

Complaint

90 F.T.C.

IN THE MATTER OF
WALGREEN CO.

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

Docket C-2897. Complaint, Aug. 3, 1977—Decision, Aug. 3, 1977

This consent order, among other things, requires a Deerfield, Ill. retail drug store chain, to cease disseminating advertisements that offer any item for sale, unless such item is available for sale at or below advertised price, in reasonably sufficient quantities to meet anticipated demands. Further, respondent is required to conspicuously post advertisements and disclosure statements at designated locations; maintain specified business records; and institute a surveillance program designed to ensure that its stores comply with the terms of the order.

Appearances

For the Commission: *Richard A. Palewicz.*

For the respondent: *Pasquale A. Zambrino and John O'Connell,*
Deerfield, Ill.

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 Walgreen Co., 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 thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Walgreen Co. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business located at 200 Wilmot Road, Deerfield, Illinois.

PAR. 2. Respondent is now, and for some time last past, has been engaged in the operation of a large chain of retail drug stores throughout the United States. Its national distribution of products is broadened by the franchising of over 1800 independently owned "Walgreen Agency Stores." Respondent's volume of business has been and is substantial. In the operation of its retail drug stores, respondent offers to its customers an extensive line of general merchandise, drug and cosmetic products. Many of the said products offered for sale and sold are manufactured or processed by respon-

dent through its various divisions, subsidiaries and affiliates at manufacturing and processing plants located in various states. Many of the said products, however, are purchased from numerous independent suppliers located throughout the United States.

PAR. 3. In the course and conduct of its business, as aforesaid, respondent now causes, and for some time last past has caused, directly or indirectly, the aforesaid general merchandise, drug and cosmetic products to be shipped and distributed from the aforesaid manufacturing and processing plants or from its other sources of supply to warehouses and distribution centers and thereafter to its retail drug stores located in various states other than the state of origination, distribution or storage of said products. Respondent maintains, and at all times mentioned herein has maintained a substantial course of trade in the production, processing, distribution, advertising, offering for sale and sale of the general merchandise, drug and cosmetic products in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of its business, as aforesaid, and for some time last past respondent has been and is now disseminating, and causing the dissemination of, certain advertisements concerning the aforesaid general merchandise, drug and cosmetic products by various means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, including but not limited to, advertisements in newspapers of general and interstate circulation and other advertising media, for the purpose of inducing and which were and are likely to induce, directly or indirectly, the purchase of said products from respondent; and respondent has been and is now disseminating, and causing the dissemination of, advertisements concerning said products by various means, including but not limited to the aforesaid media, for the purpose of inducing and which were and are likely to induce, directly or indirectly, the purchase from respondent of the said products in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act. Many of the said advertisements list or depict the aforesaid general merchandise, drug and cosmetic products and also contain statements and representations concerning the price or terms at which said products would be offered for sale. Many of the aforesaid advertisements contain further direct and express statements and representations concerning the time periods during which the offers would be in effect and geographical areas in which the offers would be made.

PAR. 5. Through the use of such advertisements disseminated and now being disseminated in various areas of the United States served

by respondent's retail drug stores, respondent has represented and is now representing directly or by implication that in those stores covered by such advertisements, during 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. Conspicuously available for sale at or below the advertised prices; and
- C. Sold to consumers at or below the advertised price.

PAR. 6. In truth and in fact, in a number of respondent's retail drug stores located in metropolitan areas in which the aforesaid advertisements were disseminated, and covered by such advertisements during the effective periods of the advertised offers, a substantial number of items listed or depicted in the said advertisement were or are:

- A. Not readily available for sale;
- B. Not conspicuously available for sale at or below the advertised prices; or
- C. Sold to customers at a price higher than the advertised price.

Therefore, the statements and representations as referred to herein, were and are false, misleading and deceptive.

PAR. 7. 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, during 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. Conspicuously available for sale at or below the advertised prices;

respondent has been and now is engaged in unfair acts and practices.

PAR. 8. 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 has been and now is engaged in unfair acts and practices.

PAR. 9. In the course and conduct of its business, and at all times

referred to herein, respondent has been and now is in substantial competition in commerce, with corporations, partnerships, firms and individuals in the retail general merchandise, drug and cosmetic business.

PAR. 10. The use by respondent of the aforesaid unfair and false, misleading and deceptive statements, representations, acts and practices, has had and now has the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that the said statement and representations were and 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 and substantial quantities of items other than the advertised items.

PAR. 11. The acts and practices as aforesaid, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted and now constitute unfair methods of competition in commerce and unfair or deceptive acts or practice in commerce in violation of Section 5 of the Federal Trade Commission Act.

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 Chicago 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 (60) days, now in further conformity with the procedure prescribed in Sec. 2.34 of its Rules, the Commission hereby

issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Walgreen Co. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 200 Wilmot Road, Deerfield, Illinois.

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.

It is ordered, That respondent Walgreen Co., a corporation, its successors or assigns, and 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 general merchandise, drug or cosmetic products, hereafter sometimes referred to as items, offered or sold in its retail drug 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 any items for sale at a stated price, unless during 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 advertised item which is usually and customarily individually marked with a price, is individually, clearly, and conspicuously marked with the advertised price;

4. Each advertised item is sold to customers at or below the advertised price.

The Commission recognizes that technical per se violations of Section I of this order are inevitable despite the honest best efforts of

respondent to ensure availability and proper pricing of advertised items. Therefore, in determining compliance with Section I of this order, the Commission will consider (a) all circumstances surrounding nondelivery of advertised products which were actually ordered in quantities sufficient to meet reasonably anticipated demands but were not delivered due to circumstances beyond respondent's control, and (b) all circumstances surrounding failure to make advertised items conspicuous and readily available for sale at or below the advertised prices due to circumstances beyond respondent's control.

Provided, it shall constitute a defense to a charge of unavailability under subparagraph I.A.1. if respondent maintains and furnishes or makes available for inspection and copying upon the request of the Federal Trade Commission, such records and affidavits as will show that (a) the advertised items were delivered to its stores in quantities sufficient to meet reasonably anticipated demand, 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 "rain check" 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 it shall not be deemed a violation of subparagraphs I.A.1., I.A.2., I.A.3., or I.A.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.

Provided, further, that an advertised item which is usually and customarily individually marked with a price, need not be marked with the advertised price but may remain marked at its regular price if both (i) a conspicuous sign at the site of the display of such item clearly states that the cashiers know the sale price; and (ii) the cashiers do in fact have a written list containing such sale price, have been instructed to charge the sale price for said item, and do in fact charge the customer the sale price.

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 information:

- A. A copy of the advertisement.
- B. A statement that: "All items listed in the advertisement are required to be available for sale at or below the advertised price."
- C. A clear and conspicuous statement of respondent's rain check program which will inform customers that:
 1. A rain check will be promptly issued by any store employee when an advertised item is unavailable.
 2. A rain check will enable customers to purchase an unavailable item at the advertised price when stocks are replenished or, if such replenishment is impossible, a similar item of equal or better quality will be substituted.
 3. A rain check will be valid for a period of thirty (30) days.

III.

It is further ordered, That respondent shall cause the following statement to be clearly and conspicuously set forth in each advertisement 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 Walgreen store, except as specifically noted in this ad."

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 directors who, directly or indirectly, have any supervisory responsibilities as to 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;
- 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

insure continuing compliance with the terms and provisions of this order;

2. Grant any duly authorized representative of the Federal Trade Commission access to all such business records;

3. 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, on or before each of the first three (3) anniversary dates of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order in the preceding year.

It is further ordered, That no provision of this order shall be construed in any way to annul, invalidate, repeal, terminate, modify or exempt respondent from complying with agreements, orders or directives of any kind obtained by any other agency or act as a defense to actions instituted by municipal or state regulatory agencies. No provision of this order shall be construed to imply that any past or future conduct of respondent complies with the rules and regulations of, or the statutes administered by, the Federal Trade Commission.

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.

It is further ordered, That respondent shall, within sixty days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

Interlocutory Order

90 F.T.C.

IN THE MATTER OF

AMREP CORPORATION

Docket 9018. Interlocutory Order, Aug. 10, 1977

General counsel directed to petition United States District Court (S.D.N.Y.) for grand jury testimony; and procedures established for *in camera* review by ALJ and access to testimony by counsel for both sides.

ORDER GRANTING REQUEST FOR APPLICATION TO UNITED
STATES DISTRICT COURT FOR GRAND JURY TESTIMONY

In a report of August 2, 1976, the administrative law judge in this proceeding recommended that the Commission seek access to grand jury testimony presented by a prospective witness in this proceeding, Mr. Paul W. Heinz, in a criminal proceeding against this respondent, *United States v. Amrep Corp.*, No. 75 Cr. 1023 (S.D.N.Y.). We took that recommendation under advisement pending completion of the criminal proceedings in the expectation that Mr. Heinz' testimony would be turned over to respondent in those proceedings, 88 F.T.C. 457 (1976). The law judge, in a report of July 27, 1977, now informs us that respondent has not secured access to transcripts of the testimony, and the criminal case has concluded. Respondent requests access to the transcripts for their potential value in impeaching Mr. Heinz' prospective testimony. Accordingly,

It is ordered, That the Commission's General Counsel shall expeditiously petition the United States District Court for the Southern District of New York for discretionary release, pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure, of all transcripts of grand jury testimony presented by Paul W. Heinz, in connection with *United States v. Amrep Corp.*, No. 75 Cr. 1023.

It is further ordered, That should any such transcripts be secured by the General Counsel acting on the Commission's behalf, they shall be delivered to the Administrative Law Judge in this proceeding, who shall review them *in camera* to determine whether they would be producible after direct examination of Mr. Heinz, under the standards in conformity with the Jencks Act which the Commission has established, *Ernest Mark High*, 56 F.T.C. 625, 632-633 (1959); *L. G. Balfour Co.*, 69 F.T.C. 1118 (1969); *Inter-State Builders, Inc.*, 69 F.T.C. 1152 (1969); *Star Office Supply Co.*, 74 F.T.C. 1595 (1968). Access may be granted to complaint counsel in advance of hearings to enable them to reassess whether to elicit testimony from Mr. Heinz. Access to respondent should be granted after direct examination of Mr.