

IN THE MATTER OF
FISHER FOODS, INC.

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

Docket 9062. Complaint, Oct. 28, 1975 — Decision, Nov. 11, 1977

This consent order, among other things, requires a Bedford Heights, Ohio, retail food store chain, to make each of its advertised items readily available for sale to customers in its stores, to have advertised items correctly priced and to sell those items at or below the advertised price. Further, the firm must post copies of advertisements and notices of the availability of "rainchecks" for unavailable items.

Appearances

For the Commission: *Aaron H. Bulloff, Melvin H. Wolovits and Paul K. Trause.*

For the respondent: *John F. McClatchey, Thompson, Hine & Flory, Cleveland, Ohio.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by that Act, the Federal Trade Commission, having reason to believe that Fisher Foods, 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 thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

COUNT I

Alleging violation of Section 5 of the Federal Trade
Commission Act (15 U.S.C. 45)

PARAGRAPH 1. Respondent Fisher Foods, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Ohio, with its principal office and place of business located at 5300 Richmond Road, Bedford Heights, Ohio.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the operation of a chain of retail food stores. Respondent operates food stores and food departments in Ohio, Kentucky, Northern Illinois, and California. Its volume of business has been and is substantial. In the operation of its retail food stores,

respondent offers and promotes for sale to its customers an extensive line of products, including "food," as that term is defined in the Federal Trade Commission Act, groceries, or other merchandise. Many of the said products offered for sale and sold are manufactured or processed by respondent through its various divisions, subsidiaries, and affiliates at manufacturing and processing plants located in the State of Ohio. Many other of the said products are purchased from numerous 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 food and grocery products or other merchandise 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 food 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 aforesaid food and grocery products or other merchandise in 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 food and grocery products or other merchandise by various means in 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 have been and are likely to induce, directly or indirectly, the purchase of said advertised products and other 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 have been and are likely to induce, directly or indirectly, the purchase from respondent of the said advertised products and other products in commerce, as "commerce" is defined in the Federal Trade Commission Act. Many of the said advertisements list or depict the aforesaid food and grocery products, or other merchandise, and also contain statements and representations concerning the prices or terms at which said advertised products were being offered and presented for sale, as well as the time periods during which the offers would be in effect.

PAR. 5. Through the use of such advertisements disseminated in various areas of the United States served by respondent's retail food stores, respondent has represented 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:

- A. Readily available for sale to customers;
- B. Readily and conspicuously available for sale at or below the advertised prices; and
- C. Sold to persons who attempted to purchase such items at prices at or below the advertised prices.

PAR. 6. In truth and in fact, in a significant number of respondent's retail food 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 were:

- A. Not readily available for sale;
- B. Not readily and conspicuously available for sale at or below the advertised prices; or
- C. Sold to persons who attempted to purchase such items at prices higher than the advertised prices.

Therefore, the statements and representations as referred to herein, were 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 a significant number of its stores covered by such advertisements, during the effective periods of the advertised offers, substantially all of the aforesaid advertised items:

- A. Readily available for sale to customers in quantities sufficient to meet reasonably anticipated demands;
- B. Conspicuously available for sale at or below the advertised prices;

and by selling substantial numbers of said items to persons attempting to purchase such items at prices in excess of the advertised price, respondent has engaged in unfair acts and practices.

PAR. 8. 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 food and grocery business.

PAR. 9. The use by respondent of the aforesaid unfair and false, misleading and deceptive statements, representations, acts and

practices, has had the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that the said statements and representations were 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, some of those other items being higher priced or otherwise less desirable to Fisher customers than the unavailable advertised items, by reason of such erroneous and mistaken belief.

PAR. 10. The acts and practices as aforesaid were all to the prejudice and injury of the public and of respondent's competitors and constituted unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

COUNT II

Alleging violation of the Federal Trade Commission Trade Regulation Rule Concerning Retail Food Store Advertising and Marketing Practices (16 C.F.R. 424, *et seq.*), and Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One, Two, Three, Four and Eight, respectively, of Count I hereof are incorporated by reference in Count II as if fully set forth verbatim.

PAR. 11. The Federal Trade Commission, pursuant to the Federal Trade Commission Act, as amended, 15 U.S.C. 41, *et seq.*, and the provisions of Subpart B, Part 1, of the Commission's Procedures and Rules of Practice, 16 C.F.R. 1.11, *et seq.*, conducted a proceeding for the promulgation of a trade regulation rule regarding retail food store advertising and marketing practices. Notice of this proceeding, including a proposed rule, was published in the *Federal Register* on November 14, 1969 (34 F.R. 18252). Interested parties were thereafter afforded opportunity to participate in the proceeding through the submission of written data, views, and arguments, and to appear and orally express their views as to the proposed rule and to suggest amendments, revisions, and additions thereto.

The Commission considered all matters of fact, law, policy, and discretion, including the data, views, and arguments presented on the record by interested parties in response to the Notice, as prescribed by law, determined that the adoption of the Trade Regulation Rule and Statement of its Basis and Purpose was in the public interest, and, accordingly, promulgated the Trade Regulation

Rule Concerning Retail Food Store Advertising and Marketing Practices on May 13, 1971, effective July 12, 1971.

PAR. 12. Respondent is a member of the retail food stores industry, and its acts and practices in connection with the sale of food and grocery products or other merchandise being subject to the jurisdiction of Section 5 of the Federal Trade Commission Act are within the intent and meaning of, and are subject to, the provisions of the aforesaid Trade Regulation Rule.

PAR. 13. In connection with its aforesaid advertisements, respondent, in a substantial number of instances, has failed to comply with Paragraph (1) of the aforesaid Trade Regulation Rule by offering food and grocery products or other merchandise subject to the jurisdictional requirements of Section 5 of the Federal Trade Commission Act for sale at stated prices by means of advertisements disseminated in areas served by certain of its stores which were covered by such advertisements but which, during the advertised sale periods, neither has such products in stock nor provided clear and adequate notice that the items were in stock and might be obtained upon request.

PAR. 14. In connection with its advertisements disseminated as aforesaid, respondent, in a substantial number of instances, has failed to comply with Paragraph (2) of the Trade Regulation Rule by offering products for sale at stated prices by means of advertisements disseminated in areas served by certain of its stores which are covered by such advertisements and by failing in those stores to charge out to persons who attempted to purchase such items, substantial numbers of such advertised products at prices at or below the advertised prices during the effective periods of the advertisements, thereby failing to make said advertised items conspicuously and readily available for sale at or below the advertised prices.

PAR. 15. Respondent's aforesaid violations of the Trade Regulation Rule Concerning Retail Food Store Advertising and Marketing Practices constitute unfair and deceptive acts and practices in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having heretofore issued its complaint charging the respondent, Fisher Foods, Inc., named in the caption hereto with violation of Section 5(a)(1) of the Federal Trade Commission Act, and the respondent, Fisher Foods, Inc., having been served with a copy of the complaint and with a copy of the notice of contemplated relief accompanying said complaint; 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 the 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 issued an order withdrawing the matter described in the caption hereto from adjudication for the purpose of considering the proposed consent agreement pursuant to Section 3.25 of its Rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing a consent order having thereupon been placed on the public record for a period of sixty (60) days and the Commission having duly considered the comments filed pursuant to Sections 2.34 and 3.25 of its Rules, now in further conformity with the procedure prescribed in Section 3.25 of its Rules, the Commission hereby issues its decision in disposition of the proceeding against the above-named respondent, makes the following jurisdictional findings, and enters the following order:

1. Respondent Fisher Foods, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business located at 5300 Richmond Road, Bedford Heights, Ohio.

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

Definitions

For purposes of this order:

A. "Respondent" means Fisher Foods, Inc., but does not include Fisher's existing wholly-owned subsidiary, Dominick's Finer Foods, Inc.

B. A "Retail Food Store" means one of respondent's Retail Food Stores in the Northern Ohio Division, in the Southern Ohio Division, or in the Los Angeles Division, other than a convenience store, *i.e.* a store having less than 4,000 square feet of floor space.

C. The "Northern Ohio Division" means the Retail Food Stores

located in the following counties in Ohio: Ashtabula, Cuyahoga, Geauga, Lake, Lorain, Mahoning, Medina, Portage, Stark, Summit, Trumbull, and Wayne.

D. The "Southern Ohio Division" means the Retail Food Stores located (1) in each county in Ohio other than the Ohio counties located in the Northern Ohio Division, and (2) in states contiguous to Ohio.

E. The "Los Angeles Division" means the Retail Food Stores located in, and in states contiguous to, California.

F. A "Northern Ohio Division Sample" means a selection of at least 25 percent (to the nearest whole number) of respondent's Retail Food Stores located in the Northern Ohio Division, 75 percent (to the nearest whole number) of which shall be randomly selected from the Ohio Counties of Cuyahoga, Lake, Lorain, and Summit, and 25 percent of which shall be randomly selected from respondent's Retail Food Stores in the other Ohio Counties which comprise the Northern Ohio Division.

G. A "Southern Ohio Division Sample" means a selection of at least 25 percent (to the nearest whole number) of respondent's Retail Food Stores located in the Southern Ohio Division.

H. A "Los Angeles Division Sample" means a selection of at least 25 percent (to the nearest whole number) of respondent's Retail Food Stores located in the Los Angeles Division, 75 percent (to the nearest whole number) of which shall be randomly selected from the California Counties of Los Angeles and Orange, and 25 percent of which shall be randomly selected from respondent's Retail Food Stores in the other California Counties which comprise the Los Angeles Division.

I. A "Survey" or a "Survey of the Sample" means a survey of the Northern Ohio Division Sample, Southern Ohio Division Sample, or Los Angeles Division Sample, conducted in accordance with the Survey Procedures set forth in Exhibit A, attached hereto and incorporated herein by reference. Stores to be surveyed shall be chosen in a manner that is consistent with the Survey Procedures. Respondent waives any right it might have to challenge the admissibility into evidence of the results of a Survey, or to challenge the evidentiary weight of a Survey based upon the size of the Sample. Respondent, however, retains the right to challenge the evidentiary weight to be given to the results of any such Survey on any other legally available basis.

J. The "Unadjusted Number of Unavailable Advertised Items" with respect to one of respondent's surveyed Retail Food Store means the surveyed number of unavailable advertised items before

that number is reduced by any instances of unavailability that are excused by the defenses set forth in Trade Regulation Rule 424, as presently drafted, or in this order.

K. The "Adjusted Number of Unavailable Advertised Items" with respect to one of respondent's surveyed Retail Food Stores means the Unadjusted Number of Unavailable Advertised Items reduced by all instances of unavailability that are excused by the defenses set forth in Trade Regulation Rule 424, as presently drafted, or in this order.

L. The "Unadjusted Number of Over-Price-Marked or Overcharged Advertised Items" with respect to one of respondent's surveyed Retail Food Stores means the surveyed number of Over-Price-Marked or Overcharged Advertised Items before that number is reduced by any instances of overpricing or overcharging that are excused by the defenses set forth in Trade Regulation Rule 424, as presently drafted, or in this order.

M. The "Adjusted Number of Over-Price-Marked or Overcharged Advertised Items" with respect to one of respondent's surveyed Retail Food Stores means the Unadjusted Number of Over-Price-Marked or Overcharged Advertised Items reduced by all instances of over-price-marking or overcharging that are excused by the defenses set forth in Trade Regulation Rule 424, as presently drafted, or in this order.

N. The "Average Adjusted Rate of Unavailability" revealed by a Survey, as referred to in Paragraph III(B)(1) of this order, shall be determined as follows:

1. For each store surveyed, the Unadjusted Number of Unavailable Advertised Items shall be recorded and that number shall be reduced in accordance with the definition of "Adjusted Number of Unavailable Advertised Items" in this Order to ascertain the Adjusted Number of Unavailable Advertised Items in that store.

2. For each store surveyed, the number of items that the advertisement represents to be available in that store shall be recorded.

3. After the individual stores in the Sample have been surveyed, the sum, or aggregate, of the Adjusted Numbers of Unavailable Advertised Items recorded pursuant to Paragraph I(N)(1) shall be determined.

4. After the individual stores in the Sample have been surveyed, the sum, or aggregate, of the numbers of advertised items recorded pursuant to Paragraph I(N)(2) shall be determined.

5. The Average Adjusted Rate of Unavailability shall be the fraction of which the numerator is the sum, or aggregate, deter-

mined pursuant to Paragraph I(N)(3) and of which the denominator is the sum, or aggregate, determined pursuant to Paragraph I(N)(4).

O. The "Average Adjusted Rate of . . . Over-Price-Marking" revealed by a Survey as referred to in Paragraph III(D)(1) of this order, shall be determined as follows:

1. For each store surveyed, the Unadjusted Number of Over-Price-Marked Advertised Items shall be recorded and that number shall be reduced in accordance with the definition of "Adjusted Number of Over-Price-Marked Advertised Items" in this Order to ascertain the Adjusted Number of Over-Price-Marked Advertised Items in that store.

2. For each store surveyed, the number of items that the advertisement represents to be available in that store shall be recorded.

3. After the individual stores in the sample have been surveyed, the sum, or aggregate, of the Adjusted Numbers of Over-Price-Marked Advertised Items recorded pursuant to Paragraph I(O)(1) shall be determined.

4. After the individual stores in the Sample have been surveyed, the sum, or aggregate, of the numbers of advertised items recorded pursuant to Paragraph I(O)(2) shall be determined.

5. The Average Adjusted Rate of Over-Price-Marking shall be the fraction of which the numerator is the sum, or aggregate, determined pursuant to Paragraph I(O)(3), and of which the denominator is the sum, or aggregate, determined pursuant to Paragraph I(O)(4).

P. The "Average Adjusted Rate of . . . Overcharging" revealed by a survey as referred to in Paragraph III(D)(1) of this order shall be determined as follows:

1. For each store surveyed, the Unadjusted Number of Overcharged Advertised Items shall be recorded and that number shall be reduced in accordance with the definition of "Adjusted Number of Overcharged Advertised Items" in this order to ascertain the Adjusted Number of Overcharged Advertised Items in that store.

2. For each store surveyed, the number of items that the advertisement represents to be available in that store shall be recorded.

3. After the individual stores in the Sample have been surveyed, the sum, or aggregate, of the numbers of advertised items recorded pursuant to Paragraph I(P)(2) shall be determined.

4. After the individual stores in the Sample have been surveyed, the sum, or aggregate, of the numbers of advertised items recorded pursuant to Paragraph I(P)(2) shall be determined.

5. The Average Adjusted Rate of Overcharging shall be th

fraction of which the numerator is the sum, or aggregate, determined pursuant to Paragraph I(P)(3), and of which the denominator is the sum, or aggregate, determined pursuant to Paragraph I(P)(4).

Q. A "Perishable Item" means any item that will probably spoil or that will be substantially reduced in value if not sold on the day of delivery, or, in the case of prepared foods such as barbecued chicken or in-store baked products, on the day of preparation.

II

Prohibited Activities

It is ordered. That, in connection with respondent's advertising, offering for sale, sale or distribution of food or grocery products or other merchandise (hereinafter sometimes referred to as items) offered for sale or sold in its Retail Food Stores, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, that respondent forthwith cease and desist, directly or indirectly or through any device, from disseminating or causing the dissemination of any advertisement by any means that offers any items for sale at an advertised price unless, with respect to Paragraphs II(A), II(B), and II(C) below, respondent is complying with a specific exception, limitation, or restriction with respect to a store, item, or price that is clearly and conspicuously disclosed in all advertisements for the item in question (including but not limited to limitations or restrictions concerning the stores in which an item is available, the numeral quantities of an item available in each Retail Food Store, and the hours during which a Perishable Item is available), or unless, throughout the effective period of the advertised offer at each Retail Food Store covered by the advertisement:

A. 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 indicating that the item is in stock and may be obtained upon request and the item is readily furnished upon request;

B. Each unit of each advertised item, any of which is marked with at least one price either on the item itself or on a sign at the point of display, is clearly and conspicuously marked with a price that is no higher than the advertised price; if any unit of an advertised item is marked with two or more different prices, the customer is charged the lowest of the prices, which is no higher than the advertised price;

C. Each unit of each advertised item is sold to customers at or below the advertised price;

except that no proceeding to enforce Paragraphs II(A), II(B), or II(C) of this order, pursuant to Section 5(l) of the Federal Trade Commission Act, as amended, that is based on a survey shall be instituted or commenced except on the basis of a Survey of a Sample of the Northern Ohio Division.

III

Defenses and Presumptions

A. Defenses to a charge of unavailability under Trade Regulation Rule 424, as presently drafted, Section 5 of the Federal Trade Commission Act, as amended, or any provisions of this order shall consist of every instance in which the Respondent can show:

1. That the advertised item was unavailable due to circumstances beyond respondent's control, that respondent did not have notice or knowledge of such impending unavailability in time to delete the item from the proposed advertisement, and that respondent offered to customers, for each unavailable item, a "raincheck" that (a) entitled the holder to purchase the item in the near future at or below the advertised price and (b) conspicuously disclosed on its face that, if the customer tendered the "raincheck" to Respondent more than three days, but less than 17 days, after receipt and the advertised item was still unavailable, the customer may elect, at his option, either to renew the "raincheck" for an additional two-week period or to receive a comparable item at or below the advertised price.

2. That the advertised items were delivered in adequate time to respondent's Retail Food Stores in quantities sufficient to meet reasonably anticipated demand. For purposes of this Paragraph III(A)(2):

(a) Respondent shall be deemed to have shown that it delivered an item to a store in quantities sufficient to meet reasonably anticipated demand in a particular advertisement period if it maintains records showing that it delivered that item to that store during that advertisement period in quantities equal to or greater than the quantities of that item sold by that store during the last preceding comparable advertisement period.

(b) The phrase, "quantities of that item sold by that store during the last preceding comparable advertisement period," for items other than meat, means the sum of the number of units in the closing inventory of the store after closing hours on the night before the first day of the advertisement period, *plus* the number of units delivered to the store during the advertisement period, *plus* the

number of "rainchecks" issued for that item during the advertisement period, and *minus* the number of units in the closing inventory of the store after closing hours on the last day of the advertisement period.

(c) The phrase, "delivered in adequate time," for items other than meat, means that, if respondent delivers more than one shipment of an item to a store in the comparable advertisement period, the "quantities of that item sold by that store during the . . . advertisement period" shall be apportioned among the deliveries in the particular advertisement period in such quantities that, by the comparable delivery date of the particular advertisement period, there shall have been delivered to the store at least the same proportion of quantities as were delivered by that date in the comparable period. For example, if the "quantities of that item sold by that store during the comparable advertisement period" for items other than meat were 110 units (100 units actually delivered and 10 "rainchecks" issued), and the units were delivered to the store in the comparable advertisement period in three deliveries consisting of 40 units on Monday, 40 units on Wednesday, and 20 units on Friday, respondent "will have delivered, in adequate time" if respondent delivers for the particular advertisement period, at least 40 percent (of the 110 units to be delivered) by Monday, 80 percent by Wednesday, and 100 percent by Friday.

(d) It shall be presumed that respondent has delivered meat items to a store in quantities sufficient to meet reasonably anticipated demand in a particular advertisement period when the sum of the number of primal cuts or carcasses containing that item in the closing inventory of the store after closing hours on the night before the first day of the particular advertisement period, *plus* the number of primal cuts or carcasses containing that item delivered to the store during the particular advertisement period, is equal to or greater than the sum of the number of primal cuts or carcasses containing that item in the closing inventory of the store after closing hours on the night before the first day of the comparable advertisement period, *plus* the number of primal cuts or carcasses containing that item delivered to the store during the comparable advertisement period, *minus* the number of primal cuts or carcasses containing that item in the closing inventory of the store after closing hours on the last day of the comparable advertisement period, taking into consideration the number of "rainchecks" issued and the frequency of delivery.

(e) The phrase, "last preceding comparable advertisement period" means, for a particular item, the last preceding advertisement period

(during which the item was advertised) that is most comparable to the particular advertisement period, considering the time of the year, the week of the month, weather conditions, the nature of the item, the amount of the price reduction, the location of the advertisement for the item with reference to the advertisement as a whole, the type size of the advertisement for the item, the availability of a coupon, the location of the product within the store, and any other relevant factors affecting a customer's buying habits.

(f) Each item that respondent can show it delivered to a Retail Food Store, included in the Sample, in quantities sufficient to meet reasonably anticipated demand, as provided herein, shall be employed herein as a defense in reducing the "Unadjusted Number of Unavailable Advertised Items" in computing the "Adjusted Number of Unavailable Advertised Items."

B. The following presumptions shall apply in ascertaining the availability to respondent of the defenses set forth in Paragraph III(A).

1. Because respondent has obligated itself, pursuant to Paragraph IV(C)(2) of this order, to institute, enforce, monitor, improve on the basis of experience, and maintain procedures designed to effect compliance with this order, it shall be presumed that the unavailability of all advertised items resulted from circumstances beyond respondent's control, within the meaning of Paragraph III(A)(1), if (a) the Average Adjusted Rate of Unavailability does not exceed 2/100 or 2 percent and (b) the unavailability revealed by the Survey is not shown to be caused in whole or in substantial part by the gross negligence or deliberate acts or omissions of respondent. (Sporadic unavailability caused by the gross negligence or deliberate acts or omissions of an insubstantial number of store level employees of respondent shall not negate the presumption if respondent can demonstrate that it took appropriate disciplinary action against the employees promptly after learning that the employees' gross negligence or deliberate acts or omissions caused the unavailability; persistent unavailability, however, caused by the gross negligence or deliberate acts or omissions of a substantial number of store level employees of respondent shall be attributed to respondent and shall negate the presumption.)

2. If, with respect to a Survey conducted in accordance with Paragraph IV(C) of this order, respondent is not advised in writing by the Federal Trade Commission or its staff within four months after receipt of a verified report from respondent as outlined in the Survey Procedures, or if respondent is not advised with respect to a Survey conducted by the Federal Trade Commission or its staff

within four months after the Commission or its staff receives documents from respondent concerning its defenses as set forth in Trade Regulation Rule 424, as presently drafted, or this order, that the Federal Trade Commission or its staff has reason to believe that respondent has failed to make advertised items available, in violation of Trade Regulation Rule 424, as presently drafted, Section 5 of the Federal Trade Commission Act, as amended, or this order, after taking into consideration the defenses set forth in Trade Regulation Rule 424, as presently drafted, or in this order, it shall be presumed that the alleged failure of respondent to make advertised items available was due to circumstances beyond respondent's control within the meaning of Paragraph III(A)(1). If on the other hand respondent is advised, within the prescribed period, of the position of the Federal Trade Commission or its staff, the advice shall indicate each specific item alleged to have been unavailable in identified stores on specified days.

C. Defenses to a charge of over-price-marking or overcharging under Trade Regulation Rule 424, as presently drafted, Section 5 of the Federal Trade Commission Act, or any provision of this order, shall consist of every instance in which the respondent can show:

1. That the advertised item was not marked or charged out at or below the advertised price due to circumstances beyond respondent's control, and that respondent, upon notice of knowledge of such over-price-marking or overcharging, acted immediately to price-mark the goods with, or charge out the goods at, the advertised price.

2. That, with respect to charges of over-price-marking in the case of stores equipped with devices that "read" an identification code (commonly referred to as the Universal Product Code) marked on the packaging of items and transmit the information to a computer that transmits the information to cash register tapes, with the items (and individual units thereof) not price-marked in any additional manner, the advertised price of such items was clearly and conspicuously posted at the point of display.

3. That, in the case of advertised items the ultimate price of which is to be determined by the total dollar amount of the customer's order or the use of a coupon or other similar price arrangement, the price at which the item is sold, and not the price marked on the item, shall govern.

D. The following presumptions shall apply in determining the availability to respondent of the defenses set forth in Paragraph III(C).

1. Because respondent has obligated itself, pursuant to Paragraph IV(C)(2) of this order, to institute, enforce, monitor, improve

on the basis of experience, and maintain procedures designed to effect compliance with this order, it shall be presumed that the over-price-marking or overcharging of all advertised items resulted from circumstances beyond respondent's control within the meaning of Paragraph III(C)(1) if (a) neither the Average Adjusted Rate of Over-Price-Marking nor the Average Adjusted Rate of Overcharging exceeds 1/100 or 1 percent, and (b) the over-price-marking or overcharging revealed by the Survey is not shown to be caused in whole or in substantial part by the gross negligence or deliberate acts or omissions of respondent. (Sporadic over-price-marking or overcharging caused by the gross negligence or deliberate acts or omissions of an insubstantial number of store level employees of respondent shall not negate the presumption if respondent can demonstrate that it took appropriate disciplinary action against the employees promptly after learning that the employees' gross negligence or deliberate acts or omissions caused the over-price-marking or overcharging; however, persistent over-price-marking or overcharging caused by the gross negligence or deliberate acts or omissions of a substantial number of store level employees of respondent shall be attributed to respondent and shall negate the presumption.)

2. If, with respect to a Survey conducted in accordance with Paragraph IV(C) of this order, respondent is not advised in writing by the Federal Trade Commission or its staff within four months after receipt of a verified report from respondent as outlined in the Survey Procedures, or if respondent is not advised with respect to a Survey conducted by the Federal Trade Commission or its staff within four months after the Commission or its staff receives documents from respondent concerning its defenses as set forth in Trade Regulation Rule 424, as presently drafted, or this order, that the Federal Trade Commission or its staff has reason to believe that respondent has failed to price-mark or charge out advertised items at the advertised prices, in violation of Trade Regulation Rule 424, as presently drafted, Section 5 of the Federal Trade Commission Act, as amended, or this order, after taking into consideration the defenses set forth in Trade Regulation Rule 424, as presently drafted, or in this order, it shall be presumed that the alleged failure of respondent to make advertised items available at or below the advertised price was due to circumstances beyond respondent's control within the meaning of Paragraph III(C)(1). If on the other hand respondent is advised, within the prescribed period, of the position of the Federal Trade Commission or its staff, the advice shall indicate each specific

item alleged to have been over-price-marked or overcharged in identified stores on specified days.

IV

Additional Obligations of Respondent

A. *It is further ordered*, That, throughout each advertisement period in each of its Retail Food Stores covered by an advertisement, Respondent shall post conspicuously, at or near each doorway affording entrance to the public, and at or near the place where customers pay for merchandise:

1. A copy of any printed advertisement.
2. The following statement:

NOTICE

All items advertised for sale in this store are "required to be readily available for sale" at or below the advertised price, except as otherwise specifically noted in the advertisement.

If an advertised item you wish to purchase is unavailable, please request a "raincheck" from the store office.

If two (or more) prices appear on a unit of an item, you will be charged the lower (or lowest) of the prices marked; in no event will you be charged more than the advertised price.

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

B. *It is further ordered*, That respondent shall cause the following statement to be clearly and conspicuously set forth in each printed advertisement that represents that items are available for sale at any of its Retail Food Stores:

Each of these advertised items is "required to be readily available for sale" in each store, except as otherwise specifically indicated in this advertisement.

C. *It is further ordered*, That:

1. Respondent shall forthwith deliver a copy of this order to the head of its operating divisions and to each of its officers and other personnel in its organization down to the level of, and including, assistant store managers who, directly or indirectly, have any supervisory responsibilities relating to (a) the availability or price-marking of advertised items in respondent's Retail Food Stores and (b) check stand operations or who are engaged in any aspect of the preparation, creation, or placing of advertising; respondent shall promptly deliver a copy of this order to any person who is hereafter elected in or placed in one of these positions. Respondent shall secure

a signed statement acknowledging receipt of the order from each such person.

2. Respondent shall institute, enforce, monitor, improve on the basis of experience, and maintain a program (including a continuing surveillance procedure) that is designed to effect compliance with this order and to reveal whether the business practices of each of its Retail Food Stores conform to this order, and shall confer with a representative of the Federal Trade Commission pertaining to the program when requested to do so by such representative. This program shall include five Surveys of respondent's Retail Food Stores by an independent organization, conducted according to the Survey Procedures and within the time limitations hereinafter prescribed, with the commencement date for each of these Surveys to be selected by the Federal Trade Commission or its staff. Respondent shall not modify any Survey procedure or form without prior Commission approval. At least one of these Surveys shall be conducted using a Sample of the Northern Ohio Division and shall be conducted between six months after the effective date of this order and four years after the effective date of this order. At least one of these Surveys shall be conducted using a Sample of the Southern Ohio Division and shall be conducted between one year after the effective date of this order and four years after the effective date of this order. Each of the remaining two Surveys shall be conducted in any of the three divisions chosen by the Federal Trade Commission or its staff and shall be conducted between one year after the effective date of this order and four years after the effective date of this order, except that no Survey of the same division shall be commenced earlier than six months after the commencement of an earlier Survey of the same division. The results of each of these Surveys, the defenses of respondent, and any underlying documents shall be provided to the Federal Trade Commission or its staff within four months after the completion of the Survey.

3. The results of any Survey, any defenses of the respondent, and any underlying documents, as they relate to respondent's Retail Food Stores located in the Southern Ohio Division or in the Los Angeles Division, may be used by the Federal Trade Commission in any proceeding under the Federal Trade Commission Act, as amended, other than a proceeding to enforce Paragraph II of this order. The results of any Survey, any defenses of the respondent, and any underlying documents, as they relate to respondent's Retail Food Stores located in the Northern Ohio Division, may be used by the Federal Trade Commission in any proceeding under the Federal Trade Commission Act, as amended. As set forth in Paragraph I(I),

respondent waives any right it might have to challenge the admissibility into evidence of the results of a Survey or to challenge the evidentiary weight of the Survey based upon the size of the Sample; respondent, however, retains the right to challenge the evidentiary weight to be given to the results of any such Survey on any other legally available basis.

4. Respondent shall, for a period of five years after the effective date of this order:

a. Maintain business records which show respondent's efforts taken to ensure continuing compliance with the terms and provisions of this order;

b. Grant a representative of the Federal Trade Commission access to all such business records, during normal business hours and for reasonable periods of time;

c. Furnish to the Federal Trade Commission or its staff copies of such records when they are requested by any representative of the Federal Trade Commission possessing authority to make such request.

5. Respondent shall, all other provisions of this order notwithstanding, for a period of four years after the effective date of this order, file with the Commission an annual report in writing revealing the effectiveness of the steps or actions taken by respondent with regard to the aforesaid program (including a continuing surveillance procedure) and setting forth in detail the manner and form in which it has complied with this order in the preceding year.

D. *It is further ordered*, That Fisher shall notify the Commission at least 30 days prior to any proposed change in its corporate existence (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 Fisher that may affect compliance obligations arising out of this order.

E. *It is further ordered*, That respondent herein shall within 60 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.

IN THE MATTER OF

FOOD FAIR STORES, INC. ALSO TRADING AS PANTRY
PRIDECONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT

Docket C-2912. Complaint, Nov. 11, 1977 — Decision, Nov. 11, 1977

This consent order, among other things, requires a Philadelphia, Pa. retail food store chain to make each of its advertised items readily available for sale to customers in its stores, to have advertised items correctly priced, and to sell those items at or below the advertised price. Further, the firm must post copies of advertisements and notices of the availability of "rainchecks" for unavailable items.

Appearances

For the Commission: *Bernard Rowitz, Alan L. Cohen and Irvin E. Abrams.*

For the respondent: *Stein, Mitchell & Mezines*, Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Food Fair Stores, Inc., a corporation, also trading and doing business as Pantry Pride, hereinafter sometimes referred to as respondent, has engaged in acts and practices contrary to the Commission's Trade Regulation Rule Concerning Retail Food Store Advertising and Marketing Practices (16 C.F.R. 424) in violation of the Federal Trade Commission Act, as amended, and has also engaged in acts and practices in violation of the provisions of the above-mentioned 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:

COUNT I

Alleging violation of Section 5 of the Federal Trade Commission Act, as amended.

PARAGRAPH 1. Respondent, Food Fair Stores, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania with its office and principal place of business located at 3175 John F. Kennedy