

Complaint

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IN THE MATTER OF

LIGGETT & MYERS INCORPORATED

DIVESTITURE ORDER, OPINION, ETC., IN REGARD TO ALLEGED
VIOLATION OF SEC. 7 OF THE CLAYTON ACT*Docket 8938. Complaint, Aug. 14, 1973—Final Order, April 29, 1976*

Order requiring among other things, one of the largest manufacturers of dog food, located in Durham, N.C., to divest itself completely of a competitive company within one year, subject to F.T.C. approval. Additionally, the order prohibits the company from acquiring corporations engaged in selling or producing dog foods for a period of ten years.

Appearances

For the Commission: *Steven A. Rothman, Martin A. Rosen and Robert J. Joseph.*

For the respondent: *Harvey D. Myerson, C. Kenneth Shank, Jr., Kurt V. Blankmeyer and James S. Sligar, Webster, Sheffield, Fleischmann, Hitchcock & Broodfield, New York City, Frederick P. Haas, New York City and James Scott Hill, Senior Counsel of Liggett & Myers, Inc., Durham, N.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that respondent, Liggett & Myers Incorporated, a corporation, has violated the provisions of Section 7 of the Clayton Act, as amended (15 U.S.C. § 18), by reason of an acquisition more particularly described herein, and it appearing to the Commission that a proceeding by it with reference thereto would be in the public interest, hereby issues its complaint, stating its charges as follows:

THE ACQUIRING CORPORATION

Liggett & Myers Incorporated

1. Respondent, Liggett & Myers Incorporated [hereafter L&M], is a corporation organized, existing and doing business under the laws of the State of Delaware, with its principal office and place of business located at 630 Fifth Ave., New York, New York.

2. L&M is a leading producer of tobacco products in the United States. In recent years, L&M has diversified through acquisitions of companies engaged in manufacturing or distributing nontobacco products, including alcoholic beverages, animal and poultry feeds, dog foods and other consumer products.

3. In 1964, L&M commenced manufacturing and distributing dog food by acquiring Allen Products Company, Inc. Since 1964, L&M has become one of the nation's leading dog food manufacturers.

4. In fiscal 1968 and 1969, L&M was ranked by *Fortune* 219th among the Nation's largest corporations with estimated sales of \$617 million and \$658 million, respectively. L&M's nontobacco business accounted for approximately 35 percent of the company's net sales in 1968 and 42 percent of said sales in 1969. Dog food sales represented approximately 30.0 percent of L&M's nontobacco business in 1968 and 39 percent in 1969.

5. L&M, in the sale of its products, relies heavily on advertising. In 1969, L&M's total advertising expenditures were \$41.0 million of which \$5.2 million was expended for dog food advertising through its wholly-owned subsidiary, Allen Products Company, Inc. Respondent has continued to expand its advertising expenditures.

6. At all times relevant herein, L&M has been and is engaged in "commerce," as "commerce" is defined in the Clayton Act, as amended, through the sale and shipment of products to purchasers located in various States of the United States and has caused and does cause such products to be transported from its facilities to such purchasers.

Allen Products Company, Inc.

7. Allen Products Company, Inc. [hereinafter Allen], a wholly-owned subsidiary of L&M, is engaged directly or through its subsidiaries in the manufacture, sale and distribution of dog food. Its primary brand is ALPO. Allen owns and operates dog food manufacturing facilities in Pennsylvania, Delaware, Nebraska and Ohio.

8. By virtue of an extensive advertising campaign ALPO has become one of the largest selling brands of dog food in the country.

9. Allen's total sales of dog food were approximately \$13.2 million in 1964, \$48.4 million in 1967, \$66.1 million in 1968 and \$81.2 million in 1969.

10. At all times relevant herein, Allen has been and is engaged in "commerce," as "commerce" is defined in the Clayton Act, as amended, through the sale and shipment of products to purchasers located in various States of the United States and has caused and does cause such products to be transported from its facilities to such purchasers.

THE ACQUISITION

11. On January 29, 1969, L&M acquired all capital stock of Ready Foods Corporation for consideration of approximately \$29.5 million.

THE ACQUIRED CORPORATION

12. Perk Foods Co., Inc., [hereinafter Perk] the successor of Ready Foods, is a corporation organized, existing and doing business under the laws of the State of Delaware with its principal office and place of business located at 500 No. Dearborn St., Chicago, Illinois.

13. At the time of the aforesaid acquisition, Perk was engaged principally in the manufacture, sale and distribution of pet foods, including VETS and PERK dog foods. It operated plants in Pennsylvania, Illinois, Kansas and California. Perk's total sales of pet foods were approximately \$35 million in 1968 and \$41 million in 1969. Perk's total sales of dog food were approximately \$24.9 million in 1967, \$26.5 million in 1968 and \$27.7 million in 1969.

14. Prior to the aforesaid acquisition Perk did not rely heavily upon media advertising. One year prior thereto, Perk planned to engage in an extensive media advertising program. In 1969 Perk's total budgeted advertising was \$830,000 of which \$703,000 was for television advertising.

15. At all times relevant herein, Perk has been and is now engaged in "commerce," as "commerce" is defined in the Clayton Act, as amended, through the sale and shipment of products to purchasers located in various States of the United States and has caused and does cause such products to be transported from its facilities to such purchasers.

TRADE AND COMMERCE

16. For purposes of this complaint, the relevant product market is dog food, and the relevant geographic market is the United States.

17. Dog food is comprised of all wet, dry, and semimoist commercially prepared foods for dogs, exclusive of treats.

18. The manufacture of dog food is a significant industry in the United States. The dog food market has been growing rapidly in recent years. Total sales of dog food were approximately \$506 million in 1967 and \$682.5 million in 1969.

19. There has been a trend toward concentration in the dog food industry. Concentration has remained high notwithstanding a growing market and the existence of small companies. Between the years 1964 and 1970, there were at least nineteen mergers in this industry. L&M has been a leading participant in the dog food merger movement, with two acquisitions of companies manufacturing dog foods, Allen and Ready Foods. L&M also acquired a manufacturer of dog treats, Liv-A-Snaps, Inc.

20. The dog food market is concentrated. In 1967, the four largest

dog food manufacturers accounted for approximately 57.3 percent of total sales, and the eight largest for 76.2 percent. By 1969 the four largest producers accounted for approximately 61.4 percent of total sales, and the eight largest for 80.4 percent.

21. Since 1962 there has been a significant increase in the amount of advertising and promotional expenditures in connection with the distribution and sale of dog food. Consumer appeal created by advertising is an important element in the marketing of dog food products.

22. At the time of the aforesaid acquisition L&M and Perk ranked approximately fourth and seventh respectively in total sales of all dog food manufacturers. Of total sales in the dog food industry at the time of the acquisition in 1969, L&M accounted for approximately 12 percent and Perk for approximately 4 percent. As a result of the acquisition, L&M became the second ranked manufacturer of dog food with approximately 16 percent of total dog food sales in 1969.

23. Prior to the aforesaid acquisition, L&M and Perk were substantial and actual competitors in the manufacture, distribution, and sale of dog food.

EFFECTS OF ACQUISITION

24. The effect of the acquisition of Perk by L&M may be substantially to lessen competition or to tend to create a monopoly in the production, distribution and sale of dog food in the United States in violation of Section 7 of the Clayton Act, as amended, in the following ways, among others:

a. Actual and potential competition between L&M and Perk in the production, distribution and sale of dog food has been or may be eliminated;

b. Perk has been eliminated as an independent competitive factor in the manufacture, distribution and sale of dog food;

c. The combination of L&M and Perk may so increase respondent's manufacturing and distribution facilities and technology as to provide L&M with a decisive competitive advantage in the dog food industry to the detriment of actual and potential competition;

d. Concentration in the manufacture and sale of dog food will be maintained or increased, and the possibility of deconcentration may be diminished;

e. Existing barriers to new entry may be increased substantially;

f. Additional acquisitions and mergers in the industry may be encouraged;

g. Independent manufacturers, distributors and sellers of dog food

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may be deprived of a fair opportunity to compete with the combined resources and market position of L&M and Perk;

h. Members of the consuming public may be deprived of the benefits of free and unrestricted competition in the manufacture, sale and distribution of dog food.

VIOLATION

25. The acquisition of Perk by L&M constitutes a violation of Section 7 of the Clayton Act, as amended (15 U.S.C. §18).

INITIAL DECISION BY MORTON NEEDELMAN, ADMINISTRATIVE LAW
JUDGE

JUNE 25, 1975

I

STATEMENT OF THE CASE

[1] The Commission's complaint, issued on August 14, 1973, charges that Liggett & Myers' acquisition on January 29, 1969, of Ready Foods Corporation (after the acquisition the name of the firm was changed to Perk Foods, Inc.) violates Section 7 of the Clayton Act, as amended (15 U.S.C. § 18). The complaint alleges that the effect of the acquisition may be "to substantially lessen competition or to tend to create a monopoly in the production, distribution and sale of dog food in the United States." Dog food is defined in the complaint as "all wet, dry, and semimoist commercially prepared food for dogs exclusive of treats."

Respondent filed its answer on September 21, 1973, in which it admitted making the challenged acquisition. It also admitted certain corporate and jurisdictional facts. Respondent denied all other substantive allegations in the complaint, particularly those relating to the existence of an "all" dog food relevant product market, and the charges respecting the alleged anticompetitive effects of the acquisition.

At the prehearing stage some additional discovery was granted to both parties, stipulations were entered into, and the issues were further refined.¹ Specifically, respondent again argued, as it had in its answer, that from an economic standpoint there is no "all" dog food market, and that the acquisition could properly be evaluated only in terms of its impact on certain economically significant markets,

¹ The undersigned replaced Administrative Law Judge Andrew C. Goodhope who was relieved of the assignment on June 3, 1974. I presided at the Prehearing Conferences of July 29, 1974 and October 18, 1974, and all evidentiary hearings.

namely, five separate markets including a premium-priced canned dog food market where L&M did business before the acquisition, an inexpensive canned dog food market where most of Perk's sales were concentrated, medium-priced canned dog food, dry dog food, and semimoist dog food.

[2] Hearings were held between January 10, 1975, and January 30, 1975. All counsel were afforded full opportunity to be heard, and to examine and cross-examine witnesses.

The record was left open until February 5, 1975, for the receipt of additional stipulations. Proposed findings of fact and conclusions of law, together with supporting briefs were filed by the parties on March 7, 1975, and replies were filed on March 24, 1975.²

After reviewing the evidence, the proposed findings, and conclusions submitted by the parties³ and based on the entire record, including my observation of the witnesses, I make the following findings of fact:⁴

II

FINDINGS OF FACT

L&M, Allen, and Perk

1. Respondent, Liggett & Myers Incorporated (hereinafter L&M), is a Delaware corporation with its principal offices located at 4100 Roxboro Rd., Durham, North Carolina. (Answer ¶ 1; Stip. of 2/14/75; Tr. 1751)

2. Prior to 1964, L&M was exclusively engaged in the manufacture, distribution, and sale of cigarettes and other tobacco products. (CX's 334a, 335c)

[3] 3. On November 19, 1964, L&M began a long-term program of diversification by acquiring (for approximately \$12,000,000) Allen Products Company, Inc. (hereinafter Allen), a manufacturer of a line of premium-priced canned dog food sold under the Alpo label. (CX's 2e, 2h, 29a-c, 334a; Tr. 1753)⁵

4. Continuing with its acquisition program, on January 29, 1969, L&M acquired (for approximately \$29,500,000) all the stock and assets

² By leave of the Commission and because of prior trial commitments of the administrative law judge, the time for filing an initial decision was extended from May 6, 1975, to June 30, 1975.

³ Proposed findings not adopted, either in the form proposed or in substance, are rejected as not supported by the evidence, or as involving immaterial matters.

⁴ The following abbreviations are used in citing to the record: "Tr." (transcript of testimony); "CX" (complaint counsel's exhibits); "RX" (respondent's exhibits).

⁵ The Alpo line currently consists of 13 items — Beef Chunks, Chopped Beef, Chopped Horsemeat, Chicken & Chicken Parts, Trio (Beef-Chicken-Liver), Horsemeat Chunks, Liver Chunks, Lamb Chunks, Rib of Veal, Savory Stew, Beef Stew, Meat Balls with Gravy, and Egg'n Beef. (CX 269d) The leading item is Alpo Beef Chunks Dinner. (Tr. 1770)

Until 1974, Alpo was manufactured in plants located in Allentown, Pennsylvania, Crete, Nebraska, and Cleveland, Ohio. Operations in the Cleveland plant were discontinued in 1974 because of environmental and labor problems. (Tr. 1889-41)

of Ready Food Corp., another manufacturer of dog food. (CX 6j; Ans. ¶ 11; Tr. 1989-90) Following the acquisition, the name of the acquired firm was changed to Perk Foods Company, Inc. (hereinafter Perk). (Ans. ¶ 12) Perk is a Delaware corporation with its main offices located at 500 No. Dearborn St., Chicago, Illinois. (Ans. ¶ 12) The acquisition of Perk by L&M is the subject of this proceeding.

5. At the time of the acquisition, Perk manufactured and marketed a line of economy-priced canned dog foods which were sold under the firm's proprietary labels, Vets and Perk.⁶ The company also made a dry dog food (Vets Nuggets) and sold a small amount of semimoist dog food under the Vets Burger label. (CX 25k)

[4] 6. In addition to its proprietary sales of Vets and Perk brand products, since 1949 Perk has manufactured private label⁷ dog food products for the Safeway chain. (Tr. 2093-96) Since 1966 Perk has also engaged in custom-packing⁸ for various companies including Allen, and several companies, besides Perk, have custom-packed for Allen during the same period. (Tr. 1829-30, 2001, 2023, 2101) In 1968, the year prior to the acquisition, Perk custom-packed about \$2,400,000 worth of dog food for Allen. (CX 307b) The value of Perk's custom-packing for Allen increased in 1969 to approximately \$5,100,000 and in 1970 to approximately \$9,000,000. (CX 306a; RX 63a)⁹

7. In 1969, the acquiring company, L&M, ranked among the Nation's largest industrial corporations with sales of \$658,000,000. L&M's non-tobacco business, including its pet food business, accounted for approximately 42 percent of its total sales in 1969. (CX 334d; Ans. ¶ 4)

8. At all times relevant to this case, L&M, Allen, and Perk were engaged in commerce, as "commerce" is defined in the Clayton Act, as amended. (Ans. ¶¶ 6, 10, 15)

The Product Market

9. The Perk acquisition took place in a dog food industry which in 1969 accounted for approximately \$810,000,000 in retail sales. (CX 41e)

⁶ Prior to the acquisition, the canned products made by Perk were Vets Regular, Vets Chicken Flavor, Vets Liver Flavor and Perk Regular. (CX 25k) After the acquisition, additions were made to the canned line and it now includes Vets Beef Flavor, Lamb Flavor, Horsemeat Flavor and Variety. (CX 269b) Both before and after the acquisition, Perk products were manufactured in plants located in Chicago, Illinois (2 plants), Kansas City, Kansas, Harrisburg, Pennsylvania, and Los Angeles, California. (CX 25p, q; Tr. 2105-06) At the time of the acquisition, Perk also operated a plant in Hillsboro, Oregon, on a cooperative basis. (CX 25p, q)

⁷ Private labeling is an operation in which a manufacturer usually, although not always, makes dog food products according to its own formulation and sells the products to a supermarket chain for marketing under labels owned by the supermarket chain. (Tr. 1483, 1767-68, 2000)

⁸ Custom-packing (sometimes referred to as co-packing) is an operation by which one company manufactures a product for a client company, usually under a cost-plus arrangement and using the brands, labels, and recipes of the client company. (Tr. 1346, 1829, 1832, 2000-01; RX 58)

⁹ Despite a sharp increase in custom-packing production for Alpo since the acquisition, Perk still has excess capacity. (Tr. 1968)

This dog food industry is part of a larger pet food industry which has been growing at an average rate of 11 percent per year in recent years, and had increased its retail [5] sales from \$700,000,000 in 1965 to an estimated \$1.4 billion in 1971. (CX 95b) Retail sales of dog food alone reached a level of \$1.5 billion in 1974. (Tr. 363) American consumers spend considerably more for dog food than they do for baby food. (CX's 93b, 97L)

10. As for the putative object of all this spending — the dog¹⁰ — the authoritative National Research Council (NRC)¹¹ of the National Academy of Sciences has stated that its nutritional needs are as follows:

Dogs can meet their nutritional requirements from protein, carbohydrates, fats, minerals and vitamins combined in a purified ration form or from one of many combinations of natural foodstuffs. They can meet their energy requirements from plant materials if they have an adequate supply of essential amino acids. They can meet their protein requirements from many sources of proteins that supply the essential amino acids. (CX 206, p.1)

11. With respect to these nutritional needs of a dog, the NRC has concluded that “A dry, semi-moist or canned diet can provide all the nutrients required by dogs if the diet is properly formulated and processed.” (CX 206, p. 24)

12. The three categories of dog food cited by NRC — dry, semimoist, and canned — are generally understood in the industry to consist of the following:

[6] “Dry” dog food is primarily grain-based meal, pellets, or “kibbles” with a relatively low moisture level (approximately 10 percent). It is customarily packaged either in boxes or bags. (Tr. 450, 953, 2016-17, 2210, 2308-10)

“Semimoist” (sometimes called softmoist) looks like hamburger but contains both meat (35 percent) and cereal ingredients as well as between 20 to 25 percent sugar as a preservative. It has a moisture content of about 20 to 30 percent. The product is formed by an extrusion process into pattie-like “hamburgers” and it is packaged in a cellophane wrapper. (Tr. 447, 952, 1870, 2013-14)

Canned dog food, sometimes called “wet” dog food, has a high moisture content (68-78 percent) and it can be made of various proportions of meat or meat by-products, egg, fish, cereals, textured vegetable protein, flavorings, vitamins and minerals. (CX's 94a, 190, 192, 194; Tr. 448, 951, 1533, 1573-74, 2201)

¹⁰ In 1969 the canine population of the United States was about 25 million dogs in some 19 million homes. (CX 6j)

¹¹ The NRC nutritional standards are the “standards of the industry.” (CX 75a; see also RX 72, p. 8) The NRC standards are the bases of nutritional claims made by many dog food companies. (CX's 178b, 179b; Tr. 1118-19)

13. At the time of the acquisition (1969) retail sales of the three kinds of dog food were divided as follows:

TABLE 1:	Percentage of Retail Dollar Sales of Dog Food (Based Upon Estimated Total Retail Sales of \$810 million)
Canned	49%
Dry	37%
Semimoist	14%
(Source: CX 41e) ¹²	

14. To assure that all dog foods are properly formulated, the NRC has published standards for a well-balanced canned, dry, or semimoist main meal. These standards are accepted industrywide and most dog food manufacturers, including Allen (after 1970) and Vets [7] (before and after the acquisition), produce products which meet or exceed the minimum standards of the NRC for a complete and balanced dog food diet. (CX's 75a, 178a-b, 179, 190, 192, 194, 201; Tr. 1342, 1688-89, 1771-72, 1807, 2181-83)

15. All main meal dog food products, in all price ranges, which meet or exceed the NRC minimum standards, adequately fulfill the entire nutritional needs of a dog, and all of these products are intended to serve this purpose. (Tr. 211, 451, 725, 729-30, 952-54, 1125-26, 1533-35, 1686-87, 1813, 1818, 2181-83, 2234, 2320)

16. In addition to the three basic categories, it is well accepted in the dog food industry that the canned category is subdivided into at least two sub-categories — economy, and premium. Economy is also referred to, from time to time, as "inexpensive," "ration" or "maintenance." (CX's 25k, 151n, *in camera*) It has a loaf or pudding appearance and (in the case of Vets) is made of meat or meat by-products (20 percent to 7 percent), substantial quantities of cereal (20 percent), soy bean meal (16 percent) and water for processing. (Tr. 1575, 2026-27, 2201) The acquired company in this proceeding, Perk, essentially was in the business of selling a canned dog food which falls into this economy or maintenance subcategory.

Allen, on the other hand, with its all-meat Alpo, was the pioneer and to this day dominates the premium subcategory of the canned part of the industry. Premium (brands such as Alpo and Kal Kan) sells for a

¹² The picture has changed in recent years, and dry dog food now leads the market. (Tr. 1062) Thus, the record shows that Ralston Purina, the dominant dry company, has increased its own market share from 14.19 percent of all dog food sales in 1969 (Finding 94) to over 20 percent in 1975. (Tr. 310)

higher price than economy and at least until 1970 was, in fact, (in the case of Alpo) all-meat and meat by-products.¹³ The premium-priced product is usually manufactured in a chunky form (although other forms are used, too), and it has been variously referred to in the industry as "all meat," "specialty," "supplement" or "gourmet." (CX's 41d, 151p, *in camera*; Tr. 230, 1571-73, 1745)

[8] 17. The differences between the prices of the Alpo and Vets canned¹⁴ lines are shown in Table 2:¹⁵

Year	Vets	Alpo
1968	9.70c	23.35c
1969	10.06	23.92
1970	10.33	29.26
1971	10.87	29.78
1972	11.24	29.37
1973	12.53	31.92

(Source: RX 175)¹⁷

[9] 18. In 1975, following "good price increases," Vets canned dog food was selling at retail between 15 cents and 18 cents a can. (Tr. 1981, 2039)¹⁸ The price of products like Vets has gone up because of inflationary pressures. (Tr. 1656, 2039) Allen's own experience, however, with premium-priced Alpo indicated a consumer willingness to pay higher prices for dog food. This experience was confirmed by a 1972 report to L&M (*i.e.*, its Perk Division) about "preference for economical brands:"

The low average ratings of a factor describing preference for low-priced brands and purchase of brands on sale tend to corroborate other data and conclusions: the emotional attachment to dogs, interest in product quality, the nutritional balance, which imply a willingness to pay premium prices.

Historically, perhaps, the dog food industry has operated under some price constraints, actual and even self-imposed. Today's intense consumer demand for convenience, for the social reinforcement of personal judgment and choice that highly

¹³ In 1970, vitamins and minerals were added to Alpo to enable it to meet NRC minimum requirements for a complete and balanced diet. Since mid-1973, due to shortages of meat and high meat costs, textured vegetable protein (TVP) has been added to Alpo. Alpo's current composition is: Meat and meat by-products 92 percent; TVP 6 percent; vitamins and minerals 2 percent. (Tr. 2026-27)

¹⁴ The record does not contain comparable data for semimoist or dry. The record shows, however, that on a cost per feeding basis, dry costs about 11 or 12 cents per average feeding, as compared to 25 cents for canned inexpensive dog food (*i.e.*, more than one can is used in an average feeding) and semimoist, and about 60 cents per premium canned dog food — again, more than one can is used in average feeding. The cost per feeding of the super premium product, Mighty Dog, would be twice as much as premium canned. (Tr. 1095)

¹⁵ The price differences between Vets and Alpo cannot be translated into any generalized difference between *all* premium and *all* economy because, for example, there are so-called premium brands which have sold for substantially less than Alpo (Tr. 806), and economy products come in several price ranges. See Note 50, *infra*.

¹⁶ The standard size can for packing dog food is the 300 by 407 (3" x 4.7/16") can which holds between 14 and 16 ounces. (Tr. 2201-02) The super-premium product, Mighty Dog, is sold in a 6-1/2 ounce can. (Tr. 1447)

¹⁷ The average wholesale price of Alpo beef chunks was 24 cents in 1969 and 25 cents in 1970; the average wholesale price of Vets Regular was 7 cents in 1969 and 9 cents in 1970. (CX 306a; RX 63a)

¹⁸ In 1975, Alpo was selling between 36 cents and 39 cents a can. (Tr. 1775)

advertised brands convey, and for vicarious indulgence on behalf of a dog, indicate that dog-food manufacturers may have more flexibility in pricing structure. (RX 13, p. 113)

19. The most serious reservation expressed by the NRC with respect to the proper feeding of dogs related to the all-meat (*i.e.*, premium-priced) diet. According to NRC:

[10] Difficulties associated with high protein diets have become more commonplace since the introduction of dog foods composed almost entirely of meat and meat by-products. (Goddard *et al.*, 1970)

Optimal levels of dietary protein for some physiological states of the dogs are not completely defined, but it is clear that diets containing as much as twice the minimum required amount of protein can have serious consequences, irrespective of vitamin and mineral supplementation, if fed over long periods (Krook, 1971; Newberne and Wilson, 1971). Digestive upsets and bone changes occurred in puppies fed diets composed primarily of meat and meat by-products, and such diets may have adverse effects on older dogs with liver and kidney diseases (Jubb and Kennedy, 1970; Kennedy, 1957). Since excess protein must be metabolized by the liver and the nitrogen must be excreted by the kidney, high protein diets increase the workload of these organs, and, in a diseased state, the organs may be incapable of adequately handling the additional nitrogen. Diets high in protein contribute to renal disease (Kennedy, 1957).

In view of the difficulties, it is prudent to adhere to dietary levels approximating those set forth in tables 1, 2, and 4. [*i.e.*, NRC, Nutritional Requirement Tables]

There is no evidence proving that animal protein is an essential constituent of a dog's diet (Walker, 1971). Koehn (1942) maintained and reared dogs successfully on diets containing proteins of plant origin only. In practice, it is usually advisable to include some animal proteins both for enhancing acceptability and for ensuring a desirable and economical amino acid pattern. (CX 206, p. 7)¹⁹

[11] 20. Alpo was changed from an all-meat formulation to a more balanced diet in 1970; thereafter, the product met the minimum nutritional standards of NRC. Prior to its reformulation in 1970, Allen knew that there had been veterinarian and professional breeder criticism of the all-meat diet. (CX's 41b, 72b)²⁰

21. There are differences in the cost of ingredients as between a premium canned product and an economy canned product. For example, in 1969 and 1970, the average cost of ingredients in Alpo's leading product, Beef Chunks, was approximately 10 cents per can. During the same period of time, the average cost of ingredients in Vets

¹⁹ The NRC standards were largely the basis of the F.T.C.'s Guides For the Dog and Cat Food Industry adopted in 1969, 16 C.F.R. 241. Section 241.5(j) of the Guides provides as follows:

The quality of an industry product from the nutritional standpoint is not necessarily dependent upon its meat content, or upon the amount or nature of other ingredients derived from animals, poultry or fish which it may contain. Accordingly, it is improper to represent that a dog or cat has a nutritional requirement for such an ingredient, or that solely because a particular industry product contains, for example, a specified percentage of meat it is nutritionally superior to products having a lesser quantity of meat, or to those which contain other and different ingredients. Such advertising is deceptive because it does not take into consideration the nutritional properties of various ingredients or combinations thereof used in the formulation and processing of industry products.

²⁰ One industry representative testified "old Alpo was all meat and it is pretty well known that you can't feed an animal all meat." (Tr. 1739)

leading product, Vets Regular, was about 3 cents per can. (RX 61a; Tr. 1764, 1773-74, 2034-35)

22. The physical differences between the various categories and subcategories of dog food are not static. The record shows the following:

(a) All-meat Alpo became less than all-meat Alpo when (i) Allen decided in 1970 to add vitamins and minerals to make the product more nutritionally well-balanced and thereby meet the minimum NRC standards; and (ii) the price of meat went up in 1973 and TVP (textured vegetable protein) was added. (Tr. 1770-72) [12] Moreover, the premium priced category can hardly be classified as a uniformly "all-meat" segment since two of the companies in the so-called premium category — Recipe and Kal Kan — have engaged in aggressive *anti* all-meat advertising. (CX 44d; Tr. 1611-12)

(b) There are "premium" chunky-style products which have substantially *less* meat than Alpo and much *more* cereal than Alpo. (Tr. 1659, 1869, 1939-40) Just prior to the acquisition, Perk had developed a product called Vets Canned Chunks, which was intended as a premium-priced dog food made from cereal and produced at a low raw material cost. The product was considered revolutionary at the time since it had a meat flavor and texture even though it was produced entirely from a cereal base. (CX 25o)

(c) The chunky appearance of Alpo (not chunks of meat, but meat "formed" into chunks) is not the only *form* of a premium-priced product. The Alpo line consists of products in both chunk (Alpo Beef Chunks, Alpo Horse Meat Chunks, Alpo Liver Chunks, Alpo Lamb Chunks) as well as non-chunk, chopped form — Alpo Rib of Veal, Alpo Chopped Beef, Alpo Chopped Horse Meat, Alpo Meat Trio, Alpo Savory Stew, Alpo Beef'n Eggs, Alpo Meat Balls with Gravy, Alpo Chicken and Chicken Parts. (CX 269d)

(d) The meat content of dry can be varied significantly, as in fact Alpo has done with its Beef Bites product which contains 25 percent dried beef. (Tr. 1338, 1792-93, 1809) Besides, in an industry where image advertising is extremely important, physical differences can be blurred by clever copy. Ralston Purina's Chuck Wagon (a dry without a speck of meat) has been advertised as "meaty, juicy, and chunky." (Tr. 1407-08, 1941) In their advertising, different categories of dog food are constantly making competing claims about "meatiness," palatability, and nutritional balance. (see Findings 47-49)

(e) Ingredient contents are subject to change. Thus, research done for L&M has recommended product exploration including "analogues of human mixture foods, such as hash (meat and potatoes) with egg * * * ." [13] and creating resemblances to human foods such as

“canned meat balls *au jus* or canned burgers with bouillon sauce.” (RX 13, pp. 130-131)

(f) The palatability of dry can be increased significantly by coating the cereal with fats. (Tr. 2153) While palatability tests indicate that because of its near all-meat (and high fat) content, a premium-priced product like Alpo ranks higher in palatability than a cereal-based product like Vets.²¹ Dr. Corbin, an expert on animal feeding at the University of Illinois, testified that he has had first hand experience in observing animals who preferred a non-all-meat diet to an all-meat diet. (Tr. 1137) Moreover, within the premium sector of canned, and even in the historical development of a particular product, palatability is by no means permanently fixed — for example, current Alpo is less palatable than all-meat Alpo. (Tr. 1028)

23. Both chunk and loaf-style products use some of the same equipment — closing machines, hydrostatic cookers, and labeling machinery — but other equipment cannot be used for both kinds of products.²²

[14] 24. There are differences in the cost of the facilities used for manufacturing chunk-style premium products (approximately \$1,400,000) and loaf-style economy products (approximately \$650,000). (Tr. 2010-11) At the time of the acquisition, however, not only did Perk already have the capability for making “chunky” products in its Los Angeles plant, but its plant in Pennsylvania could be used to make chunk items “rather simply at a cost of approximately \$200,000.” (CX 27a)²³

²¹ Alpo’s all-meat and high fat content undoubtedly produced a high level of palatability which in turn resulted in animal “contentment.” (RX 76v, x; Tr. 537, 1019) As for nutritional value of such a diet, see Finding 19. As one of respondent’s witnesses put it “The dogs loved it. It is like offering a child cake. They will eat cake all meals, too.” (Tr. 1739)

²² The following process and equipment are used to manufacture a chunk-style product like Alpo Beef Chunks: Meat and meat by-products are frozen and stored in a freezer. Later, the meat and meat by-products are thawed slightly, sliced, and cubed, pre-cooked (or braised), and mixed with TVP (textured vegetable protein) and vitamins and minerals. The mixture is conveyed on a belt or screw conveyors to circular tables where the ingredients are scrapped into cans from revolving fillers. Juices are added and cans are sealed by closing machines. After the cans are cooked, they are labeled, and packed in cases. (Tr. 1776-79, 2007-09)

The following processes and equipment are used to manufacture a loaf-style product like Vets: Meat and meat by-products are ground, pre-cooked in a temperature container, and conveyed to cookers. Cereals are conveyed from a silo to the cooker; water is added and the temperature is increased to 175 degrees. The mixture is then conveyed to a filler where the cans are filled by piston filling machines. The filled cans are sealed by a closing machine and conveyed to hydrostatic cookers. After the cans are cooked, they are labeled, and packed in cases. (Tr. 2003)

²³ There is no evidence that the cost of equipment is a significant entry barrier into the manufacturing of any category of dog food. (see, Tr. 1974)

