CT - 89/2

COMPETITION TRIBUNAL

IN THE MATTER OF an Application by the Director of Investigation and Research under Sections 79 and 77 of the Competition Act, R.S.C. 1985, c. C-34 as amended;

AND IN THE MATTER OF The NutraSweet Company

B E T W E E N :

The Director of Investigation and Research

Applicant

- and -

The NutraSweet Company

Respondent

RESPONSE

The Respondent responds as follows to the Statement of Grounds and Material Facts set out at pages 3 to 33 of the Application by the Director of Investigation and Research as particularized in part by letter dated June 22, 1989 ("Application").

1. As to the whole of the Application the Respondent says as follows:

(a) The Respondent currently sells most of the aspartame sold in Canada by reason of the following facts:

(i) The Respondent made important inventions relating to aspartame and as a result enjoyed patent protection giving it the exclusive right to sell aspartame in Canada until July, 1987.

(ii) Until the Respondent introduced aspartame into Canada in 1981 aspartame was not sold at all in Canada. In addition to its continuous research and development activities relating to aspartame, including the studies and testing necessary to obtain approvals from health authorities in Canada and other countries for the use of aspartame as an ingredient in various products, the Respondent has worked and promoted aspartame intensively, at very considerable expense, in order to establish a demand for aspartame and to convince potential customers to switch to aspartame from other competitive sweeteners they had traditionally used. None of the Respondent's aspartame competitors has committed resources to the creation and continuing enlargement of the demand for aspartame in Canada.

(iii) The Respondent has been more effective than competing suppliers of aspartame in serving the interests of customers, and continually strives to attract and keep those customers by offering a better quality product, better service, better customer support and better value in every respect.

The Respondent's success in the marketing of aspartame in Canada is due solely to its innovation, its risk-taking and its superior performance. It is not attributable to the existence of significant market power or to the use of market power to coerce customers or exclude others, as alleged by the Applicant, because none of those things exist or have occurred.

(b) The Respondent functions in a competitive environment, the basic features of which include the following:

(i) In addition to the many competing sweeteners currently available to customers, many large corporate enterprises around the world devote very substantial resources to research and development relating to sweeteners. This has led and will continue to lead to new and improved sweeteners being made available in the market.

(ii) There are several manufacturers of aspartame other than the Respondent, all of whom are becoming increasingly successful in the manufacture and sale of aspartame as patents relating to aspartame in various jurisdictions expire. These competitive forces will continue to intensify, particularly as the Respondent's United States patent approaches expiry in 1992. All such manufacturers can sell in Canada as easily, or with the same difficulty, as can the Respondent. In fact it is easier for them to do so because the Respondent's marketing efforts have educated a significant portion of the sweetener demand to the competitiveness of aspartame.

(iii) Entry into the manufacture of aspartame is relatively easy.

(iv) Many of the Respondent's customers are large enterprises and most are sophisticated buyers of sweeteners. They can readily choose and shift among competing sweeteners and sweetener suppliers.

(v) Aspartame prices have steadily decreased for some time and continue to do so in the face of competitive pressures.

(c) The Respondent's terms of supply are freely negotiated with its customers. They serve the legitimate business interests of both the Respondent and its customers. Further, the terms of supply and the short duration of the purchasing commitment leave ample opportunity for competing aspartame and other suppliers to win those customers away from the Respondent should they make superior offerings.

(d) None of the alleged supply practices of which the Applicant complains limits output or otherwise restricts competition. Indeed, the Respondent's terms of supply illustrate just how competitive the market is, and serve to transmit the benefits of that competition directly to customers. What the Applicant alleges as illustrations of customer coercion and exclusionary inducement by the Respondent, as in paragraph 54 of the Application, in reality represent valuable benefits bargained for by customers in order that they may compete more effectively in their own respective markets. They are beneficial forms of competition.

(e) In the market conditions described above, such elements of market power as may exist from time to time are readily contestable and do not warrant intervention by government authority.

Parties (re Application paragraphs 1 and 2)

2. The Respondent admits the allegations contained in paragraphs 1 and 2 of the Application except as to the location of the Respondent's head office, which is Deerfield, Illinois.

Product Market (re Application paragraphs 17 to 29)

3. The Respondent admits the allegations contained in paragraphs 18, 19, 20, 23 and 26 of the Application.

4. The Respondent admits the allegations contained in paragraph 27 of the Application except to say that tabletop sweeteners comprise a significant segment of the demand for sweeteners.

5. The Respondent denies that aspartame constitutes a distinct product market, and that its supply constitutes a class or species of business, which is appropriate for the analysis of competition issues as alleged in paragraphs 17 and 29 of the Application. Market features relevant to an understanding of the product market and, in addition, to the issues of market effects raised in this proceeding, include the following:

   (a) All sweeteners compete with each other in that their respective manufacturers strive to sell them to the same customers and consumers for the same or similar purposes. Elements of that competition include taste, cost, blending attributes with other sweeteners, technical aspects of manufacturing and ingredient performance (e.g. stability, bulk, solubility, effects of heat) and health and safety attributes.

   (b) Many large corporate enterprises around the world including drug manufacturers, chemical manufacturers, food and beverage manufacturers and even sugar manufacturers, engage in extensive research with a view to developing and improving sweeteners of all types and competing for the same demand.

   (c) All of the terms in the Respondent's supply contracts with its customers are freely negotiated with those customers, many of whom are large enterprises and

sophisticated buyers of sweeteners who can readily choose among competing sweeteners.

(d) Consumers have readily available to them, and choose among, products sweetened with sugars, aspartame, and other sweeteners or mixtures of them.

6. As to paragraphs 21, 22 and 28 of the Application, certain classes of consumers may exhibit a strong preference for, or aversion to, one or more particular sweeteners from time to time but this is not relevant to identification of the appropriate product market when a significant portion of consumers are willing to switch among the alternatives.

Geographic Market (re Application paragraphs 30 and 31)

7. The Respondent denies that the relevant geographic market is Canada as alleged in paragraphs 30 and 31 of the Application. All sweeteners, and particularly high potency sweeteners, are readily sold in geographic areas distant from the manufacturing plant because their transportation costs are low. Most sweeteners, including aspartame, produced by any manufacturing facility in the world can be sold competitively in Canada.

Respondent's Alleged Market Power (re Application paragraphs 3, 4, 5(b), 10, 15, 32 to 41, 70 and 75)

8. The Respondent denies that it sells approximately 95% of the aspartame currently used in Canada as alleged in paragraph 41 of the Application. The Respondent further denies that it controls or substantially controls either the supply of aspartame or any market as alleged in paragraphs 3 and 4 of the Application, denies that it holds a "dominant market position" as alleged in paragraph 5(b) of the Application, denies that it is a "major supplier" within the meaning of Section 77 of the Competition Act as alleged in paragraphs 10 and 15 of the Application, and denies that it is "the dominant supplier" as alleged in paragraphs 70 and 75

of the Application. The Respondent specifically denies that it has the power to control price or to exclude competitors.

9. As to paragraphs 32, 34 and 35 of the Application:

(a) The Respondent says that whether a manufacturing plant currently produces only aspartame or, in some cases, whether it even currently produces aspartame at all, is irrelevant to the capability of the plant to produce significant quantities of aspartame.

(b) The Respondent admits that the producers identified in paragraphs 32 and 34 of the Application have the capability to produce aspartame, and says that Tosoh Corporation also produces aspartame. These producers and others may readily expand the production of aspartame in response to any profit opportunities.

10. The Respondent admits paragraph 33 of the Application except to say that Ajinomoto also produces aspartame that is sold outside of North America.

11. As to paragraphs 36 and 37 of the Application the Respondent says that the distributors identified therein, and other distributors, have experience in the supply of aspartame in Canada. The Respondent has no knowledge as to whether or which of the distributors identified in paragraph 37, or other distributors, actively distribute aspartame in Canada at this time, except that it understands that Semmons Taylor does not do so but that Givaudan and Quadra Chemicals do. The Respondent says further that the existence in Canada of several distributors with experience in the distribution of aspartame facilitates sales in Canada by any aspartame manufacturer anywhere in the world.

12. The Respondent repeats paragraphs 1 and 5 hereof.

13. The Respondent admits the allegations contained in paragraphs 38 to 40 of the Application, except to say that it has no specific knowledge of the current volume of demand for aspartame in Canada. Further, it would be quite misleading to regard the current volume of demand for aspartame in Canada as stable. That level of demand should continue to increase with sustained marketing efforts, subject to its also remaining constantly vulnerable to aggressive competition from other existing sweeteners and to new sweetener product developments.

Canadian Patent History (re Application paragraphs 42 to 44)

14. The Respondent admits the allegations contained in paragraphs 42 to 44, except to say that Monsanto's acquisition of Searle occurred as of October 1, 1985.

Regulatory Response in Other Jurisdictions (re Application paragraphs 45 to 49)

15. The Respondent says that what was done by or before regulatory authorities in other jurisdictions, under other laws and in other circumstances, is irrelevant to this proceeding. Paragraphs 45, 46, 48 and 49 of the Application are prejudicial to the fair and expeditious hearing of this matter and ought to be disregarded.

16. The Respondent admits the allegations contained in paragraph 47 of the Application, but says further that its contracts with The Coca-Cola Company and Pepsico Inc. at no time foreclosed competition.

Respondent's U.S. Patent (re Application paragraphs 5(a), 8(c) and 50)

17. The Respondent denies the allegations contained in paragraphs 5(a), 8(c) and 50 of the Application.

Respondent's Terms of Supply

18. As to each of the Respondent's alleged terms of supply the Respondent repeats paragraph 1 of this Response. The Respondent denies that it has coerced any customer into agreeing to any such terms, denies that acceptance by the customer of any of the alleged terms have been conditions for supply, and denies the anticompetitive effects that are alleged in the Application. The Respondent says that all its supply contracts are freely negotiated in a competitive environment and that its terms of supply are efficiency enhancing. More specifically the Respondent says as follows:

(a) **Exclusive Supply Clauses** (re Application paragraphs 5(b), 8(b) 51, 68(b) and 72(b))

and Exclusive Use Clauses (re Application paragraphs 5(b) and 52)

(i) The Respondent admits that several of its customers have agreed, subject to the other terms of their respective contracts which may include meet-or-release clauses, to purchase all of their aspartame requirements from the Respondent for the period covered by the contract. The Respondent denies that these clauses constitute a practice as alleged in paragraph 72 of the Application.

(ii) Exclusive supply or use clauses reflect benefits bargained for and received by customers, including contractual assurances of supply.

(iii) The Respondent renegotiates its contract terms with customers in response to competitive pressures.

(iv) The Respondent denies that many of its customers have agreed to use aspartame produced by the Respondent as the sole sweetener in their products as alleged in paragraph 52 of the Application, but the Respondent admits that such agreements have been made with respect to certain products.

(b) **Volume Discounts** (re Application paragraphs 5(b) and 53(a))
and Volume Incentive Clause (re Application paragraphs 5(b) and 53(b))

(i) The Respondent admits that its agreements with many customers provide for net price reductions in accordance with volumes purchased, and says that such price reductions constitute normal commercial practice in most competitive industries.

(c) **Trade Mark Display Allowance** (re Application paragraphs 5(b), 5(f), 8(a), 9(c), 13, 14, 53(c), 59, 60, 68(a), 69(c), 72(a), 73 and 74)

(i) The Respondent admits that it pays a trade mark display allowance in accordance with each customer's free election on a brand-by-brand basis. The allowance serves to reduce the cost of aspartame to the customer, thereby assisting it to compete in its own market, and compensates the customer for a form of consumer advertising that helps the Respondent to compete in its market.

(ii) The opportunity to display the Respondent's trade mark on their products is beneficial to all customers. In particular it assists small customers and private label customers to compete with more widely known brands by

communicating to consumers that their products contain a high quality sweetener.

(iii) The Respondent requires customers who wish to display the Respondent's trade mark in association with the customer's products, to purchase aspartame for those particular products exclusively from the Respondent in order to protect the value of the goodwill attaching to the trade mark from being depreciated by different sweetener performance resulting from blends, and to protect the validity of the trade mark itself.

(iv) The Respondent denies that its trade mark constitutes a distinct product and that its trade mark display terms constitute tied selling within the meaning of the Competition Act.

(d) **Cooperative Marketing Programs** (re Application paragraphs 5(b), 5(f), 9(d), 53(d) and 69(d))

(i) The Respondent admits that it has a cooperative marketing program, and says that its program reflects normal commercial practice in most competitive industries.

(e) **Meet-or-Release Clauses** (re Application paragraphs 5(d), 9(a), 56(a), 57 and 69(a))

and Extended Release Clause (re Application paragraphs 5(d) and 56(b))

(i) The Respondent admits that some of its contracts contain meet-or-release clauses. These clauses are bargained for by customers and ensure that the customer can maximize its opportunities, even within the duration of a short term contract, to minimize its costs for

aspartame. They also permit alternate suppliers of aspartame to compete for all or part of the customer's demand at all times.

(f) **"Most Favoured Nation" Clauses** (re Application paragraphs 5(e), 9(b), 56(c), 58 and 69(b))

and Price Protection Assurances (re Application paragraph 56(d))

(i) The Respondent admits that some of its contracts contain "most favoured nation" clauses. These clauses are bargained for by customers in order to ensure their opportunity to remain competitive even within the duration of a short term contract.

(ii) The Respondent seeks to ensure that none of its customers suffers an unfair competitive disadvantage as a result of the Respondent's pricing of aspartame, and admits that it assures customers of this. The Respondent admits that it also assures its customers that it will seek to remain competitive at all times.

(iii) The Respondent understands that "most favoured nation" clauses and other forms of price protection assurance are common commercial practice in many competitive industries.

(g) **Free Aspartame** (re Application paragraphs 5(f), 9(e) and 69(e))

(i) The Respondent has on occasion provided limited quantities of aspartame free of charge to some customers. Its purpose in so doing, and the effect, has been to facilitate the introduction of aspartame as a sweetener for new product lines or to facilitate new product introductions. In this way the Respondent helps its customer to expand the demand for aspartame, and

shares with the customer some of the risk associated with such endeavours. It is one of the ways the Respondent competes with manufacturers of sugars and other sweeteners, and is one of the many types of investments made by the Respondent to enlarge the overall demand for aspartame as referred to in paragraph 1(a)(ii) hereof.

(ii) The Respondent has also on occasion paid part of the cooperative marketing allowances earned by customers in the form of aspartame.

World-Wide Contracts (re Application paragraphs 5(a), 8(c), 50, 63 and 68(c))

19. The Respondent admits that it has world-wide contracts with a small number of its customers who have valuable world-wide trade marks. These contracts ensure secure supply for the customer, they ensure consistency in sweetener performance for the customer's products in all areas where they are sold, and they ensure known service levels and product quality for the customer. They further enable the realization of economies in purchasing, production and distribution.

20. The Respondent denies that its world-wide contracts foreclose competition.

Alleged Extension of Respondent's Canadian Patent Position (re Application paragraphs 5(c) and 55)

21. The Respondent denies the allegations contained in paragraphs 5(c) and 55 of the Application.

Alleged Selling Below Cost (re Application paragraphs 5(g) and 61)

22. The Respondent admits that some of the aspartame it supplies to its Canadian customers is manufactured in the United States by the Respondent, but says that most of its Canadian

supply comes from Japan. The Respondent denies each of the other allegations contained in paragraphs 5(g) and 61 of the Application.

Differential Pricing (re Application paragraphs 5(h) and 62)

23. The Respondent denies that it grants or has granted price concessions or other advantages to any customer that are or were not available to competitors of such customer in comparable circumstances, and further denies that its terms of supply with any customer lessen competition.

Market Effects of Terms of Supply (re Application paragraphs 63 to 67)

24. The Respondent repeats the allegations contained in this Response and denies that its terms of supply, either individually or cumulatively, have any of the effects alleged in paragraphs 63 to 67 of the Application.

25. The Respondent says further that any harmful effects that may be found to exist, or to have existed, are or were of a transient nature and are more than offset by efficiency benefits of the acts that may have led to them.

Disposition of this Proceeding (re Application paragraph 77)

26. The Respondent requests that the Application herein be dismissed.

27. The Respondent says that the Competition Tribunal does not have jurisdiction to make the orders applied for in paragraph 77(b), (c), (d), (g), (h) and (i) of the Application.

28. In the event that the Competition Tribunal makes findings that would entitle it to make an Order against the Respondent, the Respondent repeats the allegations contained in

paragraph 25 hereof and requests the Competition Tribunal to exercise its discretion not to make such an Order.

DATED at the City of Toronto in the Province of Ontario this 25th day of July, 1989.

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