IN THE MATTER OF

J. WALTER THOMPSON COMPANY

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

Docket 9131. Complaint, Nov. 27, 1979—Decision, April 13, 1981*

This consent order requires, among other things, a New York City advertising agency to cease making survey claims unless the surveys are designed, executed and analyzed in a competent and reliable manner. Further, the firm is prohibited from making claims regarding the opinions or recommendations of any professional group unless that professional group is actually asked about their opinions or recommendations.

Appearances

For the Commission: *Randell C. Ogg, John Clewett, Roberta L. Gross* and *David Axelrad.*

For the respondent: *Donald H. Green, Mark Schattner* and *Mary Graham, Wald, Harkrader & Ross,* Washington, D.C.

DECISION AND ORDER

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

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the 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The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and

* Complaint published at page 320 herein.

having duly considered the comments filed thereafter by interested persons pursuant to Section 3.25 of its Rules, now in further conformity with the procedure prescribed in Section 3.25 of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent, J. Walter Thompson Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal offices and place of business located at 420 Lexington Ave., in the City of New York, State of New York.

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

ORDER

Part I

It is ordered, That respondent J. Walter Thompson Company ("JWT"), its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other entity, in connection with the advertising, offering for sale, sale or distribution of any "drug" or "device" (as those terms are defined by Section 15 of the Federal Trade Commission Act); aids to decrease use of cigarettes, cigars or pipes; smoke alarms; water purifiers; baby food preparation kits; shower head attachments; and water foot massagers (hereinafter referred to in Part I as "Product" or "Products"), in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Employing, in any advertisement for any product, the word "survey" (or any comparable term), or basing any claim upon one or more surveys in whole or in part which states, either expressly or by implication, the beliefs, opinions, practices, recommendations, or endorsements of any professional group (or portion thereof) with expertise relative to the product, unless:

(1) a projectable sample was used and the sample size of and response rate to the survey were sufficiently large so as to allow meaningful projections to the population referred to in the advertisement with a reasonable degree of confidence unless there is a clear and conspicuous disclosure in the advertisement that the survey may

not be representative of the population referred to in the advertisement;

(2) the survey was completed within three years prior to the date of the representation, unless there is other appropriate data which establishes a reasonable basis for concluding that the beliefs, opinions, practices, recommendations or endorsements of the members of the relevant professional population surveyed have not materially changed since the completion of the survey; and

(3) the survey was designed, executed and analyzed in a competent and reliable manner.

B. Representing, directly or by implication, that the beliefs, opinions, practices, recommendations or endorsements of members of any professional group with expertise relative to the advertised product have been surveyed or sampled unless the survey or sample directly solicits the beliefs, opinions, practices, recommendations, or endorsements of members of that group.

Provided, however, in circumstances where the survey or sample was conducted by an independent third party and was not, directly or indirectly, conducted or controlled by JWT or its client, it shall be an affirmative defense to an alleged violation of this Part for JWT to prove that it had a reasonable basis for believing that the survey or sample was conducted in accordance with the provisions of Part I of this Order. For purposes of this affirmative defense, JWT may demonstrate that it had a reasonable basis by showing (i) that the document reflecting the survey or sample had sufficient information for JWT to conclude that the survey(s) or sample(s) was conducted in accordance with this Part, or (ii) where there is insufficient information in such document that JWT made an appropriate inquiry and either (1) received a letter or memorandum from the third party containing adequate information regarding those aspect(s) of the sample(s) or survey(s) as to which there was insufficient information so that JWT had a reasonable basis for concluding that the sample(s) or survey(s) was conducted in accordance with this Part, or (2) sent a letter or memorandum to the third party confirming the third party's oral communication of adequate information regarding those aspect(s) of the sample(s) or survey(s) as to which there was insufficient information so that JWT had a reasonable basis for concluding that the sample(s) or survey(s) was conducted in accordance with this Part. In lieu of the letter or memorandum required by (1) or (2) above, JWT may rely on other written confirmation regarding the aspect(s) of the sample(s) or

survey(s) as to which there was insufficient information only if JWT has a reasonable explanation for so doing.

Part II

It is further ordered, That respondent J. Walter Thompson Company ("JWT"), its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other entity, in connection with the advertising, offering for sale, sale or distribution of any product, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Making any statements or representations, directly or by implication, concerning the ability of the advertised product to prevent, mitigate, or treat periodontal disease unless, at the time the statements or representations are made, JWT possesses and relies on a reasonable basis for such statements or representations, which shall include a competent and reliable clinical test and may also include other competent and reliable evidence including competent and reliable opinions of experts who are qualified by professional training, education, and experience to render competent and reliable judgments in such matters.

For purposes of this Order, a "clinical test" is one in which a person with skill and expertise in the field conducts a well-controlled test on human subjects, using those testing procedures generally accepted in the profession which ensure accurate and reliable results, and evaluates its results in a disinterested manner. The clinical test must be of sufficient duration to ensure that the results (a) were not materially distorted by any unusual short-term practices or temporary physical conditions of the test subjects (as such practices or conditions related to the test conditions), and (b) were clinically significant.

Provided, however, in circumstances where the clinical test or other evidence was not directly or indirectly conducted or controlled by JWT, it shall be an affirmative defense to an alleged violation of this Part for JWT to prove that it reasonably relied on the expert judgment of its client or of an independent third party in concluding that it had a reasonable basis in accordance with Part II of this Order. Such expert judgment shall be in writing signed by a person qualified by education or experience to render the opinion. Such opinion shall describe the contents of such test or other evidence upon which the opinion is based.

Provided further, however, in the event the Commission enters a

final order to cease and desist against Teledyne, Inc., or Teledyne Industries, Inc., or any division thereof, in this proceeding which prohibits the dissemination, without a reasonable basis, of claims for the prevention, mitigation or treatment of periodontal disease and if said order did not require that the reasonable basis for such claims include, as an essential and necessary element, a clinical test, the phrase in the second paragraph of Part II "and may also include" shall thereupon be deleted and the word "or" inserted in its place.

Part III

It is further ordered, That:

For the period of three years after JWT last placed the advertisements for dissemination, JWT shall retain all test results, data, and other documents on which it relied for advertisements of Products covered by this Order which were in its possession during either creation or placement by JWT of the advertisements.

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

JWT shall forthwith distribute a copy of this Order to each of its operating divisions, and to each of its officers, agents, representatives, or employees engaged in the preparation and placement of advertisements of the Products covered by this Order.

JWT shall, within sixty (60) days after service upon it of this Order, and at such other times as the Commission may require, file with the Commission a written report setting forth in detail the manner and form of its compliance with this Order.

Commissioner Pitofsky did not participate.

IN THE MATTER OF

NATIONAL TEA COMPANY, ET AL.

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

Docket 9126. Decision, July 23, 1980—Modifying Order, April 15, 1981

This order reopens the proceeding and modifies the Commission order issued on July 23, 1980, 96 F.T.C. 42, (45 F.R. 53455), by modifying Paragraph IG of the Order to relieve respondent from the obligation of divesting a specific store, since no purchaser could be found.

ORDER MODIFYING CEASE AND DESIST ORDER ISSUED JULY 23, 1980

The Federal Trade Commission having considered respondent National Tea Company's petition filed on January 29, 1981 to reopen this matter and to modify the consent order to cease and desist issued by the Commission on July 23, 1980, and having determined that reopening and modification of the order is warranted:

It is ordered, That this matter be, and it hereby is reopened and that Paragraph I(G) of the Commission's order be and it is hereby modified to read as follows:

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

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

IN THE MATTER OF

AMERICAN GENERAL INSURANCE COMPANY, ET AL.

DISMISSAL ORDER AND OPINION IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT

Docket 8847. Complaint, June 17, 1971—Dismissal Order, April 21, 1981*

On remand from the Ninth Circuit Court of Appeals, 589 F.2d 462, the Commission has determined to dismiss the June 17, 1971 complaint which alleged that the effect of American General Insurance Co.'s 1969 acquisition of Fidelity & Deposit Co. of Maryland would be to decrease competition in the fidelity and surety bond markets. The Commission, in dismissing the complaint, held that it would not be in the public interest to impose an order, at this late date, on a respondent no longer doing business in the relevant market.

FINAL ORDER

This matter has been heard by the Commission on remand from the Court of Appeals upon the appeals of complaint counsel and respondent from the initial decision and upon briefs and oral argument in support of and in opposition to the appeals. For the reasons stated in the accompanying Opinion, the Commission has determined to sustain respondent's appeal. Complaint counsel's appeal is denied. The motion to supplement the record filed by complaint counsel is granted. The motion to dismiss filed by respondent is granted. Accordingly,

It is ordered, That the complaint is dismissed.

OPINION OF THE COMMISSION

BY PITOFSKY, *Commissioner*:

This case is before us on remand from the Ninth Circuit after an appeal of a cease and desist order issued by the Commission on June 28, 1977. For the reasons set forth in this opinion, the Commission has determined to dismiss the complaint.

The history of this proceeding is long and tortuous. The complaint was issued on June 17, 1971, challenging the July 1, 1969 acquisition by American General Insurance Company of Fidelity & Deposit Company of Maryland (F&D). Various interlocutory proceedings followed, including an unsuccessful district court action filed by respondent to enjoin the Commission from proceeding with the case. *American General Insurance Co.* v. *FTC,* 359 F. Supp. 887 (S.D. Tex.

* Complaint, Initial Decision, Opinion and Final Order previously published at 89 F.T.C. 557.

1973), *aff'd,* 496 F.2d 197 (5th Cir. 1974). The initial decision was issued in August of 1975, and respondent was ordered by the Administrative Law Judge to divest F&D.

Both sides appealed from the findings of the ALJ, and the Commission affirmed the initial decision in 1977. Because of the participation of Commissioner Collier in both the earlier interlocutory action (as General Counsel) and the Commission decision, the Ninth Circuit reversed and remanded the case to the Commission. *American General Insurance Co.* v. *FTC,* 589 F.2d 462 (9th Cir. 1979). After the remand, the Commission reopened the proceeding and invited briefs from the parties on how to proceed. We now have before us, in addition to the original briefs filed with the Commission in connection with the appeal from the initial decision, a supplemental appeal brief from complaint counsel, an opposition thereto, a motion to dismiss from respondent and complaint counsel's opposition to that motion.

The Commission's 1977 decision found American General's acquisition of F&D to be an unlawful horizontal acquisition that substantially lessened competition in the fidelity and surety bond markets. *American General Insurance Co.,* 89 F.T.C. 545 (1977). After the close of the record in the Commission proceeding, respondent significantly altered the nature of its presence in the relevant products markets. In 1976, respondent terminated most of its own bonding business, other than that conducted by F&D.[1] Subsequently, in 1979, American General ended the rest of its business in the bond markets, except for the bonds written by F&D.[2] Finally, in December of 1980, American General sold F&D to two Swiss companies, and thereby withdrew entirely from the relevant product markets.[3]

Respondent has now moved to dismiss the complaint on the ground that the case has become moot because divestiture of F&D, as ordered by the Commission in 1977, has been accomplished. Alternatively, respondent contends that it would not be in the public interest for the Commission to enter an order against it. Complaint counsel oppose dismissal of the case, arguing that it is not moot because they believe that further relief, beyond the divestiture of F&D, is warranted.

We agree with complaint counsel that the case is not moot. Under the case law cited by both parties, a case is not moot if a controversy

[1] Affidavit of H.J. Bremermann, Jr., May 2, 1980 at 1. This affidavit was entered into the record by order of October 6, 1980.

[2] *Id.* at 2.

[3] Affidavit of J.F. Flack, January 30, 1981. We hereby reopen the record and receive this affidavit into evidence.

remains to be resolved, even if the controversy involves only the question of appropriate relief.[4] Here, there obviously remains such a controversy. Further, as reiterated by the Supreme Court in the case relied upon by respondent, the mere voluntary cessation of illegal conduct (*i.e.* divestiture of an unlawfully acquired company) "does not deprive the tribunal of power to hear and determine the case . . . ."[5] Indeed, there may be a public interest in having the legality of the abandoned practices settled.[6] We do not believe that a company should be permitted to escape the imposition of a Commission cease and desist order, once it has reaped the fruits of an illegal acquisition, by selling off the acquired company.

We are much more sympathetic to respondent's argument that it is not in the public interest to enter an order against American General. Complaint counsel would have us impose further relief, arguing that such relief is necessary to restore the market to the competitive conditions prevailing before the acquisition of F&D. To this end, they argue that the Commission should impose a ten-year ban on acquisitions by respondent of any fidelity or surety underwriter without prior Commission approval (Supplemental Appeal Brief at 7). Such a ban was contained in the Commission's previous order, and they argue it is necessary because it is likely that American General will make future anticompetitive acquisitions.[7]

Complaint counsel's second request is more complicated. They have asked the Commission to require American General to divest to F&D the earnings and capital it took from it after the acquisition (Supplemental Appeal Brief at 8). According to complaint counsel, American General has taken approximately $41 million from F&D in the form of a special dividend from capital and surplus ($20 million), and quarterly dividends equal to F&D's earnings ($21 million). Complaint counsel assert that since a bond company needs liquid assets, it is necessary to return this money so that F&D can be an effective competitor. The same relief was requested by complaint counsel when this case was before the Commission in 1977, and it was denied.

We do not believe that it is in the public interest to enter an order against American General. We are not convinced that there is a reasonable likelihood that American General will reenter the

[4] *United States* v. *Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968); *Walling* v. *Helmerich & Payne, Inc.*, 323 U.S. 37, 43 (1944).

[5] *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 632 (1953).

[6] *Id.* at 632.

[7] Complaint counsel have moved to supplement the record with an SEC filing submitted by American General, indicating its intention to purchase some shares of The St. Paul Companies, Inc., a competitor of American General in the relevant product markets. We hereby grant the motion to reopen the record, and receive the Schedule 13D into evidence.

relevant market, nor do we have reason to believe that if they do the reentry would be anticompetitive. With regard to the divestiture of the earnings, we do not believe that any relevant circumstances have changed since our first denial of the request for the earnings divestiture. Complaint counsel have not shown that F&D's competitive viability has been impaired because it lacks sufficient liquid assets.

Because we do not believe it is in the public interest to impose an order at this late date on a respondent no longer doing business in the relevant markets, respondent's motion to dismiss is granted.

IN THE MATTER OF

ALBERTSON'S, INC.

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

Docket C-3064. Complaint, April 21, 1981—Decision, April 21, 1981

This consent order requires, among other things, a Boise, Idaho operator of retail grocery stores to refrain from acquiring any unapproved retail grocery store business in specified areas for a period of ten years.

Appearances

For the Commission: *Rafe H. Cloe.*

For the respondent: *Michael F. Reuling,* in-house general counsel, *James O'M Tingle, Pillsbury, Madison & Sutro,* San Francisco, Calif., and *David J. McKean, McKean, MacIntyre, Wilson & Richardson,* 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 Albertson's, Inc., a corporation subject to the jurisdiction of the Commission, has acquired the California Division of Fisher Foods, Inc., which acquisition violates Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45), and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows.

DEFINITION

1. For purposes of this complaint, *Retail grocery stores* are retail food stores currently classified under Bureau of Census Industry Classification No. 541, including supermarkets, convenience stores and delicatessens, which primarily sell a wide variety of canned or frozen foods, such as vegetables, fruits and soups; dry groceries, either packaged or in bulk, such as tea, coffee, cocoa, dried fruits, processed food and nonedible grocery items. In addition, these stores

often sell smoked and prepared meats, fresh fish and poultry, fresh vegetables and fruits and fresh or frozen meats.

ALBERTSON'S, INC.

2. Respondent Albertson's Inc. (Albertson's) is a Delaware corporation with its principal office at 250 Parkcenter Boulevard, Boise, Idaho.

3. As of January 1978, Albertson's operated and continues to operate retail grocery stores throughout the West Coast, the Rocky Mountain states and in Florida, Alabama, Louisiana and Texas.

4. Albertson's total sales for its fiscal year ending January 28, 1978 were approximately $1,816,495,000. Albertson's ranks among the ten largest retail grocery chains in the United States.

5. In the first half of 1978, Albertson's operated a chain of approximately 32 retail grocery stores in Los Angeles County and Orange County, California.

6. At all times relevant herein, Albertson's has been engaged in the purchase or sale of products in interstate commerce and was a corporation engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended (15 U.S.C. 12) and was a corporation whose business was in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended (15 U.S.C. 44).

FISHER FOODS, INC.

7. Fisher Foods, Inc. (Fisher) is an Ohio corporation with its principal office at 5300 Richmond Road, Bedford Heights, Ohio.

8. In the first half of 1978, Fisher operated a chain of approximately 197 retail grocery stores located in Ohio, Illinois and California.

9. Fisher's total net sales for its fiscal year ending December 31, 1977 amounted to approximately $1,536,523,000.

10. In the first half of 1978, the California Division of Fisher operated a chain of approximately 46 retail grocery stores, of which approximately 40 stores were in Los Angeles County and Orange County, California. The Fisher stores in California were operated under the trade name "Fazio's."

11. At all times relevant herein, Fisher has been engaged in the purchase or sale of products in interstate commerce and was a corporation engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended (15 U.S.C. 12) and was a corporation whose business was in or affecting commerce, as

"commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended (15 U.S.C. 44).

ACQUISITION

12. On or about July 17, 1978, Albertson's acquired Fazio's following an agreement in principle reached between Albertson's and Fisher in April 1978.

TRADE AND COMMERCE

13. The relevant line of commerce in which to assess Albertson's acquisition of Fazio's is retail sales by retail grocery stores.

14. The relevant section of the country or geographic market is Los Angeles County and Orange County, California. (Los Angeles/Orange County).

15. The retail grocery store business in Los Angeles/Orange County is concentrated, with the combined market share of the four largest retail grocery chains estimated to be approximately 48.6% in 1978.

16. In the first half of 1978, Albertson's operated approximately 32 retail grocery stores in Los Angeles/Orange County. It ranked as the ninth largest firm in that market with a market share of approximately 3.6%.

17. In 1978, Fazio's operated approximately 40 retail grocery stores in Los Angeles/Orange County. It ranked as the seventh largest firm in that market with a market share of approximately 4.9%.

18. Albertson's and Fazio's have been for many years direct and substantial competitors of one another in the relevant line of commerce in Los Angeles/Orange County.

19. Immediately following Albertson's acquisition of Fazio's, Albertson's was the sixth largest operator of retail grocery stores in Los Angeles/Orange County.

EFFECT OF THE MERGER: VIOLATIONS CHARGED

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

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