IN THE MATTER OF

PERFORMANCE SAILCRAFT INC.

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

Docket C-2922. Complaint, May 2, 1978 —Decision, May 2, 1978

Consent order requiring a Pointe-Claire, Quebec, Canada, manufacturer and distributor of fiberglass sailboats and accessories, among other things, to cease entering into or enforcing any form of agreement with its dealers concerning the retail price of its products; restricting territories in which its dealers may advertise or sell its products; and terminating or threatening to terminate dealers who do not follow its pricing and territorial instructions. Further, any future price lists distributed by the firm must note that the prices are suggested or approximate.

Appearances

For the Commission: *Allen R. Caskie.*
For the respondent: *R. Warden McKimm,* Ottawa, Canada.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Performance Sailcraft Inc., a corporation, more particularly described and referred to hereinafter as respondent, has violated the provisions of Section 5 of the Federal Trade Commission Act (38 Stat. 719, as amended; 15 U.S.C. 45), 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 with respect thereto as follows:

PARAGRAPH 1. Respondent Performance Sailcraft Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the province of Quebec, Canada, with its principal office and place of business at 91 Hymus Boulevard, Pointe-Claire, Quebec, Canada.

PAR. 2. Respondent is a manufacturer and distributor of small recreational sailboats of fiberglass construction and accessories to be used therewith.

In 1975, respondent's gross income from sales of said products was $3.6 million, over $2 million of which was derived from sales in the United States.

PAR. 3. In the course of conduct of its business of manufacturing

and distributing sailboats and accessories, respondent is engaged in transacting business within the United States through the following activities, among others: the placement of advertising in United States magazines and newspapers of interstate circulation; the presence within the United States and participation of respondent's salesmen at numerous trade shows; and the C.O.D. shipment of respondent's products from its principal place of business to independent dealers located in various States throughout the United States who sell the products to consumers.

There is now and has been for several years past, a constant, substantial and increasing flow of such products in or affecting "commerce" as that term is defined in the Federal Trade Commission Act, as amended.

PAR. 4. In the course and conduct of its business in or affecting commerce, except to the extent that competition has been hampered or restrained by reason of the practices hereinafter alleged, respondent has been and is now in competition with other persons, firms and corporations engaged in the manufacture, sale and distribution of said products.

PAR. 5. Respondent, in combination, agreement, or understanding with certain of its authorized dealers, or with the cooperation or acquiescence of other of its dealers, has for the last several years been engaged in a planned course of action to fix, establish and maintain certain resale or retail prices at which said products are resold. In furtherance of said planned course of action, respondent has for the past several years engaged in the following acts or practices, among others:

(a) Regularly furnishing its dealers with price lists and necessary supplements thereto containing certain resale or retail prices;

(b) Establishing agreements, understandings, or arrangements with its dealers, as a condition precedent to the granting of a dealership, that such dealers will maintain certain resale or retail prices;

(c) Informing its dealers, by direct or indirect means, that respondents expect and require such dealers to maintain and enforce certain resale or retail prices or such dealerships will be terminated;

(d) Soliciting and obtaining from its dealers cooperation and assistance in identifying and reporting any dealer who advertises, or offers to sell, or sells said products at prices lower than certain resale or retail prices.

PAR. 6. Respondent, in combination, agreement, or understanding with certain of its authorized dealers, or with the cooperation or

engaged in a planned course of action whose effect has been to foster, promote, maintain and support its policies of restricting dealer competition in the United States in the marketing, sale, and distribution of fiberglass sailboats by directing, encouraging, threatening, warning, and/or otherwise prohibiting its dealers from selling or advertising the sale of said products outside of their allocated territories.

PAR. 7. These aforesaid acts and practices as alleged, are prejudicial and injurious to the public; have a tendency to hinder, restrict, restrain and prevent competition and have actually hindered, restricted, restrained and prevented competition; and constitute unfair acts or practices and unfair methods of competition in or affecting commerce within the meaning and intent 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 Washington, D.C. Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act, as amended; and

The respondent and its counsel 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 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 hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Performance Sailcraft Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the province of Quebec, Canada, with its principal office and

place of business at 91 Hymus Boulevard, Pointe-Clare, Quebec, Canada.

2. The Federal Trade Commission has jurisdiction of the subject matter of the proceeding and the respondent, and the proceeding is in the public interest.

ORDER

I. *It is ordered,* That respondent Performance Sailcraft Inc., and its subsidiaries, divisions, licensees, successors, assigns, officers, directors, agents, representatives and employees, directly or indirectly, or through any corporate or other device, in connection with the distribution, advertising, offering for sale, or sale of fiberglass sailboats and accessories, or any other products (hereinafter referred to in this order as "said products"), in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, shall forthwith cease and desist from:

A. Establishing, maintaining or enforcing any contract, agreement, understanding or arrangement fixing, establishing, maintaining, controlling, influencing or enforcing in any way or to any extent, directly or indirectly, the price at which any of said products is advertised, sold or offered for sale at retail.

B. Requiring any dealer or prospective dealer to enter into any oral or written agreement or understanding that such dealer or prospective dealer will maintain any resale or retail price for any of said products as a condition of buying any of said products.

C. Requesting or requiring any dealer or prospective dealer, either directly or indirectly, to report any dealer, person or firm who does not adhere to any resale or retail price for any of said products, or acting on reports so obtained by refusing or threatening to refuse sales to any dealer, person or firm so reported.

D. Threatening to terminate or terminating, either directly or indirectly, any dealer for failure to observe, maintain or advertise respondent's suggested resale prices for said products.

E. Requiring, from any dealer charged with price cutting or failure to adhere to any resale or retail price, a promise or assurance to adhere to any resale or retail price for any of said products as a condition precedent to any future sales to said dealer.

F. Publishing, disseminating or circulating any price list, price book, price tag, advertising or promotional material, or other document indicating any resale or retail price without stating on each page (of such list, book, tag, advertising or promotional material or other document), on which a price appears, that the price is suggested or approximate.

G. Imposing or attempting to impose any limitations or restrictions respecting the territories in which said products may be advertised or sold by its dealers.

H. Attempting to enter into, entering into, continuing, maintaining, or enforcing any contract, combination, understanding or agreement to limit, allocate, or restrict the territory in which said products may be advertised or sold by its dealers.

I. Requesting or requiring any dealer or prospective dealer, either directly or indirectly, to report any dealer, person or firm who does not adhere to any territorial restriction in the advertising and sale of any of said products, or acting on reports so obtained by refusing or threatening to refuse sales to any dealer, person or firm so reported.

J. Threatening to terminate or terminating, either directly or indirectly, any dealer for failure to limit or restrict the advertising and sale of said products to a specified territory.

Provided, that none of the provisions herein shall prohibit respondent from designating geographical areas within which a dealer may agree to devote his best efforts to the sale of said products (hereinafter "area of primary responsibility") as a condition of becoming a dealer or maintaining a dealership, provided that such dealers are told that said area is not exclusive and does not place a territorial restriction upon the sale of said products.

Provided further, that none of the provisions herein shall prohibit respondent from terminating dealers for lawful business reasons.

II. *It is further ordered,* That the respondent shall within sixty (60) days after the service upon it of this order, mail a copy of this order to each of its dealers of said products in the United States and, during the five (5) year period of time following the date of service of this order, to all of its future dealers in the United States at the time said dealers are opened as accounts, under cover of the letter annexed hereto as Exhibit A, and furnish the Commission proof of the mailing thereof in the file required to be maintained under Paragraph V herein.

III. *It is further ordered,* That respondent shall forthwith distribute a copy of this order to each of its operating divisions engaged in the manufacture, sale, marketing and distribution of said products and to all of its sales personnel connected with the sale, marketing, and distribution of said products and shall instruct each sales person employed by it now or in the future to read this order and to be familiar with its provisions.

IV. *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 of or dissolution of subsidiaries or any other such change in the corporation which may affect compliance obligations arising out of the order.

V. *It is further ordered,* That the respondent herein, for a period of five (5) years from the date of this signing, establish and maintain a file of all records referring or relating to respondent's refusal to sell said products to any of respondent's dealers, which file shall contain the names and addresses of all dealers with whom respondent has refused to deal since the effective date of the order, a description of the reason for the refusal, the date of the refusal, and a record of a communication to each such dealer explaining respondent's refusal to sell said products, and which file will be made available on reasonable notice for inspection at the Commission's offices in Washington, D.C.

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 this order.

EXHIBIT A

(Letterhead of Performance Sailcraft Inc.)

Dear Dealer:

PSI has entered into an agreement with the Federal Trade Commission relating to our territorial allocation and pricing policies. A copy of the consent order entered into pursuant to that agreement is enclosed herewith.

We have entered into this agreement solely for the purpose of settling a dispute with the Commission, and the agreement and consent order are not to be construed as an admission that we have 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 our activities 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 retail or resale prices for the products covered by the consent order.

(2) We will not solicit, invite or encourage any dealer or any other person to report any dealer not following any retail or resale price for any of said products, and, furthermore, will not act on any such report sent to us.

(3) We will not require or induce our dealers to refrain from advertising said

(4) As you know, it is a condition of becoming a dealer or maintaining a dealership that you agree to devote your best sales efforts in your designated geographical territory. However, you are free to advertise and sell any of the products covered by the consent order outside of these designated territories.

Sincerely,
(Officer)

IN THE MATTER OF

CHRYSLER CORPORATION, ET AL.

Docket 9072. Interlocutory Order, May 8, 1978

Denial of complaint counsel's motion to enforce subpoena *duces tecum* against present owner of records sought, a purchaser of the assets of the corporation named in the subpoena.

ORDER DENYING MOTION TO ENFORCE SUBPOENA DUCES TECUM

On February 13, 1978, Administrative Law Judge Lewis F. Parker certified to the Commission the motion of complaint counsel herein for enforcement of a subpoena *duces tecum* issued in November, 1976,[1] directing Northline Dodge, Inc., a California corporation, to produce certain documents relating, *inter alia*, to motor vehicle repossessions in which it had been involved during a specified time period. A partial return was made, and complaint counsel were pursuing further compliance when, on July 29, 1977, complaint counsel were advised that the assets of the California corporation had been sold to a Texas corporation having different principals but the same name, and the California corporation dissolved. The assets transferred evidently include the records sought, to the extent they exist, but complaint counsel assert that the Texas corporation has declined to take the effort necessary to make any further return on the subpoena. Matters were in this posture when complaint counsel moved for enforcement of the subpoena.

Complaint counsel's motion does not attempt to propound a theory for enforcing a subpoena *duces tecum* against a corporation which simply purchased assets from the corporation against which it was issued. It is patent, however, that mere identity of name between the two corporations has no bearing on the matter. The subpoena was issued against and served upon a particular legal entity. While that legal entity retains the capacity to be sued for some period of time after formal dissolution, it evidently no longer possesses the documents sought. The legal entity which does possess the documents, on the other hand, has never been subpoenaed to produce them. Moreover, there is nothing in the record to indicate that the new entity stands in the position of a legal successor to the dissolved corporation so as to enable the outstanding subpoena to be enforced

[1] The exact date does not appear from the materials before us. Indeed, as complaint counsel note, the copy of the subpoena attached to the motion herein does not show on its face that it was authorized by the ALJ. Because of

against the Texas corporation. In these circumstances, an order that the November 1976 subpoena be enforced would appear to be an exercise in futility. Accordingly,

It is ordered, That complaint counsel's Motion to Enforce Subpoena *Duces Tecum* be, and it hereby is, denied.[2]

[2] This ruling, of course, in no way precludes complaint counsel from seeking to subpoena the documents directly from the new corporation.

IN THE MATTER OF

AMERICAN DENTAL ASSOCIATION, ET AL.

Docket 9093. Interlocutory Order, May 8, 1978

Denial of supplemental motions of subpoenaed third parties to quash and/or limit subpoenas *duces tecum*.

ORDER DENYING MOTION TO QUASH AND/OR LIMIT SUBPOENAS DUCES TECUM

This matter comes to the Commission upon supplemental motions to quash and/or limit subpoenas *duces tecum* filed on behalf of Henry L. Ernstthal and the California Dental Association ("CDA") and Kathie Boise and the Orange County Dental Society, Inc. ("OCDS"). Because of the unusual posture of this motion, it is necessary to chronicle the prior developments in some detail.

The Commission issued an administrative complaint in this proceeding on January 4, 1977. In the course of the administrative proceedings, the administrative law judge ("ALJ"), at the request of Commission complaint counsel, on November 16, 1977, issued subpoenas *duces tecum* to CDA and OCDS pursuant to Section 3.34(b) of the Commission's Rules of Practice and Procedures. CDA and OCDS filed a joint motion to quash the subpoenas on December 1, 1977, which motion was denied by the ALJ on December 15, 1977. CDA and OCDS then filed a joint motion on January 3, 1978, seeking extraordinary leave to appeal to the Commission the denial of their motion to quash. On January 6, 1978, this motion was denied by the ALJ, who established January 23, 1978, as the final date for compliance with the subpoenas. CDA and OCDS moved before the ALJ on January 18, 1978, for reconsideration of his denial of their motion to quash and their motion for appeal to the Commission, arguing for the first time that the Commission lacked jurisdiction over the parties. The ALJ denied this motion on January 23, 1978. Upon the parties' subsequent refusal to comply with the subpoenas, on February 17, 1978, the Commission granted complaint counsel's motion requesting court enforcement of the subpoenas and enforcement papers were filed on March 14, 1978.

In an order issued April 19, 1978, the District Court for the District of Columbia concluded that it was inappropriate to consider the parties' jurisdictional challenge to the Commission's pending adjudicative proceeding. However, the court found that the ALJ had not had an opportunity to consider some of the parties' non-jurisdictional challenges. Accordingly, the court's order permit-

present to the ALJ by April 21, 1978, any of the non-jurisdictional challenges which they raised in the enforcement proceedings but which were not initially presented to the ALJ. The court's order further provides that the ALJ shall rule on any such challenges no later than April 28, 1978, and that after the ALJ has so ruled (and the Commission, if requested, has reviewed the matter), CDA and OCDS may assert in the enforcement proceeding any non-jurisdictional challenges to the instant subpoenas *duces tecum*. The order specifically indicates that the court will retain jurisdiction over the Commission's present enforcement petition pending the ALJ's consideration (and the Commission's, if so requested) of non-jurisdictional challenges not previously presented by the parties to the ALJ.

Pursuant to this order, CDA and OCDS filed the instant supplemental motion to quash and/or limit the subpoenas *duces tecum* on April 21, 1978, arguing that the specifications of the subpoenas are overly broad, seek irrelevant information, and are too indefinite. Additionally, the parties contend that compliance with the subpoenas would be unduly burdensome and that they are entitled to a protective order for confidential documents. By orders of April 28, May 1, and May 2, 1978, the ALJ issued a protective order but otherwise denied the supplemental motion and certified the matter to the Commission for its consideration in view of the order of the district court.[1]

Ordinarily, under the Commission's Rules of Practice and Procedure the supplemental motion would have been untimely since no good cause for a belated, piecemeal submission has been shown to justify an extension under Section 3.34(b). Moreover, even had it been timely, the ALJ's denial of that motion, like other pre-trial discovery rulings, would not be reviewed by the Commission absent a showing (not made here) of a clear abuse of discretion. *See, e.g., Exxon Corp.*, 85 F.T.C. 91 (1975). The opposition of CDA and OCDS to court enforcement of the subpoena did not focus on a supplemental motion to quash as a form of relief, and the status of such motion under the Commission's Rules was not addressed in the litigation papers. Accordingly, the court had no reason to know that the review apparently contemplated by the court's order would ordinarily be unavailable, and it is open to question whether the court intended to require the Commission to engage in extraordinary review in this matter.

[1] We understand that the May 31, 1978 compliance date established by the ALJ is contingent upon the district court's enforcement of the subpoenas.

Nevertheless, in a spirit of compliance with the court's order and to forestall further delay in enforcement of the subpoenas,[2] the Commission has reviewed the ALJ's denial of the supplemental motion. Our review convinces us that there is no showing sufficient to warrant reversal of the ALJ's well-considered ruling. Accordingly,

It is ordered, That the Supplemental Motion to Quash and/or Limit the Subpoenas *Duces Tecum* is denied.

[2] We assume that the court did not intend to endorse any generally-applicable departure from the usual principle requiring exhaustion of administrative remedies, under which legal or factual arguments not tendered in a timely motion to quash a subpoena would be deemed waived.

IN THE MATTER OF

GEORGIA-PACIFIC CORPORATION

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATIONS OF THE FEDERAL TRADE COMMISSION AND SEC. 7 OF THE CLAYTON ACTS

Docket 8843. Final Order, Dec. 26, 1972—Modifying Order, May 12, 1978

This order modifies a final order to cease and desist issued December 26, 1972, 38 FR 1581, 81 F.T.C. 984, by changing Paragraphs 6 and 7 to permit acquisitions of $1,000,000 or less without prior Commission approval, and by substituting for Paragraph 10, one that limits reporting obligations to those corporate alterations that may have a significant affect on compliance.

ORDER MODIFYING ORDER TO CEASE AND DESIST

By a petition filed March 31, 1978, and revised by a petition filed April 26, 1978, respondent Georgia-Pacific Corporation asked the Commission to reopen this proceeding to modify Paragraphs 6, 7, and 10 of the consent order issued by the Commission on December 26, 1972.

Paragraph 7 of the consent order requires, *inter alia,* that Georgia-Pacific obtain Commission approval before purchasing non-softwood plywood assets when the seller is engaged in softwood plywood manufacturing. Georgia-Pacific contends that this reporting requirement is overbroad because the consent order was aimed at preventing Georgia-Pacific from increasing its market power in the softwood plywood industry, and it is unlikely that its ability to control price or entry in the relevant market would be affected when the acquisition is of non-softwood plywood assets.

Respondent also requests modification of Paragraphs 6 and 7 of the order so that it need not obtain approval of acquisitions of softwood plywood assets where the purchase price is less than 1 million dollars. Respondent believes that purchases of this size are *de minimis* and "would not undercut the effectiveness of the consent order, but it would reduce needless administrative burdens arising from compliance with the consent order. . . ." More precisely, respondent contends that it is unable to bid at auctions for softwood plywood equipment owned by softwood plywood firms, as these auctions often take place upon relatively short notice which precludes the soliciting and receiving of prior approval from the Commission. Because of their *de minimis* nature, these asset acquisitions, respondent believes, would likely be approved by the Commission.

The final modification sought by Georgia-Pacific relates to Paragraph 10 of the consent order. This paragraph requires respondent to notify the Commission of the creation or dissolution of subsidiaries even if the corporate change does not affect compliance obligations arising from the order. Respondent is a large, multinational corporation which periodically must, it represents, "make various adjustments in its corporate structure which do not or would not affect its compliance obligations." The modification proposed by respondent will limit its reporting obligations under Paragraph 10 to those corporate alterations that may have significance from a compliance standpoint.

The Bureau of Competition filed on May 1, 1978, an answer to respondent's petition. The Bureau does not oppose the modifications.

We agree that the petition should be granted. The modifications proposed by respondent should not affect adversely the purpose of the order, which, is to say, the aspects of the order complained of by respondent are either unnecessary or overbroad, and they are, therefore, unwarranted.

Accordingly,

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

It is further ordered, That the order to cease and desist be, and it hereby is, modified by substituting for Paragraphs 6, 7 and 10 of the order, the following:

PARAGRAPH 6

It is further ordered, That for ten (10) years from the effective date, respondent shall cease and desist from acquiring, directly or indirectly through subsidiaries, or otherwise, for its use in the manufacture of softwood plywood, from any person, firm or corporation other than the manufacturer thereof or a regular dealer or distributor of such equipment in the ordinary course of such dealer's or distributor's business:

(A) Any equipment specifically designed for the manufacture of softwood plywood;

(B) Any equipment specifically designed and theretofore used in the manufacture of softwood plywood; and

(C) Any equipment thereafter converted by respondent, directly or indirectly, into equipment specifically designed for the manufacture of softwood plywood; unless such acquisitions amount to $1,000,000 or less from any one person, firm or corporation in any twelve month period in the absence of prior Federal Trade Commission approval of

PARAGRAPH 7

It is further ordered, That for a period of ten (10) years from the effective date, respondent shall cease and desist from acquiring, directly or indirectly, through subsidiaries, or otherwise, the whole or any part of the share capital or assets of, or any other interest in, any other person, firm or corporation engaged in the manufacture of softwood plywood in the United States immediately prior to such acquisition, unless such asset acquisitions amount to $1,000,000 or less from any one person, firm or corporation in any twelve-month period, in the absence of prior Federal Trade Commission approval of such acquisition; *Provided, however,* That nothing contained in this paragraph shall preclude or be deemed to preclude respondent from acquiring timberlands or any interest therein or timber in any form (including but not limited to stumpage, logs, veneers, chips, sawdust and cores); and, *Further provided,* That nothing contained in this paragraph shall apply to purchases of lumber, plywood, machinery, or any other product, by respondent in the regular conduct of its business from suppliers in the regular conduct of their businesses, or to sales made by respondent in the regular conduct of its business.

PARAGRAPH 10

It is further ordered, That for a period of ten (10) years from the effective date of the order entered by the Commission on December 26, 1972, respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent which may affect compliance obligations arising out of the order, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or joint ventures.

IN THE MATTER OF

BELTONE ELECTRONICS CORPORATION, ET AL.

Docket 8928. Interlocutory Order, May 12, 1978

Remand for additional hearings ordered for consideration of customer and territorial restriction on interbrand and intrabrand competition.

ORDER REMANDING FOR ADDITIONAL HEARINGS

By order of July 5, 1977, the Commission directed the parties in this proceeding to submit supplemental briefs concerning the impact of *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977). After careful review of the briefs submitted by the parties and the record developed before the administrative law judge ("ALJ"), the Commission has determined that a limited remand of the case is necessary for consideration of the impact of respondents' customer and territorial restrictions upon both interbrand and intrabrand competition.

The complaint in this proceeding was issued on May 8, 1973, charging respondents with various violations of Section 5, including, *inter alia*, imposition of exclusive dealing, maintenance of territorial and customer restrictions, use of certain post-termination restraints, and misappropriation of the names and addresses of dealers' customers. After extensive pretrial discovery and 115 days of hearings in Washington, D.C., Chicago, San Francisco, and New Orleans, the ALJ filed his initial decision on September 7, 1976, finding that the respondents had engaged in the following unfair acts and practices and unfair methods of competition in violation of Section 5:

(A) Requiring their selected dealers to sell Beltone products within assigned geographic territories;

(B) Requiring their selected dealers to deal exclusively in Beltone hearing aids:

(C) Prohibiting their dealers from dealing with certain potential customers;

(D) Preventing others, not their dealers, from dealing in or repairing Beltone products; and

(E) Appropriating and using for their own purposes the names and addresses of their dealers' customers.

The ALJ's legal analysis of respondents' territorial and customer restrictions (ID 79-82)[1] leaves no doubt that he examined these

[1] We recognize, of course, that respondents deny the existence of any territorial or customer restrictions and

particular restraints in light of the then-prevailing *per se* standard of *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), under the rationale that conduct violating the Sherman Act would necessarily violate Section 5 of the FTC Act. Moreover, complaint counsel's trial and answering briefs indicate that they contemplated application of a *per se* theory throughout the proceeding. Although the record contains some discussion of the competition effects of respondents' territorial and customer restrictions, it is clear that the evidence introduced provides, on balance, an incomplete picture of the interbrand and intrabrand effects of these practices. Hence, the need to premise our disposition of this case upon a thorough examination of the competitive impact of these specific restraints leads us to conclude that we should remand the proceeding.[2] Accordingly,

It is ordered, That this matter is remanded to the administrative law judge for an expedited proceeding solely to receive additional evidence regarding the effects of respondents' territorial and customer restrictions upon interbrand and intrabrand competition.

It is further ordered, That, after the receipt of such additional evidence, the administrative law judge certify the record to the Commission together with any findings of fact or conclusions of law which he may make in light of the additional evidence.

[2] In view of the unusual amount of cumulative dealer testimony evident in the present record, we wish to emphasize that an expeditious resolution of the issues on remand is in the best interest of all parties. To this end, stipulations should be freely utilized to avoid the introduction of duplicative testimony. In any event, we assume that the ALJ will exercise appropriate control over the receipt of additional evidence.