

Modifying Order

97 F.T.C.

IN THE MATTER OF

JAMES B. LANSING SOUND, INC.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE  
FEDERAL TRADE COMMISSION ACT*Docket C-1785. Decision, Aug. 24, 1970—Modifying Order, May 20, 1981*

This order reopens the proceeding and modifies the order issued by the Commission on August 24, 1970, 77 F.T.C. 1165, 35 FR 15807, by replacing Paragraph I(2) of the original order with one containing additional language which permits the firm to establish lawful, reasonable and non-discriminatory minimum standards for its dealers and to withhold its products from dealers who fail to maintain those standards.

## REOPENING AND MODIFICATION OF ORDER

By petition of April 10, 1981, respondent James B. Lansing Sound, Inc. ("JBL") requests that Paragraph I(2) of the Commission's order issued against JBL on August 24, 1970 be modified so that the order would no longer prohibit JBL from establishing performance standards for sellers of its loudspeakers. Pursuant to Section 2.51 of the Commission's Rules of Practice the petition was placed on the public record for comment. Attorneys for Best Products Co., Inc. filed the only comment requesting that the Commission deny JBL's petition.

JBL had previously petitioned the Commission to modify the consent order; the Commission denied this petition by order dated August 29, 1978. The Commission found that although there had been a change of law since the order was issued the petition had made an inadequate showing of the need for the requested relief.

Upon consideration of JBL's petition and supporting materials and the public comment, the Commission now finds that JBL has a very small market share and that JBL would likely suffer significant competitive injury unless the order is modified. Further the Commission notes that the proposed modification relates only to a nonprice vertical restraint that the Commission's complaint had not alleged to be a reinforcing mechanism for resale price fixing. For these reasons the Commission has determined that the order should be modified.

Accordingly,

*It is ordered,* That the proceeding be, and it hereby is, reopened.

*It is further ordered,* That the order to cease and desist be, and it hereby is, modified by substituting the following for Paragraph I(2).

2. Preventing or prohibiting any independent dealer or distributor from reselling his products to any person or group of persons,

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business or class of businesses, except as expressly provided herein. This order shall not prohibit James B. Lansing Sound, Inc. from establishing lawful, reasonable, and non-discriminatory minimum standards for its dealers, including standards that relate to promotion and store display, demonstration, inventory levels, service and repair, volume requirements and financial stability; nor shall this order prohibit respondent from requiring its dealers who sell JBL products for resale to make such sales only to dealers who maintain such minimum standards.

Commissioner Pertschuk did not participate. Commissioner Bailey voted in the negative.

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IN THE MATTER OF  
SHAKLEE CORPORATION

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE  
FEDERAL TRADE COMMISSION ACT

*Docket C-2790. Decision, Feb. 18, 1976—Modifying Order, June 1, 1981*

This order reopens the proceeding and modifies the order issued by the Commission on February 18, 1976, 87 F.T.C. 239, 41 FR 11480, by modifying Paragraph I of the Order so as to eliminate the provisions prohibiting the firm from restricting retail store sales or cross-group sales, except when related to resale price maintenance; and by providing certain protections for existing distributors.

ORDER REOPENING PROCEEDING AND MODIFYING CEASE AND DESIST  
ORDER

The Commission on May 8, 1981, having issued an order against respondent to show cause why the proceeding herein should not be reopened for the purpose of modifying Paragraph I of the consent order to cease and desist entered on February 18, 1976; and Respondent having answered that it has no objection to the reopening of the proceeding and the modification of the consent order, as set forth in the order to show cause.

Accordingly, *it is ordered*, That the matter is reopened and that Paragraph I of the order herein is modified so that it will read:

I

*It is ordered*, That respondent Shaklee Corporation, a corporation, its successors and assigns, and respondent's officers, agents, representatives and employees, directly or indirectly, or through any corporation, subsidiary, division or other device, in connection with the offering for sale, sale or distribution of goods or commodities in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from:

1. Fixing, establishing, maintaining or otherwise controlling, or attempting to fix, establish, maintain or otherwise control, directly or indirectly, the prices and to the extent, if at all, they relate to the pricing of merchandise for resale, discounts, rebates, overrides, commissions, fees or bonuses or other terms or conditions of sale; *provided*, that from the date this Order becomes final:

(a) If respondent suggests to its distributors prices for resale of its

merchandise, it must state clearly and conspicuously in conjunction therewith the following statement:

The prices quoted herein are suggested only. You are free to determine for yourself the prices you charge.

(b) If respondent suggests to its distributors discounts, rebates, overrides, commissions, fees or bonuses or other terms or conditions of sale to the extent, if at all, they relate to pricing of merchandise for resale, it must state clearly and conspicuously in conjunction therewith the following statement:

The (e.g.) discounts quoted herein are suggested only. You are free to determine for yourself the discount you grant.

2. Requiring, coercing, threatening or otherwise exerting pressure on any distributor, directly or indirectly, to observe, maintain or advertise established or suggested retail prices.

3. Requiring or requesting any distributor, directly or indirectly, to report any person or firm who does not observe the retail prices established or suggested by respondent, or acting upon reports so obtained by refusing or threatening to refuse sales to the distributor so reported.

4. Engaging in any of the following for the purpose of fixing or maintaining any resale price or in connection with the fixing or maintaining of any resale price:

(a) Requiring, contracting with, or coercing, directly or indirectly, any distributor to refrain from selling any merchandise in any quantity to or through any specified person, class of persons, business or class of businesses.

(b) Requiring, contracting with, or coercing, directly or indirectly, any distributor to refrain from establishing a fixed retail location for the sale or distribution of any merchandise in any quantity.

(c) Requiring or requesting any distributor, directly or indirectly, to report to respondent or to any person it designates, any person or firm who sells any of respondent's merchandise to a retail store or from a fixed retail location, or acting upon reports so obtained by refusing or threatening to refuse sales to the distributor so reported.

5. Preventing or discouraging, or attempting to prevent or discourage any distributor from selling or offering for sale products to retail customers on the grounds that such customer is the customer of another distributor.

6. Until March 1, 1986, restricting, prohibiting, taking any action against, threatening or otherwise interfering with a distributor's

operation of a retail store owned or, if leased by a distributor, during the remaining term of the lease (but no later than March 1, 1986), *provided*, that:

(a) For distributors as of July 1, 1980 the store was acquired or the lease was executed prior to July 1, 1980 and for those becoming distributors after July 1, 1980 the store was acquired or the lease was executed prior to notice of the May 8, 1981 Order to Show Cause in this matter;

(b) Shaklee products account for more than 35 percent of the store's retail sales;

(c) The distributor provides to the respondent, within 60 days of actual notice of this order, evidence of ownership or a copy of the lease and evidence that Shaklee products accounted for more than 35 percent of the facility's retail sales, during the six month period prior to notice of the May 8, 1981 Order to Show Cause in this matter.

*Provided, however*, that nothing contained in this paragraph shall prohibit respondent and a distributor from entering an agreement pursuant to which the distributor voluntarily agrees to discontinue such retail sales through an owned or leased facility. *Provided further*, that this paragraph shall not prohibit respondent from requiring a distributor to discontinue such retail sales through an owned or leased facility upon reimbursement by respondent for financial loss incurred by the distributor and attributable to the discontinuance of such retail sales. Such reimbursement shall consist of payment for (1) the cost of the portion of inventory in saleable condition (distributor net price less any bonuses paid by Shaklee) which was purchased prior to notice of the May 8, 1981 Order to Show Cause in this matter and exceeds \$50.00 at distributor's cost (2) losses from subleasing or any lease termination penalty, and (3) the costs of conversion of a store to non-Shaklee uses. Any irreconcilable disagreement between respondent and a distributor with respect to the amount owed to a distributor under this paragraph shall be resolved by binding arbitration (arbitrator's fees to be paid by Shaklee).

7. Until March 1, 1986, restricting, prohibiting, taking any action against, threatening or otherwise interfering with a distributor's sales to a retail store from any property owned or, if leased by the distributor, during the remaining term of the lease (but no later than March 1, 1986), and principally used for sales to retail stores, *provided*, that:

(a) The property was acquired or the lease was executed after February 18, 1976 and prior to July 1, 1980;

(b) The inventory exceeds \$200.00 in value and was acquired prior to notice of the May 8, 1981 Order To Show Cause in this matter;

(c) Shaklee products account for more than 35% of the gross dollar volume of sales from the distributor's property;

(d) More than 50 percent of the distributor's gross dollar volume of sales of Shaklee products were to retail stores;

(e) The distributor provides respondent within sixty days of actual notice of this order, evidence of ownership or a copy of the lease and evidence that more than 50 percent of the distributor's sales of Shaklee products were to retail stores during the six months prior to notice of the May 8, 1981 Order to Show Cause in this matter.

*Provided, however,* that nothing contained in this paragraph shall prohibit respondent and a distributor from entering an agreement pursuant to which the distributor voluntarily agrees to discontinue sales to retail stores. *Provided further,* that this paragraph shall not prohibit respondent from requiring a distributor to discontinue sales to retail stores upon reimbursement by respondent for the financial loss incurred by the distributor and attributable to the discontinuance of such sales to retail stores. Such reimbursement shall consist of payment for (1) the cost of the portion of inventory in saleable condition (distributor net price less any bonuses paid by Shaklee) which was purchased prior to notice of the May 8, 1981 Order To Show Cause in this matter and exceeds \$50.00 at distributor's cost, (2) losses from subleasing or any lease termination penalty, and (3) the cost of conversion of such property to non-Shaklee uses. Any irreconcilable disagreement between respondent and a distributor with respect to the amount owed to a distributor under this paragraph shall be resolved by binding arbitration (arbitrator's fees to be paid by Shaklee).

IN THE MATTER OF  
AMERICAN HOSPITAL SUPPLY CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF  
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF  
THE CLAYTON ACT

*Docket C-3067. Complaint, June 2, 1981—Decision, June 2, 1981*

This consent order requires, among other things, American Hospital Supply Corporation ("AHSC"), an Evanston, Illinois manufacturer and distributor of health care products, to timely divest, in accordance with the terms of the order, either 100 percent of the stock of American Latex Corporation ("ALC") or, all assets and properties constituting ALC together with all the assets of American Cystoscope Makers, Inc. The order further requires respondents to maintain ALC as a viable business entity pending divestiture; offer to purchase for a period of one year all urological catheters from the acquirer of ALC; and refrain for five years from acquiring more than 1 percent of stock or any interest in an entity engaged in the manufacture and distribution of urological catheters.

*Appearances*

For the Commission: *Norman A. Drezin, Karen G. Bokar, Randall S. Leff and Peter A. Sklarew.*

For the respondent: *Seymour D. Lewis, Rosenman Colin Freund Lewis & Cohen, Washington, D.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that the above named respondent, subject to the jurisdiction of the Commission, has acquired all the assets of American Cystoscope Makers, Inc. in violation of Section 7 of the Clayton Act, as amended, (15 U.S.C. 18) and Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. 45), and having found that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, pursuant to Section 11 of the Clayton Act (15 U.S.C. 21) and Section 5(b) of the Federal Trade Commission Act (15 U.S.C. 45(b)), stating its charges as follows:

I. DEFINITIONS

1. For purposes of this complaint, the term *urological catheters* means any flexible product designed, promoted, and sold for insertion into the urethral orifice of a human or other animal in order to

drain, irrigate or otherwise provide access to the urinary bladder of said human or animal.

2. The term *urological catheter products* means all urological catheters sold separately and all urological catheter *kits* or *trays* that include a urological catheter and accessories used in conjunction with the insertion of a urological catheter.

## II. RESPONDENT

3. American Hospital Supply Corporation (AHSC) is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Illinois with its office and principal place of business located at One American Plaza, Evanston, Illinois.

4. In 1979 AHSC, including its foreign subsidiaries, had consolidated revenues of approximately \$2.04 billion and consolidated assets of approximately \$1.28 billion.

5. AHSC is a multinational manufacturer and distributor of a wide range of products used and consumed in the health care field including medical supplies, pharmaceuticals, medical and surgical instruments and laboratory supplies.

6. AHSC has been engaged in the manufacture and distribution of urological catheters through its American Pharmaseal Division and in the distribution of urological catheters through its American Hospital Supply Division and its American V. Mueller Division.

## III. THE ACQUIRED CORPORATION

7. American Cystoscope Makers, Inc. (ACMI) is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York with its office and principal place of business at 300 Stillwater Avenue, Stamford, Connecticut. Prior to the acquisition of ACMI by respondent AHSC, American Latex Corporation (ALC) was a subsidiary of ACMI, organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business in Sullivan, Indiana.

8. In 1979 ACMI, including its foreign subsidiaries, had consolidated revenues of approximately \$40.2 million and consolidated assets of \$27.3 million.

9. ACMI is engaged primarily in the research, development, manufacture, and marketing of endoscopes.

10. ACMI through its subsidiary, American Latex Corporation, is engaged in the manufacture and sale of urological catheters.



## IV. JURISDICTION

11. At all times relevant herein, respondent AHSC and ACMI have been and are engaged in commerce within the meaning of the Clayton Act, as amended, and engaged in or affecting commerce within the meaning of the Federal Trade Commission Act, as amended.

## V. THE ACQUISITION

12. On October 10, 1980, respondent AHSC acquired substantially all of the assets of ACMI for approximately \$38.5 million, including 100% of the stock of ALC.

## VI. TRADE AND COMMERCE

13. For the purpose of this complaint, the relevant product market is the manufacture and sale of urological catheter products and the relevant geographic market is the United States.

14. Urological catheters are comprised primarily of urethral and Foley type catheters used to drain and/or irrigate the urinary bladder.

15. Sales to hospitals of urological catheter products in the United States in 1979 are estimated to have been approximately \$70.4 million.

16. Prior to the acquisition of ACMI by AHSC, AHSC and ACMI were actual competitors in the manufacture and sale of urological catheter products. In 1979, AHSC, through its American Pharmaseal Division, ranked approximately fifth in total sales among all urological catheter product manufacturers. AHSC's share of urological catheter products sales is estimated to have been approximately 8.1% and ACMI's share approximately 3.6% in 1979.

17. The urological catheter products market is highly concentrated. In 1979 the four top ranking firms accounted for approximately 82.7% of domestic sales.

## VII. EFFECTS OF THE ACQUISITION; VIOLATIONS CHARGED

18. The effects of the acquisition by AHSC of ACMI may be substantially to lessen competition or tend to create a monopoly in the manufacture and sale of urological catheter products in the United States in violation of Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, as amended, in the following ways among others:

- a. Actual competition between respondent and ACMI in the manufacture and sale of urological catheter products will be eliminated;
- b. ACMI as a substantial, independent competitive factor in the manufacture and sale of urological catheter products will be eliminated;
- c. Concentration in the manufacture and sale of urological catheter products will be increased, and the possibility of deconcentration may be diminished; and
- d. Additional acquisitions and mergers in the industry may be encouraged.

#### DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the proposed acquisition of American Cystoscope Makers, Inc. by American Hospital Supply Corporation, and the respondent having been furnished thereafter with a copy of a draft of a complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Clayton and Federal Trade Commission Acts; and

The respondent 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 aforesaid draft of 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 Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that complaint should issue stating its charges in that respect, 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 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent American Hospital Supply Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Illinois with its office and the principal place of business located at One American Plaza, Evanston, Illinois.

American Cystoscope Makers, Inc., was a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York with its offices and principal place of business located at 300 Stillwater Avenue, Stamford, Connecticut.

American Latex Corporation was a subsidiary of American Cystoscope Makers, Inc., organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business in Sullivan, Indiana.

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

### I

*It is ordered,* That, subject to the prior approval of the Federal Trade Commission, respondent, through its officers, directors, employees, subsidiaries, affiliates, divisions, successors, and assigns, shall within eighteen (18) months from the date on which this order becomes final divest absolutely and in good faith either 100% of the stock of American Latex Corporation (hereinafter "ALC") or all assets, properties, rights, and privileges, tangible and intangible, of ALC, including but not limited to corporate name, real property, plant, equipment, machinery, raw material inventory, product inventory, lists of customers, product trade names, product trademarks, patents, licenses, manufacturing specifications and procedures, marketing materials, sales training materials, research and development projects, and together therewith shall also divest those assets of American Cystoscope Makers, Inc. (hereinafter "ACMI") intrinsically related to the manufacture, distribution, sale, research or development of the products manufactured by ALC including but not limited to copies of all customer lists, records of sales in the previous two years, market projections and surveys, marketing plans and studies, and promotional or advertising materials. Such divestiture shall be made to a third party which represents that it intends to use the assets in the manufacture, distribution or sale of urological catheters in the United States.

### II

*It is further ordered,* That, at the option of the acquirer of the stock or assets of ALC, respondent (including its newly acquired ACMI subsidiary or any successor organization) shall, for a period of one

year from the date of compliance with Paragraph I of this order, purchase from ALC all catheters that respondent purchases during such one year period for resale under any trademark or trade name of ACMI of a type which ACMI obtained from ALC at the time of the acquisition of ACMI by respondent.

### III

*It is further ordered,* That, pending the divestiture required by this order, respondent shall not cause, and shall use its best efforts to prevent, any diminution of the value of the products or assets of ALC and shall preserve ALC as a viable, ongoing business.

### IV

*It is further ordered,* That, pursuant to the requirements of Paragraph I above, none of the assets of ALC shall be divested directly or indirectly to anyone who is, at the time of divestiture, an officer, director, employee, or agent of, or under the control, direction, or influence of, respondent or any of respondent's subsidiaries or affiliated corporations, whether direct or indirect, or who owns or controls more than one (1) percent of the outstanding shares of the capital stock of respondent.

### V

*It is further ordered,* That, for a period of five (5) years from the date this order becomes final, neither respondent, nor its subsidiaries, affiliates, divisions, successors or assigns shall, without the prior approval of the Federal Trade Commission, directly or indirectly acquire more than one percent (1%) of any stock, share capital, or equity interest in any concern, corporate or noncorporate, engaged in, or any of the assets of such concern relating to, the manufacture, distribution, or sale in the United States of urological catheters.

### VI

*It is further ordered,* That respondent shall, within ninety (90) days after the date of service of this order, and every ninety (90) days thereafter until respondent has fully complied with the divestiture provision of this order, and annually thereafter, for the duration of this order, submit in writing to the Federal Trade Commission a verified report setting forth in detail the manner and form in which respondent intends to comply, is complying or has complied with this

order. Until divestiture is accomplished, all compliance reports shall include, among other things that are from time to time required, a summary of contacts or negotiations with anyone for the disposition of the assets or stock specified in Paragraph I of this order, the identity of all such persons and copies of all written communications between such persons and respondent.

## VII

*It is further ordered,* That respondent notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation, which may affect compliance obligations arising out of this order.

IN THE MATTER OF  
THE COCA-COLA COMPANY

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE  
FEDERAL TRADE COMMISSION ACT

*Docket D. 8824. Decision, Oct. 26, 1976—Modifying Order, June 4, 1981*

This order reopens the proceeding and modifies the order issued by the Commission on October 26, 1976, 88 F.T.C. 666, 41 FR 53653, by deleting certain language from Paragraph 1(c) which required respondent to maintain *all* entry forms submitted in games or contests and by adding language limiting the applicability of the recorded retention requirement to games of skill.

ORDER REOPENING THE PROCEEDING AND MODIFYING CEASE AND  
DESIST ORDER

Petitioner, The Coca-Cola Company, seeks the modification of a record-keeping provision of the Order to Cease and Desist issued by the Commission on October 26, 1976.

The Order Paragraph in question currently prohibits petitioner from:

Engaging in, promoting the use of, or participating in any . . . promotional game, contest, sweepstake or similar device, by means of any announcement, notice or advertisement, unless:

\* \* \* \* \*

(c) There are maintained by respondent or its designee for a period of at least two years after the closing of each such promotional game or contest and the awarding of all prizes in connection therewith, full and adequate records *including all entry forms submitted by participants therein*, which clearly disclose the operation of such promotional game or contest, the basis or method used to determine entitlement to prizes, and the facts as to the receipt of such prizes by participants entitled thereto; which said records and documents shall be open for inspection during normal business hours by each contest participant or his duly authorized representative. (Emphasis supplied.)

Petitioner is required by this provision to retain all entry forms submitted in all contests—including games of chance and games of skill—in which it engages. Petitioner requests that the Commission modify the Order by limiting the applicability of this requirement to games of skill. Specifically, petitioner proposes that the Commission delete the underscored language, requiring the maintenance of entry forms, from Paragraph (c), and add a new paragraph requiring the retention of entry forms in connection with games of skill.

The purpose of the requirement that petitioner keep entry forms

submitted in contests in which it engages is to enable the Commission to determine whether contest winners were properly selected and, if not, to identify persons to whom prizes should have been awarded. Thus, the Commission could, at the conclusion of a skill contest, examine the contest entries and evaluate whether petitioner had fairly conducted the promotion and, if not, determine the proper winners of the contest. In the case of a game of chance, however, examination of the entry forms would not provide the Commission with any useful information in determining whether the contest was properly administered or the identity of any injured parties. This is because all entry forms are identical, and winners are chosen at random rather than based on whether the information contained on their entry forms is correct. The maintenance of entry forms submitted in connection with games of chance does not, therefore, serve any useful function. It does, however, impose costs upon petitioner.

The Commission, having considered the Petition, determines that petitioner has made a satisfactory showing that the public interest requires that the Order be reopened and modified as requested. This determination is consistent with the Commission's Order of February 24, 1981, modifying the Order against Glendinning Companies, Inc., in Docket No. 8824 in the same manner as the Commission hereby directs in the instant case.

*It is therefore ordered*, That the proceeding is hereby reopened and the Decision and Order issued on October 26, 1976, against The Coca-Cola Company shall be modified by making the following additions (indicated by underscoring the added language) and deletions (indicated by placing dashes over the deleted language) to the Order:

#### ORDER

*It is ordered*, That respondent The Coca-Cola Company, a corporation, its successors and assigns, officers, agents, representatives and employees, directly or through any corporation or other device, in connection with the advertising, offering for sale, sale or distribution of Coca-Cola, Tab, or any food or other product, or in connection with the sale or distribution of "Big Name Bingo", or any other promotional game, contest, sweepstake or similar device which involves or offers the awarding of a prize or anything of value to participants therein, by any means, in commerce, as "commerce" is defined in the Federal Trade Commission Act, forthwith cease and desist from:

1. Engaging in, promoting the use of, or participating in any such

promotional game, contest, sweepstake or similar device, by means of any announcement, notice or advertisement, unless:

(a) All of the requirements, terms and conditions for participating therein and for entitlement of such prizes are clearly and conspicuously set forth in each advertisement or notice which purports to explain or illustrate the operation of, manner of participation in, or the basis for or prospects of becoming entitled to or receiving a prize in connection with, any such contest or promotional game.

(b) All such prizes are in fact awarded to all participants therein whose entries conform to the stated requirements, terms and conditions for entitlement to and receipt of such prizes.

(c) There are maintained by respondent or its designee for a period of at least two years after the closing of each such promotional game or contest and the awarding of all prizes in connection therewith, full and adequate records including all entry forms submitted by participants therein, which clearly disclose the operation of such promotional game or contest, the basis or method used to determine entitlement to prizes, and the facts as to the receipt of such prizes by participants entitled thereto; which said records and documents shall be open for inspection during normal business hours by each contest participant or his duly authorized representative.

2. Engaging in, promoting the use of or participating in the development or operation of any skill contest unless respondent or its designee maintains for at least two years after the closing of each skill contest and the awarding of all prizes in connection therewith, in addition to the records required by Paragraph 1(c), all entry forms submitted by participants in such skill contests.

*It is further ordered,* That respondent shall forthwith distribute a copy of this order to each of its operating divisions.

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

*It is further ordered,* That the respondent herein shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

*It is further ordered.* That this modification shall become effective upon service of this Order.



IN THE MATTER OF  
KELLOGG COMPANY, ET AL.

*Docket 8883. Interlocutory Order, June 8, 1981*

Denial of respondents' motions to reconsider order of May 15, 1981.

## ORDER

Kellogg and General Mills have filed objections to our Order of May 15, 1981. We have reviewed these objections and we find them to be without merit.

Kellogg argues that the statutory requirement for the Office of Personnel Management ("OPM") to appoint an Administrative Law Judge ("ALJ")—that is, that the Commission be "occasionally or temporarily \* \* \* insufficiently staffed with administrative law judges," see 5 U.S.C. 3344—has not been met. Kellogg does not specify the relief it seeks based upon this objection. After ALJ Berman withdrew from the supplementary proceedings on November 21, 1979, then-Chief Judge Hanscom, in lieu of appointing another ALJ under Rules of Practice Section 3.42(b), filed a "Certification to Commission of Matter of Appointment of Official to Conduct Proceeding to Supplement Record" on November 27, 1979. Chief Judge Hanscom recited that Judge Berman withdrew because he "concluded that his impartiality might reasonably be questioned and that rulings, findings or conclusions he might make could be subject to the contention that they were influenced by the relative degree of his friendship with [Judge Hanscom], Judge Barnes and Judge Hinkes." Judge Hanscom further reported that, although ordinarily he would appoint a substitute ALJ, "in this instance the factors cited by Judge Berman motivating his withdrawal apply to all the remaining law judges in this office." Kellogg would apparently have us go behind this assertion of the Chief Law Judge and canvass each ALJ individually. We believe, however, that Judge Hanscom's certification is an entirely sufficient record basis for the Commission's conclusion that it is "occasionally or temporarily \* \* \* insufficiently staffed" with ALJ's.

Moreover, Kellogg itself urged the course of action it now challenges. It contended

Additionally, for the reasons stated in Chief Judge Hanscom's memorandum of November 26, 1979, Kellogg contends that no ALJ currently employed by the Commission can properly preside over any further proceedings to supplement the record.

Accordingly, Kellogg recommends that the Commission appoint an ALJ from outside the agency \* \* \*. [Memorandum of Respondent Kellogg Company in Response to the Commission's Order of March 4, 1980, filed Apr. 3, 1980 at 70.]

In addition, our February 13 Order gave notice of our intention to seek the appointment of an outside ALJ. Not only did Kellogg not object, but it filed detailed recommendations on the procedures to be followed. It has given no explanation either for its sudden reversal of position or for its untimely objection, and we perceive none.

Kellogg also objects that under the Commission's Order of May 15, 1981, the new ALJ will file a recommended rather than an initial decision. It misapprehends the nature of the supplementary proceedings we have ordered in this matter. Those proceedings are intended to assure the integrity of the Commission's procedures in this case. The Commission has been, and continues to be, therefore, itself the fact-finder, as is evidenced by the prior orders entered in this collateral inquiry (see, *e.g.*, Orders of November 30, 1979, July 31, 1980, October 9, 1980). Moreover, the factual issues have now been narrowed to one remaining question: "[W]hat actions did any employee of the Bureau of Competition take in the process leading to the contract with former ALJ Hinkes?" (Order of May 15, 1981, at 7.) The recommended decision procedure, expressly authorized by 5 U.S.C. 557, is ideally suited to the role that the Commission has reserved for itself, and we therefore adhere to our earlier determination to utilize that procedure.<sup>1</sup>

Third, Kellogg asks that it be afforded a ten-day period to comment upon and challenge any OPM selection. Insofar as this request asks us to make such a recommendation to OPM as the appointing authority, we decline to do so. The notification and objection procedure that Kellogg now urges is similar, although not identical, to the procedure it proposed for the appointment of an ALJ in its submission in response to our February 13 Order. Under that proposal, we would have requested OPM to prepare a list of up to ten eligible ALJ's, and the parties would have had ten days to object to up to four of the ten ALJ's listed by OPM. We rejected that proposal because it appeared "cumbersome and burdensome for OPM, the Commission and the parties, and could well lead to a substantial delay in the appointment of an ALJ." Order of May 15, 1981, at 3. Procedures already in place assure that proper grounds for disqualification of an ALJ can be heard.<sup>2</sup>

<sup>1</sup> Kellogg also urges that OPM should not appoint an ALJ because of this determination. Our exercise of procedural discretion will ultimately be subject to review in a court of appeals if an order adverse to Kellogg issues in this proceeding. In our view, this determination is not a relevant factor in OPM's appointment of an ALJ pursuant to 5 U.S.C. 3344.

<sup>2</sup> See Rules of Practice Section 3.42(g)(2). Commission determinations of such disqualification motions are of course subject to judicial review, as described in footnote 1, *supra*.

General Mills objects to the appointment process because we did not follow its suggestion that the Commission request OPM to appoint an ALJ of at least five years' experience in presiding over proceedings under rules similar to those of the Commission. Our letter to OPM of May 15, 1981, expressly advised that agency of the nature of the proceeding and the position of respondents in this respect. We see no reason to alter our May 15 determination.

Accordingly, treating the filings of Kellogg and General Mills as motions to reconsider our Order of May 15, 1981, we find them without merit and deny them. *It is so ordered.* The Secretary shall transmit a copy of this order to the Director of OPM.

Commissioner Pertschuk did not participate.

## ADVISORY OPINION

**Whether any of the laws enforced by the Commission would be violated if a member of UAW served as a director of American Motors Corporation at the same time that another UAW member was a director of Chrysler Corporation. [*United Auto Workers, May 1, 1981*]**

*Advisory Opinion Letter*

May 1, 1981

Dear Mr. Fillion:

On October 9, 1980, on behalf of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America ("UAW"), and pursuant to Sections 1.1-1.4 of the Commission's Rules of Practice, you requested advice with respect to whether any of the laws enforced by the Commission would be violated if a member of the UAW served as a director of American Motors Corporation ("AMC") at the same time that another UAW member was a director of Chrysler Corporation ("Chrysler"). In considering this request for an advisory opinion, the Commission has reviewed the memoranda submitted by the UAW and AMC.

1. Factual Background<sup>1</sup>

The UAW is a labor union that represents employees of automobile manufacturers, including Chrysler and AMC. Pursuant to an agreement between the UAW and Chrysler, Douglas A. Fraser, President of the UAW, was nominated to serve on Chrysler's board of directors and has been a director of Chrysler since May 1980. During 1980 contract negotiations between the UAW and AMC, the UAW presented a demand for participation on AMC's board of directors through a member other than Mr. Fraser. AMC agreed to nominate a UAW member other than Mr. Fraser as a director at its next regular stockholders' meeting. This agreement, however, is contingent upon determinations of "legal acceptability" by the Federal Trade Commission, the Department of Justice, and the Department of Labor.

<sup>1</sup> The facts discussed in this opinion are based upon the materials supplied by the UAW and AMC.

## 2. Section 8 of the Clayton Act

Section 8 of the Clayton Act prohibits interlocking directorates between competing corporations. In pertinent part, the statute provides that

no person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus and undivided profits aggregating more than \$1,000,000, engaged in whole or in part in commerce, other than banks, banking associations, trust companies, and common carriers . . . , if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws.

The Congressional intent underlying Section 8 was clearly summarized in one of the first cases to be brought under the statute:

[A] fair reading of the legislative debates leaves little room for doubt that, in its efforts to strengthen the antitrust laws, what Congress intended by § 8 was to nip in the bud incipient violations of the antitrust laws by removing the opportunity or temptation to such violations through interlocking directorates.

*United States v. Sears, Roebuck & Co.*, 111 F.Supp. 614, 616 (S.D.N.Y. 1953).<sup>2</sup>

It has been recognized that "there is no need to assess the nature of the industry or to look at mitigating circumstances. It [Section 8] is a *per se* statute." *Perpetual Fed. Sav. & Loan Ass'n*, 90 F.T.C. 608, 619 (1977) (Initial Decision), *order withdrawn on other grounds*, 94 F.T.C. 401 (1979).

It appears that Chrysler and AMC are competitors, that they satisfy the size requirement contained in Section 8, and that they engage in interstate commerce. Thus, some elements of a violation are present, and the law would be violated if the same person were a director of both companies and if no exemption from the antitrust laws were applicable. This letter, therefore, focuses on the issue of whether the UAW is a "person" within the meaning of Section 8 and, if so, whether it would be a "director" of AMC and Chrysler in the circumstances described in the materials submitted to us and the related issue of whether the labor feature of the arrangement renders Section 8 inapplicable.

Section 1 of the Clayton Act, 15 U.S.C. 12 (1976), defines the term "person" to include corporations and associations. This language is identical to the definition found in the Sherman Act, under which unions have been held to be persons. *United Mine Workers v. Colorado Coal Co.*, 259 U.S. 344, 390-92 (1922). There is no case prece-

<sup>2</sup>See also H.R. Rep. No. 627, 63d Cong., 2d Sess. 20 (1914).

dent holding that the same construction is or is not appropriate under the Clayton Act, but it is conceivable that the UAW could be a person within the meaning of Section 8.

The next question is whether the UAW would, for purposes of Section 8, be a director of both Chrysler and AMC in the factual situation presented to us. Specifically, the question is whether Section 8 would be violated since, technically, different individuals would be elected as directors of the two companies and since, in the labor-management context, the concerns to which Section 8 is addressed might not arise.

The basic purposes of Section 8 are to avoid the opportunity for coordination of business decisions by competitors and to prevent the exchange of commercially sensitive information among competitors. The potential harm prohibited by Section 8 has been said to be likely if two individual directors serving on the boards of competing companies are both representatives of a third party. See V.P. Areeda & D. Turner, *Antitrust Law* 374-75 (1980); see also *United States v. Cleveland Trust Co.*, 392 F.Supp. 699 (W.D. Ohio 1974), in which the government took the position that a corporation sat on the boards of competing corporations through representatives or deputies. Although the Department of Justice advanced the deputization theory nearly eight years ago, the *Cleveland Trust* case was settled and there are no decided cases adopting or endorsing that theory.

Because of the absence of decided cases, our views concerning the "deputization theory" must be somewhat tentative. Nevertheless, we believe that a corporation or association may violate Section 8 of the Clayton Act if it has representatives or deputies serving simultaneously on the boards of two competing corporations. However, we do not believe Section 8 was intended to reach interlocking directorates formed through "representatives" of a common labor union. Such a construction of Section 8 would extend its reach beyond the situations which Congress intended to be *per se* unlawful and might preclude particular labor-management relationships which may not present the risk of competitive harm at which Section 8 was aimed. Consequently, we do not believe that Section 8 should be construed to make unlawful the type of labor-management experiment at issue here.

Further, the UAW has made clear in its submission that it intends that the director on the AMC board will function independently and will refrain from sharing confidential commercial information with other union officials, including the UAW director on the Chrysler board. The proposed arrangement arises in the novel context of worker involvement in the affairs of corporate management with expressed aims that do not raise Section 8 concerns. On those facts (and

we believe we are bound to accept the UAW's assertions as factually correct) we do not believe a "representative" relationship for purposes of Section 8 is present.

By direction of the Commission, Commissioner Bailey dissenting.

/s/ Carol M. Thomas  
Secretary

### *Letter of Request*

October 9, 1980

The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) hereby requests the Commission for advice or interpretation pursuant to Title 16 C.F.R. Part 1, Sub-part A, Section 1.1 through Section 1.4.

### Question Presented

1. Whether a UAW member on the board of directors of American Motors Corporation (AMC) violates applicable United States Antitrust Laws under the jurisdiction of the Federal Trade Commission, when a separate UAW member is on the board of directors of the Chrysler Corporation, a competitor of American Motors.

### Statutes under Which the Question Arises

The question arises under the following statutes of the United States:

1. Section 8 of the Clayton Act, 15 U.S.C. 19 (1976);
2. Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45(d)(1);
3. Section 1 of the Sherman Antitrust Act, 15 U.S.C. 1.

### Statement of Material Facts

The UAW is a labor union that represents auto workers employed, among others, by Chrysler Corporation and by the American Motors Corporation. Since May of 1980, Douglas A. Fraser, a member of the UAW, has been a director of Chrysler. During the 1980 contract negotiations with AMC, AMC agreed to nominate a UAW member as a director at its next regular stockholders' meeting (February,

1981) upon determinations of "legal acceptability" by the Department of Labor, the Department of Justice and the Federal Trade Commission, as set forth in a letter from American Motors Corporation to the UAW attached hereto and made a part hereof as Exhibit A.\*

As a consequence, and because of the agreement with the American Motors Corporation, the UAW is requesting appropriate advisory opinions of the agencies set forth in the letter of agreement. The anti-trust aspects of the matter for which the UAW seeks advice or interpretation involve substantial and novel questions of fact and law, and there is no clear Commission or court precedent. In addition, the subject matter of the request and subsequent publication of Commission advice on this matter is of significant public interest.

In order to assist the Commission in its consideration of this request, the UAW submits the attached Memorandum of Fact and Law in Support of the Nomination of a UAW Member To Serve on the Board of Directors of the American Motors Corporation.\*

Copies of this letter, Exhibit A, Exhibit B,\* the request to the Justice Department,\* and the UAW's Memorandum of Fact and Law are being sent to Richard MacCracken, Vice President, Industrial Relations, American Motors Corporation, 14250 Plymouth Road, Detroit, Michigan 48232.

Respectfully Submitted,

INTERNATIONAL UNION, UNITED  
AUTOMOBILE, AEROSPACE AND  
AGRICULTURAL IMPLEMENT  
WORKERS OF AMERICA (UAW)

/s/ John A. Fillion  
General Counsel

Philip W. Moore  
Law Offices of Philip W. Moore

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\* Not reproduced herein for reasons of economy.





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