Order directing General Counsel to prepare papers for transmittal to Attorney General requesting him to initiate civil enforcement proceedings against respondents requiring them to comply with hearing examiner's order of August 12, 1965.

DISSENTING OPINION

BY ELMAN, *Commissioner:*

Assuming that the hearing examiner's order for production of

[13] Address by Commissioner Mary Gardiner Jones before the Bar Association of the District of Columbia, Washington, D.C. (February 25, 1965).

documents was within his discretion and should have been obeyed by respondents, it does not necessarily follow that the Commission should initiate a civil enforcement action pursuant to Section 9 of the Federal Trade Commission Act. Section 3.12 of the Commission's Rules of Practice provides that, in the case of refusals to comply with hearing examiners' directions, the matter shall promptly be certified by the examiner to the Commission, which will thereafter make such orders as the circumstances require. It is only after the Commission, upon due deliberation, enters an order of its own that Section 9 of the Federal Trade Commission Act comes into play. Before invoking Section 9 in such manner the Commission should weigh (1) the requirement of Section 6(a) of the Administrative Procedure Act that every agency "shall proceed with reasonable dispatch to conclude any matter presented to it", and (2) the representations made to it by staff counsel, in connection with the Commission's prior consideration of offers of settlement, concerning the scope and length of the litigation which would ensue if the offers were rejected.

The Commission's action today will bring this administrative proceeding to a halt for at least several years. The inevitable consequence will be that, if and when this case is finally decided on the merits, the record will be stale and the practices challenged in the complaint will have changed or disappeared. In the circumstances presented, this trip to court is neither necessary nor desirable. I would direct the hearing examiner to proceed with all dispatch in going forward with the proceeding.

ORDER DIRECTING THE GENERAL COUNSEL TO PREPARE AND SUBMIT PAPERS TO THE COMMISSION REQUESTING THE ATTORNEY GENERAL TO INITIATE CIVIL ENFORCEMENT PROCEEDINGS

Upon consideration of the hearing examiner's certification filed December 10, 1965, of the motion of complaint counsel, the Commission has determined that the Attorney General of the United States should be requested to initiate a civil enforcement action pursuant to Section 9 of the Federal Trade Commission Act, 15 U.S.C. § 49, against respondents Associated Merchandising Corporation, Aimcee Wholesale Corporation, and Federated Department Stores, Inc., in conformity with the stipulation of the parties and the order of November 18, 1965, of the United States District Court for the District of Columbia, in Civil Action No. 2701–65, to require compliance with the hearing examiner's order for production of documents issued August 12,

1965, and that the General Counsel should prepare and submit to the Commission for its consideration and approval the necessary papers for transmittal to the Attorney General of the United States in connection therewith, accordingly:

It is ordered, That the General Counsel be, and he hereby is, directed to prepare and submit to the Commission for its consideration and approval the necessary papers for transmittal by the Commission to the Attorney General of the United States requesting the latter to initiate civil enforcement proceedings under Section 9 of the Federal Trade Commission Act against the aforesaid respondents to require compliance with the hearing examiner's order of August 12, 1965, in conformity with the stipulation of the parties dated November 18, 1965, and the order of the United States District Court for the District of Columbia of the same date.

Commissioner Elman dissented and has filed a dissenting statement.

BEATRICE FOODS CO. AND THE KROGER CO., INC.