

Interlocutory Order

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IN THE MATTER OF

EXXON CORPORATION, ET AL.

Docket 8934. Interlocutory Order, Nov. 10, 1977

Granting in part and denying in part of motion by complaint counsel for leave to modify pending application for interlocutory review and to obtain expedited decision on modified application.

ORDER GRANTING IN PART AND DENYING IN PART COMPLAINT
COUNSEL'S MOTION FOR LEAVE TO MODIFY PENDING
APPLICATION FOR INTERLOCUTORY REVIEW AND TO OBTAIN AN
EXPEDITED DECISION ON THE MODIFIED APPLICATION

Complaint counsel on February 20, 1976, filed with the Administrative Law Judge a motion for issuance of subpoenas *duces tecum* to respondents. The motion exceeded 1,800 pages and included approximately 700 numbered specifications¹ which, according to complaint counsel, "request[ed] a vast number of documents' quite likely numbering in the millions or tens of millions."² This was to be complaint counsel's first effort to secure documents of a substantive nature from respondents. In July 1976, respondents filed individual and joint objections to the motion and in September complaint counsel filed a reply which included a revised subpoena request. The reply contained 950 pages, including over 300 pages of specifications, definitions and instructions and 300 pages of analyses thereof. The revised request was hardly the shadow of complaint counsel's former request; it contained approximately 550 numbered specifications.³

By his order of November 11, 1976, the ALJ questioned the practicality of complaint counsel's discovery strategy. He noted that complaint counsel had made "what appear to be plausible arguments why the various avenues of investigation would or might produce relevant information or might be fruitful in uncovering leads to relevant information. However, when all of the avenues of investigation are taken together they add up to an overwhelming and unreasonable burden upon respondents and an unmanageable case."⁴ Accordingly, he denied a major portion of complaint counsel's motion but authorized the issuance of more limited subpoenas calling for the production of introductory materials concerning

¹ Order Denying Major Portion of, but Granting in Part, Complaint Counsel's Motion for Issuance of Subpoenas Duces Tecum to Respondents and Establishing Guidelines as to any Further such Motions, November 11, 1976, at 5.

² Motion by Complaint Counsel for Issuance of Subpoenas Duces Tecum to Respondents, February 20, 1976, at 10.

³ Order, November 11, 1976, at 8, 20.

⁴ *Id.* at 24.

respondents' structure and operations and certain documents filed with other government agencies.⁵

In their motion for reconsideration, complaint counsel again modified their discovery request, agreeing to convert all interrogatories to document requests, to delete specifications that referred to transcript pages⁶ and to alter the forward cutoff date for documents to be produced.

As the Judge noted in denying the motion for reconsideration, the specifications "are so burdensome, particularly with respect to the time it would take to comply, that, considering also other future discovery steps proposed to be taken by complaint counsel, the end of discovery could not realistically be envisioned and a trial date could not be realistically predicted, except to predict that it would be far off in the future."⁷ The Law Judge, pursuant to Section 3.23(b) of the Rules of Practice, granted complaint counsel's request for permission to file an application for interlocutory review.

In January 1977, complaint counsel filed their application for review and respondents filed their answers. While complaint counsel's voluminous subpoena application was pending review by the Commission, they moved, on September 28, 1977, that the Commission refrain from ruling on the hundreds of individual specifications in order that they might submit to the ALJ a shorter, less burdensome and more manageable subpoena.⁸ The motion before us asks essentially that complaint counsel be permitted to withdraw the subpoena. We grant that motion, without prejudice.

Complaint counsel also request that the Commission:

- (1) instruct the ALJ that the burden of complying with Commission subpoenas should be evaluated in light of offers by complaint counsel to screen documents;
- (2) instruct the ALJ that he has authority under the rules to require the type of subpoena compliance conditions and controls proposed by complaint counsel;
- (3) rule that complaint counsel in their forthcoming revised information request, are entitled to substantial discovery into post-complaint events

⁵ The subpoenas issued on November 24, 1976. The Commission declined respondents' request that it review the subpoenas on an interlocutory basis. Order Denying Request for Interlocutory Review, March 8, 1977 [89 F.T.C. 168]. On July 26, 1977, the Commission commenced a proceeding to enforce the subpoenas against five respondents that declined to produce certain documents and one that declined to produce any. *FTC v. Anderson*, Misc. No. 77-0161 (D.D.C.).

⁶ Many specifications requested all documents referred to by a particular witness during the course of depositions and interviews. The ALJ ruled that "respondents would be required to comb almost 13,000 pages of depositions and interviews. . . to find some 3,315 pages or portions of pages which purport to describe required documents. . . ." Order, November 11, 1976, at 46.

⁷ Order Denying Complaint Counsel's Motion for Reconsideration. . . , December 22, 1976, at 10.

⁸ Seemingly conceding the wisdom of the ALJ's November 11 order, complaint counsel assert that "[t]he returns on the nonsubstantive November 24 subpoenas duces tecum have afforded us for the first time an opportunity to make reasonably informed reductions in our substantive document discovery requests." Complaint Counsel's Motion for Leave to Modify Pending Application. . . , September 28, 1977, at 6.

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including the current activities of respondents reflected in respondents' active or working files; and

(4) direct the law judge to adopt an expedited time-table for the filing of respondents' opposition, if any, to complaint counsel's forthcoming revised document subpoena proposal and for prompt commencement of respondents' compliance with, or early announcement of any intended noncompliance with, the resulting subpoenas issued by the ALJ.

We reject the argument advanced by several respondents that the requests have been mooted by complaint counsel's withdrawal of their subpoena specifications. The issues presented by these requests are almost certain to be raised by any new specifications. All but one of the respondents also assert that these issues are not now properly before the Commission and that the ALJ must be afforded an opportunity to decide them in the context of the revised specifications. In view of their importance, however, we believe it appropriate to provide the parties and the ALJ some guidance as to our thinking on the issues raised by the first two requests. Since we will not be considering the propriety of specific discovery provisions, these issues can be addressed without reference to the forthcoming subpoena application.⁹

The first two requests concern the ALJ's authority to provide for discovery methods not explicitly sanctioned by the Rules of Practice.¹⁰ In *Century 21 Commodore Plaza, Inc.*, CCH Trade Reg. Rep. para. 21,276, at 21,177 (89 F.T.C. 108, 1977), the Commission held that access orders are authorized by the F.T.C. Act and that the Administrative Law Judges may issue such orders under Rule 3.42(c). We believe that the law judges are likewise authorized to impose production procedures designed to assure orderly compliance with subpoenas. Cf. *Ash Grove Cement Co.*, 77 F.T.C. 1660 (1970).¹¹

We do not mean to suggest, however, that the Administrative Law

⁹ Except perhaps for the fourth issue, we believe that these issues are fairly within the scope of the ALJ's December 22, 1976, certification under Rule 3.23(b).

¹⁰ The ALJ, in assessing the burden of complaint counsel's requested discovery, refused to consider an alternative order advanced in their reply on the grounds that it amounted to an order directing access to respondents' files and that such orders are not authorized by our Rules of Practice. We are inclined to agree with the ALJ's characterization of this proposal although not with his conclusion that such orders are not authorized by the Rules of Practice.

¹¹ In support of his holding that he lacked authority to impose the production controls suggested in a second alternative order proposed by complaint counsel, the ALJ cited language in a footnote to Rule 3.34(b)(2) and also in a notice of proposed amendments to the Commission's discovery rules, 40 F.R. 15239 (1975), stating that the Rules of Practice do not provide for requests, or orders, for production of documents as an alternative method of discovery. Order, November 11, 1976, at 40.

We do not believe that these statements are inconsistent with the issuance of an order imposing controls essential to orderly compliance with a subpoena. The Commission in 1967 rescinded a rule authorizing production orders because proper use of the newly adopted rules authorizing subpoenas *duces tecum* to parties during pre-trial discovery "ma[de] the use of such orders superfluous." *All-State Industries of North Carolina, Inc.*, 72 F.T.C. 1020, 1023 (1967). Until 1967, the production order was, in effect, the pre-trial equivalent of the subpoena *duces tecum*. Although "orders for the production of documents" are no longer to be employed in view of the availability of subpoenas, we do not believe that the imposition of necessary compliance controls is precluded.

Judges are free to allow discovery by any method they deem expedient. Discovery should ordinarily be by the methods described in the Rules of Practice. Only where necessary to the conduct of "fair and impartial hearings. . . [and] to avoid delay in the disposition of proceedings," Rule 3.42(c), may the law judges resort to discovery methods not explicitly sanctioned by the Rules. Moreover, the Administrative Law Judges may not depart from the specific requirements of applicable rules and any orders they issue must, of course, be authorized by the F.T.C. Act.¹²

We see no reason to address complaint counsel's third request. The ALJ has already ruled that complaint counsel are entitled to discovery of post-complaint materials. Determination of appropriate forward cutoff dates should be left to the Law Judge's discretion based on his review of the revised specifications.

Nor have complaint counsel offered sufficient justification for their fourth request. While we hope that the revised specifications can be decided expeditiously, there has been no showing of the ALJ's unwillingness to adopt an appropriate timetable for disposition of complaint counsel's forthcoming subpoena proposal. Moreover, since complaint counsel's proposal is not before us, and, indeed, has apparently not been completed, we have no basis for determining what would be an appropriate timetable for a decision by the ALJ on the revised specifications or for compliance with any specifications he upholds.¹³

We are unwilling to assume that cases involving complex issues and large industries are incapable of efficient adjudication. We believe that complaint counsel's determination to submit a "more manageable subpoena"¹⁴ is a step in the right direction. This, together with the use of discovery procedures tailored to the needs of complex litigation¹⁵ and close adherence to the suggestions set forth in the Manual for Complex Litigation, including continued efforts by the Law Judge to maintain firm control of the proceeding,¹⁶ will

¹² Assuming that, in the circumstances of this case, an access order would be appropriate, the ALJ's assessment of the burden of complaint counsel's request obviously should take into account any reduced burdens resulting from their screening of respondents' files. Cf. *Hunt Foods and Industries, Inc. v. FTC*, 286 F.2d 803, 810-12 (9th Cir. 1960), cert. denied, 365 U.S. 877 (1961). We do not decide whether access orders or compliance controls should be imposed in this case, much less the question of the sorts of provisions that would be appropriate.

¹³ Complaint counsel have also suggested that the Commission "authorize complaint counsel to undertake phased document and data discovery commencing with an initial, vastly reduced subpoena duces tecum as outlined" in their motion. Motion at 9. Complaint counsel do not need Commission authorization to file a revised request with the ALJ and we do not understand complaint counsel to request us to endorse a subpoena we have not seen.

¹⁴ Motion at 6.

¹⁵ Pp. 4-5 *supra*.

¹⁶ See *Manual*, §1.10 (CCH 1973). The ALJ's efforts to control this case have been frustrated by the parties' numerous appeals to the Commission. We have entertained this appeal solely to indicate our belief that the Rules of Practice afford the trial judge broad power to manage this complicated case forcefully and efficiently. This order

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enable this case to be adjudicated in the foreseeable future.¹⁷

It is so ordered.

should not be understood to signal an inclination to review rulings that are best left to the responsible judgment of the ALJ. See, e.g., *Exxon Corp.*, 85 F.T.C. 404 (1975).

¹⁷ The Commission denies the request of Texaco Inc. that we suspend the pending subpoena enforcement proceeding. Assuming that they are now properly before us, we also reject suggestions made by various respondents that we withdraw the case from adjudication or otherwise terminate it.

IN THE MATTER OF
BRISTOL-MYERS COMPANY, ET AL. - D. 8917
AMERICAN HOME PRODUCTS CORPORATION, ET AL. -
D. 8918
STERLING DRUG INC., ET AL. - D. 8919

Dockets 8917, 8918, 8919. Interlocutory Order, Nov. 11, 1977

Order remanding to the administrative law judge an order by him denying *in camera* treatment of certain documents with instructions to grant *in camera* status only to those documents meeting the criteria set forth in the accompanying Commission opinion.

General Foods Corporation applies for review of the administrative law judge's June 28, 1977 order denying its motion for *in camera* treatment of certain documents. The law judge has determined that interlocutory review would be appropriate under Commission Rule Section 3.23(b). We entertain this appeal to clarify the standards as to when *in camera* treatment is warranted.

The Commission's Rules, Section 3.45(b), provide that *in camera* treatment should be granted only in those unusual and exceptional circumstances when good cause is found on the record. It is well established that the person or corporation whose records are involved can satisfy this burden only by demonstrating that public disclosure of the documents will result in "clearly defined, serious injury." *H. P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961).

In this case, General Foods Corporation contends that it will sustain serious injury because disclosure of these documents will provide competitors with the benefits of its research concerning consumer attitudes toward caffeine. In our opinion, however, documents should not be sealed simply because an applicant asserts that its competitors would like to possess the information the documents contain. General Foods Corporation did not provide answers to such fundamental questions as what in rough terms these studies cost, or whether their competitors could replicate them today and at what cost. More importantly, it did not demonstrate that these studies are significant today. Therefore, we conclude that General Foods has not yet demonstrated on the record that public disclosure of these documents will result in serious injury.¹

We are impressed with the possibility, however, that the docu-

¹ Nor is it relevant that General Foods Corporation relied on complaint counsel's promise to support General Foods Corporation's motion to limit access to respondent's counsel. That promise pertained only to those portions of the documents not introduced into evidence, but given to respondent's counsel for purposes of cross-examination. As the law judge points out there has been no agreement by complaint counsel not to offer these documents as a

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ments in question may warrant *in camera* treatment. General Foods Corporation does state that the efforts of several of its employees and outside consultants, and significant marketing outlays, were involved in producing this research. It also maintains that this research is relevant to marketing non-caffeine coffee today and that its competitors would also find it useful. It has raised doubt in our mind as to the possibility that it will incur serious injury. For this reason, we remand this matter for further consideration, with the following guidance as to what constitutes "good cause" in terms of Section 3.45(b).

We do not believe that everything that is loosely called a trade secret in the world of commerce necessarily meets the standard that disclosure will result in serious injury.² We cannot accept the logic of General Foods Corporation's argument that its research falls under the "trade secrets" rubric and therefore, should be accorded *in camera* treatment regardless of any discussion of the seriousness of the injury. On the contrary, to warrant *in camera* treatment it must be shown that public disclosure of research, as in this case, or of any allegedly confidential business information will result in clearly defined serious injury. This standard reflects the balance the Commission has struck between the need for a public record and the danger of discouraging business from producing and retaining socially valuable information. The "serious injury" standard is appropriate because the latter danger can only arise when the documents in question are secret and material to the applicant's business, and would less likely be produced if it were known that they had to be publicly disclosed. In all other circumstances, disclosure will not cause serious injury and secrecy would have to give way to the strong Commission policy favoring a public record.

Accordingly, we believe demonstrating serious injury requires the applicant to show that the documents are secret, that they are material to the applicant's business and that public disclosure will plausibly discourage the future production of such information. We find the Restatement of Torts to be instructive regarding the first two criteria. The following factors should be weighed in considering both secrecy and materiality:

- (1) the extent to which the information is known outside of his business;
- (2) the extent to which it is known by employees and

part of the public record. Moreover, the public policy behind an open record is no less important, where complaint counsel does not oppose *in camera* treatment. See *National Dairy Products Corporation*, 64 F.T.C. 1441, 1442 (1964); and *Crown Cork & Seal Company, Inc.*, 71 F.T.C. 1714, 1716 (1967).

² We need not consider "trade secrets" as defined by 15 U.S.C. 46(f) because that exception to §46(f) is inapplicable to adjudicative proceedings. See *Hood* at 1188-89.

others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. Restatement of Torts §757, Comment b at 6 (1939).

We would add that when considering (4), the value of the information, the law judge should place a greater burden on the applicant when the information is old. Regarding the final criterion, the law judge should consider whether the production of the information is required by law or whether the information would otherwise have been produced and retained regardless of whether it was to be publicly disclosed. Also, we note that wherever it would not defeat the purpose of the application, the applicant should demonstrate good cause using the most specific information available.

In ruling on requests for *in camera* treatment the law judge should also consider the strength of the policies favoring disclosure in the particular factual context. Thus, the general and fundamental policy favoring government decisions based on publicly available facts may warrant different treatment for similar information depending upon the importance of the information to an understanding of the Commission's decisionmaking processes. Taking this approach, it may be reasonable in some cases, as Commission Rule 3.45(a) allows, for the law judge to grant *in camera* treatment for information at the time it is offered into evidence subject to a later determination by the law judge or the Commission that public disclosure is required in the interests of facilitating public understanding of their subsequent decisions.

We note, to avoid confusion, that this appeal does not present questions regarding the terms or the advisability of any *in camera* order that might issue. Compare *Mississippi River Fuel Corporation*, 69 F.T.C. 1186 (1966); *F.T.C. v. Crowther*, 430 F. 2d 510 (D.C. Cir. 1970); *Ash Grove Cement Co.*, 77 F.T.C. 1671 (1970); *Eaton Yale & Towne, Inc.*, 79 F.T.C. 998 (1971); and *Pepsico, Inc.*, 83 F.T.C. 538 (1973).

Finally, consideration of the above factors, like other questions relating to the proper, fair and expeditious conduct of adjudicative hearings is a matter within the sound discretion of the administrative law judge.

Because the administrative law judge did not consider and could not have anticipated many of these issues, this matter should be and

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it will be remanded to the law judge for reconsideration of his order denying *in camera* treatment. In so disposing of the appeal, we intimate no view on whether said documents should in fact be afforded *in camera* treatment.

ORDER REMANDING CASE

This matter having been heard and considered by the Commission upon the interlocutory appeal filed by General Foods Corporation from an order of the administrative law judge denying *in camera* treatment, and the Commission for reasons stated in the accompanying opinion having determined that General Foods Corporation failed to demonstrate good cause for *in camera* treatment.

It is ordered, That this proceeding be, and it hereby is, remanded to the law judge with instructions that he grant *in camera* status only to those documents which upon reconsideration, after the parties have been afforded an opportunity to present their views thereon, appear to warrant *in camera* protection in accordance with the Commission's views as expressed in the accompanying opinion.

IN THE MATTER OF
THE KROGER COMPANY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT

Docket 9040. Complaint, June 24, 1975 — Decision, Nov. 11, 1977

This consent order, among other things, requires a Cincinnati, Ohio retail food store chain to make each of its advertised items readily available for sale to customers in its stores, to have advertised items correctly priced, and to sell those items at or below the advertised price. Further, the firm must post copies of advertisements and notices of the availability of "rainchecks" for unavailable items.

Appearances

For the Commission: *Robert Eliot Easton, Charles L. Hall and James J. Angelone.*

For the respondent: *Murray H. Bring, Robert Pitofsky, Peter K. Bleakly, Thomas D. Nurmi and M. Jean Anderson, Arnold & Porter, Washington, D.C.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that The Kroger Company, a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said 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 in that respect as follows:

COUNT I

(Alleging violation of Section Five of the Federal Trade Commission Act)

PARAGRAPH 1. Respondent, The Kroger Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio with its office and principal place of business located at 1014 Vine St., Cincinnati, Ohio.

PAR. 2. Respondent through its wholly-owned subsidiaries is engaged in the operation of a chain of retail food stores, operating approximately 1,258 stores in 20 states. Its volume of business is substantial, totaling approximately 3.8 billion dollars in retail food

sales in 1973. In the operation of its retail food stores, respondent offers and sells to its customers an extensive line of products, including food, drugs, cosmetics, and devices as those terms are defined in the Federal Trade Commission Act, all of which are sometimes referred to hereinafter as "items." Some of said items are manufactured or processed by respondent at its manufacturing and processing plants located in various states. However, many of said items are purchased from numerous independent suppliers located throughout the United States.

PAR. 3. In the course and conduct of its business, as aforesaid, respondent now causes, and for some time last past has caused, directly or indirectly, the aforesaid items to be shipped and distributed from its manufacturing and processing plants or from its other sources of supply to its warehouses, distribution centers, or retail food stores located in various states other than the state of origination, distribution or storage of said items. In the further course and conduct of its business, respondent transmits contracts, business correspondence, monies and other documents from its stores, offices, and divisions located in states other than the states in which such contracts, correspondence, monies, and other documents originated. Respondent maintains, and at all times mentioned herein has maintained a substantial course of trade in the distribution, advertising, offering for sale and sale of the aforesaid items in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of its business, as aforesaid, and for some time last past respondent has been and is now disseminating, and causing the dissemination of, certain advertisements concerning the aforesaid items by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including but not limited to, advertisements in newspapers of general and interstate circulation and other advertising media, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said items from respondent; and respondent has been and is now disseminating, and causing the dissemination of, advertisements concerning said items by various means, including but not limited to the aforesaid media, for the purpose of inducing and which were likely to induce, directly or indirectly, the attempted or actual purchase from respondent of the said items in commerce, as "commerce" is defined in the Federal Trade Commission Act. Many of the said advertisements list or depict the aforesaid items and also contain statements and representations concerning the price or terms at which said items would be

offered for sale. Many of the aforesaid advertisements contain further direct and express statements and representations concerning the time periods during which the offers would be in effect and the locations of respondent's food stores at which the offers would be made.

PAR. 5. Through the use of such advertisements disseminated in various areas of the United States served by respondent's retail food stores, respondent has represented directly or by implication that in those stores covered by such advertisements, throughout the effective periods of the advertised offers, the items listed or depicted in such advertisements would be:

- A. Readily available for sale to customers;
- B. Readily and conspicuously available for sale at or below the advertised prices; and
- C. Sold to persons who attempted to purchase such items at prices at or below the advertised prices.

PAR. 6. In truth and in fact, in a significant number of respondent's retail food stores covered by such advertisements, during the effective periods of the advertised offers, a substantial number of the items listed or depicted in the said advertisements were:

- A. Not readily available for sale;
- B. Not readily and conspicuously available for sale at or below the advertised prices; or
- C. Sold to persons who attempted to purchase such items at prices higher than the advertised prices.

Therefore, the statements and representations as referred to herein, were false, misleading and deceptive, and each of such advertisements was misleading in material respects and constituted a "false advertisement," as that term is defined in the Federal Trade Commission Act.

PAR. 7. By disseminating or causing the dissemination of advertisements which offer or present for sale items as aforesaid, and by failing to have, in a significant number of its stores covered by such advertisements, during the effective periods of the advertised offers, substantially all of the aforesaid advertised items:

- A. Readily available for sale to customers in quantities sufficient to meet reasonably anticipated demands;
- B. Conspicuously available for sale at or below the advertised prices;

and by selling substantial numbers of said items to persons attempting to purchase such items at prices in excess of the

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advertised price, respondent has engaged in unfair acts and practices.

PAR. 8. In the course and conduct of its business, and at all times referred to herein, respondent has been and now is in substantial competition in commerce, with corporations, partnerships, firms and individuals in the retail food and grocery business.

PAR. 9. The use by respondent of the aforesaid unfair and false, misleading and deceptive statements, representations, acts and practices, including the dissemination of the aforesaid "false advertisements," has had the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that the said statements and representations were true, and to induce such persons to go to respondent's stores and to purchase from respondent substantial quantities of the advertised items at prices in excess of the advertised prices and substantial quantities of items other than the advertised items, some of those other items being higher priced or otherwise less desirable to Kroger customers than the unavailable advertised items, by reason of such erroneous and mistaken belief.

PAR. 10. The acts and practices as aforesaid, and the dissemination by respondent of the false advertisements, as aforesaid, were all to the prejudice and injury of the public and of respondent's competitors and constituted unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

COUNT II

(Alleging violations of the Federal Trade Commission Trade Regulation Rule Concerning Retail Food Store Advertising and Marketing Practices (16 C.F.R. 424), and Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One, Two, Three, Four, and Eight, respectively, of Count I hereof are incorporated by reference in Count II as if fully set forth verbatim)

PAR. 11. The Federal Trade Commission, pursuant to the Federal Trade Commission Act, as amended, 15 U.S.C. 41, *et seq.*, and the provisions of Subpart B, Part 1, of the Commission's Procedures and Rules of Practice, 16 C.F.R. 1.11, *et seq.*, conducted a proceeding for the promulgation of a trade regulation rule regarding retail food store advertising and marketing practices. Notice of this proceeding, including a proposed rule, was published in the *Federal Register* on November 14, 1969 (34 F.R. 18252). Interested parties were thereaf-

ter afforded opportunity to participate in the proceeding through the submission of written data, views, and arguments, and to appear and orally express their views as to the proposed rule and to suggest amendments, revisions, and additions thereto.

The Commission considered all relevant matters of fact, law, policy, and discretion, including the data, views, and arguments presented on the record by interested parties in response to the Notice as indicated in the accompanying Statement of Basis and Purpose (36 F.R. 8777 (May 13, 1971)) and as prescribed by law, determined that the adoption of the trade regulation rule was in the public interest, and, accordingly, promulgated the Trade Regulation Rule Concerning Retail Food Store Advertising and Marketing Practices on May 13, 1971, effective July 12, 1971.

PAR. 12. Respondent is a member of the retail food store industry, and its acts and practices in connection with the sale and offering for sale of food and grocery products or other merchandise being subject to the jurisdiction of Section 5 of the Federal Trade Commission Act are within the intent and meaning of, and are subject to, the provisions of the aforesaid Trade Regulation Rule.

PAR. 13. In connection with its aforesaid advertisements, respondent, in a substantial number of instances, has failed to comply with Paragraph (1) of the aforesaid Trade Regulation Rule by offering food and grocery products or other merchandise subject to the jurisdictional requirements of Section 5 of the Federal Trade Commission Act for sale at stated prices by means of advertisements disseminated in areas served by certain of its stores which were covered by such advertisements but which during the advertised sale period neither had such products in stock readily available for sale to customers nor provided clear and adequate notice that the items were in stock and might be obtained upon request.

PAR. 14. In connection with its advertisements disseminated as aforesaid, respondent, in a substantial number of instances, has failed to comply with Paragraph (2) of the aforesaid Trade Regulation Rule by offering food and grocery products or other merchandise subject to the jurisdictional requirements of Section 5 of the Federal Trade Commission Act for sale at stated prices by means of advertisements disseminated in areas served by certain of its stores which were covered by such advertisements and by failing in those stores to make certain of the advertised items conspicuously and readily available for sale at or below the advertised prices during the effective periods of the advertisements, and by failing to charge out to persons who attempted to purchase such items substantial numbers of such advertised products at prices at or below

the advertised prices during the effective periods of the advertisements.

PAR. 15. Respondent's aforesaid violations of the Trade Regulation Rule Concerning Retail Food Store Advertising and Marketing Practices constitute unfair and deceptive acts and practices in violation of Section 5 of the Federal Trade Commission Act.

Commissioners Thompson and Nye dissenting.

DECISION AND ORDER

The Federal Trade Commission having issued a complaint based upon alleged acts and practices of The Kroger Co., a corporation, also trading and doing business as Kroger, hereinafter referred to as respondent, and having served such complaint upon respondent and having withdrawn the proceeding from adjudication based upon a joint motion for withdrawal from adjudication filed by complaint counsel and counsel for respondent; and

The respondent and counsel for the Commission having executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid 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 had 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 accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed pursuant to Sections 2.34 and 3.25 of its Rules, now in further conformity with the procedure prescribed in Section 3.25 of its Rules, the Commission hereby makes the following jurisdictional findings, and enters the following order:

1. Respondent The Kroger Co. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business located at 1014 Vine St., Cincinnati, Ohio. Respondent also operates, trades and does business under the name Kroger.

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

Definitions: For purposes of this order, "unadjusted rate of

unavailability" means the raw rate of unavailability before the rate is reduced by those instances of unavailability which are excused by defenses set forth in Trade Regulation Rule 424, as presently drafted, or this order.

For purposes of this order, "unadjusted rate of over price marking or overcharging" means the raw rate of over price marking or overcharging before the rate is reduced by those instances of over price marking or overcharging which are excused by defenses set forth in Trade Regulation Rule 424, as presently drafted, or this order.

For purposes of this order, "sample" means a selection of at least forty of respondent's stores, at least 50 percent of which will be selected from at least four of the twenty largest standard metropolitan statistical areas in which respondent operates six or more retail food stores. The survey of the sample must be conducted in at least three different weeks, and not more than 40 percent of the stores selected may be surveyed during the same week. Stores to be surveyed by or on behalf of the Commission shall be chosen in a manner which is consistent with this definition but which is otherwise to be determined at the discretion of the staff or the Commission. Respondent waives any right it might have to challenge the admissibility into evidence of the results of the survey of the sample on grounds that those results are not projectable to a universe greater than the sample. Respondent, however, retains the right to challenge the evidentiary weight to be given to the results of any such survey on any legally available basis.

For purposes of this order, the "average, unadjusted rate of unavailability revealed by a survey of a sample of respondent's retail food stores" referred to in Section II.B.1. of this order shall be determined as follows:

a. For each store surveyed, the number of items which the ad represents to be available in that store and the number of items found to be unavailable in that store shall be recorded.

b. After the individual stores in the sample are surveyed, the total number of items represented to be available in the surveyed stores shall be determined.

c. After the individual stores in the sample are surveyed, the total number of items found to be unavailable in the surveyed stores shall be determined.

d. A fraction shall then be constructed using as the numerator the total number of items found to be unavailable (see subparagraph c) and as the denominator the total number of items contained in all relevant advertisements (see subparagraph b).

e. The fraction described in subparagraph d shall then be multiplied by 100 to arrive at a percentage figure.

Total # items found to be unavailable/ Total # items contained in advertisements times 100 equals Average, unadjusted rate of unavailability

For purposes of this order, the "average, unadjusted rate of . . . over price marking . . . revealed by a survey of a sample of respondent's retail food stores" referred to in Section II.D.1. of this order shall be determined as follows:

a. For each store surveyed, the number of items which the ad represents to be available in that store and the number of items found to be over price marked in that store shall be recorded.

b. After the individual stores in the sample are surveyed, the total number of items represented to be available in the surveyed stores shall be determined.

c. After the individual stores in the sample are surveyed, the total number of items found to be over price marked in the surveyed stores shall be determined.

d. A fraction shall then be constructed using as the numerator the total number of items found to be over price marked (see subparagraph c) and as the denominator the total number of items contained in all relevant advertisements (see subparagraph b).

e. The fraction described in subparagraph d shall then be multiplied by 100 to arrive at a percentage figure.

Total # items found to be over price marked/ Total # items contained in advertisements times 100 equals Average, unadjusted rate of over price marking

For purposes of this order, the "average, unadjusted rate of . . . overcharging . . . revealed by a survey of a sample of respondent's retail food stores" referred to in Section II.D.1. of this order shall be determined as follows:

a. For each store surveyed, the number of items which the ad represents to be available in that store and the number of items found to be overcharged in that store shall be recorded.

b. After the individual stores in the sample are surveyed, the total number of items represented to be available in the surveyed stores shall be determined.

c. After the individual stores in the sample are surveyed, the total number of items found to be overcharged in the surveyed stores shall be determined.

d. A fraction shall then be constructed using as the numerator the total number of items found to be overcharged (see subparagraph

c) and as the denominator the total number of items contained in all relevant advertisements (see subparagraph b).

e. The fraction described in subparagraph d shall then be multiplied by 100 to arrive at a percentage figure.

Total # items found to be overcharged/ Total # items contained in advertisements times 100 equals Average unadjusted rate of overcharging

For purposes of this order, "respondent" means The Kroger Co., a corporation, its successors or assigns, its officers, agents, representatives and employees.

For purposes of this order, "retail food store" shall mean all of respondent's food stores, but shall not include convenience stores (stores less than 4,000 square feet in total area) and drug stores.

I. *Prohibited Activities.*

It is ordered, That respondent, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of food or grocery products or other merchandise, hereafter sometimes referred to as items, offered or sold in its retail food stores, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from, directly or indirectly:

A. Disseminating, or causing the dissemination of any advertisement by any means which offers or presents any items for sale at a stated price, unless throughout the effective period of the advertised offer at each retail food store covered by the advertisement:

1. Each advertised item is readily available for sale to customers in the public area of the store, or, if not readily available there, a clear and conspicuous notice is posted where the item is regularly displayed which states that the item is in stock and may be readily obtained upon request, and said item is readily furnished upon request;

2. Each unit of each advertised item, any of which is marked with a price, is individually, clearly, and conspicuously marked with a price no higher than the advertised price; and

3. Each unit of each advertised item is sold to customers at or below the advertised price.

Unless, with respect to 1, 2 and 3 above, respondent was complying with a specific exception, limitation or restriction with respect to store, item or price which was clearly and conspicuously disclosed in all advertisements for the product in question.

Provided, however, that no enforcement proceeding relating to the unavailability, over price marking or overcharging of advertised products, which is based on a survey, shall be instituted or

commenced except on the basis of a survey conducted by, on behalf of, or under the guidance or direction of the Commission of a sample of respondent's retail food stores.

II. A. *Defenses Applicable to Unavailability.*

The following shall constitute defenses to a charge of unavailability under Trade Regulation Rule 424, as presently drafted, Section 5 of the Federal Trade Commission Act or any provision of this order if respondent can show:

1. That the advertised items were unavailable due to circumstances beyond respondent's control, that respondent did not have notice or knowledge of such impending unavailability in time to delete the items from the proposed advertisement, and that respondent offered to customers a "raincheck" for each unavailable item which entitled the holder to purchase the item in the near future at or below the advertised price; or
2. That the advertised items were delivered to respondent's retail food stores in quantities sufficient to meet reasonably anticipated demand.

B. *Presumptions Applicable to Defenses Set Forth in Section II.A.*

The following presumptions apply to the defenses set forth in Section II.A.

1. Because respondent, pursuant to Section III.C.2. of this order, has obligated itself to institute, enforce, and maintain procedures designed to effect compliance with this order, if (a) the average, unadjusted rate of unavailability revealed by a survey of a sample of respondent's retail food stores does not exceed four (4.0) percent, and (b) the unavailability revealed by the survey is not shown to be caused in whole or substantial part by the gross negligence or deliberate acts or omissions of respondent, it shall be presumed that such unavailability resulted from circumstances beyond respondent's control within the meaning of Section II.A.1. *Provided, that,* sporadic unavailability caused by the gross negligence or deliberate acts or omissions of a store level employee of respondent shall not negate the presumption if respondent can demonstrate that it took appropriate disciplinary action against the employee promptly after learning that the employee's gross negligence or deliberate acts or omissions caused such unavailability. *Provided further,* that persistent unavailability caused by the gross negligence or deliberate acts or omissions of a substantial number of store level employees of

respondent shall be attributed to respondent and shall negate the presumption.

2. If respondent is not advised in writing by the Federal Trade Commission or its staff that it has reason to believe that respondent has failed to make advertised items available, in violation of Trade Regulation Rule 424, Section 5 of the Federal Trade Commission Act or this order, and is not so notified within three months of the occurrence of such alleged violation, it shall be presumed that the alleged failure of respondent to make advertised items available was due to circumstances beyond respondent's control within the meaning of Section II.A.1. Such notice shall indicate each specific item alleged to be unavailable in identified stores on specified days.

C. Defenses Applicable to Over Price Marking or Overcharging.

The following shall constitute defenses to a charge of over price marking or overcharging under Trade Regulation Rule 424, as presently drafted, Section 5 of the Federal Trade Commission Act or any provision of this order if respondent can show:

1. That the advertised items were not marked or charged out at or below the advertised price due to circumstances beyond respondent's control, and respondent, upon notice or knowledge of such over price marking or overcharging, acted immediately to price mark the goods with or charge out the goods at the advertised price;

2. That, with respect to charges of over price marking, in the case of stores equipped with devices which "read" an identification code marked on the packaging of items, and which transmit the information to a computer which then transmits the correct prices of the items to cash registers where the prices are displayed and printed on cash register tapes, where the items (and individual units thereof) are not price marked in any additional manner, the advertised price of such items is clearly and conspicuously posted at the point of display;

3. That in the case of advertised items the ultimate price of which is to be determined by the total dollar amount of the customer's order or the use of a coupon or other similar price arrangement, the price at which the item is sold, and not the price marked on the item, shall govern.

D. Presumptions Applicable To Defenses Set Forth in Section II.C.

1. Because respondent, pursuant to Section III.C.2. of this order,

has obligated itself to institute, enforce, and maintain procedures designed to effect compliance with this order, if (a) the average, unadjusted rate of neither over price marking nor overcharging revealed by a survey of a sample of respondent's retail food stores exceeds two (2.0) percent, and (b) the over price marking or overcharging revealed by the survey is not shown to be caused in whole or substantial part by the gross negligence or deliberate acts or omissions of respondent, it shall be presumed that such over price marking or overcharging resulted from circumstances beyond respondent's control within the meaning of Section II.C.1. *Provided, that,* sporadic over price marking or overcharging caused by the gross negligence or deliberate acts or omissions of a store level employee of respondent shall not negate the presumption if respondent can demonstrate that it took appropriate disciplinary action against the employee promptly after learning that the employee's gross negligence or deliberate acts or omissions caused such over price marking or overcharging. *Provided further,* that persistent over price marking or overcharging caused by the gross negligence or deliberate acts or omissions of a substantial number of store level employees of respondent shall be attributed to respondent and shall negate the presumption.

2. If respondent is not advised in writing by the Federal Trade Commission or its staff that it has reason to believe that respondent has failed to price mark or charge out advertised items at the advertised prices in violation of Trade Regulation Rule 424, Section 5 of the Federal Trade Commission Act or this order, and is not so notified within three months of the occurrence of such alleged violation, it shall be presumed that the alleged failure of respondent to make advertised items available at or below the advertised price was due to circumstances beyond respondent's control within the meaning of Section II.C.1. Such notice shall indicate each specific item alleged to be over price marked or overcharged in identified stores on specified days.

III. *Additional Obligations of Respondent.*

A. *It is further ordered,* That throughout each advertised sale period in each of its retail food stores covered by an advertisement, respondent shall post conspicuously (1) at or near each doorway affording entrance to the public, and (2) at or near the place where customers pay for merchandise:

- (1) A copy of the advertisement.
- (2) The following statement:

All items advertised are required to be readily available for sale at or below the advertised price in each Kroger store except as specifically noted in this ad.

If an advertised item you wish to purchase is unavailable you may obtain a rain check that will enable you to purchase this item at the advertised price in the near future.

If you have any questions, the store manager will be glad to assist you.

B. *It is further ordered*, That respondent shall cause the following statement to be clearly and conspicuously set forth in each printed advertisement which represents that items are available for sale at any of its retail food stores:

Each of these advertised items is required to be readily available for sale in each Kroger store, except as specifically noted in this ad.

C. *It is further ordered*, That:

1. Respondent shall forthwith deliver a copy of this order to each of its operating divisions and to each of its present and future officers and other personnel in its organization down to the level of and including assistant store managers who, directly or indirectly, have any supervisory responsibilities relating to (a) availability or price marking of advertised items in respondent's retail food stores, and (b) check stand operations, or who are engaged in any aspect of preparation, creation, or placing of advertising, and respondent shall secure a signed statement acknowledging receipt of said order from each such person.

2. Respondent shall institute, enforce and maintain a program (including a continuing surveillance program) which is designed to effect compliance with this order and which is adequate to reveal whether the business practices of its retail food stores conform to this order, and shall confer with any duly authorized representative of the Commission pertaining to such program when requested to do so by a duly authorized representative of the Commission. The details (including methodology and procedures to ascertain and effect compliance) of the program are set forth in an initial report on compliance procedures submitted simultaneously with this order. The program may be modified by respondent from time to time, upon thirty (30) days' advance notice to the Commission, *provided*, that as modified the program shall be adequate to comply with respondent's obligations under Part III.C.2. of this order.

3. Respondent shall, for a period of three (3) years subsequent to the date of this order:

a. Maintain business records which show the efforts taken to ensure continuing compliance with the terms and provisions of this order;

b. Grant any duly authorized representative of the Federal Trade Commission access to all such business records;

c. Furnish to the Federal Trade Commission: (i) copies of such records as reveal the results of outside surveys and such other records as are maintained at the Kroger general office, which are requested by any of its duly authorized representatives within three weeks from the date the request is received by respondent; and (ii) copies of all other such records which are requested by any of its duly authorized representatives as promptly as possible.

4. Respondent shall, all other provisions of this order notwithstanding, annually for a period of three (3) years from the date that this order becomes final, file with the Commission a report in writing demonstrating the effectiveness of the steps or actions taken by respondent with regard to the aforesaid program, including a surveillance program, and setting forth in detail the manner and form in which it has complied with this order in the preceding year.

D. *It is further ordered,* That respondent shall notify the 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 respondent which may affect compliance obligations arising out of this order.

E. *It is further ordered,* That the respondent herein shall within 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.

Complaint

IN THE MATTER OF
FISHER FOODS, INC.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT

Docket 9062. Complaint, Oct. 28, 1975 — Decision, Nov. 11, 1977

This consent order, among other things, requires a Bedford Heights, Ohio, retail food store chain, to make each of its advertised items readily available for sale to customers in its stores, to have advertised items correctly priced and to sell those items at or below the advertised price. Further, the firm must post copies of advertisements and notices of the availability of "rainchecks" for unavailable items.

Appearances

For the Commission: *Aaron H. Bulloff, Melvin H. Wolovits and Paul K. Trause.*

For the respondent: *John F. McClatchey, Thompson, Hine & Flory, Cleveland, Ohio.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by that Act, the Federal Trade Commission, having reason to believe that Fisher Foods, Inc., a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Act, 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:

COUNT I

Alleging violation of Section 5 of the Federal Trade
Commission Act (15 U.S.C. 45)

PARAGRAPH 1. Respondent Fisher Foods, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Ohio, with its principal office and place of business located at 5300 Richmond Road, Bedford Heights, Ohio.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the operation of a chain of retail food stores. Respondent operates food stores and food departments in Ohio, Kentucky, Northern Illinois, and California. Its volume of business has been and is substantial. In the operation of its retail food stores,

respondent offers and promotes for sale to its customers an extensive line of products, including "food," as that term is defined in the Federal Trade Commission Act, groceries, or other merchandise. Many of the said products offered for sale and sold are manufactured or processed by respondent through its various divisions, subsidiaries, and affiliates at manufacturing and processing plants located in the State of Ohio. Many other of the said products are purchased from numerous suppliers located throughout the United States.

PAR. 3. In the course and conduct of its business as aforesaid, respondent now causes, and for some time last past has caused, directly or indirectly, the aforesaid food and grocery products or other merchandise to be shipped and distributed from the aforesaid manufacturing and processing plants, or from its other sources of supply, to warehouses and distribution centers, and thereafter to its retail food stores located in various states other than the state of origination, distribution, or storage of said products. Respondent maintains, and at all times mentioned herein has maintained, a substantial course of trade in the production, processing, distribution, advertising, offering for sale, and sale of the aforesaid food and grocery products or other merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of its business as aforesaid, and for some time last past, respondent has been, and is now disseminating and causing the dissemination of certain advertisements concerning the aforesaid food and grocery products or other merchandise by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including but not limited to advertisements in newspapers of general and interstate circulation and other advertising media, for the purpose of inducing, and which have been and are likely to induce, directly or indirectly, the purchase of said advertised products and other products from respondent; and respondent has been, and is now, disseminating and causing the dissemination of advertisements concerning said products by various means, including but not limited to the aforesaid media for the purpose of inducing, and which have been and are likely to induce, directly or indirectly, the purchase from respondent of the said advertised products and other products in commerce, as "commerce" is defined in the Federal Trade Commission Act. Many of the said advertisements list or depict the aforesaid food and grocery products, or other merchandise, and also contain statements and representations concerning the prices or terms at which said advertised products were being offered and presented for sale, as well as the time periods during which the offers would be in effect.

PAR. 5. Through the use of such advertisements disseminated in various areas of the United States served by respondent's retail food stores, respondent has represented directly or by implication that in those stores covered by such advertisements, throughout the effective periods of the advertised offers, the items listed or depicted in such advertisements would be:

- A. Readily available for sale to customers;
- B. Readily and conspicuously available for sale at or below the advertised prices; and
- C. Sold to persons who attempted to purchase such items at prices at or below the advertised prices.

PAR. 6. In truth and in fact, in a significant number of respondent's retail food stores covered by such advertisements, during the effective periods of the advertised offers, a substantial number of the items listed or depicted in the said advertisements were:

- A. Not readily available for sale;
- B. Not readily and conspicuously available for sale at or below the advertised prices; or
- C. Sold to persons who attempted to purchase such items at prices higher than the advertised prices.

Therefore, the statements and representations as referred to herein, were false, misleading and deceptive.

PAR. 7. By disseminating or causing the dissemination of advertisements which offer or present for sale items as aforesaid, and by failing to have, in a significant number of its stores covered by such advertisements, during the effective periods of the advertised offers, substantially all of the aforesaid advertised items:

- A. Readily available for sale to customers in quantities sufficient to meet reasonably anticipated demands;
- B. Conspicuously available for sale at or below the advertised prices;

and by selling substantial numbers of said items to persons attempting to purchase such items at prices in excess of the advertised price, respondent has engaged in unfair acts and practices.

PAR. 8. In the course and conduct of its business, and at all times referred to herein, respondent has been, and now is, in substantial competition in commerce, with corporations, partnerships, firms, and individuals in the retail food and grocery business.

PAR. 9. The use by respondent of the aforesaid unfair and false, misleading and deceptive statements, representations, acts and

practices, has had the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that the said statements and representations were true, and to induce such persons to go to respondent's stores and to purchase from respondent substantial quantities of the advertised items at prices in excess of the advertised prices and substantial quantities of items other than the advertised items, some of those other items being higher priced or otherwise less desirable to Fisher customers than the unavailable advertised items, by reason of such erroneous and mistaken belief.

PAR. 10. The acts and practices as aforesaid were all to the prejudice and injury of the public and of respondent's competitors and constituted unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

COUNT II

Alleging violation of the Federal Trade Commission Trade Regulation Rule Concerning Retail Food Store Advertising and Marketing Practices (16 C.F.R. 424, *et seq.*), and Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One, Two, Three, Four and Eight, respectively, of Count I hereof are incorporated by reference in Count II as if fully set forth verbatim.

PAR. 11. The Federal Trade Commission, pursuant to the Federal Trade Commission Act, as amended, 15 U.S.C. 41, *et seq.*, and the provisions of Subpart B, Part 1, of the Commission's Procedures and Rules of Practice, 16 C.F.R. 1.11, *et seq.*, conducted a proceeding for the promulgation of a trade regulation rule regarding retail food store advertising and marketing practices. Notice of this proceeding, including a proposed rule, was published in the *Federal Register* on November 14, 1969 (34 F.R. 18252). Interested parties were thereafter afforded opportunity to participate in the proceeding through the submission of written data, views, and arguments, and to appear and orally express their views as to the proposed rule and to suggest amendments, revisions, and additions thereto.

The Commission considered all matters of fact, law, policy, and discretion, including the data, views, and arguments presented on the record by interested parties in response to the Notice, as prescribed by law, determined that the adoption of the Trade Regulation Rule and Statement of its Basis and Purpose was in the public interest, and, accordingly, promulgated the Trade Regulation

Rule Concerning Retail Food Store Advertising and Marketing Practices on May 13, 1971, effective July 12, 1971.

PAR. 12. Respondent is a member of the retail food stores industry, and its acts and practices in connection with the sale of food and grocery products or other merchandise being subject to the jurisdiction of Section 5 of the Federal Trade Commission Act are within the intent and meaning of, and are subject to, the provisions of the aforesaid Trade Regulation Rule.

PAR. 13. In connection with its aforesaid advertisements, respondent, in a substantial number of instances, has failed to comply with Paragraph (1) of the aforesaid Trade Regulation Rule by offering food and grocery products or other merchandise subject to the jurisdictional requirements of Section 5 of the Federal Trade Commission Act for sale at stated prices by means of advertisements disseminated in areas served by certain of its stores which were covered by such advertisements but which, during the advertised sale periods, neither has such products in stock nor provided clear and adequate notice that the items were in stock and might be obtained upon request.

PAR. 14. In connection with its advertisements disseminated as aforesaid, respondent, in a substantial number of instances, has failed to comply with Paragraph (2) of the Trade Regulation Rule by offering products for sale at stated prices by means of advertisements disseminated in areas served by certain of its stores which are covered by such advertisements and by failing in those stores to charge out to persons who attempted to purchase such items, substantial numbers of such advertised products at prices at or below the advertised prices during the effective periods of the advertisements, thereby failing to make said advertised items conspicuously and readily available for sale at or below the advertised prices.

PAR. 15. Respondent's aforesaid violations of the Trade Regulation Rule Concerning Retail Food Store Advertising and Marketing Practices constitute unfair and deceptive acts and practices in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having heretofore issued its complaint charging the respondent, Fisher Foods, Inc., named in the caption hereto with violation of Section 5(a)(1) of the Federal Trade Commission Act, and the respondent, Fisher Foods, Inc., having been served with a copy of the complaint and with a copy of the notice of contemplated relief accompanying said complaint; 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 the 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 issued an order withdrawing the matter described in the caption hereto from adjudication for the purpose of considering the proposed consent agreement pursuant to Section 3.25 of its Rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing a consent order having thereupon been placed on the public record for a period of sixty (60) days and the Commission having duly considered the comments filed pursuant to Sections 2.34 and 3.25 of its Rules, now in further conformity with the procedure prescribed in Section 3.25 of its Rules, the Commission hereby issues its decision in disposition of the proceeding against the above-named respondent, makes the following jurisdictional findings, and enters the following order:

1. Respondent Fisher Foods, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business located at 5300 Richmond Road, Bedford Heights, Ohio.

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

Definitions

For purposes of this order:

A. "Respondent" means Fisher Foods, Inc., but does not include Fisher's existing wholly-owned subsidiary, Dominick's Finer Foods, Inc.

B. A "Retail Food Store" means one of respondent's Retail Food Stores in the Northern Ohio Division, in the Southern Ohio Division, or in the Los Angeles Division, other than a convenience store, *i.e.* a store having less than 4,000 square feet of floor space.

C. The "Northern Ohio Division" means the Retail Food Stores

located in the following counties in Ohio: Ashtabula, Cuyahoga, Geauga, Lake, Lorain, Mahoning, Medina, Portage, Stark, Summit, Trumbull, and Wayne.

D. The "Southern Ohio Division" means the Retail Food Stores located (1) in each county in Ohio other than the Ohio counties located in the Northern Ohio Division, and (2) in states contiguous to Ohio.

E. The "Los Angeles Division" means the Retail Food Stores located in, and in states contiguous to, California.

F. A "Northern Ohio Division Sample" means a selection of at least 25 percent (to the nearest whole number) of respondent's Retail Food Stores located in the Northern Ohio Division, 75 percent (to the nearest whole number) of which shall be randomly selected from the Ohio Counties of Cuyahoga, Lake, Lorain, and Summit, and 25 percent of which shall be randomly selected from respondent's Retail Food Stores in the other Ohio Counties which comprise the Northern Ohio Division.

G. A "Southern Ohio Division Sample" means a selection of at least 25 percent (to the nearest whole number) of respondent's Retail Food Stores located in the Southern Ohio Division.

H. A "Los Angeles Division Sample" means a selection of at least 25 percent (to the nearest whole number) of respondent's Retail Food Stores located in the Los Angeles Division, 75 percent (to the nearest whole number) of which shall be randomly selected from the California Counties of Los Angeles and Orange, and 25 percent of which shall be randomly selected from respondent's Retail Food Stores in the other California Counties which comprise the Los Angeles Division.

I. A "Survey" or a "Survey of the Sample" means a survey of the Northern Ohio Division Sample, Southern Ohio Division Sample, or Los Angeles Division Sample, conducted in accordance with the Survey Procedures set forth in Exhibit A, attached hereto and incorporated herein by reference. Stores to be surveyed shall be chosen in a manner that is consistent with the Survey Procedures. Respondent waives any right it might have to challenge the admissibility into evidence of the results of a Survey, or to challenge the evidentiary weight of a Survey based upon the size of the Sample. Respondent, however, retains the right to challenge the evidentiary weight to be given to the results of any such Survey on any other legally available basis.

J. The "Unadjusted Number of Unavailable Advertised Items" with respect to one of respondent's surveyed Retail Food Store means the surveyed number of unavailable advertised items before

that number is reduced by any instances of unavailability that are excused by the defenses set forth in Trade Regulation Rule 424, as presently drafted, or in this order.

K. The "Adjusted Number of Unavailable Advertised Items" with respect to one of respondent's surveyed Retail Food Stores means the Unadjusted Number of Unavailable Advertised Items reduced by all instances of unavailability that are excused by the defenses set forth in Trade Regulation Rule 424, as presently drafted, or in this order.

L. The "Unadjusted Number of Over-Price-Marked or Overcharged Advertised Items" with respect to one of respondent's surveyed Retail Food Stores means the surveyed number of Over-Price-Marked or Overcharged Advertised Items before that number is reduced by any instances of overpricing or overcharging that are excused by the defenses set forth in Trade Regulation Rule 424, as presently drafted, or in this order.

M. The "Adjusted Number of Over-Price-Marked or Overcharged Advertised Items" with respect to one of respondent's surveyed Retail Food Stores means the Unadjusted Number of Over-Price-Marked or Overcharged Advertised Items reduced by all instances of over-price-marking or overcharging that are excused by the defenses set forth in Trade Regulation Rule 424, as presently drafted, or in this order.

N. The "Average Adjusted Rate of Unavailability" revealed by a Survey, as referred to in Paragraph III(B)(1) of this order, shall be determined as follows:

1. For each store surveyed, the Unadjusted Number of Unavailable Advertised Items shall be recorded and that number shall be reduced in accordance with the definition of "Adjusted Number of Unavailable Advertised Items" in this Order to ascertain the Adjusted Number of Unavailable Advertised Items in that store.

2. For each store surveyed, the number of items that the advertisement represents to be available in that store shall be recorded.

3. After the individual stores in the Sample have been surveyed, the sum, or aggregate, of the Adjusted Numbers of Unavailable Advertised Items recorded pursuant to Paragraph I(N)(1) shall be determined.

4. After the individual stores in the Sample have been surveyed, the sum, or aggregate, of the numbers of advertised items recorded pursuant to Paragraph I(N)(2) shall be determined.

5. The Average Adjusted Rate of Unavailability shall be the fraction of which the numerator is the sum, or aggregate, deter-

mined pursuant to Paragraph I(N)(3) and of which the denominator is the sum, or aggregate, determined pursuant to Paragraph I(N)(4).

O. The "Average Adjusted Rate of . . . Over-Price-Marking" revealed by a Survey as referred to in Paragraph III(D)(1) of this order, shall be determined as follows:

1. For each store surveyed, the Unadjusted Number of Over-Price-Marked Advertised Items shall be recorded and that number shall be reduced in accordance with the definition of "Adjusted Number of Over-Price-Marked Advertised Items" in this Order to ascertain the Adjusted Number of Over-Price-Marked Advertised Items in that store.

2. For each store surveyed, the number of items that the advertisement represents to be available in that store shall be recorded.

3. After the individual stores in the sample have been surveyed, the sum, or aggregate, of the Adjusted Numbers of Over-Price-Marked Advertised Items recorded pursuant to Paragraph I(O)(1) shall be determined.

4. After the individual stores in the Sample have been surveyed, the sum, or aggregate, of the numbers of advertised items recorded pursuant to Paragraph I(O)(2) shall be determined.

5. The Average Adjusted Rate of Over-Price-Marking shall be the fraction of which the numerator is the sum, or aggregate, determined pursuant to Paragraph I(O)(3), and of which the denominator is the sum, or aggregate, determined pursuant to Paragraph I(O)(4).

P. The "Average Adjusted Rate of . . . Overcharging" revealed by a survey as referred to in Paragraph III(D)(1) of this order shall be determined as follows:

1. For each store surveyed, the Unadjusted Number of Overcharged Advertised Items shall be recorded and that number shall be reduced in accordance with the definition of "Adjusted Number of Overcharged Advertised Items" in this order to ascertain the Adjusted Number of Overcharged Advertised Items in that store.

2. For each store surveyed, the number of items that the advertisement represents to be available in that store shall be recorded.

3. After the individual stores in the Sample have been surveyed, the sum, or aggregate, of the numbers of advertised items recorded pursuant to Paragraph I(P)(2) shall be determined.

4. After the individual stores in the Sample have been surveyed, the sum, or aggregate, of the numbers of advertised items recorded pursuant to Paragraph I(P)(2) shall be determined.

5. The Average Adjusted Rate of Overcharging shall be th

fraction of which the numerator is the sum, or aggregate, determined pursuant to Paragraph I(P)(3), and of which the denominator is the sum, or aggregate, determined pursuant to Paragraph I(P)(4).

Q. A "Perishable Item" means any item that will probably spoil or that will be substantially reduced in value if not sold on the day of delivery, or, in the case of prepared foods such as barbecued chicken or in-store baked products, on the day of preparation.

II

Prohibited Activities

It is ordered. That, in connection with respondent's advertising, offering for sale, sale or distribution of food or grocery products or other merchandise (hereinafter sometimes referred to as items) offered for sale or sold in its Retail Food Stores, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, that respondent forthwith cease and desist, directly or indirectly or through any device, from disseminating or causing the dissemination of any advertisement by any means that offers any items for sale at an advertised price unless, with respect to Paragraphs II(A), II(B), and II(C) below, respondent is complying with a specific exception, limitation, or restriction with respect to a store, item, or price that is clearly and conspicuously disclosed in all advertisements for the item in question (including but not limited to limitations or restrictions concerning the stores in which an item is available, the numeral quantities of an item available in each Retail Food Store, and the hours during which a Perishable Item is available), or unless, throughout the effective period of the advertised offer at each Retail Food Store covered by the advertisement:

A. Each advertised item is readily available for sale to customers in the public area of the store or, if not readily available there, a clear and conspicuous notice is posted where the item is regularly displayed indicating that the item is in stock and may be obtained upon request and the item is readily furnished upon request;

B. Each unit of each advertised item, any of which is marked with at least one price either on the item itself or on a sign at the point of display, is clearly and conspicuously marked with a price that is no higher than the advertised price; if any unit of an advertised item is marked with two or more different prices, the customer is charged the lowest of the prices, which is no higher than the advertised price;

C. Each unit of each advertised item is sold to customers at or below the advertised price;

except that no proceeding to enforce Paragraphs II(A), II(B), or II(C) of this order, pursuant to Section 5(l) of the Federal Trade Commission Act, as amended, that is based on a survey shall be instituted or commenced except on the basis of a Survey of a Sample of the Northern Ohio Division.

III

Defenses and Presumptions

A. Defenses to a charge of unavailability under Trade Regulation Rule 424, as presently drafted, Section 5 of the Federal Trade Commission Act, as amended, or any provisions of this order shall consist of every instance in which the Respondent can show:

1. That the advertised item was unavailable due to circumstances beyond respondent's control, that respondent did not have notice or knowledge of such impending unavailability in time to delete the item from the proposed advertisement, and that respondent offered to customers, for each unavailable item, a "raincheck" that (a) entitled the holder to purchase the item in the near future at or below the advertised price and (b) conspicuously disclosed on its face that, if the customer tendered the "raincheck" to Respondent more than three days, but less than 17 days, after receipt and the advertised item was still unavailable, the customer may elect, at his option, either to renew the "raincheck" for an additional two-week period or to receive a comparable item at or below the advertised price.

2. That the advertised items were delivered in adequate time to respondent's Retail Food Stores in quantities sufficient to meet reasonably anticipated demand. For purposes of this Paragraph III(A)(2):

(a) Respondent shall be deemed to have shown that it delivered an item to a store in quantities sufficient to meet reasonably anticipated demand in a particular advertisement period if it maintains records showing that it delivered that item to that store during that advertisement period in quantities equal to or greater than the quantities of that item sold by that store during the last preceding comparable advertisement period.

(b) The phrase, "quantities of that item sold by that store during the last preceding comparable advertisement period," for items other than meat, means the sum of the number of units in the closing inventory of the store after closing hours on the night before the first day of the advertisement period, *plus* the number of units delivered to the store during the advertisement period, *plus* the

number of "rainchecks" issued for that item during the advertisement period, and *minus* the number of units in the closing inventory of the store after closing hours on the last day of the advertisement period.

(c) The phrase, "delivered in adequate time," for items other than meat, means that, if respondent delivers more than one shipment of an item to a store in the comparable advertisement period, the "quantities of that item sold by that store during the . . . advertisement period" shall be apportioned among the deliveries in the particular advertisement period in such quantities that, by the comparable delivery date of the particular advertisement period, there shall have been delivered to the store at least the same proportion of quantities as were delivered by that date in the comparable period. For example, if the "quantities of that item sold by that store during the comparable advertisement period" for items other than meat were 110 units (100 units actually delivered and 10 "rainchecks" issued), and the units were delivered to the store in the comparable advertisement period in three deliveries consisting of 40 units on Monday, 40 units on Wednesday, and 20 units on Friday, respondent "will have delivered, in adequate time" if respondent delivers for the particular advertisement period, at least 40 percent (of the 110 units to be delivered) by Monday, 80 percent by Wednesday, and 100 percent by Friday.

(d) It shall be presumed that respondent has delivered meat items to a store in quantities sufficient to meet reasonably anticipated demand in a particular advertisement period when the sum of the number of primal cuts or carcasses containing that item in the closing inventory of the store after closing hours on the night before the first day of the particular advertisement period, *plus* the number of primal cuts or carcasses containing that item delivered to the store during the particular advertisement period, is equal to or greater than the sum of the number of primal cuts or carcasses containing that item in the closing inventory of the store after closing hours on the night before the first day of the comparable advertisement period, *plus* the number of primal cuts or carcasses containing that item delivered to the store during the comparable advertisement period, *minus* the number of primal cuts or carcasses containing that item in the closing inventory of the store after closing hours on the last day of the comparable advertisement period, taking into consideration the number of "rainchecks" issued and the frequency of delivery.

(e) The phrase, "last preceding comparable advertisement period" means, for a particular item, the last preceding advertisement period

(during which the item was advertised) that is most comparable to the particular advertisement period, considering the time of the year, the week of the month, weather conditions, the nature of the item, the amount of the price reduction, the location of the advertisement for the item with reference to the advertisement as a whole, the type size of the advertisement for the item, the availability of a coupon, the location of the product within the store, and any other relevant factors affecting a customer's buying habits.

(f) Each item that respondent can show it delivered to a Retail Food Store, included in the Sample, in quantities sufficient to meet reasonably anticipated demand, as provided herein, shall be employed herein as a defense in reducing the "Unadjusted Number of Unavailable Advertised Items" in computing the "Adjusted Number of Unavailable Advertised Items."

B. The following presumptions shall apply in ascertaining the availability to respondent of the defenses set forth in Paragraph III(A).

1. Because respondent has obligated itself, pursuant to Paragraph IV(C)(2) of this order, to institute, enforce, monitor, improve on the basis of experience, and maintain procedures designed to effect compliance with this order, it shall be presumed that the unavailability of all advertised items resulted from circumstances beyond respondent's control, within the meaning of Paragraph III(A)(1), if (a) the Average Adjusted Rate of Unavailability does not exceed 2/100 or 2 percent and (b) the unavailability revealed by the Survey is not shown to be caused in whole or in substantial part by the gross negligence or deliberate acts or omissions of respondent. (Sporadic unavailability caused by the gross negligence or deliberate acts or omissions of an insubstantial number of store level employees of respondent shall not negate the presumption if respondent can demonstrate that it took appropriate disciplinary action against the employees promptly after learning that the employees' gross negligence or deliberate acts or omissions caused the unavailability; persistent unavailability, however, caused by the gross negligence or deliberate acts or omissions of a substantial number of store level employees of respondent shall be attributed to respondent and shall negate the presumption.)

2. If, with respect to a Survey conducted in accordance with Paragraph IV(C) of this order, respondent is not advised in writing by the Federal Trade Commission or its staff within four months after receipt of a verified report from respondent as outlined in the Survey Procedures, or if respondent is not advised with respect to a Survey conducted by the Federal Trade Commission or its staff

within four months after the Commission or its staff receives documents from respondent concerning its defenses as set forth in Trade Regulation Rule 424, as presently drafted, or this order, that the Federal Trade Commission or its staff has reason to believe that respondent has failed to make advertised items available, in violation of Trade Regulation Rule 424, as presently drafted, Section 5 of the Federal Trade Commission Act, as amended, or this order, after taking into consideration the defenses set forth in Trade Regulation Rule 424, as presently drafted, or in this order, it shall be presumed that the alleged failure of respondent to make advertised items available was due to circumstances beyond respondent's control within the meaning of Paragraph III(A)(1). If on the other hand respondent is advised, within the prescribed period, of the position of the Federal Trade Commission or its staff, the advice shall indicate each specific item alleged to have been unavailable in identified stores on specified days.

C. Defenses to a charge of over-price-marking or overcharging under Trade Regulation Rule 424, as presently drafted, Section 5 of the Federal Trade Commission Act, or any provision of this order, shall consist of every instance in which the respondent can show:

1. That the advertised item was not marked or charged out at or below the advertised price due to circumstances beyond respondent's control, and that respondent, upon notice of knowledge of such over-price-marking or overcharging, acted immediately to price-mark the goods with, or charge out the goods at, the advertised price.

2. That, with respect to charges of over-price-marking in the case of stores equipped with devices that "read" an identification code (commonly referred to as the Universal Product Code) marked on the packaging of items and transmit the information to a computer that transmits the information to cash register tapes, with the items (and individual units thereof) not price-marked in any additional manner, the advertised price of such items was clearly and conspicuously posted at the point of display.

3. That, in the case of advertised items the ultimate price of which is to be determined by the total dollar amount of the customer's order or the use of a coupon or other similar price arrangement, the price at which the item is sold, and not the price marked on the item, shall govern.

D. The following presumptions shall apply in determining the availability to respondent of the defenses set forth in Paragraph III(C).

1. Because respondent has obligated itself, pursuant to Paragraph IV(C)(2) of this order, to institute, enforce, monitor, improve

on the basis of experience, and maintain procedures designed to effect compliance with this order, it shall be presumed that the over-price-marking or overcharging of all advertised items resulted from circumstances beyond respondent's control within the meaning of Paragraph III(C)(1) if (a) neither the Average Adjusted Rate of Over-Price-Marking nor the Average Adjusted Rate of Overcharging exceeds 1/100 or 1 percent, and (b) the over-price-marking or overcharging revealed by the Survey is not shown to be caused in whole or in substantial part by the gross negligence or deliberate acts or omissions of respondent. (Sporadic over-price-marking or overcharging caused by the gross negligence or deliberate acts or omissions of an insubstantial number of store level employees of respondent shall not negate the presumption if respondent can demonstrate that it took appropriate disciplinary action against the employees promptly after learning that the employees' gross negligence or deliberate acts or omissions caused the over-price-marking or overcharging; however, persistent over-price-marking or overcharging caused by the gross negligence or deliberate acts or omissions of a substantial number of store level employees of respondent shall be attributed to respondent and shall negate the presumption.)

2. If, with respect to a Survey conducted in accordance with Paragraph IV(C) of this order, respondent is not advised in writing by the Federal Trade Commission or its staff within four months after receipt of a verified report from respondent as outlined in the Survey Procedures, or if respondent is not advised with respect to a Survey conducted by the Federal Trade Commission or its staff within four months after the Commission or its staff receives documents from respondent concerning its defenses as set forth in Trade Regulation Rule 424, as presently drafted, or this order, that the Federal Trade Commission or its staff has reason to believe that respondent has failed to price-mark or charge out advertised items at the advertised prices, in violation of Trade Regulation Rule 424, as presently drafted, Section 5 of the Federal Trade Commission Act, as amended, or this order, after taking into consideration the defenses set forth in Trade Regulation Rule 424, as presently drafted, or in this order, it shall be presumed that the alleged failure of respondent to make advertised items available at or below the advertised price was due to circumstances beyond respondent's control within the meaning of Paragraph III(C)(1). If on the other hand respondent is advised, within the prescribed period, of the position of the Federal Trade Commission or its staff, the advice shall indicate each specific

item alleged to have been over-price-marked or overcharged in identified stores on specified days.

IV

Additional Obligations of Respondent

A. *It is further ordered*, That, throughout each advertisement period in each of its Retail Food Stores covered by an advertisement, Respondent shall post conspicuously, at or near each doorway affording entrance to the public, and at or near the place where customers pay for merchandise:

1. A copy of any printed advertisement.
2. The following statement:

NOTICE

All items advertised for sale in this store are "required to be readily available for sale" at or below the advertised price, except as otherwise specifically noted in the advertisement.

If an advertised item you wish to purchase is unavailable, please request a "raincheck" from the store office.

If two (or more) prices appear on a unit of an item, you will be charged the lower (or lowest) of the prices marked; in no event will you be charged more than the advertised price.

If you have any questions, the store manager will be glad to assist you.

B. *It is further ordered*, That respondent shall cause the following statement to be clearly and conspicuously set forth in each printed advertisement that represents that items are available for sale at any of its Retail Food Stores:

Each of these advertised items is "required to be readily available for sale" in each store, except as otherwise specifically indicated in this advertisement.

C. *It is further ordered*, That:

1. Respondent shall forthwith deliver a copy of this order to the head of its operating divisions and to each of its officers and other personnel in its organization down to the level of, and including, assistant store managers who, directly or indirectly, have any supervisory responsibilities relating to (a) the availability or price-marking of advertised items in respondent's Retail Food Stores and (b) check stand operations or who are engaged in any aspect of the preparation, creation, or placing of advertising; respondent shall promptly deliver a copy of this order to any person who is hereafter elected in or placed in one of these positions. Respondent shall secure

a signed statement acknowledging receipt of the order from each such person.

2. Respondent shall institute, enforce, monitor, improve on the basis of experience, and maintain a program (including a continuing surveillance procedure) that is designed to effect compliance with this order and to reveal whether the business practices of each of its Retail Food Stores conform to this order, and shall confer with a representative of the Federal Trade Commission pertaining to the program when requested to do so by such representative. This program shall include five Surveys of respondent's Retail Food Stores by an independent organization, conducted according to the Survey Procedures and within the time limitations hereinafter prescribed, with the commencement date for each of these Surveys to be selected by the Federal Trade Commission or its staff. Respondent shall not modify any Survey procedure or form without prior Commission approval. At least one of these Surveys shall be conducted using a Sample of the Northern Ohio Division and shall be conducted between six months after the effective date of this order and four years after the effective date of this order. At least one of these Surveys shall be conducted using a Sample of the Southern Ohio Division and shall be conducted between one year after the effective date of this order and four years after the effective date of this order. Each of the remaining two Surveys shall be conducted in any of the three divisions chosen by the Federal Trade Commission or its staff and shall be conducted between one year after the effective date of this order and four years after the effective date of this order, except that no Survey of the same division shall be commenced earlier than six months after the commencement of an earlier Survey of the same division. The results of each of these Surveys, the defenses of respondent, and any underlying documents shall be provided to the Federal Trade Commission or its staff within four months after the completion of the Survey.

3. The results of any Survey, any defenses of the respondent, and any underlying documents, as they relate to respondent's Retail Food Stores located in the Southern Ohio Division or in the Los Angeles Division, may be used by the Federal Trade Commission in any proceeding under the Federal Trade Commission Act, as amended, other than a proceeding to enforce Paragraph II of this order. The results of any Survey, any defenses of the respondent, and any underlying documents, as they relate to respondent's Retail Food Stores located in the Northern Ohio Division, may be used by the Federal Trade Commission in any proceeding under the Federal Trade Commission Act, as amended. As set forth in Paragraph I(I),

respondent waives any right it might have to challenge the admissibility into evidence of the results of a Survey or to challenge the evidentiary weight of the Survey based upon the size of the Sample; respondent, however, retains the right to challenge the evidentiary weight to be given to the results of any such Survey on any other legally available basis.

4. Respondent shall, for a period of five years after the effective date of this order:

a. Maintain business records which show respondent's efforts taken to ensure continuing compliance with the terms and provisions of this order;

b. Grant a representative of the Federal Trade Commission access to all such business records, during normal business hours and for reasonable periods of time;

c. Furnish to the Federal Trade Commission or its staff copies of such records when they are requested by any representative of the Federal Trade Commission possessing authority to make such request.

5. Respondent shall, all other provisions of this order notwithstanding, for a period of four years after the effective date of this order, file with the Commission an annual report in writing revealing the effectiveness of the steps or actions taken by respondent with regard to the aforesaid program (including a continuing surveillance procedure) and setting forth in detail the manner and form in which it has complied with this order in the preceding year.

D. *It is further ordered*, That Fisher shall notify the Commission at least 30 days prior to any proposed change in its corporate existence (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 Fisher that may affect compliance obligations arising out of this order.

E. *It is further ordered*, That respondent herein shall within 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.

IN THE MATTER OF
FOOD FAIR STORES, INC. ALSO TRADING AS PANTRY
PRIDE

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT

Docket C-2912. Complaint, Nov. 11, 1977 — Decision, Nov. 11, 1977

This consent order, among other things, requires a Philadelphia, Pa. retail food store chain to make each of its advertised items readily available for sale to customers in its stores, to have advertised items correctly priced, and to sell those items at or below the advertised price. Further, the firm must post copies of advertisements and notices of the availability of "rainchecks" for unavailable items.

Appearances

For the Commission: *Bernard Rowitz, Alan L. Cohen and Irvin E. Abrams.*

For the respondent: *Stein, Mitchell & Mezines, Washington, D.C.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Food Fair Stores, Inc., a corporation, also trading and doing business as Pantry Pride, hereinafter sometimes referred to as respondent, has engaged in acts and practices contrary to the Commission's Trade Regulation Rule Concerning Retail Food Store Advertising and Marketing Practices (16 C.F.R. 424) in violation of the Federal Trade Commission Act, as amended, and has also engaged in acts and practices in violation of the provisions of the above-mentioned Act, 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:

COUNT I

Alleging violation of Section 5 of the Federal Trade Commission Act, as amended.

PARAGRAPH 1. Respondent, Food Fair Stores, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania with its office and principal place of business located at 3175 John F. Kennedy

Boulevard, Philadelphia, Pennsylvania. Respondent also operates, trades and does business under the name of Pantry Pride.

PAR. 2. Respondent is engaged in the operation of a chain of retail food stores, buying and selling a wide variety of food and grocery products. Respondent operates retail food stores in Pennsylvania, New Jersey, Maryland, Florida and other States in the United States. Its volume of business is substantial. In the operation of its retail food stores, respondent offers and presents for sale to its customers, and sells to its customers, an extensive line of products, including food, groceries and other merchandise, all of which are sometimes referred to hereafter as "items." Many of said items are purchased from numerous suppliers located throughout the United States.

PAR. 3. In the course and conduct of its business, as aforesaid, respondent now causes, and for some time last past has caused, directly or indirectly, the aforesaid items to be shipped and distributed from manufacturing and processing plants or from other sources of supply to its warehouses, distribution centers, or retail food stores located in various states other than the state of origination, distribution or storage of said items. Respondent maintains, and at all times mentioned herein has maintained a substantial course of trade in the distribution, advertising, offering for sale and sale of the aforesaid items in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 4. In the course and conduct of its business, as aforesaid, and for some time last past respondent has been and is now disseminating, and causing the dissemination of, certain advertisements concerning the aforesaid items by various means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, including but not limited to, advertisements in newspapers of general and interstate circulation and other advertising media, for the purpose of inducing and which were and are likely to induce, directly or indirectly, the purchase of said items from respondent; and respondent has been and is now disseminating, and causing the dissemination of, advertisements concerning said items by various means, including but not limited to the aforesaid media, for the purpose of inducing and which were and are likely to induce, directly or indirectly, the purchase from respondent of the said items in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, as amended. Many of the said advertisements list or depict the aforesaid items and also contain statements and representations concerning the price or terms at which said

items would be offered for sale. Many of the aforesaid advertisements contain further direct and express statements and representations concerning the time periods during which the offers would be in effect and the locations of respondent's food stores at which the offers would be made.

PAR. 5. Through the use of such advertisements disseminated, and now being disseminated, in various areas of the United States served by respondent's retail food stores, respondent has represented, and is now representing, directly or by implication, that in those stores covered by such advertisements, throughout the effective periods of the advertised offers, the items listed or depicted in such advertisements would be or are:

- A. Readily available for sale to customers;
- B. Readily available for sale at or below the advertised prices.

PAR. 6. In truth and in fact, in a number of respondent's retail food stores covered by such advertisements, during the effective periods of the advertised offers, a number of items listed or depicted in the said advertisements were or are:

- A. Not readily available for sale;
- B. Not readily available for sale at or below the advertised prices.

Therefore, the statements and representations as referred to herein, were and are false, misleading and deceptive, and each of such advertisements was and is misleading in material respects.

PAR. 7. By disseminating or causing the dissemination of advertisements which offer or present for sale items as aforesaid, and by failing to have in each of its stores covered by such advertisements, throughout the effective periods of the advertised offers, in quantities sufficient to meet reasonably anticipated demands, the advertised items:

- A. Readily available for sale to customers; or
- B. Readily available for sale at or below the advertised prices;

respondent has been and now is engaged in unfair acts and practices.

PAR. 8. By disseminating or causing the dissemination of advertisements which offer or present for sale items at specific prices, as aforesaid, and during the effective periods of such advertised offers at certain stores covered by said advertisements, by marking said items or permitting said items to remain marked at prices higher than the advertised prices, respondent has been and now is engaged in unfair acts and practices.

PAR. 9. In the course and conduct of its business, and at all times referred to herein, respondent has been and now is in substantial competition in or affecting commerce, with corporations, partnerships, firms and individuals in the retail food and grocery business.

PAR. 10. The use by respondent of the aforesaid unfair and false, misleading and deceptive statements, representations, acts and practices, including the dissemination of the aforesaid advertisements, has had and now has the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that the said statements and representations were and are true, and to induce such persons to go to respondent's stores and to purchase from respondent substantial quantities of the advertised items at prices in excess of the advertised prices and substantial quantities of items other than the advertised items.

PAR. 11. The acts and practices as aforesaid, and the dissemination by respondent of the false advertisements, as aforesaid, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted and now constitute unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended.

COUNT II

Alleging violations of the Federal Trade Commission Trade Regulation Rule Concerning Retail Food Store Advertising and Marketing Practices (16 C.F.R. 424), the allegations of Paragraphs One, Two, Three, Four, and Nine, respectively, of Count I hereof are incorporated by reference in Count II as if fully set forth verbatim.

PAR. 12. The Federal Trade Commission, pursuant to the Federal Trade Commission Act, as amended, 15 U.S.C. 41, *et seq.*, and the provisions of Subpart B, Part 1, of the Commission's Procedures and Rules of Practice, 16 C.F.R. 1.11, *et seq.*, conducted a proceeding for the promulgation of a trade regulation rule regarding retail food store advertising and marketing practices. Notice of this proceeding, including a proposed rule, was published in the *Federal Register* on November 14, 1969 (34 F.R. 18252). Interested parties were thereafter afforded opportunity to participate in the proceeding through the submission of written data, views, and arguments, and to appear and orally express their views as to the proposed rule and to suggest amendments, revisions, and additions thereto.

The Commission considered all relevant matters of fact, law,

policy, and discretion, including the data, views, and arguments presented on the record by interested parties in response to the Notice as indicated in the accompanying Statement of Basis and Purpose (36 F.R. 8777 (May 13, 1971)) and as prescribed by law, determined that the adoption of the trade regulation rule was in the public interest, and, accordingly, promulgated the Trade Regulation Rule Concerning Retail Food Store Advertising and Marketing Practices on May 13, 1971, effective July 12, 1971.

PAR. 13. Respondent is a member of the retail food store industry, and its acts and practices in connection with the sale and offering for sale of food and grocery products or other merchandise are subject to the jurisdiction of Section 5 of the Federal Trade Commission Act, as amended, and are within the intent and meaning of, and are subject to, the provisions of the aforesaid trade regulation rule.

PAR. 14. In connection with its aforesaid advertisements, respondent, in many instances, has failed to comply with the aforesaid trade regulation rule by offering food and grocery products or other merchandise for sale at a stated price by means of advertisements disseminated in areas served by certain of its stores which were covered by the advertisement but which did not have such products in stock and readily available for sale to customers during the effective period of the advertisement.

PAR. 15. In connection with its advertisements disseminated as aforesaid, respondent, in many instances, has failed to comply with the aforesaid trade regulation rule by failing to make certain of the advertised items conspicuously and readily available for sale at or below the advertised prices.

PAR. 16. Respondent's aforesaid violations of the Trade Regulation Rule Concerning Retail Food Store Advertising and Marketing Practices constitute violation of Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of Food Fair Stores, Inc., a corporation, also trading and doing business as Pantry Pride, hereinafter sometimes referred to as respondent, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Washington, D.C. Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act, as amended; 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 Act, and that complaint should issue stating its charges in that respect, having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed pursuant to Section 2.34 of its Rules, 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 Food Fair Stores, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania. Respondent also operates, trades and does business under the name Pantry Pride.
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 respondent Food Fair Stores, Inc., a corporation, also trading and doing business as Pantry Pride, or under any name or names, its successors or assigns, its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of food or grocery products or other merchandise, hereinafter sometimes referred to as items, offered or sold in its retail food stores, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from, directly or indirectly:

- A. Disseminating, or causing the dissemination of, any advertisement by any means which offers any items for sale at a stated price, unless throughout the effective period of the advertised offer at each retail food store covered by the advertisement:

1. Each advertised item is readily available for sale to customers in the public area of the store;

2. Each unit of each advertised item, any of whose units are marked with a price, is individually, clearly, and conspicuously marked with a price no higher than the advertised price;

3. Each advertised item is sold to customers at or below the advertised price.

Provided, that it shall not be deemed a violation of the above subparagraphs A.1, A.2, A.3, if respondent is complying with a specific exception, limitation or restriction with respect to store, item or price which is clearly and conspicuously disclosed in all advertisements for the product in question.

Provided, further, that it shall constitute a defense to a charge of unavailability under subparagraph I.A.1. if respondent has posted a clear and conspicuous notice where the item is regularly displayed which states that the item is in stock and may be obtained upon request, and said item is furnished on request.

Provided, further, it shall constitute a defense to a charge of unavailability under subparagraph I.A.1. if respondent maintains and furnishes or makes available for inspection and copying upon the request of the Federal Trade Commission, such records and affidavits as will show that (a) the advertised items were delivered to or were on hand in its food stores in quantities sufficient to meet reasonably anticipated demand, or (b) the advertised items were ordered but not delivered due to circumstances beyond respondent's control, and that respondent, upon notice or knowledge of such non-delivery, acted immediately to contact the media to correct any future advertisement (including the same ad run at some future date) to delete or to reflect the limited availability of such items, and (c) respondent offered to customers on inquiry a "raincheck" for each unavailable item which entitled the holder to purchase the item in the near future at or below the advertised price.

If respondent or any of its employees, agents or representatives are not advised of an alleged instance of unavailability through any source including the Federal Trade Commission within three months of its occurrence, it shall be presumed that the records called for by this proviso were in the possession of respondent showing (a) or (b), and (c), *unless* clear and convincing evidence establishes the contrary.

Provided, that in the case of advertised items the ultimate prices of whose units are determined by the total dollar amount of the customer's order or the use of a coupon, or other similar conditional

price arrangement, the prices at which the units are sold, and not the prices marked on the units, shall govern.

In determining compliance with Section I of this order, the Commission will consider the circumstances surrounding failure to make advertised items conspicuously and readily available for sale at or below the advertised prices due to circumstances beyond respondent's control. In considering what circumstances shall be considered "beyond respondent's control" the Commission will consider instances of demonstrable human error where such error appears excusable under all of the facts and circumstances and is not indicative of a pattern of non-compliance or attributable to company negligence in following surveillance procedures.

II

It is further ordered, That throughout each advertised sale period in each of its retail food stores covered by an advertisement, respondent shall post conspicuously (1) at or near each doorway affording entrance to the public, and (2) at or near the place where customers pay for merchandise, notices which contain the following:

A. A copy of the advertisement.

B. A statement that: "All items advertised are readily available for sale at or below the advertised price. In the event you are unable to find any advertised item, please ask any employee. If we cannot supply you with any advertised item, a raincheck will gladly be issued entitling you to purchase such item in the near future at the advertised price. Instead of a raincheck, you may ask for a comparable item at the advertised price.

Please ask our store manager if you have any questions. He will be pleased to assist you."

III

It is further ordered, That:

A. Respondent shall forthwith deliver a copy of this order to each of its operating divisions and to each of its present and future officers and other personnel in its organization, down to the level of store managers, who, directly or indirectly, have any supervisory responsibilities as to individual retail food stores of respondent, or who are engaged in a supervisory capacity in any aspect of preparation, creation, or placing of advertising, and that respondent shall secure a signed statement acknowledging receipt of said order from each such person;

B. Respondent shall institute and maintain a program of

continuing surveillance adequate to reveal whether the business practices of each of its retail food stores conform to this order, and shall confer with any duly authorized representative of the Commission pertaining to such program when requested to do so by a duly authorized representative of the Commission;

C. Respondent shall, for a period of three (3) years subsequent to the date of this order:

1. Maintain business records which show the efforts taken to insure continuing compliance with the terms and provisions of this order;

2. Grant any duly authorized representative of the Federal Trade Commission access to all such business records;

3. Furnish to the Federal Trade Commission copies of such records which are requested by any of its duly authorized representatives;

D. Respondent shall, all other provisions of this order notwithstanding, on or before each of the first three (3) anniversary dates 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 in the preceding year.

It is further ordered, That respondent shall notify the 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 respondent which may affect compliance obligations arising out of this order.

Complaint

90 F.T.C.

IN THE MATTER OF
SHOP-RITE FOODS, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT

Docket C-2913. Complaint, Nov. 11, 1977 — Decision, Nov. 11, 1977

This consent order, among other things, requires a Grand Prairie, Tex. retail food store chain, to make each of its advertised items readily available for sale to customers in its stores, to have advertised items correctly priced, and to sell those items at or below the advertised price. Further, the firm must post copies of advertisements and notices of the availability of "rainchecks" for unavailable items.

Appearances

For the Commission: *Donald Higginbotham* and *Jim B. Brookshire*.

For the respondent: *Glenn A. Mitchell, Stein, Mitchell & Mezines*, Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Shop-Rite Foods, Inc., a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said 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 in that respect as follows:

COUNT I

(Alleging violation of Section 5 of the Federal Trade Commission Act)

PARAGRAPH 1. Respondent, Shop-Rite Foods, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Mexico with its office and principal place of business located at 2401 West Marshall Drive, Grand Prairie, Texas.

PAR. 2. Respondent, through its wholly-owned subsidiaries is engaged in the operation of a chain of retail food stores, operating over 100 stores in three (3) states. Its volume of business is substantial, totaling approximately \$282 million in retail food sales in 1974. In the operation of its retail food stores, respondent offers for

sale and sells to its customers an extensive line of products, including food, drugs, cosmetics and devices as those terms are defined in the Federal Trade Commission Act, as amended, all of which are sometimes referred to hereinafter as "items." Some of said items are manufactured or processed by respondent at its manufacturing and processing plants located in various states. However, many of said items are purchased from numerous independent suppliers located throughout the United States.

PAR. 3. In the course and conduct of its business, as aforesaid, respondent now causes, and for sometime last past has caused, directly or indirectly, the aforesaid items to be shipped and distributed from its manufacturing and processing plants or from its other sources of supply to its warehouses, distribution centers, or retail food stores located in various states other than the state of origination, distribution or storage of said items. In the further course and conduct of its business, respondent transmits contracts, business correspondence, monies and other documents from its stores, offices, and divisions located in states other than the state in which such contracts, correspondence, monies, and other documents originated. Respondent maintains, and at all times mentioned herein, has maintained a substantial course of trade in the distribution, advertising, offering for sale and sale of the aforesaid items in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 4. In the course and conduct of its business, as aforesaid, and for some time last past, respondent has been and is now disseminating, and causing the dissemination of, certain advertisements concerning the aforesaid items by various means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, including, but not limited to, advertisements in newspapers of general and interstate circulation and other advertising media, for the purpose of inducing and which are now and were likely to induce, directly or indirectly, the purchase of said items from respondent; and respondent has been and is now disseminating and causing the dissemination of, advertisements concerning said items by various means, including but not limited to the aforesaid items by various means, including but not limited to the aforesaid media, for the purpose of inducing and which are now and were, likely to induce, directly or indirectly, the attempted or actual purchase from respondent of the said items in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended. Many of the said advertisements list or depict the aforesaid items and also contain statements and representations

concerning the price or terms at which said items would be offered for sale. Many of the aforesaid advertisements contain further direct and express statements and representations concerning the time periods during which the offers would be in effect and the locations of respondent's food stores at which the offers would be made.

PAR. 5. Through the use of such advertisements disseminated in various areas of the United States served by respondent's retail food stores, respondent has represented directly or by implication that in those stores covered by such advertisements, throughout the effective periods of the advertised offers, the items listed or depicted in such advertisements would be:

- A. Readily available for sale to customers;
- B. Readily and conspicuously available for sale at or below the advertised prices; and
- C. Sold to persons who attempted to purchase such items at prices at or below the advertised prices.

PAR. 6. In truth and in fact, in a significant number of respondent's retail food stores covered by such advertisements, during the effective period of the advertised offers, a substantial number of the items listed or depicted in the said advertisements were:

- A. Not readily available for sale;
- B. Not readily and conspicuously available for sale at or below the advertised prices; or
- C. Sold to persons who attempted to purchase such items at prices higher than the advertised prices.

Therefore, the statements and representations as referred to herein, were false, misleading and deceptive, and each of such advertisements were misleading in material respects and constituted a "false advertisement," as that term is defined in the Federal Trade Commission Act, as amended.

PAR. 7. By disseminating or causing the dissemination of advertisements which offer or present for sale items as aforesaid, and by failing to have, in a significant number of its stores covered by such advertisements, during the effective periods of the advertised offers, substantially all of the aforesaid advertised items:

- A. Readily available for sale to customers in quantities sufficient to meet reasonably anticipated demands; and
- B. Conspicuously available for sale at or below the advertised prices;

and by selling substantial numbers of said items to persons attempting to purchase such items at prices in excess of the

advertised price, respondent has engaged in unfair acts and practices.

PAR. 8. In the course and conduct of its business as aforesaid, and at all times referred to herein, respondent has been and now is in substantial competition in commerce, with corporations, partnerships, firms and individuals in the retail food and grocery business.

PAR. 9. The use by respondent of the aforesaid unfair and false, misleading and deceptive statements, representations, acts and practices, including the dissemination of the aforesaid "false advertisements," has had the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that the statements and representations were and are true, and to induce such persons to go to respondent's stores and to purchase from respondent, substantial quantities of the advertised items at prices in excess of the advertised prices and substantial quantities of items other than the advertised items, some of those items being higher priced or otherwise less desirable to Shop-Rite Foods, Inc., customers than the unavailable advertised items, by reason of such erroneous and mistaken beliefs.

PAR. 10. The acts and practices as aforesaid, and the disseminations by respondent of the false advertisements, as aforesaid, were all to the prejudice and injury of the public and of respondents' competitors and constituted unfair methods of competition in or affecting commerce and unfair or deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act, as amended.

COUNT II

(Alleging violations of the Federal Trade Commission Trade Regulation Rule Concerning Retail Food Store Advertising and Marketing Practices (16 C.F.R. Section 424), and Section 5 of the Federal Trade Commission Act, the allegations set forth in Paragraphs One, Two, Three, Four, and Ten, respectively, of Count I hereof are incorporated by reference in Count II as if fully set forth verbatim)

PAR. 11. The Federal Trade Commission, pursuant to the Federal Trade Commission Act, as amended, 15 U.S.C. 41, *et seq.* and the Rules of Practice, 16 C.F.R. 1.11, *et seq.* conducted a proceeding for the promulgation of a trade regulation rule regarding retail food store advertising and marketing practices. Notice of this proceeding, including a proposed rule, was published in the *Federal Register* on November 14, 1969 (34 F.R. 18252). Interested parties were thereaf-

ter afforded opportunity to participate in the proceeding through the submission of written data, views, and arguments, and to appear and orally express their views as to the proposed rule and to suggest amendments, revisions, and additions thereto.

The Commission considered all relevant matters of fact, law, policy, and discretion, including the data, views, and arguments presented on the record by interested parties in response to the Notice as indicated in the accompanying Statement of Basis and Purpose (36 F.R. 8777 (May 13, 1971)) and as prescribed by law, determined that the adoption of the Trade Regulation Rule was in the public interest, and, accordingly, promulgated the Trade Regulation Rule Concerning Retail Food Store Advertising and Marketing Practices on May 13, 1971, effective July 12, 1971.

PAR. 12. Respondent is a member of the retail food store industry, and its acts and practices in connection with the sale and offering for sale of food and grocery products or other merchandise being subject to the jurisdiction of Section 5 of the Federal Trade Commission Act are within the intent and meaning of, and are subject to, the provisions of the aforesaid Trade Regulation Rule.

PAR. 13. In connection with its aforesaid advertisements, respondent, in a substantial number of instances, has failed to comply with Paragraph (1) of the aforesaid Trade Regulation Rule by offering food and grocery products or other merchandise subject to the jurisdictional requirements of Section 5 of the Federal Trade Commission Act for sale at stated prices by means of advertisements disseminated in areas served by certain of its stores which were covered by such advertisements but which during the advertised sale period neither had such products in stock readily available for sale to customers nor provided clear and adequate notice that the items were in stock and might be obtained upon request.

PAR. 14. In connection with its advertisements disseminated as aforesaid, respondent, in a substantial number of instances, has failed to comply with Paragraph (2) of the aforesaid Trade Regulation Rule by offering food and grocery products or other merchandise subject to the jurisdictional requirements of Section 5 of the Federal Trade Commission Act for sale at stated prices by means of advertisements disseminated in areas served by certain of its stores which were covered by such advertisements and by failing in those stores to make certain of the advertised items conspicuously and readily available for sale at or below the advertised prices during the effective periods of the advertisements, and by failing to charge out to persons who attempted to purchase items substantial

numbers of such advertised products at prices at or below the advertised prices during the effective periods of the advertisements.

PAR. 15. Respondent's aforesaid violations of the Trade Regulation Rule Concerning Retail Food Store Advertising and Marketing Practices constitute unfair and deceptive acts and practices in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of Shop-Rite Foods, Inc., a corporation, hereinafter sometimes referred to as respondent, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Dallas, Texas Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act, as amended; 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 Act, 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 and having duly considered the comments filed thereafter pursuant to Section 2.34(b) of its Rules, 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, Shop-Rite Foods, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Mexico, with its office and principal place of business located at 2401 West Marshall Drive, Grand Prairie, Texas.

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 respondent, Shop-Rite Foods, Inc., a corporation, its successors or assigns, its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of food or grocery products or other merchandise, hereinafter sometimes referred to as items, offered or sold in its retail stores, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from, directly or indirectly:

A. Disseminating, or causing the dissemination of any advertisement by any means which offers or presents any items for sale, unless during the effective period of the advertised offer at each retail store covered by the advertisement:

1. Each advertised item is in stock and readily available to customers, or if not readily available, clear and adequate notice shall be provided that the items are in stock and may be obtained upon request;

2. Each unit of each advertised item, any of whose units are marked with a price, is individually, clearly, and conspicuously marked with a price no higher than the advertised price;

3. Each unit of each advertised item is charged out to customers at a price which is at or below the advertised price;

Provided, however, that it shall constitute a defense to a charge of violation under subparagraph I.A.1. if respondent maintains and furnishes or makes available for inspection and copying upon the request of the Federal Trade Commission, such records as will show that (a) *the advertised items were ordered in adequate time for delivery or were delivered to the stores in quantities sufficient to meet reasonably anticipated demands during the advertised sales period or* (b) *the advertised items were ordered in quantities sufficient to meet reasonably anticipated demands but were not delivered due to circumstances beyond respondent's control, and that respondent, upon notice or knowledge of such nondelivery immediately offers to customers a choice of a "rain check" for each unavailable item which entitles the holder to purchase the item in the future at or below the advertised price, or a similar product of equal or better quality at or below the advertised price of the unavailable product.*

Provided, further, that it shall not be deemed a violation of

subparagraphs I.A.1, I.A.2, or I.A.3, if respondent is complying with a specific exception, limitation or restriction with respect to store, item or price which is clearly and conspicuously disclosed in all advertisements for the product in question.

Provided, further, however, that if respondent or any of its employees, agents, or representatives are not advised of an alleged instance of unavailability through any source, including the Federal Trade Commission, within six months of its occurrence, it shall be presumed that the records called for by this subparagraph were in the possession of respondent and that quantities of the advertised items adequate to meet reasonably anticipated demand had been ordered in adequate time for delivery prior to the sale and were delivered.

Provided, further, that in the case of advertised items the ultimate price of which is to be determined by the total dollar amount of the customer's order or the use of a coupon, or other similar price arrangement, the price at which the item is sold, and not the price marked on the item, shall govern.

Provided, further, that in stores equipped with optical scanning devices which electronically "read" the identification numbers marked on the packaging of such units, and which transmit the identification number to in-store computers which then transmit the correct prices of the items to electronic cash registers where the prices are displayed and printed on cash register tapes, the units need not be pricemarked in any additional manner; furthermore, clear and conspicuous posting of the advertised prices of such items at the point of the display will be deemed in compliance with this requirement provided that the units of such items are sold to customers at or below the advertised prices throughout the advertised sale period.

II

It is further ordered, That respondent Shop-Rite Foods, Inc., a corporation, its successors or assigns, its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of food or drugs, as those terms are defined in the Federal Trade Commission Act, do forthwith cease and desist from, directly or indirectly:

A. Disseminating or causing to be disseminated, by United States mail or by any means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, for the

purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of any such product, subject to the jurisdictional requirements of Section 5 of the Federal Trade Commission Act, as amended, any advertisement which contains any of the offers prohibited by Section I of this order;

B. Disseminating or causing to be disseminated by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of any such product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, subject to the jurisdictional requirements of Section 5 of the Federal Trade Commission Act, as amended, any advertisement which contains any of the offers prohibited by Section I of this order.

III

It is further ordered, That throughout each advertised sale period in each of its retail stores covered by an advertisement, respondent shall display conspicuously at or near the place where customers pay for merchandise:

- A. A copy of the advertisement and;
- B. The following statement:

All items advertised are required by law to be readily available for sale at or below the advertised prices in each store except as specifically noted in this ad.

If an advertised item you wish to purchase is unavailable, you may obtain a raincheck that will enable you to purchase this item at the advertised price in the near future. Or, you will be allowed to purchase immediately, a similar product of equal or better quality at the advertised price of the unavailable advertised item.

If you have any questions, the store manager will be glad to assist you.

In order to avoid overcharging that might result from incorrect price marking, we ask each of our customers to inspect the price marked (if any) on each item he or she selects to insure that such price is correct and to report instances of merchandise being marked with an incorrect price to store personnel. We are legally obligated to make available any advertised item at the advertised price during the applicable advertised sale period regardless of the price marked on any unit of the advertised item. (In the case of coupon offers or minimum purchase orders, you must, of course, have the appropriate coupon or make the required minimum purchase in order to receive the advertised price.)

If any checker, when confronted by you with the fact that he or she

is about to ring up, or he or she has rung up, an advertised price, refuses to correct the error immediately or to ring up the item at the advertised price, you are requested to report the incident to the store manager.

IV

It is further ordered, That respondent shall cause the following statement to be clearly and conspicuously set forth in each advertisement which represents that items are available for sale at a stated price at any of its stores: "Each of these advertised items is required to be readily available for sale at or below the advertised price in each store, except as specifically noted in this ad."

V

It is further ordered, That:

A. Respondent shall forthwith deliver a copy of this order to each of its operating divisions and to each of its present and future officers and other personnel in its organization down to the level of and including assistant store managers who, directly or indirectly, have any supervisory responsibilities relating in any way to availability, pricing or charging out of advertised items as to individual retail stores of respondent, or who are engaged in any aspect of preparation, creation, or placing of advertising, and that respondent shall secure a signed statement acknowledging receipt of said order from each such person;

B. Respondent shall institute and maintain a program of continuing surveillance adequate to reveal whether the business practices of each of its retail stores conform to this order, and shall confer with any duly authorized representative of the Commission pertaining to such program when requested to do so by a duly authorized representative of the Commission;

C. Respondent shall, for a period of three (3) years subsequent to the date of service of this order:

1. Maintain business records which show the efforts taken to insure continuing compliance with the terms and provisions of this order;

2. Furnish to the Federal Trade Commission copies of such records which are requested by any of its duly authorized representatives;

3. Grant any duly authorized representative of the Federal Trade Commission access to all such business records.

VI

It is further ordered, That respondent shall notify the 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 respondent which may affect compliance obligations arising out of this order.

VII

It is further ordered, That the respondent herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order; and shall in addition, on or before each of the subsequent two anniversary dates 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 in the preceding year.

IN THE MATTER OF
CENTURY 21 COMMODORE PLAZA, INC., ET AL.

Docket 9088. Interlocutory Order, Nov. 15, 1977

Order striking unauthorized pleading from the record.

On September 15, 1977, the Administrative Law Judge assigned to this matter denied Mr. Unterberg's motion to intervene in this matter. On October 19, 1977 the Commission denied Mr. Unterberg's appeal from this decision.

On November 9, 1977 Mr. Unterberg filed a pleading herein styled "Public Interest Amicus and Interested Party Brief Submitted in Opposition to Complaint Counsel's Motion to Stay Proceedings." The Commission's Rules do not authorize this pleading.

It is ordered, That the aforesaid pleading be, and it hereby is, stricken from the record.