

IN THE MATTER OF

SMITTY'S SUPER MARKETS, INC.

CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF
THE FEDERAL TRADE COMMISSION ACT*Docket 9172. Complaint, Dec. 16, 1983—Decision, Sept. 7, 1984*

This consent order requires a Springfield, Missouri operator of retail grocery stores, among other things, to cease engaging in any concerted action to impede the collection or dissemination of comparative price information. For a period of five years, the company is prohibited from requiring price checkers to purchase items to be priced as a condition of allowing them to price check; denying price checkers the same access to its stores as is provided to customers; or coercing any price checker, publisher or broadcaster to refrain from collecting or reporting comparative price information. The company is also required to offer to reimburse TeleCable up to \$1,000 for the broadcast of a comparative grocery price information program. Should the station elect to broadcast such a program, respondent is further required to post signs and place newspaper ads notifying the public that such a program is being broadcast.

Appearances

For the Commission: *Patricia Bremer.*

For the respondent: *Donald W. Jones, Springfield, Mo.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. 41 *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Smitty's Super Markets, Inc., Roswil, Inc., and David Porter (hereinafter sometimes referred to collectively as "respondents") have violated Section 5 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 this complaint charging as follows:

1. Smitty's Super Markets, Inc., is a Missouri corporation with its principal offices at 218 South Glenstone, Springfield, Missouri.
2. Roswil, Inc., is a Missouri corporation trading and doing business as Ramey Super Markets. Its registered agent is Flavius Freeman, 1-130 Corporate Square, Springfield, Missouri.
3. David Porter is an individual trading and doing business as Porter's So-Lo Markets. Porter's business address is 1475 North National, Springfield, Missouri.

4. At all times relevant to this complaint, respondents have been engaged in the operation of retail grocery stores in Greene or Christian counties, Missouri (hereafter "Springfield"), said activities being in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act.

5. Except to the extent that competition has been restrained as herein alleged, in the course and conduct of their retail grocery businesses respondents have been and are now in competition in or affecting commerce among themselves and with other corporations, firms, or individuals engaged in the operation of retail grocery stores in Springfield.

6. Vector Enterprises, Inc., (hereafter "Vector") has been and is engaged in the business of collecting and selling comparative retail grocery price information in various cities throughout the United States for publication or broadcast to consumers. This activity is sometimes referred to herein as "price checking."

7. On or about July 15, 1980, Vector began collecting comparative price information on a weekly basis at about five Springfield retail grocery stores, including stores of some of the respondents. Vector then began selling this comparative retail grocery price information to TeleCable of Springfield ("TeleCable"), a cable television operator in Springfield. TeleCable broadcast this information to cable television subscribers in Springfield. During the weeks immediately preceding October 14, 1981, Vector's price checking included stores operated by respondents and two other operators of retail grocery stores in Springfield.

8. Prior to October 14, 1981, each respondent agreed with one or more other respondents or other operators of retail grocery stores in Springfield to impede Vector's ability to price check. On or about that date, in furtherance of their agreements, each respondent and others took action that effectively prevented Vector from price checking in their stores.

9. As of October 14, 1981, as a direct result of the agreements alleged in Paragraph 8, and the actions taken in furtherance thereof, Vector was able to price check only one of the retail grocery chains that had been included in its survey. Thereafter, TeleCable broadcast the prices for just that one chain. On or about December 31, 1981, TeleCable stopped broadcasting Vector's price reporting program because Vector was no longer able to provide comparative price information for the major retail grocery chains in Springfield.

10. Through the acts and practices described above, each respondent has agreed, combined or conspired with one or more other respondents or other operators of retail grocery stores to prevent or obstruct the collection and dissemination of comparative grocery

price information, with the following actual or potential effects, among others:

a. Price competition among Springfield grocery retailers has been hindered or restrained; and

b. Consumers in Springfield have been deprived of comparative retail grocery price information that can be used in the selection of a grocery store.

11. The acts and practices described above constitute an unlawful restraint on price competition and constitute unfair methods of competition or unfair acts or practices. Respondents have violated Section 5(a)(1) of the Federal Trade Commission Act, as amended.

12. The acts and practices described above constitute an unlawful boycott and constitute unfair methods of competition or unfair acts or practices. Respondents have violated Section 5(a)(1) of the Federal Trade Commission Act, as amended.

13. The violations charged herein or the effects thereof are continuing and will continue in the absence of appropriate relief.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondent named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondent having been served with a copy of that complaint, together with a notice of contemplated relief; 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 Secretary of the Commission having thereafter withdrawn this matter from adjudication as to this respondent in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter 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 by interested persons pursuant to Section 3.25 of its Rules, now in further conformity with the procedure prescribed in Section 3.25 of its Rules the

Commission hereby makes the following jurisdictional findings and enters the following order:

1. Smitty's Super Markets, Inc., is a Missouri corporation, with its principal office at 218 South Glenstone, Springfield, Missouri.
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.

For the purpose of this Order, the following definitions shall apply:

A. *Smitty's* means Smitty's Super Markets, Inc., its divisions and subsidiaries, officers, directors, representatives, agents, employees, successors and assigns.

B. *Price checker* or *price checking* means the collecting, from information available to customers, of retail prices of items offered for sale by any retail grocery store (SIC 5411), which is done neither by nor on behalf of a person engaged in the sale of groceries, and which information is used in price reporting.

C. *Price checker* means any person engaged in price checking.

D. *Price reporting* or *price report* means the dissemination to the public of price checking information through any medium by any person not engaged in the sale of groceries.

E. *Springfield* means the counties of Christian and Greene, Missouri.

F. *Customer* means any individual who enters a retail grocery store for the purpose of grocery shopping, whether or not that individual actually makes a purchase.

G. *Person* means individuals, corporations, partnerships, unincorporated associations, and any other business entity.

H. *Geographic area* means: (1) a Standard Metropolitan Statistical Area as defined by the Bureau of the Census, U.S. Department of Commerce, as of October 1, 1982; or (2) a county.

I. *Supermarket* means any retail grocery store (SIC 5411) with annual sales of more than one million dollars (\$1,000,000.00).

II.

It is further ordered, That:

- A. Smitty's shall forthwith cease and desist from taking any action

in concert with any other person engaged in the sale of grocery products which has the purpose or effect of restricting, impeding, interfering with or preventing price checking or price reporting.

B. Except as provided in paragraph II.C., for five (5) years following the date on which this Order becomes final, Smitty's shall cease and desist from taking or threatening to take any unilateral action that would:

1. Require price checkers to purchase items to be price checked as a condition of allowing them to price check; or
2. Deny price checkers the same access to Smitty's supermarkets as is provided to customers; or
3. Coerce, or attempt to coerce, any price checker, publisher or broadcaster into refraining from or discontinuing price checking or price reporting.

C. 1. Nothing in paragraph II.B. shall prevent Smitty's from adopting reasonable, non-discriminatory rules governing the number of price checkers in its supermarkets at any one time for the purpose of preventing disruption of Smitty's normal business operations.

2. Nothing in subparagraph II.B.3. shall prevent Smitty's from publicly commenting upon or objecting to any price report in which its prices are compared to those of any other grocery retailer.

3. Whenever Smitty's believes that conditions exist that justify the exclusion of a price checker, it may submit to the Federal Trade Commission a sworn statement setting forth with particularity the facts that Smitty's believes meet such conditions. For purposes of this Order, the only conditions justifying the exclusion of a price checker are that another supermarket operator with whose prices Smitty's prices are compared in a price report has knowingly tampered with or manipulated the results of such price report for its own competitive gain either (a) by the use of information wrongfully obtained and not available to all supermarket operators whose prices are being compared, or (b) by inducing any price reporter or price checker to cause false information to be published or broadcast. Following the Federal Trade Commission's actual receipt of such statement, Smitty's may exclude the price checkers from its supermarkets in the geographic area(s) covered by the affected price report for so long as the conditions set forth in Smitty's statement shall exist. In any civil penalty action against Smitty's for a violation of subparagraph II.B. 2. occurring after notice to the Federal Trade Commission was given by Smitty's as provided in this subparagraph, Smitty's shall have the burden of proving, by a preponderance of the evidence, that the conditions justifying the exclusion of a price checker as set forth in this subpara-

dence only for the purpose of proving the facts set forth in its statement to the Federal Trade Commission. Nothing in this subparagraph shall be construed to be an exception to the prohibitions of paragraph II.A. of this Order.

III.

It is further ordered, That, upon the resumption of price reporting by TeleCable of Springfield that is similar in quality and coverage to that broadcast by it prior to October 14, 1981, and that includes any Smitty's supermarket, and upon receipt by Smitty's of written request for payment from TeleCable, Smitty's shall reimburse TeleCable for its actual cost of obtaining a price reporting program up to the amount of two hundred fifty dollars (\$250.00) per week. Smitty's obligation under this Part (III) shall terminate either when it has reimbursed TeleCable in the total amount of one thousand dollars (\$1,000.00) or three (3) years following the date on which this Order becomes final, whichever occurs first. Smitty's shall not reimburse TeleCable for costs incurred by TeleCable during any week for which TeleCable's costs are reimbursed by any other person.

IV.

It is further ordered, That, within seven (7) days following the date on which this Order becomes final, Smitty's shall send a letter, a copy of which is attached here as Exhibit A, together with a copy of this Order, to TeleCable of Springfield, informing TeleCable of Smitty's obligations under Parts II and V of this Order, TeleCable's rights under Part III, and the notices that Smitty's must receive from TeleCable before certain Order provisions become binding upon Smitty's.

V.

It is further ordered, That, if at any time during the two years following the date on which this Order becomes final, Smitty's is notified in writing by TeleCable of Springfield that price reporting that includes any of Smitty's supermarkets has resumed in Springfield:

A. For a period of sixty (60) days following the receipt of such notice, Smitty's shall post signs no smaller than 30 inches by 40 inches in a front window in each of Smitty's supermarkets in Springfield, stating:

GROCERY PRICE SURVEY

A price survey comparing prices of selected grocery items at Smitty's and other Springfield grocery supermarkets is being broadcast over cable television. This comparative price survey can be seen on channel _____ and is broadcast from _____ to _____.

B. For a period of sixty (60) days following the receipt of such notice, whenever Smitty's places food advertisements of one-half page or larger in any printed advertising medium with circulation of 15,000 or more copies in Springfield, Smitty's shall publish an announcement as a part thereof in the same language provided in paragraph V.A. This announcement shall be no smaller than 3 inches high by 3 inches wide and shall be printed in conspicuous type. In each week in which Smitty's does not place a one-half page or larger food advertisement in such printed advertising medium, Smitty's shall place this announcement as a display advertisement in any printed advertising medium with circulation of 15,000 or more copies in Springfield.

VI.

It is further ordered, That Smitty's shall, within seven (7) days after the date on which this Order becomes final, and once a year thereafter for three years, provide a copy of this Order to each of its officers and supermarket managers, and secure from each such individual a signed statement acknowledging receipt of this Order.

VII.

It is further ordered, That Smitty's shall, within sixty (60) days after the date on which this Order becomes final, file with the Commission a verified written report, setting forth in detail the manner and form in which Smitty's has complied with this Order. Additional reports shall be filed at such other times as the Commission may by written notice require. Each compliance report shall include all information and documentation as may be required by the Commission to show compliance with this Order.

VIII.

It is further ordered, That Smitty's shall notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in it such as dissolution, assignment or sale resulting in the emergence of a successor corporation, or any other proposed change in the corpo-

ration or its retail grocery operations, which may affect compliance obligations arising out of this Order.

EXHIBIT A

TeleCable of Springfield
1533 South Enterprise
Springfield, Missouri 65801

Dear Sir or Madam:

This is to notify you that Smitty's Super Markets, Inc. ("Smitty's"), which operates Smitty's grocery stores in Springfield, Missouri, has entered into a consent order with the Federal Trade Commission in which it has agreed that it will not interfere with efforts by independent parties such as TeleCable of Springfield to engage in price reporting or price checking in Smitty's grocery stores in Springfield. Smitty's has agreed that it will not require price checkers to purchase the items being price checked, will not deny price checkers the same access to its supermarkets as is provided to customers, and will not attempt to coerce any price checker, publisher or broadcaster into refraining from or discontinuing price checking or price reporting. The terms of and limitations on Smitty's agreement are set forth in a consent order issued by the Federal Trade Commission, a copy of which is enclosed herewith.

If TeleCable of Springfield institutes a price reporting program similar or superior in quality and coverage to the one broadcast by TeleCable in 1981, and if the program includes any of Smitty's grocery stores in Springfield, Missouri, Smitty's will reimburse TeleCable for its actual costs of obtaining price reports, up to the amount of \$250 per week, and up to \$1,000 in total. Smitty's will also place notices in its Springfield grocery stores and in its weekly advertisements, informing consumers of TeleCable's price surveys. The precise terms of Smitty's obligations to place such notices, and to reimburse TeleCable for certain of its costs, are set forth in the enclosed consent order.

In order to receive any funds to which you may be entitled and to effect the placement of the notices described above, please notify Smitty's in writing, c/o President, Smitty's Super Markets, Inc., 218 South Glenstone, Springfield, Missouri 65802, stating when the program began or is scheduled to begin, the time and channel on which the survey will be broadcast, and TeleCable's costs, if any, of obtaining the survey information.

Very truly yours,

President
Smitty's Super Markets, Inc.

IN THE MATTER OF

DAVID PORTER

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

Docket 9172. Complaint, Dec. 16, 1983—Decision, Sept. 7, 1984*

This consent order requires a Springfield, Missouri operator of retail grocery stores, among other things, to cease engaging in any concerted action to impede the collection or dissemination of comparative price information. For a period of five years, Mr. Porter is prohibited from requiring price checkers to purchase items to be priced as a condition of allowing them to price check; denying price checkers the same access to his stores as is provided to customers; or coercing any price checker, publisher or broadcaster to refrain from collecting or reporting comparative price information. Mr. Porter is also required, upon the resumption of price reporting by TeleCable of Springfield, to reimburse the company \$250 per week for the cost of the program, up to \$1,000, or for a period of three years, whichever comes first; and to notify consumers of the broadcast through posted signs and newspaper ads.

Appearances

For the Commission: *Patricia Bremer.*

For the respondent: *Donald W. Jones, Springfield, Mo.*

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondent named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondent having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondent, his 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 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 Secretary of the Commission having thereafter withdrawn this

*Complaint previously published at 104 F.T.C. 526.