IN THE MATTER OF

EXXON CORPORATION, ET AL.

Docket 8934. Interlocutory Order, Nov. 10, 1977

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

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

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

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

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

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

[3] Order, November 11, 1976, at 8, 20.

[4] *Id.* at 24.

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

In their motion for reconsideration, complaint counsel again modified their discovery request, agreeing to convert all interrogatories to document requests, to delete specifications that referred to transcript pages[6] and to alter the forward cutoff date for documents to be produced.

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

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

Complaint counsel also request that the Commission:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

We are unwilling to assume that cases involving complex issues and large industries are incapable of efficient adjudication. We believe that complaint counsel's determination to submit a "more manageable subpoena"[14] is a step in the right direction. This, together with the use of discovery procedures tailored to the needs of complex litigation[15] and close adherence to the suggestions set forth in the Manual for Complex Litigation, including continued efforts by the Law Judge to maintain firm control of the proceeding,[16] will

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

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

[14] Motion at 6.

[15] Pp. 4-5 *supra*.

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

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

It is so ordered.

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

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

IN THE MATTER OF

BRISTOL-MYERS COMPANY, ET AL. - D. 8917

AMERICAN HOME PRODUCTS CORPORATION, ET AL. - D. 8918

STERLING DRUG INC., ET AL. - D. 8919

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

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

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

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

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

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

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

(Continued)

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

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

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

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

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

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

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

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

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

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

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

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

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

ORDER REMANDING CASE

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

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

IN THE MATTER OF

THE KROGER COMPANY

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

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

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

Appearances

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

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

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that The Kroger Company, a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereto would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

COUNT I

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

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

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

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

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

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

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

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

A. Readily available for sale to customers;

B. Readily and conspicuously available for sale at or below the advertised prices; and

C. Sold to persons who attempted to purchase such items at prices at or below the advertised prices.

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

A. Not readily available for sale;

B. Not readily and conspicuously available for sale at or below the advertised prices; or

C. Sold to persons who attempted to purchase such items at prices higher than the advertised prices.

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

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

A. Readily available for sale to customers in quantities sufficient to meet reasonably anticipated demands;

B. Conspicuously available for sale at or below the advertised prices;

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

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

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

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

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

COUNT II

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

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

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

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

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

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

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