

IN THE MATTER OF
PAY LESS DRUG STORES NORTHWEST, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF
THE CLAYTON ACT

Docket C-3039. Complaint, Sept. 2, 1980—Decision, Sept. 2, 1980

This consent order requires, among other things, Pay Less Drug Stores Northwest, Inc. ("Northwest"), a Beaverton, Oregon, drug chain to refrain from acquiring Pay Less Drug Stores ("Pay Less"), located in the California communities of Lodi, Salinas and Livermore, because the acquisition eliminates the actual competition between Northwest and Pay Less "super drug stores." Further, the order requires that divestiture only be made to a person approved in advance by the Commission and the divested businesses continue as going concerns.

Appearances

For the Commission: *Laurence O. Masson.*

For the respondent: *Robert M. Heller, Kramer, Lowenstein, Nessen, Kamin & Soll, New York City.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Pay Less Drug Stores Northwest, Inc. ("Northwest"), a corporation subject to the jurisdiction of the Commission, has acquired the stock and will acquire additional stock of Pay Less Drug Stores ("Pay Less"), a corporation, or has entered into an agreement and plan of reorganization and merger with Pay Less in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, pursuant to Section 11 of the Clayton Act, 15 U.S.C. 21, and Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), stating its charges as follows:

I. DEFINITIONS

1. For the purposes of this complaint the following definitions shall apply:

(a) "Super drug store" means a retail establishment, as distinguished from a traditional neighborhood or corner drug store, which

carries a much broader selection of traditional drug store merchandise as well as numerous lines not normally found in neighborhood drug stores and which caters to a relatively large trading area.

(b) "Lodi Area" means the city of Lodi, California.

(c) "Salinas Area" means the city of Salinas, California.

(d) "Livermore Area" means the city of Livermore, California, and its surrounding environs, including the unincorporated areas known as Dublin, California and San Ramon, California.

(e) "Prescription drugs" mean ethical drugs available at retail only by prescription.

II. PAY LESS DRUG STORES NORTHWEST, INC.

2. Northwest is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Maryland with its headquarters office and principal place of business located, through February 15, 1980, at 10605 S.W. Allen Boulevard, Beaverton, Oregon and, after February 15, 1980, at 9275 S.W. Peyton Lane, Wilsonville, Oregon.

3. Northwest and its subsidiaries engage in the business of operating thirty-six super drug stores in communities in Oregon, twenty-eight super drug stores in communities in Washington, nineteen super drug stores in communities in California, and seven super drug stores in communities in Idaho. Northwest owns two of the super drug stores operated in Oregon and two in Washington; Northwest's other super drug store premises are leased. Northwest owns substantially all of the furniture and fixtures it uses in its stores with the exception of certain fixtures which are leased in Northwest's California super drug stores.

4. Northwest operates its super drug stores in California under the name "Value Giant."

5. For its fiscal year ending January 31, 1979, Northwest and its subsidiaries had total assets of \$136,465,000 and net sales and other income of \$347,959,000, yielding net earnings after income taxes of \$9,853,000.

III. PAY LESS DRUG STORES

6. Pay Less is a corporation organized, existing, and doing business under and by virtue of the laws of the State of California with its principal offices at 8000 Edgewater Drive, Oakland, California.

7. Pay Less and its subsidiaries engage in the business of operating forty-eight super drug stores in communities in California,

two super drug stores in communities in Nevada and ten super drug stores in communities in Hawaii. All of Pay Less' super drug stores are leased, except for the premises owned and occupied by Pay Less' Sacramento, California store at 1012 "K" Street. Pay Less owns the fixtures and equipment used in most of its super drug stores.

8. Pay Less operates its super drug stores in California under the name "Pay Less."

9. For its fiscal year ending February 3, 1979, Pay Less and its subsidiaries had total assets of \$102,477,000 and sales and other income of \$278,354,000, yielding net earnings after income taxes of \$2,854,000.

IV. JURISDICTION

10. At all times relevant herein, Northwest and Pay Less have been engaged in the ownership or operation of super drug stores in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and the businesses of Northwest and Pay Less are in or affect commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

V. TENDER OFFER AND MERGER AGREEMENT

11. On January 17, 1980 Northwest commenced a tender offer to purchase, through its wholly owned subsidiary PNW Inc., any and all of the outstanding shares of common stock, no par value, of Pay Less at \$22.50 net per share, the offer expiring on February 14, 1980 at 5:00 p.m. New York City time, unless extended, and being conditioned upon the valid tender of at least 917,000 shares prior to the expiration of the offer or any extension thereof. The purpose of the offer was to enable Northwest to acquire the entire equity interest of Pay Less. On February 4, 1980 Northwest amended its tender offer to increase, to \$24.00 net in cash per share, the price it will pay for shares of Pay Less. In addition, Northwest extended the expiration of its tender offer to 12:00 midnight on February 15, 1980, unless further extended.

12. As of December 28, 1979 Northwest had obtained 269,000 shares, approximately 12.2% of the outstanding shares, of Pay Less in open market purchases. On or about February 27, 1980 Northwest acquired a controlling interest in Pay Less.

13. On February 1, 1980 Pay Less and Northwest, including certain wholly owned subsidiaries, entered into an agreement and plan of reorganization and merger, subject to the approval of a majority of shareholders of Pay Less, providing that Pay Less enter

into an agreement of merger whereby it become a wholly-owned indirect subsidiary of Northwest. A Pay Less shareholder's meeting has been called for March 31, 1980 for purposes of voting on the agreement and plan of reorganization and merger.

VI. TRADE AND COMMERCE

14. The relevant lines of commerce are the retail sale of prescription drugs or retail sales by super drug stores.

15. At all times relevant herein, Northwest and Pay Less are actual competitors in the Lodi Area, Salinas Area and in the Livermore Area.

VII. EFFECTS

16. The effects of the acquisition of Pay Less by Northwest may be substantially to lessen competition or tend to create a monopoly in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, in the following ways, among others:

(a) actual competition between Northwest and Pay Less in the super drug store business in the Lodi Area will be eliminated;

(b) actual competition between Northwest and Pay Less in the retail sale of prescription drugs in the Lodi Area will be eliminated;

(c) actual competition between Northwest and Pay Less in the super drug store business in the Salinas Area will be eliminated;

(d) actual competition between Northwest and Pay Less in the super drug store business in the Livermore Area will be eliminated;

(e) actual potential competition between Northwest and Pay Less in the super drug store business in the Livermore Area will be eliminated;

(f) concentration in the super drug store business in the Lodi Area, Salinas Area or the Livermore Area will be increased or the possibility for eventual deconcentration may be diminished;

(g) concentration in the retail sale of prescription drugs in the Lodi Area will be increased or the possibility for eventual deconcentration may be diminished; and

(h) mergers or acquisitions between other super drug stores may be fostered or encouraged, causing a further substantial lessening of competition in the super drug store business.

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 San Francisco Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and

The respondent, its attorney, 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 has reason to believe that the respondent has violated the said Acts, 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 Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Pay Less Drug Stores Northwest, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its office and principal place of business located at 9275 S.W. Peyton Lane, in the City of Wilsonville, State of Oregon.
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

For the purposes of this Order the following definitions shall apply:

1. "Northwest" means Pay Less Drug Stores Northwest, Inc., a corporation organized, existing, and doing business under and by virtue of the laws of the State of Maryland with its principal offices,

through February 15, 1980, at 10605 S.W. Allen Boulevard, Beaverton, Oregon, and, after February 15, 1980, 9275 S.W. Peyton Lane, Wilsonville, Oregon, and each of its successors, assigns, subsidiaries, affiliates, directors, officers, employees and agents.

2. "Pay Less" means Pay Less Drug Stores, a corporation organized, existing, and doing business under and by virtue of the laws of the State of California with its principal offices at 8000 Edgewater Drive, Oakland, California, and each of its successors, subsidiaries and affiliates.

3. "Person" means any individual, corporation (including subsidiaries thereof), partnership, joint venture, trust, unincorporated association, or other business or legal entity.

4. "Super drug store" means a retail establishment which carries a much broader selection of drug store merchandise than a traditional neighborhood drug store, as well as numerous lines not normally found in a neighborhood drug store, and which caters to a relatively large trading area.

5. "Super drug stores subject to the terms and provisions of this Consent Order" mean

(1) the super drug stores operated at the following locations by Pay Less:

- (a) 300 West Kettleman, Lodi, California; and
- (b) 7201 Regional Street, Dublin, California; and

(2) the super drug store operated by Northwest at the following location:

- (a) 1623 Chestnut Street, Livermore, California.

6. "Eligible person" means any person subject to prior approval by the Commission.

I.

It is ordered, and directed that within one (1) year of the date of service of the Consent Order, except in the case of the super drug store located at 1623 Chestnut St., Livermore, California, as to which the date for compliance shall be eighteen (18) months of the date of service of this Consent Order or within four months of respondent's opening a new super drug store in Livermore, whichever comes first, Northwest shall divest itself of all assets, title, interests, rights, and privileges, of whatever nature, tangible and intangible, presently owned or acquired in the future by Northwest, including without

limitation all buildings, equipment, fixtures, inventory, leasehold interests and other property of whatever description of each of the super drug stores subject to the terms and provisions of this Consent Order. Divestiture may be accomplished by the disposition of aforementioned super drug stores either separately or jointly.

II.

It is further ordered, That divestiture shall be made only to an eligible person and shall be in a manner which preserves the assets and business of the super drug stores subject to the terms and provisions of this Consent Order as going concerns and fully effective competitors.

III.

It is further ordered, That pending divestiture required by this Consent Order, Northwest shall not cause or permit any deterioration of the assets and businesses of the super drug stores subject to the terms and provisions of this Consent Order in a manner that impairs the viability of any such assets and businesses.

IV.

It is further ordered, That the divestiture ordered and directed by this Consent Order shall be made in good faith and shall be absolute and unqualified; *provided, however,* that an eligible person may give and Northwest may accept and enforce any bona fide lien, mortgage, deed of trust or other form of security on all or any portion of any one or more of the super drug stores subject to the terms and provisions of this Consent Order. If a security interest is accepted, in no event should such security interest be interpreted to mean that Northwest has a right to participate in the operation or management of such stores. In the event that Northwest as a result of the enforcement of any bona fide lien, mortgage, deed of trust or other form of security interest reacquires possession of any one or all of the aforementioned super drug stores, then Northwest shall divest the reacquired assets and business in accordance with the terms of this Consent Order within six (6) months of the reacquisition.

V.

It is further ordered, That Northwest shall use its best efforts to fulfill and complete the current expansion plans of Pay Less with

respect to the lease, construction, opening and operation of new super drug stores to be located in San Ramon, California and Livermore, California.

VI.

It is further ordered, That, in the event Northwest has not terminated the lease of the premises of its super drug store located at 1045 N. Main St., Salinas, California, and vacated the premises on or before March 31, 1980, Northwest shall divest itself of the aforesaid super drug store within one (1) year of the date of service of this Consent Order and otherwise in the same manner as the divestiture of super drug stores subject to the terms and provisions of this Consent Order.

VII.

It is further ordered, That Northwest shall within ninety (90) days from the date of service of this Consent Order and every ninety (90) days thereafter until divestiture is completed and the new San Ramon and Livermore super drug stores opened submit in writing to the Commission a report setting forth in detail the manner and form in which respondent intends to comply, is complying, and has complied with the terms of this Order and such additional information relating thereto as may from time to time be required.

VIII.

It is further ordered, That Northwest 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 corporation which may affect compliance with the obligations arising out of this Consent Order.

IN THE MATTER OF
STERLING DRUG INC., ET AL.

Docket 8919. Interlocutory Order, Sept. 3, 1980

ORDER DENYING STERLING'S APPLICATION FOR INTERROGATORIES

Respondent Sterling Drug Inc., ("Sterling") seeks authorization to serve complaint counsel with interrogatories concerning the issuance of a Federal Trade Commission press release dated April 17, 1980. Sterling's application was certified to us by the Administrative Law Judge on May 15, 1980; the law judge has declined to rule on the matter because he believes that Rules 3.31(b)(1) and 3.35 do not authorize him to do so.

The press release involved here announced the Commission's initial acceptance of a consent agreement with Dancer-Fitzgerald-Sample, Inc. ("DFS"), an advertising agency that was named as a respondent in this proceeding due to its former responsibility for handling Sterling's Bayer Aspirin and Cope accounts. The agreement specifically limited the superiority and other types of claims that DFS could make in the future on behalf of Bayer Aspirin, Bayer Children's Aspirin, Cope, and any other over-the-counter analgesic. Sterling claims that the press release on this agreement was deceptive, however, and led to erroneous news reports that Bayer (i.e., Sterling) had agreed not to claim that its aspirin was superior to others. More specifically, Sterling contends that the release should at least have stated that DFS no longer handles advertising for Sterling and that Sterling is "now vigorously defending" against Commission charges at trial. In fact, the company's basic position appears to be that the press release should not have named any of its products at all since DFS is no longer connected with them in any way.

Complaint counsel have stated that they reviewed the press announcement prior to dissemination. Sterling contends that this fact raises the issue of prosecutorial misconduct and that interrogatories are necessary to establish complaint counsel's role in approving the release.

We do not consider lightly the kinds of concerns which Sterling has raised, for we recognize the impact that an agency press release may have on a company's reputation and competitive position. It is essential, therefore, that every effort be made to ensure that press releases are accurate and fair, and are not likely to be misconstrued by the news media. However, it is also clear that the Commission has an important obligation to inform the public of its activities, and