UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA c/o Department of Justice Antitrust Division Washington, D.C. 20530, Plaintiff, v. Harold A. Honickman, 66 Bayview Drive Loveladies, NJ 08008, Defendant.	Civ. No.

COMPLAINT FOR CIVIL PENALTY FOR VIOLATION OF PREMERGER REQUIREMENTS OF HART-SCOTT-RODINO ACT

The United States of America, plaintiff, by its attorneys, acting under the direction of the Attorney General of the United States and at the request of the Federal Trade Commission, brings this civil action to obtain monetary relief in the form of a civil penalty against the defendant named herein, and alleges as follows:

JURISDICTION AND VENUE

1. This complaint is filed and these proceedings are instituted under Section 7A of the Clayton Act, 15 U.S.C. § 18a, commonly known as Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("the HSR Act" or "the Act"), to recover a civil penalty for defendant's violation of the premerger notification and waiting period requirements of the HSR Act.

2. This Court has jurisdiction over the person and over the subject matter of this action pursuant to 15 U.S.C. § 18a(g) and 28 U.S.C. §§ 1331, 1337(a), 1345, and 1355.

3. Venue in this District is proper by virtue of defendant's consent, in the Stipulation relating hereto, to the maintenance of this action and entry of the Final Judgment in this District.

THE DEFENDANT

4. Harold A. Honickman ("Honickman"), an individual, is made a defendant herein. Defendant Honickman resides at 66 Bayview Drive, Loveladies, NJ 08008.

5. At all times relevant to this complaint, defendant Honickman, through his control of Pepsi-Cola Bottling Company of New York, Inc., Canada Dry Bottling Company of New York, and other entities, was engaged in the production, distribution and sale of carbonated soft drinks in various geographic areas, including New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, and Washington, D.C. In the New York Metropolitan Area, Honickman, through his control of Pepsi-Cola Bottling Company of New York, Inc., and Canada Dry Bottling Company of New York, is engaged in the production, distribution and sale of the PepsiCo and Canada Dry lines of carbonated soft drinks.

6. At all times relevant to this complaint, defendant Honickman, through his control of various entities engaged in the production, distribution and sale of carbonated soft drinks, had total assets or annual net sales in excess of $100 million.

7. At all times relevant to this complaint, defendant Honickman was engaged in commerce, or in activities affecting commerce, within the meaning of Section 1 of the Clayton Act, 15 U.S.C. § 12, and Section 7A(a)(1) of the Act, 15 U.S.C. § 18a(a)(1).

OTHER RELEVANT ENTITIES

8. Seven-Up Brooklyn Bottling Company, Inc. ("Brooklyn Seven-Up"), at the time of the acquisition of its assets by defendant Honickman, was a New York corporation. At all times relevant to this complaint prior to the acquisition of its assets by defendant Honickman, Brooklyn Seven-Up was engaged in the production, distribution and sale of carbonated soft drinks, including Seven-Up and Royal Crown products, in the New York Metropolitan Area. At all times relevant to this complaint, Brooklyn Seven-Up had total assets or annual net sales in excess of $10 million.

9. Pepsi-Cola Bottling Company of New York, Inc., at the time of the acquisition of assets of Brooklyn Seven-Up, was a New York corporation. On or about December 31, 1987, this entity was merged into the Pepsi-Cola Bottling Company of New York, Inc., a Pennsylvania corporation (hereinafter individually or collectively referred to as "Pepsi New York"). At all times relevant to this complaint, Pepsi New York was engaged in the production, distribution and sale of carbonated soft drinks, including the PepsiCo line of products, in the New York

Metropolitan Area. At all times relevant to this complaint, Honickman controlled Pepsi New York for purposes of the HSR Act.

10. Canada Dry Bottling Company of New York ("Canada Dry New York") is a New York limited partnership. At all times relevant to this complaint, Canada Dry New York was engaged in the production, distribution and sale of carbonated soft drinks, including Canada Dry products, in the New York Metropolitan Area. At all times relevant to this complaint, defendant Honickman controlled Canada Dry New York for purposes of the HSR Act.

11. Canada Dry Delaware Valley Bottling Company ("Canada Dry Delaware Valley") is a Pennsylvania corporation. At all times relevant to this complaint, Canada Dry Delaware Valley was engaged in the production, distribution and sale of carbonated soft drinks in Philadelphia, Pennsylvania, and other areas. At all times relevant to this complaint, defendant Honickman controlled Canada Dry Delaware Valley for purposes of the HSR Act.

12. L. I. Acquisition Company ("LIA") was a partnership formed on or about July 30, 1987, by four corporate partners. Brooklyn Beverage Acquisition Corp. ("BBAC") was the managing partner of LIA with the right to manage the partnership's business and affairs. Defendant Honickman held all of the voting stock of BBAC. For purposes of the HSR Act, Honickman controlled BBAC. The sole shareholder in the second partner was Jeffrey Honickman, defendant's son. The sole shareholder in the third partner was Shirley Honickman,

defendant's daughter. The sole shareholder in the fourth partner was Lance T. Funston, a business associate of defendant.

13. Melville Beverage Partners Limited Partnership ("Melville") was a partnership formed on or about July 31, 1987. Defendant Honickman was the only general partner of Melville. He also was the managing partner of Melville with the right to manage the partnership's business and affairs. There were six limited partners of Melville: Jeffrey Honickman, defendant's son; Shirley Honickman, defendant's daughter; and four employees of companies controlled by defendant Honickman.

14. The Berriman Cozine Corporation ("Berriman") was a New York corporation formed on or about July 27, 1987. Steven Korman, the brother-in-law of defendant Honickman, was Berriman's sole shareholder. Korman acquired his shares in Berriman for approximately $15,000.

THE HART-SCOTT-RODINO ACT AND RULES

15. The HSR Act provides that, if the Act's commerce and size-of-person tests are met, no person shall acquire, directly or indirectly, any assets of any other person, unless both persons first file notification and report forms with the Federal Trade Commission and the Department of Justice, and observe a waiting period, if "as a result of such acquisition, the acquiring person would hold . . . an aggregate total amount of . . . assets of the acquired person in excess of $15,000,000." 15 U.S.C. § 18a(a). The premerger notification rules, 16 C.F.R. Parts 800 et seq., define "hold" to mean "beneficial ownership,

whether direct, or indirect through fiduciaries, agents, controlled entities or other means." Rule 801.1(c), 16 C.F.R. § 801.1(c).

16. Rule 801.13(b), 16 C.F.R. § 801.13(b), provides that all of the assets acquired from the acquired person "shall be assets held as a result of the acquisition" even if the assets are acquired in separate acquisitions as long as they occur within the 180-day period described in subparagraph (b)(2) of Rule 801.13.

17. Rule 801.90, 16 C.F.R. § 801.90, provides that "[a]ny transaction(s) or other device(s) entered into or employed for the purpose of avoiding the obligation to comply with the requirements of the [HSR] act shall be disregarded, and the obligation to comply shall be determined by applying the [HSR] act and these rules to the substance of the transaction."

DESCRIPTION OF THE TRANSACTION

18. On or shortly after July 31, 1987, defendant Honickman employed LIA, Melville, and Berriman as devices for the purpose of avoiding his obligation to comply with the requirements of the HSR Act in acquiring assets of Brooklyn Seven-Up that were valued at more than $15 million.

19. On or shortly after July 31, 1987, Brooklyn Seven-Up was sold to four entities: R.C. Acquisition Company, LIA, Melville, and Berriman.

20. R.C. Acquisition Company ("RCAC") acquired Brooklyn Seven-Up's franchises for RC Cola and other Royal Crown

products for the New York Metropolitan Area. This acquisition occurred on or shortly after July 31, 1987, and was valued at $200,000. Honickman did not control RCAC and, for purposes of the HSR Act, he did not hold the assets involved in this transaction.

21. LIA, Melville, and Berriman acquired all of the assets of Brooklyn Seven-Up that were not acquired by RCAC.

THE LIA DEVICE

22. On or shortly after July 31, 1987, LIA acquired certain assets of Brooklyn Seven-Up for approximately $8.8 million. These assets included soft drink franchises, vehicles, vending machines, and other equipment. At the time of its formation, LIA was capitalized with $150,000.

23. BBAC, which was controlled by defendant Honickman, was the managing partner of LIA. As managing partner, BBAC had broad discretion to manage the partnership and the partnership's assets. According to the partnership agreement, the managing partner had "complete authority and discretion in the management and operation of the business and affairs of the partnership." The managing partner could be changed only through unanimous vote of the partnership. Thus, for Honickman to have been relieved of his power to manage the partnership, it would have been necessary for him to agree to his own removal. After the acquisition of assets of Brooklyn Seven-Up, LIA was to be converted to a limited partnership with all partners other than BBAC becoming limited partners.

24. All or virtually all of the consideration for the $8.8 million purchase of the Brooklyn Seven-Up assets by LIA was provided or guaranteed by Canada Dry New York, which is controlled by Honickman. No other partner put at risk any money beyond its contribution to the partnership at the time of its formation.

25. As the sole voting shareholder of BBAC, which was the managing partner of LIA, defendant Honickman managed the assets of LIA. Defendant Honickman intended to integrate Brooklyn Seven-Up assets acquired by LIA into the operations of Pepsi New York and Canada Dry New York, companies that he controlled, and operate these assets for the benefit of his soft drink operations.

THE MELVILLE DEVICE

26. On or shortly after July 31, 1987, Melville acquired certain assets of Brooklyn Seven-Up for approximately $4 million. These assets included a soft drink production facility located in Melville, New York. At the time of its formation, the Melville partnership was capitalized with $50,000.

27. Canada Dry New York, which was controlled by Honickman, provided the $4 million with which Melville acquired assets from Brooklyn Seven-Up. No other partner put at risk any money beyond his or her contribution to the partnership at the time of its formation.

28. As security for its loan, Canada Dry New York took back a mortgage on the property that Melville acquired from

Brooklyn Seven-Up. The property was leased to LIA. As such, it was to be operated by defendant Honickman, as the sole voting shareholder of the managing partner of LIA. The lease payments by LIA (a partnership managed by defendant Honickman) to Melville (a partnership also managed by defendant Honickman) were used to pay back the mortgage held by Canada Dry New York (a corporation controlled by defendant Honickman).

29. As managing partner of Melville, defendant Honickman managed the assets of Melville. Defendant Honickman intended to integrate Brooklyn Seven-Up assets acquired by Melville into the operations of Pepsi New York and Canada Dry New York, companies that he controlled, and operate these assets for the benefit of his soft drink operations.

THE BERRIMAN DEVICE

30. On or shortly after July 31, 1987, Berriman acquired certain assets from Brooklyn Seven-Up for approximately $5 million. These assets included a distribution facility located in Brooklyn, New York.

31. The entire $5 million purchase price for the Brooklyn Seven-Up assets acquired by Berriman was borrowed from Continental Bank. In deciding to make the loan, Continental evaluated the creditworthiness of Honickman and his companies; Continental did not evaluate the creditworthiness of Korman or Berriman.

32. As security for its loan, Continental took back a mortgage on the acquired property. The property was leased to

LIA (a partnership managed by defendant Honickman). Berriman assigned the rights under the lease to Continental. The lease included a put option allowing the lessor to require that the lessee buy the property for an amount specified in the lease. The rights assigned to Continental by Berriman included the right to exercise the put option. As a result, Continental had the right to require LIA to purchase the property.

33. Canada Dry Delaware Valley, which was controlled by defendant Honickman, guaranteed LIA's obligation to pay the rent pursuant to the lease and guaranteed LIA's obligation to acquire the property if the bank were to exercise the put option. As sole shareholder of the managing partner of LIA, defendant Honickman managed the property.

34. Defendant Honickman intended to integrate assets acquired from Brooklyn Seven-Up by Berriman into the operations of Pepsi New York and Canada Dry New York, companies that he controlled, and to operate these assets for the benefit of his soft drink operations.

SUBSEQUENT DEVELOPMENTS

35. On or about December 13, 1988, in an attempt to avoid antitrust litigation with the Commission over the legality of his acquisition of assets of Brooklyn Seven-Up, defendant Honickman sold his interest in LIA to LTF Brooklyn, Inc. The LIA partnership was dissolved.

36. On November 2, 1989, the Federal Trade Commission issued an administrative complaint against defendant Honickman

charging that his 1987 acquisition of assets of Brooklyn Seven-Up resulted in a substantial lessening of competition in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. On July 25, 1991, the Federal Trade Commission accepted a consent agreement with defendant Honickman and entered a decision and order settling the charges contained in the Commission's administrative complaint issued against him.

VIOLATION ALLEGED

37. Defendant Honickman employed LIA, Melville and Berriman as devices for the purpose of avoiding his obligation to comply with the requirements of the HSR Act within the meaning of Rule 801.90, 16 C.F.R. § 801.90.

38. Applying the Act and Rules to the substance of the transaction, as is required by Rule 801.90, 16 C.F.R. § 801.90, defendant Honickman acquired and held an aggregate total amount of Brooklyn Seven-Up assets in excess of $15 million on or shortly after July 31, 1987, because:

(a) Honickman held approximately $8.8 million worth of Brooklyn Seven-Up assets as a result of the acquisition by LIA described above;

(b) Honickman held approximately $4 million worth of Brooklyn Seven-Up assets as a result of the acquisition by Melville described above; and

(c) Honickman held approximately $5 million worth of Brooklyn Seven-Up assets as a result of the acquisition by Berriman described above.

39. The HSR Act and Rules required defendant Honickman to file premerger notification forms and observe the Act's waiting period before acquiring Brooklyn Seven-Up assets worth in the aggregate in excess of $15 million.

40. Defendant Honickman did not comply with the notification and waiting period requirements of the Act before the acquisitions described above were made.

41. Defendant Honickman was in continuous violation of the HSR Act each day during the period beginning on or shortly after July 31, 1987, and ending on or about December 13, 1988.

42. Section 7A(g)(1) of the Clayton Act, 15 U.S.C. § 18a(g)(1), provides that any person who fails to comply with the HSR Act shall be liable to the United States for a civil penalty of not more than $10,000 for each day during which such person is in violation of the HSR Act.

PRAYER

WHEREFORE, plaintiff prays:

1. That the Court adjudge and decree that defendant's acquisition of more than $15 million of Brooklyn Seven-Up assets on or shortly after July 31, 1987, was in violation of the HSR Act, 15 U.S.C. § 18a, and that defendant was in violation of the HSR Act each day during the period beginning on or shortly after July 31, 1987, and ending on or about December 13, 1988;

2. That defendant be ordered to pay to the United States Treasury an appropriate civil penalty provided by Section 7A(g)(1) of the Clayton Act, 15 U.S.C. § 18a(g)(1);

3. That plaintiff have such other and further relief as the Court shall deem just and proper; and

4. That the Court award plaintiff its costs of this suit.

Dated: October 30, 1992.

FOR PLAINTIFF UNITED STATES OF AMERICA:

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