

IN THE MATTER OF

EGGLAND'S BEST, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3520. Complaint, Aug. 15, 1994--Decision, Aug. 15, 1994

This consent order prohibits, among other things, a Pennsylvania company from misrepresenting the amount of nutrients or other ingredients, such as cholesterol and fat, that is in its eggs or foods containing egg yolks, and requires the respondent to have competent and reliable scientific evidence to substantiate future health-benefit claims for such foods and, for one year, to label certain egg packages with a corrective notice stating that no studies show Egglan's eggs are different from other eggs in their effect on serum cholesterol.

Appearances

For the Commission: *Michelle K. Rusk, Anne V. Maher and Beth M. Grossman.*

For the respondent: *Eugene I. Lambert, Covington & Burling, Washington, D.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Egglan's Best, Inc. ("respondent"), a corporation, has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent is a Pennsylvania corporation with its offices and principal place of business at 842 First Street, King of Prussia, Pennsylvania.

PAR. 2. Respondent has advertised, labeled, offered for sale, sold, and distributed Egglan's Best eggs and other egg products to consumers. These products are "foods" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

PAR. 3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

PAR. 4. Respondent has disseminated or has caused to be disseminated advertisements for Eggland's Best eggs, including but not necessarily limited to the attached Exhibits A-E. These advertisements contain the following statements:

- A. **Eggland's Best. Eggs that won't increase your serum cholesterol.** Imagine! Fresh, delicious, 100% real eggs that won't increase your serum cholesterol. You read it right.
In recent clinical tests as part of a low-fat diet, even a dozen Eggland's Best eggs a week caused no increase in serum cholesterol even though they contain about as much cholesterol as other eggs.
Know what that means? Now you can eat real eggs again.
So go ahead, enjoy! Cut out the coupon below and save 35¢ on real eggs that won't increase your serum cholesterol.
Eggland's Best. Now you can eat real eggs again.
[Exhibit A (Print: "Eggs That Won't Increase Your Serum Cholesterol")]
- B. You can eat eggs again . . . and not increase your serum cholesterol.
Introducing Eggland's Best. They're fresh, real eggs. And in clinical tests in a low-fat diet even twelve a week caused no increase in serum cholesterol . . . They're special eggs from specially fed hens. . . .
Eggland's Best. Now, you can eat real eggs again.
[Exhibit B (TV: "Egg Dishes," Ver. 3)]
- C. Do you remember eating eggs every day? Then there was all this cholesterol business. Well, now we can eat eggs again without worrying about raising our cholesterol.
New Eggland's Best eggs are fresh, real eggs that won't increase serum cholesterol . . . even though they contain about as much cholesterol as other eggs. In recent clinical tests, as part of a low-fat diet, people ate as many as twelve Eggland's Best eggs a week . . . and didn't increase their serum cholesterol.
Eggland's Best eggs come from very specially fed hens, you see.
Hens that eat no animal fat. Just healthy grains, extra Vitamin E and a special all-natural supplement that's rich in minerals. Plus canola oil, the oil lowest in saturated fat. So now there's a delicious, honest-to-goodness fresh egg that we can enjoy without worrying about cholesterol.
Now we can eat real eggs again!
[Exhibit C (Radio: "Hattie," Rev. 3)]
- D. If you love eggs, but cholesterol has put you on a lowfat diet, here's a way to turn that diet sunny side up.
Introducing Eggland's Best, eggs from specially fed hens.
Like ordinary eggs, they contain cholesterol. Yet in clinical tests, people ate twelve Eggland's Best eggs a week as part of a low-fat diet and showed no increase in their serum cholesterol.
Try Eggland's Best. Your cholesterol-conscious diet can now have a sunny side. [Exhibit D (TV: "Put Back On," 93 Rev.)]
- E. **It's simple. When the hens eat better, you eat better, too.**
Introducing Eggland's Best. Premium eggs from hens fed a premium diet.

Unlike ordinary eggs, Egglan's Best are laid by hens that eat no animal fat. Just lots of healthy grains, extra Vitamin E and a little canola oil -- the oil lowest in saturated fat.

[Exhibit E (Print: "It's Simple")]

PAR. 5. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A-D, respondent has represented, directly or by implication, that:

- A. Eating Egglan's Best eggs will not increase serum cholesterol.
- B. Eating Egglan's Best eggs will not increase serum cholesterol as much as eating ordinary eggs.

PAR. 6. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A-D, respondent has represented, directly or by implication, that at the time it made the representations set forth in paragraph five, respondent possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 7. In truth and in fact, at the time it made the representations set forth in paragraph five, respondent did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph six was, and is, false and misleading.

PAR. 8. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A-D, respondent has represented, directly or by implication, that clinical studies have proven that adding twelve Egglan's Best eggs per week to a low-fat diet does not increase serum cholesterol.

PAR. 9. In truth and in fact, clinical studies have not proven that adding twelve Egglan's Best eggs per week to a low-fat diet does not increase serum cholesterol. Therefore, the representation set forth in paragraph eight was, and is, false and misleading.

PAR. 10. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits C and E, respondent has represented, directly or by implication, that:

- A. Eggland's Best eggs are low in saturated fat.
- B. Eggland's Best eggs are lower in saturated fat than ordinary eggs.

PAR. 11. In truth and in fact:

- A. Eggland's Best eggs are not low in saturated fat.
- B. Eggland's Best eggs are not lower in saturated fat than ordinary eggs.

Therefore, the representations set forth in paragraph ten were, and are, false and misleading.

PAR. 12. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices and the making of false advertisements in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

Commissioner Owen dissenting.

EXHIBIT B

Ayer

NW Ayer Incorporated
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019-7498
212-474-5000
Fax: 212-474-5400

EXHIBIT B

CLIENT EGGLAND'S BEST
PRODUCT Eggs
TITLE "Egg Dishes Vers. 3"
NUMBER ZAYA 2021 ***AS PRODUCED***

PROGRAM
FACILITIES TV
DATE 7/27/92
LENGTH :30

VIDEO

AUDIO

OPEN ON CU OF MAN TALKING TO HIMSELF
CUT TO CU L/R PAN OF TWO EGGS IN PAN
CUT TO QUICK PAN OF MAN TALKING
CUT TO CU OF POACHED EGG BEING LIFTED
OUT OF BOILING WATER
CUT TO L/R PAN OF EGGLAND CARTON
CUT TO CU OF WHOLE EGGS FALLING INTO
BOILING WATER
CUT TO ECU OF HARD-BOILED EGG BEING
PEELED
CUT TO PLATE OF EGGS AND POTATOES
CUT TO HARD-BOILED EGG BEING SLICED
CUT TO L/R PAN OF FULL EGG CARTON
CUT TO CU OF SCRAMBLED EGGS BEING PUT
ON MUFFIN
CUT TO CU OF MAN TALKING
CUT TO RAW EGGS BEING MIXED IN BOWL
CUT TO MUSHROOMS BEING PUT IN OMELET
CUT TO CU OF MAN
CUT TO ECU OF EGGLAND LOGO ON EGGS
CUT TO SHOT OF EGGLAND'S BEST CARTON.
SUPER: NOW YOU CAN EAT REAL EGGS AGAIN.


(MUSIC THROUGHOUT)
MAN OC: "Two eggs over easy."
AVO: You can eat eggs again.
MAN OC: "No wait...poached!"
AVO: and not increase your serum cholesterol.
Introducing Eggland's Best.
They're fresh.
real eggs.
And in
clinical tests in a
lowfat diet even twelve a week
caused no increase in serum cholesterol.
MAN OC: "An omelet."
AVO: They're special eggs
from specially
fed hens.
MAN OC "Sunnyside...that's it!"
Eggland's Best.
Now, you can eat real eggs again

Complaint

EXHIBIT B

EXHIBIT B - P. 2

EXHIBIT B - P. 2

1. G.A. BOCK/EGGLAND'S BEST EGGS/EGG BEATERS

 CUT TO MAN IN KITCHEN TENDING HOT LOGS.
 VOICE: BOCK'S MAN
 BOCK: The eggs were great.

2. CUT TO FETTER BOGS BEING FLIPPED.
 VOICE: You can get eggs right!

3. CUT BACK TO MAN AS HE CHANGES HIS EGG.
 BOCK: He said: "Pardon."

4. CUT TO THE EGGLAND'S BEST EGGS FALLING THROUGH ROLLING WATER.
 They're fresh, real eggs...

5. CAMERA PANS OVER TOP OF EGGLAND'S BEST CAPTION.
 VOICE: Introducing Eggland's Best.

6. CUT TO CO OF PACKED EGGS BEING LIFTED OUT OF THE ROLLING WATER.
 VOICE: AND ONE EGGLAND'S BEST
 BETTER CHOLESTEROL.

7. CUT TO A BASKET OF BAKED EGGS BEING SLID UPON PLATE.
 EGGLAND'S BEST...

8. CUT TO A BAKED-ROLLER EGG BEING SLICED.
 ...in a special egg...

9. CUT TO BAKED ROLLER EGGLAND'S BEST EGG BEING REVEALED.
 ...and in




10. CUT TO SCRAMBLED EGGS BEING SLID OFF A SPATULA ONTO AN ENGLISH MUFFIN.
 ...and an increase in serum cholesterol.

11. CUT TO 12 EGGLAND'S BEST EGGS IN AN OPEN CAPTION.
 VOICE: 12 Eggland's Best Eggs a week...

12. CUT BACK TO MAN IN KITCHEN. HE'S CHANGED HIS MIND YET AGAIN.
 BOCK: An excellent!

EXHIBIT B

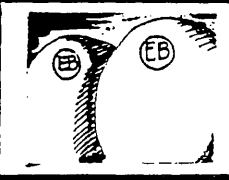

C. L. BOCK/EGGLAND'S BEST BOCK/EGG STICKS

CUT TO BOCK BEING FLIPPED IN A KILLING BOA.
They're special eggs

CUT TO AN OMELETTE BEING FLIPPED.
...from specially fed hens.

CUT BACK TO BOCK IN HIS KITCHEN.
BOCK: ...can you have a sunny side.
BOCK: Sure, sure! That's it.

KEEP PULLING BACK TO REVEAL EGG'S SHIMMERING BAKED BACK.
Eggland's Best.

CUT TO BEAUTY SHOT OF EGGLAND'S BEST PACKAGE.
Now you can eat great eggs again!

Complaint

118 F.T.C.

EXHIBIT C

EXHIBIT C

STRACHAN-McMILLIN
~~WORLDWIDE PLAZA~~

WORLDWIDE PLAZA
 120 EIGHTH AVENUE, 1801 LL
 NEW YORK, N.Y. 10019-7498
 TEL: 474-6966 FAX: 474-5299
 FAX: 474-5895

CLIENT EGGLAND BEST EGGS

PROGRAM

PRODUCT SAME

FACILITIES RADIO

TITLE HATTIE

DATE August 24, 1992

NUMBER 08-0792 AS PRODUCED

LENGTH :60

Track #7

HATTIE: Hi, this is Hattie Winston. Do you remember eating eggs every day? Then there was all this cholesterol business. Well, now we can eat eggs again without worrying about raising our cholesterol.

New Egglan*d's Best* eggs are fresh, real eggs that won't increase serum cholesterol...even though they contain about as much cholesterol as other eggs. In recent clinical tests, as part of a low-fat diet, people ate as many as twelve Egglan*d's Best* eggs a week...and didn't increase their serum cholesterol.

Egglan*d's Best* eggs come from very specially fed hens, you see.

Hens that eat no animal fat. Just healthy grains, extra vitamin E and a special all-natural supplement that's rich in minerals. Plus canola oil, the oil lowest in saturated fat. So now there's a delicious, honest-to-goodness fresh egg that we can enjoy without worrying about cholesterol.

Now we can eat real eggs again!

ANNCR: Look for the initials "EB" on every Egglan*d's Best* egg.

APPROVED

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Complaint

EXHIBIT D

EGGLAND'S BEST
130 TV
"PUT BACK ON"
1/15/93
AS PRODUCED

EXHIBIT D

Pulp White ZAYA 3004

MUSIC:

UNDER THROUGHOUT

V.O.:

If you love eggs, but
cholesterol has put you on a low-fat diet...
here's a way to turn that diet sunny side up.

Introducing Egglan's Best, eggs from
specially fed hens.

Like ordinary eggs, they contain cholesterol.
Yet, in clinical tests, people ate 12 Egglan's
Best eggs a week as part of a low-fat diet
and showed no increase in their serum
cholesterol.

Try Egglan's Best.
Your cholesterol-conscious diet can now have a
sunny side.

EXHIBIT D

EXHIBIT D - p. 2

EGGLAND'S BEST
"PUT BACK ON"
150%

OPEN ON ECU EGG IN SILHOUETTE.
MUSIC UNDER THROUGHOUT.
Answer to: If you love eggs...

EGG ROTATES TO REVEAL "EB" LOGO.
but cholesterol has put you on a low-fat diet...

CUT TO HAND CRACKING EGG IN SLOW-MOTION.
here's a way to turn that diet...

CUT TO SUNNY SIDE UP IN PAN.
sunny side up...

CUT TO L/R PAN EGGLAND WHITE EGG CARTON.
Introducing Egglard's Best.

CUT TO ECU OF HARD-BOILED WHITE EGG BEING PEELED.
eggs from specially fed hens.

CUT TO CU POACHED EGG BEING LIFTED FROM BOILING WATER.
Like ordinary eggs, they contain cholesterol.

CUT TO L/R PAN OF EGGS IN CARTON.
Yes, in clinical tests, people ate 12 Egglard's Best eggs a week.

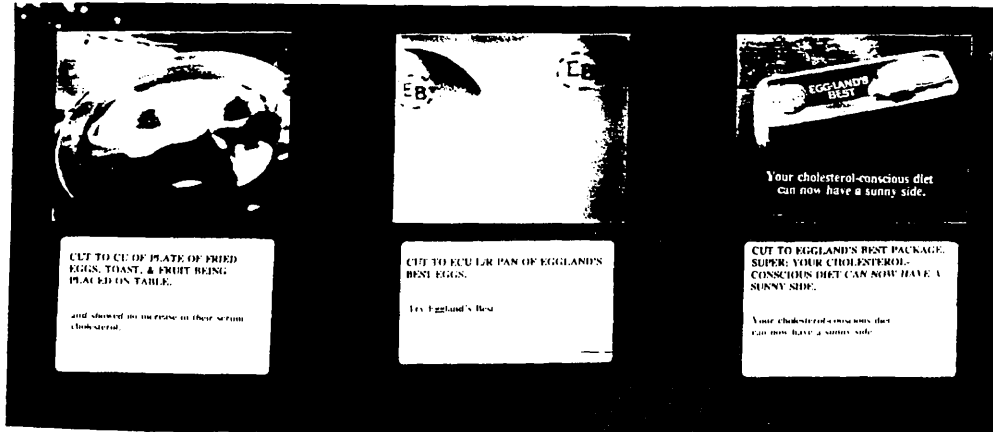
CUT TO SPANISH OMELET IN PAN.
as part of a low-fat diet

340

Complaint

EXHIBIT D

EXHIBIT D - p. 3



Complaint

118 F.T.C.

EXHIBIT E

EXHIBIT E

EXHIBIT E

It's simple. When the hens eat better, you eat better, too.

Introducing Egg-land's Best® Premium eggs from hens fed a premium diet. Unlike ordinary eggs, Egg-land's Best are laid by hens that eat no grains, extra Vitamin E and a little canola oil—the oil lowest in saturated fat.



Ask for them at one of the fine restaurants listed in this book. And find out just how good an egg can be.

Introducing Egg-land's Best.

©1992 C.R. Egg, Inc.

UTAH MENU GUIDE AD -- RAN JULY 1992

CR NAT P20003
8" x 5"
Utah Menu Directory—July 1992

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 complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by 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, 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 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 Eggland's Best, Inc. is a corporation organized, existing and doing business under and by the virtue of the laws of the State of Pennsylvania, with its offices and principal place of business located at 842 First Street, King of Prussia, Pennsylvania.
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

DEFINITION

For purposes of this order, the phrase "food containing egg yolk" shall not include "medical foods" as defined by 21 U.S.C. 360ee (b)(3) as currently in effect as of the date of this order.

I.

It is ordered, That respondent Egglan's Best, 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 the labeling, advertising, promotion, offering for sale, sale, or distribution of eggs or any food containing egg yolk in or affecting commerce, as "food" and "commerce" are defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, in any manner, directly or by implication, through numerical or descriptive terms or any other means, the absolute or comparative amount of cholesterol, total fat, saturated fat or any other nutrient or ingredient in such food.

II.

It is further ordered, That respondent Egglan's Best, 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 the labeling, advertising, promotion, offering for sale, sale, or distribution of eggs or any food containing egg yolk in or affecting commerce, as "food" and "commerce" are defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, in any manner, directly or by implication, about the absolute or comparative effect of such food on serum cholesterol, whether or not such food is consumed as part of an unrestricted diet or as part of any specific dietary regimen, unless at the time of making the representation, respondent possesses and relies upon competent and reliable scientific evidence substantiating such representation; provided, however, that any such representation that is specifically permitted in labeling for such food by regulations promulgated by the Food and

Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990 will be deemed to be substantiated as required by this paragraph. For purposes of this order, "competent and reliable scientific evidence" shall mean tests, analyses, research, studies or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

III.

It is further ordered, That respondent Egglan's Best, 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 the labeling, advertising, promotion, offering for sale, sale, or distribution of eggs or any food containing egg yolk in or affecting commerce, as "food" and "commerce" are defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, in any manner, directly or by implication, about the absolute or comparative health benefits of such food, including but not limited to its effect on heart disease, unless at the time of making the representation, respondent possesses and relies upon competent and reliable scientific evidence substantiating such representation; provided, however, that any such representation that is specifically permitted in labeling for such food by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990 will be deemed to be substantiated as required by this paragraph.

IV.

It is further ordered, That respondent Egglan's Best, 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 the labeling, advertising, promotion, offering for sale, sale, or distribution of any food in or affecting commerce, as "food" and "commerce" are defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, in any manner, directly or by implication, the

existence, contents, validity, results, conclusions or interpretations of any test or study.

V.

It is further ordered, That respondent Egglan's Best, 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 the labeling, advertising, promotion, offering for sale, sale, or distribution of eggs or any food containing egg yolk in or affecting commerce, as "food" and "commerce" are defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Failing to disclose clearly and prominently in any advertisement or promotional material that refers, directly or by implication, to the absolute or comparative amount of cholesterol, fat or saturated fat in such food, the average cholesterol content of such food expressed in the following terms:

1. The number of milligrams; and
2. The percentage of "Maximum Daily Value."

The statements required by subparagraphs A.1 and A.2 of this Part shall appear in close proximity. For purposes of this Part, the term "Maximum Daily Value" shall mean: (1) the daily reference value or other daily intake limit for cholesterol established in an effective final regulation of the Food and Drug Administration; or (2) in the absence of such a regulation, the daily intake limit of cholesterol advised by any one of the following three organizations: the National Academy of Sciences, the Surgeon General of the Public Health Service, or the American Heart Association. In the event that the Food and Drug Administration does not have a final effective regulation and none of the three named organizations advises that daily cholesterol intake be limited to a specific maximum amount, subparagraph A.2 of this Part shall not apply. Provided, however, that this Part will not be deemed to apply to any representation that is specifically permitted in labeling for such food product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990.

B. For a time period of one year, beginning no later than forty-five (45) days from the date this order becomes final, offering for sale, selling, or distributing eggs unless the package label for such eggs clearly and prominently states, in the exact language that follows, that: "There are no studies showing that these eggs are different from other eggs in their effect on serum cholesterol." Provided, however, that this requirement shall apply only in those geographic areas where respondent has disseminated or caused to be disseminated advertising or promotional materials containing any representation, directly or by implication, about the effect of Eggland's Best eggs or other eggs on serum cholesterol over a period of 12 weeks or more, or at any time between January 1, 1993 and the date of the acceptance of this order by the Commission for public comment, including but not limited to those geographic areas listed in Attachment A to this order.

For purposes of this order, "clearly and prominently" shall mean as follows:

1. In a television or videotape advertisement, the disclosure shall be presented simultaneously in both the audio and video portions of the advertisement. The audio disclosure shall be delivered in a volume and cadence and for a duration sufficient for an ordinary consumer to hear and comprehend it. The video disclosure shall be of a size and shade, and shall appear on the screen for a duration, sufficient for an ordinary consumer to read and comprehend it;

2. In a print advertisement, the disclosure shall be in type size which is at least the same size as that in which the principal portion of the text of the advertisement appears, shall be located in close proximity to the statement or other reference requiring the disclosure and shall be of a color or shade that readily contrasts with the background of the advertisement;

3. In a radio advertisement, the disclosure shall be delivered in a volume and cadence and for a duration sufficient for an ordinary consumer to hear and comprehend it;

4. On a package label, the disclosure shall be in a conspicuous and prominent place on the package, in a conspicuous format, and in conspicuous and legible type in contrast by typography, layout, or color with all other printed material on the package. Provided, however, that if the disclosure is displayed on the top or front panel of a standard twelve-egg carton or on the top, front or side panel of

a standard six-egg carton, is in at least ten (10) point type and is either on a separate label or enclosed within a border, and both the type and the border are of a color or shade that readily contrasts with the background of the carton, the disclosure shall be deemed to have been made clearly and prominently for purposes of this order.

VI.

It is further ordered, That for five (5) years after the last date of dissemination of any representation covered by this order, respondent Egglan's Best, Inc., or its successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All materials that were relied upon in disseminating such representation; and

B. All tests, reports, studies, surveys, demonstrations or other evidence in their possession or control that contradict, qualify or call into question such representation, or the basis relied upon for such representation, including complaints from consumers and complaints or inquiries from governmental organizations.

VII.

It is further ordered, That respondent Egglan's Best, Inc. shall, within thirty (30) days after service upon it of this order, distribute a copy of the order to each of its operating divisions, to each of its franchisees, to each of its managerial employees, and to each of its officers, agents, representatives or employees engaged in the preparation or placement of advertising or other materials covered by this order and shall secure from each such person a signed statement acknowledging receipt of this order.

VIII.

It is further ordered, That respondent Egglan's Best, Inc. shall notify the Commission at least thirty (30) days prior to any proposed change in its corporate structure, including but not limited to dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or

affiliates, or any other corporate change that may affect compliance obligations arising out of this order.

IX.

It is further ordered, That respondent Egglan's Best, Inc. shall, within sixty (60) days after service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

Commissioner Owen dissenting.

ATTACHMENT A

GEOGRAPHIC AREAS WITH CHOLESTEROL-RELATED
ADVERTISING OR PROMOTION PURSUANT TO
PARAGRAPH V.B. OF AGREEMENT CONTAINING CONSENT ORDER

1. Iowa
2. Maine
3. Rhode Island
4. Western and Central Pennsylvania
5. Virginia
6. Maryland
7. Washington, D.C.
8. Georgia
9. South Carolina
10. Alabama
11. Mississippi
12. Louisiana
13. Arkansas
14. California
15. Nevada
16. Idaho
17. Michigan
18. Colorado
19. South Dakota
20. Washington
21. Montana
22. Alaska
23. Wyoming
24. Missouri
25. Oklahoma
26. Salt Lake City, Utah
27. Raleigh-Durham, North Carolina
28. Southern Illinois (St. Louis Market)

SEPARATE STATEMENT OF COMMISSIONER MARY L. AZCUENAGA
CONCURRING IN PART AND DISSENTING IN PART

The Commission today issues a final consent order settling complaint allegations that Egglan's Best, Inc., made deceptive advertising claims about its eggs. I join the Commission in finding reason to believe that Egglan's claims are deceptive and join in approving the order except for paragraph V.B. I do not agree that the corrective notice provision contained in paragraph V.B. is warranted, and I dissent from the order to that extent.

In imposing a corrective notice remedy, the Commission must consider whether an advertisement has played a substantial role in creating in the public's mind a false belief about a product that will linger on after the false advertisement ceases. *Warner-Lambert Co. v. FTC*, 562 F.2d 749, 762 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978). A corrective notice provision is intended to dissipate the lingering effects of a deceptive advertisement so that future advertisements do not become part of a continuing deception of the public. *Id.* at 769.

Here, there is no direct evidence, such as the consumer surveys and expert testimony in *Warner Lambert Co.*, that Egglan's Best's advertisements created a lingering false impression about the effects on serum cholesterol of its eggs. It is unlikely that such an impression was created. Egglan's Best's advertisements ran for a relatively short period of time, and the claims are contrary to general information about the relationship between the consumption of eggs and serum cholesterol that is available to consumers in significant quantity from a variety of other sources. Without a stronger showing of the need for corrective advertising under the Warner-Lambert test, I cannot support the corrective notice provision in the order.

During the period for comment on the order, the issue was raised whether the required corrective notice is unduly broad and in itself could be misleading. Although this appears to be a reasonable question, given the available evidence, I do not reach this issue, because I would not impose a corrective notice requirement at all.

STATEMENT OF COMMISSIONER DEBORAH K. OWEN
CONCURRING IN PART AND DISSENTING IN PART

I concur in the Commission's decision to issue a complaint, and to accept a consent agreement in this matter, except as to Section V.B. of the order. With respect to that Section, which requires corrective advertising, I dissent.

The seminal case on corrective advertising is the Listerine case, *Warner-Lambert Company*, 86 FTC 1398 (1975), where the Commission opined:

[I]f a deceptive advertisement has played a substantial role in creating or reinforcing in the public's mind a false and material belief which lives on after the false advertising ceases, there is clear and continuing injury to competition and to the consuming public as consumers continue to make purchasing decisions based on the false belief. Since this injury cannot be avoided by merely requiring respondent to cease disseminating the advertisement, we may appropriately order respondent to take affirmative action designed to terminate the otherwise continuing ill effects of the advertisement.

86 FTC at 1499-1500.

As the complaint alleges, Egglund's ads, in my judgment, certainly create an impression that its eggs will not increase serum cholesterol, or, comparatively, increase cholesterol as much as ordinary eggs. However, we must also find that the beliefs created by the challenged ads are likely to linger after the advertising ceases. As to that likelihood, it seems to me important to compare and contrast the facts in Warner-Lambert to the situation here.

In Warner-Lambert, decided in 1975, the Commission noted that the challenged advertising claims had been made directly to the consuming public since 1921, and involved expenditures of large sums in print and television media. 86 FTC at 1501. The Commission cited to the ALJ's Findings of Fact, which noted that Listerine had made the contested representations since the product went on the market almost a century before; that cold and sore throat claims had been made continuously on its labeling since prior to 1938; and that over the ten years preceding the decision, Listerine had spent several million dollars on its colds advertising, the vast majority occurring on network and spot television, covering all parts of the day and evening and particularly in network prime time. *Id.* at 1468 (IDFF 219-220); *see also id.* at 1407-1408 (IDFF 5-8). The Commission pointed to record testimony indicating the high

percentage of consumers taking such claims that would remain as long as five years after the ads ended. It concluded: "The record demonstrates that long after Listerine cold efficacy advertising ceased, a substantial proportion of the public would continue to believe in Listerine's efficacy for the treatment and prevention of colds and sore throats." *Id.* at 1503 (emphasis supplied).

If we contrast the length in time, and the magnitude of Listerine's advertising to the instant case, Egglan's advertising would hardly appear to rise to even a two-digit percentage thereof. We have no evidence that Egglan's campaign was so similarly saturated and extended that long after it ceases, a substantial portion of the public will continue to believe the challenged claims in the absence of the corrective advertising that the Commission has accepted.

One significant factor is in evidence here that was not present in the Listerine case: the barrage of contrary information to which the public is exposed. While the public received little, if any, information from sources other than the advertiser about the true effect of Listerine on colds and sore throats, the vast majority of information available to consumers challenges the Egglan claims, and links egg consumption with increased serum cholesterol. Articles in the popular press, television and radio programs, and many cookbooks recommend that consumers lower their consumption of eggs. Doctors and the American Heart Association advise people to limit their egg consumption for health reasons. The general ambient information and perception is that eggs are unhealthy, and this climate is highly relevant in determining whether the false beliefs created by Egglan's Best advertisements will likely linger. Egglan's Best advertisements attempted to counteract the common wisdom, but ran for only a short time. Because the information that eating eggs is likely to increase serum cholesterol will continue to be widely disseminated to consumers through media sources, it is unlikely that the beliefs regarding the effects of Egglan's Best eggs on serum cholesterol, or their comparative benefits to other eggs, will be maintained. In sum, the half-life of Egglan's advertising campaign is probably very short.

During the public comment period, eighteen comments were received. Two of these comments supported the Commission's position with respect to the corrective labeling notice, and the remaining sixteen comments either disagreed with the Commission's position or were silent on this issue. Comments from the American

Advertising Federation and the American Association of Advertising Agencies focused on the lack of a factual record indicating that Egglund's advertising has caused the type of injury that needs to be redressed by corrective advertising, and stressed the quantum difference in factual record between Egglund's and Warner-Lambert. Members of the egg industry and academics were also critical of the corrective labeling provision. In addition to echoing the concerns regarding evidence of lingering harm, these commentators believe that the incentive to innovate will be reduced, and that the required language of the corrective label is itself misleading.

In contrast, both the Massachusetts Office of the Attorney General and the Center for Science in the Public Interest (CSPI) believe that corrective advertising is appropriate in this case. Further, both request that the Commission expand the scope of the requirement. The Massachusetts AG's Office recommends including Massachusetts in the area where corrective labeling is required, and the CSPI urges the Commission to require that the corrective statement be made in advertising as well as on the carton label. The Commission has chosen to refrain from altering the scope of the corrective advertising based on these comments, and I believe that the weight of the public comment reinforces my earlier opinion in opposition to corrective advertising.¹

My dissent on the use of corrective advertising in this case is not to suggest, however, that corrective advertising is only appropriate where the ad campaign is decades-old and swamps the public. A classic opportunity for appropriately imposing the remedy was the Sun Company case two years ago. File No. 902-3268. There, the Commission challenged claims linking octane and automobile engine performance made by a company that was previously under a Commission order for earlier false performance and uniqueness claims for its gasoline. *Sun Oil Co.*, 84 FTC 247 (1974). Nonetheless, the Commission agreed to merely a cease-and-desist order, despite the fact that the challenged claims took advantage of, and further contributed to, widespread consumer misperception about the relationship between octane and performance. The contrast between the Commission's decision there, and here, suggests that the Commission's current posture on corrective advertising may be more

¹ Moreover, it should be noted that nothing in the Commission's action precludes Massachusetts from seeking its own relief and, indeed, Massachusetts has filed a law suit against Egglund's Best.

a function of respondents' willingness to agree to the remedy, rather than of a well defined and implemented policy.

Finally, a comment on the remedy itself. The corrective advertising is ordered to be placed on Egglan's Best carton label. Due to other legal limitations, Egglan's Best has not made serum cholesterol or heart health claims on the carton. Thus, while the attempt to limit the breadth of the remedy may be well-intentioned, I find it highly ironic that corrective advertising has been mandated in a medium where the original deceptive claims were never made.

STATEMENT OF ROSCOE B. STAREK, III

I support the corrective advertising provision in this order. Under the appeals court decision in Warner-Lambert Co., corrective advertising may be ordered if the challenged ads substantially contributed to the development and maintenance of a false and material belief, and a substantial portion of consumers will continue to hold the false belief.¹ The Warner-Lambert court suggested that the purpose of advertising is to create enduring beliefs in consumers' minds, such that the FTC might well presume in some cases that the standard for imposing corrective advertising had been met.² The Warner-Lambert decision accords the Commission substantial discretion in applying a corrective advertising remedy. The Commission must take care, however, to exercise such broad discretion judiciously. The question I had to answer in this case was whether corrective advertising is appropriate in the absence of an extended period of deceptive advertising or extrinsic evidence demonstrating that the false impressions will persist in consumers' minds after the ads cease.³

I have determined that a limited corrective advertising requirement is an appropriate remedy here. First, I have reason to believe that the Egglan's ads have created in consumers, minds enduring

¹ *Warner-Lambert Co. v. FTC*, 562 F.2d 749 (D.C. Cir. 1977), *modifying and enforcing* 86 FTC 1398 (1975), *cert. denied*, 435 U.S. 950 (1978).

² The court stated that it need not rely upon such a presumption in its case, however, because the record contained evidence that the Listerine ads in question had created, in the minds of consumers exposed to the advertising, false beliefs that would persist after the ads ended. *Id.*, 562 F.2d at 762-63; *see* 86 FTC at 1471 n.23 (data relied upon was a survey of "consumers who have seen or heard a lot of advertising for Listerine").

³ It is certainly unrealistic to think that we will have this data when the respondents enter into a consent agreement before a complaint is filed.

false impressions about these eggs. Because Egglan's is able to charge for its eggs about 200% of the typical price per dozen, we have strong evidence that the company's ads have been successful in creating in the minds of its consumers a belief that its eggs are meaningfully superior to other eggs. Second, the superiority touted by Egglan's ads -- including ads disseminated during the public comment period -- pertains to their effect on serum cholesterol. Common sense tells me that this belief, which relates to the principal attribute purportedly distinguishing Egglan's eggs from other eggs is not going to disappear overnight, simply because advertising making that claim ceases. Third, consumers who continued to believe that Egglan's had a demonstrated superiority over typical eggs would suffer an identifiable injury, again due to the price differential. Further, if the ads lead consumers to increase their egg consumption significantly, some consumers may increase their serum cholesterol levels and thus potentially harm their health. A corrective notice placed on the egg package would enable consumers to avoid further injury.

Finally, I am persuaded by the careful crafting of the corrective remedy. The instant notice is designed to reach consumers likely to have been misled by Egglan's ads (those who are preparing to purchase the product), rather than the population at large. It has a limited dissemination schedule and will not be unreasonably costly. Moreover, the notice itself is a statement of fact that is neither derogatory of Egglan's eggs nor implies criticism of other companies' products.

Thus, although I think corrective advertising is a remedy that should be used sparingly, I support its inclusion in this order.

STATEMENT OF COMMISSIONER DENNIS A. YAO

I voted to accept the consent agreement in this matter. Although I support the terms of the consent agreement, I would have preferred that the complaint include an implied heart disease allegation.

The Commission alleges in its complaint that, among other things, Egglan's Best falsely represented that it had a reasonable basis for claims that eating its eggs will not increase serum cholesterol in an absolute sense and that eating its eggs will not increase serum cholesterol as much as eating ordinary eggs. I believe that reasonable consumers would interpret the express claim that

- Eggland's eggs will not increase serum cholesterol to imply that those eggs would therefore not increase the risk of heart disease -- especially when the express claim was made for eggs, a product notoriously well known for its negative impact on heart health.
- Although the order does include a requirement that health claims, including claims about heart disease, be substantiated by competent and reliable scientific evidence, I believe that industry and the public would best be served if the Commission communicated its belief that an implied health claim has been made here.¹

¹ I would note that the complaint also alleges that Eggland's Best falsely represented that its eggs are low in saturated fat in an absolute sense, and are lower in saturated fat than ordinary eggs. Although I agree that the implied saturated fat claims challenged in the complaint were made, in my view this claim is further down the spectrum of implied claims towards those needing extrinsic evidence than the implied heart disease claim I discuss here. I thus can discern no reason for excluding the implied heart disease claim from the complaint while including the saturated fat claims.

IN THE MATTER OF

TCH CORPORATION, ET AL.

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

Docket C-3519. Complaint, Aug. 16, 1994--Decision, Aug. 16, 1994

This consent order requires, among other things, two California-based corporations to divest, within one year, to a Commission-approved buyer, the pharmacy business in either the PayLess or the Thrifty or Bi-Mart stores in six designated areas, requires the respondents to ensure that the assets to be divested remain viable and marketable, and for ten years requires that the respondents obtain Commission approval prior to acquiring any stock or other interest in any entity engaged in the business of selling prescription drugs at retail stores in the six areas designated.

Appearances

For the Commission: *Laura Wilkinson, Ann B. Malester, Claudia R. Higgins, Melissa K. Heydenreich, Meribeth Petrizzi and Jacqueline K. Mendal.*

For the respondents: *Harvey I. Saferstein, George S. Cary, Aimee H. Goldstein and Stephanie Kaufman, Irell & Mannella, Newport Beach, CA.*

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondents, TCH Corporation ("TCH"), a Delaware corporation, and Green Equity Investors, L.P. ("GEI"), a Delaware investment limited partnership (collectively, "respondents"), subject to the jurisdiction of the Federal Trade Commission, have agreed to acquire certain assets of Kmart Corporation, a corporation subject to the jurisdiction of the Federal Trade Commission, 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 ("FTC Act"), 15 U.S.C. 45; and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. DEFINITIONS

For the purposes of this complaint the following definitions apply:

1. “*TCH*” or “*Thrifty*” means TCH Corporation, a corporation organized, existing, and doing business under and by the virtue of the laws of Delaware, its directors, officers, agents and representatives, its domestic and foreign parents, successors, assigns, divisions, subsidiaries, affiliates, partnerships and joint ventures, and the directors, officers, agents and representatives of its domestic and foreign successors, assigns, divisions, subsidiaries, affiliates, partnerships and joint ventures. The words “subsidiary,” “affiliate” and “joint venture” refer to any firm in which there is partial (10 percent or more) or total ownership or control between corporations or partnerships.

2. “*GEP*” means Green Equity Investors, L.P., an investment limited partnership organized, existing, and doing business under and by the virtue of the laws of Delaware, its general partners, directors, officers, agents and representatives, its domestic and foreign parents, successors, assigns, divisions, subsidiaries, affiliates, partnerships and joint ventures, and the directors, officers, agents and representatives of its domestic and foreign successors, assigns, divisions, subsidiaries, affiliates, partnerships and joint ventures. The words “subsidiary,” “affiliate” and “joint venture” refer to any firm in which there is partial (10 percent or more) or total ownership or control between corporations or partnerships.

3. “*Kmart*” means Kmart Corporation, a corporation organized, existing, and doing business under and by virtue of the laws of Michigan, its directors, officers, employees, agents and representatives, its domestic and foreign parents, predecessors, successors, assigns, divisions, subsidiaries, affiliates, partnerships and joint ventures, and the directors, officers, employees, agents and representatives of its domestic and foreign predecessors, successors, assigns, divisions, subsidiaries, affiliates, partnerships and joint ventures.

II. RESPONDENTS

4. Respondent TCH is a corporation organized and existing under the laws of Delaware, with its principal place of business at 3424 Wilshire Boulevard, Los Angeles, CA.

5. Respondent GEI is an investment limited partnership organized and existing under the laws of Delaware, with its principal place of business at 333 South Grand Avenue, Suite 5400, Los Angeles, CA. GEI controls TCH.

6. For purposes of this proceeding, respondents are, and at all times relevant herein have been, engaged in commerce as commerce is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and are either corporations, or partnerships whose business or practices are in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

III. ACQUIRED COMPANY

7. Kmart is a corporation organized and existing under the laws of the State of Michigan, with its headquarters at 3100 West Big Beaver Road, Troy, Michigan.

8. Kmart is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

IV. THE ACQUISITION

9. On or about December 1, 1993, TCH and Kmart agreed to enter into an agreement whereby GEI, through TCH, will acquire from Kmart Corporation all of the stock of PayLess Drug Stores Northwest, Inc., a wholly-owned subsidiary of Kmart, for consideration totaling approximately \$1.162 billion ("Acquisition").

V. THE RELEVANT MARKETS

10. For purposes of this complaint, the relevant line of commerce in which to analyze the effects of the Acquisition is the sale of prescription drugs in retail stores.

11. For purposes of this complaint, the relevant sections of the country in which to analyze the effects of the Acquisition are: Bishop, California; Fort Bragg/Mendocino, California; Mt. Shasta, California; Taft, California; Florence, Oregon; and Ellensburg, Washington.

12. The relevant markets set forth in paragraphs ten and eleven are highly concentrated, whether measured by Herfindahl-Hirschmann Indices ("HHI") or two-firm and four-firm concentration ratios.

13. Entry into the relevant markets is difficult or unlikely.

14. TCH and Kmart are actual competitors in the relevant markets.

VI. EFFECTS OF THE ACQUISITION

15. The effect of the Acquisition may be substantially to lessen competition and to tend to create a monopoly in the relevant markets in violation of Section 7 of the Clayton Act 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, in the following ways, among others:

- a. By eliminating direct actual competition between TCH and Kmart;
- b. By increasing the likelihood that TCH will unilaterally exercise market power; or
- c. By increasing the likelihood of collusion in the relevant markets.

16. All of the above increase the likelihood that firms in the relevant markets will increase prices and restrict output both in the near future and in the long term.

VII. VIOLATIONS CHARGED

17. The acquisition agreement described in paragraph nine constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

18. The acquisition described in paragraph nine, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of respondents' proposed acquisition of certain voting securities and

assets of PayLess Drug Stores Northwest, Inc., a wholly-owned subsidiary of Kmart Corporation, and the respondents having been furnished thereafter with a copy of a draft of complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violations 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

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents 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 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 Acts, and that a 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 comment filed thereafter by an interested person pursuant to Section 2.34, 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 TCH Corporation ("TCH" or "Thrifty") is a corporation organized and existing under the laws of Delaware with its office and principal place of business at 3424 Wilshire Boulevard, Los Angeles, CA.

2. Respondent Green Equity Investors, L.P. ("GEI") is a Delaware investment limited partnership organized and existing under the laws of Delaware with its office and principal place of business at 333 South Grand Avenue, Suite 5400, Los Angeles, CA.

3. 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.

It is ordered, That, as used in this order, the following definitions shall apply:

A. “*TCH*” or “*Thrifty*” means TCH Corporation, a corporation organized, existing, and doing business under and by the virtue of the laws of Delaware, its subsidiaries, divisions, and groups controlled by TCH, and their respective directors, officers, agents, representatives, and their respective successors and assigns.

B. “*GEI*” means Green Equity Investors, L.P., an investment limited partnership organized, existing, and doing business under and by the virtue of the laws of Delaware, its general partners, subsidiaries, divisions, and groups controlled by GEI, and their respective directors, officers, agents, representatives, and their respective successors and assigns.

C. “*Respondents*” means TCH and GEI.

D. “*Commission*” means the Federal Trade Commission.

E. “*Acquisition*” means the acquisition of the voting stock of PayLess Drug Stores Northwest, Inc., a wholly-owned subsidiary of Kmart Corporation, by respondents TCH and GEI.

F. “*Acquirer*” means the party or parties to whom respondents TCH and GEI divest the assets herein ordered to be divested.

G. “*Prescription drugs*” means ethical drugs available at retail only by prescription.

H. “*PayLess Pharmacy Business*” means PayLess’s business of selling prescription drugs at retail stores located in any of the cities or towns listed in paragraph I.L. of this order, but does not include PayLess’s business of selling other products in those retail stores.

I. “*PayLess Pharmacy Assets*” means all assets constituting the PayLess Pharmacy Business, excluding those assets pertaining to the PayLess trade name, trade dress, trade marks and service marks, and including but not limited to:

1. Leases and properties, at the acquirer’s option;
2. Zoning approvals and registrations, at the acquirer’s option;
3. Books, records, reports, dockets and lists relating to the PayLess Pharmacy Business;

