

IN THE MATTER OF
WESTERN GENERAL DAIRIES, INC.

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

Docket C-3089. Complaint, May 4, 1982—Decision, May 4, 1982

This consent order requires a Utah dairy cooperative to cease engaging in price discrimination in the sale and distribution of raw milk and dairy products, or communicating in any manner disparaging or derogatory information or opinions concerning competing firms. Commencing one year from its effective date, the order bars the cooperative from restricting, for more than six months, the sale or transfer of "base" by any of its members to any bona fide Grade A milk producer. ("Base" is a member's right to receive from the cooperative the going rate for raw milk.)

Appearances

For the Commission: *David M. Newman and Jerome M. Steiner, Jr.*

For the respondent: *Randon W. Wilson, Jones, Waldo, Holbrook & McDonough, Salt Lake City, Utah.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and of the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Western General Dairies, Inc., an incorporated cooperative association, hereinafter sometimes referred to as respondent, has violated the provisions of said Acts, 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 Western General Dairies, Inc. is an incorporated cooperative association organized, existing and doing business under and by virtue of the laws of the State of Utah;

Respondent during the period 1973 to 1975 acted as a marketing agent for Federated Dairy Farms, Inc., General Dairies, Inc., and Upper Snake River Valley Dairymen's Association, each an incorporated cooperative association, hereinafter collectively referred to as the "other cooperatives."

Respondent currently owns and operates and for some time last past has owned and operated a number of processing facilities, each

of which was previously owned or used by one of the other cooperatives.

Respondent has had as members in excess of ninety percent of those Grade A producers who were members of the other cooperatives prior to respondent's appointment as marketing agent.

PAR. 2. Respondent is now and for some time last past has been engaged in the sale and distribution of raw milk and dairy products, on its own behalf and on behalf of the other cooperatives, and respondent's members are now and for some time last past have been engaged in the production of raw milk.

PAR. 3. Respondent receives milk from its members who are located in the states of Utah and Idaho.

Respondent sells and distributes or has sold and distributed raw milk to independent processors in the States of Utah, Idaho, Wyoming, and Colorado. Respondent sells and distributes dairy products to wholesale and retail customers in the States of Utah, Wyoming, and Idaho, and to other states in the Western United States.

Respondent operates processing facilities in the States of Utah and Idaho.

There is now and has been at all times mentioned in this Complaint a pattern and course of commerce in respondent's products which is in and affects interstate commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Except to the extent that competition has been hindered, frustrated, lessened and eliminated as set forth in this Complaint, respondent has been and is in substantial competition with other corporations, cooperative associations, individuals and partnerships engaged in the production, sale and distribution of raw milk and in the manufacture, sale and distribution of dairy products.

PAR. 5. In the course and conduct of its business as above described, respondent has for some time last past effectuated and pursued a policy throughout the states above mentioned, the purpose and effect of which is and has been to monopolize and control the supply of raw milk in those states and to monopolize and control the sale and distribution of dairy products in Utah and Southeastern Idaho.

PAR. 6. By various means and methods, respondent has effectuated and enforced the aforesaid practice and policy. To carry out said practice and policy, respondent adopted and employed the following means and methods among others:

- (a) By offering and granting advantageous prices and credit

terms to certain dairy products purchasers which were not offered or granted to other purchasers who compete with them in the resale of such products, it engaged in price discrimination among its purchasers, to the injury of its competitors in the manufacture, sale and distribution of dairy products;

(b) It and its agents, members and employees communicated derogatory information concerning the credit-worthiness of persons, firms, corporations and cooperatives which compete with respondent in the sale and distribution of dairy products;

(c) It has unduly restricted the sale or transfer of base by members desiring to leave the cooperative by conditioning such sale or transfer upon such members' cessation of Grade A milk production.

The above are the means and methods which respondent has used to monopolize and control the supply of raw milk and the sale and distribution of dairy products in the above mentioned states.

PAR. 7. The aforesaid acts and practices have had the capacity, tendency, and effect of hindering, eliminating or suppressing the competition in the production, sale and distribution of raw milk and the sale and distribution of dairy products in the States of Utah and Southeastern Idaho, thus tending to obstruct the free and natural flow of commerce and the freedom of competition in the channels of interstate commerce.

PAR. 8. The acts and practices of respondent, as herein alleged, were and are all to the prejudice of the public and of respondent's competitors and constituted, and now constitute, unfair methods of competition in or affecting commerce or unfair acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. Certain of the acts and practices of respondent, as herein alleged, are continuing and will continue in the absence of the relief herein requested.

Chairman Miller did not participate.

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 the Federal Trade Commission Act and the Clayton Act; 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 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 Western General Dairies, Inc. is an incorporated cooperative association, organized, existing and doing business under and by virtue of the laws of the State of Utah, with its offices and principal place of business located at 195 West 7200 South, in the City of Salt Lake City, State of Utah.

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:

Respondent means Western General Dairies, Inc.

Raw Milk means raw, unprocessed cow's milk.

Dairy products means any products processed from raw milk and includes but is not limited to milk, skim milk, buttermilk, two percent milk, flavored milk, flavored milk drink, filled milk, whipping and table cream, half and half, sour cream, cottage cheese, concentrated milk, fortified milk, reconstituted milk or any mixture in fluid form of milk, skim milk or cream, ice milk, ice cream, powdered milk, butter, yogurt, cheese, or cheese products.

Producer means a person or firm which operates a farm which produces raw milk.

Member means a producer which belongs to or is affiliated with a cooperative association.

Handler means any person, firm, corporation or cooperative association which is considered a handler within any Federal or State Marketing Order.

Processor means a person, firm or corporation, other than a handler, which purchases raw milk.

Base means any right granted or sold by a cooperative association to its members allowing such members to receive from the cooperative the U.S.D.A. Uniform Blend Price or any other established price for any given amount of raw milk.

Grade A means the production of raw milk in compliance with the inspection requirements of a duly constituted health authority for fluid consumption.

I.

It is ordered, That respondent Western General Dairies, Inc., an incorporated cooperative association, its successors and assigns, and its officers, and respondent's agents, representatives, employees, and members, directly or indirectly or through any corporation, cooperative association, subsidiary, division or other device, in connection with the purchasing, offering for sale, sale or distribution of raw milk or dairy products in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

A. Discriminating directly or indirectly in the price of any such product by selling to any customer at a net price higher than the net price charged any other customer who competes in the resale and distribution of such product with the customer paying the higher price. "Net price," as used in this Order, shall mean the ultimate cost to the customer, and for purposes of determining such cost, shall take into account all rebates, allowances, commissions, discounts, credit arrangements, terms and conditions of sale, and other forms of direct and indirect price reductions, by which the ultimate cost to the customer is affected:

B. Furnishing, contracting to furnish or contributing to the furnishing of services or facilities in connection with the handling, sale or offering for sale of any such product to any customer of such product bought for resale, when such services or facilities are not accorded on proportionally equal terms to all other customers who resell such product in competition with any customer who receives such services or facilities;

C. Communicating in any way, whether orally or in writing, any disparaging or derogatory information or opinions concerning any person or firm which competes with respondent in the production or sale of raw milk or dairy products; *provided, however*, that respondent may provide truthful information about such person's or firm's credit relationship with respondent upon written request by (1) a credit reporting agency or (2) any prospective creditor of such person or firm.

II.

It is further ordered, That respondent shall cease and desist from executing or continuing in force any membership contract or agreement with any member which restricts in any way the right of such member to sell raw milk to any person, firm, or association after the expiration of such contract or agreement, except as provided in Section III of this Order.

III.

It is further ordered That, commencing one year after the date of service of this Order, respondent shall cease and desist from restricting the sale or transfer of base by any member in any manner, including but not limited to (1) tying such sale or transfer to the concurrent sale or transfer of land, fixtures, or livestock, or (2) requiring that any member cease, for a period longer than six months, shipping or using raw milk for any Class I utilization, as Class I is defined by the Great Basin Milk Marketing Order;

Provided, however, That respondent may refuse to authorize a sale or transfer of base

(1) to any producer who is not a Grade A producer or who will not become a Grade A producer on or before the date on which such sale or transfer becomes effective;

(2) to any producer who is not a member of respondent or who will not become a member of respondent, on or before the date on which such sale or transfer becomes effective; *provided, however*, that respondent may not refuse to accept a producer as a member in order to bar such a sale or transfer;

(3) to any producer (a) whose location would necessitate a net increase in pickup routes of more than 20 miles; or (b) who would not be able to ship an average of 5000 pounds of milk or more per pickup;

(4) where respondent has not received written notice of such sale

or transfer more than 60 days prior to the date on which such sale or transfer becomes effective.

IV.

It is further ordered, That respondent shall, within sixty (60) days after service upon it of this Order, distribute a copy of this Order to each of its operating divisions and to all officers, employees, agents and members and shall distribute a copy of this Order to any person or firm that becomes a member within five (5) years after service of this Order.

V.

It is further ordered, That respondent herein shall, within sixty (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.

VI.

It is further ordered, That, for a period of ten (10) years after service upon it of this Order, respondent notify the Commission at least thirty (30) days prior to any proposed change in the respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, the appointment of a marketing agent, the transfer of any facility designated as a pool plant under any Federal Milk Marketing Order, or any other change in the respondent which may affect compliance obligations arising out of the Order.

Chairman Miller did not participate.

Modifying Order

99 F.T.C.

IN THE MATTER OF
THE AMERICAN MEDICAL ASSOCIATION, ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5
OF THE FEDERAL TRADE COMMISSION ACT

Docket 9064. Final Order, Oct. 12, 1979—Modifying Order, May 19, 1982

The FTC, in accordance with a decision and judgment rendered by the Court of Appeals for the Second Circuit on October 7, 1980, has modified its Final Order In the Matter of The American Medical Association, et al. issued on October 12, 1979 (94 F.T.C. 701). The modified order, effective May 19, 1982 narrows the scope of the order so as not to encroach upon the valid activities of the AMA.

MODIFIED ORDER TO CEASE AND DESIST

Respondents having filed in the United States Court of Appeals for the Second Circuit a petition for review of the Commission's cease and desist order issued herein on October 12, 1979; and the Court having rendered its decision and judgment on October 7, 1980, affirming and enforcing the Commission's order with modification of Parts I and II; and the Supreme Court of the United States having affirmed by an equally divided court the judgment of the court of appeals on March 23, 1982, and having denied a petition for rehearing on May 3, 1982:

Now, therefore, it is hereby ordered, That the aforesaid order to cease and desist be, and it hereby is, modified in accordance with the decision and judgment of the Court of Appeals to read as follows:

ORDER

I.

It is ordered, That respondent American Medical Association, and its delegates, trustees, councils, committees, officers, representatives, agents, employees, successors and assigns, directly or indirectly, or through any corporate or other device, in or in connection with respondent's activities as a professional association in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Restricting, regulating, impeding, declaring unethical, interfering with, or advising against the advertising or publishing by any person of the prices, terms or conditions of sale of physicians' services, or of information about physicians' services, facilities or