

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The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and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

Modifying Order

97 F.T.C.

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 PITOFKY, *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.

Complaint

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:

- a) The elimination of actual competition between Albertson's and Fisher in the retail grocery business in Los Angeles/Orange County;
- b) actual competition between competitors generally in the retail grocery store business in Los Angeles/Orange County may be lessened;
- c) the elimination of Fisher as a substantial independent competitor in the retail grocery store business in Los Angeles/Orange County;
- d) increased concentration in the retail grocery store business in Los Angeles/Orange County; and
- e) the encouragement of further acquisitions and mergers by and among other leading firms in the retail grocery store business in Los Angeles/Orange County.

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 Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act and the Clayton Act; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Albertson's, Inc. is a corporation organized, exist-

ing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 250 Parkcenter Boulevard, in the City of Boise, State of Idaho.

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

ORDER

I

As used in this order:

(A) *Albertson's* means Albertson's, Inc., a corporation organized under the laws of Delaware with its principal executive offices at 250 Parkcenter Boulevard, Boise, Idaho, and its directors, officers, agents and employees, and its subsidiaries, successors and assigns.

(B) *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.

(C) *Acquisition, acquire, merger, or merge with* includes all other forms of arrangement by which Albertson's may obtain all or any part of the market share of any other retail grocery store or stores.

II

It is ordered, That for a period of ten (10) years from the date on which this order becomes final, Albertson's shall not merge with or acquire, or merge with or acquire and thereafter hold, directly or indirectly through subsidiaries or in any other manner, without the prior approval of the Federal Trade Commission, the whole or any part of the stock or assets of any individual, firm, partnership, corporation or other legal or business entity which directly or indirectly owns or operates any retail grocery store, where such acquisition or merger involves five or more such retail grocery stores, any one of which is located in any of the following areas:

(A) In Washington, Oregon, Nevada, Idaho, Montana, Wyoming,

New Mexico, Utah, Colorado, Florida, California, Texas, Louisiana, Alabama or Arizona; or

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

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

III

It is further ordered, That upon written request of the staff of the Federal Trade Commission, Albertson's shall submit such reports in writing to assure compliance with this order as may from time to time be requested.

IV

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

IN THE MATTER OF

THOMPSON MEDICAL COMPANY, INC., ET AL.

Docket 9149. Interlocutory Order, April 22, 1981

ORDER DENYING MOTION OF RESPONDENT THOMPSON MEDICAL
COMPANY, INC. TO RECONSIDER COMPLAINT

The administrative law judge has certified to the Commission a motion filed by respondent Thompson Medical Company, Inc. to reconsider the complaint issued by the Commission in this proceeding.¹ In support of its motion, respondent argues that the Food and Drug Administration (FDA) has the responsibility to determine drug efficacy, and that the FDA-appointed panel on topical analgesics will review the evidence on the efficacy of Aspercreme's active ingredient ("TEA"). Respondent contends that it is consequently not in the public interest for the FTC to conduct the above-captioned proceeding. For the reasons stated below, the Commission disagrees.

The Commission has authority under Sections 5 and 12 of the FTC Act, 15 U.S.C. 45 and 52, to challenge, *inter alia*, advertising claims which it has reason to believe are false or deceptive. While the statutory authority of the FDA and FTC overlap to some degree, under the Liaison Agreement between the two agencies there is in fact no duplication of function because the Commission exercises primary jurisdiction over nonprescription drug advertising and the FDA exercises primary jurisdiction over drug labeling. 36 Fed. Reg. 18539 (1971), 3 Trade Reg. Rep. (CCH) ¶9851 at 17,678.² Thus, while any relevant findings to emerge from FDA's OTC drug review—concerning, *e.g.*, the performance of "TEA"—can of course be given appropriate consideration by the ALJ and the Commission if made part of the record of the present proceeding, the Commission's responsibility to police allegedly false or deceptive OTC drug advertising is in no way diminished during the pendency of the

¹ The motion is captioned "Motion to Reconsider Complaint." Elsewhere in its filing, respondent frames its motion as a request "that the Commission withdraw those portions of the complaint which challenges the efficacy of Aspercreme as a topical analgesic ****" (Motion at 2), and as a request that "the Commission amend its complaint *** to remove the allegations challenging the advertising claims regarding the efficacy, and mode of action of the product Aspercreme" (Motion at 5). This Order constitutes a denial of the requested relief in all its forms.

² Moreover, the Supreme Court has long held that the same issues and parties may be proceeded against simultaneously by more than one agency. See, *e.g.*, *FTC v. Cement Institute*, 333 U.S. 683 (1948). See also *Warner-Lambert v. FTC*, 361 F. Supp. 948, 952 (D.D.C. 1973), in which the court applied this principle in disposing of precisely the same argument that respondent has presented here.

FDA's extensive process. See *Warner-Lambert Co. v. FTC*, 361 F. Supp. 948 (D.D.C. 1973).³

Respondent also argues that the Commission has unfairly "singled it out" and placed it at a disadvantage relative to other marketers of TEA-based products. As the complaint is based on advertising claims allegedly made by this respondent, however, it is appropriately focused solely on this respondent (along with the advertising agency respondent).⁴ Accordingly,

It is ordered, That the aforesaid motion be, and it hereby is, denied.

³ See also, *e.g.*, Commission Response to Morton-Norwich's Motion to Quash Subpoena Duces Tecum, File No. 7923228 (May 14, 1980); Order of the Commission Denying Respondent American Home Products' Motion to Dismiss the Complaint or in the Alternative Suspend Proceeding, Docket No. 8918 (May 31, 1977).

⁴ In any event, it is well settled that the Commission may exercise its discretion to proceed against one company without taking action against similarly situated competitors. *FTC v. Universal Rundle Corp.*, 387 U.S. 244 (1967); *Moog Industries, Inc. v. FTC*, 355 U.S. 411 (1958).

IN THE MATTER OF

TEXORA INTERNATIONAL CORPORATION, ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC.
5 OF THE FEDERAL TRADE COMMISSION ACT AND THE WOOL
PRODUCTS LABELING ACT OF 1939

Docket C-2794. Decision, Feb. 23, 1976—Modifying Order, April 22, 1981

This order reopens the proceeding and modifies the Commission order issued on Feb. 23, 1976 (41 F.R. 11817, 87 F.T.C. 273), by deleting the first "IT IS FURTHER ORDERED" paragraph which required respondents to file a special performance bond with the Secretary of the Treasury and replacing it with one requiring respondents to provide for fiber content testing and relabeling of misbranded wool products.

ORDER MODIFYING CEASE AND DESIST ORDER

In their request filed on January 23, 1981, and their amended request filed on February 12, 1981, the respondents petitioned the Commission, pursuant to Section 2.51 of its Rules of Practice, to reopen the proceedings and modify the order of February 23, 1976, entered in Docket No. C-2794. Respondents ask that the first "*It is further ordered*" paragraph be deleted from the order and that a new paragraph be inserted in the order in lieu of that paragraph. The paragraph requested to be deleted from the order reads as follows:

It is further ordered, That respondents Texora International Corp., a corporation, its successors and assigns, and its officers, and Max Kovner, individually and as an officer of Texora International Corp., and respondents' representatives, agents, and employees, directly or through any corporation, subsidiary, division, or other device, do forthwith cease and desist from importing or participating in the importation of wool products into the United States except upon filing bond with the Secretary of the Treasury in a sum double the value of said wool products and any duty thereon, conditioned upon compliance with the provisions of the Wool Products Labeling Act of 1939.

The paragraph which respondents requested be inserted in the order to replace the paragraph deleted, as amended by their amended petition and further revised by agreement with staff reflected in their letters dated March 17, 1981, and March 24, 1981, is as follows:

It is further ordered, That respondents Texora International Corp., a corporation, its successors and assigns, and its officers, and Max Kovner, individually and as an officer of Texora International Corp., and respondents' representatives, agents and employees, directly or

through any corporation, subsidiary, division, or other device, shall cause such fiber content tests to be performed on each style or quality of their imported wool products as may be necessary to determine the minimum percentage by weight of the total fiber weight of each fiber present in such style or quality. If said fiber content tests reveal that the percentage of any fiber in any style or quality is misstated by more than three percent (3%) on the labels attached or affixed to such style or quality, such style or quality shall be relabeled to set forth on said labels the lowest percentage revealed by such tests of (1) wool, (2) recycled wool, (3) each fiber other than wool if the percentage of such fiber is five percent (5%) or more of the total fiber weight and (4) the aggregate of all other fibers. If said fiber content tests reveal that the percentages of fibers in such style or quality are, for practical purposes, undeterminable, then such style or quality shall be relabeled in accordance with rules 28 or 29 of the rules and regulations promulgated under the Wool Products Labeling Act of 1939, as for example:

- (i) made of miscellaneous fibers including acrylic, cotton and polyester, and with a minimum of 20% recycled wool, or
- (ii) 20% recycled wool
 - 20% acrylic
 - 20% cotton
 - 40% unknown reclaimed fibers

(1) The requirement that fiber content tests be performed on each style or quality of respondents' imported wool products shall not be applicable to any style or quality of wool products imported during any calendar year, the amount of which does not exceed one thousand (1,000) yards, and which is used solely for samples or swatches to promote the sale of such style or quality and is not sold or offered for sale.

(2) The fiber content tests required by this paragraph shall be performed by an independent fiber content testing laboratory approved for testing wool products by the Department of Defense, United States Government.

(3) As used herein, the terms "style" or "quality" shall mean wool products which are represented to have the same unit weight, fiber content and weave and are manufactured by the same foreign supplier.

(4) As used herein, the terms "imported" and "importation" shall mean entered for consumption when wool products enter the United States on a consumption entry and withdrawn for consumption when wool products enter the United States on a warehouse entry.

In support of their request, the respondents have advanced a number of considerations intended to show changed conditions of fact since the order was issued and to show that the public interest will best be served by granting their request. They stated that, soon after the order became final, they instituted a program of testing the fiber content of imported fabrics and relabeling those found by these tests to be misbranded. They have agreed to continue their program of fiber content testing and relabeling of misbranded wool products under the terms of a paragraph of the order that they requested the Commission to place in the order in lieu of the paragraph requiring the filing with the Secretary of the Treasury of a special performance bond. They stated further that the high costs of premiums charged by sureties on the bond have exceeded their profits. They cited as a competitive disadvantage the fact that many of their competitors are not subject to the bonding requirement and that bonds have not appeared in recent Commission orders and court judgments under the Wool Products Labeling Act of 1939.

Having considered the request, the Commission has concluded that the order should be modified to delete the bond paragraph and to insert in the order, in lieu thereof, a paragraph providing for fiber content testing and relabeling of misbranded wool products and that the modification will safeguard the public interest. Therefore,

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

It is further ordered, That the first "*It is ordered*" paragraph of the order to cease and desist of February 23, 1976, entered in Docket No. C-2794, be, and it hereby is, deleted and replaced by the paragraph requested by respondents as set forth above.

Complaint

—97 F.T.C.

IN THE MATTER OF

THE PILLSBURY COMPANY, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3065. Complaint, April 28, 1981—Decision, April 28, 1981*

This consent order requires, among other things, that a Minneapolis, Minnesota manufacturer of refrigerated bakery dough ("RBD") products and its major distributor, Kraft, Inc., cease from entering into or enforcing any agreement which bars either party from freely dealing with competitive firms. The order further requires that a prescribed amendment eliminating exclusive dealing requirements be incorporated into the companies' current distribution contract relating to RBD products.

Appearances

For the Commission: *James C. Egan, Jr.*, and *Debra Simmons*.

For the respondent: *Edward C. Stringer*, General Counsel, The Pillsbury Company, *John D. French, Faegre & Benson*, Minneapolis, Minn., *O. E. Swain*, Kraft, Inc., *C. Lee Cook, Jr.*, *Chadwell, Kayser, Ruggles, McGee & Hastings, Ltd.*, Chicago, Ill.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and in the exercise of authority vested in it by the Act, the Federal Trade Commission, having reason to believe that the above-named respondents have violated Section 5 of the Federal Trade Commission Act (15 U.S.C. 45), and that a proceeding in respect thereof would be in the public interest, hereby issues this complaint charging as follows:

I. DEFINITION

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

Refrigerated dough bakery products (RDB) means dough-based, unbaked, packaged food products that are chemically leavened. Such products require refrigeration during distribution and storage, and must be heated before consumption to fully activate the chemical leavening.

II. THE PILLSBURY COMPANY

PAR. 2. The Pillsbury Company ("Pillsbury") is a Delaware corporation with its general office located at 608 Second Ave. South, Minneapolis, Minnesota.

PAR. 3. Pillsbury is an international food company operating in three major segments of the food industry. The Restaurant Group prepares and sells food through Burger King, and limited menu and specialty restaurants. The Consumer Products Group manufactures and sells, among other things, a broad range of dry, refrigerated and frozen grocery products. The Agri-Products Group processes grain by milling it into flour for sale to commercial users or to the Consumer Products Group.

PAR. 4. In its fiscal year ending May 31, 1979, Pillsbury had total sales and revenues of \$2.166 billion, net earnings after taxes of \$83.5 million, and total assets of \$1.805 billion. According to Fortune magazine, in 1978 Pillsbury was the 176th largest in sales and 172nd largest in assets among the nation's industrial corporations.

PAR. 5. The Refrigerated Foods Division of Pillsbury's Consumer Products Group, an unincorporated division of Pillsbury, manufactures and sells refrigerated dough bakery products under various brand names, including Pillsbury, Hungry Jack, 1869 Brand, and Big Country. Pillsbury entered the refrigerated dough bakery products business in 1951, when it acquired Ballard and Ballard Company of Louisville, Kentucky.

PAR. 6. Pillsbury is the nation's largest manufacturer of refrigerated dough bakery products, with over 55% of total industry sales in its fiscal year ended May 31, 1978.

PAR. 7. At all times relevant herein, Pillsbury sold and shipped refrigerated dough bakery products throughout the United States and was, and is now, engaged in commerce or affects commerce as "commerce" is defined in the amended Federal Trade Commission Act.

III. KRAFT, INC.

PAR. 8. Kraft, Inc. (hereinafter "Kraft") is a Delaware corporation with its principal office located at Kraft Court, Glenview, Illinois.

PAR. 9. Kraft is an international manufacturer and marketer of food products, and is one of the nation's largest manufacturers and distributors of refrigerated dairy products. Its Retail Foods Group manufactures and sells cheese and related products; vegetable oil-based products such as salad dressings, margarine, cooking oils and shortening; jellies and preserves; and other products. The Dairy

Group manufactures and sells fluid milk, cream and manufactured dairy products, including cottage cheese, yogurt and sour cream. Kraft manufactures and sells under various brand names, including Kraft cheese, Miracle Whip salad dressing, Sealtest milk and ice cream, Philadelphia brand cream cheese, and Breakstone yogurt. Kraft also manufactures and sells non-food items, including chemicals, paper containers, aluminum cookware and toys.

PAR. 10. In the year ended December 31, 1979, Kraft had total sales to unaffiliated customers of \$6.433 billion; net income after taxes of \$188.1 million, and total assets of \$2.523 billion. According to Fortune magazine, in 1978 Kraft was the 39th largest in sales and 91st largest in assets among the nation's industrial corporations.

PAR. 11. In addition to products manufactured by it, Kraft also distributes Pillsbury's refrigerated dough bakery products. In 1979, Kraft's sales of Pillsbury's refrigerated dough bakery products totaled more than \$200 million.

PAR. 12. At all times relevant herein, Kraft distributed and sold refrigerated dough bakery products throughout the United States and was, and is now, engaged in commerce as "commerce" is defined in the amended Federal Trade Commission Act.

IV. VIOLATION

PAR. 13. Since July 2, 1951, Pillsbury and Kraft have entered into a series of written agreements and amendments thereto by which Pillsbury has appointed Kraft its principal distributor, with certain limited exceptions, of refrigerated dough bakery products. The agreements between Kraft and Pillsbury allow Pillsbury to sell refrigerated dough bakery products to additional other distributors should Kraft manufacture or sell competitive refrigerated dough bakery products.

PAR. 14. Pursuant to these agreements, Kraft has purchased substantially all of Pillsbury's refrigerated dough bakery products since July 2, 1951. In Pillsbury's fiscal year ended May 31, 1978, more than 99% of Pillsbury's sales of refrigerated dough bakery products were to Kraft, representing approximately 10% of Pillsbury's total consolidated net sales to unaffiliated customers.

PAR. 15. Since 1953, when Kraft closed its own refrigerated dough bakery products manufacturing plant in California, Kraft has not sold or distributed in the United States refrigerated dough bakery products manufactured by any company other than Pillsbury.

PAR. 16. The purpose or effect of these agreements has been to create an exclusive agreement between Pillsbury and Kraft, whereby

Pillsbury, the largest manufacturer of refrigerated dough bakery products in the nation, sells substantially all of these products to Kraft; and Kraft, one of the nation's largest manufacturers and distributors of refrigerated dairy products, purchases these products only from, and distributes these products only for, Pillsbury.

PAR. 17. The purpose or effect of the aforesaid acts and practices has been, or may be, to substantially lessen, hinder, restrain or suppress competition in the sale, distribution and purchase of refrigerated dough bakery products in interstate commerce.

PAR. 18. The acts, practices and methods of competition alleged in Paragraphs Thirteen, Fourteen, Fifteen and Sixteen are unfair and constitute a violation of Section 5 of the Federal Trade Commission Act.

Acting Chairman Clanton voted in the negative.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have 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 days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent The Pillsbury Company is a corporation organized, existing and doing business under and by virtue of the laws of the

State of Delaware, with its office and principal place of business located at 608 Second Ave. South, in the City of Minneapolis, State of Minnesota.

Respondent Kraft, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at Kraft Court, in the City of Glenview, State of Illinois.

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

ORDER

I.

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

Refrigerated dough bakery products (RDB products) means dough-based, unbaked, packaged food products that are chemically leavened. Such products require refrigeration during distribution and storage, and must be heated before consumption to activate fully the chemical leavening.

II.

It is ordered, That respondents Kraft, Inc. ("Kraft"), a corporation, and The Pillsbury Company ("Pillsbury"), a corporation, their successors and assigns, and their officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the sale, purchase or distribution of RDB products in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended do forthwith cease and desist from hereafter entering into or enforcing any written or oral contract with one another for the sale or distribution of RDB products to the retail trade by which:

(a) Pillsbury shall appoint Kraft its sole and exclusive distributor of RDB products; or

(b) Kraft shall be restricted in any manner from distributing the RDB products of a manufacturer other than Pillsbury.

III.

It is further ordered, That concurrent with the issuance of this Order, Kraft and Pillsbury shall make effective the attached

amendment to their current distribution contract dated July 1, 1976, relating to RDB products. This amendment is to be considered part of the Order. The purpose of this amendment is to allow:

(a) Pillsbury, in its sole discretion, to sell or distribute RDB Products to the retail trade through any means in addition to Kraft. Pillsbury will give Kraft at least sixty days' prior written notice of its intention to begin selling or distributing its RDB Products to the retail trade through any means in addition to Kraft;

(b) Kraft, in its sole discretion, to sell or distribute to the retail trade RDB Products manufactured by a person or persons in addition to Pillsbury. Kraft will give Pillsbury at least sixty days' prior written notice of its intention to sell or distribute competitive products;

(c) Pillsbury, in its sole discretion and upon prior written notice of at least one year, to terminate Kraft as a distributor to the retail trade of RDB Products in any area of the United States or in the entire United States; and

(d) Kraft, in its sole discretion and upon prior written notice of at least one year, to cease selling to the retail trade RDB Products manufactured by Pillsbury in any area of the United States or in the entire United States.

Provided, however that nothing in this Order shall be construed as requiring Pillsbury to sell or distribute its RDB products to or through any company or person other than Kraft; and Pillsbury shall be free, if it deems it advisable in its sole discretion, to continue selling its RDB products only to Kraft and its other existing distributors; and *Provided further*, that nothing in this Order shall be construed as requiring Kraft to sell, distribute, or otherwise deal in the RDB products manufactured by someone other than Pillsbury; and *Provided further*, that Kraft shall be free, if it deems it advisable in its sole discretion, to continue selling only the RDB products of Pillsbury.

IV.

It is further ordered, That thirty days after date of issuance of this Order, Kraft and Pillsbury shall each file with the Commission a written report setting forth in detail the manner and form in which it has complied with the Order. During the term of this Order, Kraft and Pillsbury shall each file with the Commission a written report setting forth in detail any change in their contract, or in any

amendments thereof relating to the provisions of this Order sixty days prior to the effective date of such change.

V.

It is further ordered, That Kraft and Pillsbury shall notify the Commission at least thirty days prior to any fundamental change in either respondent corporation which may affect compliance obligations arising out of this Order.

VI.

It is further ordered, That this Order shall expire ten years from the date of issuance of this Order.

Acting Chairman Clanton voted in the negative.

AMENDMENT

THIS AMENDMENT, entered into this 21st day of May, 1981, by and between The Pillsbury Company, a Delaware corporation (hereinafter referred to as "Pillsbury"), and Kraft, Inc., a Delaware corporation (hereinafter referred to as "Kraft"), shall become effective upon issuance of the Final Order arising from the Federal Trade Commission's investigation, File No. 741-0024.

WITNESSETH

WHEREAS, Pillsbury and Kraft are parties to an Agreement dated July 1, 1976 (hereinafter referred to as "the Agreement"), whereunder Pillsbury has appointed Kraft its exclusive distributor (except for five other specified distributors) of certain Pillsbury refrigerated dough bakery products (all of which products are hereinafter collectively called "RDB Products") to the retail trade; and

WHEREAS, Pillsbury and Kraft have entered into a consent agreement with the Federal Trade Commission requiring that the above-cited Agreement be amended; Accordingly, Pillsbury and Kraft do hereby amend the Agreement as follows:

1. (a) Notwithstanding any other provisions of the Agreement, Pillsbury, in its sole discretion, may in any geographic area (or in the entire United States) begin selling its RDB Products to the retail trade through any means in addition to Kraft. Pillsbury will give Kraft at least sixty (60) days' prior written notice of its intention to begin selling its RDB Products to the retail trade through any means in addition to Kraft.

(b) Notwithstanding any other provision of the Agreement, Kraft, in its sole discretion, may sell to the retail trade products competitive with the Pillsbury RDB Products in any geographic area (or in the entire United States). Kraft will give

Pillsbury at least sixty (60) days' prior written notice of its intention to sell competitive products.

(c) Notwithstanding any other provisions of the Agreement, upon at least one (1) year's prior written notice, Pillsbury, in its sole discretion, may in any geographic area (or in the entire United States) terminate Kraft as a distributor; and upon at least one (1) year's prior written notice, Kraft, in its sole discretion, may in any geographic area (or in the entire United States) cease selling the RDB Products of Pillsbury to the retail trade.

(d) In the event any notice referred to in subparagraph (a), (b), or (c) above refers to an area less than the entire United States, a separate notice shall be given with respect to each geographic area and shall identify the area to the degree practicable.

2. As used herein, the phrase "through any means in addition to Kraft" shall mean the use of one or more distributors or brokers, Pillsbury's own sales force, or any other means chosen by Pillsbury, in addition to Kraft. The term "competitive products" as used herein shall include products made by any existing or future manufacturer, including but not limited to Kraft. The term "geographic area" shall mean any definable part of the United States and may include parts not contiguous to one another.

3. In the event that any time after Pillsbury has commenced selling its RDB Products through means other than Kraft, Kraft remains a distributor of RDB Products in some geographic areas and the supply or availability of Pillsbury's RDB Products is insufficient to fill the orders of Kraft and the other means chosen by Pillsbury, Pillsbury shall reasonably and fairly allocate the supply of RDB Products among Kraft and such other means, taking into account all relevant circumstances, including historical purchases by the retailers being served by each of them.

4. In any geographic area in which RDB Products of Pillsbury are being sold by Kraft as well as through some other means (other than the distributors through which Pillsbury presently sells its RDB Products), Kraft shall not have the obligation set forth in paragraph 11 of the Agreement to assume all loss resulting from spoilage of products in that geographic area, and instead Pillsbury shall reimburse Kraft for all credits or discounts which Kraft must give its customers by reason of spoils or distress product in such area.

5. Paragraphs 6, 17, 18, 19, 20, and 25 of the Agreement dated July 1, 1976 (and the phrase "sole and exclusive" in paragraph 4 thereof) are hereby canceled and rescinded.

6. Paragraph 21 of the Agreement dated July 1, 1976, is hereby canceled and rescinded, excepting only that the definition of "best efforts" contained therein shall remain in full force and effect and be applicable only during such times as Kraft is the sole distributor of RDB Products.

7. All references in paragraphs 6, 17 and 25 of the Agreement to a consent order then contemplated to be entered into between Pillsbury, Kraft, and the FTC, and all provisions of the Agreement which are in any way dependent upon or arise from the operation of that consent order which was contemplated but never became effective, are hereby nullified and rescinded in their entirety.

8. All other provisions of the Agreement which are not modified hereby shall remain in full force and effect.

9. This Amendment shall become effective when the FTC has formally concluded the aforementioned investigation by issuing a Final Order.

IN WITNESS WHEREOF, the parties hereto have caused this instrument to be duly executed by their respective officers thereunto duly authorized on the date first above written.

THE PILLSBURY COMPANY

By _____

KRAFT, INC.

By _____

IN THE MATTER OF

MONTGOMERY WARD & COMPANY, INC.

FINAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED
VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT
AND THE MAGNUSON-MOSS WARRANTY ACT

Docket 9117. Complaint, Sept. 14, 1978—Decision, April 29, 1981

This order requires, among other things, a Chicago, Illinois operator of retail stores and catalog houses to make the text of written warranties readily available to prospective buyers prior to sale, and to prominently display signs advising consumers of such availability. Further, for a period of three years respondents are required to conduct semiannual audits to ensure continuing compliance with the provisions of the order.

Appearances

For the Commission: *Benita A. Sakin, Carlton Lowe and Kenneth B. Drost.*

For the respondent: *Bonnie B. Wan, Spencer H. Heine and T. E. Grace,* in-house counsel.

COMPLAINT

Pursuant to the provisions of the Magnuson-Moss Warranty Act and Rule 702, 16 CFR 702 promulgated thereunder, and the Federal Trade Commission Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission having reason to believe that Montgomery Ward & Co., Inc., a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Acts and Rule 702 promulgated under the Magnuson-Moss Warranty Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charge in that respect as follows:

PARAGRAPH 1. The definitions of terms contained in Section 101 of the Magnuson-Moss Warranty Act Pub. Law No. 93-637, 15 U.S.C. 2301 (Supp. 1975) and in Rule 702, 16 CFR 702.1 promulgated thereunder shall apply to the terms used in this complaint.

PAR. 2. Respondent Montgomery Ward & Co., Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business located at One Montgomery Ward Plaza, Chicago, Illinois.

PAR. 3. Respondent is now and has been in the operation of a chain of retail department stores and catalog houses throughout the

United States. Its volume of business has been and is substantial. In the operation of its retail department stores, respondent is now and has been distributing, advertising, offering for sale and selling among other items, major appliances, including but not limited to refrigerators, stoves, washer-dryers, dishwashers, stereos and televisions which are consumer products. Therefore, respondent is both a supplier and seller of consumer products.

PAR. 4. Respondent, in the course and conduct of its aforesaid business, now causes and has caused consumer products to be distributed in commerce.

PAR. 5. The Federal Trade Commission, pursuant to Title I, Section 109 of the Magnuson-Moss Warranty Act, 15 U.S.C. 2309, has duly promulgated the Rule concerning the Pre-Sale Availability of Written Warranty Terms on December 31, 1975 [16]CFR 702 (1977)], effective January 1, 1977. A copy of the Rule is marked and attached as Appendix A,* and is incorporated in this Complaint by reference as if fully set forth verbatim.

COUNT I

Alleging violations of the Magnuson-Moss Warranty Act and the implementing Rule promulgated under that Act and the Federal Trade Commission Act, as amended, the allegations of Paragraphs One through Five are incorporated by reference in Count I as if fully set forth verbatim.

PAR. 6. In the ordinary course and conduct of its aforesaid business, respondent regularly offers and has offered written warranties on consumer products. Therefore, respondent is a warrantor of consumer products.

PAR. 7. In the further course and conduct of its business as warrantor of consumer products actually costing more than \$15.00 respondent has failed to provide its retail stores with the warranty materials required by 16 CFR 702.3(b)(1) which are necessary for such stores to comply with the requirements for sellers of consumer products as set forth in 16 CFR 702.3(a).

PAR. 8. Respondent's failure to comply with the provisions of 16 CFR 702 constituted and now constitutes a violation of the Magnuson-Moss Warranty Act and, pursuant to Section 110(b) thereof, an unfair or deceptive practice under Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1), as amended.

* Not reproduced herein for reasons of economy.

COUNT II

Alleging violations of the Magnuson-Moss Warranty Act and the implementing Rule promulgated under that Act and the Federal Trade Commission Act, as amended, the allegations of Paragraphs One through Five are incorporated by reference in Count II as if fully set forth verbatim.

PAR. 9. In the ordinary course and conduct of its aforesaid business, respondent regularly sells or offers for sale consumer products for purposes other than resale or use in the ordinary course of the buyer's business. Therefore, respondent is a seller of consumer products.

PAR. 10. On or after January 1, 1977, respondent, in the ordinary course of its aforesaid business as a seller of consumer products actually costing more than \$15.00 and manufactured on or after January 1, 1977 has failed to make the terms of written warranties available to the consumer prior to sale through utilization of one or more of the methods required by 16 CFR 702.3(a)(1):

1. Clearly and conspicuously displaying the text of the written warranty in close conjunction with the product;
2. Maintaining a binder system readily available to the consumer along with conspicuous signs noting the location of binders where the binders themselves are not in plain view;
3. Displaying the warranty package in such a way that the text of the warranty is visible; and
4. Placing a sign with the warranty terms in close proximity to the product.

PAR. 11. Respondent's failure to comply with the provisions of 16 CFR 702 constituted and now constitutes a violation of the Magnuson-Moss Warranty Act and, pursuant to Section 110(b) thereof, an unfair or deceptive practice under Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1) as amended.

INITIAL DECISION BY THEODOR P. VON BRAND,

ADMINISTRATIVE LAW JUDGE

DECEMBER 19, 1979

PRELIMINARY STATEMENT

The complaint charges Montgomery Ward & Co. ("Wards") with

violating the Magnuson-Moss Warranty - Federal Trade Commission Improvements Act, 15 U.S.C. 2301 et seq. (1979), and 16 C.F.R. 702 (1979) promulgated under that Act. Count I of the complaint alleges that respondent failed to supply its retail stores with the warranty materials needed by its stores to comply with the requirements of 16 C.F.R. 702.3. Count II charges that Wards failed to make the terms of written warranties available to the consumer prior to sale through utilization of one or more of the methods required by 16 C.F.R. 702.3(a)(1) (The Pre-Sale Rule). Both counts of the complaint allege that the failure to comply with the regulations constituted a violation of the Magnuson-Moss Warranty Act and an unfair or deceptive practice under Section 5 of the Federal Trade Commission Act. [2]

No proof was offered in support of the charges in Count I of the complaint. That Count is dismissed.

The Pre-Sale rule, which was promulgated on December 31, 1975, became effective a year later on December 31, 1976 (16 C.F.R. 700.12 (1979)).

This matter is now before the undersigned for decision based on the allegations of the complaint, the answer, the evidence of record and the proposed findings of fact, conclusions and briefs filed by the parties. All proposed findings of fact, conclusions and arguments not specifically found or accepted herein are rejected. The undersigned, having considered the entire record and the contentions of the parties, makes the following findings of fact and conclusions, and issues the orders set out herein.

FINDINGS OF FACT

I. RESPONDENT AND ITS BUSINESS

1. Montgomery Ward & Co., Incorporated ("Wards") is a corporation, incorporated under the laws of the State of Illinois with its principal office and principal place of business located at One Montgomery Ward Plaza, Chicago, Illinois (Ans., ¶ 2; RA 1-3).

2. Wards is now and has been engaged in the operation of a chain of retail department stores and catalog houses throughout the United States (Ans., ¶ 3).

3. In the course of its business, Wards now causes and has caused consumer products to be distributed in commerce (Ans., ¶ 4).

4. Wards sells products through approximately 650 retail outlets: 411-427 retail stores in 41 states and 230 limited line catalog-retail stores (RA 4 and 5; RX 326 at p. 1-18; RX 327 at pp. 1-21-1-22).

5. Retail stores are full-line department stores carrying an

assortment of hard and soft goods and certain leased departments which provide various personal services to customers. In addition to providing delivery, installation and repair services, most retail stores operate restaurants and automobile centers (TBA) which install automotive equipment, such as tires and accessories (RX 326 at p. 1-18, RX 327 at p. 1-21). [3]

6. The limited line catalog-retail stores contain catalogs and maintain in stock for sale at retail several lines of merchandise, principally paint, appliances, automotive accessories and tires (PAAT) (RX 326 at p. 1-19, RX 327 at pp. 1-22).¹

7. During the year ending December 28, 1977, Wards employed in excess of 103,000 persons (RX 326 at p. 1-20). In the following year, ending December 27, 1978, it employed in excess of 107,700 employees (RX 327 at pp. 1-23). Temporary sales people are used, for example, at the Christmas season (Kerin 1178-79). Employees are sometimes transferred from store to store (Ochu 984-85; Pagliaro 1015-16; Cote 1099-1100; Sorenson 1130-31).

8. Wards' retail operations sell merchandise acquired from approximately 6,000 different sources (RX 326 at p. 1-18; RX 327 at p. 1-21).

9. Over 90 percent of the products sold by Wards, whether or not covered by a written warranty, are sold under respondent's private labels (RA 16).

10. On some private label merchandise, costing more than \$15.00 and manufactured after January 1, 1977, Wards offers its own written warranties (RA 10). Wards also sells non-private label consumer products costing more than \$15.00 and manufactured after January 1, 1977, which are warranted by companies other than Wards (RA 17).

II. CHARACTERISTICS OF WARDS' RETAIL STORES

11. Wards' retail stores range in size from 1,720 to 220,297 square feet of selling space and from one to four floors of selling areas (CX 45).

12. In the Bloomington store, Bloomington, Minn. which has two selling floors with 114,000 square feet of selling space (Pagliaro 1065), the time needed to walk from one end of the sales floor to another does not exceed two minutes (Pagliaro 1042-43, 1057).

13. The majority of the three and four-level stores are the smallest stores in terms of square footage of selling space (CX [4]45).

¹ Complaint counsel introduced no evidence concerning Pre-Sale availability in PAATS stores.

However, Wards' store at 140 S State Street, Chicago, Ill. is one of Wards' largest stores; it consists of four selling floors totaling 200,624 square feet of selling space (CX 45cc). Most Wards' full-line retail stores contain several entrances (CX 50-55).

14. More than 50 percent of Montgomery Ward Automotive Centers are located in separate buildings from the closest Montgomery Ward retail store (RA 31d).

15. The Customer Accommodation Center (CAC) in each store is an area where numerous customer services are handled and where consumers go for information and assistance (RA 34; Banis 322-23, 337; Hollon 502; Pagliaro 1027).

Departments and Merchandise in Wards' Stores

16. Most Wards' full-line retail stores contain 55 departments. These departments fall within four general categories of merchandise: "A" Lines - Soft Goods; "B" Lines - Home Furnishings; "C" Lines - Heavy Line Merchandise; "D" Lines - Major Appliances (RX 343). However, not every Wards' store contains each of these 55 departments. The location of particular departments within a Wards' retail store varies from store to store and there is no general pattern or practice which governs where a particular department is located in a store in relation to another particular department (CX 50-55; Pagliaro 1027-28).

17. The layout of merchandise within a department varies from store to store (Williamson 947-50; Sorenson, 1135-37; Pinelli Interview, pp. 5-11). The layouts change because of remodeling (Gelder 528, 538-39; Ochu 1002).

18. In Wards' stores, "major appliances" includes the entire "D" Lines departments, including sewing machines, vacuum cleaners, televisions, stereos, records, air conditioners, humidifiers, and dehumidifiers, as well as the major kitchen appliances (RX 343; Pagliaro 1033-34; Williamson 977).

19. The "D" Lines - Major Appliances - in Wards' stores are not physically located in one selling area. In multi-level stores, some departments within the "D" Lines are on different floors. In some stores, the four departments which comprise the major kitchen appliances are physically separated (Pagliaro 1033-34, 1040-41).

20. The mix of merchandise in Wards' stores does not remain constant; rather, the variety of consumer products (including those subject to the Pre-Sale Rule) constantly changes (RX 369a-r¹⁶; [5]RX 370a-z⁵; RX 371a-rrrr; RX 372a-wwww). Not all merchandise is carried at all times by every retail store (CX 47).

21. In the TV/Stereo and Major Appliance Departments virtually all products sold are covered by written warranties and cost more than \$15.00 (Williamson 962-63; Ochu 1002-03; Cote 1106; Sorenson 1152).

22. In most departments in the retail stores, only a limited number of products sold are covered by written warranties and cost over \$15.00. Several departments sell only one or two such warranted products (CX 1e-1; CX 1f⁶-w⁶).

23. The following lines of merchandise sold under Wards' private label carry identical warranties: all black and white television sets are covered by the same warranty (CX 1ww; RX 2; Cote 1107); all color television sets are covered by the same warranty (CX 1xx; RX 1; Cote 1107); all microwave ovens are covered by the same warranty (CX 1h³; RX 3); and all private label small kitchen appliances from toasters to coffeemakers to popcorn poppers are covered by one, all-inclusive warranty (CX 1p⁵; RX 347-56).

III. WARDS' BINDER AND SIGN PROGRAM

24. After publication of the Pre-Sale Availability Regulations (16 C.F.R. 702), Wards chose as its primary method of compliance, a binder and sign program which would be implemented by providing each retail outlet with a select number of binders and signs (CX 10; McWaters 219-20, 906, 919). The decision to adopt the binder system was made by a Vice President, Mr. Marchese, (McWaters 218-19). Implementation of the policy was the responsibility of Chet Eckman, Vice President-Retail Operating Manager (McWaters 219, 221; Eckman 228-30).

25. Beginning August 1976, Wards took steps to assure that the binders would contain not only all the Wards' private label warranties but also the warranties covering non-private label merchandise. To accomplish this, Wards conducted surveys of its 6,000 sources to obtain copies of their warranties for use in the binders (RX 331, 332).

26. In the late summer and early fall of 1976, at the same time that all Wards' warranties were being revised to comply with the new 701 Regulations, meetings were held with all the merchandise department managers to discuss the revision of Wards' own warranties and the continued efforts to obtain source warranties for the binders (CX 12, 19, 20). [6]

27. Prior to the effective date of the regulations, corporate officials corresponded with store managers and store advertising managers concerning the revision of Wards' warranties, emphasize-

ing that care had to be taken at the local levels to assure compliance with the company's legal obligations (RX 335).

28. The warranty binder employed by Wards is a large, 3-ring, looseleaf, heavy plastic binder. It is bright blue with large, white block lettering "WARRANTIES" on the front and spine (CX 1). The binder is divided into three parts: the white pages contain the index, by department, of all the products in the binder; Montgomery Ward warranties for private label products are printed on pink pages; and warranties for non-private label merchandise are printed on yellow pages. The three binder sections are separated by heavy green dividers which identify the section for Montgomery Ward private label warranties and the section for source warranties (CX 1; RX 369, 370, 371, 372). The text of all warranties on private label and source merchandise is included in the binder (CX 1; Pagliaro 1022; McWaters, 908).

29. The size, construction, and content of each warranty sign distributed were uniform for all Wards' stores (CX 43h). These signs were quarter-sheet size, 11" x 14", with orange lettering on white background (CX 2; Pagliaro 1023; Sorenson 1132, Kerin 1173-74). The orange and white coloring for the warranty sign was a distinct color combination, not used for any other types of signs in Wards' retail stores (Cote 1113; Sorenson 1132-33).

30. These signs state the following:

MERCHANDISE WARRANTY INFORMATION

Warranties covering merchandise sold in this store are available for inspection at the Customer Accommodation Center and the Automotive Center.

Any salesperson will direct you to these or other convenient Warranty information locations (CX 2).

A. Implementation of Initial Binder and Sign Program at the Store Level

31. The first step in the actual implementation of the binder and sign program at the retail level was a letter from Mr. Eckman to all retail store managers in November 1976 and a [7]separate letter to each PAAT manager, also sent in November 1976. These letters stated that the Consumer Product Warranty Act (Magnuson-Moss Warranty Act) requires sellers to make written warranty terms available to consumers before the sale of warranted merchandise (CX 10; RX 333).

32. For retail stores, Mr. Eckman's instructions were that the warranty binders were to be placed in the Customer Accommodation Center; the Automotive Center; and for stores with multi-levels, the

store manager was to select a central location, by floor, for placement of another warranty binder. Mr. Eckman also stated that warranty signs were being made and distributed from Chicago. A sign was to be placed in conjunction with each binder and additional signs displayed in prominent areas as follows: A) Appliance Department; B) A main entrance/exit to the store; and C) Near the area of escalators/elevators (CX 10).

33. Three binders were, in fact, sent to each retail store (CX 43b; RX 340; Eckman 242; Pagliaro 1022, 1030). The initial distribution of three warranty binders was made on November 16-19, 1976 (CX 43b). Depending upon store size, varying numbers of warranty signs were distributed to each retail store on November 22, 1976 (CX 43h).

34. Under a separate directive, each PAAT store was sent one warranty binder for display. In PAAT stores, warranty signs were to be displayed with the warranty binder and in the appliance department and the automotive area (RX 333, 340).

1. *Distribution and Placement of Binders*

35. In each of Wards' stores, there are approximately thirty-five departments carrying products for which warranty information is included in respondent's binder (CX 1c). Binders were not provided by respondent for each department in its stores which carried warranted goods (RA 20).

36. Pursuant to the binder part of the program, for each retail store, there was one binder per floor as follows:

a. In the Customer Accommodation Center leaving to the store manager's discretion the location within the CAC (CX 10; Eckman 326);

b. In the Automotive Center (TBA), which is more often than not, in a detached building (CX 10; Finding 14). [8]

c. In a third location, if needed because a multi-level store had a detached TBA. The choice of a third location on the remaining floor which did not have a binder as a result of a. and b. above was left to the discretion of each store manager (Pagliaro 1025). Store managers were given such discretion because no two stores are physically the same in size and layout (Finding 16).

37. Respondent's instruction dated November 19, 1976 to its store managers regarding the placement of binders and signs did not require that such binders be placed in either the Major Appliance Department or the TV/Stereo Department (CX 10a-b). Both of these

departments carry products which come within the scope of the Pre-Sale Rule (Finding 21).

38. In the period September 1, 1977 to February 1, 1978, a customer in some Wards' stores, in order to review a warranty binder, was required to go either to the Customer Accommodation Center or the Automotive Center (RA 21).

2. *Distribution and Placement of Signs*

39. Pursuant to the signing part of the program, store managers were, on November 19, 1976, instructed to display one sign (CX 2) with each binder. Additional warranty signs were to be displayed in "prominent areas" as follows:

- a. Appliance Department;
- b. Main entrance; and
- c. Escalator/elevator area (CX 10).

40. The initial shipment of signs was sent to each of Wards' retail stores on November 22, 1976 (CX 42e, 43h). Wards sent no fewer than two and no more than eight signs to each of its retail stores on that date (CX 42e, 43h). The number of signs sent to each store was based on the size of the store as determined by the store's square footage of selling space. The number of signs sent per store was as follows:

13,000	square feet	2
27,850	"	2
40,900	"	4
72,000	"	6
87,500	"	6
103,000	"	8 [9]
124,000	"	8
140,000	"	8
165,000	"	8

(CX 42e, 43h, 43o)

41. Wards' policy of requiring one sign with each of the three binders left some stores, on the basis of the initial shipment, with no signs for placement anywhere else in the store and other stores with at most five additional signs for placement at other points in the store. The number of signs from the initial shipment available for display other than with binders is as follows:

Number of stores	Number of signs available for placement in the store other than with the binder
82	0
55	1
148	3
138	5

(CX 10, 43e, 43h, 43o)²

42. In the period September 1, 1977 to February 1, 1978, respondent did not automatically supply its retail stores with enough warranty information signs for placement of such a sign in each of its departments where warranted consumer products were sold (RA 51).

43. Between September 1, 1977 and February 1, 1978, it was not the policy of Montgomery Ward to post signs indicating the location of warranty binders in each retail department of each of its retail stores where warranted consumer products were sold (RA 53).³ [10]

44. Prior to February 1, 1978, an additional 1,100 signs identical to CX 2 were distributed to retail stores on a "by request" basis. No records exist identifying those of respondent's four hundred plus retail stores which requested such signs (CX 42e, 43i).⁴

3. *Presentation of the Binder and Sign Program to Wards' Personnel*

45. Meetings were held by the store manager during which the binder system was discussed. For example, one store manager held one meeting with department managers and followed up with a second meeting of all store personnel (Pagliaro 1024). In other instances, the store manager held meetings with the department managers and store staff and left it up to the department managers to inform their sales personnel (Williamson 944-45; Ochu 989, 998;

² Respondent instructed its retail stores to place warranty signs with each binder as well as in the appliance department, a main entrance/exit and the escalator/elevator, if applicable (CX 10).

³ In this connection, respondent's admissions explained that:
[B]etween September 1, 1977 and February 1, 1978, Montgomery Ward's retail stores were not directed to place signs indicating location of warranty binders in each retail department of each of its retail stores where warranted consumer products were sold. However, since individual stores could and, in fact, some did request and/or print their own additional signs, Respondent is unable to state whether, in a particular retail store, such signs were placed in each retail department in which warranted consumer products were sold (RA 52).

⁴ After notification on February 2, 1978, by the Federal Trade Commission that Wards was not in compliance with the Pre-Sale Rule, signs identical to those in the initial distribution (CX 2) were sent to the retail stores in the same pre-determined quantity as the November 22, 1976, distribution; additional unrecorded distributions were made by request between February 14, 1978, and February 26, 1979 (CX 43i-j).

Cote 1100-1101; Sorenson 1132-34). In at least one instance, the meeting with the department managers was a special meeting called solely to discuss implementation of the binder system (Williamson 944-45). In other instances, it was discussed at a regularly scheduled weekly meeting (Pagliaro 1024; Sorenson 1147). Department managers related the details of the program to their staffs either at meetings (Williamson 950-55; Ochu 989; Sorenson 1133-34), or spoke to their sales personnel individually (Cote 1105-06). [11]

B. Supplementary Efforts Regarding the Initial Binder and Sign Program

46. Following the initial distribution of warranty binders in November 1976, additional binders (CX 1) were distributed to Wards' retail stores on a "per request" basis. Most of these shipments were not documented (CX 43b, g). However, in the fourteen months following the initial distribution of signs in November 1976, an additional 1100 signs (CX 2) were distributed to Wards' retail stores on this basis (CX 43i).

47. While it was not the policy of Wards to require its retail stores to fabricate additional signs, certain stores did fabricate additional signs. Store managers were afforded latitude to implement the program and to tailor the program to the needs of a particular store (CX 43k; Williamson 964). A random survey of Wards' stores selected by complaint counsel, showed some stores fabricated as many as 25, 15, 12, and 10 additional signs. A total of 36.4 percent of the surveyed stores fabricated some quantity of signs for use in addition to the corporate-mandated signing (the survey specifically excluded signs fabricated as replacements for corporate signs) (CX 431-n).

48. In 1977, one year after the binder and sign program was initially implemented, Wards' Merchandise Development Manager arranged and conducted a series of meetings in connection with that program (CX 19; RX 336-38). Three meetings were held in Chicago on April 20, 1977 (RX 337), and were attended by Mr. McWaters, Mr. Frank Berman, and by various persons in the merchandise departments, (McWaters 925). A make-up meeting was held on April 27, 1977, for those Chicago department managers who could not attend on April 20th. An additional meeting was held in New York on April 29th for the New York Office (RX 338). Those attending the meetings were provided with materials regarding continuing compliance with the 702 Regulations and copies of new warranty request forms (RX 338). At this series of meetings, McWaters explained the 702

Regulations and other applicable Federal Trade Commission requirements (CX 20e, f, h, j, k, n).

49. Since its inception in November 1976, Wards' binder system has been updated regularly. In its first year alone, four sets of warranty updates were distributed for inclusion in each binder (RX 369, 370, 371, 372).

50. The written instructions regarding the proper display for warranty binders and signs were repeated with each set of updates (RX 369, 370, 371, 372). [12]

51. By late 1977 or early 1978, Wards had learned that there were allegations that it was not in compliance with the 702 Regulations (CX 26; Terry 795-97).

C. Expansion of the Binder And Sign Program

52. During May and June of 1978, the binder and sign program was expanded. Brown and white plastic signs (RX 346) were sent to each retail store to be permanently affixed to cash registers/terminals in the B, C, and D Lines. These signs stated that merchandise warranty texts were available at the CAC and Automotive Service and that access to warranty information could be obtained by asking any salesperson (CX 29; RX 346). The plastic signs were received and glued to the top of the cash registers (Williamson 959-60; Ochu 996; Pagliaro 1053-54; Cote 1112-13; Sorenson 1139-40).⁵

53. Two silver and black warranty binder stands (RX 380) were sent to each store to be placed on the CAC and TBA counters (CX 28).

IV. WARDS' AUDIT PROCEDURES

A. General Corporate Audit Procedures

54. Wards' corporate audits are "exception" audits. This means that auditors are provided with the instructions to conduct an audit; the procedures are employed and the designated items reviewed; and then a written report is required only on those items on which exceptions or deficiencies are found. If an audit makes no mention of a particular aspect under review, the report is construed as meaning that the auditor found no violation (Terry 790-91).

55. Wards' Assistant Vice President, William Terry, is the "general auditor" of the company; he is primarily responsible for all the corporate auditing done within the company. Directly reporting

⁵ Although some stores had more than 25 cash registers in the B, C, and D lines, only 25 signs to be affixed to cash registers were initially sent to each store (CX 30).

to Mr. Terry are nine managers, four of whom are Field Audit Managers. Each of the Field Audit Managers is responsible for the field audits within his region. These [13]regions are the combined Northeast and Southeast, North Central, South Central, and Western. Three out of four of these Field Audit Managers have assistants (Terry 788-89).

56. Reporting to the Field Audit Managers and their assistants in each region are the field auditors, classified as senior auditors, internal auditors, and auditors (Terry 789-90). Approximately 38-40 field auditors actually conduct the store audits. Wards also employs certain special auditors: administrative auditors, construction auditors, factory auditors, and EDP auditors (Terry 802-04).

57. Corporate audits of Wards' stores are generally done on a two or three-year cycle (Terry 791). Those stores which are better than average in terms of sales, profit, operations, inventory recovery and which have an assigned store controller would be on the longer audit cycle (Terry 791-92, 852).

58. The Field Audit Manager initiates the audit for any particular store and determines when one shall take place. He considers travel, personnel available, and whether someone in the corporate office may have requested acceleration of an audit in determining when a particular store is to be audited (Terry 799-800).

59. In addition to the regular corporate audits, there are follow-up retail store audits and special retail store audits. A follow-up audit may be performed six to nine months after a regular audit which revealed conditions which were generally bad in a store. A special audit is called when specific information requires it such as when an individual's integrity is at stake (Terry 801).

60. The corporate auditors who audit Wards' retail stores utilize a manual. The manual contains about 15 different sections including cash, sales records, credit service, accounts payable, merchandising, etc. (Terry 804-05). Each section describes the detailed audit program.

61. The audit manual does not list every possible item which may be audited. The auditing staff reviews new procedures and policies to determine if a particular item should be made part of the audit program. If so, an audit letter is issued to the Field Audit Managers who in turn issue an "auditor letter" (Terry 797-98). The instructions for audit procedures consist of the audit manuals plus the "auditors letters". Periodically—every three or four years—the manual is revised to incorporate the procedures contained in the "auditor letters" (Terry 798-99).

62. There is a procedure to ensure that the directives in the

manual and the auditor letters are followed. Field Audit [14] Managers review every audit submitted and contact auditors, if they believe a particular procedure is not being covered. On larger audits, they visit auditors in the field, review their work before it is submitted, and attend the closing meetings with management. At times, they supervise auditors in the conduct of the audit. If a Field Audit Manager observed that no notation was made for a particular procedure over a period of time, he would review the auditors' records to ensure compliance with proper procedures (Terry 807-09).

63. When a store is to undergo a corporate audit, the auditor shows up at the store. The store manager has no prior knowledge of the audit. Only a store controller, who is responsible for working with the auditor, may get advance notice of the audit, but the store controller is forbidden to notify the store manager (Terry 885; Pagliaro 1059). An audit may last anywhere from five to seven weeks. Among store personnel, only the store controller will accompany the auditor during parts of the audit (Pagliaro 1059). The auditor in the course of an audit performs many functions including counting cash, examining bank deposits, checking fitting rooms, and checking for binders and signs. The auditors physically go to the areas they are checking (Terry 882-83).

64. Upon the conclusion of a store audit, there is an audit review meeting. Present is a representative from the regional audit department, the district manager, the corporate field auditor, and the store management staff (Kerin 1218-19). Within a couple of weeks of the audit, the store manager must submit a written response to the audit explaining what was done or is to be done to correct each reported deficiency. This written response is sent to the Regional Vice-President, the District Manager, Mr. Terry, the Regional Controller, and the Regional Field Audit Manager, among others (RX 341; Pagliaro 1060-61; Kerin 1236).

65. A good corporate audit is important to store management and deficiencies are a serious matter which ultimately affect a store manager's evaluation (Pagliaro 1061; Kerin 1218-19, 1232a-33).

B. Specific Warranty Binder and Sign Program Auditing

66. In November of 1976, after receiving copies of Mr. Eckman's correspondence implementing the Wards' binder and sign program, Mr. Terry determined to add compliance with that program to the audit procedures. He issued a bulletin (CX 11) to the four Field Audit Managers, attaching the correspondence detailing the binder system (CX 10, 88, 89). The bulletin [15]directed that effective with audits commencing January 1, 1977, for retail and PAAT stores, auditors

must determine that warranty binders were displayed and signs posted as required by corporate instructions (CX 11; Terry 792-94).

67. After the audit procedure with respect to the binder and sign program was implemented on January 1, 1977, Wards' corporate auditors throughout the country reviewed stores for proper placement and display of warranty binders and signs. No exceptions on this point were shown for 93 percent of the retail stores audits (RX 20-325). CX 57-78 are audit reports noting deficiencies in compliance with Wards' binder and sign program.

68. When deficiencies were found, corrective action was taken to bring the deficient stores into compliance with the binder and sign program (RX 341-42; Kerin 1234-36). The audit procedure reinforced the store managers' awareness of the requirements of the binder and sign program (Kerin 1232a-1234).

69. After learning in late 1977 or 1978 of allegations that Wards was not complying with the Pre-Sale Rule, William Terry, Vice President Auditing, determined that the warranty binder and sign program should be added to the specific checklist which auditors must complete. From this checklist a statistical report is generated which permits the corporate offices to evaluate the overall level of compliance with this program by Regional and by Corporate totals (Terry 795-97, 810-12, 832-33, 836, 847).⁶

Retail Store Controllers

70. More than 200 retail stores have store controllers; namely, those stores with sales volume in excess of \$10 million and certain stores with sales volumes between \$6-10 million (Terry 852). Store controllers' responsibilities include accounting, invoicing records, inventory recovery, and store audits (Terry 848). [16]

71. Store controllers are physically located in retail stores and they perform certain functions for the store managers, but their main reporting relationship is to the Regional Controller and Regional Retail Controller (Terry 850; Pagliaro 1018).

72. Store controllers perform two complete store audits per year - one in the fall and one in the spring. They basically perform one audit section per week over a period of 13 to 15 weeks, stop the audit procedures for a period of time, and then conduct another 13 to 15 week cycle. Each 13 to 15 week cycle constitutes a full store audit

⁶ When an item is added to such a checklist, the field auditors must specifically report that they reviewed the item and state that they found or did not find compliance (Terry 811-13). The effect of this checklist is to turn a particular audit item from a purely "exception" nature to a required check-off on a list. This checklist is not the same as a "positive action comment" which requires for a particular subject that a written comment actually be included in every audit report (Terry 822-23, 842).

(Terry 848-49; Pagliaro 1018-19). The only exception to two complete audit cycles per year by store controllers is when the store controller's audit cycle is interrupted by a corporate audit. The store controller's cycle stops during a corporate audit and does not begin again until the start of the next scheduled cycle (Terry 862).

V. THE FTC SURVEY OF RESPONDENT'S STORES

73. In the latter part of 1977, a number of the Commission's Regional Offices conducted surveys of respondent's stores to determine compliance with the Pre-Sale Rule (Findings 74-92).

The survey's primary focus was on the Major Appliance Department and the TV/Stereo Department in each store, because these were big ticket items and the Commission's staff felt it was important for consumers to be able to examine the warranty in the case of those products (Hollon 482).

A. The Individual Stores

74. *Serramonte Shopping Center California*

The Serramonte store, located within a mall, is a two story building consisting of one selling floor and one floor of administrative offices (Austin 274-75). There are approximately 10 consumer entrances to the store (Austin 302-03). The store was surveyed in November 1977 by consumer protection specialist, Fred C. Austin (Austin 269-70).

No warranty signs were posted nor binders displayed in the Major Appliance Department of the Serramonte store (Austin 275-76, 277, 309). The Major Appliance Department contained 20-50 [17]appliances (Austin 291); no warranty information was visible on the exterior of any appliance (Austin 276-77, 306). An examination of the interior of six appliances revealed written warranty information in one refrigerator and one freezer (Austin 291, 293, 305-06). In addition, the other four models contained sealed informational packets (Austin 294). No warranty information was visible on the exterior of the packet. Warranty information may have been contained in the interior of the sealed packets, but they were not opened for examination (Austin 310-13).

At the time of the survey, there were no signs at the cash registers directing consumers to warranty information. Signs containing information on the availability of written warranties were placed at cash registers at a later date (Austin, 284, 303-04).

An examination of the administrative floor, which included the CAC, revealed no signs and no binders (Austin 285-87).

75. *State Street, Chicago, Illinois*

The State Street store in Chicago is a free-standing store (Hollon 503). On November 15, 1977, this store was surveyed by Commission investigator Jennifer Hollon (Hollon 502).

There were no signs advising of the availability of warranty information at the entrance or en route to the Major Appliance and TV/Stereo Departments (Hollon 503, 505, 508).

The Major Appliance Department had no signs, no binders, and no warranty information on the exterior of the products (Hollon 503-04). When saleswoman Ms. Kellerman was asked for a copy of the warranty on a stove she produced a copy from a desk in the department (Hollon 504-05, 607). Ms. Kellerman did not mention the availability of warranty binders (Hollon 507, 607).

The TV/Stereo Department was devoid of warranty information on the products or in the form of signs or binders (Hollon 505). An inquiry as to the warranty covering a stereo produced an oral summation of the terms. When the same salesman was asked for a copy of the warranty he responded that "you get it when you buy the stereo" (Hollon 506).

The CAC was not surveyed. [18]

76. *Evergreen Park, Illinois*

The Montgomery Ward store in Evergreen Park is a four story mall store (Pinelli 18; Hollon 509), with seven consumer entrances and a detached Automobile Center (Pinelli 19, 30). On November 18, 1977, Jennifer Hollon surveyed the store as part of an FTC project to determine the presale availability of warranty information (Hollon 479-80, 508). Orlando P. Pinelli, whose unsworn interview was made part of the record by order issued September 25, 1979, is manager of the Major Appliance Department at Evergreen Park (Pinelli 2). Mr. Pinelli has been appliance manager at Evergreen Park since October 1977 (Pinelli 2).

There was no warranty information at the entrance to the store used by the FTC investigator (Hollon 509, 514).

In the Major Appliance Department, which contains 3600 square feet of selling space, there was a sign placed in a four foot sign holder (Pinelli 3-4, 57). It was the practice in the Evergreen Park Major Appliance Department to remove all papers, including warranties, from display items; the warranty information was then placed in

folders in a file cabinet next to the department manager's desk (Pinelli 36-37). Warranty information was not available in, around or on the products (Hollon 512-13). In the summer of 1978, after the FTC survey, opaque seals were affixed to the front of microwave ovens and gold plastic signs were placed on top of these units (Pinelli 40-43). Ms. Hollon spoke with saleswoman, Ruth Adams, about the warranty for a microwave oven. The saleswoman quoted the terms of the warranty but did not produce a written copy or refer to a binder (Hollon 513). Sales personnel, in Major Appliances, were instructed as to the existence of binders (Pinelli 38-39). They were instructed to inform customers of warranties, but normally they would not show a copy of the written warranty unless the customer requested a copy (Pinelli 44-45, 50).

There were no binders in the Major Appliance Department located on the lower level at Evergreen Park (Pinelli 18-19, 54; Hollon 512-13). The nearest binder was in the CAC located three floors above major appliances (Pinelli 54-57).⁷ [19]

No warranty information of any kind was available in the TV/Stereo Department located on the third floor of the store (Hollon 509-10). There were no decals on products, no binders and no signs on the products or on the walls (Hollon 509-10). When asked for a copy of a television warranty, saleswoman, Pat Steegman, gave a brief summary of the warranty terms and service [20]contract. A further request to see a copy of the warranty produced the response "You get a copy of the warranty when you get the TV" (Hollon 510-11). No copy of the warranty was produced for inspection; no mention was made of the existence of a warranty binder (Hollon 511).

⁷ In respondent's rebuttal to complaint counsel's Proposed Findings of Fact, the following statement is made: CPF No. 123 is especially misleading and irrelevant. There was no testimony of the need to go to the CAC in order to see a warranty binder in the Evergreen Park, Ill. store. Therefore, distances to the CAC on the 3rd floor are irrelevant as there is no evidence that a prospective buyer would have to leave the basement floor to obtain a warranty binder.

This statement is surprising in view of the testimony of respondent's employee, Orlando P. Pinelli. Mr. Pinelli testified unequivocally that the nearest binder to the Major Appliance Department was located in the CAC on the third floor (Pinelli 54). The Major Appliance Department is on the lower level (Pinelli 18-19).

Q. Okay. What is the nearest binder to your department in the Evergreen Park Store?

A. The warranty binder?

Q. The warranty binder, right.

A. In the CAC Department. (Pinelli 54)

Mr. Pinelli's testimony is clear concerning the location of the two departments; the CAC is on the third floor and the Major Appliance Department is on the lower level.

Q. Okay. Can you tell me where the Customer Accommodation Center is located?

A. Third floor. (Pinelli 20)

Q. And which level would your department be considered on?

A. Lower level. (Pinelli 18-19)

Presumably, respondent asserts that this evidence is irrelevant because of the practice of keeping warranty information in a folder in the department. Maintaining warranty texts in a file drawer, however, does not comply with any of the four alternative methods of warranty disclosure required by the Rule.

A binder was available in the Customer Accommodation Center located on the third floor (Pinelli 20, 28-30). The binder was attached to a metal platform (Pinelli 61-62). There was a sign with the binder to indicate that warranty information was available (Pinelli 32).

77. *Ford City, Illinois*

The Ford City store is located in a mall and was surveyed on November 18, 1977 by Jennifer Hollon (Hollon 541).

No warranty information or signs advising of the availability of warranty information were posted at the store entrance used by the FTC investigator or in the main aisles (Hollon 541-43, 547).

There were no signs or binders in the Major Appliance Department (Hollon 545). An examination of the department including in, on, and around all appliances produced no warranty information (Hollon 543-44). The interiors of appliances were examined by a visual inspection of the interior including the interior of any drawer and the contents of any packets filled with papers (Hollon 544). A conversation with salesman, Gordon Gregory, about the warranty on a refrigerator produced a packet of materials from a desk in the department. Mr. Gregory explained that the packet, which included a warranty, came with the refrigerator when purchased (Hollon 546). Mr. Gregory made no mention of the availability of warranty binders (Hollon 547).

No warranty information was found in the TV/Stereo Department. There were no binders and no signs (Hollon 542). When Ms. Hollon asked salesman Mr. Jachimczak to see a copy of the warranty for a television, he gave her the terms orally. He did not give her a written copy of the warranty nor did he mention a warranty binder (Hollon 542-43).

78. *Yorktown Shopping Center, Lombard, Illinois*

The Montgomery Ward store in Lombard, Illinois is located in a shopping mall (Hollon 485). The store was surveyed on November 11, 1977 by FTC investigator Jennifer Hollon (Hollon 485). At the time the survey was conducted, Don A. Cote was manager of the TV/Stereo Department and Raymond Shallcross was [21]employed as a salesman in major appliances (Cote 1099-1100; Shallcross 190-91).

There were no signs to advise consumers of the availability of warranty information at the entrance to the store nor in the aisles en route to the Major Appliance Department nor those en route to the TV/Stereo Department (Hollon 485, 487, 493, 495-96, 616-17).

The Major Appliance Department had no binder. There was a sign advising the consumer to go to the CAC for warranty information (Hollon 488; Shallcross 896); however, the sign was partially obscured by the microwave display and was not visible from all places in the Major Appliance Department (Hollon 488). There were decals on the inside or outside, or a loose leaflet on the inside of most refrigerators giving the warranty terms and one 8 x 11 sign on a microwave oven (Hollon 487).⁸ No other warranty information was found in conjunction with the products (Hollon 487-88).

Ms. Hollon was present when complaint counsel, Benita Sakin, asked salesman, Raymond Shallcross, to see a copy of the warranty for a refrigerator. Salesman Shallcross referred Ms. Sakin to the back of the price tag. After inspecting the price tag, Ms. Sakin pointed out that the information was not warranty information but concerned the service contract. Mr. Shallcross said "you get it (the warranty) on a green slip when you purchase the product" (Hollon 492; Shallcross 893, 899).

The TV/Stereo Department contains approximately 3800-4000 square feet of selling space (Cote 1117). The only warranty information in the department was a sign on one television and a decal on another television (Hollon 494-95). There were no signs and no binders (Hollon 494-95).⁹ [22]

There were no signs or binders visible in the Customer Accommodation Department. When Ms. Hollon asked to see a copy of the warranty for a refrigerator, she was shown a binder which contained service contracts. The saleswoman behind the counter in the CAC was unable to produce a warranty binder (Hollon 489-90, 600).

79. *North Riverside Plaza, North Riverside, Illinois*

The Montgomery Ward store in North Riverside, Illinois is a two story store located in a shopping mall (Banis 318; Hollon 496). On separate occasions, the store was surveyed by Commission investigators Dianne Banis and Jennifer Hollon. Ms. Banis examined only the departments themselves, she did not look for signs, binders or other warranty information in the entrances or aisles of the store (Banis 324-27).

In the Major Appliance Department, on the second floor, there

⁸ Ms. Hollon did not read the warranties; she skimmed the text. She did not know whether the warranty sign for microwaves applied to all microwaves or just the microwave on which the sign sat (Hollon 593-94, 597). Nor, did she know if the warranty with the refrigerator applied to more than just the one unit (Hollon 592-93). Montgomery Ward uses one warranty for all of its products of a particular genre - for example all color televisions are covered by one warranty (See Finding 23).

⁹ Mr. Cote did testify that both a binder and a sign were in his department. However, at trial it was noted that Mr. Cote had stated in his deposition that he "never paid attention to (the) binder" (Cote 1120). Neither the binder nor the sign was permanently affixed (Cote 1119).

were no signs advising of the location of warranty information around the products or on the walls informing the consumer of the availability of warranty information (Banis 320-21; Hollon 497-98). Most of the microwave ovens had a sign with the warranty terms. In about one quarter of the refrigerators which were opened for examination, there were loose leaflets containing warranty terms (Hollon 497, 499). There was no warranty information of any kind for washers, dryers, freezers, and dishwashers (Hollon 497).

Both Ms. Banis and Ms. Hollon requested warranty information from a salesperson in Major Appliances. In Ms. Banis's case, the salesperson pointed out the guarantee stickers on the appliance; however, these stickers were not the full warranty. Further inquiry about a binder of warranties prompted the salesperson to speculate that such a binder might be found in the CAC (Banis 320-21, 328-29). When Ms. Hollon inquired about the warranty on a specific refrigerator, salesperson Wally Riggins pulled a leaflet with warranty terms on it out of the bottom drawer of the refrigerator and told her a capsulized version of the warranty terms (Hollon 498). The salesman made no mention of the availability of a warranty binder (Hollon 499).

Neither surveyor found any warranty information in the TV/Stereo Department. There were no signs and no binders (Banis 318-19, 337; Hollon 500). Ms. Hollon did ask a salesperson for a copy of the warranty for a stereo. The salesperson told her she could go to the CAC and examine a copy of the warranty there (Hollon 500, 604).
[23]

The CAC was located near the Major Appliance Department (Banis 322). There were no signs and no binder visible (Banis 322-23, 337; Hollon 502). In both instances, there were lines of customers so that the surveyors had to wait to talk with store personnel behind the counter. When Ms. Banis requested the binder only the supervisor knew of its existence in the CAC; it was kept behind the counter (Banis 322-23). During Ms. Hollon's survey, a request for the binder proved futile; the person behind the counter could not locate the binder and suggested that they check with the Stereo Department and that they should retain written warranties after purchase (Hollon 501-02).

No warranty information was spotted at the store's entrance (Hollon 502).

80. *Laurel, Maryland*

The Laurel, Maryland store is a free-standing, large, one-story

building (Abrams 421). It was surveyed by Irvin Eugene Abrams on December 20, 1977 (Abrams 404).

There were no binders and no signs advising the consumer of the availability of warranty information in the main aisle of the store or at the entrance used by Mr. Abrams (Abrams 421-22, 428-29).

In the Major Appliance Department, twenty to twenty-five products were checked for warranty information; no information was found. There were no binders in the department, not even on the desk in the department, and no signs (Abrams 422-23). Mr. Abrams asked a salesperson if a warranty came with a particular refrigerator; the salesman indicated that the refrigerator was covered by a warranty and quoted some of the terms (Abrams 423-24). When asked for a copy of the written warranty for inspection, the salesman directed Mr. Abrams to the CAC (Abrams 424-25).

In the TV/Stereo Department, the surveyor checked hang tags, the exterior and interior of products, and the general vicinity of the department for warranty information (Abrams 426). No warranty information was available in the department—there were no signs and no binders (Abrams 426). An inquiry as to whether a particular stereo was covered by a warranty produced the response from the saleswoman that the written warranty for that stereo and other products could be seen in the CAC (Abrams 426-27).

The Customer Accommodation Center, located on the other side of the store from the Major Appliance Department, contained a warranty binder (Abrams 425). The binder was clearly visible at [24] a distance of three to four feet from the CAC counter (Abrams 425). There were no signs in the CAC (Abrams 425).

81. *Capital Plaza, Prince George's County, Maryland*

On December 20, 1977, Irvin Eugene Abrams surveyed the Montgomery Ward store at Capital Plaza (Abrams 404). The Capital Plaza store consists of two floors only one of which is a sales floor (Abrams 408).

With the exception of a 9 x 12 inch sign at the elevator which directed customers to the CAC for warranty information, no warranty information was posted on the walls of the store or in the main aisles (Abrams 408-09, 417-18). The area surrounding the elevator is a sales area (Abrams 417).

No warranty information was found in the Major Appliance Department. Approximately 20-25 of the 50-60 products on display were individually checked for warranty information (Abrams 409-10). There were no signs, no binders, and no warranties with the products either affixed to the product or in a packet attached to the

product (Abrams 410-11). Mr. Abrams inquired of a salesperson whether there was a warranty for a certain dishwasher. The salesperson produced a written warranty for another dishwasher indicating that the warranty terms were similar for all dishwashers (Abrams 412, 447). The salesperson stated that the warranty for that particular dishwasher could be obtained in the CAC and, upon further inquiry, indicated that warranties for all products in the department could be found in the CAC (Abrams 412-14, 447-48).

The TV/Stereo Department contained no warranty information. There were no signs and no binders (Abrams 415). A salesperson did produce a written warranty for a color television from the back of the department but declined to go get one for a black and white set if Mr. Abrams was not interested in purchasing (Abrams 416, 448-50). This investigation took place in a busy season—five days before Christmas (Abrams 450).

In the Customer Accommodation Center the binder was visibly on the counter. There were no signs (Abrams 419).

82. *Wheaton Shopping Center, Wheaton, Maryland*

The Wheaton, Maryland store, located in the Wheaton Plaza, is one of two major department stores in the shopping center (Abrams 429). The store has two sales floors comprising 112,000 square feet of selling space; the basement is a warehouse and district office (Abrams 430; Kerin 1188). [25]

On December 20, 1977, Irvin Eugene Abrams surveyed the Wheaton, Maryland store as part of a Federal Trade Commission investigation (Abrams 404). Richard Kerin, store manager of the Wheaton Plaza store, testified as to the implementation of Montgomery Ward's binder policy in the Wheaton store. In his position as store manager, Mr. Kerin made periodic observations of the presence of signs and binders in the Wheaton store (Kerin 1183).

There was a sign located at the main entrance to the Wheaton store (RX 342B; Kerin 1192).

Warranty information was not displayed in conjunction with the products in the Major Appliance Department (Abrams 431). However, an 11" x 14" sign was in the department placed above a counter to which a warranty binder was chained (RX 342B; Kerin 1182-84). The sign was two sided facing both east and west and was visible from over half of the department (Kerin 1205, 1207-08). The sign and binder were located in the most prominent position in the department (Kerin 1232A). Mr. Abrams spoke with a Montgomery Ward salesman in the Major Appliance Department. When Mr. Abrams asked whether a written warranty came with a particular refrigera-

tor, the salesman indicated that the written warranty could be found in the CAC on the second floor (Abrams 432). The salesman did not refer Mr. Abrams to the binder located in Major Appliances (Abrams 440).

No signs or binders were present in the TV/Stereo Department nor was there any warranty information available in conjunction with the product in the form of hang tags or literature with the televisions and stereos (Abrams 434-35, 439).

The Customer Accommodation Center, located on the second floor, was not part of a sales area (Abrams 432, 435). A sign in the CAC indicated that warranty information was available (Abrams 436). Mr. Abrams asked to see the binder; the saleswoman, hired for the Christmas season in the gift-wrap section of the CAC, was unable to produce the binder (Abrams 436-37, 464; Kerin 1178). Mr. Abrams consulted store manager, Richard Kerin, about the presence of a warranty binder in the CAC. Mr. Kerin went to the 11 x 14 orange and white sign at the junction of the gift-wrap and repair counters. A saleswoman behind the repair counter produced a binder from under the counter (Kerin 1173-76). The binder was chained to the counter (Abrams 465; Kerin 1176). [26]

83. *Northtown Shopping Center, Blaine, Minnesota*

Jennifer Hollon surveyed Montgomery Ward's mall store in the Northtown Shopping Center on December 15, 1977 (Hollon 569).

No warranty information was present at the store's entrance or in the aisles and areas directly adjacent to the aisles which form the route between the entrance and the TV/Stereo and Major Appliance Departments (Hollon 569-71, 573).

In the Major Appliance Department, the only warranty information seen after looking through the department and in, around and on the products was inside a few refrigerators. There were no signs advising of the availability of warranty information and no binders (Hollon 571-72). Ms. Hollon asked salesman Don Diepholz for a copy of the warranty for an oven. Mr. Diepholz gave an oral summary of the warranty terms and the extended service contract. A second request for a copy of the warranty brought the response that a copy of the warranty came with the product when it was purchased (Hollon 572).

The TV/Stereo Department was examined for the availability of warranty information. After examining in, around and on the products the only warranty information available consisted of two loose leaflets on televisions. There were no signs indicating the availability of warranty information and no binders (Hollon 570).

The CAC was not surveyed.

84. *Southtown Shopping Center, Bloomington, Minnesota*

The Southtown Shopping Center store is one of Montgomery Ward's largest stores (Pagliaro 1043). The Southtown store has 114,000 square feet of selling space located on two floors (Pagliaro 1028, 1065).

On December 15, 1977, the Southtown store was surveyed by Jennifer Hollon (Hollon 573). At the time of the survey, John Pagliaro was store manager and Bruce Ochu was department manager for the TV/Stereo Department (Ochu 985; Pagliaro 1015).

There was no warranty information at the entrance used by the FTC investigator (Hollon 573, 576). Signs were present at three of the seven consumer entrances to the store (Pagliaro 1031, 1067).

In the Major Appliance Department, the only warranty information readily available was a loose copy of the warranty inside three or four refrigerators (Hollon 575). There were no signs or binders in the department (Hollon 575-76). There was a sign and a binder chained to a head-on located in sewing machines; however, an aisle separated sewing machines from the [27]other appliances (Pagliaro 1030, 1034-35). The binder in sewing machines was the nearest binder for information on washers, dryers, ranges and other major appliances. The sign and binder in sewing machines did not face the other appliances across the aisle (Pagliaro 1072-73, 1075). A consumer could enter the Major Appliance Department, purchase an appliance, and leave the department without seeing a warranty sign (Pagliaro 1076).

There was a warranty sign at the top of the down escalator (Pagliaro 1031, 1049). It was mounted on top of the glass that goes around the escalator in a position about six inches from the right hand rail (Pagliaro 1049-50). The sign was present until January 1977 when it was removed as a safety hazard (Pagliaro 1051, 1090).

The TV/Stereo Department is on the second floor about twelve (12) feet across the aisle from the CAC and approximately ten to twelve (10-12) feet from the escalator (Ochu 988, Pagliaro 1040). The department is rectangular and contains 1,500 square feet of selling space (Ochu 989). There are two pillars in the department (Ochu 991). On the day of the survey, there were no warranty signs and no binders in the department. The only warranty information available consisted of a few loose sheets with warranty terms scattered around a few of the televisions and stereos (Hollon 574).

A warranty binder and sign were in the CAC. The binder was chained to the counter (Ochu 1000-01; Pagliaro 1030).

In addition to the binders in the CAC and sewing machine areas, there was a binder chained to the top of a counter in the TBA (Pagliaro 1030). The binder was chained to the only counter in the department; it is the counter where orders are written (Pagliaro 1039). The TBA is part of the main store building in the Southtown Shopping Center store (Pagliaro 1029) and is located near the hardware department (Pagliaro 1038).

85. *Apache Plaza, Minneapolis, Minnesota*

The Apache Plaza store, a mall store with one sales floor, was surveyed by Jennifer Hollon on December 15, 1977 (Hollon 573, 577; Sorenson 1135). Dorothy Sorenson was manager of the Apache Plaza Major Appliance Department for the three year period from March 1976 - July 1979 (Sorenson 1131). The survey was conducted while Ms. Sorenson managed the appliance department.

There was no warranty information at the store entrance, nor was there any warranty information visible en route between the [28] entrance, the TV/Stereo Department and the Major Appliance Department (Hollon 577-78, 580).

The Major Appliance Department consists of approximately 800 to 1,000 square feet of selling space (Sorenson 1136). The department is arranged with four rows of merchandise (Sorenson 1136). There are two posts in the department one near the main aisle and the other towards the wall in the rear of the department (Sorenson 1136-37). On the post in the rear of the department was an orange and white warranty sign placed at eye level (CX 2; Sorenson 1132-33, 1138). The sign, in a metal frame, was affixed to the post with glue in January or February of 1977 (Sorenson 1138, 1140). Ms. Sorenson noted the presence of the sign from the time it was affixed until her transfer to the store in Robbinsdale in July 1979 (Sorenson 1138). The sign was visible from one-half of the department; there was no place in the department where 100 percent visibility could have been achieved (Sorenson 1139, 1158-59).

There was no binder in the Major Appliance Department (Hollon 579; Sorenson 1159). Consequently, salesmen were instructed to direct customers to the CAC for warranty information which could not be obtained with the product in the department (Sorenson 1134). It was a half minute walk to the CAC from the Major Appliance Department (Sorenson 1135-36). Ms. Sorenson had no personal recollection as to whether or not a binder was present in the CAC (Sorenson 1162).

The Major Appliance Department in the Apache Plaza store had a unique system of displaying the written warranty with the product

(Sorenson 1152). The warranty was opened up for viewing, placed in a plastic envelope, and chained to the product. Plastic packets were displayed with all merchandise (Sorenson 1140-44). In the case of refrigerators, ovens, washers, dryers, and freezers the packet was on the inside of the machine; in the case of air conditioners it was chained to the outside. For microwave ovens, the warranty was in a frame placed on top of the microwave oven (Sorenson 1141-43). Consumers always look into the usable area of an appliance (Sorenson 1144-45). Where the appliance was in use as a demonstrator the warranty was displayed on the outside.

Ms. Hollon spoke with salesman Ken Houchins; she asked him if she could see a copy of the warranty for a combination conventional and microwave oven. Mr. Houchins gave a summary of the warranty terms and of the extended service contract but he could not show her a copy of the warranty. He said, "You get the warranty, all the other papers, whenever you buy the product" (Hollon 580). Mr. Houchins did not mention warranty binders (Hollon 580).

In the TV/Stereo Department, Ms. Hollon found no warranty information other than one loose leaflet partially covered by a [29] stereo and one loose leaflet partially covered by a television. There were no binders, no signs, and no conversations with sales personnel (Hollon 577-78).

86. *St. Paul, Minnesota*

The St. Paul, Minnesota store is a multi-level mall store (CX 65B; Hollon 582). The store was surveyed on December 16, 1977 by Commission investigator, Jennifer Hollon (Hollon 582). St. Paul was also the subject of a field audit report dated September 13, 1978 (CX 65A-B). At the time of the survey and of the field report, Paul A. Williamson was manager of the St. Paul Major Appliance Department (Williamson 943).

There was no warranty information at the entrance used by the FTC investigator nor at the up or down escalator (Hollon 582, 584, 586).

The Major Appliance Department consists of 750 square feet of selling space on the first floor of the store (Williamson 968, 977). There is a beam in the center of the department; on one side of the beam is the cash register and on the other side is the salesperson's desk (Williamson 948). At the time of the survey, an 11 x 14 warranty sign (white with black letters) was displayed at eye level on the center beam facing the front of the department (Williamson 949, 964). The sign was stapled to the wood of a bulletin board which was permanently affixed to the beam; the sign was visible from

almost the total area of the department (Williamson 949, 983). In addition to the 11 x 14 sign advising customers where warranty information was available, approximately five microwave ovens had signs in picture frames sitting on top of the ovens (Williamson 958). There were no binders (Hollon 583). The nearest warranty binder in the Fall of 1977 was located in the CAC on the second floor (Williamson 967-68).

During her survey of the Major Appliance Department, Ms. Hollon asked salesman Rick Carlson if she could see a copy of the warranty for a conventional oven. Mr. Carlson orally summed up the terms of the warranty and service contract. When Ms. Hollon repeated her request Mr. Carlson responded that she would get the warranty when she purchased the product (Hollon 583).

A survey of the TV/Stereo Department produced no warranty information. There were no signs and no binders (Hollon 584-585).

The CAC was located on the second floor (Williamson 967-68). It was not surveyed. [30]

87. *Belmont Store, Kansas City, Missouri*

The Belmont store was surveyed on December 7, 1977. This free standing store was in disarray on the day of the survey; a sign stated the store was in the process of closing down its operations (Hollon 548, 608).

An examination of the entranceway and the areas immediately adjacent en route to the Major Appliance and TV/Stereo Departments showed that no warranty information was displayed (Hollon 548, 550).

In the Major Appliance Department, Ms. Hollon examined the area on, around, and in the appliances. An examination of the interior of a product included an examination of any drawers and the contents of any packets containing papers (Hollon 544, 551). On almost every microwave oven, there was a sign with the warranty terms. The signs on the microwave ovens seemed to be identical (Hollon 551, 611). In approximately three refrigerators, there were looseleaf copies of warranties. No other warranty information was available in the department either with the products, on the walls, or in any other area; there were no signs and no binders (Hollon 551-52).

In the TV/Stereo Department, there was one sign on one

television giving warranty terms and one sign on one stereo giving warranty terms (Hollon 549).¹⁰ No other information was available in the department. There were no binders (Hollon 549).

88. *Metro Center North, Kansas City, Missouri*

The Metro Center North store, surveyed by Jennifer Hollon on December 7, 1977, is located in a mall (Hollon 553).

No signs advising the consumer of the availability of warranty information were present at the entrance or in the aisles which formed the route between the entrance, the Major Appliance Department and the TV/Stereo Department (Hollon 553, 556-57). [31]

In the Major Appliance Department, most of the refrigerators and freezers had loose copies of the warranties inside, a couple of washers and dryers had a loose copy of the warranty lying on top of the appliance, and almost all of the microwave ovens had identical signs on top setting out the warranty terms (Hollon 554, 614-15). No other warranty information was available in the department; there were no signs and no binders (Hollon 555). But, Ms. Hollon does not recall if the signs and loose leaflets applied to just the one unit with which they were displayed or to more than one item (Hollon 613-14).

In the TV/Stereo Department, there were no signs and no binders; however, there was warranty information displayed in direct conjunction with the products. On one television, there was a sign with the warranty terms; there was no indication on the sign as to which televisions were covered by the warranty. On one stereo, there was a loose copy of the warranty (Hollon 556-57).

The CAC was not surveyed.

89. *Greenwood Mall, Toledo, Ohio*

On December 21, 1977, the Greenwood Mall store was surveyed by Commission investigator Carole Danielson (Danielson 632).

The Greenwood Mall store has one floor (Danielson 633, 662). In the Major Appliance Department, located approximately halfway through the store (Danielson 634), there were no signs indicating where warranty information might be obtained nor were there any binders visible (Danielson 635-37, 640). A visual inspection of the exterior and interior of most appliances displayed did not reveal any warranty information nor did an examination of the walls and ceiling reveal any signs (Danielson 634-35). However, written

¹⁰ Ms. Hollon does not recall if any brands other than Montgomery Ward's own label were present in the TV/Stereo Department. She does not recall if the signs giving warranty terms were limited to one unit or if they applied to more than one (Hollon 549, 608, 611).

warranties, either loose or visible in plastic packets were present in the vegetable trays of all refrigerators (Danielson 635-36). A salesperson was able to produce a written warranty for a range from inside the broiler pan (Danielson 638-40). The salesperson made no mention of the availability of warranty binders (Danielson 676, 682).

No signs or binders were visible in the Customer Accommodation Center (Danielson 636-37, 665). [32]

90. *Southwyck Mall, Toledo, Ohio*

The two story mall store located in Southwyck Mall was surveyed by Carole Danielson on December 21, 1977 (Danielson 632, 641). Ms. Danielson surveyed only the departments for warranty information. She did not survey the entrances and aisles (Danielson 650-53, 661).

A three to five minute visual search of the Major Appliance Department and its vicinity, as well as an examination of the exterior of all appliances displayed and the interior of half of each type of appliance displayed, produced no warranty information (Danielson 644-45). No written warranty information was contained in the vegetable trays of the refrigerators (Danielson 677). An examination of the sales desk in the department was also fruitless (Danielson 645).

When approached by salesman Joe Sostack, Ms. Danielson asked what type of warranty a particular range carried. The salesman gave an oral summary of the warranty terms. Ms. Danielson then asked to see a copy of the warranty or a warranty binder (Danielson 646, 654). The salesman found a copy of the warranty after looking in five or six ranges (Danielson 646, 654-55). He did not produce the warranty from the interior of the same range she had inquired about (Danielson 647). The warranty was headed "gas and electric ranges" in large letters; it was not limited to a specific range but applied to gas and electric ranges generally (Danielson 657, 660). The salesman made no mention of a warranty binder (Danielson 682).

Ms. Danielson browsed through the TV/Stereo Department and found no signs displayed in connection with the products or generally in the department (Danielson 641-42). The televisions and stereos were examined on the exterior for hang tags, decals, signs, notices, and written copies of the warranties which might be lying on or near the products. About one-third to one-half ($\frac{1}{3}$ - $\frac{1}{2}$) of the products which had doors or parts that were to be opened were examined on the interior (Danielson 642). A sales desk in the department was checked for warranty information. A number of binders on the sales desk were also checked; they contained product specifications. There were no warranty binders in the department

(Danielson 642-43). In the course of demonstrating a stereo console, the saleswoman was asked about the type of warranty which covered the console. She summarized the warranty terms orally. When Ms. Danielson asked to see a written copy of the warranty or a warranty binder, the saleswoman responded that Ms. Danielson could not see the written warranty. She stated that the terms of the warranty were written on the salescheck and that a written copy of the warranty was included in the delivery box (Danielson 642-43, 676). The saleswoman did not direct Ms. Danielson to a place where written warranty information was available even after she was specifically asked about a warranty binder (Danielson 642-44, 676).

[33]

91. *Crossroads Shopping Center, Oklahoma City, Oklahoma*

On December 8, 1977, Jennifer Hollon surveyed the Montgomery Ward store at the Crossroads Shopping Center (Hollon 558, 562). The Crossroads store is a mall store (Hollon 562).

There were no signs advising of the availability of warranty information at the store's entrance nor were there signs in the aisles en route to the TV/Stereo Department or the Major Appliance Department (Hollon 562, 566, 569).

In the Major Appliance Department, almost all of the microwave ovens had a sign on top; a few refrigerators had a copy of the warranty inside. There were no other signs in the department concerning warranty terms or the availability of written warranties; there were no binders (Hollon 567). A conversation with salesman Glen Ashley resulted in a verbal summary of the warranty and the extended service contract for a refrigerator. When the salesman was then asked for a copy of the warranty, he produced a copy from his files (Hollon 568). Mr. Ashley did not mention the availability of warranty binders (Hollon 568).

Some loose leaflets located between the products were the only warranty information available in the TV/Stereo Department (Hollon 564). There were no signs advising of the availability of warranty information and no binders, nor was there a leaflet for each item displayed (Hollon 564-65). When Ms. Hollon asked to see a copy of the warranty for a television, salesman Mike Keaton verbally summarized the warranty terms. Ms. Hollon repeated her request for a copy of the warranty to inspect. Mr. Keaton did not show her a copy nor did he direct her to the loose leaf warranties on the shelf rather, he stated, "You will get the copy of the warranty when you buy the product" (Hollon 565-66).

92. *Penn Square Shopping Center, Oklahoma City, Oklahoma*

Jennifer Hollon surveyed the Penn Square store, a mall store, on December 8, 1977 (Hollon 558).

An examination of the entrance and aisles linking the Major Appliance Department, TV/Stereo Department, and the entrance revealed no signs indicating the availability of warranty information (Hollon 558, 560, 562). [34]

Some warranty information was found with the appliances in the Major Appliance Department. A loose copy of the warranty was found in most refrigerators and a sign stating the warranty terms was on almost every microwave oven. A loose leaflet was found in one washer (Hollon 559). No other warranty information was found in the department either in conjunction with the products or in the form of signs or binders (Hollon 559). Saleswoman Maryann Phillips gave an oral summation of the warranty terms when she was asked for a copy of the warranty for a refrigerator. Ms. Hollon was not shown a copy of the refrigerator warranty. When she repeated her inquiry, she was told by Ms. Phillips that she would get a copy when she purchased the refrigerator (Hollon 599-600). Ms. Phillips did not say anything about the availability of a warranty binder (Hollon 560).

Other than a few copies of warranties, some of which were in packets, scattered among the television and stereos, there was no warranty information in the TV/Stereo Department. There were no signs and no binders (Hollon 560-61).

The CAC was not surveyed.

B. Summary of Survey Results

93. There were no warranty binders in the Major Appliance Department of the Montgomery Ward store located at:

- (a) Serramonte Shopping Center, California (Austin 276-77)
- (b) State Street, Chicago, Illinois (Hollon 503-04)
- (c) Evergreen Park, Illinois (Hollon 512-13)
- (d) Ford City, Illinois (Hollon 545)
- (e) North Riverside Plaza, North Riverside, Illinois (Banis 320-21; Hollon 497-98)
- (f) Yorktown Shopping Center, Lombard, Illinois (Hollon 488; Shallcross 896)
- (g) Laurel, Maryland (Abrams 422-23)
- (h) Capital Plaza, Prince George's County, Maryland (Abrams 410-11)

- (i) Northtown Shopping Center, Blaine, Minnesota (Hollon 571-72) [35]
- (j) Southtown Shopping Plaza, Bloomington, Minnesota (Hollon 575-76)¹¹
- (k) Apache Plaza, Minneapolis, Minnesota (Hollon 579; Sorenson 1159)
- (l) St. Paul, Minnesota (Hollon 583; Williamson 967-68)
- (m) Belmont Store, Kansas City, Missouri (Hollon 551-52)
- (n) Metro Center North, Kansas City, Missouri (Hollon 555)
- (o) Greenwood Mall, Toledo, Ohio (Danielson 635-37, 640)
- (p) Southwyck Mall, Toledo, Ohio (Danielson 644-45)
- (q) Crossroads Shopping Center, Oklahoma City, Oklahoma (Hollon 567)
- (r) Penn Square Shopping Center, Oklahoma City, Oklahoma (Hollon 559)

94. There were no warranty signs in the Major Appliance Department of the Montgomery Ward store located at:

- (a) Serramonte Shopping Center, California (Austin 276-77)
- (b) State Street, Chicago, Illinois (Hollon 503-04)
- (c) Ford City, Illinois (Hollon 545)
- (d) North Riverside Plaza, North Riverside, [36]Illinois (Banis 320-21; Hollon 497-98)¹²
- (e) Laurel, Maryland (Abrams 422-23)
- (f) Capital Plaza, Prince George's County, Maryland (Abrams 410-11)
- (g) Northtown Shopping Center, Blaine, Minnesota (Hollon 571-72)
- (h) Southtown Shopping Center, Bloomington, Minnesota (Hollon 575-76)¹³
- (i) Belmont Store, Kansas City, Missouri (Hollon 551-52)¹⁴
- (j) Metro Center North, Kansas City, Missouri (Hollon 554-55, 615)¹⁵
- (k) Greenwood Mall, Toledo, Ohio (Danielson 635-37, 640)¹⁶
- (l) Southwyck Mall, Toledo, Ohio (Danielson 644-45)

¹¹ There was a binder and a sign located in sewing machines; however, they were separated from the other appliances by an aisle and were not visible from the area in which the other appliances were located.

¹² Most microwaves had a sign with warranty terms. About one-quarter of the refrigerators examined had loose leaflets.

¹³ See Finding 93, note 11.

¹⁴ On almost every microwave, there was a sign.

¹⁵ Most of the refrigerators and freezers had loose copies of the warranties inside, a couple of washers and dryers had a loose copy of the warranty lying on top of the appliance, and almost all microwaves had signs.

¹⁶ Written warranties, either loose or visible in packets were in the vegetable trays of all refrigerators.

- (m) Crossroads Shopping Center, Oklahoma City, Oklahoma (Hollon 567)¹⁷
- (n) Penn Square Shopping Center, Oklahoma City, [37]Oklahoma (Hollon 559)¹⁸

95. There were no warranty binders in the TV/Stereo Department of the Montgomery Ward store located at:

- (a) State Street, Chicago, Illinois (Hollon 505)
- (b) Evergreen Park, Illinois (Hollon 509-10)
- (c) Ford City, Illinois (Hollon 542)
- (d) North Riverside Plaza, North Riverside, Illinois (Banis 318-19, 337; Hollon 500)
- (e) Yorktown Shopping Center, Lombard, Illinois (Hollon 494-95)
- (f) Southtown Shopping Center, Bloomington, Minnesota (Hollon 574)
- (g) Apache Plaza, Minneapolis, Minnesota (Hollon 577-78)
- (h) St. Paul, Minnesota (Hollon 584-85)
- (i) Laurel, Maryland (Abrams 426)
- (j) Capital Plaza, Prince George's County, Maryland (Abrams 415)
- (k) Northtown Shopping Center, Blaine, Minnesota (Hollon 570)
- (l) Belmont Store, Kansas City, Missouri (Hollon 549)
- (m) Metro Center North, Kansas City, Missouri (Hollon 556-57)
- (n) Southwyck Mall, Toledo, Ohio (Danielson 642-43)
- (o) Crossroads Shopping Center, Oklahoma City, [38]Oklahoma (Hollon 564-65)
- (p) Penn Square Shopping Center, Oklahoma City, Oklahoma (Hollon 560-61)
- (q) Wheaton Shopping Center, Wheaton, Maryland (Abrams 434-35, 439)

96. There were no warranty signs in the TV/Stereo Department of the Montgomery Ward store located at:

- (a) State Street, Chicago, Illinois (Hollon 505)
- (b) Evergreen Park, Illinois (Hollon 509-10)
- (c) Ford City, Illinois (Hollon 542)
- (d) North Riverside Plaza, North Riverside, Illinois (Banis 318-19, 337; Hollon 500)
- (e) Yorktown Shopping Center, Lombard, Illinois (Hollon 494-95)
- (f) Laurel, Maryland (Abrams 426)

¹⁷ Almost all microwaves had a sign on top; a few refrigerators had a copy of the warranty inside.

¹⁸ A loose copy of the warranty was found in most refrigerators and a sign with warranty terms on almost every microwave.

- (g) Capital Plaza, Prince George's County, Maryland (Abrams 415)
- (h) Wheaton Shopping Center, Wheaton, Maryland (Abrams 434-35, 439)
- (i) Northtown Shopping Center, Blaine, Minnesota (Hollon 570)
- (j) Southtown Shopping Center, Bloomington, Minnesota (Hollon 574)
- (k) Apache Plaza, Minneapolis, Minnesota (Hollon 577-78)
- (l) St. Paul, Minnesota (Hollon 584-85)
- (m) Belmont Store, Kansas City, Missouri (Hollon 549)¹⁹ [39]
- (n) Metro Center North, Kansas City, Missouri (Hollon 556-57)¹⁹
- (o) Southwyck Mall, Toledo, Ohio (Danielson 641-42)
- (p) Crossroads Shopping Center, Oklahoma City, Oklahoma (Hollon 564-65)
- (q) Penn Square Shopping Center, Oklahoma City, Oklahoma (Hollon 560-61)

97. There were no warranty binders located in the CAC of the Montgomery Ward store located at:

- (a) Serramonte Shopping Center, California (Austin 285-87)
- (b) North Riverside Plaza, North Riverside, Illinois (Banis 322-23, 337; Hollon 502)
- (c) Yorktown Shopping Center, Lombard, Illinois (Hollon 489-90, 600)
- (d) Greenwood Mall, Toledo, Ohio (Danielson 636-37, 665)

98. There were no warranty signs in the CAC at:

- (a) Serramonte Shopping Center, California (Austin 285-87)
- (b) North Riverside Plaza, North Riverside, Illinois (Banis 322-23, 337; Hollon 502)
- (c) Yorktown Shopping Center, Lombard, Illinois (Hollon 489-90, 600)
- (d) Laurel, Maryland (Abrams 425)
- (e) Capital Plaza, Prince George's County, [40]Maryland (Abrams 419)
- (f) Greenwood Mall, Toledo, Ohio (Danielson 636-37, 665)

99. The Pre-Sale Rule requires that either a binder or a sign be displayed in a manner reasonably calculated to elicit the prospective buyer's attention. In the following departments, there were neither signs nor binders:

¹⁹ There was one sign on a TV and one sign on a stereo. On Wards' products, a single warranty covers all of the same type of product. For example, there is one warranty for all Wards' color televisions.

- a. Serramonte Shopping Center, California
Major Appliance (Austin 276-77)
- b. State Street, Chicago, Illinois
Major Appliance (Hollon 503-04)
TV/Stereo (Hollon 505)
- c. Evergreen Park, Illinois
TV/Stereo (Hollon 509-10)
- d. Ford City, Illinois
Major Appliance (Hollon 545)
TV/Stereo (Hollon 542)
- e. North Riverside Plaza, North Riverside, Illinois
Major Appliance (Banis 320-21; Hollon 497-98)
TV/Stereo (Banis 318-319, 337; Hollon 500)
- f. Yorktown Shopping Center, Lombard, Illinois
TV/Stereo (Hollon 494-95)
- g. Laurel, Maryland
Major Appliance (Abrams 422-23)
TV/Stereo (Abrams 426)
- h. Capital Plaza, Prince George's County, Maryland
Major Appliance (Abrams 410-11)
TV/Stereo (Abrams 415)
- i. Northtown Shopping Center, Blaine, Minnesota
Major Appliance (Hollon 571-72)
TV/Stereo (Hollon 570)
- j. Southtown Shopping Plaza, Bloomington, Minnesota [41]
Major Appliance (Hollon 575-76)²⁰
TV/Stereo (Hollon 574)
- k. Apache Plaza, Minneapolis, Minnesota
TV/Stereo (Hollon 577-78)
- l. St. Paul, Minnesota
TV/Stereo (Hollon 584-85)
- m. Belmont Store, Kansas City, Missouri
Major Appliance (Hollon 551-52)
TV/Stereo (Hollon 549)

²⁰ See Finding 93, note 11.

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- n. Metro Center North, Kansas City, Missouri
Major Appliance (Hollon 554-55, 615)
TV/Stereo (Hollon 556-57)
- o. Greenwood Mall, Toledo, Ohio
Major Appliance (Danielson 635-37, 640)
- p. Southwyck Mall, Toledo, Ohio
Major Appliance (Danielson 644-45)
TV/Stereo (Danielson 641-43)
- q. Crossroads Shopping Center, Oklahoma City, Oklahoma
Major Appliance (Hollon 567)
TV/Stereo (Hollon 564-65)
- r. Penn Square Shopping Center, Oklahoma City, Oklahoma
Major Appliance (Hollon 559)
TV/Stereo (Hollon 560-61)

1. *Wards' Audits Concerning Pre-Sale Availability*

100. Respondent's field audit reports (CX 57A-78B) show the following stores were not in compliance with respondent's binder and sign policy:

- a. Baton Rouge, Louisiana 9/21/77
No binder - CAC [42]
- b. Lake Charles, Louisiana 10/12/77
No binder - CAC
- c. St. Petersburg, Florida 11/30/77
No sign - Major Appliance
main entrance
escalator/elevator
- d. Ann Arbor, Michigan 3/16/78
No sign - entrance
CAC
- e. Mt. Vernon, Illinois 2/17/78
No binder - CAC
No sign - anywhere in store
- f. Greensboro, North Carolina 8/5/77
No sign - Major Appliance
main entrance
escalator

- g. Monroe, Louisiana 11/4/77
No binder - CAC
- h. Penn Square, Oklahoma City, Oklahoma 12/12/77
Binder not properly displayed CAC
- i. St. Paul, Minnesota 9/13/78
No binder - first & third levels
No sign - Dept. 38
- j. Piqua, Ohio 5/3/77
Binders not properly displayed
- k. Wheaton, Maryland 6/6/77
No binder - first floor
No sign - Auto service
Major Appliance
main entrance
escalator/elevator
Binder not properly displayed CAC
- l. Torrance, California 10/19/78
No binder - on one of four floors
No sign - main entrance
escalator/elevator
- m. Corte Madera, California 10/20/78
No sign - main entrance
- n. Grants Pass, Oregon 7/6/78 [43]
No sign - Auto service
main entrance
- o. Costa Mesa, California 6/27/78
No sign - Auto service
Binders not properly displayed in CAC and Auto service
Signs obscured CAC and Major Appliance
Six of seven employees were either unaware of binders
or did not know their location
- p. Porterville, California 6/7/78
No sign - main entrance
Auto service
CAC

- q. Norwalk, California 6/6/78
No sign - Major Appliance
main entrance
Auto service
Appliance salesman was not aware binder existed.
- r. Fremont, California 4/28/78
No sign - TV/Stereo
Binders not properly displayed: binder in CAC left behind counter, but there was a sign indicating its availability.
- s. Escondido, California 3/29/78
No sign - Major Appliance
main entrance
Two appliance salesmen were not aware of the existence of warranty binders.
- t. Stockton, California 11/29/77
No binders were displayed
No signs at any location.
Of the six applicable department managers none knew where the binder was being stored and five did not know of its existence.
- u. Anderson, Indiana 7/20/77
Binders not properly displayed
No signs
- v. Riverside, California 12/15/77
Binder not displayed
CAC manager not aware of its existence [44]

Respondent's own field audit reports corroborate the results of the Commission's survey insofar as both indicate that all Wards' stores were not in compliance with Wards' announced binder policy.

2. *Responses by Certain Salesmen in Response To Requests For Copies of Warranty During FTC Survey*

101. In the following stores, sales personnel did not furnish a copy of a written warranty when an FTC investigator asked to see warranties for particular products. Nor did they inform the individuals making such requests of the availability of warranty binders. In a number of instances, in response to such requests for written warranties, Wards' sales personnel gave oral summaries of the

warranty and/or stated the written warranty would be made available upon purchase.

- a. State Street, Chicago, Illinois
TV/Stereo (Hollon 506)
- b. Evergreen Park, Illinois
Major Appliance (Hollon 513)
TV/Stereo (Hollon 510-11)
- c. Ford City, Illinois
TV/Stereo (Hollon 542-43)
- d. Yorktown Shopping Center, Lombard, Illinois
Major Appliance (Hollon 492-93; Shallcross 893, 899)
- e. Northtown Shopping Center, Blaine, Minnesota
Major Appliance (Hollon 572-73)
- f. Apache Plaza, Minneapolis, Minnesota
Major Appliance (Hollon 580)
- g. St. Paul, Minnesota
Major Appliance (Hollon 583-84)
- h. Southwyck Mall, Toledo, Ohio
TV/Stereo (Danielson 643-44, 676)
- i. Crossroads Shopping Center, Oklahoma City, Oklahoma
TV/Stereo (Hollon 565-66)
- j. Penn Square Shopping Center, Oklahoma City, Oklahoma
Major Appliance (Hollon 560) [45]

C. Violations Found

102. The failure to place a warranty binder on the lower level of Wards' Evergreen Park Store, where that outlet's Major Appliance Department is located, caused prospective customers in that department to go to the third floor (three floors above) to consult a warranty binder (Finding 76). The absence of a binder on every floor constitutes the failure to place binders in a location with ready access as required by the Pre-Sale Rule.

103. The failure in the period September 1, 1977 to February 1, 1978 to have a warranty binder in the CAC's of some stores in accordance with respondent's policy (Finding 97) and the representation on respondent's warranty signs, CX 2 (Finding 30) deprived prospective customers of ready access to warranty binders in contravention of the Pre-Sale Rule.

104. In the absence of binders and/or warranty signs displayed in the Major Appliance or TV/Stereo Departments of certain stores, prospective customers in those departments were unlikely to get notice of the availability of warranty information in those stores. The failure to display either warranty binders or signs in those departments accordingly constituted a failure to display signs or binders in a manner reasonably calculated to elicit the prospective buyer's attention in contravention of Section 702.3(a)(1)(A) and (B) of the Pre-Sale Rule (Finding 99).

105. Some of respondent's sales personnel were either unable or unwilling to furnish copies of warranties upon request failing at the same time to advise prospective buyers of the existence or location of warranty binders (Finding 101). In those instances where sales personnel did not make a copy of a warranty available on request and failed to advise consumers of the availability of warranty binders their actions conflicted with the instructions for access on Wards' warranty signs. The notice of availability of and the instructions for obtaining access to binders were particularly frustrated, when some sales personnel stated that the warranty would be made available on purchase of the product. The failure by Wards' sales personnel to direct consumers to warranty information rendered the instructions on respondent's warranty signs for obtaining access [46]to binders inaccurate.²¹ This violated the requirements of Section 702.3(a)(1)(B) of the Pre-Sale Rule concerning instructions for gaining access to warranty binders.

VI. DISCUSSION

Section 102(b)(1)(A) of the Magnuson-Moss Warranty Act, 15 U.S.C. 2302(b)(1)(A), directs the Commission to prescribe rules requiring that written warranties be made available prior to sale. The Pre-Sale Rule, 16 C.F.R. 702.3, is the Commission's response to that directive.

This is a case of first impression concerning construction of the regulations defining the retail seller's duty under the Pre-Sale Rule. The primary focus of this proceeding is on that part of the regulation defining the seller's duties if he elects to use the binder method of making warranty texts available prior to sale.

The purpose of 16 C.F.R. 702 is to enable the consumer to examine the written warranty prior to consummating the sale. Before the Rule, warranties were often enclosed in a sealed package and not

²¹ "Any sales person will direct you to these or other convenient warranty information locations" (CX 2).

available to consumers until after the sale thereby making it impossible for consumers to consider warranty information in their purchasing decisions (40 Fed. Reg. 60182 (1975)).

The Rule offers the retailer four methods of making warranties available to consumers. The seller of a consumer product with a written warranty shall:

(1) make available for the prospective buyer's review, prior to sale, the text of such written warranty by the use of one or more of the following means:

(i) clearly and conspicuously displaying the text of the written warranty in close conjunction to each warranted product; and/or

(ii) maintaining a binder or series of binders which contain(s) copies of the warranties for the products sold in each [47]department in which any consumer product with a written warranty is offered for sale. Such binder(s) shall be maintained in each such department, or in a location which provides the prospective buyer with ready access to such binder(s), and shall be prominently entitled "Warranties" or other similar title which clearly identifies the binder(s) The seller shall either:

(A) display such binder(s) in a manner reasonably calculated to elicit the prospective buyer's attention; or

(B) make the binders available to prospective buyers on request, and place signs reasonably calculated to elicit the prospective buyer's attention in prominent locations in the store or department advising such prospective buyers of the availability of the binders, including instructions for obtaining access; and/or

(iii) displaying the package of any consumer product on which the text of the written warranty is disclosed, in a manner such that the warranty is clearly visible to prospective buyers at the point of sale; and/or

(iv) placing in close proximity to the warranted consumer product a notice which discloses the text of the written warranty, in a manner which clearly identifies to prospective buyers the product to which the notice applies;

The Rule is phrased in the disjunctive, and the seller must comply with one of the four listed methods for each warranted product costing over \$15. The seller may use more than one method of compliance within his retail operation, but must utilize at least one of the prescribed methods for each product (40 Fed. Reg. 60183 (1975)).

Wards chose the second method, the binder and sign method, as its primary means of compliance with the Rule. Although there is evidence that Wards also used other disclosure methods, this case has been tried essentially on the issue of compliance with the binder method. [48]

A. The Binder Option

Under the Rule's binder option, the retailer must meet two

requirements, first the binders must be placed in each department where warranted goods are sold or in a location within the store providing ready access, second a binder or a number of binders must be placed so that they are reasonably calculated to elicit the prospective buyer's attention. As an alternative to displaying binders in a manner reasonably calculated to elicit the prospective buyer's attention, the retailer may make the binders available to buyers on request *and* place signs reasonably calculated to elicit the prospective buyer's attention which advise him of the availability of the binders including instructions for obtaining access.

B. The Position Of The Parties On Interpretation Of The Rule

The primary issues presented are the meaning of the term "a location which provides the prospective buyer with ready access" and the phrase "reasonably calculated to elicit the prospective buyer's attention." The construction of the Rule advanced respectively by the Commission staff and Wards cannot be reconciled.

Complaint counsel interpret the binder option of the Rule to require large retailers to place binders in each department or in a number of locations providing "ready access". Small retailers or small stores of a chain retailer, according to complaint counsel, may have one binder in a single location providing ready access to the entire store (CB 46).

In complaint counsel's view, taking into consideration the size and configuration of Wards' stores, respondent cannot comply with the rule by maintaining a single binder at one or two locations in a large multi-floor retail store (CRB 5). Wards' failure to place binders at locations "not near the point of sale," according to complaint counsel, deters consumer use and thus contravenes the ready access requirement of the Rule (CB 50).

Expressly disavowing the contention that, on its face, the Rule requires respondent to maintain a binder in every department of every store (CRB 5, 52), complaint counsel nevertheless maintain that "[d]ue to the size of its [Wards] stores, the ready access requirement itself would generally demand a binder in each department" (CRB 52). [49]

To comply with the second requirement of the Rule, complaint counsel state that: "respondent must place signs indicating the location of warranty binders so that they are clearly visible to prospective buyers who are examining applicable consumer products within the store, because placement of such signs at any other location would not be 'reasonably calculated to elicit the prospective buyer's attention!'" (CRB 3).

Respondent rejects the contention that the Rule's requirements differ for large and small stores asserting that there is no language in the Rule placing different obligations on a retailer depending on size of the store (RRB 18).

Respondent contends that the Pre-Sale Rule is clear and specific on its face and that Wards has complied with its precise language (RRB 13). Wards in fact asserts that its binder policy exceeds the literal requirements of the Rule (RB 1).

Respondent states that the Commission, in enacting the Rule, considered assertions that binders should be placed at the point of sale and intentionally refrained from imposing such a requirement (RRB 15). Wards contends that the rule permits the use of warranty binders outside the immediate selling area (RRB 14-16). According to respondent, the Pre-Sale Rule is not a "while examining rule". It maintains the Rule requires no more than that the warranty information must be imparted to the consumer prior to consummation of the sale (RRB 21).

C. Background And Purpose Of The Rule

The mere fact that an administrative rule requires interpretation does not constitute an amendment of the rule. Therefore, the construction of a rule consistent with its text and purpose in the course of an adjudicative proceeding does not constitute an "amendment" of the rule contrary to due process. As the Southern District of New York held on the basis of analogous arguments:

As is not unheard of, the determination of the charge will or may require construction and application of the rule. As is also familiar, the rule may in the process become clearer, more precise, more specifically defined—as has been true, say of endless statutes, the Constitution, and other administrative rules in many settings. To predict the rule will inevitably be "amended" is at this point an empty form of words. There is thus no foundation for the conclusion that the agency [50]cannot adjudicate the case before it but must, as the A&P steadily repeats hold an amendatory rulemaking proceeding.

* * * * *

It is, moreover, an unattractive novelty to insist that the agency may not consider in an adjudication the precise and detailed meaning of its own regulation *Great Atlantic & Pacific Tea Co. v. F.T.C.*, 1974-1 Trade Cases ¶ 75,080 at 96,815, 96,816 (S.D.N.Y. 1974).

Respondent insists that the language of the Rule is unambiguous and urges usage of the plain meaning rule of statutory construction. Under that approach, interpretation of the Rule should be limited to the text of the regulation (RB 9-10). Following the plain meaning

approach, Wards relies on the dictionary meaning of the words "ready access", asserting this term is synonymous with an ability to obtain or make use of without delay (RB 20). It insists no further construction is appropriate. Complaint counsel claims that the plain meaning rule does not apply (CRB 6).

To a considerable degree, the decision herein turns on the construction of two phrases "ready access" and "reasonably calculated to elicit the prospective buyer's attention." Both are undefined in the regulation and subject to various meanings. Under the circumstances, the plain meaning rule must give way to the need for interpretation of these phrases.

Unless the statute's words expressly forbid it, the plain meaning doctrine has always been subservient to a truly discernible legislative purpose whether ascertained from the context of the statute or by recourse to legislative history. *Wilderness Society v. Morton*, 479 F.2d 842, 855 (D.C. Cir. 1973), *cert. denied*, 411 U.S. 917 (1973); *District of Columbia v. Orleans*, 406 F.2d 957-59 (D.C. Cir. 1968). The courts have repeatedly recognized that:

[W]ords are inexact tools at best, and for that reason there is wisely no rule of law forbidding resort to explanatory legislative history no matter "how clear the words may appear on 'superficial examination'."

Harrison v. Northern Trust Co., 317 U.S. 476, 479 (1943); *Train v. Colorado Pub Int. Research Group*, 426 U.S. 1, 9-10 (1976); *U.S. v. American Trading Association*, 310 U.S. 534, 543-544 (1940). [51]

Words undefined in a statute must not be construed in the abstract by resorting solely to the dictionary. Rather, the words of a statute should be construed to further rather than frustrate the legislative intent or purpose. *Bartok v. Boosey & Hawkes, Inc.*, 523 F.2d 941, 947 (2nd Cir. 1975).²² The starting point for determining legislative purpose and from the purpose the intended meaning of the terms of the statute is an appreciation of the mischief which the legislation is to alleviate. *ICC v. J-T Transport Co.*, 368 U.S. 81, 107 (1961) Mr. Justice Frankfurter (dissenting opinion); see also *Liberation News Service v. Eastland*, 426 F.2d 1379, 1383 (2nd Cir. 1970) (referring to Justice Frankfurter's comment in *J-T Transport*).

In this case, analysis of the purpose or intent behind the Rule should start with the Commission's Statement of Basis and Purpose (40 Fed. Reg. 60168 *et seq.* (1975)). The purpose of the Rule is to make

²² . . . [I]t is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."

Bartok v. Boosey & Hawkes, Inc., 523 F.2d at 947 citing *L. Hand Cabell v. Markham*, 148 F.2d 737, 739 (2nd Cir.), *aff'd*, 326 U.S. 404 (1945).

warranty information available prior to sale so that the consumer can base his decision to buy on the warranty as well as factors such as the cost and qualities of the product (Address by Congressman Eckhardt cited in 40 Fed. Reg. at 60182). The mischief at which the Pre-Sale Rule is aimed was the fact that:

Warranty information is currently either unavailable or difficult to procure at the point of sale . . . (40 Fed. Reg. at 60182).

At a minimum, it is the purpose of the rule that written warranties and the information where warranties can be secured be made available prior to sale. It is also clearly the intent of the rule that the consumer be apprised of the availability of warranty information independent of oral inquiry from sales personnel. [52]

D. Ready Access

The large retailer as well as the small retailer comes within the ambit of the rule; consequently, the binder option of the rule was drafted to provide a flexible method of compliance to be geared to the size and configuration of the individual store.

The Statement of Basis and Purpose compares large retail operations, many of which contain multiple departments, with small retail operations. While there was testimony in the rulemaking proceeding indicating that a binder per department would be a reasonable means of compliance for large multi-department stores, there is no mandate under the final rule that large multi-department stores have a binder in each department (40 Fed. Reg. 60183-84 (1975)). The final Rule was designed to heed the retailers' cry for greater flexibility (40 Fed. Reg. at 60183).

Originally, the Rule required that a binder be placed in each department.²³ That language of the binder option was modified on the basis of the following rationale:

This sub-paragraph requires that the binders be maintained either in the department where the warranted product is sold, or in a location which provides the prospective buyer with ready access to the binders. Gambles, in its written submission, noted that "(w)hile the provision that binders be kept on a departmental basis is reasonable in the case of large retail outlets where it would be a burden on the customer to require that he or she go to one specific location in the store to find the binders, there are many small retail outlets which may have merchandise laid out by department, yet are small enough so that one complete set at a single location in the store would suffice."

²³ "[M]aintain a binder or series of binders in each department in which any consumer product with a written warranty is offered for sale, containing copies of the warranties for the products sold in such department (40 Fed. Reg. at 60183)."

Thus, in such instances, it would be permissible to place the binders in a location other than in the departments in which the products are being sold (40 Fed. Reg. at 60184). [53]

It is clear, from examination of the Rule and the purpose behind it, that factors such as number of departments, size and configuration of the store, were important factors considered by the drafters of the rule in formulating the ready access concept. As the Commission noted, placing binders in a single location would be permissible in the case of those retailers where the retailer is "small enough so that one complete set at a single location in the store would suffice."²⁴ However, taking into consideration the purpose of the Rule and the regulation as a whole, a single location will not suffice "where it would be a burden on the customer to require that he or she go to one specific location in the store" (40 Fed. Reg. at 60184).

In this proceeding, there has been little factual evidence developed concerning the behavior of the consumer in department stores.²⁵ Although, the record contains considerable information about the dimensions of Wards' stores, there is a dearth of evidence as to what distance in space and/or time a consumer may reasonably be expected to travel to consult warranty binders. Nevertheless, based upon an examination of the Statement of Basis and Purpose, the language of the Rule, and the record (including Ward's own decision to place a binder on every floor)²⁶ it appears that in large multi-department retail operations a minimum of a binder on every sales floor is necessary to constitute ready access.

In any event, the Pre-Sale Rule does not require that binders be placed in a sales area when the option for a location providing ready access is exercised. The Statement of Basis and Purpose demonstrates that the Commission considered the contention that warranty binders should be located in the sales or display area so that warranty information would be available at [54]the time that products were examined.²⁷ However, the revision of the Rule, which permits the placing of binders in a location providing ready access as an alternative to locating binders in each selling department, testifies to the fact that the Commission did not accept the contention that warranty binders must be at the point of sale. The Commission itself stated in commenting on the Rule: "Thus, in such

²⁴ The Statement of Basis and Purpose includes Gambles written submission on this point (40 Fed. Reg. 60184 (1975)).

²⁵ Only one consumer witness, Mr. Gelder, testified.

²⁶ Other than the binders placed in the CAC and TBA, Wards' policy was to include two other binders for multi-level stores. "In those stores, the store manager *must* select a central location, by floor . . ." for placement of the other two binders (CX 10A).

²⁷ "'Consumers will not be rapidly convinced (if at all) that they should run back and forth between display area and location of warranty binder'" (Knauer Transcript cited at 40 Fed. Reg. at 60183 n. 194).

instances, it would be permissible to place the binders in a location other than in the departments in which the products are being sold" (40 Fed. Reg. at 60184). Since the Regulation cannot be construed as requiring that warranty binders be available at the point of sale, the ready access alternative cannot be equated with placement of binders in a sales area.

The conclusion on this point derives added force from the fact that the Commission in its final formulation of the binder option in the Pre-Sale Rule considered the "logistics and expense of setting up and maintaining a binder system" and the fact that such expense would be reflected in terms of higher prices (40 Fed. Reg. at 60183, note 193).

The binder option is distinguishable from the other disclosure methods sanctioned by the Rule which do require that the warranty texts be available at the point of sale.²⁸ The non-binder options under the Pre-Sale Rule in effect require disclosure so that the customer can examine the warranty text while examining the product. The contrast between the binder method and the other disclosure methods specified by the Rule is significant. The Commission could have required that binders be displayed in "close proximity" to the product or "at the point of sale." It chose not to follow that course. Evidently, the disclosure standard was formulated differently for the binder option because of the "logistics and expense" inherent in that [55]method. Considering the Regulation as a whole and the legislative background, "ready access" cannot be construed as synonymous with "at the point of sale" or "in a sales area."

Accordingly, the test in determining whether a location provides ready access to a binder depends on whether it would be an undue burden to require the consumer to go to that location.²⁹ There is little information in this record concerning consumer behavior in retail stores from which a determination can be made as to the point where the burden of going to a particular location to consult a warranty binder becomes undue.³⁰ Mere reluctance by consumers to consult collateral material away from the point of sale is not equivalent to an undue burden. When the Commission formulated the Rule it had

²⁸ Under 702.3(a)(1)(i), the warranty text must be displayed *in close conjunction to each warranted product*; under 702.3(a)(1)(iii), the text of the warranty is to be displayed on the package so that it is clearly visible to prospective buyers *at the point of sale*; 702.3(a)(1)(iv), permits a notice disclosing the text of the written warranty *in close proximity to the warranted product* in a manner which clearly identifies to prospective buyers product to which the notice applies (emphasis added).

²⁹ See, views of Gamble Adopted at 40 Fed. Reg. at 60184.

³⁰ There is evidence that in one of Wards' largest stores it takes approximately two minutes to traverse a sales floor (Pagliaro 1043). On this record, absent additional evidence on consumer behavior, no finding can be made one way or the other whether such a two minute walk constitutes an undue burden.

before it evidence of the consumer's reluctance to consult collateral materials away from the point of sale.³¹ The text of the binder option, unlike the other disclosure methods specified by the Rule, does not take such reluctance into account. Therefore, the test of ready access, namely undue burden of going to a particular location, is not equivalent to mere reluctance by the consumer to consult binders away from the point of sale. It is clear, however, that requiring consumers to go from one floor to another to examine such materials would constitute an excessive burden.³² [56]

The Rule clearly gives retailers the choice between placing binders "in each department or in a location which provides ready access" (emphasis added). It may be necessary in certain stores, depending upon the characteristics of the individual outlets, that binders be placed in a number of locations providing ready access to ensure the standard has been met. As a matter of law, the regulation does not require that, for any class of stores, binders must be placed in each department selling warranted goods. Having given retailers the choice between the two alternatives, the Commission must make a factual showing in the case of the particular retailer that ready access can only be met by placing binders in each department if it wishes to impose that burden. This record does not contain sufficient factual data to support such a determination.³³

E. Reasonably Calculated To Elicit The Prospective Buyer's Attention

The additional requirement that signs and/or binders be placed in a manner reasonably calculated to elicit the prospective buyer's attention is also subject to interpretation. One must examine the term "reasonably calculated to elicit the prospective buyer's attention" in light of its context within the rule.³⁴ The binder option is the second of four options the retailer must choose from. The other options require the retailer to:

³¹ 40 Fed. Reg. at 60183 n. 194.

³² Consider, for example, the Major Appliance Department in Wards' Evergreen Park, Illinois store. Evergreen Park is a four story store with four sales levels, i.e., a lower level, a first, second and third floor. The Major Appliance Department is located on the lower level and the nearest warranty binder is located in the CAC on the third floor. In the case of the Evergreen Park Major Appliance Department, the prospective buyer must travel up three floors to have access to a warranty binder (Pinelli 54; Finding 76). See also, the Major Appliance Department in Wards' St. Paul, Minnesota store. The nearest binder in the Fall of 1977 was in the CAC on the second floor. The Major Appliance Department in the St. Paul store was on the first floor (Williamson 967-68; Finding 86).

³³ The Commission in *George's Radio and Television Company, Inc.*, F.T.C. Docket No. 9115 Order Issued Nov. 7, 1979, required in that proceeding that a binder be located in each department of the retail outlet. The order in question was agreed to by respondent on appeal. The issue of whether large retail outlets must have a binder in each department selling warranted goods as opposed to a location which provides ready access was not litigated in that case. Therefore, the decision and order in *George's Radio and Television* is not controlling on this point.

³⁴ Discussion pp. 49-51.

1. clearly and conspicuously display the text of the written warranty *in close conjunction to each warranted product*; and/or
3. display the package of any consumer product on which the text of the written warranty is [57]disclosed, in a manner such that the warranty is clearly visible to prospective buyers *at the point of sale*; and/or
4. place *in close proximity to the warranted consumer product* a notice which discloses the text of the written warranty, in a manner which clearly identifies to prospective buyers the product to which the notice applies.

16 C.F.R. 702.3(1) (emphasis added).

The mischief at which the Rule was directed viz., unavailability of warranty information prior to sale,³⁵ can be cured by requiring that warranty information or instructions to secure such information be displayed at the point of sale or in close proximity thereto.

In each of the nonbinder options, the warranty text is to be displayed at the point of sale. The binder option differs from the other methods specified by the Rule in not requiring, although permitting, the display of warranty information at the point of sale. The binder option, at a minimum, requires notice of the availability of the information be displayed so that the customer is likely to see it prior to his purchase.

“Reasonably calculated to elicit the prospective buyer’s attention” must be read, in context with the three nonbinder options, to require that notice of the availability of warranty information in the form of binders or signs be in sufficient proximity to the point of sale so that buyers are likely to see such notice before making their purchases.

A close reading of the binder option shows that the requirement that signs and/or binders be displayed in a manner reasonably calculated to elicit the prospective buyer’s attention is intertwined with the ready access provision. If the consumer is unaware that the information exists there can be no access, ready or otherwise. Section 702.3(a)(1)(B) is a notice requirement and thus, inherently stricter than the ready access provision. Although the sign need not necessarily be in a display area in order to provide the requisite notice, it must be in sufficient proximity to the point of sale so that it is likely to be seen before the purchase is made. In short, to comply with the purpose of the Rule by using the binder option, [58]there must at least be a sign and/or binder sufficiently close to the point of sale so that, as a practical matter, the consumer is likely to receive notice of the availability of warranty information prior to sale.

³⁵ 40 Fed. Reg. at 60182.

VII. VIOLATION

The record shows instances in which Wards has violated 16 C.F.R. 702.3(a)(1)(ii) by failing to maintain warranty binders in a location providing prospective buyers with ready access to such binders. In addition, respondent has violated Section 702.3(a)(1)(ii)(B) by failing to display, in prominent locations reasonably calculated to elicit the prospective buyer's attention, signs advising of the availability of the binders, including instructions for obtaining access.³⁶

- A. Binders were not present in the CAC's of some of Respondent's Stores in the Period September 1, 1977 to February 1, 1978.

Respondent selected the binder option of the Pre-Sale Rule as its primary means of compliance. In conjunction with that decision, it selected the CAC as one of three locations which would provide a prospective buyer with ready access to warranty information (Findings 24, 32).

The FTC survey, in the latter part of 1977, found that respondents failed to have warranty binders available in the CAC [59]of some stores. The survey results show four (4) instances in which the binder was not available in the CAC (Finding 97). The results of the FTC survey on this point are confirmed by respondent's admission that it did not have a binder present at some Customer Accommodation Centers during the period September 1, 1977 to February 1, 1978 (RA 22) and by certain of respondent's field audit reports (CX 57(B), 58(b), 63(b), 78(b)).

To the extent that binders were not present in the CACs of some stores, respondent has failed to provide prospective buyers with ready access to written warranty information in accordance with its own policy. Furthermore, failing to maintain a binder at a location to which the consumer has been directed as a place where he can consult warranty information constitutes the failure to maintain information in a location which provides the consumer with ready access in violation of Section 702.3(a)(1) (ii).

³⁶ In finding a violation, consideration has been given to respondent's utilization of methods other than the binder method to disclose written warranty information. It may be that in certain instances, respondent has used another method specified by the rule. (See for example Finding 85 on the Apache Plaza store). Ms. Sorenson's method of displaying the warranty in a plastic packet attached to the major appliance may comply with 16 C.F.R. 702.3(1)(i). But, compare the Major Appliance Department in the Evergreen Park store (Finding 74). Department manager, Orlando P. Pinelli, kept the warranties in a file drawer in the department; the warranties were not displayed).

The record shows little uniformity as to non-binder methods in use in the Major Appliance and TV/Stereo Departments in Wards' stores. Under the circumstances, evidence of this nature does not rebut a finding of violation based on respondent's failure to comply with the binder option in a number of Major Appliance and TV/Stereo Departments.

As part of its corporate policy for compliance with 16 C.F.R. 702.3(a)(1)(ii), respondent required that signs advising customers of the availability of warranty information be displayed in prominent locations within the store. The text of such signs states:

MERCHANDISE WARRANTY INFORMATION

Warranties covering merchandise sold in this store are available for inspection at the Customer Accommodation Center and the Automotive Center.

Any salesperson will direct you to these or other convenient warranty information locations. (CX 2)

Wards has chosen the CAC as a location providing the prospective buyer with ready access and has chosen to display signs representing that warranty information is available at the CAC. The failure in some stores to have binders located at the CAC in accordance with the instructions for obtaining access violates the ready access requirement of the Rule. Without adequate instructions for obtaining them, there can be no access to the binders (Discussion p. 57).

The representation on respondent's warranty signs that binders were present at the CAC were instructions for obtaining access pursuant to Section 702.3(a)(1)(ii)(B). When the binders were not present at the CAC, as represented on the sign, the instructions were inaccurate and thus, violated this part of the Pre-Sale Rule. [60]

- B. The representations made by Montgomery-Ward's salesmen about the availability of warranty information.

Wards, through its signs, represented to the prospective buyer that "any salesperson will direct you to these and other convenient warranty information locations" (CX 2). With that statement, respondent directed the consumer to look to sales personnel for "instructions for obtaining access" to warranty information. 16 C.F.R. 702.3(1)(ii)(B). The FTC surveys show that some salespersons were not aware of the binder system and that some salespersons did not provide prospective buyers with instructions for obtaining access to written warranty information when such information was requested (Finding 101; Danielson 642-43, 676; Hollon 492, 506, 510-11, 542-43, 560, 565-66, 572, 580; Shallcross 893, 899). The Commission survey is corroborated on this point by certain of Wards' audit reports (CX 71(b), 73(b), 75(b), 76(b), 78(b)).

To the extent that sales personnel were unable to or did not inform prospective buyers of the availability of warranty binders after they were represented to be a source for such information, Wards violated

the provision of Section 702.3 which requires the seller to provide the consumer with instructions for obtaining access. By failing to provide prospective buyers with instruction for obtaining access, Wards also violated the provision of the rule which requires that the binders be placed "in a location which provides the prospective buyer with ready access." Ready access depends upon the consumer being adequately and accurately informed of the existence and location of the warranty information pursuant to Section 702.3(a)(1)(ii)(B).

- C. The survey of Respondent's stores shows that they failed to display signs and binders.

The Commission surveyed approximately twenty (20) of respondent's retail stores. The survey disclosed that respondent failed to display signs advising consumers of the availability of written warranty information in the Major Appliance Department of fifteen (15) of the stores surveyed (Finding 94). Nor, were there signs in the TV/Stereo Department of sixteen (16) of the stores surveyed (Finding 96). The FTC investigators were not alone in noting the absence of warranty signs. The survey findings are corroborated by the results of respondent's own field audit reports which found signs were not present in certain stores in the appliance department and other locations required by respondent's instructions (CX 59B, 61B, 62B, 67B, 74B, 75B, 76B, 77B).

In a large multi-department store where there is neither a warranty binder nor a sign displayed in a department in which [61] warranted goods are sold, there is no notice in sufficient proximity to the point of sale so as to be reasonably calculated to elicit the prospective buyer's attention prior to sale.³⁷

Therefore, Wards' failure to display either warranty binders or signs at or near the point of sale violated the requirement that binders or signs be placed in a manner reasonably calculated to elicit the prospective buyer's attention prior to sale (See Discussion pp. 56-58).

- D. Binders were not present on every sales floor in some of Wards' stores.

A number of Wards' stores are multi-level retail operations. The Commission's survey showed that in at least two of those stores, St.

³⁷ The order herein requires Wards to place signs advising of the availability of warranty information on all cash registers. While a cash register may serve several departments in a Montgomery Ward store, for all practical purposes, the consumer will receive notice prior to leaving the vicinity of the department. Certainly with a sign on the cash register the customer will receive notice of the availability of warranty information prior to consummating the sale as required by the Rule.

Paul, Minnesota and Evergreen Park, Illinois, there was not a binder on every floor (Findings 76, 86).

The Rule requires that binders be placed in each department or in a location which provides the consumer with ready access. In order to comply with the ready access requirement of the Rule, the seller must, at a minimum, maintain a warranty binder on every sales floor (Discussion p. 55). Wards failed to provide the consumer with a warranty binder on every sales floor in each of its retail stores. The absence of such binders on every floor violates the ready access requirement of 16 C.F.R. 702.3(a)(1)(ii) (1975).

E. Credibility of Commission witnesses.

With respect to the stores surveyed by the FTC, a number of conflicts in the testimony pertaining to compliance with the Pre-Sale Rule have been resolved in respondent's favor. This does not mean that all the testimony of the surveyors has been discredited nor, should it be disregarded, as respondent [62] contends. The witnesses were observed while on the stand; on the basis of that evaluation there is no justification for disregarding their testimony. Furthermore, much of the survey evidence is unrebutted and respondent's own audits corroborate the findings of the survey that some Wards' stores were not complying with the Pre-Sale Rule.

F. The Audit Reports.

Respondent's audit reports showing no exception concerning compliance with Wards' binder program in the majority of the stores audited have been considered. Essentially, they are irrelevant to the issue of violation. A showing that there was compliance in some of Wards' stores would not defeat a showing of violation in other outlets. *Basic Books Inc. v. F.T.C.*, 276 F.2d 718, 721 (7th Cir. 1960). In any event, the audit reports showing no exception are entitled to little weight on the substantive question of violation. No auditor conducting such surveys testified concerning the methodology used in auditing an individual store's compliance with respondent's pre-sale policy.³⁸

VIII. REMEDY

Complaint counsel's proposed order would prohibit violation of the

³⁸ Respondent was advised at the time these documents were introduced, that they were received with reservations as to the weight which should be given them, since "there is no evidence on the basis of which findings can be made as to how thoroughly or how well, or if at all, a particular auditor looked into the pre-sale availability situation in a particular store" (Tr. 935). Respondent was given the opportunity to call two or three auditors to provide a substantive foundation for this evidence (Tr. 936). No such testimony, however, was adduced.

Pre-Sale Rule and in addition impose certain affirmative obligations. If the binder option is employed, the proposed order would require Wards to employ one of three methods of disclosure. The three alternatives may be summarized as follows:

1. Maintain not less than one permanently affixed binder in each 500 square feet of selling space displayed so that they are reasonably calculated to elicit a prospective [63]buyer's attention while examining the products offered for sale and which are accessible without the assistance of sales personnel *or*

2. Maintain a single permanently affixed binder in each department and not less than one warranty sign in each 500 square feet of selling space so that at least one such sign is reasonably calculated to elicit a prospective buyer's attention while examining products in the department *or*

3. Maintain a single, permanently affixed binder at each cash register servicing departments where the binder option is utilized and maintain no less than one warranty sign in each 500 square feet of selling space served by such cash register and placed so that at least one such sign is, reasonably calculated to elicit the customer's attention while examining products offered for sale in such department.

A ban on violation of the Pre-Sale Rule is supported by the record and will issue (See Findings 93-101). The affirmative obligations proposed in connection with the binder program will not be adopted.

Neither the wording of the regulation nor the legislative background supports a construction that the binders must be placed in a sales area when the ready access option is exercised (Discussion pp. 52-56).

The proposed order's options requiring that a sign and/or a binder be placed every 500 square feet would be unduly burdensome and of doubtful efficacy. As a practical matter every area 22.3 ft. by 22.3 ft. would require such a sign.³⁹ The record in this case contains little evidence concerning consumer behavior in retail stores which would necessitate or even justify such a plethora of binders. Furthermore, no finding can be made on the basis of the record that the expense of such an undertaking would be balanced by the benefit to the consumer in requiring it.⁴⁰ Such expenses, moreover, would [64] inevitably be passed on to the consumer in the form of higher prices.

The record justifies measures to ensure that notice of the

³⁹ The square root of 500 is 22.36.

⁴⁰ Complaint counsel at the beginning of the trial replied to a question on how many binders per square feet were necessary for ready access stating "I don't believe it can be judged in terms of square feet" (Tr. 268).

availability of warranty information be displayed in a manner designed to reasonably elicit the consumer's attention prior to purchase. This can only be done effectively if such notice is in sufficient proximity to the point of sale so that it is likely to be seen before purchase. Respondent will be required to place on each cash register at which goods within the scope of the Rule are sold a sign advising "prospective buyers of the availability of the binders, including instructions for obtaining access." Since it is generally at the cash register that sales are consummated, such a provision will reasonably ensure that consumers purchasing warranted goods are likely to become aware of the existence of warranty information and how to secure it prior to sale of the product.

Complaint counsel state that "informing consumers of a right to view a written warranty after approaching the cash register to make payment on an item is of little value because the purchasing decision has already been made" (CB 53). This argument is rejected. Both the Statute and the Rule clearly indicate that the information must be made available "prior to sale" that is before the sale is consummated. Signs on the cash register will achieve that objective. Neither the text of the Regulation or that of the Statement of Basis and Purpose support a construction that binders or signs displayed pursuant to 702.3(a)(1)(A) or (B) must be seen while the consumer examines the product. The Commission could easily have required that warranty signs or binders be displayed in "close proximity to" or in "close conjunction to" the warranted product or "at the point of sale" had it been the intention to ensure that signs or binders be visible while the customer examines the product. Such a requirement was not imposed. The failure to use these or similar terms compels the inference that the phrase "reasonably calculated to elicit the prospective buyer's attention" must be construed as meaning no more than that warranty signs are likely to be seen before the purchase is made.⁴¹ Signs permanently affixed to cash registers meet that standard. [65]

It is true that in mid 1978 respondent began placing signs advising consumers of the availability of warranty information on cash registers in its B, C, and D lines. This procedure, however, was implemented after Wards learned of allegations by the Commission staff that it was not in compliance with the Pre-Sale Rule. Remedial measures taken after the inception of an investigation do not as a general rule vitiate the need for an order where the record

⁴¹ In any event, even if the point in time at which a purchasing decision is made (as opposed to when the sale is consummated) were relevant, there is little or no information on this subject in the record. No conclusions as to the behavior of consumers in general can be drawn from the behavior of the one consumer witness who testified in this case.

demonstrates a law violation. *Coro Inc., et al. v. F.T.C.*, 338 F.2d 149, 153 (1st Cir. 1964), *cert. denied*, 380 U.S. 954 (1965).

The need for an order requiring cash register signs is underscored by the fact that on a number of occasions oral requests to Wards' sales personnel for access to warranty texts proved unavailing (Finding 101). This is precisely the mischief at which the Regulation is aimed. Warranty signs properly displayed are designed to inform the consumer of the availability of warranty information independent of verbal inquiries of sales personnel.

There is no need for provisions specifying in detail requirements with respect to the text or appearance of respondent's warranty signs. Those issues were not litigated in this proceeding. Moreover, the precise wording and appearance of such signs is best left to the compliance procedures following finality of the order issued herein. While orders should be clear as to what is required they should not be so detailed that they become needlessly cumbersome. *American Home Products Corporation d/b/a Whitehall Laboratories*, 63 F.T.C. 2227, 2228-19 (1963).⁴² [66]

The record demonstrates a violation of the ready access provision of the Rule (Findings 30, 76, 97). At a minimum, there must be one warranty binder on every sales floor. A provision in the order spelling out where binders must be placed on a sales floor once that minimum requirement has been met is however not warranted here. The record does not permit a detailed and concrete formulation on this point which could be incorporated in an order. The prerequisite to such a determination would be more detailed evidence of consumer behavior in the store situation than is available here.

The provision in the proposed order requiring the preparation of a list of all products for which the binder system is inapplicable will not be adopted. As a practical matter, the showing of violation on the litigated record has been confined to respondent's compliance with the Pre-Sale Rule's binder option. There is no justification for imposing affirmative obligations, unconnected with the binder method, whose burden and expense cannot be assessed on the basis of this record. In the event, that respondent's compliance with the Rule falls short in implementing disclosure methods other than the binder method, the provision requiring it to cease and desist from violating the Rule would cover such violations.

⁴² As the Commission stated in *American Home*:

These are details of compliance, which respondent will have ample opportunity to resolve after the Commission's order becomes effective. For the order "is only the beginning of a 'marriage' under which the Commission is obliged to afford the respondent definitive advice as to whether proposed conduct would meet the requirements of the order." *Foremost Dairies, Inc.*, F.T.C. Docket No. 7475 (decided May 23, 1963), p. 7 [62 F.T.C. 1344, 1363]. See Section 3.26 of the Commission's Rules of Practice and Procedure; *Vanity Fair Paper Mills, Inc. v. F.T.C.*, 311 F.2d 480, 488 (2d Cir. 1962) [7 S.&D. 583, 592].

The proposed order would also require respondent to distribute a copy of the order "to all operating divisions of the said corporation, . . . to all present and future corporate and regional personnel, and all store managers, department managers, and all audit personnel and secure from each person a signed statement acknowledging receipt of said Order." The meaning and scope of the phrase "all present and future corporate and regional personnel" is unclear. The provision will not be adopted in the form proposed. Respondent will be required to distribute a copy of the order to all of respondent's corporate officers, all regional vice presidents, store managers and department managers. The provision as modified should ensure that compliance receives the necessary attention at the management level. [67]

Complaint counsel propose that respondent be required to institute a program of instruction at all levels of the company concerning compliance with the Act. The purpose of the Pre-Sale Rule is to ensure that access to warranty information and/or notice of such information be available independent of inquiry to sales personnel. Nevertheless, a provision requiring that respondent's sales personnel be given written instructions concerning their obligations under the Pre-Sale Rule will be adopted. Such a requirement is justified in this case because respondent's warranty signs instruct the consumer to look to Wards' sales personnel for instructions for access to binders. In addition, the responses of certain salesmen to requests for warranty information have frustrated the purpose of the warranty signs (Finding 101).

The Commission's survey evidence embraced approximately twenty of respondent's retail stores. It establishes that in 14 appliance departments and 16 TV/Stereo Departments in those stores there were neither warranty binders nor signs displayed (Finding 99). Significantly, respondents binder and sign policy as initially implemented did not provide for furnishing each retail outlet with sufficient signs or binders so that either a sign or binder could be displayed in every department selling warranted goods (Findings 35, 42). The pattern of violation is sufficient to support the imposition of an order. *Goodyear Tire & Rubber Co. v. F.T.C.*, 331 F.2d 394, 401 (7th Cir. 1964), *aff'd.*, 381 U.S. 357 (1965); *Hoving v. F.T.C.*, 290 F.2d 803, 806 (2nd Cir. 1961).

Complaint counsel request imposition of a requirement that Wards' audit reports contain an express written statement concerning the compliance of each department with all provisions of the order. Considering the nature of the violation and respondent's previous attempts to implement the Rule, there is no need for such

an intrusion on Wards' internal management procedures. To the extent that the Commission needs reports of compliance, these can be required as a normal part of the compliance procedures.

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and over respondent Montgomery Ward & Co., Incorporated.
2. This proceeding is in the public interest.
3. The aforesaid acts and practices of the respondent, as herein found, constitute violations of the Magnuson-Moss Warranty Act and the Pre-Sale Rule duly promulgated thereunder. Accordingly, pursuant to Section 110(b) of the Act, they [68]constitute violations of Section 5 of the Federal Trade Commission Act.

ORDER

I.

It is ordered, That the definitions of terms contained in Section 101 of the Magnuson-Moss Warranty Act, 15 U.S.C. 2301 (1976), and in Rule 702 (16 C.F.R. 702.1 (1979)) promulgated thereunder shall apply to the terms in this order.

II.

It is further ordered, That Respondent Montgomery Ward & Co., Incorporated, a corporation, its successors and assigns, and its officers, representatives, agents and employees, directly or indirectly through any corporation, subsidiary, division or any other device in connection with its business as a seller of consumer products distributed in commerce as "seller" and "consumer product" are defined in Rule 702 (16 C.F.R. 702.1) of the Magnuson-Moss Warranty Act (15 U.S.C. 2301) do forthwith cease and desist from:

Failing, in the course of its business as a seller of consumer products, to make the terms of written warranties on consumer products actually costing more than \$15.00 and manufactured on or after January 1, 1977, available to the consumer prior to sale through utilization of one or more means specified in 16 C.F.R. 702.3(a)(1).

It is further ordered, That if respondent uses a binder system to comply with the seller's duties under 16 C.F.R. 702.3(a)(1), then respondent shall permanently affix to each cash register servicing a department where consumer products within the scope of Section 702.3(a)(1) are sold, signs, reasonably calculated to elicit the prospec-

tive buyers attention, to advise prospective buyers of the availability of warranty binders including instructions for obtaining access to such binders.

It is further ordered. That respondent shall:

1. Distribute a copy of this Order to all officers of the corporation, all regional vice presidents, store managers, and department managers in its retail stores and secure a signed statement acknowledging receipt of this order from each such person.

2. Instruct, in writing, all present and future salespersons, store managers and other [69]representatives engaged in the direct sale of consumer products to consumers on behalf of respondent as to their specific obligations and duties under the Magnuson-Moss Warranty Act the Pre-Sale Rule 16 C.F.R. 702.3(a)(1) and, 15 U.S.C. 2301 *et seq.* this order, and secure a signed statement acknowledging receipt of such written instructions from each such person.

3. Maintain, for a period of three (3) years from the effective date of this Order, complete business records to be furnished upon request to any duly authorized representative of the Federal Trade Commission, relative to the manner and form of Respondent's continuing compliance with the terms and provisions of this Order.

4. 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.

5. 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.

It is further ordered. That Count I of the complaint be, and it hereby is, dismissed.

APPENDIX OF ABBREVIATIONS

- CB - Complaint Counsel's Brief
- CPF - Complaint Counsel's Proposed Findings
- CRB - Complaint Counsel's Reply Brief
- CX - Complaint Counsel's Exhibit
- RA - Respondent's Admissions
- RB - Respondent's Brief
- RPF - Respondent's Proposed Findings
- RRB - Respondent's Reply Brief
- RX - Respondent's Exhibit

OPINION OF THE COMMISSION

BY PITOFSKY, *Commissioner*:

This is the first fully litigated case to reach the Commission involving the Pre-Sale Availability Rule (16 C.F.R. 702.3), promulgated under the Magnuson-Moss Warranty Act (15 U.S.C. 2301 *et seq.*). Respondent Montgomery Ward & Co. ("Ward") was charged by a complaint issued on September 14, 1978 with failing to make consumer product warranties available to prospective purchasers of its products according to the terms of the rule. The Administrative Law Judge ("ALJ") found that Ward had violated the rule, and entered an order in accordance with his findings. Ward appeals from the finding of a violation, and complaint counsel appeal from the ALJ's failure to enter a more comprehensive order. For the reasons set out in this opinion, we affirm the finding of a violation, but modify the ALJ's order.

Although we are entering an order against Ward, the Commission is aware that questions have been raised about the benefits to consumers provided by the Pre-Sale Availability Rule in its present form. In response to a petition for repeal or modification of the Pre-Sale rule, the Commission recently undertook to reexamine the effects of the rule and to gather more information about consumers' and retailers' experiences under the rule.* When this information is [2]received, the Commission will examine the practicality of alterna-

* Letter of March 3, 1981 to Endicott Peabody, Esq., counsel for the National Mass Retailing Institute.

tive approaches to pre-sale availability of warranty information, and will consider whether to commence a proceeding to amend the Pre-Sale rule.

We have kept these concerns in mind in deciding this case, and our order has been drafted accordingly. Although our review of the Pre-Sale rule may ultimately lead us to modify its terms, we believe it would be improper to make a decision about modification until we have completed a full examination of its costs and benefits. Further, we cannot ignore the record before us in this case. The rule is still in place, and we believe that respondent's violations should be corrected.

We emphasize, however, that the order we are imposing applies prospectively only. Respondent is thus not penalized for its past violations, but merely directed to comply with the rule, as defined by this opinion, in the future. The requirements of the rule have been substantially relaxed compared to standards sought by complaint counsel and imposed by the Administrative Law Judge. Moreover, the order will be subject to modification should the obligations of retailers under the Pre-Sale rule be revised at a later date.

I. Respondent's Warranty Availability Program

Ward operates a chain of retail department stores and catalog outlets. Its approximately 650 retail stores carry both hard and soft goods. Most products are sold under Ward's private label. (I.D.F. 2, 4, 5, 9.)¹

Montgomery Ward stores vary in size and number of floors. A store can be anywhere from 1,720 to 220,297 square feet and can have from one to four selling floors. The layout of each store (with regard to location of the merchandise) varies from store to store. Most retail stores have 55 departments selling four categories of merchandise: soft goods, furnishings, heavy line merchandise, [3]and major appliances. In most of these departments, only a small number of products are covered by written warranties. Two departments, however, the TV/Stereo department and the Major Appliance

¹ The following abbreviations are used herein.

- I.D.F. - Initial Decision Finding of Fact
- I.D. - Initial Decision
- Tr. - Transcript of Testimony
- CX - Complaint Counsel's Exhibit
- RX - Respondent's Exhibit
- CAB - Complaint Counsel's Appeal Brief
- C. Ans. B. - Complaint Counsel's Answering Brief
- RAB - Respondent's Appeal Brief
- SBP - Statement of Basis and Purpose

department, sell almost exclusively products that are covered by warranties. (I.D.F. 11, 16, 17, 21, 22.)

In order to implement its obligations to make warranty information available to its customers, Ward instituted a system of binders and signs in accordance with one of the options of the Pre-Sale Availability Rule.² Under the program, Ward chose not to provide a binder or sign for every department that carried warranted goods;³ instead, Ward supplied its stores with binders and signs to be placed in specified areas within each store. Binders were to be available at the Customer Accomodation Center (CAC),⁴ in the Automotive Center (usually a detached building), and in a central location (at the discretion of the store manager) on each floor of a multilevel store. (CX 10.) The signs advertising the availability of the binders were to be placed in "prominent areas", including the appliance department, the main entrance and the escalator/elevator area. One sign was also to be placed near each binder. (I.D.F. 35, 39.)

In 1977 investigators from several of the Commission's Regional Offices conducted a survey of 19 Ward stores in order to check respondent's compliance with the Pre-Sale Availability Rule. (I.D.F. 73.) The results of the survey led to the issuance of the complaint and became the focus of this litigation.

II. The Pre-Sale Availability Rule

The Magnuson-Moss Act provides that the "Commission shall prescribe rules requiring that the terms of any written warranty on a consumer product be made available to the consumer . . . prior to the sale of the product . . ." 15 U.S.C. 2303(b)(1)(A). Pursuant to the provision, the Commission promulgated the Pre-Sale Availability Rule. The rule, which went into effect on December 31, 1976, sets out four alternative methods by which retailers may make warranties available to consumers. The seller may display [4]the text of the warranty "in close conjunction to each warranted product" (16 C.F.R. 702.3(a)(1)(i)); make binders containing copies of warranties available to consumers (16 C.F.R. 702.3(a)(1)(ii)); display the text of the warranty on the package of the product (16 C.F.R. 702.3(a)(1)(iii)); or place a notice with the text of the warranty "in

² The binders contain copies of warranties offered on the products sold, and the signs direct customers to the location of the binders.

³ Approximately 35 departments sell products for which warranties are available in the binders. (I.D.F. 35.)

⁴ The CAC is the customer service department in Ward's stores. Customers frequent the CAC for information and assistance. (I.D.F. 16.)

close proximity to the warranted consumer product" (16 C.F.R. 702.3(a)(1)(iv)).⁵ The second alternative, the binder method, was chosen by respondent. [5]

The binder option is the most complicated alternative offered by the rule. It requires that a retailer maintain a binder or series of binders containing copies of all warranties offered on products sold. The binders must be kept in each department in which warranted products are sold, or "in a location which provides the prospective buyer with *ready access* to such binder(s)." (16 C.F.R. 702.3(a)(1)(ii) (emphasis added).) In addition, the retailer must inform consumers of the availability of the binders, by either of two methods. The binders themselves may be displayed, or signs advertising the existence of the binders may be posted, in a manner "reasonably calculated to elicit the prospective buyer's attention." *Id.* Thus, the issue presented by this case is whether Ward provided prospective purchasers with "ready access" to warranty binders, and displayed the binders or signs in a manner "reasonably calculated to elicit the prospective buyer's attention."

A

At the outset, we acknowledge that the rule's requirements, if read literally, could be subject to more than one interpretation. Ward certainly did not set out to exploit consumers, nor did it completely ignore its obligations under the rule. Nevertheless, we find that

⁵ The full text of the relevant portions of the rule is as follows:
 §702.3 *Pre-sale availability of written warranty terms*
 The following requirements apply to consumer products actually costing the consumer more than \$15.00:
 (a) *Duties of the seller.* Except as provided in paragraphs (c)-(d) of this section, the seller of a consumer product with a written warranty shall:
 (1) make available for the prospective buyer's review, prior to sale, the text of such written warranty by the use of one or more of the following means:
 (i) clearly and conspicuously displaying the text of the written warranty in close conjunction to each warranted product; and/or
 (ii) maintaining a binder or series of binders which contain(s) copies of the warranties for the products sold in each department in which any consumer product with a written warranty is offered for sale. Such binder(s) shall be maintained in each such department, or in a location which provides the prospective buyer with ready access to such binder(s) and shall be prominently entitled "Warranties" or other similar title which clearly identifies the binder(s). Such binder(s) shall be indexed according to product of warrantor and shall be maintained up to date when new warranted products or models or new warranties for existing products are introduced into the store or department by substituting superseding warranties and by adding new warranties as appropriate. The seller shall either:
 (A) display such binder(s) in a manner reasonably calculated to elicit the prospective buyer's attention; or
 (B) make the binders available to prospective buyers on request, and place signs reasonably calculated to elicit the prospective buyer's attention in prominent locations in the store or department advising such prospective buyers of the availability of the binders, including instructions for obtaining access; and/or
 (iii) displaying the package of any consumer product on which the text of the written warranty is disclosed, in a manner such that the warranty is clearly visible to prospective buyers at the point of sale; and/or
 (iv) placing in close proximity to the warranted consumer product a notice which discloses the text of the written warranty, in a manner which clearly identifies to prospective buyers the product to which the notice applies.

under a fair reading of the rule and its history, Ward's procedures fell short of adequate compliance.

The following discussion contains our conclusions as to the proper interpretation, as applied to a large retail outlet such as Ward, of the binder option of the Pre-Sale Availability Rule. Because the rule is phrased in broad, general terms, we intend by this opinion to give more content to those terms, and to give further guidance to Ward and to [6]those retailers whose operations are similar to Ward's. To aid us in our interpretation, and to demonstrate that respondent should have been aware that its program was not in compliance with the rule, we have analyzed the rule's "legislative history." We will, therefore, first discuss Ward's contention that we may not use the rule's Statement of Basis and Purpose⁶ as an interpretive aid.

B

Respondent argues that because the language of the Pre-Sale rule is clear and unambiguous, we may not examine extrinsic evidence to interpret its terms, under the "plain meaning rule" of statutory construction. Ward asserts that the key terminology of the rule, the terms "ready access" and "reasonably calculated to elicit the prospective buyer's attention", are sufficiently clear that the Commission need not, and indeed may not, resort to an examination of the rule's Statement of Basis and Purpose, nor the context of the provision within the rule as a whole, in order to interpret the obligations imposed by the binder option. (RAB 3-1.)⁷

Ward goes to great lengths to demonstrate that the words of the rule are unambiguous, citing a large number of wholly irrelevant cases. (RAB 9, n. 6.) In spite of these efforts, Ward succeeds in uncovering six different judicially recognized meanings for the phrase "ready access".⁸ It seems to us, therefore, that the term is not so clear as to preclude the use of the rule's Statement of Basis and Purpose [7]to determine the appropriate application of the rule to respondent.⁹ Moreover, as the Supreme Court has said, "[W]hen aid

⁶ 40 Fed. Reg. 60182 (1975).

⁷ We agree with respondent that the plain meaning doctrine is applicable to the interpretation of agency regulations to the same extent as it is to statutory construction. See, e.g., *New York State Comm'n on Cable Television v. FCC*, 571 F.2d 95 (2d Cir.), cert. denied, 439 U.S. 820 (1978).

⁸ For example, *Bache & Co., Inc. v. Roland*, 375 F.Supp 989 (S.D.N.Y. 1974) involved "ready access" to state courts; *Lincoln American Corp. Victory Life Ins. Co.*, 375 F. Supp. 112 (D. Kan. 1974) referred to "ready access" to corporate records; and *McKieLighter Co. v. City of Boston*, 335 F. Supp. 663 (D. Mass. 1971) concerned "ready access" to boat moorings. *Bache* and *Lincoln American* both defined ready access in terms of a lack of legal impediment to certain actions. None of the cases cited is relevant to a determination about convenience to consumers.

⁹ This by no means suggests, of course, that the rule's language is so ambiguous as to prevent retailers from applying its provisions to their operations. We are only saying that its meaning is not so clear on its face that the Statement of Basis and Purpose would not assist in determining its applicability to respondent's stores.

to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" *Train v. Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 10 (1976) (quoting *United States v. American Trucking Association*, 310 U.S. 534, 543-44 (1940)).¹⁰

Words and phrases less ambiguous than "ready access" or "reasonably calculated to elicit attention" have been held to require an examination of the legislative history of a statute to determine their meaning in a particular context. For example, the words "employee",¹¹ "pollution",¹² and "size and weight"¹³ have been found not to have a plain meaning. Words and phrases similar to "ready access" have also been considered ambiguous enough to require further scrutiny of legislative intent.¹⁴ In this case it would be foolish to seek only a literal meaning of the phrase when we are fortunate enough to have the Statement of Basis and Purpose of the rule as an interpretive aid, and where the binder option is one of four related methods provided by the rule for giving access to warranty information. [8]

Mere incantation of the plain meaning rule, without placing the language to be construed in its proper framework, cannot substitute for meaningful analysis. For we must remember Judge Learned Hand's stricture that "[t]here is no surer way to misread any document than to read it literally. . . ." [*New York State Commission on Cable Television v. FCC*, 571 F.2d 95, 98 (2d Cir.), cert. denied, 439 U.S. 820 (1978) (citations omitted).]

C

Ward asserts that under the Pre-Sale rule binders containing warranty information need only be "accessible or attainable" (RAB 7) in one location in a store (RAB 8), and that ready access is to be construed as allowing consumers to obtain warranty information with only a "reasonable delay or effort" (RAB 8-9). Ward's practice is in line with this interpretation; in many of its stores it made only one warranty binder available—usually in the CAC.¹⁵ Complaint counsel, on the other hand, argue that the binders must be placed in

¹⁰ See generally Murphy, *Old Maxims Never Die: The Plain Meaning Rule and Statutory Interpretation in the "Modern" Federal Courts*, 75 Columbia L.Rev. 1299 (1975).

¹¹ *United States v. American Trucking Ass'n*, 310 U.S. 534, 545 (1940); *Marriott In-Flite Serv. v. Local 504, Air Transport Div.*, 557 F.2d 295, 298 (2d Cir. 1977).

¹² *Train v. Colorado Public Interest Research Group, Inc.*, 426 U.S. 1 (1976).

¹³ *Maurer v. Hamilton*, 309 U.S. 598, 617 (1940).

¹⁴ In *Curlott v. Hampton*, 438 F. Supp. 505, (D. Alas. 1977), rev'd in part on other grounds, 598 F.2d 1175 (9th Cir. 1979), the words "are furnished" were interpreted to mean "have access to". See also *Cape Fox Corp. v. United States*, 456 F. Supp. 784, 805 (D. Alas. 1978 ("immediately")):

¹⁵ See discussion of placement of warranty binders, *infra*.

“reasonably close proximity” to all warranted products, in as many locations as necessary to achieve such proximity. (C. Ans. B. 14.) As for the signs, according to Ward the rule’s language “reasonably calculated to elicit . . . attention” is applicable only to a sign’s physical attributes, not to its placement in the store. (RAB 10.) Complaint counsel counter that the display of signs as well as their physical attributes is governed by the rule. (C. Ans. B. 14.)

After an examination of the Statement of Basis and Purpose and an analysis of the binder option in the context of the other options of the rule, we find that Ward’s interpretation of its obligations under the rule cannot stand.

Binders

As with other rules, the Statement of Basis and Purpose provides an analysis of the factors considered by the Commission in promulgating a rule, and is thus a useful aid in understanding the rule. Here, the Statement of Basis and Purpose reveals both the purpose of the warranty statute and of the Pre-Sale Availability Rule. The Commission was required by Congress to promulgate a rule that would permit the consumer to use product warranties “as a tool for making product comparisons”. (SBP 60182).¹⁶ As originally proposed by the Commission, the Pre-Sale rule would have [9]required a warranty binder to be placed in every department in which warranted products were sold. In response to comments on the rule, however, the Commission changed the wording of the rule in order to provide more flexibility for the retailer. (SBP 60183.) At the same time, the Commission recognized that a binder in an inconvenient location might discourage the use of the information. (See SBP 60183 n. 194.)

It is evident from the Statement of Basis and Purpose that the requirement that binders be located in every department was altered at the request of those retailers whose stores were small enough so that binders in every “department” would be unnecessary. The Commission explained, quoting one of the written submissions in the rulemaking record, that:

“[W]hile the provision that the binders be kept on a departmental basis is reasonable in the case of large retail outlets where it would be a burden on the customer to require that he or she go to one specific location in the store to find the binders, there are many small retail outlets which may have merchandise laid out by department, yet are small enough so that one complete set at a single location in the store would suffice.” [SBP 60184.]

¹⁶ The page numbers of the Statement of Basis and Purpose used herein are the corresponding pages of Volume 40 of the Federal Register.

The Commission went on to say that “in *such* instances, it would be permissible to place the binders in a location other than in the departments in which the products are being sold.” (*Id.* (emphasis added)). Thus, the rule’s flexibility was not intended to permit large retailers such as Ward to avoid the requirement that warranty information be provided in reasonable proximity to the areas where the warranted products were sold.¹⁷

Of course, the rule applies uniformly to all retailers, large and small, and Ward is entitled to take advantage of the clause that permits binders to be placed either in a department or in a location that provides ready access. If a large retailer such as Ward does avail itself of the alternative, however, the locations it chooses for the binders must not deprive the consumer of ready access to warranty information. [10]

The meaning of the binder option of the Pre-Sale rule becomes clearer when the other options are examined. These provisions are much more restrictive than the interpretation of the binder option that Ward advances. One method, for example, requires that warranty information actually be displayed on the package of the product. (16 C.F.R. 702.3(a)(1)(iii).) The other two options require display of the text of the warranty “in close conjunction to each warranted product” (16 C.F.R. 702.3(a)(1)(i)) and placement of a notice with the text of the warranty “in close proximity to the warranted consumer product” and “in a manner which clearly identifies . . . the product to which the notice applies” (16 C.F.R. 702.3(a)(1)(iv)). In light of the obvious intent of these other provisions to provide warranty information at or near the point of sale of warranted products, it would be incongruous to read the binder option, as Ward would have us read it, to require only one binder to be placed in a large multilevel retail establishment.

Respondent argues that it is impermissible for the Commission to make a judgment about ready access in the absence of specific evidence in the record as to how consumers behave when making purchasing decisions in retail stores. Commission “expertise” on consumer behavior, Ward asserts, is limited to judging consumer perceptions of advertising, and may not be brought to bear in other situations. (RAB 49-51.)

Although we reject the argument that our expertise is so limited,¹⁸

¹⁷ Respondent’s reliance on the fact that the rule is phrased in terms of “a” location (RAB 8) is misplaced. Such a narrow reading of the rule would deny all consumers ready access to warranty information by permitting retailers to choose a single location in a large store without regard to the number of selling floors, the size of the floors or other similar considerations. This is obviously not what the Commission intended when the rule was promulgated.

¹⁸ See *Brite Manufacturing Co. v. FTC*, 347 F.2d 477, 478 (D.C. Cir. 1965); *S.S.S. Co.*, 73 F.T.C. 1058, 1087 (1967); *Montgomery Ward & Co.*, 70 F.T.C. 52, 71-72 (1966), *aff’d*, 379 F.2d 666 (7th Cir. 1967).

we need not address that issue here. The Commission has already made a judgment about consumer behavior in the course of promulgating the Pre-Sale Availability Rule, and has determined that the convenience of the consumer is an important aspect of warranty availability.

In the Statement of Basis and Purpose the Commission recognized the burden on consumers that would be created if warranty binders were kept in only one location in large retail outlets. (SBP 60184.) This judgment was based on the great quantities of information about many aspects of retailing with which the Commission was furnished during the rulemaking proceeding—including information about consumer purchasing behavior. (*See, e.g.*, SBP 60183 n. 194.) [11]

As discussed above, the Statement of Basis and Purpose reveals that the concept of ready access represents a compromise, based on the rulemaking record, between the retailer's convenience and the consumer's convenience. As originally proposed, the Pre-Sale rule called for a binder in each department as the only method of compliance.¹⁹ The binder requirement was modified and the other options were added to the rule, in response to "the retailers' cry for greater flexibility." (SBP 60183.) In place of the requirement that a binder be maintained in each department, based on its knowledge of consumer behavior, the Commission introduced the concept of ready access into the rule.

A determination as to whether ready access has been provided is a practical, commonsense judgment about reasonable convenience to consumers, based on knowledge gained from the rulemaking proceeding, and common experience.²⁰ The only question we need resolve here is whether consumers had ready access to warranty information in Ward's stores. This is a judgment that Congress intended us to make when it enacted the Magnuson-Moss Warranty Act, and it is one that we can make on the basis of the record in this case.

Of course, what is ready access in one store will not necessarily be ready access in another. The layout of a particular store may provide more ease of access to certain areas than to others. There may be areas within each store which are frequented more often than others by consumers. Some stores may have most warranted products

¹⁹ The original proposal required the retailer to maintain a binder or a series of binders in each department in which any consumer product with a written warranty is offered for sale, containing copies of the warranties for the products sold in such department. [SBP 60183.]

²⁰ No special expertise is needed to determine that consumers will not travel all over a store to find warranty information. "In reaching their decisions neither courts nor administrative bodies should ignore the realities of life and disregard common knowledge. . . ." *Continental Can Co. v. United States*, 272 F.2d 312, 315 (2d Cir. 1959).

grouped in one location; others, like Ward, may have those products spread throughout the store. It is therefore difficult to generalize about appropriate locations for warranty binders. We do have information in the record before us, however, about the nature and layout of Ward's retail establishments. (I.D.F. 1-23; *see, e.g.*, CX 50-55), and the Commission can determine which locations are readily accessible to consumers. [12]

Accordingly, we have determined that consumers are unlikely to travel to other floors of a multi-level establishment in order to obtain access to warranty information. All other information necessary for the purchasing decision, (*e.g.*, price, sizes and colors available, instruction booklets) is available where the merchandise is displayed, and the place where the goods are purchased (the cash register) is in the same area. Therefore, a minimum of one binder per selling floor is necessary for most large retail establishments like Ward to provide consumers with sufficient access to warranty information.²¹

Signs

The requirement that signs be posted to advertise the availability of the binders is an integral part of the binder option of the Pre-Sale rule. No signs need be posted if the binders themselves are displayed in such a manner as to "elicit the prospective buyer's attention." (16 C.F.R. 702.3(a)(1)(iii)(A).) If the retailer chooses not to display the binders, however, the customer must be informed of the availability of warranty information through other means. As the Commission stated at the time of promulgation, "a prominent notice or series of notices must alert the prospective buyer's attention to the existence of the binders and the means for obtaining access to them". (SBP 60184.) It is reasonable to infer from this statement that the phrase "reasonably calculated to elicit the prospective buyer's attention" was intended to refer not only to the physical attributes of the signs, as contended by respondents, but to their ability to inform consumers of the availability of warranty information.

As with the placement of the binders, the placement of the signs so as to elicit consumers' attention will vary with the particular retail establishment.²² Unless the signs alert prospective purchasers to the existence of the binders, however, the rule has served no purpose. If

²¹ We note that Ward's own policy, as opposed to what it actually did, was to provide one warranty binder on each selling floor of its stores. (I.D.F. 36; CX 10.)

²² Although we hold that the language of the rule refers both to physical attributes and location of the signs, we will discuss only the placement of the signs in this opinion. The requirements of the rule as to physical attributes were not litigated below. (I.D. 65.)

the only signs advertising the availability of warranty information are at a distance from the location in which the products are sold, the consumer is unlikely to remember when comparing [13]products that the information is available. Thus, in order for effective notice to be given of the availability and location of the information, the signs must be placed in or near the areas in which warranted products are sold, and must be unobstructed so as to be capable of being read at some distance.

III. Ward's Violations of the Rule

For the purpose of assessing Ward's liability under the Pre-Sale Availability Rule, we have judged violations against a minimum standard of compliance, based on the record of this proceeding. We have determined that stores that were found to have fewer than one binder per selling floor and stores that had no signs in or near those departments where a substantial number of warranted products are sold, are in violation of the Pre-Sale rule.

A

Binders

The record demonstrates that many large retail stores had more selling floors than binders—thus there were some floors in those stores with no binders available. The record shows sufficient instances where warranty information was not readily available to prospective purchasers to subject Ward to liability for violations of the Pre-Sale Availability Rule.²³

The documentary evidence introduced by complaint counsel provides a basis for our finding of liability. This evidence consists of a chart of the number of binders and their locations in each store, compiled by complaint counsel from [14]information supplied by Ward (CX 46); blueprints of six Montgomery Ward stores, submitted by Ward (CX 50-55); and Ward's internal audit reports (CX 57-59).²⁴

²³ Many of Ward's stores also had no warranty binder in the CAC, the area respondent's witnesses testified that customers were likely to seek out when in search of warranty information (Pagliaro, Tr. 1027), and the area in which stores were instructed to place binders. (CX 10.)

²⁴ In addition to the documentary evidence in the record, complaint counsel called several witnesses to testify about the availability of warranty information. These witnesses had conducted a survey of respondent's stores, looking for warranty information, and had testified as to its unavailability. (I.D.F. 73-92.) In particular, at least nine of 12 stores visited by surveyor Jennifer Hollon had no warranty binder in or around either the Major Appliance department or the TV/Stereo department. (Hollon, Tr. 497-500, 503, 505, 542, 544, 555, 557, 559, 561, 564, 567, 570, 572, 583-84.) Since virtually all the products these departments sell are covered by written warranties (I.D.F. 21), in contrast to most other departments which sell only a few warranted products (I.D.F. 22), the failure to provide warranty information in close proximity to these departments made it unlikely that consumers would have pre-sale warranty information when it would be most likely to be influential.

In response to respondent's argument that the survey evidence is not reliable (RAB 23-32), we note that the

(Continued)

The most conclusive documentary evidence in the record regarding the location of the binders in Ward's stores is CX 46, a chart prepared by complaint counsel. The chart was compiled from information submitted by respondent, and its admissibility and accuracy were stipulated, with certain exceptions not relevant to the issue of the location of binders.²⁵ The chart indicates that 53 Montgomery Ward stores had at least one selling floor without a warranty binder. This figure shows substantial noncompliance with the rule at the time the chart was drawn up.

The evidence of CX 46 is corroborated in part by the blueprints of six stores that were introduced into evidence. (We assume that these blueprints are representative examples of the floor plans of Ward's stores; respondent has made no attempt to convince us otherwise.) They show that in the North Riverside and Penn Square stores, for example, there was no binder on the first floor. (CX 50 and 52.) In addition, we note that the blueprints demonstrate the distances consumers must travel to find the warranty binders. [15]

In several cases, the blueprints show that a customer at one end of a selling floor must cover a distance at least the size of a football field in order to obtain access to warranty information.²⁶

Ward's audit reports are documents prepared by internal auditors according to a program established by the company. (I.D.F. 56, 60.) In November 1976, compliance with Ward's warranty availability program was added to the list of matters to be audited. (I.D.F. 66.) The audit reports record any deficiencies found by the auditor, *i.e.*, the failure to place a binder or a sign in the location required by Ward's policy. (I.D.F. 54.) The reports in the record corroborate some of the other evidence and confirm that at least on some occasions violations of the Pre-Sale Availability Rule occurred.

Respondent argues that it was inappropriate for the ALJ to rely on the audit reports as evidence of violations of the rule, because "the audit procedures assure that such deficiencies are corrected immediately". (RAB 33.) We need not resolve the issue of whether it is proper for us to rely on the audit reports, however, since we need not use them as independent evidence. Consequently, we merely note that the reports confirm some of the other evidence in the record.

ALJ found the survey evidence to be credible (I.D. 61-62), and we are not persuaded that his finding should be disturbed. See *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951). Indeed, much of the testimony was corroborated by the documentary evidence introduced in this case. Compare *Hollon*, Tr. 497, 500 with CX 50; *Hollon*, Tr. 555, 557 with CX 46BB.

²⁵ Tr. 174-180.

²⁶ *E.g.*, CX 54 (312 feet); CX 55 (360 feet).

Signs

The survey taken by complaint counsel's investigators turned up ample evidence that respondent's stores did not have a sufficient number of signs "reasonably calculated to elicit the prospective buyer's attention."²⁷ According to the surveyors, there were no warranty signs in the CAC in six of the stores surveyed. (I.D.F. 98.) Since the CAC is the place chosen by Ward for making binders available, and since (as we noted earlier) it considers the CAC the place that customers are most likely to go for such information (Pagliaro, Tr. 1027), it would seem that posting a sign in the CAC would be crucial to maintenance of an effective warranty information program.²⁸ [16]

The survey also demonstrated that many stores had no signs advising customers of the availability of warranty information in the two departments where consumers were most likely to wish to make use of such information: the TV/Stereo department and the Major Appliance department. Seventeen of the stores surveyed had no sign in the TV/Stereo department (I.D.F. 96) and 14 had no sign in the Major Appliance department (I.D.F. 94). Moreover, in many of the stores, no signs alerting consumers to the existence of the warranty binders were visible at the entrance used by the surveyors or in the aisles on the way to the TV/Stereo and Major Appliance departments. (See, e.g., Hollon, Tr. 485, 497, 503, 548, 562, 570, 584.) We note that Ward's policy was to have signs posted in the Major Appliance Department. (I.D.F. 39; CX 10.)

Although respondent's failure to have a sign in each one of these locations at any given moment in time would not necessarily violate the Pre-Sale Availability Rule, the aggregate evidence shows that in many stores signs were not clearly visible. The very fact that in so many stores the surveyors did not notice signs in most of the locations they visited is indicative of the manner in which Ward complied with the requirements of the rule. Those individuals entered the stores looking for warranty signs; if they spotted none, how were ordinary consumers to do so?

The ALJ also found that the failure of some of Ward's salespeople, when asked, to direct consumers to the location of warranty information and to inform them of the availability of the binders violated the Pre-Sale rule. (I.D.F. 105.) Commission investigators testified that several salespeople informed them, when they asked

²⁷ The documentary evidence in the record is inconclusive as to the presence or absence of signs in appropriate places in respondent's stores.

²⁸ If the binder is not displayed, and if no sign is posted, a customer could conclude that warranty information is not in fact available. See SBP 60184 n. 208 (comment of Montgomery Ward).

about warranty information, that the warranty would be available after purchase of the product. (I.D.F. 101; *see, e.g.*, Hollon 506, 510-11; Danielson 643-44, 676.) We disagree with the ALJ that this lapse on the part of the sales force is a separate violation of the rule, but it does show a failure by respondent to educate its salespeople as to their responsibility to make warranty information available.

In sum, the record demonstrates numerous violations of the Pre-Sale rule under any reasonable interpretation of that rule. The survey done by the Commission investigators shows an absence of warranty availability in the areas of the store where consumers are most likely to benefit from warranty information. The documentary evidence reveals that [17]over 50 stores did not have at least one binder placed on every floor. We therefore find that the binder requirement of the rule was violated in those stores where there were selling floors without any binders. We also find that the lack of signs, in the aggregate, amounts to a violation of the requirement that binders or signs be placed so as to elicit the attention of consumers.

B

Respondent contends for several reasons that the Commission may not hold it liable for violations of the Pre-Sale rule. First, Ward contends that application of any interpretation of the rule in this case would be in effect an amendment to the rule, which must be done in accordance with the notice and comment procedures of the Administrative Procedure Act, 5 U.S.C. 553. Second, Ward asserts that application of the ALJ's interpretation of the rule (and presumably the Commission's interpretation) would violate its due process rights, because Ward has had inadequate notice of its obligations, and because the rule would thus be rendered so vague as to be unconstitutional. Finally, respondent argues that "as a matter of public policy" the Commission should not have issued the complaint that initiated the adjudicative proceeding.

In response to respondent's first contention, we agree that the Commission may not, in an adjudicative proceeding, create a general obligation that was not contemplated when the rule was promulgated. *See NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). That is quite a different matter, however, from interpreting the general terms of a rule in an adjudicative proceeding. Of necessity, any rule that is to cover such widely divergent entities as large retailers like Ward and small, one-room stores must be drafted in general terms.

Application of the Pre-Sale rule to a specific situation, therefore, must be done in an adjudication.

An administrative agency generally has a choice whether to proceed by rulemaking or by adjudication. "[T]he agency must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective." *SEC v. Chenery Corp.*, 332 U.S. 194, 202-03 (1947). Agencies also have a choice, when clarifying the meaning of rules, between amending them and interpreting them in an adjudication. See 1 K.C. Davis, *Administrative Law Treatise* Section 5.01 at 292 (1958).²⁹ Moreover, a finding of liability in a Commission proceeding subjects the respondent to no fines or penalties, [18]but merely results in an order to cease and desist from past practices. Such a proceeding is particularly appropriate for an adjudicative interpretation of a general legislative rule. *NLRB v. Bell Aerospace Co.*, 417 U.S. 267, 295 (1974).

Respondent's second contention is equally without merit. On the one hand, Ward argues that the Pre-Sale rule is so clear on its face that the Commission may not use its Statement of Basis and Purpose to aid in its interpretation; on the other hand, Ward asserts that when the rule is interpreted to make its practices a violation, it is so vague as to violate its due process rights.

As we noted above, some vagueness is inherent in a rule of general applicability like the Pre-Sale rule. Such a rule is not overly vague if it has a "reasonable degree of certainty." *Boyce Motor Lines v. United States*, 342 U.S. 337, 340 (1952). Indeed, one purpose of an adjudicative proceeding to enforce a rule is to interpret the rule, and it is proper for the government to give content to a general rule through its application to a particular party in an adjudication. *Waters v. Peterson*, 495 F.2d 91, 99 (D.C. Cir. 1973).

Respondent's public policy argument must also be rejected. A congressional determination has been made that consumers will be well served by the availability of warranty information prior to sale. See 15 U.S.C. 2302(b)(1)(A). This proceeding was brought to ensure that this congressional policy was carried out. Moreover, under Section 5 of the FTC Act, 15 U.S.C. 45, it is within the Commission's discretion to determine whether a proceeding is in the public interest, and that public interest determination was made when the Commission issued the complaint in this adjudication.

²⁹ A third alternative is to issue an interpretation of an existing rule, either by interpretative rule or in a policy statement. Again, the choice is within the discretion of the agency. See 1 K. C. Davis, *Administrative Law Treatise* Section 5.01 at 289 (1958).

IV. Relief

Having found numerous violations of the Pre-Sale Availability Rule, we have entered an order designed to ensure, to the extent possible, future compliance with the rule. *See FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1959). In the future Ward must make sure that warranty binders are readily accessible and that signs are posted to inform its customers of the existence and location of the binders. In formulating our order, we have taken into account the record evidence about the size and layout of Ward's stores and have employed our own expertise on consumer behavior (*see Part II C, supra*). In addition, we have considered the costs to retailers of establishing and maintaining a series of warranty binders.

Binders

The attached order requires Ward to maintain at least one warranty binder per selling floor in its retail establishments. (This would include a binder in its automotive [19]departments in stores where the department is contained in a separate building (*see I.D.F. 14*)). The order provision is based on our judgment that, given the size of many of Ward's stores, customers are unlikely to consult the binders if they must go to a different floor (*see Part II C, supra*). As evidenced by Ward's own policy to maintain a warranty binder on each selling floor, the order should not prove overly burdensome for Ward to implement.

Complaint counsel in their appeal brief urge the Commission to require respondent to maintain one binder in each department or sales area of each selling floor. (CAB 11-12.) It is at least possible that in some stores more than one binder per floor may be necessary to provide ready access, but we are unwilling, on this record, to impose such a burden on respondent. Although we have determined that consumers have not been provided with ready access to warranty information if that information is not on the same selling floor as the department in which the warranted product is sold, we are not persuaded that more than one binder per floor is necessary to provide ready access. Thus, we are unable to conclude that the costs of requiring more than one binder per selling floor are outweighed by the benefits to consumers.

Signs

In order to ensure that signs informing consumers of the availability of warranty information are placed in the areas where decisions

to purchase warranted products are made, the attached order requires respondent to place one sign in each department in which warranted products are sold. In our judgment, consumers are unlikely to consider asking for a warranty binder unless they are informed of its existence while they are making their purchasing decision. For this reason, the ALJ's determination that signs should be placed on cash registers is erroneous. Generally, by the time that a customer approaches the cash register, the purchasing decision has already been made.³⁰ The order also provides, in the interest of flexibility, that where two adjacent departments share a wall, one sign will suffice for both departments.

Finally, the order contains provisions designed to ensure respondent's compliance with the order. These include a requirement that respondent conduct semi-annual audits of its stores to make sure that the warranty signs and binders [20] are maintained in the manner required by the order. Ward will be required to be substantially more vigilant in inspecting its stores and requiring warranty information to be made available than it has been in the past.

In conclusion, we would like to make clear that the provisions of the order are tailored for Montgomery Ward, based on the evidence in the record of the proceeding. The system of compliance other retailers must follow depends on the particular organization of each store. This opinion should, however, put retailers on notice that it is insufficient to maintain one warranty binder in a large multilevel store, whether it is placed in a customer service area or elsewhere.

An appropriate order is attached.

FINAL ORDER

This matter has been heard by the Commission upon the appeal of counsel for respondent and the appeal of counsel supporting the complaint, and upon briefs and oral argument in support of and in opposition to the appeals. The Commission, for the reasons stated in the accompanying opinion, has granted the appeals in part, and denied the appeals in part. Therefore,

It is ordered, That the initial decision of the administrative law judge, pages 1-46, be adopted as the Findings of Fact and Conclusions of Law of the Commission, except as is inconsistent with the attached opinion.

³⁰ If respondent chooses to display the binders themselves rather than the signs, as permitted by the rule (16 C.F.R. 702.3(a)(1)(iii)(A)), binders must be placed in each department. If only one binder per floor is displayed and no signs are posted, that binder could not be said to be placed in a manner "reasonably calculated to elicit a prospective buyer's attention."

Other Findings of Fact and Conclusions of Law of the Commission are contained in the accompanying opinion.

It is further ordered, That the following Order to Cease and Desist be entered:

ORDER

I.

It is ordered, That the definitions of terms contained in Section 101 of the Magnuson-Moss Warranty Act, 15 U.S.C. 2301 (1976), and in Rule 702, 16 C.F.R. 702.1, promulgated thereunder, shall apply to the terms in this order. [2]

II.

It is further ordered, That respondent Montgomery Ward & Co., Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device in connection with its business as a seller and warrantor of consumer products distributed in commerce, do forthwith cease and desist from failing, in its course of business as a seller of consumer products, to make the terms of written warranties on consumer products actually costing more than \$15.00 and manufactured on or after January 1, 1977, available to the consumer prior to sale through utilization of one or more means specified in 16 C.F.R. 702.3(a)(1).

III.

It is further ordered, That for those retail establishments in which respondent chooses to use a binder system to comply with the seller's duties under 16 C.F.R. 702.3(a), respondent shall:

1. Maintain a permanently affixed binder system on each selling floor of each retail establishment; and
2. Label and display such binders, or place permanently affixed signs, in a prominent location in each department of each retail establishment where warranted products are sold, in a manner reasonably calculated to elicit the prospective buyer's attention. If two adjacent departments share a wall, one sign may be placed on that wall.

IV.

It is further ordered, That:

1. Respondent shall, for a period of three (3) years from the effective date of this order, maintain business records which show the form and manner of respondent's continuing compliance with the terms and provisions of this Order; conduct semi-annual audits and maintain records of these audits concerning each store's continuing compliance; grant any duly authorized representative of the Federal Trade Commission access to all such business records; and furnish to the Federal Trade Commission copies of such records which are requested by any of its duly authorized representatives. [3]

2. Respondent 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 respondent which may affect compliance obligations arising out of this Order.

3. Respondent shall within sixty (60) days after the effective date 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 and shall submit yearly reports detailing the manner and form of its compliance on the anniversary of the effective date of this Order for a period of three (3) years.

Complaint

IN THE MATTER OF

SUNKIST GROWERS, 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 9100. Complaint, May 31, 1977—Decision, May 5, 1981

This consent order requires, among other things, that Sunkist Growers, Inc. ("Sunkist"), a Sherman Oaks, Calif. processor and marketer of citrus fruit to timely divest, in accordance with the terms of the order, the assets and properties constituting the Arizona Products Division ("APD"), and offer the purchaser, annually for four years, a prescribed volume of citrus fruit for processing. Respondent is also barred from using a non-Sunkist plant to process citrus fruit packed in Yuma County, Ariz. until it has first offered the opportunity to the acquirer of APD. Additionally, the order requires respondent, for specified periods, to limit the number of its commercial packinghouse affiliations and refrain from acquiring, without prior Commission approval, any California or Arizona commercial citrus fruit processing plant or packinghouse.

Appearances

For the Commission: *David D. Laufer, L. Barry Costilo*, special trial counsel; *Bert L. Slonim, Debra L. Goldstein, Richard Kudo* and *Patricia A. Bremer*.

For the respondent: *Raymond C. Fisher, Harold J. Kwalwasser, Marlene B. Jones* and *R. Scott Jenkins, Tuttle & Taylor, Inc.*, Los Angeles, Calif.

COMPLAINT

The Federal Trade Commission, having reason to believe that Sunkist Growers, Inc. has violated and is now violating Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and that a proceeding by it in respect thereto is in the public interest, hereby issues its complaint charging as follows:

DEFINITIONS

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

- (a) *Western citrus fruit* includes oranges, lemons, grapefruit and other varieties of citrus which are grown in California and Arizona;
- (b) *Fresh-grade fruit* is citrus that is sold for fresh consumption;
- (c) *Product-grade fruit* is citrus that is used for processing into juice or peel products;
- (d) *Citrus products* are juice or peel products made from product-grade fruit;
- (e) *Packing* means services performed by packinghouses including, among others: receiving western citrus fruit, separating it into product-grade fruit and fresh-grade fruit, shipping the product-grade fruit to citrus processing plants, washing, waxing, grading and sizing fresh-grade fruit, placing it into cartons and shipping the cartons to buyers;
- (f) *Processing* means receiving western product-grade fruit and manufacturing it into citrus products;
- (g) *Marketing* is the sale and distribution of western citrus fruit or citrus products to wholesale buyers.

SUNKIST GROWERS, INC.

PAR. 2.

- (a) Respondent Sunkist Growers, Inc. (hereinafter "Sunkist") is an incorporated cooperative association, without capital stock, organized under the laws of the State of California, with its principal office and place of business at 14130 Riverside Drive, Sherman Oaks, California;
- (b) Sunkist engages in the marketing and processing of western citrus fruit packed by approximately 43 cooperative associations and 51 commercial citrus fruit packinghouses with which Sunkist has contracts and agreements;
- (c) Sunkist markets fresh or in processed form approximately 75 percent of the total production of western oranges and lemons;
- (d) Total sales for Sunkist were \$482.9 million for the fiscal year ending October 31, 1975.

TRADE AND COMMERCE

PAR. 3.

- (a) The western citrus fruit industry is composed of several levels of operation, including growing, packing, processing, and marketing;
- (b) Total wholesale sales of western citrus fresh-grade fruit and

western citrus products exceeded \$500 million in the 1974-75 crop year.

PAR. 4.

(a) The relevant markets include the following and any submarkets thereof:

- (1) The packing of western citrus fruit in California and Arizona;
- (2) The trade in product-grade western oranges in California and Arizona;
- (3) The trade in product-grade lemons in California and Arizona;
- (4) The manufacture, sale and distribution of lemon products in the United States and Canada;
- (5) The sale and distribution of fresh-grade western oranges to wholesale buyers in the United States and Canada;
- (6) The sale and distribution of fresh-grade lemons to wholesale buyers in the United States and Canada;
- (7) The sale and distribution of fresh-grade western oranges for export outside of the United States and Canada;
- (8) The sale and distribution of fresh-grade lemons for export outside of the United States and Canada.

(b) Sunkist controls approximately 65 percent or more of each of the relevant markets or submarkets alleged herein. No other firm accounts for more than 15 percent of any of the relevant markets or submarkets alleged herein.

JURISDICTION

PAR. 5. At all times relevant herein, Sunkist sold and shipped western citrus fruit and citrus products throughout the United States and to various foreign countries and engaged in commerce within the meaning of Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and engaged in or affected commerce within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44. Except to the extent that competition has been hindered, frustrated, lessened or eliminated by the acts and practices alleged in this complaint, Sunkist is in competition with other firms in the relevant markets and submarkets alleged herein.

COUNT ONE

PAR. 6. The allegations of Paragraphs One through Five are incorporated herein by reference.

PAR. 7.

(a) Sunkist maintains exclusive dealing contracts and agreements with approximately 51 commercial packinghouses which prohibit these packinghouses from:

- (1) Packing fruit for non-Sunkist growers; and
- (2) Dealing with marketers or processors which compete with Sunkist.

(b) The effects, among others, of these contracts separately or in combination with other agreements entered into by Sunkist have been or may be to foreclose competitors from a substantial share of one or more of the markets or submarkets alleged in Paragraph Four (a)(1)-(3) and (5)-(8).

PAR. 8. The aforesaid acts and practices, considered alone or in combination with the other acts and practices alleged in this complaint, have had or may have, among other things, the tendency and capacity to increase barriers to entry or to restrain, lessen or eliminate competition or create a monopoly in one or more of the markets or submarkets alleged in Paragraph Four (a)(1)-(3) and (5)-(8) and thus are to the prejudice and injury of the public and constitute unfair methods of competition or unfair acts and practices in or affecting commerce all in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

COUNT TWO

PAR. 9. The allegations of Paragraphs One through Five are incorporated herein by reference.

PAR. 10.

(a) In January 1966, Sunkist combined, contracted, or agreed with the Western Sales Division of Blue Goose Growers, Inc. (hereinafter "Blue Goose"). Pursuant to this combination, contract, or agreement, Blue Goose ceased marketing fresh-grade western citrus fruit and Sunkist entered exclusive dealing contracts with 13 commercial packinghouses that were owned by or under contract to Blue Goose and formerly marketed through Blue Goose;

(b) The combination, contracts, or agreements alleged above resulted in prohibiting commercial packinghouses owned by or under contract to Blue Goose from dealing with growers that are not members of Sunkist or with marketers or processors that compete with Sunkist;

(c) The effects, among others, of the combination, contracts, or

agreements described above have been or may be to eliminate substantial competition between Sunkist and Blue Goose, or increase entry barriers, or increase concentration or strengthen the position of Sunkist in one or more of the relevant markets or submarkets alleged in Paragraph Four (a)(1)-(3) and (5)-(8).

PAR. 11. The aforesaid act and practice, considered alone or in combination with the other acts and practices alleged in this complaint, has had or may have, among other things, the tendency and capacity to increase barriers to entry or to restrain, lessen or eliminate competition or create a monopoly in one or more of the markets or submarkets alleged in Paragraph Four (a)(1)-(3) and (5)-(8) and thus is to the prejudice and injury of the public and constitutes an unfair method of competition or unfair act and practice in or affecting commerce all in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

COUNT THREE

PAR. 12. The allegations of Paragraphs One through Five are incorporated herein by reference.

PAR. 13.

(a) In August 1974, Sunkist, which then owned two citrus processing plants, acquired the assets of Growers Citrus Products, a division of Golden Y Growers, Inc. (hereinafter "GCP"), a corporation. The assets consisted of a citrus processing plant located in Yuma, Arizona. At the same time, Sunkist also purchased land and cold storage facilities from Southwestern Ice and Cold Storage Co. (hereinafter "Southwestern"), a corporation. The land and cold storage facilities were previously leased by GCP from Southwestern for use in connection with operation of the processing plant;

(b) Prior to the acquisition, GCP was in competition with Sunkist in the markets or submarkets alleged in Paragraph Four(a)(3)-(4). In the years prior to the acquisition, Sunkist's share of the markets or submarkets alleged in Paragraph Four(a)(3)-(4), exceeded 65 percent and GCP's share was approximately 5 percent.

(c) At all times relevant herein, GCP and Southwestern were engaged in commerce within the meaning of Section 1 of the Clayton Act, as amended, 15 U.S.C. Section 12, and engaged in or affected commerce within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

(d) The effects, among others, of the acquisitions described above have been or may be to eliminate substantial competition between

Sunkist and GCP, or increase entry barriers, or increase concentration or strengthen the position of Sunkist in one or more of the relevant markets or submarkets alleged in Paragraph Four (a)(1)–(8).

PAR. 14. The acquisitions by Sunkist alleged herein may substantially lessen competition or tend to create a monopoly in one or more of the relevant markets or submarkets alleged in Paragraph Four (a)(1)–(8) in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

COUNT FOUR

PAR. 15. The allegations of Paragraphs One through Five are incorporated herein by reference.

PAR. 16. Sunkist processes approximately 75 percent of the product-grade lemons grown in the United States.

PAR. 17.

(a) Sunkist, as an instrumentality of its members, who are otherwise competitors of each other, stores and withholds from the market a large supply of lemon products for the purpose or with the effect of stabilizing the price of lemon products.

(b) The effects, among others, of the act and practice described above have been or may be to stabilize the price of lemon products, or to deter entry into lemon processing.

PAR. 18. The aforesaid act and practice, considered alone or in combination with the other acts and practices alleged in this complaint, has had or may have, among other things, the tendency and capacity to increase barriers to entry or to restrain, lessen or eliminate competition or create a monopoly in the market or one or more of the submarkets alleged in Paragraph Four (a)(4) and thus is to the prejudice and injury of the public and constitutes an unfair method of competition or unfair act and practice in or affecting commerce all in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

COUNT FIVE

PAR. 19. The allegations of Paragraphs One through Five are incorporated herein by reference.

PAR. 20. Sunkist has monopoly power in one or more of the relevant markets or submarkets alleged in Paragraph Four (a)(1)–(8) above.

PAR. 21. Sunkist, individually or in combination with others, has engaged in the acts and practices alleged in Counts One through Four, above, among others.

PAR. 22. Sunkist has adopted and followed a policy of refusing to permit competing processors to purchase product-grade western oranges and lemons from cooperative associations under contract to Sunkist.

PAR. 23. Sunkist has adopted and followed a policy of refusing to permit competing marketers to purchase or market fresh-grade western oranges and lemons packed by cooperative associations under contract to Sunkist.

PAR. 24. Sunkist has adopted and followed a policy of refusing to permit western citrus fruit of non-Sunkist growers to be packed in packinghouses owned by cooperative associations under contract to Sunkist.

PAR. 25. Sunkist has adopted and followed a policy of refusing to sell product-grade or fresh-grade western oranges and lemons to competing marketers or processors.

PAR. 26. Sunkist has adopted and followed a policy of achieving and maintaining control of at least 70 percent of the total supply of western oranges and lemons packed by packinghouses in California and Arizona.

PAR. 27. The effects, among others, of the acts and practices described above, have been or may be to increase barriers to entry, or stabilize, control, hinder, lessen, foreclose, or restrain competition in one or more of the relevant markets or submarkets alleged in Paragraph Four (a)(1)-(8).

PAR. 28. By engaging in the acts and practices alleged herein, Sunkist by itself or in combination with others has monopolized, attempted to monopolize, or maintained a non-competitive market structure in one or more of the relevant markets or submarkets alleged in Paragraph Four (a)(1)-(8) above in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondent named in the caption hereof with violations of Section 5 of the Federal Trade Commission Act, as amended, and Section 7 of the Clayton 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, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Sunkist Growers, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 14103 Riverside Drive, in the City of Sherman Oaks, State of California.

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

DEFINITIONS

For the purpose of this order, the following definitions shall apply:

(a) *Sunkist* means Sunkist Growers, Inc.; its divisions and subsidiaries; its officers, directors, representatives, agents and employees acting as such; and its successors and assigns.

(b) *Affiliated packinghouse or packinghouse affiliated with* means a citrus packinghouse authorized by Sunkist to pack citrus for Sunkist grower-members. It does not include a packinghouse which packs citrus for Sunkist members only on a temporary, ad hoc, emergency basis.

(c) *Arizona Products Division* means (1) all facilities and assets located in Yuma, Arizona, owned by Sunkist which are used in connection with the conversion of citrus fruit into citrus products; (2) the cold storage facilities and assets, acquired by Sunkist, which

previously had been part of the Southwestern Ice and Cold Storage Company; and (3) all agricultural lands used for effluent disposal from the above-described facilities. The facilities, assets and agricultural lands listed above shall include, but are not limited to, all land, buildings, equipment, supplies and machinery used by Arizona Products Division, together with any other additions and improvements thereto.

(d) *Citrus Packinghouse* means any facility which packs lemons, navel oranges, valencia oranges, grapefruit or tangerines for fresh fruit shipment on a regular basis, but does not include a facility which packs those varieties only on an auxiliary and overflow basis.

(e) *Commercial Packinghouse* means a citrus packinghouse located in California or Arizona which is not a packinghouse owned or operated by an association of growers meeting the requirements of Section 1 of the Capper-Volstead Act, or by one or more growers packing only their own citrus fruit.

(f) *Commercial Citrus Processing Plant* means a processing plant, used or equipped to be used, in whole or in part, to process whole citrus fruit into juice, peel or oil products, which is not owned or operated by an association of growers meeting the requirements of Section 1 of the Capper-Volstead Act.

(g) *District III* means the prorated district established pursuant to the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601 et seq., as amended, and as specified in regulations thereunder, 7 C.F.R. 907.66(c), 908.66(c) and 910.64(c), as of the date this order becomes final.

(h) *Lemon Administrative Committee* means the Lemon Administrative Committee established pursuant to the Agricultural Marketing Agreement Act of 1937, as amended, and regulations thereunder.

(i) *Orange Administrative Committees* means the Navel and Valencia Orange Administrative Committees established pursuant to the Agricultural Marketing Agreement Act of 1937, as amended, and regulations thereunder.

(j) *Product-grade citrus* means citrus which is received by processing plants for processing into citrus products.

I

It is ordered, That within eighteen (18) months from the date this order becomes final, Sunkist shall divest as a unit, absolutely and in good faith, all properties and assets constituting the Arizona Products Division ("APD") of Sunkist in order to establish APD as a viable competitor in the citrus processing business. The divestiture

shall be subject to the prior approval of the Federal Trade Commission. Pending divestiture, Sunkist shall take all measures necessary to maintain APD in its present condition and prevent any deterioration, except for normal wear and tear, of any of the assets to be divested which may impair their present operating abilities or market value.

II

It is further ordered, That for each of the four (4) complete District III citrus seasons (approximately September-August) after the divestiture of APD or the four (4) years (twelve-month periods) beginning on the date of divestiture, whichever the acquirer of APD ("acquirer") shall elect, Sunkist shall offer to sell to the acquirer for processing by the acquirer a mixed supply of product-grade citrus grown in District III in the manner described below, unless otherwise modified by mutual agreement between Sunkist and the acquirer:

(a) The total volume of citrus to be offered for sale in the first three (3) seasons or years shall be determined as follows:

Sunkist's total seasonal or yearly tons of product-grade citrus from District III	Total tons Sunkist shall offer to sell to the acquirer of APD
0-100,000	45% of Sunkist's product-grade citrus from District III
100,001-150,000	45,000
150,001-170,000	50,000
170,001 and above	55,000

(b) The total volume of citrus to be offered for sale in the fourth (4th) season or year shall be one-half ($\frac{1}{2}$) of the amount determined in accordance with subparagraph (a) of this paragraph.

(c) The volume of such citrus shall consist of a mix of varieties grown in District III that is equal to the proportion that each such variety bears to Sunkist's total District III volume of those varieties.

(d) Sunkist's total seasonal or yearly obligation to offer to sell citrus to the acquirer shall be reduced by an amount equal to any amount of citrus the acquirer obtains in that season or year for processing at APD from any citrus packinghouse affiliated with Sunkist on the date this order becomes final and not affiliated with Sunkist at the time the citrus is obtained from the packinghouse. In calculating Sunkist's obligation to offer to sell citrus under this order, the amount of citrus purchased by the acquirer from such a

packinghouse shall be included in the total tons of Sunkist's product-grade citrus from District III computed on a yearly or seasonal basis, consistent with the acquirer's election referred to above.

(e) The amount of citrus which the acquirer agrees to buy from Sunkist shall be specified in a yearly contract. Sunkist shall make the citrus available in daily quantities of not less than 100 tons and not more than 600 tons until Sunkist has met its total requirements specified in the yearly contract. If Sunkist's District III tonnage on any day is less than 100 tons Sunkist shall make all its District III citrus tonnage available to the acquirer, and the acquirer shall give reasonable notice to Sunkist whether the acquirer will take such tonnage. The contract shall be in accord with usual and customary industry terms and conditions, including reasonable terms and conditions to assure timely removal of the citrus from Sunkist's affiliated packinghouses.

(f) To determine Sunkist's obligations in paragraphs II (a), (b) and (c) of this order, the seasonal crop projections of the Orange Administrative Committees for oranges, the Lemon Administrative Committee for lemons, and Sunkist's regular seasonal projections for grapefruit, tangerines and other varieties shall be used. If during the season or year the crop projection or the actual crop production for any season or year varies from the projections establishing Sunkist's initial requirements for that season or year, the total amount and mix of citrus that Sunkist must sell under its contract or offer to sell under this order shall be adjusted to conform to the revised projections or to actual production as appropriate.

(g) The price Sunkist shall charge the acquirer for the citrus shall be no less favorable than the price at which Sunkist makes comparable sales of that variety of product-grade citrus to any other processing customer. If Sunkist has no such sales to any other processing customer, then the price shall be the prevailing market price for comparable sales of that variety.

III

It is further ordered, That for a period of five (5) years after the divestiture of APD, if Sunkist uses a non-Sunkist processing plant to process the citrus of Sunkist growers packed in Yuma County, Arizona, it shall first offer to the acquirer the opportunity to process that citrus, provided the product will be processed to meet Sunkist's specifications and the charge for processing is commercially reasonable.

IV

It is further ordered, That for a period of ten (10) years from the date this order becomes final Sunkist shall not directly or indirectly acquire, without the prior approval of the Federal Trade Commission, any stock interest in or assets of any commercial citrus processing plant in the states of California or Arizona.

V

It is further ordered, That for a period of five (5) years from the date this order becomes final, there shall not be more than thirty-nine (39) commercial packinghouses affiliated with Sunkist unless prior approval of the Federal Trade Commission is obtained.

VI

It is further ordered, That for a period of five (5) years from the date this order becomes final, Sunkist shall not directly or indirectly acquire, without the prior approval of the Federal Trade Commission, any stock interest in or assets of any citrus packinghouse in the states of California or Arizona, except for an interest resulting from foreclosure by Sunkist, in which case Sunkist shall divest such interest in the packinghouse within one year of the foreclosure.

VII

It is further ordered, That within sixty (60) days after the date this order becomes final, and every sixty (60) days thereafter until Sunkist has fully complied with the provisions of paragraph I of this order, Sunkist shall submit to the Federal Trade Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying with or has complied with that provision. All compliance reports shall include, among other things that are required from time to time, a full description of contacts or negotiations with any party for the properties specified in paragraph I of this order and the identity of all such parties. Sunkist shall furnish to the Commission copies of all written communications to and from such parties, and all internal memoranda, reports and recommendations concerning divestiture.

On the date Sunkist divests APD and on every anniversary date of the divestiture thereafter for the following five years, Sunkist shall submit to the Commission a verified written report setting forth the

manner and form in which it is complying or has complied with paragraph II of this order.

On the first anniversary of the date this order becomes final and on every anniversary date thereafter for the following five years, Sunkist shall submit to the Commission a verified written report setting forth the manner and form in which it has complied with paragraphs III, V and VI of this order.

On the first anniversary of the date this order becomes final and on every anniversary date thereafter for the following nine (9) years, Sunkist shall submit to the Commission a verified written report setting forth the manner and form in which it has complied or is complying with paragraph IV of this order.

VIII

It is further ordered, That Sunkist 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, or any other proposed change in the corporation, including but not limited to changes in the corporate by-laws or membership contracts, which may affect compliance obligations arising out of this order.

Complaint

97 F.T.C.

IN THE MATTER OF
GODFREY COMPANY

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-3066. Complaint, May 14, 1981—Decision, May 14, 1981

This consent order requires, among other things, a Waukesha, Wis. operator of a retail grocery chain to divest within six months to a Commission-approved acquirer or acquirers, seven specified retail grocery stores located in "The Milwaukee SMSA." The company is also prohibited, for a period of ten years, from making any acquisition in the retail grocery store business involving four or more stores without prior Commission approval.

Appearances

For the Commission: *David D. Laufer, Katherine Boland and Paul R. Zamolo.*

For the respondent: *James T. Halverson, Thomas P. Palmer and Gregory S. Bentley, Shearman & Sterling, New York City, and Robert J. Sugrue, Boodell, Sears, Sugrue, Giambalvo & Crowley, Chicago, Ill.*

COMPLAINT

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

DEFINITIONS

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

(a) *Retail grocery stores* means retail food stores classified under Bureau of Census Industry Classification No. 541, including supermarkets, convenience stores and delicatessens, which primarily sell a wide variety of canned or frozen foods, such as vegetables, fruits

and soups; dry groceries, either packaged or in bulk, such as tea, coffee, cocoa, dried fruits, processed food, and non-edible grocery items. In addition, these stores often sell smoked and prepared meats, and fresh fish and poultry, fresh vegetables and fruits, and fresh or frozen meats.

(b) *Godfrey* means Godfrey Company, a corporation organized under the laws of Wisconsin with its principal executive offices at 1200 West Sunset Drive, Waukesha, Wisconsin and its directors, officers, agents and employees, and its subsidiaries, successors and assigns.

(c) *Milwaukee SMSA* means the Milwaukee Standard Metropolitan Statistical Area, consisting of the four Wisconsin counties of Milwaukee, Waukesha, Washington and Ozaukee.

GODFREY COMPANY

2. Respondent Godfrey Company (Godfrey) is a Wisconsin corporation with its principal executive offices at 1200 West Sunset Drive, Waukesha, Wisconsin.

3. In 1979, Godfrey was engaged in the distribution of food through a chain of 86 retail grocery stores operated under the name "Sentry." Forty-eight of the 86 Sentry grocery stores were owned and operated by Godfrey and 38 were operated by affiliated retailers pursuant to a franchise agreement with Godfrey. All 86 stores were located in the State of Wisconsin. In addition to its grocery stores and wholesale operations, Godfrey owns and operates a bakery, greenhouses, retail hardware stores, retail drug store, egg production facility, farm, and land development company.

4. Godfrey's total net sales for the year ending February 23, 1980 were approximately \$368,679,000.

5. In 1979, there were 42 Sentry retail grocery stores in the Milwaukee, Wisconsin SMSA of which 28 were corporately owned and 14 were franchised.

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

JEWEL COMPANIES, INC.

7. Jewel Companies, Inc. (Jewel) is a New York corporation with its principal office at 5725 East River Road, Chicago, Illinois.

8. In 1979 Jewel operated a chain of approximately 637 retail grocery stores located throughout the United States.

9. Jewel's total sales for the year ended February 2, 1980 amounted to \$3,764,266,000.

10. In 1979 Jewel operated 12 retail grocery stores in the Milwaukee, Wisconsin SMSA.

ACQUISITION AGREEMENT

11. On or about October 13, 1980, Godfrey and Jewel entered into an acquisition agreement under the terms of which Godfrey will acquire the assets of all Jewel's Wisconsin retail grocery stores and assume the leases of at least eleven and possibly twelve stores. Godfrey will assume the lease of the twelfth grocery store unless prohibited by the terms of the lease. The practical result of this agreement, if consummated, would be the acquisition of eleven and possibly all twelve of Jewel's Milwaukee SMSA stores by Godfrey.

TRADE AND COMMERCE

RELEVANT LINE OF COMMERCE

12. A relevant line of commerce in which to assess Godfrey's proposed acquisition of Jewel's Milwaukee SMSA stores is retail grocery store sales.

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

RELEVANT SECTION OF THE COUNTRY

14. A relevant section of the country is the Milwaukee, Wisconsin SMSA.

15. Sales by grocery stores in the Milwaukee SMSA were \$930,147,000 in 1977 and approximately \$1,131,835,000 in 1979.

16. In 1979, Godfrey owned or franchised 42 retail grocery stores in the Milwaukee SMSA. Godfrey ranked as the second largest firm in that market with a market share of approximately 19% including sales by both corporately owned and franchised Sentry stores.

17. In 1979, Jewel operated 12 retail grocery stores in the Milwaukee SMSA; it ranked as the fourth largest firm in that market with a market share of approximately 7.4%.

18. Godfrey and Jewel have been for many years and were, until October 25, 1980 when Jewel closed its Milwaukee SMSA grocery stores, direct and substantial competitors of one another in the relevant line of commerce in the Milwaukee SMSA.

EFFECTS OF THE ACQUISITION

19. The effects of the proposed acquisition set forth in Paragraph 11 herein may be substantially to lessen competition or tend to create a monopoly in the relevant market, in violation of Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and the acquisition constitutes an unfair method of competition and an unfair act or practice within the meaning of Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. 45) in the following ways among others:

- a) The elimination of actual competition between Godfrey and Jewel in the Milwaukee SMSA;
- b) increased concentration in the retail grocery store business in the Milwaukee SMSA;
- c) potentially weakening competition from independent retail grocery competitors of Godfrey and Jewel in the Milwaukee SMSA by impairing the ability of independent retail grocery store operators in the Milwaukee SMSA to compete; and
- d) the encouragement of further acquisitions and mergers by and among other leading firms in the retail grocery store business in the Milwaukee SMSA.

VIOLATION CHARGED

20. The acquisition by Godfrey of Jewel assets, if effected, would for the reasons set forth herein constitute a violation of Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45).

21. By entering into the agreement which would give rise to the violation described in Paragraph 20, herein, Godfrey has violated Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45).

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the acquisition by Godfrey Company of certain assets of Jewel Companies, Inc., and Godfrey Company having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent named in the caption hereof with violation of Section 5 of

the Federal Trade Commission Act, as amended, and Section 7 of the Clayton Act, as amended; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that the 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, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure described in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Godfrey Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Wisconsin with its principal executive offices located at 1200 West Sunset Drive, in the City of Waukesha, State of Wisconsin.
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 TO DIVEST AND OTHER RELIEF

I.

As used in this order:

- (A) *Godfrey* means Godfrey Company, a corporation organized under the laws of Wisconsin with its principal executive offices at 1200 West Sunset Drive, Waukesha, Wisconsin and its directors, officers, agents and employees, and its subsidiaries, successors and assigns.
- (B) *Jewel* means Jewel Companies, Inc., a corporation organized

under the laws of New York with its principal executive offices at 5725 East River Road, Chicago, Illinois.

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

(D) *The Milwaukee SMSA* means the Milwaukee Standard Metropolitan Statistical Area, consisting of the four Wisconsin counties of Milwaukee, Waukesha, Washington and Ozaukee.

(E) *Godfrey stores* means those retail grocery stores in the Milwaukee SMSA owned by or operated by Godfrey.

(F) *Jewel stores* means those retail grocery stores in the Milwaukee SMSA owned or operated by Jewel.

(G) *The disposition stores* means the following Godfrey ("G") stores and Jewel ("J") stores:

1. G-427 (3045 S. 13th St., Milwaukee, WI.)
2. G-607 (6077 S. Packard Ave., Cudahy, WI.)
3. G-810 (3939 S. 76th St., Milwaukee, WI.)
4. J-1201 (1201 N. 35th St., Milwaukee, WI.)
5. J-729 (729 S. Layton Blvd., Milwaukee, WI.)
6. J-15182 (N81 W15182 Appleton Ave., Menomonee Falls, WI.)
7. J-6251 (6251 S. 27th St., Greenfield, WI.)

(H) *Acquisition, acquire, merger, or merge with* includes all other forms of arrangement by which Godfrey may obtain, directly or indirectly, all or any part of the stock or assets, both tangible and intangible, of any other retail grocery store or stores.

II.

It is ordered, That within six months from the date on which this order becomes final, Godfrey shall divest itself absolutely and in good faith of all of its right, title and interest in the disposition stores; *provided, however,* that Godfrey may, if so required by the lessor(s) of any one or more of the disposition stores, remain a party to its lease with such lessor(s) and may take possession of any of the disposition stores upon default under the lease or sublease for such store by the sublessee which acquired such disposition store from Godfrey. In the event of such reacquisition of any of the disposition

stores, Godfrey shall divest the reacquired disposition store in accordance with the terms of this order within six (6) months of the date of reacquisition of any such store. Until approval of divestiture, Godfrey shall continue to operate disposition stores G-427, G-607 and G-810 as retail grocery stores. Divestiture shall be made only to an acquirer or acquirers approved in advance by the Federal Trade Commission. The purpose of the divestiture required by this paragraph is to assure the continued operation of the disposition stores as retail grocery stores and their survival as viable competitors in the Milwaukee SMSA.

III.

It is further ordered, That for a period of ten (10) years from the date on which this order becomes final, Godfrey shall not merge with or acquire, or merge with or acquire and thereafter hold, as corporately operated or as franchised retail grocery stores, directly or indirectly through subsidiaries or in any other manner, without the prior approval of the Federal Trade Commission, the whole or any part of the stock or assets of any individual, firm, partnership, corporation or other legal or business entity which directly or indirectly owns or operates any retail grocery store, where such acquisition or merger involves four or more such retail grocery stores; *provided, however,* that nothing in this order shall be construed to prevent Godfrey from being or becoming a guarantor of lease obligations of any Godfrey franchisee.

IV.

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

V.

It is further ordered, That Godfrey notify the Federal Trade

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