

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The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and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

