

IN THE MATTER OF
FRUEHAUF CORPORATION

Docket 8972. Interlocutory Order, Dec. 21, 1977

Order requiring filing of memoranda pertaining to the issue of appropriate relief.

ORDER REQUIRING MEMORANDA ON ISSUE OF RELIEF

The Commission has taken this matter under advisement upon the appeal of respondent's counsel from the initial decision of the administrative law judge. The Commission has as yet made no determination as to liability. The Commission notes, however, that respondent has suggested in its brief that assuming *arguendo* that a violation of law is found, the Commission should consider requiring less than total divestiture of the acquired company, Kelsey-Hayes.

The question of appropriate relief in a matter is one which should ordinarily be addressed as part of the trial on the merits, so as to minimize the delay in obtaining such relief if a violation should be found. This is especially so where the extent of any violation which may ultimately be found is clear in advance of a finding of such violation. In this matter, for example, any violation found must be predicated upon Fruehauf's acquisition of Kelsey-Hayes' manufacturing capacity in one or two markets, heavy-duty wheels and/or antiskid braking devices. Accordingly the parties should be able to specify in advance of any ultimate finding of liability the contours of a remedy involving partial divestiture. [*Compare Warner-Lambert Co.*, 88 F.T.C. 503 (1976) wherein the ultimate finding of violation was predicated upon only a small fraction of the submarkets in which violations were initially alleged.]

In order to consider respondent's contention that partial divestiture would be appropriate assuming a violation is found, without, however, prolonging the time necessary for resolution of this matter, the Commission will order the parties to file supplemental memoranda on the question of an appropriate partial divestiture. The memoranda should not introduce new evidence but should cite relevant evidence already of record. They should discuss, *inter alia*, (1) the percentage of Kelsey-Hayes' assets and sales accounted for by its manufacturing capacity in the relevant markets and (2) the divisibility and independent viability of the assets which would be subject to any order of partial divestiture. Both parties shall also submit a proposed form of order which they believe suitable to effect a partial divestiture if such should be ordered. Submission of such an order, is, of course, without prejudice to the contention of respondent

that no violation has occurred and of complaint counsel that full divestiture is the appropriate remedy.¹

Each side shall have 30 days from the date of receipt of service to submit its initial memorandum, and thereafter shall have 15 days from the date of receipt of the other side's memorandum within which to submit a reply.

Therefore, *it is ordered*, That within 30 days from the date of service of this order, each party shall file with the Commission a memorandum pertaining to the issue of appropriate relief in this matter, as described hereinabove. Thereafter, each party, within fifteen days after receipt of the memorandum of the other may file with the Commission a reply thereto.

¹ In issuing this order we have taken into account the contention of complaint counsel that a presumption should favor total divestiture in merger cases, because the acquired entity is more likely to prove viable upon divestiture (having proven viable before its acquisition) than some arbitrarily created sub-entity with no prior market history. We believe this argument is correct, and that the burden rests with respondent to demonstrate that a remedy other than full divestiture would adequately redress any violation which is found. However, complaint counsel when preparing their memorandum should assume, *arguendo*, that some partial divestiture may be deemed appropriate, and discuss what form it should take.

IN THE MATTER OF
BLOCK DRUG COMPANY, INC., ET AL.

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

Docket 9050. Complaint, July 29, 1975 — Final Order, Dec. 21, 1977

This order, among other things, requires a Jersey City, N.J. manufacturer and distributor of denture adhesives and denture cleansers to cease misrepresenting the effectiveness of its products and to cease making unsubstantiated performance claims.

Appearances

For the Commission: *Melvin H. Orlans* and *Mark A. Heller*.

For the respondents: *James M. Nicholson, Robert E. Liedquist* and *Edward A. Geltman, Nicholson & Carter*, 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 Block Drug Company, Inc., a corporation, and Grey Advertising, Inc., a corporation, hereinafter referred to as respondents, have 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 Block Drug Company, Inc. is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its executive office and principal place of business located at 257 Cornelison Ave., Jersey City, New Jersey.

Respondent Grey Advertising, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 777 Third Ave., New York, New York.

PAR. 2. Respondent Block Drug Co., Inc. is now, and for some time last past has been, engaged in the manufacture, distribution, sale and advertising of various products, including denture adhesives and denture cleansers, which are drugs, devices and/or cosmetics within the meaning of the Federal Trade Commission Act. [2]

Respondent Grey Advertising, Inc. is now, and for some time last past has been, an advertising agency of respondent Block Drug Co.,