IN THE MATTER OF

KELLOGG COMPANY, ET AL.

Docket 8883. Interlocutory Order, Dec. 18, 1982

Staying the effective date of the Initial Decision until January 15, 1982.

ORDER

On November 20, 1981, the Director of the Bureau of Competition ("Director") filed a Withdrawal of Notice of Intention to Appeal. Complaint counsel had previously filed its Notice of Intention to Appeal the Administrative Law Judge's ("ALJ") initial decision in this matter and had subsequently reaffirmed its contention that the public interest would be served by Commission review of the merits as recently as October 1, 1981. Therefore, the Commission issued an Order on December 3, 1981, that required complaint counsel to provide a "Statement as to why the public interest is no longer served by full Commission review and consideration of the substantive merits of this matter."

On December 11, 1981, the Director of the Bureau of Competition filed a statement with the Commission. The Bureau Director's statement expressly acknowledged that it is "the decision of the Commission which should ultimately govern here. . . ." Director's Statement at 2. The Commission concurs with this view. Section 5 of the Federal Trade Commission Act clearly provides that a determination as to the public interest, for the purpose of invoking this Act, rests solely within the discretion of the Commission.

The Bureau Director has articulated his belief that the theory of Docket 8883 is inconsistent with the public interest because it "unavoidably extends Section 5 to condemn some forms of conduct that rationally flow from an industry's structure, and thus, to condemn the structure itself." Director's Statement, at 3. Moreover, the Director states that the relief sought by complaint counsel would be anticompetitive, potentially resulting in inefficient behavior to the ultimate detriment of the consumer. Director's Statement at 3–4.

After reviewing the record materials, the Commission has determined to permit a brief period for further comment from those complaint attorneys and economists who have conducted this litigation. Chairman Miller opposes the extension of time and would not place this matter on the Commission's docket. He believes that he views of all parties have been clearly articulated in their briefs efore the ALJ and the Commission. (See separate statement.) ommissioner Clanton also is not inclined to place this matter on the

Commission's docket. However, in light of the Bureau Director's statement noting the differing views of the complaint attorneys litigating this matter, he would support the Commission's action. Respondents may also wish to provide their views on the Bureau Director's statement or on the issue of whether the Commission should place this matter on its own docket for review. Therefore, in order to afford a complete opportunity for all the parties to express their views,

It is ordered, That the parties file any statements, not to exceed thirty pages, if desired, no later than fifteen days following the date of issuance of this order.

It is further ordered, That the effective date of the Initial Decision of the ALJ in this matter is hereby stayed until January 15, 1982, pending a determination of the issues raised by the pleadings.

It is so ordered.

Chairman Miller dissented.

DISSENTING STATEMENT OF CHAIRMAN JAMES C. MILLER III

On November 3, 1981, I joined my fellow Commissioners in denying respondents' petition to affirm the Adminstrative Law Judge's (ALJ's) decison without briefs to the Commission. My reasons, as stated at that time, were as follows. First, the granting of such a petition would have been unprecedented and inconsistent with the Commission's own rules of procedure. Second, the Commission had before it, at the time, a notice of intention to file an appeal on the part of complaint counsel. To have granted respondents' petition would have required the Commission simultaneously to anticipate and resolve the merits of the then-pending appeal.

On November 23, 1981, the Director of the Bureau of Competition withdrew, without comment, the Bureau's notice of intent to appeal. In the interest of collegial inquiry, on December 3 I joined my fellow Commissioners in delaying for 15 additional days the effective date of the ALJ's decision in order to give the Commission an opportunity to hear the Bureau Director's reasons why an appeal would not be in the public interest.

On December 11, the Bureau Director submitted his rationale t the Commission, stating, in part, that in his judgment the theory c which the case is based is not sound as a matter of law or publ policy and could not prevail in the courts.

The circumstances now facing the Commission are as follows:

(1) The ALJ, after reviewing over 20,000 pages of evidence a argument, has concluded that, under the theory of the case arg

by complaint counsel, the evidence is not sufficient to support a finding of a law violation.

(2) The Director of the Bureau of Competition has concluded that, even if the evidence were found to be sufficient, the theory does not support a finding of a law violation.

(3) The case has occupied the Commission's attention for nearly a decade (the original complaint having been issued in April of 1972).

(4) The case already has cost the Commission and the taxpayers $5.9 million, and has cost the respondent private parties and, indirectly, consumers of their products, millions more.

(5) Further delays in resolving the case are draining and will continue to drain resources from the Commission's other important work.

With respect to the question of the Commission's need to hear further arguments before deciding whether to take the case on appeal on its own motion, I would note that the Commission has had ample time to review the Bureau Director's rationale for withdrawing the Bureau's notice of intent to appeal, has had since September 1st to review the ALJ's decision, and has had over eighteen months to review complaint counsel's and respondents' briefs filed with the ALJ.

I think it time the Commission acted to bring a merciful end to this case, whose result, if successfully prosecuted, would more likely harm consumers than help them. I cannot in good conscience vote either to bring the matter before the Commission for formal review or to extend further the period for making that decision.

Enough is enough.

IN THE MATTER OF

WORTHINGTON FORD OF ALASKA, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE MAGNUSON-MOSS WARRANTY AND FEDERAL TRADE COMMISSION ACTS

Docket C-3079. Complaint, Dec. 30, 1981—Decision, Dec. 30, 1981

This consent order requires four motor vehicle dealerships, located in various parts of the country, and their corporate officer, among other things, to make the text of written warranties readily available to prospective buyers, prior to sale; maintain up-to-date binders containing copies of written warranties in an easily accessible location; and conspicuously post signs advising consumers that all warranties are not the same and that written warranties are available for comparison upon request. Respondents are barred from improperly disclaiming, modifying or limiting the duration of implied warranties; and required to notify previous purchasers of motor vehicles whose implied warranty rights were improperly waived that they may have additional warranty protection. Each dealership must appoint an individual to be responsible for customer contacts resulting from the notice. Additionally, respondents are required to maintain specified records for a period of three years; instruct employees as to the requirements of the Magnuson-Moss Warranty Act; and institute a program of continuing surveillance to ensure compliance with the terms of the order.

Appearances

For the Commission: *Dennis D. McFeely.*

For the respondent: *Sandra S. Froman, Loeb and Loeb,* Los Angeles, Calif.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and of the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act ("Warranty Act"), the implementing Rule concerning the Availability of Written Warranty Terms ("Pre-Sale Rule") (16 C.F.R. 702 (1977)) duly promulgated on December 31, 1975 pursuant to Title I, Section 109 of the Warranty Act (15 U.S.C. 2309), and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Worthington Ford of Alaska, Inc., Worthington Chrysler-Plymouth, Inc., Worthington Ford, Inc., Cal Worthington Dodge, Inc., corporations, and Calvin Worthington, individually and as an officer of said corporations, hereinafter sometimes referred to as respondents, have

violated the provisions of said Acts, and the Pre-Sale Rule, 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:

PARAGRAPH 1. The present tense as used herein includes the past tense.

PAR. 2. Respondent Worthington Ford of Alaska, Inc. ("Ford Alaska") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Alaska with its principal office and place of business located at 1950 Gambell St., Anchorage, Alaska.

Respondent Worthington Chrysler-Plymouth, Inc. ("Chrysler-Plymouth California") is a corporation organized and existing under and by virtue of the laws of the State of California with its principal office and place of business located at 2850 Bellflower Boulevard, Long Beach, California.

Respondent Worthington Ford, Inc. ("Ford California") is a corporation organized, existing and doing business under and by virtue of the laws of the State of California with its principal office located at 2850 Bellflower Boulevard, Long Beach, California.

Respondent Cal Worthington Dodge, Inc. ("Dodge Arizona") is a corporation organized and existing under and by virtue of the laws of the State of Arizona with its principal office and place of business located at 2850 Bellflower Boulevard, Long Beach, California.

Respondent Calvin Worthington is an officer of said corporations. He generally formulates, directs and controls the policies, acts and practices of said corporations, and his address is Route 3, Box 3924, Orland, California.

PAR. 3. Respondents are or have been engaged in the advertising, offering for sale, and sale of new and used automobiles and trucks to the public.

PAR. 4. In the course and conduct of their business, respondents offer for sale and sell to consumers, consumer products distributed in commerce as "consumer product," "consumer," "distributed in commerce," and "commerce," are defined by Sections 101(1), 101(3), 101(13) and 101(14), respectively, of the Warranty Act. Respondents are, therfore, suppliers as "supplier" is defined by Section 101(4) of the Warranty Act.

PAR. 5. Respondents, in the course and conduct of their business have offered for sale and sold automobiles and other consumer products manufactured after July 4, 1975 costing the consumer in excess of $15.00, many of which are warranted by the manufacturer.

Respondents are, therefore, sellers as "seller" is defined in Section 702.1(e) of the Pre-Sale Rule.

COUNT 1

PAR. 6. Alleging violation of the Warranty Act and Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One through Five are incorporated by reference herein as if fully set forth verbatim.

PAR. 7. In connection with the offering for sale and sale of automobiles and other consumer products manufactured after January 1, 1977, respondents have failed, as required by Section 702.3(a) of the Pre-Sale Rule, to make the text of the written warranties offered in connection with such products available for prospective buyers' review prior to sale.

PAR. 8. Respondents' failure to comply with the Pre-Sale Rule as described in Paragraphs Six and Seven of this complaint is a violation of the Warranty Act, and, pursuant to Section 110(b) of the Warranty Act, is an unfair or deceptive act or practice in violation of Section 5 of the Federal Trade Commission Act, as amended.

COUNT 2

PAR. 9. Alleging violation of the Warranty Act and Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One through Five are incorporated by reference herein as if fully set forth verbatim.

PAR. 10. In the course and conduct of their businesses, respondents Ford Alaska, Chrysler-Plymouth California, Ford California, and Calvin Worthington, sell service contracts to purchasers of new and used automobiles and trucks manufactured after July 4, 1975. Respondents have, with respect to those same purchasers, disclaimed all implied warranties (including the implied warranties of merchantability and fitness for a particular use) arising under state law and otherwise available to purchasers of respondents' automobile and trucks.

PAR. 11. In the course and conduct of their business, responden Dodge Arizona and Calvin Worthington sell service contracts purchasers of used automobiles and trucks manufactured after Ju 4, 1975. Respondents have, with respect to those same purchase disclaimed all implied warranties (including the implied warrant of merchantability and fitness for a particular use) arising un state law and otherwise available to purchasers of responde automobiles and trucks.

PAR. 12. Respondents' disclaimer of the implied warranties as described in Paragraphs Ten and Eleven of this complaint is a violation of Section 108 of the Warranty Act, and, pursuant to Section 110(b) of the Warranty Act, is an unfair or deceptive act or practice in violation of Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Seattle Regional Office 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 (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 Worthington Ford of Alaska, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Alaska with its principal office and place of business located at 1950 Gambell St., Anchorage, Alaska.

Respondent Worthington Chrysler-Plymouth, Inc., is a corporation organized and existing under and by virtue of the laws of the State of California with its principal office located at 2850 Bellflower Boulevard, Long Beach, California.

Respondent Worthington Ford, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the

State of California with its principal office and place of business located at 2850 Bellflower Boulevard, Long Beach, California.

Respondent Cal Worthington Dodge, Inc. is a corporation organized and existing under and by virtue of the laws of the State of Arizona with its principal office and place of business located at 2850 Bellflower Boulevard, Long Beach, California.

Respondent Calvin Worthington is an officer of said corporations. He generally formulates, directs, and controls the policies, acts and practices of said corporations, and his address is Route 3, Box 3924, Orland, California.

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. *Definitions*

A. *Warranty Act* means the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act (15 U.S.C. 2301 *et seq.*).

B. *Service contract* means such contract as is defined in Section 101 (15 U.S.C. 2301) of the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act (15 U.S.C. 2301 *et seq.*).

C. The definition of terms contained in Section 101 of the Warranty Act and in Rule 702 promulgated thereunder (16 C.F.R. 702.1) as presently defined and as may be amended hereafter, shall apply to the terms of this order.

D. *Trucks* means all trucks except those larger than one ton capacity.

E. *Truck parts* means all truck parts which are at any time used on trucks as defined in I.D.

II.

It is ordered, That respondents Worthington Ford of Alaska, Inc., Worthington Chrysler-Plymouth, Inc. Worthington Ford, Inc., Cal Worthington Dodge, Inc., corporations, their successors and assigns, and their officers, and Calvin Worthington, individually and as an officer of said corporations, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary division or other device, in connection with the offering for sale and sale of automobiles, trucks and truck parts, and other consumer products:

A. Shall make available for the prospective buyer's review, prior to sale, the text of each written warranty on new cars, new trucks, and other new consumer products costing the consumer more than $15, by use of one or more of the following means:

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

(2) maintaining a binder or series of binders which contain(s) copies of the warranties for the products sold in each showroom in which any consumer product with a written warranty is offered for sale. Such binder(s) shall be maintained in each such showroom, 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 or warrantor and shall be maintained up to date when new warranted products or models or new warranties for existing products are introduced by substituting superseding warranties and by adding new warranties as appropriate. The respondent shall either:

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

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

(3) 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

(4) 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,

Unless 16 C.F.R. 702.3(a)(1) is amended, in which case respondents shall comply with said regulation as amended.

B. Shall clearly and conspicuously display the text of each written warranty provided by respondents, or any of them, for used cars or trucks in a window of each warranted vehicle; *provided,* that in the event the Federal Trade Commission issues a final Trade Regulation Rule establishing requirements which make compliance

with this paragraph legally impossible, or which requires disclosure of warranty terms on window forms, then this paragraph will be null and void.

This Section II shall not apply to media advertising.

III.

It is further ordered, That:

A. Respondents post, in a prominent location in each showroom, a sign, at least 36 inches wide by 48 inches high and reasonably calculated to elicit prospective buyers' attention, which contains a verbatim reproduction of the following language:

IMPORTANT!

NOT ALL WARRANTIES ARE THE SAME

Compare warranties before you buy

There is warranty information in this showroom

If you can't find it, ask for it

Check for these things:

What costs are covered?

What do *you* have to do?

Are all parts covered?

How long does the warranty last?

B. Any respondent who offers warranties on used automobiles or trucks, shall post, in each used vehicle sales lot, in a prominent location, in a position reasonably calculated to elicit a prospective used vehicle buyer's attention, a sign, at least 36 inches wide by 48 inches high which contains a verbatim reproduction of the following language: