

Complaint

90 F.T.C.

IN THE MATTER OF
SHOP-RITE FOODS, INC.

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

Docket C-2913. Complaint, Nov. 11, 1977 — Decision, Nov. 11, 1977

This consent order, among other things, requires a Grand Prairie, Tex. 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: *Donald Higginbotham* and *Jim B. Brookshire*.

For the respondent: *Glenn A. Mitchell, Stein, Mitchell & Mezines*, 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 Shop-Rite 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 thereto would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

COUNT 1

(Alleging violation of Section 5 of the Federal Trade
Commission Act)

PARAGRAPH 1. Respondent, Shop-Rite Foods, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Mexico with its office and principal place of business located at 2401 West Marshall Drive, Grand Prairie, Texas.

PAR. 2. Respondent, through its wholly-owned subsidiaries is engaged in the operation of a chain of retail food stores, operating over 100 stores in three (3) states. Its volume of business is substantial, totaling approximately \$282 million in retail food sales in 1974. In the operation of its retail food stores, respondent offers for

sale and sells to its customers an extensive line of products, including food, drugs, cosmetics and devices as those terms are defined in the Federal Trade Commission Act, as amended, all of which are sometimes referred to hereinafter as "items." Some of said items are manufactured or processed by respondent at its manufacturing and processing plants located in various states. However, many of said items 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 sometime last past has caused, directly or indirectly, the aforesaid items to be shipped and distributed from its manufacturing and processing plants or from its other sources of supply to its warehouses, distribution centers, or retail food stores located in various states other than the state of origination, distribution or storage of said items. In the further course and conduct of its business, respondent transmits contracts, business correspondence, monies and other documents from its stores, offices, and divisions located in states other than the state in which such contracts, correspondence, monies, and other documents originated. Respondent maintains, and at all times mentioned herein, has maintained 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. 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 items by various means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, 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 now and were likely to induce, directly or indirectly, the purchase of said items from respondent; and respondent has been and is now disseminating and causing the dissemination of, advertisements concerning said items by various means, including but not limited to the aforesaid items by various means, including but not limited to the aforesaid media, for the purpose of inducing and which are now and were, likely to induce, directly or indirectly, the attempted or actual purchase from respondent of the said items in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended. Many of the said advertisements list or depict the aforesaid items and also contain statements and representations

concerning the price or terms at which said items 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 the locations of respondent's food stores at which the offers would be made.

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 period 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, and each of such advertisements were misleading in material respects and constituted a "false advertisement," as that term is defined in the Federal Trade Commission Act, as amended.

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; and
- 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 as aforesaid, 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, including the dissemination of the aforesaid "false advertisements," has had the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that the statements 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, some of those items being higher priced or otherwise less desirable to Shop-Rite Foods, Inc., customers than the unavailable advertised items, by reason of such erroneous and mistaken beliefs.

PAR. 10. The acts and practices as aforesaid, and the disseminations by respondent of the false advertisements, as aforesaid, were all to the prejudice and injury of the public and of respondents' competitors and constituted unfair methods of competition in or affecting commerce and unfair or deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act, as amended.

COUNT II

(Alleging violations of the Federal Trade Commission Trade Regulation Rule Concerning Retail Food Store Advertising and Marketing Practices (16 C.F.R. Section 424), and Section 5 of the Federal Trade Commission Act, the allegations set forth in Paragraphs One, Two, Three, Four, and Ten, 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 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 thereaf-

ter 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 relevant 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 indicated in the accompanying Statement of Basis and Purpose (36 F.R. 8777 (May 13, 1971)) and as prescribed by law, determined that the adoption of the Trade Regulation Rule 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 store industry, and its acts and practices in connection with the sale and offering for 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 period neither had such products in stock readily available for sale to customers 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 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 and by failing in those stores to make certain of the advertised items conspicuously and readily available for sale at or below the advertised prices during the effective periods of the advertisements, and by failing to charge out to persons who attempted to purchase items substantial

numbers of such advertised products at prices at or below the advertised prices during the effective periods of the advertisements.

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 initiated an investigation of certain acts and practices of Shop-Rite Foods, Inc., a corporation, hereinafter sometimes referred to as respondent, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Dallas, Texas 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, as amended; 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 and having duly considered the comments filed thereafter pursuant to Section 2.34(b) of its Rules, 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, Shop-Rite Foods, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Mexico, with its office and principal place of business located at 2401 West Marshall Drive, Grand Prairie, Texas.
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, Shop-Rite Foods, 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 food or grocery products 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, as amended, 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 during the effective period of the advertised offer at each retail store covered by the advertisement:

1. Each advertised item is in stock and readily available to customers, or if not readily available, clear and adequate notice shall be provided that the items are in stock and may be obtained upon request;

2. Each unit of each advertised item, any of whose units are marked with a price, is individually, clearly, and conspicuously marked with a price no higher than the advertised price;

3. Each unit of each advertised item is charged out to customers at a price which is at or below the advertised price;

Provided, however, that it shall constitute a defense to a charge of violation 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 as will show that (a) *the advertised items were ordered in adequate time for delivery or were delivered to the stores in quantities sufficient to meet reasonably anticipated demands during the advertised sales period or* (b) *the advertised items were ordered in quantities sufficient to meet reasonably anticipated demands but were not delivered due to circumstances beyond respondent's control, and that respondent, upon notice or knowledge of such nondelivery immediately offers to customers a choice of a "rain check" for each unavailable item which entitles the holder to purchase the item in the 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, or I.A.3, if respondent is complying with a specific exception, 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, however, that if respondent or any of its employees, agents, or representatives are not advised of an alleged instance of unavailability through any source, including the Federal Trade Commission, within six months of its occurrence, it shall be presumed that the records called for by this subparagraph were in the possession of respondent and that quantities of the advertised items adequate to meet reasonably anticipated demand had been ordered in adequate time for delivery prior to the sale and were delivered.

Provided, further, 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.

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 identification number to in-store computers which then transmit the correct prices of the items to electronic cash registers where the prices are displayed and printed on cash register tapes, the units need not be pricemarked in any additional manner; furthermore, clear and conspicuous posting of the advertised prices of such items at the point of the display will be deemed in compliance with this requirement provided that the units of such items are sold to customers at or below the advertised prices throughout the advertised sale period.

II

It is further ordered, That respondent Shop-Rite Foods, 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 food or drugs, as those terms are defined in the Federal Trade Commission Act, do forthwith cease and desist from, directly or indirectly:

A. Disseminating or causing to be disseminated, by United States mail or by any means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, for the

purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of any such product, subject to the jurisdictional requirements of Section 5 of the Federal Trade Commission Act, as amended, any advertisement which contains any of the offers prohibited by Section I of this order;

B. Disseminating or causing to be disseminated by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of any such product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, subject to the jurisdictional requirements of Section 5 of the Federal Trade Commission Act, as amended, any advertisement which contains any of the offers prohibited by Section I of this order.

III

It is further ordered, That throughout each advertised sale period in each of its retail stores covered by an advertisement, respondent shall display conspicuously at or near the place where customers pay for merchandise:

A. A copy of the advertisement and;

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 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.

In order to avoid overcharging that might result from incorrect price marking, we ask each of our customers to inspect the price marked (if any) on each item he or she selects to insure that such price is correct and to report instances of merchandise being marked with an incorrect price to store personnel. We are legally obligated to make available any advertised item at the advertised price during the applicable advertised sale period regardless of the price marked on any unit of the advertised item. (In the case of coupon offers or minimum purchase orders, you must, of course, have the appropriate coupon or make the required minimum purchase in order to receive the advertised price.)

If any checker, when confronted by you with the fact that he or she

is about to ring up, or he or she has rung up, an advertised price, refuses to correct the error immediately or to ring up the item at the advertised price, you are requested to report the incident to the store manager.

IV

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 store, except as specifically noted in this ad."

V

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 who, directly or indirectly, have any supervisory responsibilities relating in any way to availability, pricing or charging out of advertised items 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 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 service 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. Furnish to the Federal Trade Commission copies of such records which are requested by any of its duly authorized representatives;

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

VI

It is further ordered, That respondent 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 respondent which may affect compliance obligations arising out of this order.

VII

It is further ordered, That the respondent herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order; and shall in addition, on or before each of the subsequent two 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.

IN THE MATTER OF
CENTURY 21 COMMODORE PLAZA, INC., ET AL.

Docket 9088. Interlocutory Order, Nov. 15, 1977

Order striking unauthorized pleading from the record.

On September 15, 1977, the Administrative Law Judge assigned to this matter denied Mr. Unterberg's motion to intervene in this matter. On October 19, 1977 the Commission denied Mr. Unterberg's appeal from this decision.

On November 9, 1977 Mr. Unterberg filed a pleading herein styled "Public Interest Amicus and Interested Party Brief Submitted in Opposition to Complaint Counsel's Motion to Stay Proceedings." The Commission's Rules do not authorize this pleading.

It is ordered, That the aforesaid pleading be, and it hereby is, stricken from the record.