

IN THE MATTER OF

PAY LESS DRUG STORES NORTHWEST, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT*Docket C-2820. Complaint, May 17, 1976—Decision, May 17, 1976*

Consent order requiring a Maryland corporation with its principal place of business in Beaverton, Oreg., operating a chain of retail drug and general merchandise stores in Washington, Oregon, California and other States, to make advertised items readily available; to use shelf signs to indicate the location of items advertised below the regular shelf price; to mark customarily price-marked items with their advertised prices; to sell advertised merchandise at or below the advertised price; and to post in its stores copies of advertisements and notices of the availability of rain-checks for unavailable items or a substituted product of equal or better quality at the advertised price of the unavailable advertised item.

Appearances

For the Commission: *W. Lee Buck.*

For the respondent: *H. Stewart Tremaine, Black, Kendall, Tremaine, Boothe & Higgins*, Portland, Oreg.

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 Pay Less Drug Stores Northwest, Inc., a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereto would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Pay Less Drug Stores Northwest, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its principal office and place of business located at 10605 S.W. Allen Boulevard, Beaverton, Oregon.

PAR. 2. All allegations made in the present tense include the past tense.

PAR. 3. Respondent is engaged in the operation of retail drug and general merchandise stores in Washington, Oregon, California, and other States. Its volume of business is substantial. In the operation of its retail stores, respondent offers and sells to its customers an extensive line of products, including drugs, photographic equipment, groceries, fabrics, sporting goods, household articles, tools, and other

general merchandise, all of which are referred to hereafter as "items." Many of said items are purchased from numerous suppliers located throughout the United States.

PAR. 4. In the course and conduct of its business, respondent causes, directly or indirectly, the aforesaid items to be shipped and distributed from manufacturing plants, warehouses, or from other sources of supply to its warehouses, distribution centers, or retail stores located in various States other than the State of origination, distribution or storage of said items. Respondent maintains a substantial course of trade in the distribution, advertising, offering for sale and sale of the aforesaid items in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 5. In the course and conduct of its business, as aforesaid, respondent disseminates and causes to be disseminated certain advertisements concerning the aforesaid items by various means, including but not limited to advertisements in newspapers of general and interstate circulation and other advertising media, for the purpose of inducing and which are likely to induce, directly or indirectly, the attempted or actual purchase from respondent of said items in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended. Many of the said advertisements list, describe or depict various items and also contain statements and representations concerning the price or terms at which said items would be offered for sale and sold to the public. Many of said advertisements contain further direct and express statements and representations concerning the time periods during which the offers would be in effect and the locations of respondent's stores at which the offers would be made.

PAR. 6. Through the use of such advertisements disseminated in various areas of the United States served by respondent's retail stores, respondent represents directly or by implication that in those stores covered by such advertisements, throughout the effective periods of the advertised offers, the items listed or depicted in such advertisements would be or are:

- A. Readily available for sale to customers;
- B. Readily available for sale at or below the advertised prices; and
- C. Sold to customers at or below the advertised price.

PAR. 7. In truth and in fact, in a number of respondent's retail stores located in the Seattle, Washington, and Portland, Oregon, metropolitan areas in which the aforesaid advertisements are disseminated, in stores covered by such advertisements, during the effective periods of the advertised offers, a substantial number of the items listed or depicted in the said advertisements are:

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- A. Not readily available for sale;
 - B. Not readily available for sale at or below the advertised prices;
- or
- C. Sold to customers at prices higher than the advertised prices.
- Therefore, the statements and representations as referred to herein are false, misleading and deceptive.

PAR. 8. By disseminating or causing the dissemination of advertisements which offer or present for sale items as aforesaid, and by failing to have in each of its stores covered by such advertisements, throughout the effective periods of the advertised offers, in quantities sufficient to meet reasonably anticipated demands, the advertised items:

- A. Readily available for sale to customers; or
 - B. Readily available for sale at or below the advertised prices;
- respondent is engaged in unfair acts and practices.

PAR. 9. By disseminating or causing the dissemination of advertisements which offer or present for sale items at specific prices, as aforesaid, and during the effective periods of such advertised offers at certain stores covered by said advertisements, by selling said items or other merchandise to customers at prices higher than the advertised prices, respondent is engaged in unfair acts and practices.

PAR. 10. The use by respondent of the aforesaid unfair and false, misleading and deceptive statements, representations, acts and practices has the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that the said statements and representations are true, and to induce such persons to go to respondent's stores and to purchase from respondent substantial quantities of the advertised items at prices in excess of the advertised prices.

PAR. 11. In the course and conduct of its business, and at all times referred to herein, respondent is in substantial competition in commerce with corporations, partnerships, firms and individuals in the retail drug and general merchandise businesses.

PAR. 12. The acts and practices of respondent, as herein alleged, are all to the prejudice and injury of the public and of respondent's competitors, and constitute unfair methods of competition and unfair and deceptive acts and practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act, as amended.

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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 Seattle Regional Office 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 respondent 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 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:

A. Pay Less Drug Stores Northwest, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland with its office and principal place of business located at 10605 S.W. Allen Boulevard, Beaverton, Oregon.

B. 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

It is ordered, That respondent Pay Less Drug Stores Northwest, Inc., a corporation, its successors or assigns, its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of drugs or other merchandise, hereinafter sometimes referred to as items, offered or sold in its retail stores, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from, directly or indirectly:

A. Disseminating, or causing the dissemination of any advertisement by any means which offers or presents any items for sale, unless

throughout the effective period of the advertised offer at each retail store covered by the advertisement:

(1) Each advertised item is readily available for sale to customers in the public area of the store, or if not readily available there, a clear and conspicuous notice is posted where the item is regularly displayed which states that the item is in stock and may be obtained upon request, and said item is furnished on request:

(2) There is a sign or other conspicuous marking at the place where an item advertised below regular shelf price is displayed for sale clearly disclosing that the item is "as advertised" or "on sale" or words of similar import as appropriate, and disclosing on such sign or marking, the advertised price;

(3) Each unit of each advertised item, which is usually and customarily individually marked with a price, is individually, clearly, and conspicuously marked with a price no higher than the advertised price;

(4) Each unit of each advertised item is sold to customers at or below the advertised price;

Provided, it shall constitute a defense to a charge of unavailability under subparagraph (1) if respondent maintains and furnishes or makes available for inspection and copying upon the request of the Federal Trade Commission, such records as will show that (a) the advertised items were delivered to its stores in quantities sufficient to meet reasonably anticipated demand but were "sold out," or (b) the advertised items were ordered but not delivered due to circumstances beyond respondent's control, and that respondent, upon notice or knowledge of such nondelivery acted immediately to contact the media to correct the advertisement or proposed advertisement to reflect the limited availability or unavailability of each advertised item, and (c) respondent immediately offered to customers on inquiry a "raincheck" for each unavailable item which entitled the holder to purchase the item in the near future at or below the advertised price, or a similar product of equal or better quality at or below the advertised price of the unavailable product.

Provided, further, that a coupon or book of coupons offered, presented, sold or distributed only at respondent's retail stores shall not be deemed an advertisement.

Provided, further, that in the case of advertised items the ultimate prices of whose units are determined by the use of a coupon, or other similar conditional price arrangement, the prices at which the units are sold, and not the prices marked on the units, shall govern.

Provided, further, that in stores equipped with optical scanning devices which electronically "read" the identification numbers marked

on the packaging of such units, and which transmit the number to a computer which then transmits the correct price of the items to an electronic cash register where the price is displayed and printed on the cash register tape, the units need not be price-marked in any additional manner.

Provided, further, that if an advertised item is placed for sale in a large stack, pyramid or other display containing a great number of such items, all of the items need not be individually remarked at or below the advertised price, if the items not marked individually at or below the advertised price are so situated that it would be difficult or impossible for a customer to select such item.

Provided, further, that it shall not be deemed a violation of the above subparagraphs (1) through (4) if respondent is complying with a specific exemption, limitation or restriction with respect to store, item or price which is clearly and conspicuously disclosed in all advertisements for the product in question.

II

It is further ordered, That throughout each advertised sale period in each of its retail stores covered by an advertisement, respondent shall post conspicuously (1) at or near each doorway affording entrance to the public, and (2) at or near the place where customers pay for merchandise, notices which contain the following:

A. A copy of the advertisement. Copies shall be posted at or near every checkstand where customers pay for merchandise and shall be posted in such a fashion that all customers purchasing merchandise can easily read them while standing at the checkstand.

B. The following statement:

All items advertised are required by law to be readily available for sale at or below the advertised prices in each Pay Less store except as specifically noted in this ad.

If an advertised item you wish to purchase is unavailable, you may obtain a raincheck that will enable you to purchase this item at the advertised price in the near future. Or, you will be allowed to purchase, immediately, a similar product of equal or better quality at the advertised price of the unavailable advertised item.

If you have any questions, the store manager will be glad to assist you.

III

It is further ordered, That respondent shall cause the following statement to be clearly and conspicuously set forth in each advertise-

ment which represents that items are available for sale at a stated price at any of its stores: "Each of these advertised items is required to be readily available for sale at or below the advertised price in each Pay Less store, except as specifically noted in this ad." Additionally, said statement may identify the stores, the city or the geographical area covered by the advertisement.

IV

It is further ordered, That:

A. Respondent shall forthwith deliver a copy of this order to each of its operating divisions and to each of its present and future officers and other personnel in its organization down to the level of and including assistant store managers and any other store level personnel who, directly or indirectly, have any responsibilities relating in any way to pricing and charging out of advertised items in any of the individual retail stores of respondent, or who are engaged in any aspect of preparation, creation, or placing of advertising, and that respondent shall secure a signed statement acknowledging receipt of said order from each such person;

B. Respondent shall institute and maintain a program of continuing surveillance adequate to reveal whether the business practices of each of its retail stores conform to this order, and shall confer with any duly authorized representative of the Commission pertaining to such program when requested to do so by a duly authorized representative of the Commission;

C. Respondent shall, for a period of three (3) years subsequent to the date of this order:

1. Maintain business records which show the efforts taken to ensure continuing compliance with the terms and provisions of this order and any evidence of the results of such efforts;

2. Furnish to the Federal Trade Commission copies of such records which are requested by any of its duly authorized representatives;

D. Respondent shall, all other provisions of this order notwithstanding, every six months for a period of three years from the date this order becomes final, file with the Commission a report, in writing demonstrating the effectiveness of the steps or actions taken by respondent with regard to the aforesaid surveillance program, and setting forth in detail the manner and form in which it has complied with this order in the preceding year.

V

It is further ordered, That respondent shall notify the Commission at

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

IN THE MATTER OF
DURA-HAIR INTERNATIONAL, INC.

Docket 8830. Order, May 18, 1976

Denial of respondent's petition to reopen proceeding and modify the order to cease and desist.

Appearances

For the Commission: *Gerald Wright.*

For the respondent: *Pro se.*

ORDER DENYING PETITION TO REOPEN

Respondent, by petitions to reopen this proceeding dated February 13, and March 9, 1976, requests the modification of the order entered October 23, 1973 [83 F.T.C. 570], by deleting from the order the first, third, fifth, sixth, seventh, eighth and ninth "*It is further ordered*" paragraphs, and the first three subparagraphs under the second "*It is further ordered*" paragraph. These provisions mandate that respondent disclose that its so-called system of attaching hair involves a surgical procedure requiring the use of a local anesthetic, and resulting in the implantation of sutures in the scalp. Additionally, the order provisions that respondent requests be deleted require that respondent disclose that, as a result of the surgical procedure, there is a risk of discomfort, pain, infection, scarring, and other skin disorders, and, to minimize these risks, special care is necessary. These provisions further require that these and other disclosures be made to prospective purchasers, licensees, and franchisees of the system.

Respondent asserts that the deletions are warranted, as the technique of tunneling under the scalp to form the grip for the permanently implanted sutures to which the hair is attached has been replaced by a technique that utilizes skin grafts to form tunnels through which removable clips are placed. The hair is attached to the clips. Respondent contends that since the scalp is not open, infections and other referred-to-above risks are avoided.

Complaint counsel, in its answer opposing the reopening, take the position that since respondent's assertions relate to medical matters, an affidavit from a qualified medical person, substantiating the claims, is necessary.

We agree. When the subject of an opinion is related to a professional field such as medicine, the person expressing the opinion must have sufficient knowledge and expertness in the field to give rise to the inference that the opinion is creditable and reliable. Respondent's