

Complaint

IN THE MATTER OF

ALBERTSON'S, 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-3064. Complaint, April 21, 1981—Decision, April 21, 1981*

This consent order requires, among other things, a Boise, Idaho operator of retail grocery stores to refrain from acquiring any unapproved retail grocery store business in specified areas for a period of ten years.

Appearances

For the Commission: *Rafe H. Cloe.*

For the respondent: *Michael F. Reuling*, in-house general counsel, *James O'M Tingle*, *Pillsbury, Madison & Sutro*, San Francisco, Calif., and *David J. McKean*, *McKean, MacIntyre, Wilson & Richardson*, 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 Albertson's, Inc., a corporation subject to the jurisdiction of the Commission, has acquired the California Division of Fisher Foods, Inc., which acquisition violates 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 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.

DEFINITION

1. For purposes of this complaint, *Retail grocery stores* are retail food stores currently classified under Bureau of Census Industry Classification No. 541, including supermarkets, convenience stores and delicatessens, which primarily sell a wide variety of canned or frozen foods, such as vegetables, fruits and soups; dry groceries, either packaged or in bulk, such as tea, coffee, cocoa, dried fruits, processed food and nonedible grocery items. In addition, these stores

often sell smoked and prepared meats, fresh fish and poultry, fresh vegetables and fruits and fresh or frozen meats.

ALBERTSON'S, INC.

2. Respondent Albertson's Inc. (Albertson's) is a Delaware corporation with its principal office at 250 Parkcenter Boulevard, Boise, Idaho.

3. As of January 1978, Albertson's operated and continues to operate retail grocery stores throughout the West Coast, the Rocky Mountain states and in Florida, Alabama, Louisiana and Texas.

4. Albertson's total sales for its fiscal year ending January 28, 1978 were approximately \$1,816,495,000. Albertson's ranks among the ten largest retail grocery chains in the United States.

5. In the first half of 1978, Albertson's operated a chain of approximately 32 retail grocery stores in Los Angeles County and Orange County, California.

6. At all times relevant herein, Albertson's has been engaged in the purchase or sale of products in interstate commerce and was a corporation engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended (15 U.S.C. 12) and was a corporation whose business was in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended (15 U.S.C. 44).

FISHER FOODS, INC.

7. Fisher Foods, Inc. (Fisher) is an Ohio corporation with its principal office at 5300 Richmond Road, Bedford Heights, Ohio.

8. In the first half of 1978, Fisher operated a chain of approximately 197 retail grocery stores located in Ohio, Illinois and California.

9. Fisher's total net sales for its fiscal year ending December 31, 1977 amounted to approximately \$1,536,523,000.

10. In the first half of 1978, the California Division of Fisher operated a chain of approximately 46 retail grocery stores, of which approximately 40 stores were in Los Angeles County and Orange County, California. The Fisher stores in California were operated under the trade name "Fazio's."

11. At all times relevant herein, Fisher has been engaged in the purchase or sale of products in interstate commerce and was a corporation engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended (15 U.S.C. 12) and was a corporation whose business was in or affecting commerce, as

"commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended (15 U.S.C. 44).

ACQUISITION

12. On or about July 17, 1978, Albertson's acquired Fazio's following an agreement in principle reached between Albertson's and Fisher in April 1978.

TRADE AND COMMERCE

13. The relevant line of commerce in which to assess Albertson's acquisition of Fazio's is retail sales by retail grocery stores.

14. The relevant section of the country or geographic market is Los Angeles County and Orange County, California. (Los Angeles/Orange County).

15. The retail grocery store business in Los Angeles/Orange County is concentrated, with the combined market share of the four largest retail grocery chains estimated to be approximately 48.6% in 1978.

16. In the first half of 1978, Albertson's operated approximately 32 retail grocery stores in Los Angeles/Orange County. It ranked as the ninth largest firm in that market with a market share of approximately 3.6%.

17. In 1978, Fazio's operated approximately 40 retail grocery stores in Los Angeles/Orange County. It ranked as the seventh largest firm in that market with a market share of approximately 4.9%.

18. Albertson's and Fazio's have been for many years direct and substantial competitors of one another in the relevant line of commerce in Los Angeles/Orange County.

19. Immediately following Albertson's acquisition of Fazio's, Albertson's was the sixth largest operator of retail grocery stores in Los Angeles/Orange County.

EFFECT OF THE MERGER: VIOLATIONS CHARGED

20. The effect of the merger set forth in Paragraph 12 herein may be substantially to lessen competition or tend to create a monopoly in the relevant market, in violation of Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and the acquisition constitutes an unfair method of competition and an unfair act or practice within the meaning of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45) in the following ways among others:

- a) The elimination of actual competition between Albertson's and Fisher in the retail grocery business in Los Angeles/Orange County;
- b) actual competition between competitors generally in the retail grocery store business in Los Angeles/Orange County may be lessened;
- c) the elimination of Fisher as a substantial independent competitor in the retail grocery store business in Los Angeles/Orange County;
- d) increased concentration in the retail grocery store business in Los Angeles/Orange County; and
- e) the encouragement of further acquisitions and mergers by and among other leading firms in the retail grocery store business in Los Angeles/Orange County.

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 Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act and the Clayton Act; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Albertson's, Inc. is a corporation organized, exist-

ing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 250 Parkcenter Boulevard, in the City of Boise, State of Idaho.

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

As used in this order:

(A) *Albertson's* means Albertson's, Inc., a corporation organized under the laws of Delaware with its principal executive offices at 250 Parkcenter Boulevard, Boise, Idaho, and its directors, officers, agents and employees, and its subsidiaries, successors and assigns.

(B) *Retail grocery stores* are retail food stores currently classified under Bureau of Census Industry Classification No. 541, including supermarkets, convenience stores and delicatessens, which primarily sell a wide variety of canned or frozen foods, such as vegetables, fruits and soups; dry groceries, either packaged or in bulk, such as tea, coffee, cocoa, dried fruits, processed food and nonedible grocery items. In addition, these stores often sell smoked and prepared meats, fresh fish and poultry, fresh vegetables and fruits and fresh or frozen meats.

(C) *Acquisition, acquire, merger, or merge with* includes all other forms of arrangement by which Albertson's may obtain all or any part of the market share of any other retail grocery store or stores.

II

It is ordered, That for a period of ten (10) years from the date on which this order becomes final, Albertson's shall not merge with or acquire, or merge with or acquire and thereafter hold, directly or indirectly through subsidiaries or in any other manner, without the prior approval of the Federal Trade Commission, the whole or any part of the stock or assets of any individual, firm, partnership, corporation or other legal or business entity which directly or indirectly owns or operates any retail grocery store, where such acquisition or merger involves five or more such retail grocery stores, any one of which is located in any of the following areas:

(A) In Washington, Oregon, Nevada, Idaho, Montana, Wyoming,

New Mexico, Utah, Colorado, Florida, California, Texas, Louisiana, Alabama or Arizona; or

(B) Within five hundred (500) miles of any warehouse owned or operated by Albertson's at the time of such acquisition or merger and which is engaged in the shipment of products to retail grocery stores; or

(C) Within three hundred (300) miles of any retail grocery store owned or operated by Albertson's at the time of such acquisition or merger.

III

It is further ordered, That upon written request of the staff of the Federal Trade Commission, Albertson's shall submit such reports in writing to assure compliance with this order as may from time to time be requested.

IV

It is further ordered, That Albertson's notify the Federal Trade Commission at least thirty (30) days prior to any proposed corporate changes, 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 order.

IN THE MATTER OF

THOMPSON MEDICAL COMPANY, INC., ET AL.

Docket 9149. Interlocutory Order, April 22, 1981

ORDER DENYING MOTION OF RESPONDENT THOMPSON MEDICAL
COMPANY, INC. TO RECONSIDER COMPLAINT

The administrative law judge has certified to the Commission a motion filed by respondent Thompson Medical Company, Inc. to reconsider the complaint issued by the Commission in this proceeding.¹ In support of its motion, respondent argues that the Food and Drug Administration (FDA) has the responsibility to determine drug efficacy, and that the FDA-appointed panel on topical analgesics will review the evidence on the efficacy of Aspercreme's active ingredient ("TEA"). Respondent contends that it is consequently not in the public interest for the FTC to conduct the above-captioned proceeding. For the reasons stated below, the Commission disagrees.

The Commission has authority under Sections 5 and 12 of the FTC Act, 15 U.S.C. 45 and 52, to challenge, *inter alia*, advertising claims which it has reason to believe are false or deceptive. While the statutory authority of the FDA and FTC overlap to some degree, under the Liaison Agreement between the two agencies there is in fact no duplication of function because the Commission exercises primary jurisdiction over nonprescription drug advertising and the FDA exercises primary jurisdiction over drug labeling. 36 Fed. Reg. 18539 (1971), 3 Trade Reg. Rep. (CCH) ¶9851 at 17,678.² Thus, while any relevant findings to emerge from FDA's OTC drug review—concerning, *e.g.*, the performance of "TEA"—can of course be given appropriate consideration by the ALJ and the Commission if made part of the record of the present proceeding, the Commission's responsibility to police allegedly false or deceptive OTC drug advertising is in no way diminished during the pendency of the

¹ The motion is captioned "Motion to Reconsider Complaint." Elsewhere in its filing, respondent frames its motion as a request "that the Commission withdraw those portions of the complaint which challenges the efficacy of Aspercreme as a topical analgesic ***" (Motion at 2), and as a request that "the Commission amend its complaint *** to remove the allegations challenging the advertising claims regarding the efficacy, and mode of action of the product Aspercreme" (Motion at 5). This Order constitutes a denial of the requested relief in all its forms.

² Moreover, the Supreme Court has long held that the same issues and parties may be proceeded against simultaneously by more than one agency. See, *e.g.*, *FTC v. Cement Institute*, 333 U.S. 683 (1948). See also *Warner-Lambert v. FTC*, 361 F. Supp. 948, 952 (D.D.C. 1973), in which the court applied this principle in disposing of precisely the same argument that respondent has presented here.