft drink products; and constitute unfair methods of competition and unfair acts or practices, in commerce, in violation of Section 5 of the Federal Trade Commission Act.

COMPLAINT

The Federal Trade Commission, having reason to believe that Norton Simon, Inc. and its wholly-owned subsidiary, Canada Dry Corporation, each hereby made and sometimes hereinafter referred to as respondent(s), or as Norton Simon or Canada Dry, have violated the provisions 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, stating its charges in that respect as follows:

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

(a) *Bottler* - any individual, partnership, corporation, association or other business or legal entity which purchases respondents' concentrate for use in the manufacture and sale, primarily at wholesale, of respondents' pre-mix or post-mix syrups or soft drink products, or who purchases respondents' pre-mix or post-mix syrups or soft drink products for resale, primarily at wholesale;

(b) *Central warehousing* - a method of distribution in which soft drink products are received at a storage facility and either resold or delivered to retail outlets or wholesalers;

(c) *Concentrate* - the basic soft drink ingredient sold to bottlers by respondents, which is combined with water and other ingredients for packaging in bottles or cans for sale and distribution as soft drink products, or is used to make post-mix and pre-mix syrups; [2]

(d) *Consignment* - a form of distribution in which the consignor retains title, dominion, bears all risks of loss and delivers his products to the consignee who is indistinguishable from a salesman or agent;

(e) *Place of business* - the location of any facilities available to a bottler without regard to customers or geographic area for production or service in the conduct of business operations, to include but not limited to business headquarters, branch sales offices, warehouses and garages, but specifically excluding the plant at which a bottler combines concentrate with water, and possibly other ingredients, for the packaging of soft drink products;

(f) *Post-mix syrup* - soft drink concentrate which is used in fountain dispensing or vending equipment and is usually sold by bottlers in steel tanks. A typical post-mix system draws one ounce of syrup from a five-gallon tank and mixes it at the point of sale with five ounces of carbonated water to produce 600 six-ounce finished soft drink servings per tank;

(g) *Pre-mix syrup* - although essentially the same syrup as post-mix, a pre-mix system differs from a post-mix system in that it draws from a five-gallon tank a serving of soft drink products containing both syrup and carbonated water to produce 100 six-ounce finished soft drink servings per tank; and

(h) *Soft drink products* - nonalcoholic beverages and colas, carbonated and uncarbonated, flavored and non-flavored, sold in

82 - 29 : OL 3

bott' s and cans, or through pre-mix and post-mix systems or the like.

PAR. 2. Respondent Norton Simon is a corporation organized, existing and conducting its business under and pursuant to the laws of the State of Delaware. It maintains its office and principal place of business at 230 Park Ave., New York, New York. Respondent Norton Simon had sales of $1,046,031,000 in 1970 and of $984,428,000 in 1969. Assets totaled $734,545,000 in 1969. [3]

Respondent Canada Dry, since 1968 a wholly-owned subsidiary of Norton Simon, is a corporation organized, existing and conducting its business under and pursuant to the laws of the State of Delaware. It maintains its executive offices and principal place of business at 100 Park Ave, New York, New York. Respondent Canada Dry was incorporated in the State of Delaware on June 30, 1969. Respondent Canada Dry is the successor to the concentrate and soft drink business of an earlier corporation which was incorporated in the State of Delaware on May 13, 1968, as the Nadaca Beverage Corporation; such name being changed to Canada Dry Corporation on July 17, 1968. The Nadaca Beverage Corporation was the successor to all business of another Canada Dry Corporation which was incorporated in the State of Delaware on June 1, 1925. Whenever activities, undertakings, arrangements or agreements of respondent Canada Dry are alleged to have occurred prior to June 30, 1969, it shall refer to the appropriate predecessor corporation during the applicable period. In 1969, Respondent Canada Dry had sales of approximately $7,300,000 for soft drink concentrate to over 190 licensed bottlers located in every State of the United States. Total soft drink sales by Canada Dry were $108,200,000 in 1969.

PAR. 3. Respondent Norton Simon through various subsidiaries, is engaged in diverse businesses, such as the sale of soft drink products and concentrate, and distilled spirits (Canada Dry), food and food service (Hunt Foods & Industries, Inc.), packaging systems (United Can Co., and Glass Containers Corp.), and communications (McCall Publishing Co., and Saturday Review, Inc.). In 1969 sales by respondent Canada Dry (including distilled spirits sales) accounted for approximately 20% of total sales by Norton Simon. In 1967, prior to its acquisition by Norton Simon, Canada Dry had net sales in excess of $175,000,000.

Respondent Canada Dry is engaged principally in the manufacture and sale of concentrate which it sells to its over 190 bottlers who purchase the concentrate under a license to produce and sell soft drink products under respondent's trade names such as 'Wink,"

"Sport Cola," "HI-SPOT," "Tahitian Treat," and "Canada Dry" brand ginger ale, club soda, collins [4]mixer, quinine water, bitter lemon, and various flavored beverages including root beer, orange, grape, lemon-lime, black cherry, and strawberry. Canada Dry bottlers combine the concentrate with water and other ingredients and package the mixture in bottles and cans for resale as soft drink products to retailers. In addition to manufacturing and selling concentrate to its bottlers, Canada Dry operates bottling plants in several areas of the United States and sells soft drink products to retailers.

PAR. 4. Respondents are engaged in "commerce" within the meaning of the Federal Trade Commission Act (15 U.S.C. 44) in that Norton Simon, through its wholly-owned subsidiary, Canada Dry, causes a continuous flow of interstate commerce in soft drink products and concentrate to exist between Canada Dry headquarters and production facilities and the numerous bottlers located throughout the United States which purchase their products.

PAR. 5. In the course and conduct of their businesses, respondents, except to the extent limited by the acts, practices and methods of competition hereinafter alleged, have been and are now in competition with other corporations, firms, partnerships and persons engaged in the manufacture, processing, distribution and sale of soft drink products in commerce.

PAR. 6. Respondents have hindered, frustrated, lessened and eliminated competition in the distribution and sale of pre-mix and post-mix syrups and soft drink products sold under their trade names by restricting their bottlers from selling outside of a designated geographical area. This restriction is set forth in the agreements between respondents and their bottlers. A typical agreement between respondent Canada Dry and its bottlers provides that:

ARTICLE 1. *License and Territory.* Canada Dry hereby grants the Bottler and the Bottler hereby accepts from Canada Dry an exclusive license to manufacture, bottle, sell and distribute the "CANADA DRY" beverages referred to below in the following territory only . . . .

or provides that: [5]

The Bottler agrees that it will not manufacture, bottle, sell or distribute, directly or indirectly . . . carbonated beverages under the trade names or trademarks of Canada Dry elsewhere than in the territory hereinabove described.

Canada Dry also sells soft drink products to bottlers (as that term is defined heretofore) in bottles and cans pursuant to an agreement which typically provides that:

In as much as a portion of the State of Texas is served by franchised Bottlers, we ask that you do not, under any circumstances, make deliveries of Canada Dry merchandise into the following areas:

[The territory is described.]

PAR. 7. The aforesaid agreements used by respondents have had, and may continue to have, the following effects:

(a) Competition between and among respondent Canada Dry bottlers in the distribution and sale of "Wink," "Sport Cola," "HI-SPOT," "Tahitian Treat," and "Canada Dry" brands of soft drink products has been eliminated;

(b) Competition between and among Canada Dry's bottling operations and its bottlers in the distribution and sale of Canada Dry soft drink products at the wholesale level has been eliminated;

(c) Innumerable retailers and other customers have been deprived of the right to purchase "Wink," "Sport Cola," "HI-SPOT," "Tahitian Treat," and "Canada Dry" brands of soft drink products from the bottler of their choice at a competitive price; and

(d) Consumers of "Wink," "Sport Cola," "HI-SPOT," "Tahitian Treat," and "Canada Dry" brands of soft drink products have been deprived of the opportunity of obtaining such products in an unrestricted market and at competitive prices. **[6]**

PAR. 8. Respondents' contracts, agreements, acts, practices and methods of competition aforesaid have had and may continue to have, the effect of lessening competition in the advertising, merchandising, distribution, offering for sale and sale of pre-mix and post-mix syrups and soft drink products; deprive, and may continue to deprive, the public of the benefits of competition in the purchase of soft drink products; and constitute unfair methods of competition and unfair acts or practices, in commerce, in violation of Section 5 of the Federal Trade Commission Act.

INITIAL DECISION BY

THOMAS F. HOWDER, ADMINISTRATIVE LAW JUDGE

JULY 22, 1981

On July 15, 1971, the Commission issued its complaints against Crush International Limited et al., Dr. Pepper Company, The Seven-Up Company and Royal Crown Cola Co. These were mailed on July 27, 1971. The complaint against Norton Simon, Inc. and Canada Dry Corporation was issued on March 3, 1972 and was mailed on March

9, 1972. Respondents in these five cases were charged with violating Section 5 of the Federal Trade Commission Act for including "territorial exclusivity" provisions in their licensing agreements with soft drink bottlers.

In view of the decision of the United States Court of Appeals for the District of Columbia in *Coca-Cola Co.* v. *Federal Trade Commission*, 642 F.2d 1387 (D.C. Cir. 1981), complaint counsel has filed motions to dismiss these proceeding as to all respondents.

Section 3.22(e) of the Rules of Practice provides that an initial decision shall be filed when a motion to dismiss is granted. Since it appears appropriate to grant complaint counsel's motion to dismiss, the following findings of fact and conclusions of law are hereby made: [3]

Findings of Fact

1. Although, as indicated above, complaints were issued against these five respondents, the cases were never adjudicated.
2. These cases are companions to *The Coca-Cola Co.*, Docket No. 8855, and *Pepsico, Inc.*, Docket No. 8856, two matters fully adjudicated and decided by the Commission on April 7, 1978. (91 F.T.C. 517 and 680).
3. On September 19, 1978, then-assigned Administrative Law Judge Joseph P. Dufresne issued an order staying proceedings in these cases pending appellate review of the Commission's decisions in *Coca-Cola* and *Pepsi*.
4. In *Coca-Cola Co.* v. *Federal Trade Commission*, the United States Court of Appeals, District of Columbia Circuit, set aside the Commission's order in *Coca-Cola* and *Pepsi*, because they were based upon legal standards differing from those contained in the subsequently enacted Soft Drink Interbrand Competition Act. 15 U.S.C. 3501 *et. seq.* . The cases were remanded to the Commission for dismissal.
5. On April 1, 1981, the Commission ordered that these proceedings be dismissed without prejudice to any future proceedings under the standards of the Soft Drink Interbrand Competition Act.

Conclusions

Since the instant complaints are based upon the same superseded standards under which the *Coca-Cola* and *Pepsico* cases were decided, it is concluded that there is no presently existing public interest in continuing these matters, and that complaint counsel's motion should be granted.

ORDER

These cases are companions to *The Coca-Cola Company*, Docket No. 8855 and *Pepsico, Inc.*, Docket No. 8856, two matters which the United States Court of Appeals for the District of [2]Columbia in *Coca-Cola* v. *FTC*, 642 F.2d 1387 (D.C. Cir. 1981), set aside because they were based upon legal standards differing from those contained in the Soft Drink Interbrand Competition Act, 15 U.S.C. 3501, *et seq.* These companion cases were thereafter dismissed by the Commission without prejudice to any further proceeding under the standards of the Soft Drink Interbrand Competition Act. In view of the action of the Court of Appeals, complaint counsel filed a motion before the Administrative Law Judge to dismiss these proceedings as to all respondents. The Administrative Law Judge filed his Initial Decision in these matters on July 22, 1981, dismissing the complaints as to all respondents, without prejudice to the Commission's right to institute new proceedings under the standards set forth in the Soft Drink Interbrand Competition Act, should it determine that the public interest so requires.

Now, *it is hereby ordered,* that the Initial Decision and Order be, and hereby is, effective immediately.

Commissioner Pertschuk did not participate.

IN THE MATTER OF

GEORGE IRVIN CHEVROLET COMPANY

FINAL ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE TRUTH-IN-LENDING ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9124. Complaint, March 6, 1979—Decision, Sept. 15, 1981

This consent order requires, among other things, a Denver, Colorado, motor vehicle dealer to cease failing to make all the credit disclosures required by Federal law. Further, respondent is prohibited from using certain credit terms in advertisements promoting credit sales, unless those advertisements also include statutorily required information in the manner prescribed by Regulation Z.

Appearances

For the Commission: *George S. Meyer* and *Cyrus Callum.*

For the respondent: *Glenn A. Mitchell, Michael G. Charapp,* and *David U. Fierst, Stein, Mitchell & Mezines,* Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and of the Truth-in-Lending Act and the implementing regulations promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission having reason to believe that George Irvin Chevrolet Co., a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Acts and the implementing regulations promulgated under the Truth-in-Lending Act, and it appearing to the Commission that a proceeding by it in respect thereto would be in the public interest, hereby issues its complaint stating its charges as follows:

PARAGRAPH 1. George Irvin Chevrolet Co. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado with its principal office and place of business located at 390 South Colorado Boulevard, Denver, Colorado.

PAR. 2. Respondent is now, and for many years has been, engaged in the sale and distribution of new and used motor vehicles. Respondent also provides a variety of automotive products and services to consumers.

PAR. 3. In the ordinary course and conduct of its business as aforesaid, respondent regularly arranges for the extension of con-

sumer credit and is a creditor, as "consumer credit" and "creditor" are defined in Section 226.2 of Regulation Z, the implementing regulation of the Truth-in-Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 4. Subsequent to July 1, 1969, respondent, in the ordinary course and conduct of its business, has caused to be televised advertisements, which aid, promote or assist, directly or indirectly, credit sales and other extensions of other than open end credit, as "advertisement" and "credit sale" are defined in Section 226.2 of Regulation Z.

PAR. 5. Respondent, in certain of these televised advertisements, has stated the amount of the downpayment, the amount of the periodic installment payment, the number of installment payments, or the period of repayment without also stating, clearly, and conspicuously, as required by Section 226.10(d)(2) of Regulation Z, all of the following terms:

1) the cash price;
2) the amount of the downpayment required, or that no downpayment is required, as applicable;
3) the number, amount, and due dates or period of payments scheduled to repay the indebtedness if the credit is extended;
4) the amount of the finance charge expressed as an annual percentage rate; and
5) the deferred payment price.

PAR. 6. Respondent, in certain of these televised advertisements, has stated at various times the annual percentage rate, the cash downpayment and the deferred payment price in terminology other than that prescribed by Section 226.8 of Regulation Z, and contrary to Section 226.10(d) of Regulation Z.

PAR. 7. Respondent, in certain of these televised advertisements, has used an advertising format in which the audio portion of the advertisement contained only certain credit representations selected for emphasis, while the video portion of the advertisement contained credit disclosures required by Section 226.10(d)(2) of Regulation Z. For example, respondent televised an advertisement on June 16, 1977, which made use of a videographic "crawl," a moving line of print displayed across the television screen, that disclosed the following verbatim: "NO DOWN 60 PMTS. OF $193.07 DEF. PRICE $11,584.20 ANNUAL % RATE OF 14.13% PLUS TAXES AND D & H OF $48.50 SUBJ. TO PRIOR SALE STK. #790." In this advertisement, the audio portion stated only the amount and period of installment payments. This format constitutes a failure to make

disclosures clearly, conspicuously and in a meaningful sequence, as required by Sections 226.6(a) and 226.10(d)(2) of Regulation Z.

PAR. 8. By and through the acts and practices set forth above, respondent has failed to comply with the requirements of Regulation Z, the implementing regulation of the Truth-in-Lending Act. Pursuant to Section 103(s) of the Truth-in-Lending Act, such failure to comply with Regulation Z constitutes a violation of that Act, and, pursuant to Section 108(c) thereof, respondent has engaged in unfair or deceptive acts and practices and has thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondent named in the caption hereof with violation of the Truth-in-Lending Act and the implementing regulations promulgated thereunder and of Section 5 of the Federal Trade Commission Act, as amended, and the respondent having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent 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 respondent 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 3.24(c) 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 3.24(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent George Irvin Chevrolet Co. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its office and principal place of business located at 390 South Colorado Boulevard, in the city of Denver, State of Colorado.

2. 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

It is ordered, That respondent George Irvin Chevrolet Co., a corporation, its successors and assigns, and respondent's officers, agents, representatives and employees, directly or through any corporation or other device, in connection with any advertisement to aid, promote, or assist, directly or indirectly, any extension of consumer credit, as "advertisement" and "consumer credit" are defined in Regulation Z (12 CFR 226 *et seq.*) of the Truth-in-Lending Act (Pub. Law 90–321, 15 U.S.C. 1601 *et seq.*), do forthwith cease and desist from:

1. Stating that no downpayment is required, or stating the amount of the downpayment or of any installment payment required (either in dollars or as a percentage), the dollar amount of any finance charge, the number of installments or the period of repayment, or stating that there is no charge for credit, unless all of the following items are also clearly and conspicuously set forth in terminology prescribed by Section 226.8 of Regulation Z, as required by Section 226.10(d)(2) of Regulation Z:

(a) the cash price;
(b) the amount of the downpayment required or that no downpayment is required, as applicable;
(c) the number, the amount, and due dates or period of payments scheduled to repay the indebtedness if the credit is extended;
(d) the amount of the finance charge expressed as an annual percentage rate; and
(e) the deferred payment price.

2. Failing in connection with all television and radio advertisements in which cost of credit disclosures must be made pursuant to Section 226.10(d)(2) of Regulation Z, to make such disclosures clearly, conspicuously, and in meaningful sequence, as required by Section 226.6(a) of Regulation Z. The following standards shall be met in order for a television advertisement to be deemed a "clear and conspicuous" disclosure within the meaning of this order:

(a) (i) the finance charge expressed as an annual percentage rate shall be presented simultaneously in both the audio and video portions of the television advertisement;
(ii) the remaining disclosures required by Section 226.10(d)(2) of

Regulation Z shall be presented in the video portion of the television advertisement;

(iii) any of the remaining disclosures required by Section 226.10(d)(2) of Regulation Z may be presented in the audio portion of the television advertisement, but if so presented, shall be presented simultaneously and in identical sequence in both the audio and video portions of the television advertisement;

(b) the video portion of the required credit disclosures shall contain letters large enough to be easily seen and read with reasonable ease on all television sets, regardless of picture tube size, that are commercially available to the consuming public;

(c) the video portion of the required credit disclosures shall contain letters of a color or shade that readily contrasts with the background on both color and black and white television sets. The background shall consist of only one color or shade;

(d) during the video portion of the required credit disclosures, no words or images shall appear on the television screen which are not part of the required disclosures; *provided, however*, that during said disclosures two-thirds of the television screen may contain images which do not obscure or detract attention from the required disclosures;

(e) the video presentation of the required credit disclosures shall be no less than ten seconds' duration;

(f) during the audio portion of the required credit disclosures, no sounds which obscure or detract attention from the required disclosures may be presented;

(g) the audio portion of the required credit disclosures shall be spoken with sufficient deliberateness, clarity, and volume, so as not to obscure or detract attention from the required disclosures made in either the video or audio portion;

(h) the audio and video portions of the required credit disclosures shall immediately follow the specific representation which triggers the affirmative disclosure requirement contained in Section 226.10(d)(2) of Regulation Z;

(i) the audio and video portion of the required credit disclosures shall not give such emphasis to any disclosure as to obscure or detract attention from the other credit disclosures.

It is further ordered, That respondent, its successors and assigns, shall forthwith distribute a copy of this order to each of its operating divisions and to each person responsible for or connected with preparation of its television advertisements and secure from each such person a signed statement acknowledging receipt of said order.

It is further ordered, That respondent notify the Commission at least 30 days prior to any proposed change in respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, or any other circumstances which may affect any compliance obligation arising out of this order.

It is further ordered, That respondent George Irvin Chevrolet Co., shall, within sixty (60) days after this order becomes final, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF

EXXON CORPORATION, ET AL.

FINAL ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 8934. Complaint, July 18, 1973—Dismissal Order, Sept. 16, 1981

This order dismisses without prejudice the Commission's July 18, 1973 complaint charging eight major oil companies with maintaining and reinforcing a non-competitive market structure in the refining of crude oil into petroleum products. Upon agreement between complaint counsel and respondents that the matter cannot be resolved in the foreseeable future, the Commission concluded that pending proceedings were not in the public interest. The order also vacates the ALJ's January 5, 1977 Protective Order, as modified by the ALJ's Orders of April 23 and June 5, 1979; and bars the Commission from disclosing documents and information protected by these orders to any unauthorized party, or pursuant to an FOIA request. Upon dismissal of the complaint, the agency is additionally required to place respondents' documents, received pursuant to discovery in Docket 8934, in the physical possession of a designated custodian to be accorded the protections provided by Section 21 of the FTCA.

Appearances

For the Commission: *John A. Woodstock, Marc G. Schildkraut, Daniel P. Ducore, Arthur J. Nolan, Rhett R. Krulla, David C. Dickey, Gregory M. Fox, James M. Giffin, Oleta J. Harden, Eugene Higgins, Charles A. James, Jeff Jacobovitz, Patrick J. O'Brien, Mark L. Rosenberg,* and *Constance M. Salemi.*

For the respondents: *Robert E. Jordan III, Richard H. Porter* and *F. Michael Kail, Steptoe & Johnson,* Washington, D.C., and *Edward E. Vaill,* in-house Litigation Counsel, Los Angeles, Calif., for Atlantic Richfield Co., *William Simon* and *Robert G. Abrams, Howrey & Simon,* Washington, D.C., and *Charles W. Mathews,* in-house counsel, Houston, Tex., and *A.P. Lindemann, Jr.,* in-house counsel, New York City, for Exxon Corp., and *John E. Bailey,* Assistant General Counsel, and *Morgan L. Copeland,* in-house counsel, Houston, Tex., for Gulf Oil Corp., and *Andrew J. Kilcarr* and *Vincent Tricarico, Donovan Leisure Newton & Irvine,* Washington, D.C., and *Charles F. Rice,* in-house counsel, New York City, for Mobil Oil Corp., and *William R. Jentes* and *Tefft W. Smith, Kirkland & Ellis,* Chicago, Ill., and *M.J. Keating, Paula J. Clayton,* and *Jeffrey R. Harder,* in-house counsel, Chicago, Ill., for Standard Oil Co. (Indiana), and *George A. Sears, Richard W. Odgers,* and *Roland W. Selman, Pillsbury, Madison & Sutro,* San Francisco, Calif., for Standard Oil

Co. of California, and *J. Wallace Adair* and *Frederick S. Frei, Howrey & Simon,* Washington, D.C., and *Chester D. Walz, Jr.,* in-house counsel, Houston, Tex., for Shell Oil Co., and *Milton Handler, Milton J. Schubin,* and *Barry Willner, Kaye, Scholer, Fierman, Hays & Handler,* New York City, and *Robert D. Wilson* and *Sharon S. Jacobs,* in-house counsel, White Plains, N.Y., for Texaco, Inc.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondents have violated and are now violating Section 5 of the Federal Trade Commission Act (15 U.S.C. 45), and believing that a proceeding by it in respect thereof is in the public interest, hereby issues this complaint charging as follows:

I. RESPONDENTS

1. Respondent Exxon Corporation (Exxon) is a corporation organized, existing and doing business under the laws of the State of New Jersey with its principal office and place of business at 1251 Avenue of the Americas, New York, New York. Exxon is the nation's largest corporation with assets in 1972 exceeding $21.5 billion. In 1972 its sales exceeded $20 billion—second in the nation. Exxon is the nation's largest petroleum company.

2. Texaco Inc. (Texaco) is a corporation organized, existing and doing business under the laws of the State of Delaware with its principal office and place of business at 135 East 42nd St., New York, New York. Texaco is the nation's third largest corporation with assets in 1972 exceeding $12 billion. In 1972 its sales exceeded $8.6 billion—eighth in the nation. Texaco is the nation's second largest petroleum company.

3. Gulf Oil Corporation (Gulf) is a corporation organized, existing and doing business under the laws of the State of Pennsylvania with its principal office and place of business at the Gulf Building, Pittsburgh, Pennsylvania. Gulf is the nation's sixth largest corporation with assets in 1972 exceeding $9.3 billion. In 1972, its sales exceeded $6.2 billion—eleventh in the nation. Gulf is the nation's third largest petroleum company.

4. Mobil Oil Corporation (Mobil) is a corporation organized, existing and doing business under the laws of the State of New York with its principal office and place of business at 150 East 42nd St., New York, New York. Mobil is the nation's seventh largest corporation with assets in 1972 exceeding $9.2 billion. In 1972 its

sales exceeded $9.1 billion—seventh in the nation. Mobil is the nation's fourth largest petroleum company.

5. Standard Oil Company of California (Standard of California) is a corporation organized, existing and doing business under the laws of the State of Delaware with its principal office and place of business at the Standard Oil Building, 225 Bush St., San Francisco, California. Standard of California is the nation's ninth largest corporation with assets in 1972 exceeding $8 billion. In 1972 its sales exceeded $5.8 billion—twelfth in the nation. Standard of California is the nation's fifth largest petroleum company.

6. Standard Oil Company (Indiana) (Standard of Indiana) is a corporation organized, existing and doing business under the laws of the State of Indiana with its principal office and place of business at 910 South Michigan Ave., Chicago, Illinois. Standard of Indiana is the nation's twelfth largest corporation with assets in 1972 exceeding $6.1 billion. In 1972 its sales exceeded $4.5 billion—fifteenth in the nation. Standard of Indiana is the nation's sixth largest petroleum company.

7. Shell Oil Corporation (Shell) is a corporation organized, existing and doing business under the laws of the State of Delaware with its principal office and place of business at One Shell Plaza, Houston, Texas. Shell is the nation's fourteenth largest corporation with assets in 1972 exceeding $5.1 billion. In 1972 its sales exceeded $4 billion—seventeenth in the nation. Shell is the nation's seventh largest petroleum company.

8. Atlantic Richfield Company (Atlantic Richfield) is a corporation organized, existing and doing business under the laws of the State of Pennsylvania with its principal office and place of business at 717 Fifth Ave., New York, New York. Atlantic Richfield is the nation's sixteenth largest corporation with assets in 1972 exceeding $4.6 billion. In 1972 its sales exceeded $3.3 billion—twenty-fifth in the nation. Atlantic Richfield is the nation's eighth largest petroleum company.

9. Other petroleum companies, not named as respondents herein, have engaged in some of the acts and practices alleged herein and have contributed to the noncompetitive structure of the petroleum industry, as hereinafter alleged.

II. THE INDUSTRY

10. The petroleum industry is comprised of five basic levels of operation: the exploration and production of crude oil, the transportation of crude oil, the refining of crude oil, the transportation of

refined petroleum products and the marketing of refined petroleum products. All respondents are vertically integrated companies and operate at all of the above-mentioned levels.

III. RELEVANT MARKETS

11. For purposes of this complaint, the relevant market is the refining of crude oil into petroleum products and relevant submarkets thereof.

12. For purposes of this complaint, the relevant geographic market encompasses the Eastern and Gulf Coast states, together with parts of the Mid-Continent area of the United States, and relevant submarkets thereof, in which respondents' conduct in maintaining a noncompetitive market, as alleged herein, has operated to prevent free and open competition.

IV. JURISDICTION

13. Except to the extent that competition has been hindered, frustrated, lessened and eliminated by the acts and practices alleged in this complaint, each of the respondents is in substantial competition with each and all of the other respondents and with other petroleum refiners in the refining of crude oil into petroleum products.

14. In the course and conduct of their business, respondents cause and have caused crude oil and petroleum products to be shipped from their facilities in various States to locations in various other States of the United States, and at all times mentioned, maintain and have maintained, a substantial course of trade in crude oil and petroleum products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

V. ACTS AND PRACTICES

15. Since at least 1950, respondents, individually and with each other, have maintained and reinforced a noncompetitive market structure in the refining of crude oil into petroleum products in the relevant market.

16. In maintaining and reinforcing the aforesaid noncompetitive market structure, respondents, individually and with each other, have been and are engaged in, among others, the following acts and practices, some of which, *inter alia*, control and limit the supply of crude oil to independent refiners and potential entrants into refining:

(a) Pursuing a common course of action to abuse and exploit the ownership and control of the means of gathering and transporting crude oil to refineries;

(b) Pursuing a common course of action in participating in restrictive or exclusionary transfers of ownership of crude oil among themselves and with other petroleum companies;

(c) Pursuing a common course of action of adhering to a system of posted prices leading to the maintenance of an artificial level for the price of crude oil;

(d) Entering into numerous processing arrangements with independent refiners thereby expanding their control over refining capacity and limiting the availability of refined petroleum products to independent marketers, and potential entrants into marketing;

(e) Pursuing a common course of action of accomodating the needs and goals of each other in the production, supply and transportation of crude oil to the exclusion or detriment of independent refiners and potential entrants into refining;

(f) Pursuing a common course of action of using their vertical integration to keep profits at the crude level artificially high and profits at the refining level artificially low thereby raising entry barriers to refining;

(g) Pursuing a common course of action to abuse and exploit the ownership and control of the means of transporting refined petroleum products from refineries;

(h) Pursuing a common course of action of accomodating the needs and goals of each other in the transportation and marketing of refined petroleum products to the exclusion or detriment of independent marketers and potential entrants into marketing.

17. Respondents have exercised monopoly power in the refining of petroleum products in the relevant markets by engaging in, among others, the following acts and practices:

(a) Pursuing a common course of action in refusing to sell gasoline and other refined petroleum products to independent marketers;

(b) Pursuing a common course of action in participating in restrictive or exclusionary exchanges and sales of gasoline and other refined petroleum products among themselves and with other petroleum companies;

(c) Pursuing a common course of action in their marketing practices thereby avoiding price competition in the marketing of refined petroleum products.

18. Respondents, individually and with each other, have followed and do follow common courses of action in accomodating the needs and goals of each other throughout the petroleum industry thereby increasing the interdependence of respondents and reducing respondents' incentive to behave competitively.

VI. EFFECTS

19. Respondents' acts and practices have had, among others, the following effects:

(a) Respondents have established and maintained artificial price levels for the goods and services rendered at each level of the petroleum industry.

(b) Barriers to entry into the refining of petroleum products have been raised, strengthened and otherwise increased.

(c) Actual and potential competition at all levels of the petroleum industry has been hindered, lessened, eliminated and foreclosed.

(d) The normal response of supply to demand for refined petroleum products has been distorted. Shortages of petroleum products have fallen with particular severity on sections of the country where independent refiners and marketers are primarily located.

(e) The burden of shortages of petroleum products has been forced to fall with particular severity on those sections of the United States, east of the Rockies, where independent refiners and marketers are concentrated, thereby eliminating the most significant source of price competition in the marketing of petroleum products and threatening the competitive viability and existence of the independent sector.

(f) Independent marketers have been forced to close retail outlets and significantly curtail retail operations because of their inability to obtain refined product.

(g) Respondents have obtained profits and returns on investments substantially in excess of those that they would have obtained in a competitively structured market.

(h) American consumers have been forced to pay substantially higher prices for petroleum and petroleum products than they would have had to pay in a competitively structured market.

VII. VIOLATIONS

20. The aforesaid acts and practices constitute a combination or agreement to monopolize refining of crude oil into petroleum

products in the relevant markets in violation of Section 5 of the Federal Trade Commission Act.

21. Through the aforesaid acts and practices respondents have maintained monopoly power over the refining of crude oil into petroleum products in the relevant markets in violation of Section 5 of the Federal Trade Commission Act.

22. Respondents, individually and with each other, have restrained trade and maintained a noncompetitive market structure in the refining of crude oil into petroleum products in the relevant markets in violation of Section 5 of the Federal Trade Commission Act.

Order

I.

On April 24, 1981, the Commission issued an order requesting that the parties brief four specific issues relevant to the status of this case.[1] The order also stayed all proceedings in this matter pending further order by the Commission.

On June 23, 1981, complaint counsel and respondents simultaneously filed initial memoranda in response to the Commission's April 24, 1981, Order. Responsive pleadings were subsequently filed by complaint counsel on July 9, 1981, and by respondents on July 23, 1981.

II.

On July 18, 1973, the Commission issued the complaint in this matter pursuant to Section 5 of the Federal Trade Commission Act (15 U.S.C. 45).

On October 31, 1980, complaint counsel filed their "First Statement of Issues, Factual Contentions and Proof," pursuant to a March 12, 1980, Order by Administrative Law Judge James P. Timony. In the interim, the Commission denied motions by respondents to withdraw this matter from adjudication pending the filing of complaint counsel's pleading. *See* June 30, 1980, Order. After reviewing complaint counsel's statement, ALJ Timony concluded in a January 23, 1981, Order that ". . . no issues have been eliminated

[1] The parties were requested to: (1) provide a proposed schedule setting forth dates for the conclusion of all additional discovery, the filing of all pretrial motions, the filing of all pretrial briefs, and the commencement and conclusion of trial; (2) discuss any procedures by which these proceedings may be expedited and/or resolved, in whole or in part; (3) discuss the extent to which the allegations of liability can be further narrowed or consolidated, in whole or in part; and (4) discuss whether there are any other factors bearing on the public interest which the Commission should now address in connection with the status of these proceedings.

from the Pretrial Discovery Statement of February 22, 1974, and the Order Stating Issues of January 9, 1976." Thereafter, on February 2, 1981, respondent Texaco Inc. moved that the Commission dismiss this proceeding in light of ALJ Timony's January 23, 1981, Order.

The Commission's April 24, 1981, Order specifically raised its concern that the issues of fact and law in this case did not appear to have been sufficiently narrowed to accomplish a timely and meaningful resolution of this matter. None of the memoranda filed by the parties pursuant to this Order, however, has presented any evidence to assuage the Commission's initial concerns regarding the status of this matter. Complaint counsel's "best case" model contemplates the filing by each party of three additional Statements of Contentions and Proof over the next thirty-three months and a potential target of approximately three years before trial would commence. (Complaint Counsel's Response at 26–31.) Moreover, complaint counsel state that any further narrowing of the issues at this time would be "arbitrar[y]" and "irresponsible." (Complaint Counsel's Response at 39.) Finally, complaint counsel predict that ". . . it [is] unlikely that continuation of the *Exxon* case can accomplish 'a timely and meaningful resolution' of the violations described in Complaint Counsel's First Statement. Complaint counsel therefore recommend that this matter be dismissed, without prejudice . . . ." (Complaint Counsel's Response at 6.)

Respondents, while specifically declining to address the first three requests of the Commission's April 24, 1981, Order, assert that the proceeding is not in the public interest and therefore should be terminated. (Respondents' Joint Submission at 1–4.) Respondents state that ". . . only a fraction of the discovery that will be necessary to prepare this case for trial has been completed" (Respondents' Joint Submission at 40) and that a "realistic assessment suggests that the case is far closer to its beginning than to its end." (Respondents' Joint Submission at 39.) Respondents conclude that "Docket 8934 should be dismissed." (Respondents' Joint Submission at 49.)

Thus, both complaint counsel and respondents agree that completion of discovery is at least several years away, that this matter cannot be resolved in the foreseeable future and that the complaint should be dismissed. In addition, the parties have agreed that the ALJ's January 5, 1977, Protective Order, as modified by the ALJ's Orders of April 23 and June 5, 1979, be vacated. This order requires that the documents, obtained during discovery and designated as confidential, be returned at the conclusion of the proceeding.[2]

[2] In an Agreement Between the Parties, filed with the Commission on June 23, 1981, respondents waive the

(Continued)

III.

The Commission has considered the briefs of the parties, submitted in response to its April 24, 1981, Order, together with other filings in this proceeding, submitted or referred to by the parties, specifically including Complaint Counsel's First Statement of Issues, Factual Contentions and Proof, dated October 31, 1980, and the Counterstatements of Respondents, dated March 30, 1981, and has concluded that further proceedings in Docket No. 8934 are not in the public interest. While the length or complexity of litigation does not, in itself, constitute a basis for dismissal, the circumstances of this proceeding, including the limited progress of the litigation, call for this result. This case has been in pre-trial for eight years and unless the issues are substantially narrowed it may be well over three years before trial commences. While the Commission has the authority to remove this matter from adjudication and narrow the issues on its own initiative, such action would be impracticable under the circumstances. Therefore, without reaching the merits of this case, we believe the proper course for the Commission is to dismiss the pending proceedings and to preserve the option of addressing any anticompetitive problems in this industry in more focused proceedings. Accordingly, *it is ordered*, that this matter be dismissed, without prejudice.

It is further ordered, That the Agreement Between the Parties, filed with the Commission on June 23, 1981, is approved by the Commission and that pursuant thereto, the ALJ's Protective Order of January 5, 1977, as modified by the ALJ's Orders of April 23 and June 5, 1979, is vacated. The documents and information covered by these orders will be treated as follows:

1. Except as permitted or authorized by the Federal Trade Commission Act, as amended by the Federal Trade Commission Improvements Act of 1980 (Pub. Law No. 96–252), and the Commis-

---

ALJ's January 5, 1977 Protective Order, as modified, provided that the Commission dismisses the complaint and that the Commission's order of dismissal contains the following assurances of confidentiality: (1) except as permitted or authorized by the FTC Act, as amended, the Commission shall not disclose documents received from respondents, or information contained therein, to any person who is not an employee of the Commission; (2) th Commission shall not disclose the documents or information pursuant to any request under the Freedom Information Act; and (3) upon dismissal of the complaint, the Commission shall designate a custodian who wi maintain physical possession of the documents, all of which shall be treated as if they had been designat confidential by respondents at the time of submission and as if they had been duly subpoenaed subject to applical provisions of the FTC Improvements Act, and the documents shall be protected as provided by Section 21 of FTC Act and the Commission's implementing Rules of Practice. The agreement also states that respondents do waive "any restriction imposed by law on the Commission's use or disclosure of [the] . . . documents information, . . . the right to seek the return of any or all of such documents, or the right to seek additi protection for . . . [the] documents, or information." The documents and information subject to the agreemen exempt from mandatory public disclosure under applicable statutes and case law. See 5 U.S.C. 552.

sion's implementing rules, the Commission shall not disclose documents in the possession of the Commission which were received from respondents, or information contained therein, to any person who is not an employee of the Commission. The Commission shall obtain suitable assurances from all employees afforded access to respondents' documents not to disclose such documents or the information contained therein, except as authorized.

2. The Commission shall not disclose the documents or information contained therein pursuant to any request under the Freedom of Information Act.

3. Upon dismissal of the complaint, the Commission shall designate a custodian pursuant to Section 21 of the Federal Trade Commission Act, as added by Section 13 of the Federal Trade Commission Improvements Act of 1980. The documents in the possession of the Commission which were received from respondents pursuant to discovery in Docket 8934 shall be placed in the physical possession of the custodian, and shall be treated as if they had been designated confidential by respondents at the time of submission and as if duly subpoenaed subject to provisions of the Improvements Act, and shall thereafter be protected as provided by Section 21 and pursuant to the regulations implementing the Act promulgated by the Commission.

SEPARATE STATEMENT OF COMMISSIONER PERTSCHUK

I have voted to dismiss this case for one reason—as it now stands, it cannot serve a useful public interest. The number and complexity of issues raised by the complaint, the resources and zeal of teams of awyers from eight major companies, and the need for massive iscovery on all sides have made the case unmanageable and have owed its progress to a crawl. This unfortunate state of affairs, and e Commission's resulting decision to abandon the case, do not cessarily mean that there have not been major problems in the npetitive structure and performance of the oil industry. For ımple, particular areas of concern appear to include pipeline ıership and allocation, joint ventures, and the competitive dvantages of small independent companies. In addition, there indications that mergers of competing oil companies may occur ? frequently in the future.

there are such competitive problems, however, we are much

more likely to reach them by focusing on a narrower set of issues in any future proceeding. This case, begun in 1973 and spanning over four administrations, both Democratic and Republican, and five Chairmen, has represented far and away the major commitment of the Commission to this key industry. Conducting it has obligated many of our best lawyers and has prevented the Commission from considering other, narrower oil industry investigations and possible enforcement actions. I have reluctantly concluded that the Commission's enforcement discretion should be exercised by committing our resources to initiatives more likely to provide benefits to the public. Retaining the documents obtained over the history of the case and taking advantage of the expertise gained by our staff concerning every level and significant practice of this industry will help us do just that.