FEDERAL TRADE COMMISSION DECISIONS

Findings, Opinions and Orders

IN THE MATTER OF

DANCER-FITZGERALD-SAMPLE, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket 8919. Complaint, Feb. 23, 1973—Decision, July 1, 1980

This consent order requires, among other things, a New York City advertising agency to cease disseminating advertisements which misrepresent, or fail to make relevant disclosures regarding the contents, performance, effectiveness, or therapeutic superiority of Bayer Aspirin, Bayer Children's Aspirin, Cope, or similar non-prescription drug products manufactured by Sterling Drug Inc. Additionally, the order requires the firm to substantiate all representations made for non-prescription drug products concerning their performance, effectiveness and freedom from side effects.

Appearances

For the Commission: *Melvin H. Orlans, H.R. Field, C.B. Anaeer, R.B. Bloomfield, D.J. Freeman* and *Joel Brewer.*

For the respondent: *Richard Rieder, Dunnington, Bartholow & Miller,* New York City.

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 Sterling Drug Inc., a corporation, Dancer-Fitzgerald-Sample, Inc., a corporation, and Lois Holland Callaway, Inc., a corporation, hereinafter referred to as respondents, have 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:

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

1. "Commerce" means commerce as defined in the Federal Trade Commission Act.

2. "False advertisement" means false advertisement as defined in the Federal Trade Commission Act.

PAR. 2. Respondent Sterling Drug Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 90 Park Ave. in the City of New York, State of New York.

Respondent Dancer-Fitzgerald-Sample, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 347 Madison Ave. in the City of New York, State of New York.

Respondent Lois Holland Callaway, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located at 745 Fifth Ave. in the City of New York, State of New York.

PAR. 3. Respondent Sterling Drug Inc. is now and has been for all times relevant to this complaint engaged in the manufacturing, advertising, offering for sale, sale and distribution of certain nonprescription internal analgesic preparations which come within the classification of drugs as the term "drug" is defined in the Federal Trade Commission Act. The designations, directions for use and active ingredients for some of these analgesic drugs are as follows:

1. *Designation:* "Bayer Aspirin"
   Active ingredients:
   Aspirin
   Dosage: 1 or 2 tablets with water every 4 hours, as necessary, up to 12 tablets a day.
2. *Designation:* "Bayer Children's Aspirin"
   Active Ingredients:
   Aspirin
   Dosage: Varies depending upon age of child.
3. *Designation:* "Cope"
   Active Ingredients:
   Aspirin
   Caffeine
   Methapyrilene Fumarate
   Magnesium Hydroxide
   Aluminum Hydroxide (Dried Gel)
   Dosage: 1 or 2 tablets every 4 hours, as needed, up to 9 tablets per day.

4. *Designation:* "Vanquish"
   Active Ingredients:
   Aspirin
   Caffeine
   Acetaminophen
   Magnesium Hydroxide
   Aluminum Hydroxide (Dried Gel)
   Dosage: 2 caplets with water. Can be repeated every 4 hours if needed, up to 12 caplets per day.
5. *Designation:* "Midol"
   Active Ingredients:
   Aspirin
   Caffeine
   Cinnamedrine HCL
   Dosage: 2 Midol Tablets with water. Repeat 1 or 2 tablets every 4 hours as needed, up to 8 tablets per day.

PAR. 4. Respondent Dancer-Fitzgerald-Sample, Inc. is now and for all times relevant to this complaint has been an advertising agency of Sterling Drug Inc., and for all times relevant to this complaint, has prepared and placed for publication, advertising material, including but not limited to the advertising referred to herein, to promote the sale of the said "Bayer Aspirin," "Bayer Children's Aspirin" and "Cope."

Respondent Lois Holland Callaway, Inc., for all time relevant to this complaint has been an advertising agency of Sterling Drug Inc., and for all times relevant to this complaint, has prepared and placed for publication advertising material, including but not limited to the advertising referred to herein, to promote the sale of the said "Vanquish."

PAR. 5. In the course and conduct of its aforesaid business, respondent Sterling Drug Inc., causes the said analgesic drug preparations, when sold, to be transported from its places of business located in various States of the United States to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondent Sterling Drug Inc., maintains and at all times relevant to this complaint has maintained, a substantial course of trade in said preparations in commerce. The volume of business in such commerce has been and is substantial.

PAR. 6. In the course and conduct of their businesses, respondents Sterling Drug Inc., Dancer-Fitzgerald-Sample, Inc., and Lois Holland Callaway, Inc., have disseminated, and caused the dissemination of, certain advertisements concerning the said drugs by the United

States mails and by various means in commerce, including but not limited to, advertisements inserted in magazines and newspapers, and by means of television and radio broadcasts transmitted by television and radio stations located in various States of the United States, and in the District of Columbia, having sufficient power to carry such broadcasts across state lines, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said drugs and have disseminated, and caused the dissemination of, advertisements concerning said drugs 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 purchase of said drugs in commerce.

PAR. 7. Typical of the statements and representations made in the advertisements, but not all inclusive thereof, are the following:

A. For Bayer Aspirin:

(1) To relieve a headache fast Bayer Aspirin's got the best help there is. Of all the leading pain relievers you see advertised, only Bayer is 100% aspirin. And Aspirin is what doctors recommend.

(2) I'm Ozzie Nelson. Here's something I'm passing along to *my* family. This booklet about pain relievers. Bayer tested its aspirin for quality against 220 other brands. The results? Bayer is superior. I also read about the latest report written by the American Medical Association Council on Drugs . . . Straight aspirin is preferred over other non-prescription pain relievers. Find out why . . . aspirin's the best pain reliever. And Bayer's the best aspirin.

(3) Has anyone ever improved on Bayer Aspirin? Made a faster Aspirin? A more effective Aspirin? Lots of people have tried. They took plain Aspirin. Made it bigger. Smaller. They buffered it. They added extra ingredients. They squeezed it. Squared it. Flavored it. Gummed it. Capsuled it. Fizzed it. Even tried spraying it . . . They did every thing—but improve it. Today there is still nothing faster . . . nothing more effective . . . than good old genuine Bayer Aspirin. It's pure Aspirin . . . not part Aspirin. It works wonders for headache, muscle pain, aches and fever of a cold. For just about anything that hurts.

(4) Would you like to see the inside story on all the major pain relievers you see advertised? Inside every single leading pain reliever is the same major ingredient . . . Aspirin . . . every one of those products relies chiefly on Aspirin. Surprised? Don't be . . . after all, Aspirin is the only pain reliever doctors overwhelmingly recommend for nearly every type of ache or pain. And did you know that Bayer is the only one of those pain relievers that makes all its own Aspirin? With care and experience no one else can match? That's why pure Bayer Aspirin, without Buffering or Caffeine or any other extra ingredient is the pain reliever for you.

(5) Deciding which pain reliever you should take can be like a game. Some talk about strength, some talk about speed, some talk about ingredients they don't name. But of all the leading pain relievers you see advertised, Bayer is the only one that is all Aspirin. And Aspirin is what doctors recommend.

(6) Bayer wants you to *know* about pain relievers . . . did you know that two Bayer Aspirin tablets bring all the pain relief power a headache can use? Did you know that Bayer without any additives is every bit as fast and effective in relieving pain as those products that have additives?

(7) Confused by claims? By shapes and sizes? By strange sounding ingredients? When you need fast relief from headache pain, don't forget this fact . . . Bayer is 100% Aspirin and Aspirin is the strongest pain reliever you can buy. No wonder Bayer works wonders.

(8) If you've ever heard that all aspirin's alike, here's something you should know. While it's true that the United States Pharmacopoeia does set standards for aspirin, Bayer surpasses these standards in many ways. For example, Bayer standards require complete tablet disintegration within thirty seconds. That's ten times faster than the accepted five-minute standard. It's one of the things that helps make Bayer fast and gentle.

(9) 1ST MAN: How come Bayer doesn't buffer its aspirin? BAYER MAN: There's really no need to. In relieving pain, buffered aspirin isn't any faster or gentler than Bayer. Yes.

(10) When hot weather makes you feel headachy, tense, irritable, two Bayer Aspirin and a short rest can help you feel better fast!

It happens to most of us on a hot, humid summer day, when the pressures of daily living mount up. By mid-afternoon we feel so headachy and edgy that the simplest chore, the smallest disturbance becomes an irritation. We're in no mood to enjoy life or the company of others.

Here's how to turn that mood around: just take two Bayer Aspirin for your headache, sit down for a few minutes and relax. You too will say, "Bayer works wonders." These few minutes can make a world of difference in the way you feel and act. You'll enjoy being with people, and they'll enjoy being with you.

Whenever you get headachy, tense and out of sorts on a hot summer afternoon, set aside a few minutes for Bayer Aspirin and a brief rest. Bayer is *pure* aspirin, not just *part* aspirin. Ask your pharmacist.

(11) Bayer recently tested its aspirin against 220 other brands. For purity, stability, speed of disintegration, Bayer was consistently better.

(12) I read about recent Bayer tests on aspirin. They tested for *quality,* for purity, for *freshness* against 220 other brands. The tests showed that Bayer makes the superior aspirin.

B. Bayer Aspirin for Children:

. . . You don't settle for any children's aspirin. You want the best. You want Bayer because no one makes aspirin like Bayer. No one purifies aspirin like Bayer. No one protects Aspirin like Bayer.

C. For Cope:

(1) Important studies made at the world's leading headache clinic show that for

relief of severe nervous tension headaches a combination of a pain reliever and a sedative provides greater relief than either medication alone. Of all the leading remedies you can buy for ordinary nervous tension headaches, only Cope combines a gentle relaxer with a powerful pain reliever for really effective relief. If you have chronic headaches, see your doctor. For the usual nervous tension headache get Cope.

(2) I get it on rainy days. I get it during rush hour. I get it when the boss looks over my shoulder. When the name of the pain is nervous tension headache, the name of the remedy is Cope. Because Cope gives you a powerful pain reliever plus a gentle relaxer.

D. For Vanquish:

(1) (3 tablets are shown with 1 caplet of Vanquish)

For your headache pain, here are your major choices. This leading extra strength product has no buffers. This leading buffered product has no extra strength. This leading pain reliever has strength but no buffers. Of all the leading pain relievers you can buy, only Vanquish gives you extra strength and gentle buffers. Vanquish. The choice. (Sterling Drug Inc.)

(2) When you get a headache we think you should take Vanquish. And we'll show you why in a head to head comparison. This is Vanquish. It gives you extra strength and gentle buffers. And it's the only leading pain reliever that does. This is a leading extra strength product. It has no buffers. And there are no buffers in this other extra strength product either. This leading buffered product comes without extra strength. We think your headache deserves extra strength and you deserve gentle buffers. (Sterling Drug Inc.)

(3) Vanquish is different. It gives you proven effectiveness of Aspirin as in this tablet plus extra medication as in these. But it also includes two gentle buffers . . . With Vanquish the only one. (Sterling Drug Inc.)

(4) Her headache is killing me. When she gets a pain in the head, it can be a big pain to me, so I give her Vanquish. Vanquish is strong medicine. Vanquish contains more pain relievers than the largest selling extra strength tablet . . . and it has gentle buffers. How's your headache, dear? Dit Dit Dit Dah . . . Vanquish is strong medicine. (Sterling Drug Inc., and Lois Holland Callaway, Inc.)

E. For Midol:

(1) Live Your Life . . . Relieved of Menstrual Distress. In the modern life you lead, there come the calm times, too. Strolling hand in hand. Reading together. Talking together. These are the precious, serene moments. And you let nothing interfere. Not even functional menstrual distress. How? With Midol. Because MIDOL contains:

> An exclusive anti-spasmodic that helps STOP CRAMPS
>
> Medically-approved ingredients that RELIEVE HEADACHE, LOW BACKACHE . . . CALM JUMPY NERVES . . .
>
> Plus a special mood-brightener that gives you a real lift . . . gets you through the trying pre-menstrual period feeling calm and comfortable.

PAR. 8. Through the use of these advertisements, and others

similar thereto not specifically set out herein, it was represented directly or by implication:

A. By respondents Sterling Drug Inc., and Dancer-Fitzgerald-Sample, Inc., that it has been established that:

1. Bayer Aspirin is superior in terms of significant therapeutic effect to any other aspirin.

2. Bayer Children's Aspirin is superior in terms of significant therapeutic effect to any other children's aspirin.

3. A recommended dose of Cope is more effective for the relief of "nervous tension headache" pain than a recommended dose of any other non-prescription internal analgesic.

B. By respondent Sterling Drug Inc., that it has been established that:

1. A recommended dose of Vanquish is more effective for the relief of pain than a recommended dose of aspirin or buffered aspirin.

2. Because Vanquish contains "gentle buffers" it will result in less gastric discomfort than any non-prescription internal analgesic not containing buffers.

C. By respondents Sterling Drug Inc. and Lois Holland Callaway, Inc., that a recommended dose of Vanquish is more effective for the relief of pain than the largest selling "extra strength" tablet.

PAR. 9. In truth and in fact, none of said representations has been established, for reasons including, but not limited to, the existence of a substantial question, recognized by experts qualified by scientific training and experience to evaluate the safety and efficacy of such drugs, as to the validity of all such representations.

PAR. 10. Through the use of these advertisements, and others similar thereto not specifically set out herein, it was represented directly or by implication by respondents Sterling Drug Inc., and Dancer-Fitzgerald-Sample, Inc. that:

A. Bayer Aspirin is superior in terms of significant therapeutic effect to any other aspirin.

B. Bayer Children's Aspirin is superior in terms of significant therapeutic effect to any other children's aspirin.

PAR. 11. There existed, at the time of said representations, no reasonable basis for making the above representations, in that

respondents lacked competent and reliable scientific evidence sufficient to support such representations.

PAR. 12. Through the use of these advertisements, and others similar thereto not specifically set out herein, it was represented directly or by implication:

A. By respondents Sterling Drug Inc., and Dancer-Fitzgerald-Sample, Inc., that a recommended dose of Cope is more effective for the relief of "nervous tension headache" pain than a recommended dose of any other non-prescription internal analgesic.

B. By respondent Sterling Drug Inc., that:

1. A recommended dose of Vanquish is more effective for the relief of pain than a recommended dose of aspirin or buffered aspirin.

2. Because Vanquish contains "gentle buffers" it will result in less gastric discomfort than any non-prescription internal analgesic not containing buffers.

C. By respondents Sterling Drug Inc. and Lois Holland Callaway, Inc., that a recommended dose of Vanquish is more effective for the relief of pain than the largest selling "extra strength" tablet.

PAR. 13. There existed, at the time of said representations, a substantial question, recognized by experts qualified by scientific training and experience to evaluate the safety and efficacy of such drugs, as to the validity of such representations.

PAR. 14. Moreover, respondents made said representations without disclosing the existence of such a substantial question as to the validity of each representation. In light of the representations made, the existence of such a substantial question is a material fact, which, if known to consumers, would be likely to affect their consideration of whether or not to purchase such products. Thus, respondents have failed to disclose material facts.

PAR. 15. Through the use of the aforesaid advertisements and others similar thereto not specifically set out herein, it was represented directly or by implication:

A. By respondents Sterling Drug Inc. and Dancer-Fitzgerald-Sample, Inc. that a recommended dose of Bayer Aspirin relieves nervous tension, anxiety and irritability and improves the user's mood.

B. By respondents Sterling Drug Inc., and Dancer-Fitzgerald-Sample, Inc. that a recommended dose of Cope relieves nervous tension, anxiety and irritability and will enable persons to cope with the ordinary stresses of everyday life.

C. By respondent Sterling Drug Inc. that a recommended dose of Midol relieves nervous tension, stress, fatigue and depression and improves the user's mood.

PAR. 16. There existed at the time of said representations no reasonable basis for making the above representation in that respondents had no competent and reliable scientific evidence to support such representations.

PAR. 17. Through the use of the advertisements referred to in Paragraph Seven, sections (A) (2) (3) (4) (6) (7) and (9), (C), and (D) above it was represented directly or by implication:

A. By respondents Sterling Drug Inc., Dancer-Fitzgerald-Sample, Inc., that Bayer Aspirin is as effective for the relief of headache pain (including "nervous tension headache" pain) as, and will cause gastric discomfort no more frequently than, any other non-prescription internal analgesic, including Cope and Vanquish;

B. By respondents Sterling Drug Inc., and Dancer-Fitzgerald-Sample, Inc., that Cope is more effective for the relief of "nervous tension headache" pain than any other non-prescription internal analgesic, including Bayer Aspirin and Vanquish;

C. By respondent Sterling Drug Inc., that Vanquish is more effective for the relief of headache pain than any aspirin, including Bayer Aspirin, and will cause less gastric discomfort than any non-buffered internal analgesic, including Bayer Aspirin.

The representations referred to in sections (A), (B), and (C) above are mutually inconsistent. Respondents have made claims for a product that are inconsistent with contemporaneous claims for other products made by the same firm.

PAR. 18. Furthermore, in advertisements for Cope, respondents Sterling Drug Inc., and Dancer-Fitzgerald-Sample, Inc. referred to the results of tests or studies and represented, directly or by implication, that such tests or studies prove the claim that a recommended dose of Cope is more effective for the relief of "nervous tension headaches" than recommended doses of all other non-prescription internal analgesics.

PAR. 19. In truth and in fact, the tests or studies referred to do not prove the claim that a recommended dose of Cope is more effective for the relief of "nervous tension headaches" than recommended doses of all other non-prescription internal analgesics.

PAR. 20. Through the use of the advertisements referred to in Paragraph Seven, Sections A(11) and (12), and other similar thereto not specifically set out herein, respondents Sterling Drug Inc. and

Dancer-Fitzgerald-Sample, Inc. represented, directly or indirectly, that Bayer Aspirin has been tested against 220 other brands of aspirin for quality, purity, freshness, stability, and speed of disintegration, and that the results of the tests demonstrated that Bayer Aspirin is qualitatively superior to all of the other brands tested in all respects, and therapeutically superior to all of the other brands tested.

PAR. 21. In truth and in fact, the tests referred to do not demonstrate that Bayer Aspirin is qualitatively superior in all respects, including speed of disintegration, to all other aspirins tested. Moreover, these tests do not demonstrate that Bayer is therapeutically superior to all other brands because at the time of such representations there existed a substantial question, recognized by experts qualified by scientific training and experience to evaluate the safety and efficacy of such drug product, concerning the validity, significance or interpretation of such tests as related to such representation.

PAR. 22. Respondents Sterling Drug Inc. and Dancer-Fitzgerald-Sample, Inc. represented directly or by implication that Cope contained a unique formula in that it alone among non-prescription headache remedies contained both a pain reliever and an ingredient with sedative properties. In truth and in fact the ingredients referred to are aspirin and methapyrilene, both of which were available for non-prescription use in Excedrin PM. Therefore, the advertisements referred to in Paragraph Seven (C)(1) were and are misleading in a material respect.

PAR. 23. Respondents Sterling Drug Inc. and Lois Holland Callaway, Inc., marketed and advertised Vanquish without disclosing in the advertising for this product that it contains aspirin and caffeine. Aspirin and caffeine are well-known commonplace substances widely available in a variety of non-prescription products. Moreover, the use of aspirin or caffeine can be injurious to health and may cause undesirable side effects. Thus, respondents have failed to disclose in advertising a material fact, which if known to certain consumers would be likely to affect their consideration of whether or not to purchase such products.

PAR. 24. Furthermore, respondents Sterling Drug Inc. and Dancer-Fitzgerald-Sample, Inc. marketed and advertised Cope without disclosing in the advertising for this product that it contains aspirin and caffeine. Aspirin and caffeine are well-known commonplace substances widely available in a variety of non-prescription products. Moreover, the use of aspirin or caffeine can be injurious to health and may cause undesirable side effects. Thus, respondents

have failed to disclose in advertising a material fact, which if known to certain consumers would be likely to affect their consideration of whether or not to purchase such products.

PAR. 25. Furthermore, respondent Sterling Drug Inc. marketed and advertised Midol without disclosing in the advertising for this product that it contains aspirin and caffeine. Aspirin and caffeine are well-known commonplace substances widely available in a variety of non-prescription products. Moreover, the use of aspirin or caffeine can be injurious to health and may cause undesirable side effects. Thus, respondent has failed to disclose in advertising a material fact, which if known to certain consumers would be likely to affect their consideration of whether or not to purchase such products.

PAR. 26. Furthermore, in advertisements for Midol, respondents Sterling Drug Inc. and Thompson-Koch Company represented directly or by implication that the analgesic ingredients in Midol are other than ordinary aspirin and that the stimulant in Midol is other than caffeine.

PAR. 27. In truth and in fact, the analgesic ingredient in Midol is ordinary aspirin, and the stimulant in Midol is caffeine.

PAR. 28. The advertisements referred to in Paragraph Eight above were, and are, misleading in material respects, as alleged in Paragraphs Nine, Thirteen, Fourteen, Nineteen, Twenty-one, Twenty-two, Twenty-three, Twenty-four, Twenty-five, and Twenty-seven and constituted and now constitute false advertisements.

PAR. 29. The making of claims for a product that are inconsistent with contemporaneous claims for other products made by the same firm, as alleged in Paragraph Seventeen above, and the making of representations as alleged in Paragraphs Eleven, Thirteen, Fourteen, and Sixteen, constituted and now constitute unfair or deceptive acts or practices in commerce.

PAR. 30. The use by respondents of the aforesaid deceptive statements, representations, or claims, and the dissemination of the aforesaid false advertisements has had and now has, the capacity and tendency to mislead members of the consuming public into the erroneous and mistaken belief that said statements, representations, or claims were and are true and into the purchase of substantial quantities of said drugs of respondent Sterling Drug Inc. by reason of said erroneous and mistaken belief.

PAR. 31. In the course and conduct of its aforesaid business, and at all times mentioned herein, respondent Sterling Drug Inc. has been and now is in substantial competition in commerce, with corpora-

tions, firms and individuals in the sale of drug products of the general kind and nature as those sold by respondent.

In the course and conduct of its aforesaid business, and at all times mentioned herein, respondent Dancer-Fitzgerald-Sample, Inc. has been, and now is in substantial competition in commerce with other advertising agencies.

In the course and conduct of its aforesaid business, and at all times mentioned herein, respondent Lois Holland Callaway, Inc. has been, and now is in substantial competition in commerce with other advertising agencies.

PAR. 32. The aforesaid acts and practices of respondents, as herein alleged, including the dissemination of false advertisements, as aforesaid, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted and now constitute unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce, in violation of Sections 5 and 12 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having issued a complaint which charges the above-named respondents with violation of the Federal Trade Commission Act; and

Respondent Dancer-Fitzgerald-Sample, Inc. ("Dancer") for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent Dancer 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 Dancer 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 accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in 3.25 of its Rules, the Commission hereby makes the following jurisdictional findings, and enters the following order:

1. Respondent Dancer is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 347 Madison Ave., New York, New York.

2. The Federal Trade Commission has jurisdiction of the subject

matter of this proceeding and of respondent Dancer, and the proceeding against respondent Dancer is in the public interest.

ORDER

I

It is ordered, That respondent Dancer-Fitzgerald-Sample, Inc., a corporation, its successors and assigns, and respondents' officers, agents, representatives and employees directly or through any corporation, subsidiary, division or other device, forthwith cease and desist from:

A. Disseminating, or causing the dissemination of any advertisement by means of the United States mails or by any means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act which:

1. Represents directly or by implication, in connection with the advertising, offering for sale, sale or distribution of Bayer Aspirin or any other product consisting of the same active ingredient in approximately equal amount, that Bayer Aspirin or such other product is superior in terms of significant therapeutic effect to any other aspirin unless such representation of superiority is true as applied to each and every brand of aspirin for which a comparison is made or implied.

2. Represents directly or by implication, in connection with the advertising, offering for sale, sale or distribution of Bayer Children's Aspirin, or any other product consisting of the same active ingredient in approximately equal amount, that Bayer Children's Aspirin or such other product is superior in terms of significant therapeutic effect to any other aspirin unless such representation of superiority is true as applied to each and every brand of aspirin for which a comparison is made or implied.

3. Represents directly or by implication, in connection with the advertising, offering for sale, sale or distribution of Cope, or any other product consisting of the same active ingredients in approximately equal amounts, that a recommended dose of Cope or such other product is more effective for the relief of nervous tension headaches than recommended doses of any other non-prescription analgesic.

4. Represents, directly or by implication, in connection with the advertising, offering for sale, sale or distribution of any non-prescription drug product, that any non-prescription drug product has a

unique combination of ingredients when the claimed unique combination is contemporaneously available, regardless of proportion, in other non-prescription drug products unless respondent can establish that it neither knew, nor had reason to know, nor upon reasonable inquiry could have known of such other non-prescription drug product.

5. Fails to disclose that Cope contains aspirin and caffeine.

B. Disseminating or causing the dissemination of any advertisement by any means, which contains statements which are inconsistent with, negate, or contradict any disclosures required by Paragraph A(5) above, or in any way obscure the meaning of such disclosures;

C. Disseminating, or causing the dissemination of, any advertisement by any means, for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase of any of the products named in Paragraph A above in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, which contains any of the representations prohibited in Subparagraphs A(1) through A(4) above; or which fails to disclose the disclosures required in Subparagraph A(5) above;

D. Representing that aspirin alone relieves nervous tension, anxiety or irritability or will improve the user's mood;

E. Representing that a recommended dose of Cope, or any other product consisting of the same active ingredients in approximately equal amounts, relieves nervous tension, anxiety or irritability or will enable persons to cope with the ordinary stresses of everyday life;

F. Making any statement or representation, directly or by implication, concerning any product which is inconsistent with a contemporaneous claim made by respondent for any other product manufactured or distributed by the same advertiser, either directly or through any corporation, subsidiary, division or other device.

G. Representing directly or by implication, in connection with the advertising, offering for sale, sale or distribution of any non-prescription drug product that any claim is proved by one or more tests or studies when such tests do not prove such claims unless respondent can establish that it neither knew nor had reason to know, nor upon reasonable inquiry could have known, that such tests do not prove such claims.

II

It is ordered, That respondent Dancer-Fitzgerald-Sample, Inc., a

corporation, its successors and assigns, and respondents' 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 any non-prescription drug product do forthwith cease and desist from:

A. Disseminating, or causing the dissemination of, any advertisement by means of the United States mails or by means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, which represents, directly or by implication, that a claim concerning the performance, effectiveness, or freedom from side effects of such product has been established, when there exists a substantial question, recognized by experts qualified by scientific training and experience to evaluate the safety and efficacy of such drug products, as to the validity of such claim, unless respondent can establish that it neither knew nor had reason to know, nor upon reasonable inquiry could have known, of the existence of such substantial question;

B. Making any statements or representations, directly or by implication, concerning the performance, effectiveness, or freedom from side effects of such product, unless at the time of such representations, respondents have competent and reliable scientific evidence to support such representations.

III

It is ordered, That respondent Dancer-Fitzgerald-Sample, Inc., a corporation, its successors and assigns, and respondents' 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 any non-prescription drug product do forthwith cease and desist from:

A. Disseminating, or causing the dissemination of, any advertisement by means of the United States mails or by any means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, which fails to disclose that the product contains aspirin or caffeine, if such is the case; *provided, however,* that a disclosure of aspirin content shall be unnecessary where the trademark or name contains the term "Aspirin;"

B. Disseminating, or causing the dissemination of, any advertisement by any means, which contains statements which are inconsistent with, negate or contradict any disclosures required by Para-

graph A above, or in any way obscure the meaning of such disclosures;

C. Making any representation, directly or by implication, concerning the performance, effectiveness, or freedom from side effects of such product, when there exists a substantial question, recognized by experts qualified by scientific training and experience to evaluate the safety and efficacy of such drug products, as to the validity of such representation unless respondent can establish that it neither knew nor had reason to know, nor upon reasonable inquiry could have known, of the existence of such substantial question.

IV

Provided, however, that Paragraphs II(A) and III(C) of this Order shall not take effect or be binding unless or until an order provision embodying the "Standard" set forth in Paragraphs II(A) and III(C), or any modification thereof, becomes final with respect to Sterling Drug Inc., co-respondent joined in the complaint issued in Docket 8919. *Provided further,* that should said order against Sterling Drug Inc., contain a standard different or modified in any respect from the "Standard" set forth in said paragraphs, both parties agree to a reopening and modification of these paragraphs for the sole purpose of incorporating said modification into these paragraphs. For the purpose of this Paragraph IV the "Standard" shall mean "when there exists a substantial question recognized by experts qualified by scientific training and experience to evaluate the safety and efficacy of such non-prescription internal analgesic product".

Provided further, that the defense of "neither knew nor had reason to know, nor upon reasonable inquiry could have known," as set forth in Paragraphs II(A) and III(C) of this Order shall not be revised or modified or otherwise affected, even though the "Standard" finally utilized is different or modified in any respect from the "Standard" set forth in said paragraphs.

Provided further, that should said order against Sterling Drug Inc., with respect to the prohibitions contained in Paragraphs II(A) and III(C) of this Order, prohibit only representations as to the comparative performance, comparative effectiveness and comparative freedom from side effects, both parties agree to a reopening and modification of these paragraphs for the sole purpose of incorporating said modification into these paragraphs.

V

Provided further, that Paragraphs III(A) and III(B) of this Order

shall not take effect or be binding unless or until an order provision requiring the disclosure of aspirin or caffeine content becomes final with respect to Sterling Drug Inc. in Docket 8919.

Provided further, that nothing contained in this Order shall in any way limit respondent's right to move for a reopening of the Order under the Rules of the Commission and request a modification thereof in accordance with the provisions of those Rules.

VI

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

It is further ordered, That respondent notify the Commission at least 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 changes in the corporation which may affect compliance obligations arising out of the Order.

It is further ordered, That respondent shall, within sixty (60) days and at the end of six (6) months after the effective date of the Order served upon it, file with the Commission a report, in writing, signed by respondent, setting forth in detail the manner and form of its compliance with the Order to cease and desist.

Commissioner Pitofsky did not participate.

IN THE MATTER OF

BOB RICE FORD, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND MAGNUSON-MOSS WARRANTY ACTS

Docket C-3026. Complaint, July 1, 1980—Decision, July 1, 1980

This consent order requires, among other things, a Boise, Idaho seller of new and used motor vehicles and its corporate officer to make the text of written warranties readily available to prospective buyers and prominently display signs advising consumers of such availability. Written warranties must include all statutorily required information, and limited warranties so designated. Respondents are also required to post signs stating that all warranties are not the same and that comparisons should be made prior to purchase. All relief available to purchasers under state laws must be provided; and affected customers, in instances where implied warranties were improperly waived, notified of their implied warranty rights. Further, the order bars respondents from raising any defenses pertaining to a disclaimer of implied warranties in suits brought by motor vehicle purchasers who were issued written limited warranties disclaiming implied warranties. Additionally, respondents are required to instruct their employees as to their statutory obligations, and maintain a surveillance program designed to ensure compliance with the provisions of the order.

Appearances

For the Commission: *Dennis D. McFeely.*

For the respondents: *Paul T. Baird,* Boise, Idaho.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and of the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act ("Warranty Act"), the implementing Rules concerning the Disclosure of Written Consumer Product Warranty Terms and Conditions ("Disclosure Rule") (16 C.F.R. 701 (1977)) and the Availability of Written Warranty Terms ("Pre-Sale Rule") (16 C.F.R. 702 (1977)) duly promulgated on December 31, 1975 pursuant to Title I, Section 109 of the Warranty Act (15 U.S.C. 2309), and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Bob Rice Ford, Inc., a corporation, and Robert L. Rice, individually and as an officer of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Acts, the Pre-Sale Rule and the

Disclosure Rule, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. The present tense as used herein includes the past tense.

PAR. 2. Respondent Bob Rice Ford, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Idaho. Its principal office and place of business is located at 3150 Main St., Boise, Idaho.

Respondent Bob L. Rice is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation, and his address is the same as that of Bob Rice Ford, Inc.

PAR. 3. Respondents have been, and are now, engaged in the advertising, offering for sale, and sale of new and used automobiles and trucks to the public.

PAR. 4. In the course and conduct of their business, respondents offer for sale and sell to consumers, consumer products distributed in commerce as "consumer product," "consumer," "distributed in commerce," and "commerce," are defined by Sections 101(1), 101(3), 101(13) and 101(14), respectively, of the Warranty Act. Respondents are, therefore, suppliers as "supplier" is defined by Section 101(4) of the Warranty Act.

COUNT 1

PAR. 5. Alleging violation of the Warranty Act and Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One through Four are incorporated by reference herein as if fully set forth verbatim.

PAR. 6. Respondents, in the course and conduct of their business, have offered and sold automobiles and other consumer products manufactured after July 4, 1975 costing the consumer in excess of $15.00, many of which are warranted by the manufacturer. Respondents are therefore sellers as "seller" is defined in Section 702.1(e) of the Pre-Sale Rule.

PAR. 7. In connection with the offering for sale and sale of automobiles and other consumer products manufactured after January 1, 1977, respondents have failed, as required by Section 702.3(a) of the Pre-Sale Rule, to make the text of any written warranty available for prospective buyers' review prior to sale.

PAR. 8. Respondents' failure to comply with the Pre-Sale Rule as

described in Paragraphs Six and Seven of this complaint is a violation of the Warranty Act, and, pursuant to Section 110(b) of the Warranty Act, is an unfair or deceptive act or practice in violation of Section 5 of the Federal Trade Commission Act, as amended.

COUNT 2

PAR. 9. Alleging violation of the Warranty Act and Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One through Four are incorporated by reference herein as if fully set forth verbatim.

PAR. 10. In the course and conduct of its business, respondents provide to purchasers of used automobiles and trucks manufactured after July 4, 1975 a written limited warranty covering the engine, transmission, rear axle, brake system, and electrical system. Respondents are therefore warrantors as "warrantor" is defined by Section 101(5) of the Warranty Act.

PAR. 11. In connection with the respondents' providing of written warranties, respondents have failed to designate the warranty as a "Limited Warranty" as required by Section 103 of the Warranty Act.

PAR. 12. Respondents' failure to properly designate their warranty is a violation of Section 103 of the Warranty Act, and, pursuant to Section 110(b) of the Warranty Act, is an unfair or deceptive act or practice in violation of Section 5 of the Federal Trade Commission Act, as amended.

COUNT 3

PAR. 13. Alleging violation of the Warranty Act and Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One through Four and Paragraph Ten are incorporated by reference herein as if fully set forth verbatim.

PAR. 14. In written warranties provided to purchasers of used automobiles and trucks manufactured after January 1, 1977 respondents have failed to clearly and conspicuously disclose in a single document in simple and readily understood language the following statements:

A. This warranty gives you specific legal rights, and you may also have other rights which vary from state to state.

B. Some states do not allow the exclusion or limitation of incidental or consequential damages, so the above limitation or exclusion may not apply to you.

Failure to include these statements violates Section 701.3 of the Disclosure Rule.

PAR. 15. Respondents' failure to comply with the Disclosure Rule as described in Paragraph Fourteen of this complaint is a violation of the Warranty Act, and, pursuant to Section 110(b) of the Warranty Act, is an unfair or deceptive act or practice in violation of Section 5 of the Federal Trade Commission Act, as amended.

COUNT 4

PAR. 16. Alleging violation of the Warranty Act and Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One through Four and Paragraph Ten are incorporated by reference herein as if fully set forth verbatim.

PAR. 17. While providing written warranties to purchasers, of used automobiles and trucks manufactured after July 4, 1975, respondents have, with respect to those same purchasers, disclaimed all implied warranties (including the implied warranties of merchantability and fitness for a particular use) arising under state law and otherwise available to purchasers of respondents' automobiles and trucks.

PAR. 18. Respondents' disclaimer of the implied warranties as described in Paragraph Seventeen of this complaint is a violation of Section 108 of the Warranty Act, and, pursuant to Section 110(b) of the Warranty Act, is an unfair or deceptive act or practice in 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 the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Seattle Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and the Magnuson-Moss Warranty Act.

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents 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 respondents 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 Federal Trade Commission having initiated an investigation of certain acts and practices of Bob Rice Ford, Inc., a corporation, and Robert L. Rice, individually and as an officer of said corporation, and it now appearing that said corporation, and Robert L. Rice, individually and as an officer of said corporation, hereinafter sometimes referred to as proposed respondents, are willing to enter into an agreement containing an order to cease and desist from the use of the acts and practices being investigated,

It is hereby agreed, by and between Bob Rice Ford, Inc., by its duly authorized officer, Robert L. Rice, individually and as an officer of said corporation, and counsel for the Federal Trade Commission that:

1. Proposed respondent Bob Rice Ford, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Idaho with its principal office and place of business located at 3150 Main St., Boise, Idaho.

Proposed respondent Robert L. Rice is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation, and his address is the same as that of said corporation.

2. Proposed respondents admit all the jurisdictional facts set forth in the draft of complaint here attached.

3. Proposed respondents waive:

(a) Any further procedural steps;

(b) The requirement that the Commission's decision contain a statement of findings of fact and conclusions of law; and

(c) All rights to seek judicial review or otherwise to challenge or contest the validity of the order entered pursuant to this agreement.

4. This agreement shall not become a part of the official record of the proceeding unless and until it is accepted by the Commission. If this agreement is accepted by the Commission it, together with the draft of complaint contemplated thereby and related material pursuant to Rule 2.34, will be placed on the public record for a period of sixty (60) days and information in respect thereto publicly released. The Commission thereafter may either withdraw its acceptance of this agreement and so notify the proposed respondents, in which event it will take such action as it may consider appropriate, or issue and serve its complaint (in such form as the circumstances may require) and decision, in disposition of the proceeding.

5. This agreement is for settlement purposes only and does not

constitute an admission by respondents that the law has been violated as alleged in the draft of complaint here attached.

6. This agreement contemplates that, if it is accepted by the Commission, and if such acceptance is not subsequently withdrawn by the Commission pursuant to the provisions of Section 2.34 of the Commission's Rules, the Commission may, without further notice to proposed respondents, (1) issue its complaint corresponding in form and substance with the draft of complaint here attached and its decision containing the following order to cease and desist in disposition of the proceeding, and (2) make information public in respect thereto. When so entered, the order to cease and desist shall have the same force and effect and may be altered, modified or set aside in the same manner and within the same time provided by statute for other orders. The order shall become final upon service. Delivery by the U.S. Postal Service of the complaint and decision containing the agreed-to order to proposed respondents' address as stated in this agreement shall constitute service. Proposed respondents waive any rights they may have to any other manner of service. The complaint may be used in construing the terms of the order, and no agreement, understanding, representation, or interpretation not contained in the order or the agreement may be used to vary or contradict the terms of the order.

7. Proposed respondents have read the proposed complaint and order contemplated hereby. They understand that once the order has been issued, they will be required to file one or more compliance reports showing that they have fully complied with the order, and that they may be liable for civil penalties in the amount provided by law for each violation of the order after it becomes final.

ORDER

I. Definitions

A. "Warranty Act" means the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act (15 U.S.C.2301, *et seq.*).

B. The definition of terms contained in Section 101 of the Warranty Act and in Rules 701 and 702 promulgated thereunder (16 C.F.R. 701.1, 702.1) as presently defined and as may be amended hereafter, shall apply to the terms of this order.

C. With respect to new automobiles and trucks, "display area" means a prominent location in the showroom.

II.

It is ordered, That respondent Bob Rice Ford, Inc., a corporation, its successors and assigns, and its officers, and Robert L. Rice, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or indirectly through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, and sale of automobiles or other consumer products:

A. Shall, with respect to written warranties on new cars and other new consumer products, make available to the consumer prior to sale through utilization of a binder system as specified in 16 C.F.R. 702.3(a)(1)(ii), as presently written and as may be amended hereafter, the text of any written warranties offered or provided by respondents or the manufacturers of automobiles and consumer products sold by respondents. In utilizing any such binder or binders respondents shall:

1. provide prospective buyers with ready access thereto; and
2. a. display such binder(s) in a manner reasonably calculated to elicit the prospective buyers' attention; or

b. i. make such binder(s) available to prospective buyers on request; and

ii. place signs reasonably calculated to elicit the prospective buyers' attention in prominent locations within the display area, advising such prospective buyers of the availability of the binder(s), including instructions for obtaining access; and

3. index such binder(s) according to product or warrantor; and
4. clearly entitle such binder(s) as "Warranties" or other similar title.

Provided, however, that with respect to written warranties on new cars, it shall be deemed compliance with this paragraph if respondents display the text of any written warranties offered on new cars in the showroom in a manner reasonably calculated to elicit prospective buyers' attention, employing any means authorized by 16 C.F.R. 702.3(a)(1)(i) or (iv), as presently written and as may be amended hereafter. In such instance, the sign required by Paragraph III(A) shall be amended by inserting, in lieu of Line 3, the phrase "The warranty on new cars is posted in this showroom," and inserting, in lieu of Line 4, the phrase "There is also a warranty binder for parts and accessories."

B. Shall clearly and conspicuously display the text of each written warranty offered by respondents for used motor vehicles on a

window of each warranted vehicle; *provided,* that in the event the Federal Trade Commission issues a final Trade Regulation Rule establishing requirements which make compliance with this paragraph impossible, or which requires disclosure of warranty terms on window forms, then this paragraph will be null and void.

III.

It is further ordered, That respondents:

A. Post, in a prominent location in the showroom, a sign, at least 36 inches wide by 48 inches high and reasonably calculated to elicit prospective buyers' attention, which contains a verbatim reproduction of the following language:

IMPORTANT!
NOT ALL WARRANTIES ARE THE SAME
Compare warranties before you buy
There is a warranty binder in this showroom
If you can't find it, ask for it
Check for these things:
Full or Limited:
What costs are covered?
What do *you* have to do?
Are all parts covered?
How long does the warranty last?

B. Post, in a prominent location in the used car sales office lobby, a sign, at least 36 inches wide by 48 inches high and reasonably calculated to elicit prospective buyers' attention, which contains a verbatim reproduction of the following language:

IMPORTANT!
NOT ALL WARRANTIES ARE THE SAME
Compare warranties before you buy
Warranties (when given) are on the windows of used cars
If you don't see it, ask about it
Check for these things:
Full or Limited:
What costs are covered?
What do *you* have to do?
Are all parts covered?
How long does the warranty last?

C. The signs required by Paragraphs III.A. and B. shall be posted for a period of not less than three years from the effective date of this order. The language in such signs shall be unencumbered by other written or visual matter, shall be spaced, indented and punctuated

336-345 O - 81 - 3

as indicated in Paragraphs III.A. and B. above, and shall be printed in black against a solid white background, as follows:

1. The title of each sign shall be the word "Important" and shall be printed in capital letters in 4-inch boldface type followed by an exclamation mark.
2. The next phrase shall be printed on a separate line in capital letters and in 3-inch medium face type.
3. The next three phrases shall be printed on separate lines and in 3-inch medium face type.
4. Each succeeding phrase shall be printed on a separate line and in 2-inch medium face type.
5. The word "Important!" and each phrase shall be at least one inch from every other phrase.

IV.

It is further ordered, That respondents in connection with the advertising, offering for sale, and sale of automobiles and other consumer products shall clearly and conspicuously designate written warranties offered by said respondents as required by Section 103 of the Warranty Act. If a written warranty is given which does not meet the standards set forth in Section 104 of the Warranty Act:

A. The warranty shall be titled "Limited Warranty"; and
B. The title shall be printed in capital letters in 44-point boldface type.

V.

It is further ordered, That respondents in connection with the offering of written warranties on automobiles and other consumer products shall clearly and conspicuously disclose in a single document in simple and readily understood language, the following items of information:

A. The identity of the party or parties to whom the written warranty is extended, if the enforceability of the written warranty is limited to the original consumer purchaser or is otherwise limited to persons other than every consumer owner during the term of the warranty;
B. A clear description and identification of products, or parts, or characteristics, or components or properties covered by and, where necessary for clarification, excluded from the warranty;
C. A statement of what the warrantor will do in the event of a

defect, malfunction or failure to conform with the written warranty, including the items or services the warrantor will pay for or provide, and, where necessary for clarification, those which the warrantor will not pay for or provide;

D. The point in time or event on which the warranty term commences, if different from the purchase date, and the time period or other measurement of warranty duration;

E. A step-by-step explanation of the procedure which the consumer should follow in order to obtain performance of any warranty obligation, including the persons or class of persons authorized to perform warranty obligations. This includes the name(s) of the warrantor(s), together with: the mailing address(es) of the warrantor(s), and/or the name or title and the address of any employee or department of the warrantor responsible for the performance of warranty obligations, and/or a telephone number which consumers may use without charge to obtain information on warranty performance;

F. Information respecting the availability of any informal dispute settlement mechanism that complies with 16 C.F.R. 703 (1977);

G. Any limitations on the duration of implied warranties, disclosed on the face of the warranty as provided in Section 108 of the Warranty Act, accompanied by the following statement:

Some states do not allow limitations on how long an implied warranty lasts, so the above limitation may not apply to you.

H. Any exclusions of or limitations on relief such as incidental or consequential damages, accompanied by the following statement, which may be combined with the statement required in subparagraph G above:

Some states do not allow the exclusion or limitation of incidental or consequential damages, so the above limitation or exclusion may not apply to you.

I. A statement in the following language:

This warranty gives you specific legal rights, and you may also have other rights which vary from state to state.

VI.

It is further ordered, That respondents, in connection with the advertising, offering for sale, and sale of automobiles or other consumer products in instances where respondents either provide a written warranty to the consumer with respect to such consumer product, or, at the time of sale or within 90 days thereafter, enter

into a service contract with the consumer which applies to such consumer product, shall:

A. Not disclaim or modify, except as permitted by Section 108(b) of the Warranty Act, any implied warranty with respect to a consumer product;

B. Not limit the duration of any implied warranty with respect to a consumer product unless:

1. any written warranty is clearly and conspicuously designated a "Limited Warranty"; and

2. the limitation is for a period of time at least as long as the duration of any written warranty provided by respondents with respect to the product; and

3. the duration of the written warranty is for a reasonable duration; and

4. the limitation is conscionable, is set forth in clear and unmistakable language, and is prominently displayed on the face of the warranty.

VII.

It is further ordered, That respondents shall:

A. Not raise any defenses pertaining to a disclaimer, limitation or modification of implied warranties in any case, suit or claim brought or made against respondents by consumers who have purchased any of respondents' warranted motor vehicles manufactured after July 4, 1975 and who were issued a written limited warranty disclaiming implied warranties;

B. Provide, in good faith, all consumers with all relief available to them under applicable Idaho state laws, if:

1. said consumers purchased any of respondents' warranted motor vehicles manufactured after July 4, 1975 and were issued a used car owner security plan attempting to disclaim implied warranties; and

2. if said motor vehicles did not comply with all of the implied warranties;

C. Notify all consumers who have purchased any of respondents' warranted motor vehicles manufactured after July 4, 1975 and were issued a used car owner security plan which attempted to disclaim implied warranties, by mailing to each such consumer within 60 days of the effective date of this order at the customer's last residence

address known to respondents, the notice set forth in Appendix A of this order. If the notice is returned undelivered, the return envelope shall be retained and the notice is to be sent to the customer's last employment address known to respondents or to the address of a co-signer, relative or other person through whom the customer may be reached.

VIII.

It is further ordered, That:

A. Respondents deliver a copy of this order to cease and desist to all present and future employees, salespersons, agents, independent contractors, and other representatives of respondents engaged in the sale of automobiles or consumer products on behalf of respondents, and secure a signed statement acknowledging receipt of the order from each such person.

B. Respondents instruct all present and future employees, salespersons, agents, independent contractors, and other representatives of respondents, engaged in the sale of automobiles or other consumer products on behalf of respondents, as to their specific obligations and duties under the Warranty Act, all present and future implementing Rules promulgated under the Act and this order including but not limited to:

1. instructions as to the availability and location of warranty information;
2. instructions as to the nature of and differences among full warranties, limited warranties, and service contracts.

C. Respondents institute a program of continuing surveillance to reveal whether respondents and respondents' employees, salespersons, agents, independent contractors, or other representatives are in compliance with this order.

D. Respondents maintain complete records for a period of not less than three (3) years from the date of the incident, of any written or oral information received which indicates the possibility of a violation of this order by any of respondents' employees, salespersons, agents, independent contractors, or other representatives. Any oral information received indicating the possibility of a violation of the order shall be reduced to writing, and shall include the name, address and telephone number of the informant, the name and address of the individual involved, the date of the communication and a brief summary of the information received. Such records shall

be available upon request to representatives of the Federal Trade Commission during normal business hours upon reasonable advance notice.

E. Respondents maintain, for a period of not less than three (3) years from the effective date of this order, complete business records including customer sale folders to be furnished upon request to the staff of the Federal Trade Commission, relating to the manner and form of their continuing compliance with all the terms and provisions of this order.

F. The corporate respondent named herein 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 corporate respondent which may affect compliance obligations arising out of this order.

G. For a period of five years, the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and/or of his affiliation with a new business or employment.

H. Respondents 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.

APPENDIX A

[Date]

[Name and Address of Consumer]

Dear [Name of Consumer]:

Some time ago you bought from us a used car or truck made after July 3, 1975. We gave you our "Ford Dealer Used Car Owner Security Plan." It said that for a certain time after you bought your car or truck, we would give you a discount on certain repairs.

We have learned that this plan is a warranty under federal law. This means we should not have disclaimed any implied warranties.

In fact, you do have an implied warranty of merchantability. This means that the car or truck you purchased must have been fit for ordinary use. Furthermore, if you relied on any claim made by us at the time you purchased the vehicle that it was fit for a particular purpose, you have a warranty of fitness for a particular purpose. The vehicle must fit the purpose we claimed it would fit. The law of the State of Idaho gives you four years to enforce these implied warranties.

We feel we have lived up to our "Security Plan." It said we would make repairs at a discount for a certain time after you bought your car or truck. If you feel we have not lived up to the other warranties shown above, you have a legal right to them, even though we disclaimed them in error. If you have any questions, please call us at 342–6811.

Please excuse these mistakes in our warranty.

Sincerely,

Bob Rice Ford, Inc.
A. W. Baril, Vice President &
General Manager

IN THE MATTER OF

FORD MOTOR COMPANY, ET AL.

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

Docket 9073. Decision, March 29, 1979—Modifying Order, July 3, 1980

This order changes some of the order provisions in an order to cease and desist issued against a Detroit, Mich. manufacturer of motor vehicles March 29, 1979, 93 F.T.C. 402, 44 FR 25630. In an effort to insure evenhandedness in requirements in similar cases issued against competitors, the Commission is modifying the order provisions to meet those in a provisionally accepted order against General Motors Corporation. The Commission has eliminated the references to the State of Louisiana in Paragraphs I.J and II.F; redefined the meaning of "allowable expenses" in Paragraph I.L; and removed the requirement that respondent submit summary reports of certain required audits to the agency. The order now requires simply the preparation and maintenance of such audit summary reports.

ORDER REOPENING AND MODIFYING CONSENT ORDER

On March 29, 1979, the Commission issued a Decision and Order against respondents Ford Motor Company and Ford Motor Credit Company,[1] in connection with the extension and enforcement of motor vehicle retail credit obligations and the disposition of repossessed motor vehicles. There is now before the Commission a Request by the Ford respondents (filed May 30, 1980, and amended June 10, 1980) for reopening and modification of that Order pursuant to Section 2.51 of the Commission's Rules of Practice, 16 C.F.R. 2.51.

The Order required Ford to establish and provide to all dealers, as part of the Ford Manual of Dealer Accounting Procedure (binding on all Ford dealers), a system for determining repossession surpluses and for accounting for such surpluses and for any deficiencies sought on repossessed vehicles. It required also that Ford conduct a series of field audits to verify whether its dealers are in fact adhering to that system.

Order Paragraph I.J defines "disposition" of a repossessed vehicle to include its sale or lease, but not transactions subsequent to judicial sales in Louisiana.[2] In accordance with the latter aspect,

[1] 93 F.T.C. 402. The Order was modified on February 16, 1980, [45 FR 22020; 95 F.T.C. 349] at the behest of the Ford respondents and without objection by the Commission's staff, in a single subparagraph unaffected by the Request discussed herein.

[2] The full text of Paragraph I.J is as follows:

> J. "Disposition" or "dispose" refers to a dealership's sale or lease of a repossessed vehicle previously sold by that dealership and returned to it by or for a financing institution pursuant to a repurchase agreement. Such sale or lease includes only transactions with an independent third party; *i.e.*, it does not include a sale

(Continued)

Paragraph II.F limits the coverage of the repossession accounting system as follows:

F. The accounting system shall not apply to sales of repossessed vehicles subsequent to judicial sales in Louisiana.

The Order further provides, in Paragraph I.L, that the following expenses, among others, may be deducted as "allowable" in dealers' determination of surpluses and of deficiencies upon which collection is attempted:

* * * * * * *

7. sales commissions paid for actual participation in the sale of the particular vehicle, computed at a rate no higher than for a similar, nonrepossessed vehicle and excluding portions of commissions attributable to the selling of service contracts, separately priced warranties, financing or insurance;

* * * * * * *

10. expenses for telephone calls and postage incurred in arranging for the repossession, holding, transportation, reconditioning and resale of the vehicle.

As to the Ford-conducted audits, Paragraph IV.H requires that "[w]ithin sixty days after completion of each audit of a dealership . . . Ford shall:

1. submit to the Federal Trade Commission a summary report of the audit for that dealership, containing . . . [seven specified categories of information and/or documentation]."

The current Ford Request relies on various manifestations of Commission policy in favor of evenhanded treatment of similarly situated business entities. As amended, the Request asks that Paragraphs I.J, II.F, I.L and IV.H.1 of the March 1979 Order be modified to "conform" in certain respects to a consent order agreement with General Motors Corporation, et al., accepted subject to public comment on March 5, 1980 (Docket 9074, 45 FR 14870, March 7, 1980). Specifically, Ford seeks elimination of the "in Louisiana" limitation from Paragraphs I.J and II.F; clarification that expenses incident to any proper disposition (i.e., a sale *or* lease, rather than just a sale) may be deducted as "allowable" in determining the amount of any surplus or deficiency; and provision that these expenses may include costs of certain fringe benefits

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or lease to the financing institution, the dealership or their representatives, or to a person or firm liable under a guaranty, endorsement, or repurchase agreement covering the repossessed vehicle. Disposition or dispose shall not refer to the repurchase of a repossessed vehicle by a dealership pursuant to a repurchase agreement, or refer to a sale subsequent to a judicial sale in Louisiana.

incurred in connection with payment of sales commissions, certain other certain necessary photocopying and communication expenses, and amounts paid specifically to insure the repossessed vehicle while in the dealer's possession.

Because the audit process incorporated in the *General Motors* consent order requires preparation and maintenance of a summary report of each dealership audit (*GM* ¶¶ IV.A.3 and IV.B) but not their automatic submittal to the Commission, Ford asks that Paragraph IV.H.1 be modified to require only preparation and not routine submission (to the Commission) of its individual dealership audit reports. Ford notes that such reports would still be available for review by Commission representatives upon request, under the general-recordkeeping provision of the Order (Paragraph VIII.A). In addition, Ford undertakes to submit two statistical reports to the Commission during the conduct of each sample audit, to provide Commission staff with interim overviews while the audit process is still ongoing.

The Commission's staff concurs in all of the modifications proposed in Ford's Request, as amended.[3] However, with the exception of the changes to Paragraph I.L the staff does not agree with Ford's contention that the modifications are within the scope of Paragraph VII.B (which confers upon Ford a right to have any provision conformed, as necessary and appropriate, to a corresponding provision of any final order in Dockets 9072–74 which prescribes a less restrictive standard on certain enumerated subjects). Because the Commission has decided to grant all aspects of Ford's amended Request,[4] as an exercise of sound discretion—in the interest of prompt evenhandedness rather than contingent on finality of the *General Motors* order—it is unnecessary to make a determination as to whether the requested modifications of Paragraphs I.J, II.F and IV.H.1 fall within the scope and operation of Paragraph VII.B.

Therefore, the Commission being of the opinion that the public interest will be served by modifying the Order as requested, at this time,

It is ordered, That Docket 9073 be, and it hereby is, reopened for the limited purpose of effecting the following changes.

It is further ordered, That Paragraphs I.J and II.F of the Order be modified by eliminating references to Louisiana, so that the last sentence of Paragraph I.J will read:

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[3] The Commission notes that no comments were filed on these aspects of the *General Motors* consent order during its sixty days on the public record, and that none have been filed on Ford's Request.

[4] In implementation of its proposed modifications to Paragraph I.L, Ford has submitted detailed revisions of certain portions of its Manual of Dealer Accounting Procedure. Pending staff review of these materials, the Commission expresses no view at this time as to their compliance with the modified provisions.

Disposition or dispose shall not refer to the repurchase of a repossessed vehicle by a dealership pursuant to a repurchase agreement, or refer to a sale subsequent to a judicial sale.

and Paragraph II.F will read:

F. The accounting system shall not apply to sales of repossessed vehicles subsequent to judicial sales.

It is further ordered, That Paragraph I.L of the Order be modified in its preamble and in certain indicated subparagraphs, and by addition of a new subparagraph 11, to read as follows:

L. "Allowable expenses" means only actual out-of-pocket expenses incurred as the result of a repossession. The expenses must be reasonable and directly resulting from the repossessing, holding, preparing for disposition and disposing of the vehicle, and not otherwise reimbursed to the dealership. They are limited to the following charges (if allowable under applicable state law):

* * * * * * *

5. labor and associated parts and supplies furnished by the dealership for the repair, reconditioning or maintenance of the vehicle in preparation for disposition, computed at dealer cost (as defined in the Initial Compliance Report) with appropriate adjustments for any insurance or warranty recovery;

6. amounts paid to others for labor and associated parts and supplies purchased for the repair, reconditioning or maintenance of the vehicle in preparation for disposition;

7. cost of sales commissions paid for actual participation in the disposition of the particular vehicle, computed at a rate no higher than for the sale or lease, as applicable, of a similar, nonrepossessed vehicle in similar circumstances, but excluding portions of commissions attributable to the selling of service contracts, separately priced warranties, financing, or insurance;

* * * * * * *

10. expenses paid to others for communication (including telephone calls, postage, and military locator fees) and photocopying necessary in arranging for the repossession, holding, transportation, reconditioning, or disposition of the vehicle; and

11. amounts paid to insure the particular vehicle while holding it.

It is further ordered, That Paragraph IV.H.1 of the Order be modified to eliminate the following language:

1. submit to the Federal Trade Commission a summary report of the audit for that dealership, containing . . .

and substitute therefor the following:

1. prepare a summary report of the audit for that dealership, containing . . .

IN THE MATTER OF

GENERAL MOTORS CORPORATION, ET AL.

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

Docket 9074. Complaint Feb. 10, 1976—Decision, July 7, 1980*

This consent order requires, among other things, Chuck Olson Chevrolet, Inc. (Olson), an Oregon Motor vehicle dealer with its principal place of business located in Seattle, Wash., to adopt and adhere to "Repossession Accounting Procedures" maintained by General Motors Corporation; furnish all appropriate supervisory personnel with a copy of the procedures; and establish to the reasonable satisfaction of the Commission that it has paid all surpluses realized on repossessed vehicles returned by financing institutions other than General Motors Acceptance Corporation (GMAC) since February 10, 1973. (Surpluses generated from Olson vehicles which have been repossessed by GMAC must be paid by GMAC.)

Appearances

For the Commission: *Randall H. Brook, Ivan L. Orton* and *Dean A. Fournier.*

For the respondents: *Robert C. St. Louis, Aiken, St. Louis & Siljeg,* Seattle, Wash.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondents named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondents having been served with a copy of that complaint together with a proposed form of order; and

Respondent Chuck Olson Chevrolet, Inc., its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by said respondent as to the Commission's jurisdiction, 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 the complaint, and waivers and other provisions in accordance with the Commission's Rules; and

The Secretary of the Commission having thereafter, in accordance

* Complaint previously published at 95 F.T.C. 825.

with Section 3.25(c) of its Rules, withdrawn this matter from adjudication as to Chuck Olson Chevrolet, Inc.; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Chuck Olson Chevrolet, Inc. is an Oregon corporation with its office and principal place of business located at 17545 Aurora Ave. North, Seattle, Washington.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding as to Chuck Olson Chevrolet, Inc., and of said respondent, and the proceeding is in the public interest.

ORDER

I.

It is ordered, That respondent Chuck Olson Chevrolet, Inc., a corporation, and its successors, assigns, officers, agents, representatives and employees, and any corporation, subsidiary, division or device through which they act directly or indirectly (including Viking Service Corporation doing business as Olson Triumph), shall forthwith (A) adopt and adhere to the "Repossession Accounting Procedures" maintained by General Motors Corporation pursuant to the disposition of Docket 9074 as to General Motors Corporation, and (B) deliver a copy of the Repossession Accounting Procedures to all appropriate supervisory personnel.

II.

It is further ordered, That respondent shall, no later than 60 days after service of this Order:

A. Establish to the reasonable satisfaction of the Commission that all surpluses (if any) generated from repossessed vehicles returned to respondent by financing institutions other than General Motors Acceptance Corporation between February 10, 1973 and the date of service of this Order have been paid.

B. File with the Commission a written report setting forth in detail the manner and form in which it has complied with this Order.

III.

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

IN THE MATTER OF

C. ITOH & CO. (AMERICA), INC.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND WOOL PRODUCTS LABELING ACTS

Docket C-2586. Decision, Oct. 22, 1974—Modifying Order, July 7, 1980

This order modifies a previous order to cease and desist issued October 22, 1974 against a New York City importer and distributor of fabrics (84 F.T.C. 1187, 40 FR 6482). The Commission has modified the order by limiting the bond provision to recycled wool products only. The order previously required posting of a bond on all wool products imported.

ORDER MODIFYING CEASE AND DESIST ORDER

In its request filed on April 30, 1980, the respondent petitioned the Commission, pursuant to Section 2.51 of its Rules of Practice, to reopen the proceedings and modify the order of October 22, 1974, entered in Docket C-2586. Respondent asks that the second *"It is further ordered"* paragraph be deleted from the order. The paragraph in question reads as follows:

It is further ordered, That respondent, C. Itoh & Co. (America), Inc., a corporation, its successors and assigns, and its officers, and respondent's representatives, agents, and employees, directly or through any corporation, subsidiary, division, or other device, do forthwith cease and desist from importing or participating in the importation of wool products into the United States except upon filing bond with the Secretary of the Treasury in a sum double the value of said wool products and any duty thereon, conditioned upon compliance with the provisions of the Wool Products Labeling Act of 1939.

In support of its request, the respondent has advanced a number of considerations intended to show changed conditions of fact since the order was issued and to show that the public interest will best be served by granting its request. It states that it has ensured that its imported wool products are correctly labeled by investigating the reputations of its overseas suppliers and purchasing only from those with an established record of exercising proper care and diligence in determining the fiber content of their merchandise and labeling it properly. As the result of its self-policing, it states that there have been no complaints with regard to the labeling of any of its importations of wool products in the five and one-half years that the order has been in effect. The respondent advised Commission staff, by letter dated May 5, 1980, that it is no longer importing the

reprocessed or reused wool products which gave rise to the complaint and is now importing wool and wool blend products.[1] It states further, that due to the high costs of the premiums charged by sureties on the bond, it can no longer hope to profitably continue to sell wool products. It cites as a competitive disadvantage the fact that many of its competitors are not subject to the bonding requirement and that bonds have not appeared in recent Commission orders under the Wool Products Labeling Act of 1939.

By letter dated May 28, 1980, the respondent advised staff that it will agree to a modification of the order to limit the bonding requirement to the wool products that gave rise to the complaint, recycled wool products. If the respondent resumes importing such products, the bond will be applicable. It will not, however, be required to continue to bear the financial burden of paying premiums to sureties on the wool and wool blend products that it is now importing.

Having considered the request, the Commission has concluded that the order should be modified to limit the bond provision to recycled wool products and that the modification will safeguard the public interest. Therefore,

It is ordered, That the second *It is further ordered* paragraph of the order, set forth above, be replaced by the following new paragraph:

It is further ordered, That respondent, C. Itoh & Co. (America), Inc., a corporation, its successors and assigns, and its officers, and respondent's representatives, agents, and employees, directly or through any corporation, subsidiary, division, or other device, do forthwith cease and desist from importing or participating in the importation of recycled wool products into the United States except upon filing bond with the Secretary of the Treasury in a sum double the value of said recycled wool products and any duty thereon, conditioned upon compliance with the provisions of the Wool Products Labeling Act of 1939.

It is further ordered, That the foregoing modification shall become effective upon service of this order.

[1] The Wool Products Labeling Act of 1939 has been amended to substitute the word "recycled" for the words "reprocessed" and "reused" (Pub. Law 96-242, 94 Stat. 344, May 5, 1980, eff. July 4, 1980).

336-345 O - 81 - 4

IN THE MATTER OF

NATIONAL TEA COMPANY, ET AL.

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

Docket 9126. Complaint, April 17, 1979—Decision, July 23, 1980

This consent order dismisses the complaint against Applebaums' Food Markets, Inc., and requires, among other things, a Rosemont, Ill. operator of a retail grocery store chain to divest itself, within six months from the effective date of the order, of all its right, title and interest in seven specified retail grocery stores in the Minneapolis-St. Paul area, to a Commission-approved acquirer. Further, for a ten-year period, the company (with certain minor exceptions) is prohibited from acquiring any retail grocery store business located in designated geographic areas without prior Commission approval.

Appearances

For the Commission: *Joseph Tasker, Jr., Richard K. Kudo* and *Chauncey Hopkins.*

For the respondents: *James T. Halverson, Sherman & Sterling,* New York City and *Victor S. Friedman, Fried, Frank, Harris, Shriver & Jacobson,* New York City.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondents have entered into an agreement which, if consummated, would result in a violation of Section 7 of the Clayton Act, as amended, (15 U.S.C.18), and Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. 45), and that said agreement therefore constitutes a violation of Section 5(a)(1) of the Federal Trade Commission Act, as amended, (15 U.S.C.45 (a)(1)), and having found that a proceeding with respect to said violation is in the public interest, issues its complaint stating its charges as follows:

Definitions

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

(a) "retail food stores" are defined as retail establishments primarily engaged in selling food for home preparation and consumption;

(b) "retail grocery stores" are defined as retail food stores, including supermarkets, convenience stores, and delicatessens, selling: (1) a wide variety of canned or frozen foods, such as vegetables, fruits, and soups; (2) dry groceries, either packaged or in bulk, such as tea, coffee, cocoa, dried fruits, processed food and non-edible grocery items. In addition, these establishments often sell smoked and prepared meats, and fresh fish and poultry, fresh vegetables and fruits, and fresh or frozen meats.

(c) "National Tea Company" is defined herein to include National Tea Company and all of its wholly-owned and partially-owned subsidiaries.

NATIONAL TEA COMPANY

2. Respondent National Tea Company (National) is an Illinois corporation with its principal office at 9701 West Higgins Road, Rosemont, Illinois.

3. In 1978, National operated a chain of approximately 200 retail grocery stores located primarily in the central part of the United States, including the States of Alabama, North Dakota and Wisconsin.

4. National's total sales for the year ending December 31, 1977 were approximately $835,604,312. National ranks among the twenty largest retail grocery chains in the United States.

5. In 1978, National operated a chain of approximately 19 retail grocery stores in Metropolitan Minneapolis/St. Paul, Minnesota.

6. At all times relevant herein, National has engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, and Section 4 of the Federal Trade Commission Act, as amended.

APPLEBAUMS' FOOD MARKETS, INC.

7. Respondent Applebaums' Food Markets, Inc. (Applebaums') is a Minnesota corporation with its principal office at 222 East Plato Blvd., P. O. Box 43509, St. Paul, Minnesota.

8. In 1978, Applebaums' operated a chain of approximately 29 retail grocery stores located in the State of Minnesota.

9. Applebaums' total net sales for the year ending April 29, 1978 amounted to approximately $127,991,000. The total retail sales of its grocery stores for the year ending January 31, 1979 amounted to approximately $134,927,000.

10. In 1978 Applebaums' operated a chain of approximately 28

retail grocery stores in Metropolitan Minneapolis/St. Paul, Minnesota.

11. At all times relevant herein, Applebaums' has engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, and Section 4 of the Federal Trade Commission Act, as amended.

MERGER AGREEMENT

12. On or about January 29, 1979, National and Applebaums' entered into an "Agreement and Plan of Merger and Reorganization" under the terms of which a wholly-owned subsidiary of National will be merged into Applebaums' and National will purchase all of Applebaums' outstanding stock for cash. Applebaums' will, by the terms of this agreement, become a wholly-owned subsidiary of National. The practical result of this agreement, if consummated, would be the acquisition of Applebaums' by National.

TRADE AND COMMERCE RELEVANT LINE OF COMMERCE

13. A relevant line of commerce in which to assess National's proposed acquisition of Applebaums' is retail grocery store sales.

14. Concentration in the relevant line of commerce is high in the relevant section of the country alleged below.

RELEVANT SECTION OF THE COUNTRY

15. A relevant section of the country is Metropolitan Minneapolis/St. Paul, Minnesota (MPLS/St. Paul), which is defined herein to mean the five contiguous Minnesota counties of Anoka, Dakota, Hennepin, Ramsey and Washington.

16. In 1978, Applebaums' operated approximately 28 retail grocery stores in MPLS/St. Paul; it ranked as the third largest firm in the market, with a market share, based on currently available information, of approximately 10%.

17. In 1978, National operated approximately 19 retail grocery stores in MPLS/St. Paul; it ranked as the fifth largest firm in the market, with a market share, based on currently available information, of approximately 4 1/2%.

18. National and Applebaums' have been for many years and are now direct and substantial competitors of one another in the relevant line of commerce in MPLS/St. Paul.

19. National's proposed acquisition of Applebaums' would make

National the largest operator of retail grocery stores in MPLS/St. Paul.

EFFECTS OF THE MERGER

20. The effects of the proposed merger set forth in Paragraph 12 herein may be substantially to lessen competition or tend to create a monopoly in the relevant market, in violation of Section 7 of the Clayton Act, as amended, (15 U.S.C. 18), and the acquisition constitutes an unfair method of competition and an unfair act or practice within the meaning of Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. 45), in the following ways among others:

a) The elimination of actual competition between National and Applebaums' in MPLS/St. Paul;
b) increased concentration in the retail grocery store business in MPLS/St. Paul;
c) potentially weakening competition from independent retail grocery competitors of Applebaums' and National in the MPLS/St. Paul market by impairing the ability of their wholesale supplier to maintain existing levels of price and service; and
d) the encouragement of further acquisitions and mergers by and among other leading firms in the retail grocery store business.

VIOLATION CHARGED

21. The merger between National and Applebaums', if consummated, would for the reasons set forth herein constitute a violation of Section 7 of the Clayton Act, as amended, (15 U.S.C. 18), and Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. 45).

22. By entering into the agreement which would give rise to the violation described in Paragraph 24, herein, National and Applebaums' have violated Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. 45).

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondents named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act, as amended, and Section 7 of the Clayton Act, as amended, and the respondents

having been served with a copy of that complaint, together with a notice of contemplated relief; and

Respondent National Tea Company, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by National Tea Company of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by National Tea Company that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and having placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure described in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent National Tea Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 9701 West Higgins Road, in the City of Rosemont, State of Illinois.

2. Respondent Applebaums' Food Markets, Inc., was once a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota, with its office and principal place of business located at 222 Plato Blvd., in the City of St. Paul, State of Minnesota. Applebaums' Food Markets, Inc., ceased to exist as a corporation when it was merged on July 27, 1979, into a wholly-owned subsidiary of National Tea Company.

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER TO DIVEST AND OTHER RELIEF

I

As used in this order:

(A) "National" means National Tea Co., a corporation organized under the laws of Illinois with its principal executive offices at 9701

West Higgins Road, Rosemont, Illinois, and its directors, officers, agents and employees, and its subsidiaries, successors and assigns.

(B) "Applebaums" means Applebaums' Food Markets, Inc., a corporation once organized under the laws of Minnesota with its principal executive offices at 222 Plato Blvd., St. Paul, Minnesota, and which was merged on July 27, 1979 into a wholly-owned subsidiary of National, at which time Applebaums as a corporation ceased to exist.

(C) "Retail grocery stores" are retail food stores classified under Bureau of Census Industry Classification No. 541, including supermarkets, convenience stores and delicatessens, which primarily sell a wide variety of canned or frozen foods, such as vegetables, fruits and soups; dry groceries, either packaged or in bulk, such as tea, coffee, cocoa, dried fruits, processed food, and non-edible grocery items. In addition, these stores often sell smoked and prepared meats, and fresh fish and poultry, fresh vegetables and fruits, and fresh or frozen meats.

(D) "The Minneapolis-St. Paul Area" means the area encompassed by the Minnesota counties of Anoka, Dakota, Hennepin, Ramsey and Washington.

(E) "Applebaums stores" means those retail grocery stores in the Minneapolis/St. Paul area formerly owned by Applebaums, all of which were acquired by National on July 27, 1979.

(F) "National stores" means those retail grocery stores in the Minneapolis/St. Paul area owned by or operated by National on or after the date on which this Order becomes final, including the Applebaums stores.

(G) The "disposition stores" means the following National ("N") stores and Applebaums ("A") stores:

1. N-80 (2326 Louisiana, St. Louis Park)
2. N-91 (3115 E. 38th St., Minneapolis)
3. N-99 (150 Apache Plaza, St. Anthony Village)
4. N-210 (4300 Xycon Ave., New Hope)
5. N-803 (8948 University Ave., St. Paul)
6. N-130 (1901 W. 80th St., Bloomington)
7. A-8 (900 E. Maryland, St. Paul)

(H) "May Brothers" means May Brothers Company, a wholesale supplier of groceries and related products with its principal office located at 3501 Marshall St., Northeast, Minneapolis, Minnesota.

(I) "Acquisition," "acquire," "merger," or "merge with" includes all other forms of arrangement by which National may obtain all or

any part of the market share of any other retail grocery store or stores.

II

It is ordered, That within six months from the date on which this Order becomes final, National shall divest itself of all of its right, title and interest in the disposition stores. During this period, National shall continue to operate said properties as retail grocery stores. Divestiture shall be made only to an acquiror or acquirors approved in advance by the Federal Trade Commission. The purpose of the divestiture required by this paragraph is to assure the continued operation of the disposition stores as retail grocery stores and their survival as viable competitors in the Minneapolis-St. Paul area.

III

It is further ordered, That at the request of May Brothers National shall do the following:

(A) For a period of one year from the date on which this Order becomes final, National shall continue to purchase from May Brothers, when averaged over the one-year period, at least fifty percent of the dry grocery products purchased by National for the Applebaums stores;

(B) For a period of five years from the date on which this order becomes final, National shall make annual purchases of no less than six million dollars ($6,000,000.00) of dry groceries from May Brothers for the National stores, and, for a period of five years from the date on which this order becomes final, National shall maintain May Brothers as the first alternative source for the dry grocery products requirements of the National stores; and

(C) For a period of five years from the date on which this order becomes final May Brothers shall be the exclusive frozen food supplier of the National stores;

provided, however, that this paragraph shall have effect only so long as May Brothers continues to offer National competitive quality and prices for such purchases.

IV

It is further ordered, That for a period of ten (10) years from the date on which this order becomes final, National shall not merge

with or acquire, or merge with or acquire and thereafter hold, directly or indirectly through subsidiaries or in any other manner, without the prior approval of the Federal Trade Commission, the whole or any part of the stock or assets of any individual, firm, partnership, corporation or other legal or business entity which directly or indirectly owns or operates any retail grocery store, where such acquisition or merger involves five or more such retail grocery stores, any one of which is located in any of the following areas:

(A) In Minnesota, Wisconsin, Indiana, Missouri, Illinois, Louisiana or Mississippi; or

(B) Within five hundred (500) miles of any warehouse owned or operated by National at the time of such acquisition or merger and which is engaged in the shipment of products to retail grocery stores; or

(C) Within three hundred (300) miles of any retail grocery store owned or operated by National at the time of such acquisition or merger.

V

It is further ordered, That, in the event National withdraws from the business of operating retail grocery stores in the Minneapolis/St. Paul area prior to the expiration of paragraph IV of this order, National shall divest all of its right, title and interest in the National stores to an acquiror or acquirors approved in advance by the Federal Trade Commission. The purpose of this paragraph is to assure that National's withdrawal from the Minneapolis/St. Paul area is accomplished in a manner which, in the opinion of the Federal Trade Commission, will best promote, preserve, and protect competition among retail grocery stores in that area.

VI

It is further ordered, That within sixty (60) days from the date on which this order becomes final and every sixty (60) days thereafter until the divestiture required by paragraph II of this order is completed, National shall submit to the Federal Trade Commission a written report setting forth in detail the manner and form in which National intends to comply, is complying, and has complied with the terms of this order and such additional information relating thereto as may from time to time be required. In addition, upon written request of the staff of the Federal Trade Commission, National shall

submit such reports in writing with respect to the other requirements of this order as may from time to time be requested.

VII

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

VIII

It is further ordered, That the complaint against Applebaums' Food Markets, Inc., be, and it hereby is, dismissed.

IN THE MATTER OF

CLINIQUE LABORATORIES, INC.

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

Docket C-3027. Complaint, July 23, 1980—Decision, July 23, 1980

This consent order requires, among other things, a New York City manufacturer and distributor of cosmetics and related products to cease establishing, fixing or maintaining resale prices for its products and compelling adherence to suggested prices through coercion or otherwise. The firm is prohibited from seeking the identity of dealers who fail to conform to established prices and taking adverse action against them. The order further bars the company from restricting the lawful use of brand names and trademarks in the advertising and sale of its products, and withholding earned cooperative advertising credits or allowances from recalcitrant dealers. Additionally, respondent is prohibited from suggesting retail prices for its products for a specified period.

Appearances

For the Commission: *Jeffrey Klurfeld* and *Karen Chandler.*

For the respondent: *Joshua F. Greenburg* and *Louis A. Shapiro,* New York City, and *Saul H. Magram,* House Counsel, New York City.

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 Clinique Laboratories, 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 as follows:

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

A. "Product"

"Product" is defined as any item of cosmetic, fragrance or soap, any accessory containing any item of cosmetic, fragrance or soap, or any related accessory, including but not limited to, any applicator or brush, which is manufactured, offered for sale or sold by respondent.

In addition to the foregoing, "product" is defined to include any item which is manufactured, offered for sale or sold by respondent for resale to consumers together with any "product" as defined hereinabove.

B. "Dealer"

"Dealer" is defined as any person, partnership, corporation or firm which sells any product in the course of its business.

C. "Resale Price"

"Resale Price" is defined as any price, price floor, price ceiling, price range, or any mark-up, formula or margin of profit used by any dealer for pricing any product. Such term includes, but is not limited to, any suggested, established or customary resale price as well as the retail price in effect at any dealer.

PARAGRAPH 1. Respondent Clinique Laboratories, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located at 767 Fifth Ave., New York, New York.

PAR. 2. Respondent is now, and for some time last past, has been engaged in the manufacture, advertising, offering for sale, sale and distribution of cosmetics, fragrances, soaps and related accessories.

PAR. 3. Respondent maintains, and has maintained, a substantial course of business, including the acts and practices as hereinafter set forth, which are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 4. Respondent sells and distributes its products directly to retail dealers located throughout the United States who resell respondent's products to the general public.

PAR. 5. In the course and conduct of its business, and at all times mentioned herein, respondent has been, and now is, in substantial competition in or affecting commerce with corporations, firms and individuals engaged in the manufacture, advertising, offering for sale, sale or distribution of merchandise of the same general kind and nature as merchandise manufactured, advertised, offered for sale, sold or distributed by respondent.

PAR. 6. In the course and conduct of its business as above described, respondent has for some time last past effectuated and pursued a policy throughout the United States to fix, control, establish, manipulate and maintain the resale prices at which certain of its dealers advertise, offer for sale and sell its products.

PAR. 7. By various means and methods, respondent has effectuated

and enforced the aforesaid practice and policy by which it can and does fix, control, establish, manipulate and maintain the resale prices at which its products are advertised, offered for sale and sold by certain of its dealers.

PAR. 8. By means of the aforesaid acts and practices and more, respondent, in combination, agreement, understanding and conspiracy with certain of its dealers and with the acquiescence of certain other dealers, has established, maintained and pursued a planned course of action to fix and maintain certain specified uniform prices at which products will be resold.

PAR. 9. The aforesaid acts and practices of respondent have been and are now having the effect of hampering and restraining competition in the resale and distribution of respondent's products, and, thus, are to the prejudice and injury of the public, and constitute unfair methods of competition in or affecting commerce or unfair acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. The acts and practices of respondent as herein alleged, are continuing and will continue in the absence of the relief herein requested.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the San Francisco 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; and

The respondent, its attorneys, 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, 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 Clinique Laboratories, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 767 Fifth Ave., in the City of New York, State of New York.

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

For the purposes of this Order, the following definitions shall apply:

A. "Product"

"Product" is defined as any item of cosmetic, fragrance or soap, any accessory containing any item of cosmetic, fragrance or soap, or any related accessory, including but not limited to any applicator or brush, which is manufactured, offered for sale or sold by respondent.

In addition to the foregoing, "product" is defined to include any item which is manufactured, offered for sale or sold by respondent for resale to consumers together with any "product" as defined hereinabove.

B. "Dealer"

"Dealer" is defined as any person, partnership, corporation or firm which sells any product in the course of its business.

C. "Resale Price"

"Resale Price" is defined as any price, price floor, price ceiling, price range, or any mark-up, formula or margin of profit used by any dealer for pricing any product. Such term includes, but is not limited to, any suggested, established or customary resale price as well as the retail price in effect at any dealer.

It is ordered, That respondent Clinique Laboratories, Inc., a corporation, its successors and assigns, and respondent's officers, agents, representatives and employees, directly or indirectly, or through any corporation, subsidiary, division or other device, in connection with the manufacture, advertising, offering for sale, sale or distribution of any product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

I.

1. Fixing, establishing, controlling or maintaining, directly or indirectly, the resale price at which any dealer may advertise, promote, offer for sale or sell any product.

2. Requesting, requiring or coercing, directly or indirectly, any dealer to maintain, adopt or adhere to any resale price.

3. Requesting or requiring, directly or indirectly, any dealer to report the identity of any other dealer who deviates from any resale price; or acting on any reports or information so obtained by threatening, intimidating, coercing or terminating said dealer.

4. Requesting or requiring that any dealer refrain from or discontinue selling or advertising any product at any resale price.

5. Hindering or precluding the lawful use by any dealer of any brand name, trade name or trademark of respondent in connection with the sale or advertising of any product at any resale price.

6. Conducting any surveillance program to determine whether any dealer is advertising, offering for sale or selling any product at any resale price, where such surveillance program is conducted to fix, maintain, control or enforce the resale price at which any product is sold or advertised.

7. Terminating or taking any other action to restrict, prevent or limit the sale of any product by any dealer because of the resale price at which said dealer has sold or advertised, is selling or advertising, or is suspected of selling or advertising any product.

8. Threatening to withhold or withholding earned cooperative advertising credits or allowances from any dealer, or limiting or restricting the right of any dealer to participate in any cooperative advertising program for which it would otherwise qualify, because of the resale price at which said dealer advertises or sells any product, or proposes to sell or advertise any product.

9. Making any payment or granting any other consideration or benefit to any dealer because of the resale price at which any other dealer has sold or advertised any product.

II.

1. For a period of three (3) years from June 30, 1980, orally suggesting or recommending any resale price to any dealer.

2. For a period of three (3) years from June 30, 1980, communicating in writing any resale price to any dealer.

3. After said three (3) year period, respondent shall not suggest or recommend to any dealer any resale price on any list or order form, or in any catalogue or stock control book, unless it is clearly

and conspicuously stated on each page thereof where any suggested or recommended resale price appears, the following:

THE RETAIL PRICES QUOTED HEREIN ARE SUGGESTED ONLY. YOU ARE COMPLETELY FREE TO DETERMINE YOUR OWN RETAIL PRICES.

III.

1. Nothing contained in this Order shall preclude respondent from publishing or printing any resale price which is specified by any dealer for use or inclusion in any advertising, mailer or promotional material which said dealer intends to disseminate to consumers; *provided, however,* that for a period of three (3) years from June 30, 1980, in connection with each advertising, mailer or promotional material which any dealer intends to disseminate to consumers, respondent shall make a written request to said dealer to specify its resale price(s), and shall disclose therein in a clear and conspicuous manner the following:

CLINIQUE DEALERS ARE COMPLETELY FREE TO SPECIFY RETAIL PRICES OF THEIR OWN CHOOSING FOR INCLUSION IN THIS [ADVERTISING, MAILER OR PROMOTIONAL MATERIAL]. PLEASE INSERT THOSE RETAIL PRICES YOU WISH TO BE PRINTED ON THIS [ADVERTISING, MAILER OR PROMOTIONAL MATERIAL].

2. After said three (3) year period, respondent shall not suggest any resale price to any dealer for use or inclusion in any advertising, mailer or promotional material which said dealer intends to disseminate to consumers, unless respondent, in connection with each advertising, mailer or promotional material, makes a written request to said dealer to review said advertising, mailer or promotional material for its resale price(s), and discloses therein in a clear and conspicuous manner the following:

CLINIQUE DEALERS ARE COMPLETELY FREE TO SPECIFY RETAIL PRICES OF THEIR OWN CHOOSING FOR INCLUSION IN THIS [ADVERTISING, MAILER OR PROMOTIONAL MATERIAL]. YOU MAY CHANGE THE PRICES WE HAVE SUGGESTED.

IV.

It is further ordered, That respondent shall:

1. Within sixty (60) days after service of this Order, mail under separate cover a copy of the enclosure set forth in the attached Exhibit A to each of its present accounts. An affidavit shall be sworn to by an official of respondent verifying that the attached Exhibit A was so mailed.

2. Mail under separate cover a copy of the enclosure set forth in the attached Exhibit A to any person, partnership, corporation or

firm that becomes a new account within three (3) years after service of this Order.

3. For a period of three (3) years from the date of service of this Order, mail semiannually under separate cover a copy of the enclosure set forth in the attached Exhibit B to each of respondent's then present accounts.

V.

It is further ordered, That respondent shall forthwith distribute a copy of this Order to all operating divisions of said corporation; and, for a period of five years from the date of service of the Order, to all personnel, agents or representatives having sales, advertising or policy responsibilities with respect to the subject matter of this Order, and that respondent secure from each such person a signed statement acknowledging receipt of said Order.

VI.

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the 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 respective corporation which may affect compliance obligations arising out of the Order.

VII.

It is further ordered, That respondent shall within seventy-five (75) 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.

EXHIBIT A

Dear Retailer:

This letter is being sent to all Clinique accounts. On [date], Clinique Laboratories, Inc. agreed to the entry of a Consent Order with the Federal Trade Commission concerning certain distribution practices. This Consent Order was entered into for settlement purposes only and does not constitute an admission that Clinique violated the law. As part of that Consent Order, we are obligated to send you this letter.

Clinique wants its accounts to know and understand the following:

336-345 O - 81 - 5

1. You can advertise and sell Clinique products at any price you choose.

2. Clinique will not take any action against you, including termination, because of the price at which you advertise or sell Clinique products.

3. Clinique will not suggest retail prices for any product until July 1, 1983.

4. The price at which you sell or advertise Clinique products will not affect your right to lawfully use Clinique trademarks or other identification in your sale or advertising of products bearing Clinique trademarks or identification.

5. You are free to participate in any cooperative advertising program sponsored by Clinique for which you would otherwise qualify, and to receive any advertising credit or allowance allowed thereunder regardless of the price at which you advertise a Clinique product.

6. Clinique will continue to publish or print mailers, advertising and other promotional materials which you intend to disseminate to consumers containing retail prices which you specify. Until July 1, 1983, in connection with each advertising, mailer or promotional material we will publish for you to disseminate to consumers, we will be requesting in writing that you specify the retail prices you wish to be printed on these materials.

After July 1, 1983, we will send you materials for your review which may contain our suggested retail prices. You are completely free, however, to change these prices, and we will then print the materials with the retail prices which you have specified.

7. The price at which a store sells or advertises a Clinique product is its own business. Clinique does not want to be informed by an account of the price at which any other store sells or advertises any Clinique product.

If you have any questions regarding the Consent Order or this letter, please call _____.

_____

for Clinique Laboratories, Inc.

EXHIBIT B

Dear Retailer:

We wish to remind you of the following:

1. You can advertise and sell Clinique products at any price you choose.

2. Clinique will not take any action against you, including termination, because of the price at which you advertise or sell Clinique products.

3. Clinique will not suggest retail prices for any product until July 1, 1983.

4. The price at which you sell or advertise Clinique products will not affect your right to lawfully use Clinique trademarks or other identification in your sale or advertising of products bearing Clinique trademarks or identification.

5. You are free to participate in any cooperative advertising program sponsored by Clinique for which you would otherwise qualify, and to receive any advertising credit or allowance allowed thereunder regardless of the price at which you advertise a Clinique product.

6. Clinique will continue to publish or print mailers, advertising and other promotional materials which you intend to disseminate to consumers containing retail prices which you specify. Until July 1, 1983, in connection with each advertising, mailer or promotional material we will publish for you to disseminate to

consumers, we will be requesting in writing that you specify the retail prices you wish to be printed on these materials.

After July 1, 1983, we will send you materials for your review which may contain our suggested retail prices. You are completely free, however, to change these prices, and we will then print the materials with the retail prices which you have specified.

7. The price at which a store sells or advertises a Clinique product is its own business. Clinique does not want to be informed by an account of the price at which any other store sells or advertises any Clinique product.

If you have any questions, please call _____ .

_____

for Clinique Laboratories, Inc.

IN THE MATTER OF

FRED MEYER, INC.

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

Docket C-3028. Complaint, July 23, 1980—Decision, July 23, 1980

This consent order requires, among other things, a Portland, Ore. operator of a chain of retail stores to provide each charge account customer having an outstanding credit balance with a periodic statement setting forth the amount of the credit balance; and enclose with regular monthly statements, a notice advising that credit balances are refundable upon request. Refunds of credit balances must be made upon request or automatically at the end of a six-month period. The firm is further required to refund, with interest, all unpaid credit balances existing between January 1, 1974 and the effective date of the order. The order additionally requires that the firm notify layaway customers who had not completed their purchases during the fourteen (14) months prior to entry of the order that they have the option of either completing the transaction or receiving a refund of the layaway account credit balance; refund credit balances to any customer who indicates, in response to a notice, that the purchase was not completed and the customer received no reimbursement or credit on other merchandise; and maintain specified records for at least three years.

Appearances

For the Commission: *Dennis D. McFeely, Ivan L. Orton,* and *James M. Cox.*

For the respondent: *Robert Ridgley, Davies, Biggs, Strayer, Stoel & Bollie,* Portland, Oreg.

COMPLAINT

The Federal Trade Commission, having reason to believe that Fred Meyer, Inc., a corporation, has violated the provisions of the Federal Trade Commission 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 as follows:

PARAGRAPH 1. Respondent Fred Meyer, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Oregon, with its principal office and place of business located at 3800 S.E. 22nd, Portland, Oregon.

All allegations herein made in the present tense include the past tense.

PAR. 2. Respondent Fred Meyer, Inc. operates a chain of retail

stores selling food, drug, variety goods and other general merchandise in Oregon, Montana and Washington. It also operates a wholesale grocery business in Spokane, Washington. The volume of its wholesale and retail business is substantial.

PAR. 3. In the course and conduct of its business as aforesaid, respondent causes, directly and indirectly, merchandise to be shipped and distributed from manufacturing and processing plants or from other sources of supply to its warehouses and distribution centers or retail stores located in states other than the state of origination, distribution or storage of said merchandise. Purchasers of some merchandise sold by respondent reside outside the state where the merchandise is purchased and soon after such purchase, transport the merchandise across state lines to their place of residence. By these and other acts and practices, respondent maintains a substantial course of business in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the ordinary course and conduct of its business described above, respondent permits certain of its customers who qualify for credit to charge purchases to revolving credit accounts. These customers are individuals, municipalities, charities, and businesses. On occasion, customers' charge account balances consist of credits to the customers' account which represent an amount of money owed to the customer by the respondent. These credit balances are the result of, among other things, overpayments by the customer or credits for the purchase price of returned merchandise.

PAR. 5. Typical and illustrative of respondent's practices in handling the credit balances of its customers are the following:

1. Respondent regularly fails to send out any statement or notification to its customers of the existence of a credit balance in the customers' account.

2. Respondent fails to inform charge customers that they have a continuing right to request and receive a refund in the amount of their credit balances.

3. Respondent transfers credit balances out of charge customers' accounts without notice to the charge customers.

4. Except upon request, respondent does not refund credit balances to charge customers.

Through such acts and practices, respondent has retained in its possession substantial dollar amounts of credit balances belonging to its customers and has consequently deprived customers of substantial sums of money belonging to those customers. Therefore, the acts and practices described in this paragraph are unfair and deceptive.

PAR. 6. In the ordinary course and conduct of its business described above, respondent permits its customers to make purchases under a layaway plan. Under the plan a customer makes a downpayment which reserves the merchandise. The customer makes payments on the layaway account until the merchandise is paid for. The merchandise is then given to the customer. On occasion, customer's layaway account balances consist of credits to the customers' account which represent an amount of money owed to the customer by the respondent. These credit balances are the result of, among other things, cancellation of the layaway by the customer or respondent, resulting in a credit to the layaway account.

PAR. 7. Typical and illustrative of respondent's practices in handling the credit balances of its layaway customers are the following:

1. Respondent fails to inform layaway customers that they have a continuing right to request and receive a refund in the amount of their credit balances.

2. Respondent transfers credit balances out of layaway customers' accounts without notice to the customers.

3. Except upon request, respondent does not refund credit balances to layaway customers.

Through such acts and practices, respondent has retained in its possession substantial dollar amounts of layaway credit balances belonging to its customers and has consequently deprived customers of substantial sums of money belonging to those customers. Therefore, the acts and practices described in this paragraph are unfair and deceptive.

PAR. 8. The acts and practices of respondent as set forth in Paragraphs Four, Five, Six and Seven above, were and are to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in or affecting commerce in violation of Section 5(a)(1) of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Seattle 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; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the 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, 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 Fred Meyer, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Oregon, with its office and principal place of business located at 3800 S.E. 22nd, in the City of Portland, State of Oregon.

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.

Charge Account Credit Balances

It is ordered, That respondent Fred Meyer, Inc., a corporation, its successors and assigns, and its representatives, officers, agents, and employees, directly or through any corporation, subsidiary, division or other device, except for Fred Meyer Savings & Loan Association and the wholesale division of Round-Up Company, in connection with the management of credit balances arising subsequent to the service of this Order, on charge accounts created or maintained incident to the sale of merchandise or services to credit customers for use or consumption, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall:

A. Mail or deliver to each credit customer before the end of the next billing cycle, for each credit customer's billing cycle at the end

of which there is an outstanding credit balance in excess of one dollar ($1.00):

1. a periodic statement which clearly sets forth the amount of the credit balance, and

2. include the following disclosure clearly and conspicuously in twelve-point or larger type, entirely on the front side of, or enclosed with, the periodic statement reflecting a credit balance, separated from any other written matter, and accompanied by a pre-addressed return envelope:

WE OWE YOU MONEY

The enclosed statement shows a "credit balance." This is money we may owe you. If you want a refund now, please mail this statement back to us in the enclosed envelope. Write on it that you want a refund.

If you don't ask for a refund and if you don't buy anything more from us through your account, we will send you your refund automatically within 6 months if it's over $1 (and is still due you).

If your credit balance is $1 or less, we won't send it to you if you don't ask for it. But even if we don't hear from you, we will credit it against your next purchase.

B. If a purchase is made on an account in which there is a credit balance, apply the amount of that balance to such purchase.

C. Refund the full amount of each credit balance within thirty (30) days after receiving a credit customer's written request except to the extent that such amount has already been credited against further purchases on the account.

D. Refund the full amount of each credit balance in excess of one dollar ($1.00) within thirty (30) days after the end of the sixth consecutive monthly billing cycle at the end of each of which a credit balance has existed. The amount to be refunded shall be the credit balance existing at the end of the sixth month.

E. Refrain from writing off, deleting or transferring any credit balance in excess of $1.00 until a refund has been made or until the credit customer has made a fully offsetting purchase unless respondent has taken all actions required by Paragraph III of this Order with respect to that account.

F. If respondent believes a credit balance to be not owed it need not:

1. apply the amount of the credit balance to the purchase pursuant to I.B if respondent sends to the credit customer an individualized written explanation and supporting documentation in support of its belief. This documentation shall be provided in the

manner described in III.B and shall be mailed within 30 days of the purchase. Respondent may, if it otherwise complies with this paragraph, send corrected billings to credit customers which respondent subsequently believes were sent erroneous billings.

2. refund pursuant to I.C and I.D if respondent sends to the credit customer an individualized written explanation and supporting documentation. This documentation shall be provided in the manner described in III.B and within the time that Paragraphs I.C and I.D require that refunds be made.

G. Paragraph F does not permit respondent to collect or attempt to collect (including charging to a customer's account) any amounts paid to a customer which respondent subsequently believes were paid in error.

II.

Definition

"Credit customer" as used in Section II only shall exclude all firms from which respondent purchased merchandise or services since January 1, 1974.

It is further ordered, That respondent shall:

A. Refund to each credit customer the amount of each credit balance in the amount of more than one dollar ($1.00):

1. which was created or existed at any time between January 1, 1974 and the date of service of this Order,

2. and which has not been fully refunded to a credit customer prior to the date of the service of this Order,

3. unless such credit balance is not owed to the credit customer as determined by the procedures provided in Paragraph II.D, or

4. unless the credit customer makes or has made a fully offsetting purchase on the account between January 1, 1974 and the time provided in Paragraph VII.C for the filing of a compliance report.

B. Pay to each credit customer to whom a credit balance is refunded, interest on the amount of the credit balance computed at the rate of .5 percent per month from the date the credit balance was transferred out of each credit customer's account.

C. Effect complete compliance with the provisions of Paragraphs

II.A and B of this Order within one hundred eighty (180) days after the date of service of this Order.

D. For the purposes of II.A.3 of this Order, whether a credit balance is not owed to a credit customer shall be determined by a firm of Certified Public Accountants acceptable to the Regional Director of the Seattle Regional office of the Commission. Respondent shall retain such firm to examine such originals or copies of records and papers which respondent believes justify a determination that any credit balance covered by this Order is not in fact owed to a credit customer. If the CPA firm agrees with respondent, respondent is not required to refund the credit balance. As an alternative to requesting a determination from a CPA firm, the respondent may pay the credit balance.

All credit balances other than those which the CPA firm agrees are not owed shall be considered, for the purposes of this Order, to be owed to the credit customer and shall be refunded pursuant to Paragraph II.A. The CPA firm shall be directed by respondent to make a written report of each finding in agreement with respondent through use of the certifying form attached as Exhibit A. Such report shall be included as part of the compliance report required by Paragraph VII.

III.

It is further ordered, That:

A. Each refund required by this Order shall be given to the credit customer by mailing a check payable to the order of the customer.

B. Each check sent pursuant to Paragraphs I.C, I.D, II.A, II.B, IV.C, and V.B and each disclosure and letter sent pursuant to Paragraphs I.A and V.A of this Order, shall be mailed First Class in an envelope which clearly states respondent's name and address in the upper lefthand corner, to the customer's most recent address shown in respondent's records, with the notation "Address Correction Requested" on the envelope. In the event that any such check, disclosure or letter concerning a credit balance or payment in the amount of ten dollars ($10.00) or more is returned to respondent undelivered, respondent shall seek to obtain the most current address available for the customer by consulting, in the following order, (1) telephone directories and city directories, and (2) a consumer reporting agency. If a new address is obtained, respondent shall then remail such check, disclosure, or letter First Class to the customer at the most current address obtained.

C. For each credit balance unpaid despite performance of the steps set out in Paragraphs III.A and III.B, respondent:

1. shall maintain the full amount of the credit balance in the customer's account for one year from the date on which the most recent mailing was returned; and
2. need not send any additional disclosure or refund with respect to that credit balance except as provided in Paragraph III.D of this Order.

D. Respondent shall, within thirty (30) days of any credit customer's written request for a refund of a credit balance which had been reflected at any time on the customer's account, either refund the amount requested or send the customer an individualized written explanation, with supporting documentation, when available, of the reason(s) for refusing to refund the amount requested.

IV.

Layaway Account Balances

For the purpose of this Order, the term "layaway" shall mean any transaction whereby the customer agrees to purchase merchandise at the time of the transaction, by means of a downpayment and subsequent payment or payments, with the respondent retaining possession of the merchandise until the agreed payment or payments are completed.

It is ordered, That respondent Fred Meyer, Inc., a corporation, its successors and assigns, and its representatives, officers, agents, and employees, directly or through any corporation, subsidiary, division or other device, except for Fred Meyer Savings & Loan Association and the wholesale division of Round-Up Company, in connection with the management of layaway balances arising subsequent to the service of this Order, on layaway accounts created or maintained incident to the sale of merchandise to layaway customers, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall:

A. Mail to each layaway customer:

1. within twenty (20) days after the end of the period designated in the layaway agreement to make full payment for the merchandise,
2. if the payments received by respondent have not been returned to the customer, and

3. if the merchandise has not been delivered to the customer, and

4. before the merchandise is returned to stock and before making any entries in the layaway account which would close out the account,

the following disclosure clearly and conspicuously in twelve-point or larger type, entirely on one side of a single piece of paper, separated from any other written matter:

WE OWE YOU MONEY

(Date of mailing to be inserted here)

You haven't fully paid for your recent layaway purchase at our (name of store) store. You can fully pay for your purchase within 10 days from the above date. Or you can get a refund from us for the amount you have paid (less 35 cents handling charge). If you want a refund, come to the department of the store where you have the layaway not later than (insert date 10 days from notice) and ask for your money. You also have the choice of getting a credit to purchase other merchandise. Please bring this notice with you. If you don't ask for a refund or a credit, we will send you a check automatically within 45 days if the amount we owe you is more than $1.00.

Respondent may insert in the above notice a different handling charge that is reasonable in comparison with a 35 cent charge.

B. Defer returning layaway merchandise to stock until 11 days after the mailing of the notice specified in IV.A. and allow completion of the layaway purchase within 10 days after the mailing of the notice.

C. Refund the full amount paid by the layaway customer (less 35 cents or other charge that is reasonable in comparison with a 35 cent charge) if the amount is in excess of one dollar ($1.00) within 45 days of the date of the notice specified in Paragraph IV.A unless the layaway customer has completed the purchase of the layaway merchandise. Such refund shall be made by sending a check in the amount of the layaway balance to each customer owed a refund. Respondent shall thereafter follow the provisions of Paragraph III.B (pertaining otherwise to credit balances) with respect to such checks. A credit issued by respondent at its store for the purchase of other merchandise in lieu of a cash refund, solely at the option of the layaway customer, shall be considered a refund for purposes of this Section IV.

D. Refrain from writing off, deleting, or transferring any layaway account balance until a refund has been made, or until 30 days after the procedures of Paragraphs III.A and III.B are fully complied

with, or until the customer has completed the purchase of the layaway merchandise.

V.

It is further ordered, That respondent:

A. Identify all layaway account customers which are included in all the layaway account master listings printed out during the 14 months prior to the entry of this order as having layaway balances in excess of $1.00. Mail to each customer so identified a letter identical to Attachment B in form, spacing, and layout, without the inclusion of any other written material. In sending out Attachment B, respondent shall fill in at the end of question 1 the month or months and year that the layaway account first appeared on its records. Respondent shall thereafter follow the provisions of Paragraph III.B (pertaining otherwise to credit balances) with respect to each such letter.

B. Make payment in full by sending a check in the amount of the layaway balance to each customer identified by the procedure in Paragraph V.A who has responded negatively to questions 5(a) and 5(b) on Attachment B, unless question 1 is answered negatively or 4 is answered affirmatively. Respondent shall thereafter follow the provisions of Paragraph III.B (pertaining otherwise to credit balances) with respect to each such check.

VI.

It is further ordered, That respondent shall maintain complete business records relative to the manner and form of its continuing compliance with this Order, including but not limited to the name and address of each credit and layaway customer who requested a refund of a credit or layaway balance but whose request was refused, the date and amount of the request, and the date and reason(s) for the refusal. Respondent shall retain all such records and data for at least three years and shall, upon reasonable notice, make them available for examination and copying by representatives of the Federal Trade Commission. Upon the request of a representative of the Federal Trade Commission, respondent shall compile a list of the credit and layaway balances refunded, to include the account number and dollar amount of each such account.

VII.

It is further ordered, That respondent shall:

A. Forthwith distribute a copy of this Order to each of its present and future personnel having policy responsibilities with respect to the subject matter of this Order, including but not limited to the Vice-President for Finance, Controller, Accounting Operations Manager, Accounts Payable Supervisor, Accounts Receivable Supervisory Clerk, and the assistants to the above.

B. 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 corporation which may affect compliance obligations arising out of the order.

C. File with the Commission a written report, within sixty (60) days after service of this Order, setting forth in detail the manner and form in which it has complied with this Order to that time, *provided, however,* respondent shall file with the Commission within 180 days after service of this Order, a written report setting forth the following data:

1. The number of accounts and total dollar amounts of credit balances identified pursuant to Paragraph II.A of this Order and:

a. refunded by respondent;
b. determined to be not owed pursuant to the procedures of Paragraph II.D;
c. offset by further purchases made on the customer's account; or
d. retained by respondent because the customer could not be located pursuant to the procedures of Paragraph III.B.

2. The number of accounts and total dollar amounts of layaway balances identified pursuant to Paragraph V.A of this Order and

a. refunded by respondent;
b. determined to be not owed because the layaway merchandise was received;
c. determined to be not owed because a credit was issued for the purchase of other merchandise;
d. determined to be not owed because a refund had already been received.

ATTACHMENT A

This certifies that I have reviewed the following accounts and find them to be excluded from the Consent Decree pursuant to Paragraph II.D for the reason indicated:

ACCOUNT NUMBER	BALANCE	REASON

Dated this _____ day of _____, 19____.

_____

ATTACHMENT B

Dear Customer:

We may owe you some money. Our records show that you may have started making payments on a layaway numbered _____.

Please answer the questions below. Return the bottom part of this page in the enclosed envelope. We will then check our records. If we owe you money we will mail it to you. We will not try to collect any money from you.

Sincerely yours,

Fred Meyer, Inc.

.....

Your Name _____
(Print)

_____
(Address)

1. Did you start a layaway purchase during the months of _____ or _____, 197__? Yes _____ No _____

2. Name of store _____

3. Item _____

4. Did you complete the purchase and get the item?
   Yes _____ No _____

5. If not, did you:

   a. Get a refund of any payments you made?
      Yes _____ No _____

   b. Apply any payments to the purchase of some other item?
      Yes _____ No _____

   c. Other? _____

Signed _____

Date _____

IN THE MATTER OF

TERRANCE D. LESKO, M.D.

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

Docket C-3031. Complaint, July 28, 1980—Decision, July 28, 1980

This consent order requires, among other things, a medical doctor affiliated with two California firms engaged in the sale of hair replacement services, to cease soliciting, selling or performing hair implants; or misrepresenting, in advertising or otherwise, the safety or effectiveness of the hair implant process in the treatment of baldness. Should Dr. Lesko engage in any hair replacement business during period specified in the order, he must expend at least $8,000 on corrective advertising warning consumers that "Hair Implants Are Unsafe." The order also requires that the respondent notify past hair implant customers that the process is unsafe and that they should seek prompt medical attention.

Appearances

For the Commission: *George E. Schulman* and *Anne B. Roberts.*

For the respondent: *Pro se.*

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 Terrance D. Lesko, M.D., an individual, 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:

PARAGRAPH 1. Respondent Terrance D. Lesko, M.D. is an individual and a medical doctor who was affiliated with Hair Extension of Beverly Hills, Inc. and Hair Extension, Inc. His address is 1737 Clarion Loop, Cannon Air Force Base, New Mexico.

PAR. 2. Respondent is now, and for some time last past has been engaged in performing hair replacement processes, operations and surgical procedures for the treatment of baldness, thinning hair or loss of hair, or for the replacement of lost hair, including a process or operation which is known as a "hair implant" or "dermis inversion" process ("the Hair Implant Process").

For the purpose of this complaint, the Hair Implant Process is

336-345 O - 81 - 6

defined as a hair replacement product, process, operation or surgical procedure which involves the insertion or placement of (1) synthetic fibers or filaments which simulate hair or (2) non-living human hairs, into or under the scalp of the patient.

COUNT I

Alleging violation of Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One and Two are incorporated by reference herein as if fully set forth verbatim.

PAR. 3. Respondent maintains, and has maintained, a substantial course of business, including the acts and practices as hereinafter set forth, which are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of his said business, respondent is now making, and has made representations, orally and in writing, directly and indirectly, in commerce as "commerce" is defined in the Federal Trade Commission Act, for the purpose of inducing, and which are likely to induce, the purchase of the Hair Implant Process in commerce.

PAR. 5. Respondent represents, orally and in writing, directly and indirectly, that the Hair Implant Process in general is safe and effective, and that the Hair Implant Process as performed by respondent or by his agents, representatives or employees is safe and effective for providing the purchaser with a natural looking head of hair, or for treating baldness, thinning hair or loss of hair, or for replacing lost hair, and will not result in medical complications or infections.

PAR. 6. In truth and in fact, the Hair Implant Process is not generally recognized as safe and effective, and is not performed in a safe and effective manner by respondent. The Hair Implant Process, both in general and as performed by respondent, does not result in a natural looking head of hair, and is not an effective method of treatment for baldness, thinning hair or loss of hair, or for the replacement of lost hair. The Hair Implant Process, both in general and as performed by respondent, results in medical complications and infections which may endanger the health of the purchaser.

Therefore, the making of the representations set forth in Paragraph Five were and are false, misleading, deceptive and unfair.

PAR. 7. There existed, at all times relevant hereto, no reasonable basis for making the representations set forth in Paragraph Five herein.

Therefore, the making of the representations as set forth in

Paragraph Five herein, without a reasonable basis constituted and now constitutes unfair or deceptive acts or practices.

PAR. 8. Respondent fails to disclose, either orally or in writing, directly or indirectly, that the Hair Implant Process, in general and as performed by respondent, is not a safe or effective method of treatment for baldness, thinning hair or loss of hair, or for the replacement of lost hair, and presents a high risk of infection or other medical complications which may endanger the health of the purchaser.

PAR. 9. In truth and in fact, the Hair Implant Process, both in general and as performed by respondent, is not generally recognized as a safe or effective method of treatment for baldness, thinning hair or loss of hair, or for the replacement of lost hair and presents a high risk of infection or other medical complications which may endanger the health of the purchaser.

Therefore, the failure to disclose that the Hair Implant Process is not a safe or effective method of treatment for baldness, thinning hair or loss of hair, or for the replacement of lost hair, and the failure to disclose that it presents a high risk of infection or other medical complications which may endanger the health of the purchaser, constitute unfair or deceptive acts or practices.

COUNT II

Alleging violation of Section 12 of the Federal Trade Commission Act, the allegations of Paragraphs One and Two are incorporated by reference herein as if fully set forth verbatim.

PAR. 10. In the course and conduct of his said business, respondent has disseminated and caused the dissemination of certain advertisements concerning the Hair Implant Process through the United States mails and by various means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, the insertion of advertisements in magazines and newspapers with national circulations, and advertisements in the form of a brochure entitled "Hair TransCenter" which was, and is, sent through the United States mails, for the purpose of inducing, and which is likely to induce, the purchase of respondent's Hair Implant Process, and has disseminated and caused the dissemination of advertisements concerning said Hair Implant Process by various means, including but not limited to the aforesaid media, for the purpose of inducing and which are likely to induce, directly or indirectly, the purchase of said Hair Implant Process in commerce.

PAR. 11. Respondent represents directly and indirectly, in said

advertisements, disseminated as previously described, but not necessarily inclusive thereof, that the Hair Implant Process is a safe and effective method for providing the patient with a natural looking head of hair, or for treating baldness, thinning hair or loss of hair, or for replacing lost hair, and that the Hair Implant Process is approved by doctors, and will not result in medical complications or cause infections.

PAR. 12. In truth and in fact, the Hair Implant Process, both in general and as performed by respondent, is not a safe or effective method for the treatment of baldness, thinning hair or loss of hair, or for the replacement of lost hair. The Hair Implant Process presents a high risk of severe infections or other medical complications which may endanger the health of the purchaser. The Hair Implant Process is not an effective method of treatment for baldness, thinning hair or loss of hair, or for the replacement of lost hair, because the implanted hairs fall out or break off shortly after inserted. In addition, due to the Hair Implant Process, frequently a patient loses his own hair. The Hair Implant Process is not approved by doctors relying on competent and reliable scientific evidence, and in fact, generally is recognized by doctors as an unsafe and ineffective method of treatment for baldness, thinning hair or loss of hair, or for the replacement of lost hair.

Therefore, the advertisements referred to in Paragraphs Ten and Eleven, were and are misleading in material respects and constituted, and now constitute, false advertisements.

PAR. 13. In the course and conduct of his business, and at all times mentioned herein, respondent has been, and now is, in substantial competition in or affecting commerce with corporations, firms and individuals engaged in the sale of products and services of the same general kind and nature as the products and services sold by respondent.

PAR. 14. The use by respondent of the aforesaid false, misleading, and deceptive statements, representations, acts and practices, directly or by implication, has had, and now has, the capacity and tendency to mislead members of the public into the erroneous and mistaken belief that said statements and representations were, and are, true and complete, and into the purchase of substantial quantities of respondent's products and services by reason of said erroneous and mistaken belief.

PAR. 15. The acts and practices of respondent, as herein alleged, 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 and unfair or deceptive acts or practices in

or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. The acts and practices of respondents, as herein alleged, are continuing and will continue in the absence of the relief herein requested.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Los Angeles 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; 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 respondent agreed to provide to the Commission the names and addresses of his customers who underwent or paid money to undergo the Hair Implant Process and that the Commission may notify each said customer regarding the risks and problems involved in the Hair Implant Process and the fact that this order has been accepted by the Commission, such notice being substantially similar to the following letter:

Dear _____:

Hair Extension told us that you came to their office for hair implants. The FTC has reason to believe that the hair implant process is not safe or effective at the present time. There is no medically safe way to do hair implants. Many of their customers have developed scalp infections.

Hair Extension has promised the Federal Trade Commission that they will not do any more hair implants until the Food and Drug Administration approves a safe and effective procedure that protects future customers. However, we thought we should contact former customers to let them know the problems they could have with their implants.

Some people get infections right away. For others, an infection may develop months later. A few may never have a problem.

Many people report severe symptoms—pain, noticeable scarring, hairs breaking off,

scalp soreness, redness and swelling. However, others may have only a minor problem. A problem may not be too noticeable now but could develop into a more serious problem if not treated.

Therefore, for your own safety, you may want to see a doctor for an examination of your scalp and implants. If you do have any of these symptoms, you should go see a doctor immediately. The agreement which Hair Extension signed does not provide refunds or money for your doctor bills. However, you might want to contact an attorney to find out whether Hair Extension may be liable for any costs or injury you have suffered.

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, now in further comformity 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. Proposed respondent Terrance D. Lesko, M.D. is an individual and medical doctor who was affiliated with Hair Extension of Beverly Hills, Inc., 8383 Wilshire Boulevard, Beverly Hills, California and Hair Extension, Inc., 16152 Beach Boulevard, Huntington Beach, California. His address is 1737 Clarion Loop, Cannon Air Force Base, New Mexico.

Hair Extension of Beverly Hills, Inc., also trading and doing business as Hair TransCenter, is a corporation organized, existing and doing business under and by virtue of the laws of the State of California. Its principal office and place of business is at 8383 Wilshire Boulevard, Beverly Hills, California.

Hair Extension, Inc., also trading and doing business as Hair TransCenter, is a corporation organized, existing and doing business under and by virtue of the laws of the State of California. Its principal office and place of business is at 16152 Beach Boulevard, Huntington Beach, California.

Both corporations, as well as Lee Marlow and Ann Marlow, officers and directors of the corporations, previously signed an agreement containing consent order to cease and desist, which was accepted by the Commission on September 25, 1979. Dr. Lesko is Ann Marlow's brother.

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

For the purpose of this Order, the following definition shall apply:

The "Hair Implant Process" refers to any hair replacement product, process, operation or surgical procedure which involves the insertion or placement of (1) synthetic fibers or filaments which simulate hair or (2) non-living human hairs, into or under the scalp of a patient.

I

It is ordered, That Terrance D. Lesko, M.D., an individual, his agents, representatives, employees and persons under respondent's control, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale and sale of the Hair Implant Process, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

1. Disseminating, or causing or permitting the dissemination of any advertisement or other representation or claim, express or implied, that the Hair Implant Process is safe or effective in the treatment of baldness, thinning hair or loss of hair, or for the replacement of lost hair.
2. Soliciting, recommending, promoting, offering for sale, selling, arranging for or performing the Hair Implant Process.

Provided, however, that nothing shall prevent respondent from filing with the Commission a petition to modify this order, *provided* that respondent is able to demonstrate to the satisfaction of the Commission by competent and reliable scientific tests that:

1. The Hair Implant Process is safe and effective (and affirmative approval by the Food and Drug Administration that the process is safe and effective shall be deemed sufficient proof of compliance with this provision), and
2. The Hair Implant Process will be performed by respondent (or by persons recommended by or under the control of respondent) in a safe and effective manner (and affirmative approval by the Food and Drug Administration that named respondent will perform the Hair Implant Process in a safe and effective manner shall be deemed sufficient proof of compliance with this provision.)

Provided, however, that if the Commission determines, upon

proper application of respondent, that the Hair Implant Process is safe and effective and that the Hair Implant Process will be performed by respondent (or by persons recommended by or under the control of respondent) in a safe and effective manner, and such determination shall be based upon respondent's proof of compliance with the provisions set forth in the preceding paragraph, and if the Commission determines that further relief is necessary in the public interest, the Commission may require respondent to provide further relief. Said further relief may include, but is not limited to: (1) affirmative disclosures that there is a high probability of discomfort and pain and a high risk of infection, skin disease and scarring; that continuing special care is necessary to minimize the probabilities and risks referred to herein; and that such care may involve additional costs for medications and assistance; (2) a cooling-off period, following execution of contracts for services; and (3) a recommended consultation with an independent duly-licensed physician before undergoing the Hair Implant Process.

II

It is further ordered, That if Terrance D. Lesko, M.D., an individual, his agents, representatives, employees and persons under respondent's control, directly or through any corporation, subsidiary, division or other device, are engaged in or affiliated with any business which offers methods of treating baldness, loss of hair or thinning hair, or the replacement of lost hair, and if such business advertises in any media during a one year period commencing thirty (30) days after this order becomes final, then respondent shall disclose in such advertising during that one year period, clearly and conspicuously, in type no smaller than the smallest type otherwise in the advertising or 10 point type, whichever is larger, the following notice:

WARNING

Hair implants, using artificial hair or human hair, are medically unsafe. We do not use this procedure.

III

It is further ordered, That if Terrance D. Lesko, M.D., an individual, his agents, representatives, employees and persons under respondents' control, directly or through any corporation, subsidiary, division or other device, are engaged in any business which offers methods of treating baldness, loss of hair or thinning hair, or the

replacement of lost hair, during a one year period commencing thirty (30) days after this Order becomes final, respondents shall place the following advertisement in the *Los Angeles Times*, the *Santa Ana Register*, the *Los Angeles Herald Examiner* and *Los Angeles Magazine.*

HAIR IMPLANTS ARE UNSAFE

Hair implants, the inserting of synthetic hairs or human hairs into the scalp, are medically unsafe.

Many hair implant patients have developed scalp infections, noticeable scarring *and* have lost the implanted hair.

The *Federal Trade Commission* advises anyone considering a hair implant—or any other "cure" for baldness-to see a doctor. If you had a hair implant and have developed any problems, you should go see a doctor immediately.

This notice was prepared by the FTC and placed at the expense of Hair Extension, Inc., as part of a recent consent agreement between it and the FTC.

Federal Trade Commission
Los Angeles Regional Office

A. The placement of the advertisement in the newspapers shall be as follows:

1. Said advertisements shall appear at least once per month in each and every newspaper and magazine identified above, for six consecutive months commencing thirty (30) days after the date this order becomes final.
2. Said advertisement shall appear in the Sunday edition of each above-identified newspaper.
3. Respondent shall request placement of the advertisements in the Sports section of each newspaper.

B. The size of the advertisement shall be as follows:

1. The advertisement to be placed in the *Los Angeles Magazine* shall be equal to or larger than one column in width and the full length of the page.
2. The advertisement to be placed in the *Los Angeles Times, Santa Ana Register* and *Herald Examiner* shall be equal to or larger than two columns in width and four inches in length.

C. Respondent shall endeavor to obtain bulk rates for placing said advertisements at the lowest possible rates. Respondent shall spend no less than $8,000.00 for placing the advertisement required by this section.

D. The format, type size and type face of the advertisement shall

be subject to the approval by the Commission or its representative prior to its use by respondent.

IV

It is further ordered, That for a period of five (5) years from the effective date of this Order, respondent shall promptly notify the Commission of the discontinuance of his/her present business or employment and of his/her affiliation with a new business or employment which is engaged, during the time of such employment or affiliation, in methods of treating baldness, thinning hair, loss of hair or of the replacement of lost hair. Such notice shall contain respondent's current business address, a statement of the nature of the business or employment in which the respondent is newly engaged and a description of the respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this Order.

It is further ordered, That respondent shall, within sixty (60) days after service upon them of this Order, and within thirty (30) days after termination of the advertising required by Section III 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.

IN THE MATTER OF

TOWLE MANUFACTURING COMPANY

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

Docket C-3029. Complaint, July 29, 1980—Decision, July 29, 1980

This consent order requires, among other things, a Newburyport, Mass. manufacturer, importer and distributor of silver products to cease establishing, maintaining or enforcing any agreement or arrangement with its dealers that has the effect of fixing and enforcing resale prices for its products and conditioning retention of dealerships on adherence to suggested resale prices. The firm is prohibited from inducing dealers or prospective dealers to report those who fail to adhere to suggested resale prices and barred from taking adverse action against reported dealers. Materials containing resale pricing information must include a statement advising that dealers are not bound to listed prices. Respondent is further required to reinstate those dealers who were terminated for failing to comply with the firm's pricing policy and maintain a file containing specified data for a period of three years.

Appearances

For the Commission: *Harold F. Moody* and *William F. Connolly.*

For the respondent: *John R. Hally, Nutter, McClennen & Fish,* Boston, Mass.

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 Towle Manufacturing 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 thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

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

"Dealer" means any person, partnership, corporation or other business entity who purchases Towle Manufacturing Company products for resale.

PAR. 2. Respondent Towle Manufacturing Company is a corporation organized, existing and doing business under and by virtue of

the laws of the Commonwealth of Massachusetts, with its office and principal place of business located at 260 Merrimac St., Newburyport, Massachusetts.

PAR. 3. Respondent has been and is now engaged in the manufacture, importation, distribution, and sale of silverware, plated ware and stainless steel ware including, but not limited to, sterling silver flatware and hollowware, silver plated and pewter hollowware, stainless steel flatware, cutlery, sterling silver jewelry, candlesticks, hurricane lamps, napkin rings, table trays and table mats. Said products are subsequently distributed and sold to dealers throughout the United States for resale to the general public. Gross sales by respondent for fiscal year 1976 exceeded $30,000,000.

PAR. 4. Respondent distributes and sells its products to dealers located in all fifty states and the District of Columbia, through salespersons and sales representatives who act under the direction and control and carry out the policies of respondent.

PAR. 5. In the course and conduct of its business as aforesaid, respondent causes and has caused said products to be shipped from the state in which they are manufactured to purchasers in other states. Respondent maintains, and at all times mentioned herein has maintained, a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 6. Except to the extent that competition has been hampered, hindered, lessened or restrained as set forth in this complaint, respondent has been and is now in competition with other persons, firms, and corporations engaged in the manufacture, importation, sale, and distribution of sterling silver flatware and hollowware, silver plated and pewter hollowware, stainless steel flatware, cutlery, sterling silver jewelry, candlesticks, hurricane lamps, napkin rings, table trays and table mats in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 7. Respondent, in combination, agreement or understanding with certain of its dealers, or with the cooperation or acquiescence of other of its dealers, has for the last several years been engaged in a course of action to fix, establish, and maintain certain resale or retail prices at which said products are resold to the general public. In furtherance of said course of action, respondent has for the last several years been engaged in the following acts and practices, among others:

(a) Establishing agreements, understandings or arrangements

with its dealers, as a condition precedent to the granting or retention of a dealership, that such dealers will sell respondent's products only at prices dictated by respondent;

(b) Informing certain of its dealers, by direct and indirect means, that respondent expects and requires such dealers to maintain and enforce certain resale or retail prices, or such dealerships will be terminated;

(c) Obtaining from its dealers cooperation and assistance in identifying and reporting dealers who advertise, offer to sell, or sell respondent's products at prices other than those dictated by respondent;

(d) Directing or requiring salespersons, sales representatives, and other employees or agents of respondent to secure and report information identifying dealers who advertise, offer to sell or sell respondent's products at prices below the prices established or suggested by respondent;

(e) Communicating with certain dealers who fail to sell respondent's products at those prices dictated by respondent and securing, or attempting to secure, assurances from such dealers that they will adhere to and observe those prices dictated by respondent;

(f) Threatening to terminate certain dealers who fail or refuse to observe and maintain the prices dictated by respondent, or who advertise respondent's products at resale prices below the prices established or suggested by respondent;

(g) Requiring certain of its dealers to agree not to sell or otherwise supply or furnish its products to other dealers; and

(h) Regularly furnishing dealers with price lists and supplements thereto containing resale prices for respondent's products.

PAR. 8. By means of the aforesaid acts and practices, respondent, in combination, agreement, or understanding with certain of its dealers and with the acquiescence of other of its dealers, has established, maintained and pursued a course of action to fix and maintain prices at which respondent's products will be resold.

PAR. 9. The aforesaid acts and practices of respondent have had the effect of hindering, lessening, restricting, restraining and eliminating competition in the resale and distribution of said products, and, thus, are to the prejudice and injury of the public, and constitute unfair methods of competition and unfair acts and practices in or affecting commerce, in 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 the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Boston 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; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the 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 such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Towle Manufacturing Company is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its office and principal place of business located at 260 Merrimac St., in the city of Newburyport, Commonwealth of Massachusetts.

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

Definition

For purposes of this Order the following definition shall apply:

"Dealer" means any person, partnership, corporation or other business entity who purchases Towle Manufacturing Company products for resale.

I

It is ordered, That Towle Manufacturing Company, a corporation, its successors and assigns, and its officers, and respondent's agents, representatives and employees, directly or through any corporation, subsidiary, division or other device in connection with the manufacture, importation, distribution, offering for sale or sale of sterling silver flatware and hollowware, silver plated and pewter hollowware, stainless steel flatware, cutlery, sterling silver jewelry, candlesticks, hurricane lamps, napkin rings, table top trays, tabletop mats, or other products in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

1. Entering into, maintaining, or enforcing any contract, agreement, understanding, arrangement, combination, or course of conduct which fixes, maintains, establishes, sets or enforces the price at which dealers sell any of respondent's products.

2. Requiring any dealer or prospective dealer to enter into any oral or written agreement or understanding that such dealer or prospective dealer will adhere to any resale price for any of respondent's products as a condition to receiving or retaining its dealership.

3. Refusing to sell or threatening to refuse to sell, either directly or indirectly, to any dealer or prospective dealer who desires to engage in the sale of respondent's products for the reason that such dealer will not enter into an understanding or agreement with respondent to advertise or sell any of respondent's products at only those prices established or suggested by respondent.

4. Securing or attempting to secure any promises or assurances, either directly or indirectly, from any dealer or prospective dealer regarding the prices at which such dealer will advertise or sell any of respondent's products, or requesting any dealer or prospective dealer, either directly or indirectly, to obtain approval from respondent for the price offered by said dealer in any advertisement for any of respondent's products.

5. Requesting or requiring any dealer or prospective dealer, either directly or indirectly, to report any dealer who does not sell any of respondent's products at any particular price, or acting on a report so obtained by refusing or threatening to refuse sales to any dealer so reported, or otherwise to discriminate against any such dealer.

6. Directing or requiring respondent's salesmen, or any other agents, representatives, or employees, directly or indirectly, to

report dealers who do not sell any of respondent's products for any particular price, or to act on such a report by refusing or threatening to refuse sales to any dealer so reported.

7. Refusing to sell or threatening to refuse to sell any of respondent's products to any dealer for the reason that said dealer had been reported as not adhering to or observing those prices established or suggested by respondent.

8. Requiring from any dealer charged with price cutting or failure to adhere to any particular price, either directly or indirectly, promises or assurances of the observance of any particular price as a condition precedent to future sales to said dealer.

9. Terminating, threatening, intimidating, coercing, delaying shipments, or taking any other action to prevent or hinder the sale of any of respondent's products by a dealer because said dealer has advertised or sold, is advertising or selling, or is suspected of advertising or selling any of respondent's products at other than prices that respondent has dictated.

10. Requiring or inducing by any means, any dealer or prospective dealer to refrain or to agree to refrain from reselling any of respondent's products to any other dealer.

11. Requiring, directly or indirectly, any dealer to resell to respondent any unsold stock of any of respondent's products in the event that business relations between respondent and the dealer are terminated; provided that respondent shall not be prohibited from repurchasing such unsold stock with the consent of the dealer, or where respondent has a "security interest" in said products or where the dealer is unable to meet its financial obligations to the respondent.

12. Publishing, disseminating, circulating or providing by any other means, any resale price for any of respondent's products unless it is clearly and conspicuously stated on each page of any price list, book, tag, advertising or promotional material or other document that the price is "suggested" and that the dealer is free to sell respondent's products at whatever price he chooses.

II

It is further ordered, That respondent herein shall, within thirty (30) days after service upon it of this Order, mail or deliver, and obtain a signed receipt therefor, a copy of this Order to every present dealer, to every dealer terminated by respondent since January 1, 1974, unless respondent can establish that the dealer terminated did not at the time of termination have good credit or reasonably

adequate facilities for selling respondent's products, and for a period of three (3) years from the date of service of this Order, to every new dealer within ten days of receipt of the first Order from said dealer, under cover of the letter annexed hereto as Exhibit A.

III

It is further ordered, That respondent shall within sixty (60) days from the date of service of this Order, mail or deliver and obtain a signed receipt therefor, a written offer of reinstatement, upon the same terms and conditions available to respondent's other dealers, to any dealer who was terminated by respondent from January 1, 1974, to the date of service of this Order, unless respondent can establish that the applicant does not or did not at the time of termination have good credit or that the dealer does not have reasonably adequate facilities for selling respondent's products, and forthwith reinstate any such dealer who within thirty (30) days thereafter requests, in writing, reinstatement.

IV

It is further ordered, That respondent herein shall within thirty (30) days of service upon it of this Order, distribute a copy of this Order to each of its operating divisions and subsidiaries and to all officers, sales personnel, sales agents and sales representatives, and secure from each such entity or person a signed statement acknowledging receipt of said Order.

V

It is further ordered, That respondent:

1. Notify the Commission at least thirty (30) days prior to any proposed change in the respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other such change in the corporation which may affect compliance obligations arising out of the Order.

2. For a period of three (3) years from the date this Order becomes final, establish and maintain a file of all records referring or relating to respondent's refusal during such period to sell its products to any dealer, which file shall contain a record of a communication to each such dealer explaining respondent's refusal to sell, and which file will be made available for Commission inspection on reasonable notice.

336-345 O - 81 - 7

VI

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

EXHIBIT A

(Letterhead of Towle Manufacturing Company)

Dear Dealer:

Towle Manufacturing Company has entered into an agreement with the Federal Trade Commission relating to the distributional activities and pricing policy of Towle. A copy of the consent order entered into pursuant to that agreement is enclosed herewith.

Towle has entered into this agreement solely for the purpose of settling a dispute with the Commission, and the agreement and consent order is not to be construed as an admission by Towle that it has violated any of the laws administered by the Commission, or that any of the allegations in the complaint are true and correct. Instead, the order merely relates to the activities of Towle in the future.

In order that you may readily understand the terms of the consent order, we have set forth the essentials of the agreement with the Commission, although you must realize that the consent order itself is controlling rather than the following explanation of its provisions:

(1) Our dealers are free to set their own resale prices for our products.

(2) Towle will not solicit, invite or encourage dealers, or any other persons to report any dealer not following any resale price for any of said products, and, furthermore, will not act on any such reports sent to it.

(3) Towle will not require or induce its dealers to refrain from advertising said products at any price or from selling or offering said products at any prices to any person.

Sincerely yours,

Edward W. Mulligan
President

Enclosure

IN THE MATTER OF

KELLOGG COMPANY, ET AL.

Docket 8883. Interlocutory Order, July 31, 1980

DENIAL OF MOTION TO DISQUALIFY ADMINISTRATIVE LAW JUDGE BERMAN

ORDER

The Commission has before it a variety of motions and requests filed by respondents, including: (i) the motion of respondent Kellogg Company ("Kellogg"), dated July 20, 1979, for reconsideration of the Commission's Order dated December 8, 1978, in which the Commission concluded that Administrative Law Judge Harry R. Hinkes became "unavailable" within the meaning of 5 U.S.C. 554(d) (1976) upon his retirement on September 8, 1978; (ii) Kellogg's motion, dated January 31, 1980, to disqualify Administrative Law Judge Alvin L. Berman from presiding in this proceeding and for related discovery, which was certified to the Commission by Judge Berman on February 12, 1980; (iii) the request of respondent General Mills, Inc. ("General Mills"), dated April 3, 1980, for discovery and an evidentiary hearing regarding the "unavailability" of Judge Hinkes; (iv) Kellogg's request, dated April 3, 1980, that the Commission rescind its December 8, 1978, Order and direct a retrial of this proceeding or, in the alternative, that the Commission order an evidentiary hearing and allow depositions of 21 persons, and that an ALJ not currently employed by the Commission be appointed to preside over such proceedings; and (v) the motion of General Foods Corporation ("General Foods") dated April 3, 1980 for dismissal of the complaint, which allegedly is required "as a result of the Commission's actions in connection with the retirement and contractual reemployment of former Administrative Law Judge Harry R. Hinkes."[1]

After reviewing the relevant procedural history, we shall first consider Kellogg's motion to disqualify Judge Berman and shall then turn to the various issues raised by Kellogg's July 20, 1979, motion for reconsideration of the Commission's Order of December 8, 1978, and the respondents' April 3, 1980, motions and requests.

[1] In addition, on June 9, 1980, Judge Berman certified to the Commission the question of whether he had authority to establish a briefing schedule in the principal proceeding on the merits while the Commission conducted the inquiry into the circumstances of Judge Hinkes' retirement. We agree with Judge Berman that the Commission's inquiry is collateral to the merits, and we affirm his authority to adopt the briefing schedule he has decided upon. We also grant his request for an extension of the time within which the initial decision may be filed.

I.

The complaint, charging the respondents with engaging in unfair methods of competition in violation of Section 5 of the FTC Act, 15 U.S.C. 45 (1976), was issued on April 26, 1972. The proceeding was assigned to ALJ Harry R. Hinkes, who presided over all pre-trial proceedings and a substantial portion of the trial, including all of complaint counsel's case-in-chief and much of the case-in-defense of Kellogg and General Mills. In all, Judge Hinkes presided over some four years of pretrial proceedings and some 243 hearing days encompassing more than 30,000 pages of transcript.

On August 16, 1978, Chief ALJ Daniel H. Hanscom submitted to Chairman Pertschuk a memorandum stating that Judge Hinkes had advised that he intended to retire as of August 31, 1978. Judge Hanscom recommended that Judge Hinkes be retained under contract to complete the case. His recommendation and surrounding events are the subject of the pending motions, but it is undisputed that Judge Hinkes did retire on September 8, 1978, and that he continued to preside over this case until October 20, 1978, under contract.

On September 22, 1978, Kellogg filed a motion, subsequently joined in by General Mills, for discovery concerning the contract, which Judge Hinkes certified to the Commission. Thereafter, all three respondents moved for disqualification of Judge Hinkes, and on October 20, 1978, the Commission stayed further proceedings before the ALJ. Complaint counsel subsequently petitioned for Judge Hinkes' removal. On December 8, 1978, Chairman Pertschuk, after considering the objections raised by respondents, concluded that the contract was "of questionable validity" and that he would not submit the contract to the Civil Service Commission for approval. On the same date the Commission issued an Order holding that, under the circumstances, Judge Hinkes had become "unavailable" within the meaning of 5 U.S.C. 554(d) (1976) as of the date of his retirement.

The Commission remanded the case for appointment of a new ALJ, and ALJ Alvin L. Berman was appointed. The Commission also instructed the parties to brief within 45 days certain issues relating to the need for a trial *de novo* "as well as any other legal or factual matters that the submitting party may deem relevant to the issue of whether retrial is required and, if so, to what extent." In their memoranda filed in response to this direction, none of the respondents sought reconsideration of the December 8, 1978, Order or challenged the Commission's determination of Judge Hinkes' un-

availability. On May 24, 1979, Judge Berman issued his order holding that a retrial of the merits was not required.

On July 20, 1979, Kellogg moved for (i) reconsideration of the Commission's December 8 Order holding Judge Hinkes had become "unavailable," and (ii) an evidentiary hearing concerning the circumstances of Judge Hinkes' retirement.[2] By Order of November 13, 1979, the Commission reserved decision on Kellogg's request for reconsideration of the December 8, 1978, Order, and instituted a limited inquiry into the circumstances surrounding Judge Hinkes' retirement. The Commission explained that "both the resolution of Kellogg's motion for reconsideration and the public interest generally would be served by an inquiry into the facts of Judge Hinkes' retirement as they relate to Kellogg's allegations of impropriety", *i.e.,* that "the agency itself [had brought] about the unavailability of the ALJ." Specifically, the Commission directed Chief Judge Hanscom, Deputy Chief Judge Ernest Barnes, and Deputy Executive Director Barry Kefauver to file affidavits setting forth "their knowledge of the circumstances of Judge Hinkes' retirement and the negotiations leading to the execution of the contract with Judge Hinkes and, in particular, their recollections of the time, place, and substance of any conversations with Judge Hinkes regarding either his desire to retire or his desire to continue as an ALJ if he could move to Los Angeles." The Commission noted that Chairman Pertschuk's recollections concerning his role and that of his staff had been memorialized and appended to the December 8, 1978, Order. Finally, the Commission directed the Secretary to send to Judge Hinkes a letter requesting that he file an affidavit setting forth his recollection of the circumstances.

In issuing its November 13, 1979, Order, the Commission anticipated that Judge Berman would preside over the inquiry into the circumstances surrounding Judge Hinkes' retirement. However, Judge Berman recused himself from presiding over this inquiry, stating that "while I feel that I am able to comply with the Commission's directive in an impartial manner, I am aware that my impartiality may reasonably be questioned." Furthermore, Chief Judge Hanscom advised the Commission that the concerns expressed by Judge Berman applied to all of the other Commission ALJs. Accordingly, on November 30, 1979, the Commission issued an Order providing that the Commission itself would conduct the inquiry into the circumstances surrounding Judge Hinkes' retirement.

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[2] Kellogg's motion also sought interlocutory review of Judge Berman's decision respecting the need for retrial of this proceeding and a stay of the proceeding. Both requests were denied by the Commission in its Order of November 13, 1979.

On January 31, 1980, Kellogg moved to disqualify Judge Berman from presiding over the principal proceeding on the merits, arguing that (i) "because Judge Berman has conceded he was a friend of ALJ Hinkes, his continued participation in any aspect of the case would present an appearance of impropriety"; (ii) that Judge Berman could not properly "partially recuse himself from this case"; and (iii) that Judge Berman should be disqualified because he was selected to replace Judge Hinkes by Judge Hanscom, who "may have selected Judge Berman * * * on the understanding that Judge Berman not allow * * * a retrial [of the case]." Judge Berman denied the requested relief, and certified Kellogg's motion to the Commission; in the certification Judge Berman discussed in detail his relationship to Judge Hinkes, his reasons for recusing himself from the inquiry into the circumstances surrounding Judge Hinkes' retirement, and the circumstances of his assignment to this proceeding.

In the meantime, in December 1979, Judges Hanscom and Barnes and Mr. Kefauver filed their affidavits as directed by the Commission. In lieu of an affidavit, Judge Hinkes submitted a statement taken under oath before Commissioner Clanton. Subsequently, the Commission issued an Order (i) directing that the transcript of Judge Hinkes' statement be placed in the record in this proceeding, and (ii) directing the parties to file within 30 days "their views on whether additional fact-finding is needed as to the circumstances surrounding Judge Hinkes' retirement and subsequent reemployment under contract, and if so, by what procedure such fact-finding should be undertaken."

On April 3, 1980, each of the respondents filed a motion or request with the Commission. (1) General Mills argued for further discovery and an evidentiary hearing—specifically, General Mills sought the depositions of Judges Hanscom, Barnes and Hinkes and Mr. Kefauver; Charles Dullea, former Director of the Office of Administrative Law Judges of the Civil Service Commission; Chairman Pertschuk; and eight other present or former Commission employees. General Mills also requested that, after the depositions were taken, an evidentiary hearing be held before an ALJ from another agency designated by the Civil Service Commission. (2) Kellogg requested that the Commission order a complete retrial of this case. In the alternative, Kellogg requested (i) that Judges Hanscom, Barnes and Hinkes and Mr. Kefauver testify at an evidentiary hearing; (ii) that Kellogg be permitted to depose 21 people (principally present or former Commission employees, including all of the persons General Mills wishes to depose); and (iii) that an ALJ not currently employed by the Commission be appointed to preside over

such proceedings. (3) General Foods moved for dismissal of the complaint, alleging that the Commission's actions in connection with the retirement and reemployment of Judge Hinkes had deprived General Foods of due process of law in three respects: (i) by conducting *ex parte* negotiations with a sitting judge leading to an illegal contractual arrangement; (ii) by impermissibly intermingling its prosecutorial, administrative and judicial functions; and (iii) by inducing Judge Hinkes to retire through the offer of an illegal contract.

II.

In support of its motion to disqualify Judge Berman, Kellogg argues "that the facts concerning Judge Berman's admitted friendship with ALJ Hinkes which created an appearance of impropriety necessitating his withdrawal from the proceedings for the supplementation of record also compel Judge Berman's recusal from the remainder of the * * * case" (Kellogg Memorandum filed Feb. 20, 1980, at 3). Kellogg also argues "that an ALJ may not recuse himself from part of an adjudicative proceeding, so that two triers of fact must then preside concurrently over the reception of evidence in different portions of that proceeding." This argument in turn rests on three separate contentions: (a) that neither the Administrative Procedure Act nor the Commission's Rules of Practice for Adjudicative Proceedings permit two triers of fact to preside simultaneously over different portions of the same case; (b) that such a procedure also violates basic principles of due process; and (c) that analogous cases dealing with judicial disqualification prohibit a judge from recusing himself partially from an ongoing case. Finally, Kellogg argues that Judge Berman's disqualification is compelled by the fact that he was assigned to the case by then-Chief Judge Hanscom, who was himself disqualified by virtue of his role in recommending to Chairman Pertschuk that the Commission offer a contract to Judge Hinkes.

A. Kellogg contends that Judge Berman's friendship with Judge Hinkes disqualifies him from any aspect of the case. Assuming, as does Kellogg, that Judge Berman's future participation in this case is to be determined by a standard that would disqualify Judge Berman upon the existence of an "appearance of impropriety," we do not find Judge Berman disqualified from presiding over the trial of the merits of this case.

The determination of whether events have created an "appearance of impropriety" can be difficult; however, certain benchmarks have

evolved. Our role in passing on Judge Berman's participation is to ask "whether a reasonable person would have had a reasonable basis for doubting the Judge's impartiality. * * * Neither our faith nor the imaginings of one highly suspicious of others are relevant. The inquiry begins and ends with whether a reasonable person would have had a reasonable basis for doubting the Judge's impartiality." *Rice* v. *McKenzie,* 581 F.2d 1114, 1116-17 (4th Cir. 1978) (footnotes omitted); accord, *United States* v. *Cowden,* 545 F.2d 257, 265 (1st Cir.), *cert. denied,* 430 U.S. 909 (1977).

In our view, a reasonable person would conclude that Judge Berman's relationship with Judge Hinkes does not call Judge Berman's impartiality into doubt. No rule of law disqualifies a judge from reviewing or reconsidering another judge's order because the two judges are acquaintances and colleagues. With respect to the substantive case, Judge Berman has been, and no doubt will continue to be, called upon to pass upon the prior rulings of Judge Hinkes. In the proceedings concerning Judge Hinkes' retirement, on the other hand, Judge Berman was apparently concerned that he might have had to judge the personal credibility of Judges Hinkes, Hanscom and Barnes:[3]

> I had in mind the possibility of being required to determine whether or not to subpoena the various individuals involved and the necessity to rule on the scope of examination and cross-examination of such individuals, as well as rulings that might be required with regard to particular objections that might be raised as to particular questions. In addition, there was the requirement to make factual findings with respect to possibly conflicting testimony on the part of [former Chief Judge Hanscom, Chief Judge Barnes, and Judge Hinkes]. I did not believe it appropriate for me to preside at such an inquiry. This was my thinking when I recused myself and these considerations are encompassed in the more general statement of reasons for recusement in my notice of November 21, 1979. [Certification and Denial Order at 3.]

There is of course a great deal of difference—in perception as well as fact—between reviewing the work of an acquaintance in a professional capacity and judging the personal credibility of fellow judges.[4] Judge Berman has described his relationship with Judge Hinkes–apparently they were merely colleagues, not even close friends; to require disqualification under such circumstances would be unprecedented, and if applied as a general rule would make

[3] We intimate no view as to whether Judge Berman was required to withdraw from the proceedings concerning Judge Hinkes' retirement. Clearly, it was his right to do so whether or not he was disqualified. 5 U.S.C. 556 (1976). "Judges from time to time elect not to try cases, which they are sure that can try fairly and effectively, because of their concern to avoid any substantial doubt which circumstances beyond their control may create in the public mind about the impartiality of their administration of justice in the matters at hand." *Green* v. *Murphy,* 259 F.2d 591, 595 (3d Cir. 1958) (*en banc*) (Hastie, J. concurring).

[4] It is reported that "Judge Learned Hand considered it appropriate to review decisions of his cousin Judge Augustus Hand, when the former was a circuit judge and the latter a district judge." J. Frank, *Disqualification of Judges: In Support of the Bayh Bill,* 35 J. Law & Contemp. Prob. 43, 48 n.25 (1970).

administration of the federal courts and administrative agencies difficult, if not impossible. We do not believe that disqualification of Judge Berman is required and we so hold.

B. We turn now to Kellogg's contentions that the hearing procedures employed by the Commission are impermissible under the APA and the Commission's Rules, and deny due process, because of the simultaneous use of two triers of fact; and violate an alleged rule against partial recusals applicable to judicial disqualification. These contentions are addressed to the procedures employed by the Commission, rather than to the participation of Judge Berman, and they would seem to preclude the appointment of *any* ALJ in Judge Berman's stead.[5] But in any event, assuming *arguendo* that these objections are properly raised in a motion to disqualify the ALJ, we find them to be without merit.

1. Kellogg's arguments based on the APA and the Commission's Rules of Practice stem from its perception of the proceeding concerning Judge Hinkes' retirement as an "integral part" of the case on the merits. We cannot agree. In our view, the inquiry concerning the circumstances of Judge Hinkes' retirement is "distinct and separable" from the proceedings on the merits of the Commission's complaint. *Gasoline Prods. Co.* v. *Champlin Ref. Co.*, 283 U.S. 494, 500 (1930). The proceedings involve different witnesses and testimony, bearing upon different legal and factual issues. Most importantly for purposes of Kellogg's motion, Judge Berman's reasons for recusing himself from the proceedings concerning Judge Hinkes' retirement are entirely unrelated to his ability to judge the merits of the complaint.

Neither the APA, nor the Commission's Rules preclude "bifurcation" of a proceeding under the special circumstances of this case. Both the APA and the Commission's Rules contemplate that, in the ordinary case, all of the evidence bearing upon the merits of the complaint will be taken before an ALJ, who will write the initial decision. Judge Berman has not, however, excused himself from hearing any evidence going to the merits of the complaint, and his ability to write an initial decision is not compromised by his decision not to preside over the collateral inquiry concerning Judge Hinkes' retirement.[6]

[5] Kellogg argues that the Commission should request an outside ALJ to replace Judge Berman (Kellogg Memorandum dated January 31, 1980 at 23), but "bifurcation" of the proceedings would appear no less objectionable merely because an outside ALJ was presiding over the trial on the merits.

[6] This case is thus distinguishable from *Channel 16 of Rhode Island, Inc.* v. *FCC*, 229 F.2d 520 (D.C. Cir. 1956), where the FCC defined six issues to be resolved in passing on the merits of a proceeding before it. The first five were issues of fact; the sixth issue was the appropriate ultimate legal conclusion flowing from resolution of the first five issues. The FCC referred the first five issues to a hearing examiner for an initial decision, but reserved the sixth issue to itself. With little discussion or analysis, the court held that this procedure was inconsistent with the

(Continued)

Within constitutional and statutory limitations, the formulation of procedures is generally within the discretion of the agency. *Vermont Yankee Nuclear Power Corp.* v. *NRDC,* 435 U.S. 519, 524–25 (1978). The Supreme Court has recognized "the general principle that '[i]t is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it. The action of either in such a case is not reviewable except upon a showing of substantial prejudice to the complaining party.' " *American Farm Lines* v. *Black Ball Freight Serv.,* 397 U.S. 532, 539 (1970) (quoting *NLRB* v. *Monsanto Chem. Co.,* 205 F.2d 763, 764 (8th Cir. 1953)). This rule is applicable to the special circumstances of this case, as respondents have not been prejudiced by the procedures adopted by the Commission. It is clear, for example, that, under both the APA (5 U.S.C. 556(b))[7] and the Commission's Rules (16 C.F.R. 3.42(g)) the Commission itself may conduct proceedings to resolve a motion to disqualify an ALJ—thus permitting two triers of fact in what is, in form, a single proceeding. See *Attorney General's Manual on the Administrative Procedure Act* 73 (1947). In this case, the inquiry into the circumstances of Judge Hinkes' retirement was prompted, initially by respondents' objections to Judge Hinkes' further participation in the proceeding, which sought, *inter alia,* a hearing under Commission Rule 3.42(g). Since the procedures adopted by the Commission are consistent with the APA and the Commission's Rules, we believe that the Commission has not exceeded its discretion by deciding to conduct itself the inquiry into the circumstances of Judge Hinkes' retirement.[8]

2. Kellogg's constitutional claim is equally without merit. Kellogg relies upon *Gasoline Prods., Inc.* v. *Champlin Ref. Co., supra,* a

requirements of 47 U.S.C. 409(b), noting that the hearing examiner was not "unavailable" to the FCC for purposes of the sixth issue. Here, in contrast, the issues being addressed by the Commission are collateral to, and independent of, the issues pertaining to the merits of the complaint; Judge Berman was "unavailable" to preside over the proceeding to resolve those issues; and the statutory provision on which the *Channel 16* court relied is inapplicable.

[7] 5 U.S.C. 556(b) (1976) provides: "On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case."

[8] The case law supports the proposition that an inquiry such as the inquiry into the circumstances of Judge Hinkes' retirement is collateral to, and independent of, the inquiry on the merits, and may be conducted by a different decisionmaker. For example, in *United Air Lines, Inc.* v. *CAB,* 281 F.2d 53 (D.C. Cir. 1960), a claim of improper *ex parte* communications was raised on review of CAB orders. The court, after considering and rejecting all of the substantive objections to the orders raised by the petitioners, nevertheless remanded for the CAB to conduct an inquiry into the *ex parte* allegations in order "to preserve the integrity of its own administrative process * * * ." *Id.* at 58. After the remand, the court sustained the procedures adopted by the CAB, specifically noting (with apparent approval) that the inquiry had been conducted "before a new examiner" appointed by the CAB, who issued an initial decision (later affirmed by the CAB) limited to the *ex parte* issues. *United Air Lines, Inc.* v. *CAB,* 309 F.2d 238, 239 (D.C. Cir. 1962). The court's actions in resolving the substantive objections and ordering a remand on the limited question of *ex parte* communications, and its affirmance of the "bifurcated" procedures adopted by the CAB, implicitly support our view that the procedures adopted in this case are proper, and implicitly reject Kellogg's contention that bifurcation is unallowable.

Seventh Amendment case involving the right to trial by jury in civil cases. The Court held that a partial retrial, to be permissible, must be on an issue "so distinct and separable from the others that a trial of it alone may be held without injustice." 283 U.S. at 500. There is, of course, no Seventh Amendment right to a jury trial in a Commission proceeding. But in any event, as noted above, we believe that the issues in the proceeding relating to Judge Hinkes' retirement meet this test.

Kellogg hypothesizes that the Commission may have entered into the contract with Judge Hinkes to avoid a retrial at a time when economic thought allegedly has shifted away from the theory of the complaint. It argues that it is entitled to present evidence of the Commission's conduct to the trier of fact in the merits proceeding as a type of admission by conduct supporting negative inferences. There is not a scintilla of evidence in the record to support the premise of Kellogg's argument, which is contrary to the presumption of administrative regularity. We believe Kellogg's rights are fully preserved by the procedures adopted by the Commission.

3. Kellogg additionally claims that statutes and case law concerning disqualification of judges do not permit partial recusal. The statutes are not directly applicable and the case law does not support Kellogg's broad contention. Judge Berman has not partially withdrawn from the case, but rather has wholly withdrawn from presiding over a separate inquiry involving distinct factual and legal issues. Although partial recusal may be improper if it is inconsistent with the reasons offered for recusal,[9] or may be precluded by statute,[10] the cases recognize the propriety of partial recusal where the basis of recusal is inapplicable to a segregable portion of a case. See, *e.g., Warner* v. *Rossignol,* 538 F.2d 910, 913 n.6 (1st Cir. 1976); *Middletown Nat. Bank* v. *Toledo A.A. & N.M.R. Co.,* 105 F. 547 (S.D.N.Y. 1900); *Coastal Petroleum Co.* v. *Mobil Oil Corp.,* 378 So.2d 336, 337 (Fla. App. 1980); *State* v. *Wilson,* 362 So.2d 536 (La. 1978); *Flannery* v. *Flannery,* 452 P.2d 846, 849 (Kan. 1969). In this case, Judge Berman's reasons for recusal from the inquiry into Judge

[9] See *Stringer* v. *United States,* 233 F.2d 947 (9th Cir. 1956), where the court, holding that on the facts before it the district judge, having disqualified himself on his own motion, could not resume control and try the case, nevertheless recognized:

> There may be some other instances where a judge could resume direction or even decide the issues. For instance, he might be mistaken as to the identity of a party. But the reason for resuming control should be more than a second reflection on the same facts which the trial judge considered originally disqualified him. [*Id.* at 948 n.2.]

[10] Thus, although the court in *State ex rel. Stefonick* v. *District Court,* 117 Mont. 86, 157 P.2d 96, 99 (1945), suggested, *in dictum,* a broad rule against partial disqualification, it found it "unnecessary to consider [the] question, since the statute does not make it possible to disqualify judges in particular portions of a cause or proceeding * * *." 157 P.2d at 99. No such statute applies in this case.

Hinkes' retirement would not deny respondents a fair hearing on the merits of the complaint. Accordingly, we find no reason to alter our conclusions, expressed above, that the procedures adopted by the Commission do not exceed applicable constitutional or statutory limitations, and are within the Commission's discretion.

C. Kellogg further argues that Judge Berman should be disqualified because he was assigned to the case by then-Chief Judge Hanscom. Kellogg contends that Judge Hanscom was disqualified from exercising that authority by virtue of his earlier involvement in the efforts to retain the services of Judge Hinkes. Kellogg asserts that this set of circumstances creates an appearance of impropriety requiring disqualification of Judge Berman, arguing that "one who knowingly sanctions the finalization of an unlawful contract * * * i[s] also likely to have selected an ALJ to complete [the] case whom he believed to be inherently predisposed to deny the respondents' request for a hearing *de novo*" (Kellogg Memorandum of Feb. 20, 1980, at 15). We reject this contention.

There is not the slightest record suggestion of any irregularity in Judge Berman's appointment. In the absence of any record evidence to the contrary, the Commission assumes, as it must, that the appointment was regular in every respect and conformed to legal requirements. This presumption is confirmed by the limited record evidence–Judge Hanscom advised Judge Berman that "he was 'up' for the next assignment under the rotation system maintained by the Office of the Administrative Law Judges." Certification and Denial Order at 4. Accordingly, in light of the speculative and unsupported nature of Kellogg's claims, its request for discovery into the circumstances of Judge Berman's appointment is denied.

Even assuming *arguendo* that Judge Hanscom would be disqualified from presiding over the adjudicative proceedings, it is clear under judicial and Commission precedent that he could appoint a successor to Judge Hinkes. In *Stringer* v. *United States,* 233 F.2d 947, 948 (9th Cir. 1956), a trial judge recused himself from a proceeding, which he then assigned to a judge of another division. Later, the case was transferred back to the original judge who resumed control of the case with the parties' consent and decided the merits. Although the Court of Appeals held that it was improper for the original judge to resume control of the case, it concluded that it was not improper for him to perform "the mechanical duties of transferring the case to another judge or other essential ministerial duties short of adjudication." Accord, *In re Application of Scott,* 397 F. Supp. 622, 624 (S.D. Tex. 1974) (citing cases). Analogous Commission precedent holds that a non-participating adjudicative decisionmaker may engage in the

administrative decision of whether to seek to retain an ALJ as a retired annuitant. *The Hearst Corp.*, 81 F.T.C. 1028, 1029 (1972). Thus, even assuming that Judge Hanscom would have been disqualified from the adjudicative proceeding, his appointment of Judge Berman was regular and proper.

III.

We shall next consider the issues raised in respondents' April 3, 1980, submissions and in Kellogg's July 23, 1979, motion for reconsideration.[11]

A. Kellogg advances five theories under which it seeks reconsideration by the Commission of its determination of Judge Hinkes' unavailability; by way of relief, Kellogg asks for a retrial, or, alternatively, for discovery and an evidentiary hearing. General Mills asks for discovery and an evidentiary hearing under a theory that closely resembles Kellogg's third theory, discussed *infra* .

1. Kellogg's first and second theories (in the order which Kellogg advances them in its April 3 memorandum) center on the time after the Commission entered into the contract with Judge Hinkes. The first theory hypothesizes that the contract was valid, Kellogg arguing that therefore the Commission had no right *not* to proceed with it. The second theory hypothesizes that the only missing element was the approval of the Civil Service Commission, and that the Commission had a duty to present the contract to the Civil Service Commission for its approval.

In advancing these arguments, Kellogg ignores the procedural posture in which the determination not to go forward with the contract was made, and misconstrues the basic applicable legal principles. As a matter of Commission organization, determinations on whether to retain an ALJ after retirement are within the administrative authority of the Chairman. *The Hearst Corp.*, 81 F.T.C. 1028, 1029 (1972). Accordingly, it was the Chairman who decided to proceed with a contractual arrangement with Judge Hinkes. Separate Statement of Chairman Pertschuk, Dec. 8, 1978, at 1. Having been advised that the contract was legal and that it had been cleared by the Civil Service Commission, the Chairman authorized the contract to further "the potential benefit to all concerned" (*id.* at 1–2).

[11] By a supplemental motion filed July 21, 1980, Kellogg argues that Chairman Pertschuk's Memorandum dated July 18, 1980, by which he recused himself from participating in the pending motions and requests regarding the contract with Judge Hinkes and the alleged need for further factfinding, affords an additional reason for reconsideration of the Commission's order of December 8, 1978. We have reconsidered that order, but for the reasons set forth herein as well as in that order, we reaffirm the order of December 8, 1978.

Subsequently, all three respondents and complaint counsel sought Judge Hinkes' removal from the case. "After reviewing the briefs of the parties," the Chairman concluded that there existed "substantial legal questions" about the validity of the contract. *Id.* at 3. "In light of * * * the fact that none of the parties desire[d] to have Judge Hinkes continue to preside and * * * all [were] willing to forego the benefits of having him continue," the Chairman determined not to seek Civil Service Commission approval. *Id.* Kellogg argues that the Commission at that time had no option but to continue with the contract. In essence, Kellogg contends that the Commission was bound to deny the motions filed by respondents and complaint counsel and proceed with the allegedly unlawful contract. Nothing in Section 5(c) of the APA, 5 U.S.C. 554(d) (1976), its legislative history, the relevant case law, or common sense requires such a bizarre result. Section 554(d) of the APA requires that the ALJ who heard the evidence make the initial decision, unless he or she becomes "unavailable". It imposes no duty on the agency to preserve an ALJ's availability. Here, the parties attacked as unlawful the Commission's attempt to retain Judge Hinkes under contract after his retirement, and demanded his removal. The statute does not require an agency to court error by doggedly pursuing an arrangement which the parties insist is improper and unlawful.[12]

Gamble-Skogmo, Inc. v. *FTC,* 211 F.2d 106 (8th Cir. 1954), is instructive. In that case, the Commission refused to attempt to have a statutorily retired ALJ's eligibility restored, over the objections of the respondent. The Court held that the Commission had not violated Section 554(d). *A fortiori,* the Commission's action here, where all respondents argued strenuously that the Commission was under a duty *not* to proceed with the contract, cannot be said to have been improper.

Finally, such a result seems dictated by pragmatic considerations. After the contract had been negotiated, the parties raised serious questions about its validity. Docket 8883 has been a long, complicated case involving a massive record, including the testimony of scores of witnesses and many exhibits. Because the parties raised serious questions about the validity of Judge Hinkes' service under the contract, the Chairman decided not to run the risk of proceeding with the contract. Since all parties appeared to favor Judge Hinkes'

[12] The Attorney General's Committee on Administrative Procedure, whose recommendations largely formed the basis of the APA, discussed the problem of substitution of ALJ's. It is clear from the Committee's report that the Committee thought that substitution could take place on consent of the parties. See Final Report of the Attorney General's Committee on Administrative Procedure at 50. See *United States* v. *L.A. Tucker Truck Lines, Inc.,* 344 U.S. 33, 37-38 (1952).

removal, the Chairman's action in declining to submit the contract was entirely appropriate.

2. Kellogg's fourth theory also focuses on the time after negotiation of the contract with Judge Hinkes. Kellogg argues that the Commission could and should have cancelled the contract and tried to negotiate another, more acceptable arrangement with Judge Hinkes. This contention was not suggested by Kellogg when it demanded that Judge Hinkes be removed from the case, and, even if it had been, it is clear from *Gamble-Skogmo, supra,* that the Commission was under no duty to pursue such a course, particularly in light of the parties' expressed desire that Judge Hinkes be removed. Moreover, such a course might well have created additional problems of its own. Had the Commission cancelled the Hinkes contract and negotiated an alternative arrangement, it would, in effect, have placed respondents, who had protested the terms of the contract, in the position of having denied Judge Hinkes the perceived benefits of the contract.

3. Kellogg's third and fifth theories are related, and center on the events leading up to the negotiation of the contract. In its third theory, Kellogg argues that the Commission illegally entered into the contract and thus deprived it of an ALJ in circumstances where other arrangements might have been possible. This theory, as we understand it, presupposes a duty on the part of the Commission to employ any legal means to retain the services of an ALJ who threatens to resign or requests special consideration as a condition of his continued service. General Mills' request for discovery and an evidentiary hearing is premised on a similar argument.[13]

In its fifth theory, Kellogg argues that, even if no such absolute duty exists, an ALJ is not unavailable where (1) he is willing and able to be rehired; (2) the agency determines that it is in the best interests of the agency to rehire the ALJ; and (3) the agency fails to use due diligence in finding a lawful means to reemploy the ALJ, all three of which conditions Kellogg claims were present here. According to Kellogg, the "duty of due diligence would consist both of

[13] A close reading of Kellogg's memorandum of April 3, 1980, suggests that Kellogg's third theory effectively partakes of two notions. On one hand, Kellogg argues that "unavailability" under Section 554(d) "does not refer to every situation where an ALJ becomes unable to serve, *but only to those situations* where the inability occurs for reasons beyond the agency control" (Kellogg Memorandum of April 3, 1980, at 16). This theory appears also to underlie the request of General Mills for discovery and an evidentiary hearing. General Mills Request at 3. If an ALJ were "available" so long as his continued service was under the Commission's control, it would follow that the Commission would be under a duty to employ any lawful means possible to retain the ALJ. Alternatively Kellogg argues that "the concept of unavailability does not encompass situations where an ALJ's inability to continue presiding * * * is unlawfully caused by the agency which employs him." Kellogg Memorandum of April 3, 1980, at 15. This assertion seems to rely on a different theory—that the agency must refrain from engaging in unlawful conduct in removing an ALJ from a case. Again, General Mills would also appear to rely on this premise. General Mills Request at 3.

identifying and pursuing a lawful arrangement and of ensuring that the individual terms of the contract formalizing that arrangement were all proper and legal" (Kellogg Memorandum of April 3, 1980, at 43). Kellogg contends that the basis of the duty is to be inferred from a variety of sources, see *id.* at 33 n.7, but cites no specific authority that articulates the duty.

It is in connection with these third and fifth theories that analysis of the factual record is appropriate.

The Commission has carefully reviewed the affidavits of Judges Hanscom and Barnes and Mr. Kefauver, and Judge Hinkes' statement, as well as the statements of Chairman Pertschuk. While, not surprisingly, the recollections of the witnesses differ in some respects, they are in accord with respect to the material facts. According to Judge Hinkes, he approached Judge Barnes in August 1978 and advised Judge Barnes that he had decided to retire, because, for personal reasons, he wanted to move to California; he was also motivated by an upcoming cost of living increase for federal retirees. Hinkes Statement at 11, 13, 29. According to Judge Hinkes, Judge Barnes then inquired how Judge Hinkes might be persuaded to remain on the case, and proposed a contract arrangement. *Id.* at 14, 29. Judge Hinkes recalled that he would not have been willing to remain in Washington to finish the case as either a regular ALJ or a reemployed annuitant. *Id.* at 12–13, 19. Judge Hinkes also suggests that he would have been willing to complete the case without a contract if the Commission had been willing (and able) to pay his moving expenses to California. *Id.* at 23, 30–35. Judge Hinkes states that this alternative was communicated to Judge Hanscom and Mr. Kefauver, but that Mr. Kefauver told him it could not be done. *Id.* at 30, 32. This testimony is generally consistent with the affidavits of Judges Hanscom and Barnes and Mr. Kefauver, except that Judge Barnes reports that Judge Hinkes stated somewhat different personal reasons for retiring; neither Judge Hanscom nor Judge Barnes report Judge Hinkes' expression of a willingness to continue as a regular ALJ if he were moved to California.

Thus, there is no dispute that in August 1978 Judge Hinkes approached Judge Barnes and stated that he intended to retire by the end of August. Similarly, there is no dispute that Judge Hinkes would not have remained on the case unless, at a minimum, the Commission transferred him, at Commission expense, to California—special treatment not accorded other Commission ALJ's. Even if the Commission could have granted such treatment to Judge Hinkes,[14] we conclude that, as a matter of law, the Commission was

[14] Under the circumstances, we think it highly unlikely that the Commission could have paid Judge Hinkes'

(Continued)

under no obligation to do so, and that no such obligation arose by reason of the Commission's efforts to retain Judge Hinkes under contract.[15]

Kellogg and General Mills point to an appendix to a statement of the Attorney General which says that "only the officer who presided at the hearing (unless he is unavailable *for reasons beyond the agency's control)* is eligible to make the initial or recommended decision * * * ." Appendix to Attorney General's Statement of October 5, 1945, on the APA, appendix to S. Rep. No. 752, 79th Cong., 1st Sess. (1946) (emphasis added). Assuming this appendix provides the proper test, the Commission has not violated its requirements. Judge Hinkes made the initial determination that he would retire and not complete the case absent extraordinary treatment; and to that extent became unavailable for reasons beyond the Commission's control.

If, however, this brief phrase is deemed to suggest that an agency is bound to afford any lawful, extraordinary treatment demanded by an ALJ, it is inconsistent with the removal procedures under federal law, and basic public policy, and we believe it cannot be credited. See also *Gamble-Skogmo, Inc.* v. *FTC, supra.* Indeed, respondents have elsewhere argued that the Commission is under a duty *not* to afford an ALJ special treatment or to negotiate with an ALJ regarding the

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moving expenses. The pertinent statute authorizes reimbursement of expenses where an employee is "transferred in the interest of the Government from one official station to another for permanent duty." 5 U.S.C. 5724(a)(1) (1976). The statute further provides: "When a transfer is made primarily for the convenience or benefit of an employee, including an employee in the Foreign Service of the United States, or at his request, his expenses of travel and transportation and the expenses of transporting, packing, crating, temporarily storing, draying, and unpacking of household goods and personal effects may not be allowed or paid from Government funds." 5 U.S.C. 5724(h). Finally, the statute permits payment of moving expenses only upon the employee's written agreement to continue in government employment for 12 months after his transfer. 5 U.S.C. 5724(i).

[15] Kellogg has objected to Commissioner Clanton's presiding at the taking of Judge Hinkes' statement. Kellogg's first objection—that the APA and the Commission's rules do not permit "bifurcation" of the proceeding—has been adequately answered in Part II B, *supra.* Kellogg's second objection—that the entire Commission should have presided over the proceeding to take Judge Hinkes' statement—is equally without merit. There is to be no "initial decison" as to the proceeding regarding the circumstances of Judge Hinkes' retirement, and therefore 5 U.S.C. 554(d) & 557(b) and Section 3.51(c) of the Commission's Rules are inapplicable.

Moreover, Kellogg's argument misconceives the limited nature of the proceeding to obtain Judge Hinkes' statement. The proceeding was not an "evidentiary hearing," but an alternative to the affidavits submitted by Judges Hanscom and Barnes and Mr. Kefauver, and Commissioner Clanton's role was merely to preside over the reception of Judge Hinkes' statement. Commissioner Clanton's active participation was limited to a few, minor questions seeking clarification of points made by Judge Hinkes. The procedure adopted by the Commission in this case—calling for affidavits or statements from knowledgeable witnesses addressing the material circumstances before determining whether to afford discovery and an evidentiary hearing—is fully supported by the case law. See, *e.g., Grolier, Inc.* v. *FTC,* 615 F.2d 1215 (9th Cir. 1980); *Au Yi Lau* v. *INS,* 555 F.2d 1036, 1043 (D.C. Cir 1977); *Adolph Coors Co.* v. *FTC* 497 F.2d 1178, 1189 (10th Cir. 1974), *cert. denied,* 419 U.S. 1105 (1975); *R. A. Holman & Co.* v. *SEC,* 366 F.2d 446, 453-54 (2d Cir. 1966), *cert. denied,* 389 U.S. 991 (1967). Although respondents have pointed to a variety of alleged inadequacies or inconsistencies in the statements and affidavits, they point to no inconsistency with respect to what we have found to be the material facts bearing upon the unavailability issue. *Cf.* Fed. R. Civ. P. 56. Accordingly, we find it unnecessary to permit further discovery or to hold an evidentiary hearing on the question of Judge Hinkes' unavailability. And, because we have determined that further factual inquiry related to the unavailability issue is unnecessary, we find no need to consider under what circumstances appointment of an ALJ from outside the Commission to supervise discovery and an evidentiary hearing would be warranted.

336-345 O - 81 - 8

terms of his continued service. Kellogg Memorandum of October 10, 1978, at 20-21; General Mills Memorandum of November 29, 1978 at 7.

There is no present need to define the outer limits of the Commission's discretion to accommodate special requests of an ALJ—it is enough for the present that the Commission is under no *duty* to make such an accommodation.[16] In this case, had the Commission chosen to let Judge Hinkes retire, the parties would have no cause to complain. Instead, the Commission entered into the contract. Had the respondents consented to the arrangement, there can be no question that any objection would be waived. *United States* v. *L.A. Tucker Truck Lines,* 344 U.S. 33 (1952). Similarly, when the parties objected to the contractual arrangement, petitioned for Judge Hinkes' removal, and raised substantial arguments against the validity of the arrangement, Chairman Pertschuk properly decided not to proceed with the arrangement. By acting in a manner that the parties themselves perceived to be in their own best interests, the Commission left the parties in the same position that they would have been in had the Commission taken no action at all to keep Judge Hinkes in the case. Therefore, we conclude that the Chairman's attempt to retain Judge Hinkes did not impose on the Commission any obligation to retain Judge Hinkes that would not have been imposed in the absence of such an attempt.[17]

Accordingly, Kellogg's motion for reconsideration is denied, the December 8, 1978, order is reaffirmed, and General Mills' request for discovery is denied.

B. We turn now to the motion by General Foods to dismiss the complaint, in which the other respondents have joined. General

[16] Counsel for Kellogg apparently has acknowledged the absence of such a duty in another case:

MR. FURTH: Well, Your Honor, I guess whether or not [the ALJ] was or wasn't rehired is a matter totally within the discretion of the FTC anyway. I think the law is probably such that the FTC cannot [*sic*] rehire anybody they don't want to rehire in the middle of a case.

Grolier, Inc., Dkt. 8879, Tr. 8467 (Feb. 10, 1975), attached as Exhibit A to Affidavit of Michael P. Lehmann in Support of Motion of Respondent Kellogg Company to Admit Certain Documents in Evidence in the Proceedings to Supplement the Record Concerning the Hinkes Matter, filed May 20, 1980. The Commission has reviewed the materials attached to the Lehmann Affidavit, and having concluded that they are immaterial to the issues herein, denies Kellogg's request that they be admitted into evidence. For the same reason, Kellogg's request, filed July 2, 1980, to admit into evidence a copy of a statement of Marvin H. Morse, Director of the Office of Administrative Law Judges, is denied. Mr. Morse's statement has no evidentiary value for purposes of this proceeding; and although it might be cited as a secondary authority on the legality of the contract with Judge Hinkes, the Commission has found it unnecessary to resolve that question.

[17] This case is readily distinguishable on its facts from *Chicago Automobile Trade Ass'n* v. *Madden,* 219 F. Supp. 828, 831 (N.D. Ill. 1963), *rev'd,* 328 F.2d 76 (7th Cir.), *cert. denied,* 377 U.S. 979 (1964), where the district court found that the examiner, who had withdrawn from the particular proceeding for health reasons, had subsequently participated in other proceedings and therefore was still available to the Board. The court also concluded that the Board was motivated, in part, "by its fear of his unfavorable decision were he permitted to resume the case." *Id.* No similar concern motivated the Commission in this case, and none is charged.

Foods contends that the Commission has deprived it of due process of law in the following respects:

A. By circumventing the procedures established by Congress for the protection of respondents' rights and deciding instead to conduct *ex parte* negotiations with a sitting judge which led to a contract arrangement which was and should have been known to be illegal;

B. By impermissibly intermingling its prosecutorial, administrative and judicial functions to the point where the prosecution formulated the course which the Commission then followed; and

C. By inducing Judge Hinkes to retire by the offer of an illegal contract, so that through its own improper actions the Commission rendered Judge Hinkes disqualified from continuing to preside in this matter.

Except for the relief requested—dismissal—General Foods' first argument does not differ substantially from the contentions of Kellogg and General Mills discussed above. The Commission rejects General Foods' contention that the efforts to retain Judge Hinkes create an appearance of impropriety which requires dismissal. As discussed above, Chairman Pertschuk has explained that his decision to seek to retain Judge Hinkes was based upon his conclusion that retention of the judge who had heard so much of the case would benefit all parties. This administrative decision was reasonable at the time, but when respondents (and complaint counsel) raised serious objections to the plan, the Chairman properly decided not to pursue it. Under these circumstances, we perceive no appearance of impropriety which requires dismissal of the proceeding—particularly in view of the important public interest in resolving the charges set forth in the complaint.

General Foods' third objection—charging that the Commission "induced" Judge Hinkes to retire—is simply unsupported by the record evidence. Judge Hinkes' statement makes it clear that he unilaterally decided to retire for personal reasons, and that only extraordinary treatment would have persuaded him to complete the case. (See pp. 17-18, *supra*.)

However, General Foods' second objection raises an issue not heretofore presented: whether the action of Judge Hanscom, a former official of the Bureau of Competition who recommended issuance of the complaint, in recommending the contract, and the participation by officials of the Bureau of Competition in meetings with Barry Kefauver, the Contracting Officer, amounted to impermissible commingling of functions under Section 554(d) and under Commission's Rule 4.7, or were otherwise unlawful under the several

theories outlined in pages 41–46 of General Foods' supporting memorandum.

Although the decision to attempt to retain Judge Hinkes was a managerial decision outside the scope of the Commission's adjudicative rules, the Commission has determined to continue the limited inquiry described below to shed additional light on the negotiating process and the role of Bureau of Competition officials in it. Accordingly, the Commission will defer, for now, ruling on the second ground of General Foods' motion.[18] The Commission has determined that the most orderly manner of proceeding is first to obtain affidavits or their equivalents from those who, from the current record, appear best able to provide the relevant facts.[19]

CONCLUSION

With the exception of the issues raised by General Foods as to which the Commission is undertaking further inquiry, this order is intended to dispose of all matters raised by respondents in connection with the retirement of Judge Hinkes; the parties are, of course, free to raise these issues again on appeal, if any, of Judge Berman's initial decision.

It is therefore ordered, That:

A. Kellogg's motion to disqualify Judge Berman is denied;

B. (1) The Secretary shall note for the record that the Commissioners participating in the Commission decision on this order have reconsidered the Commission's order of December 8, 1978,[20]

(2) the Commission's December 8, 1978, order is reaffirmed;

(3) Kellogg's motions of July 23, 1979 (as supplemented by its memorandum of April 3, 1980), and July 21, 1980, insofar as Kellogg seeks a trial *de novo,* an evidentiary hearing, or discovery, are denied.

C. General Mills' motion for discovery or for an evidentiary hearing is denied;

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[18] The Commission intimates no view as to the legal sufficiency of the several theories in support of dismissal advanced by General Foods in this portion of its motion.

[19] Judge Hanscom has already filed an affidavit discussing his role in the events leading to the contract with Judge Hinkes. He was not present at any meeting with Bureau of Competition officials. The Commission therefore believes that there is no present need for additional inquiry of him. General Foods' contentions concerning his role will be addressed upon the Commission's disposition of the reserved portion of its motion after the record is augmented in the manner specified.

[20] Complaint counsel's request for an extension of time, filed July 24, 1980, is denied insofar as it seeks an extension of time to address Kellogg's July 21, 1980, motion to have the Commission reconsider its order of December 8, 1978; and is granted insofar as it seeks an extension to address Kellogg's motion to disqualify Chairman Pertschuk.

D. General Foods motion to dismiss the complaint is denied except as outlined in paragraph E, *infra;*

E. (1) Barry R. Rubin and John F. Dugan shall file with the Commission, within 20 days, affidavits which set forth in detail their recollection as to the matters specified in paragraph F, *infra;* (2) Barry Kefauver shall file with the Commission, within 20 days, an affidavit which sets forth in detail his recollection as to the matters specified in paragraph F, to the extent that he has not addressed these matters in his affidavit of December 13, 1979; (3) the Secretary shall send to Daniel C. Schwartz and Peter Brickfield the attached letters, requesting them to file with the Commission, within 20 days, affidavits which set forth in detail their recollection as to the matters specified in paragraph F; and (4) the Secretary shall simultaneously place on the docket of this proceeding, and serve upon the parties, these affidavits at such time as all of them have been received. The Commission shall, upon review of the affidavits, determine what further inquiry, if any, is necessary; and

F. The affidavits required by paragraph E shall address the following:

(1) the circumstances under which each affiant first learned that Judge Hinkes was contemplating retirement;

(2) the time, place, and substance of any conversation prior to September 8, 1978, with persons outside the Bureau or office in which the affiant was employed concerning Judge Hinkes' retirement, retention under contract, or other status;

(3) the identity of all persons with whom such conversations took place;

(4) the time, place, and substance of any conversation concerning arrangements for a meeting held on August 14, 1978 at which Messrs. Schwartz, Dugan, Kefauver, Brickfield and Rubin attended, according to the Kefauver affidavit of December 13, 1979;

(5) the substance of discussion at that meeting, and in particular, whether any participant at the meeting discussed rulings that Judge Hinkes had made or might make in Docket No. 8883;

(6) the time, place, and substance of any conversation concerning arrangements for a meeting held on August 16, 1978, at which Messrs. Schwartz, Dugan, and Kefauver attended, according to the Kefauver affidavit of December 13, 1979; and

(7) the substance of discussion at that meeting, and in particular, whether any participant at the meeting discussed rulings that Judge Hinkes had made or might make in Dkt. 8883.

G. The authority of the ALJ to issue his order of May 14, 1980, is

affirmed, and the ALJ's request for an extension of time for filing the initial decision is granted.

H. Kellogg's requests to admit certain documents in evidence, filed May 20, 1980, and July 2, 1980, are denied.

I. Kellogg's objections to having Commissioner Clanton preside at the taking of Judge Hinkes' statement are overruled.

Chairman Pertschuk and Commissioner Pitofsky did not participate.