

IN THE MATTER OF

ABBOTT LABORATORIES

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

Docket 9253. Complaint, June 10, 1992--Decision, Feb. 4, 1994

This consent order prohibits, among other things, an Illinois-based manufacturer of infant formula from soliciting its competitors to adopt or adhere to any provision restricting consumer mass media advertising, including provisions in the Infant Formula Council or other organizational codes or statements, except to the extent that they prohibit false or deceptive advertising.

Appearances

For the Commission: *Richard B. Dagen* and *Michael E. Antalics*.

For the respondent: *Thomas A. Gottschalk, Kirkland & Ellis*,
Washington, D.C.

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 Abbott Laboratories ("Abbott" and sometimes referred to as "respondent") has violated Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, stating its charges as follows:

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

(a) "*Infant formula*" means a food as described at 21 U.S.C. 321(aa), which purports to be or is represented for special dietary use solely as a food for infants by reason of its simulation of human milk or its suitability as a complete or partial substitute for human milk.

(b) "*WIC*" means the Special Supplemental Food Program for Women, Infants and Children as described in 42 U.S.C. 1786 *et seq.*

The program, administered by the United States Department of Agriculture (USDA) through its Food and Nutrition Service (FNS) and state and local agencies, is designed to provide supplemental foods (including infant formula) and nutrition education to women, infants and children (up to their fifth birthday) with income levels that put them at nutritional risk.

(c) “*Open market system*” means a system in which all eligible infant formula manufacturers may supply infant formula for the WIC program. In contrast, a “*sole source system*” means a system, as described at 7 CFR 246.16(m)(1), in which one infant formula manufacturer supplies substantially all the milk and soy-based infant formula for a state’s WIC program. The state selects the sole source supplier after soliciting sealed bids from all eligible and interested manufacturers. The manufacturer offering the lowest net cost per unit or highest rebate per unit of infant formula receives the contract to supply substantially all infant formula to the state’s WIC program.

RESPONDENTS

2. Respondent Abbott Laboratories is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal place of business located at One Abbott Park Road, Abbott Park, Illinois. Ross Laboratories, a division of Abbott with its principal place of business in Columbus, Ohio, manufactures and sells infant formula in the United States. In 1990, Ross accounted for more than 50% of U.S. infant formula sales.

INFANT FORMULA INDUSTRY

3. The Infant Formula Council is the industry trade association organized under the laws of the State of Illinois, with its principal place of business located at 5775 Peachtree-Dunwoody Road, Suite 500-G, Atlanta, Georgia. The Infant Formula Council is comprised of those companies that manufacture and market infant formula in the United States.

4. The infant formula produced by infant formula manufacturers for consumption in the United States is substantially similar, being highly regulated by the Infant Formula Act of 1980, 21 U.S.C. 350a. High barriers to entry exist with respect to the manufacturing and sale

of infant formula. The three largest manufacturers have accounted for more than 90% of domestic infant formula sales during the period from 1982 to 1990. Industry performance has been characterized by relatively high profits, limited competition based directly on wholesale prices, and, until the market entry of Carnation Nutritional Products in 1988, virtually no advertising through the mass media directly to the consumer.

5. Infant formula is widely available and sold as a food product through various distribution channels, including supermarkets, mass merchandisers and drug stores. Physician prescription or recommendation is not required in order to purchase infant formula.

JURISDICTION

6. Infant formula is sold and shipped by respondent from its principal place of business and production facilities to customers located throughout the United States. Respondent maintains and has maintained a substantial course of business, including the acts and practices hereinbelow alleged, which are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act.

UNFAIR METHODS OF COMPETITION

7. Respondent believed that the absence of mass media advertising direct to the consumer served as an entry barrier and that the introduction of such advertising by respondent or respondent's competitors would result in significantly lower profits for respondent.

8. During the 1980's, respondent entered into a conspiracy with others to refrain from advertising infant formula through the mass media directly to the consumer. In addition, subsequent to 1986, respondent has requested health care professionals to ask certain of its competitors to stop advertising through the mass media direct to the consumer and has urged doctors to stop recommending those competitors' infant formula until those competitors ceased such advertising.

9. As a result of the acts, practices, and methods of competition alleged in the previous paragraph, competition was lessened, consumers have been forced to consult physicians to obtain information relating to infant formula, and consumers have been deprived of the benefits of competition.

10. During the 1980's, respondent and other members of the Infant Formula Council agreed to exchange information concerning each company's marketing practices. The information exchange occurred in the process of drafting marketing guidelines that would have prohibited the use of mass media advertising directly to the consumer.

11. As a result of the acts, practices, and methods of competition described in the previous paragraph, uncertainty relating to the marketing practices of competing manufacturers was reduced and competition was lessened.

VIOLATION

12. The acts, practices, and methods of competition of respondent, as herein alleged, were and are all to the prejudice and injury of the public and constituted unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45. The acts, practices and methods of competition herein alleged, or the effects thereof, could recur in the absence of the relief herein requested.

Commissioner Starek recused.*

DECISION AND ORDER

The Federal Trade Commission, having issued a complaint charging respondent, Abbott Laboratories, with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and

The respondent having filed an answer to the said complaint denying said charges; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order to cease and desist, an admission by respondent of all jurisdictional facts set forth in the said 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 said complaint, and waivers and other provisions as required by the Commission's Rules; and

* Commissioner Azcuenaga concurs in the issuance of the complaint only insofar as it alleges as an unfair method of competition that during the 1980's, respondent entered into a conspiracy with others to refrain from advertising infant formula through the mass media directly to the consumer.

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said acts, 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 conformity with the procedures prescribed in Section 3.25 of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Abbott Laboratories is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at One Abbott Park Road, Abbott Park, Illinois.

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.

I.

It is ordered, That, for purposes of this order, the following definitions shall apply:

A. “*Respondent*” means Abbott Laboratories, a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at One Abbott Park Road, Abbott Park, Illinois, and its successors, assigns, subsidiaries, divisions, groups and affiliates controlled by Abbott Laboratories, and their respective directors, officers, employees, agents and representatives, and their successors and assigns.

B. “*Infant formula*” means a food, as described in 21 U.S.C. 321(aa), which purports to be or is represented for special dietary use solely as a food for infants by reason of simulation of human milk or its suitability as a complete or partial substitute for human milk.

II.

It is ordered, That respondent, in connection with the advertising, offering for sale, sale or distribution of infant formula in commerce, as commerce is defined in the Federal Trade Commission Act, shall

forthwith cease and desist from, directly or indirectly, through subsidiaries or otherwise:

A. Intentionally exchanging information with any other manufacturer of infant formula relating to the advertising in the United States, its territories or possessions of infant formula through the mass media directly to the consumer.

B. Entering into or attempting to enter into any agreement, or enforcing any such agreement, with any other manufacturer of infant formula to refrain from or restrict otherwise legal infant formula marketing practices in the United States, its territories or possessions, including but not limited to requesting any health care professional or other third party to request a competitor of respondent to refrain from or restrict otherwise legal infant formula marketing practices in the United States, its territories or possessions.

C. Soliciting adherence by any competitor to, or adoption by any competitor of, any provision restricting advertising in the United States, its territories or possessions of infant formula through the mass media directly to the consumer, including, but not limited to, such provisions contained in the Infant Formula Council's Draft Policies and Practices, the American Academy of Pediatrics' Marketing Code or policy statements, the World Health Organization International Code of Marketing of Breast-Milk Substitutes, or any other industry-wide policy statement or proposal on domestic infant formula marketing practices; provided, however, that nothing contained in this paragraph shall prevent respondent from discussing or communicating to persons other than intentionally to its competitors, its position concerning the desirability or appropriateness of any such policies, practices, codes or statements, except as otherwise prohibited by this order.

Provided, however, that nothing contained in this order shall be construed to prevent respondent from exercising rights permitted under the First Amendment to the United States Constitution to petition any government executive agency or legislative body concerning legislation, rules, programs or procedures, or to participate in any government administrative or judicial proceeding.

Further provided, however, that nothing contained in this order shall prohibit respondent from exchanging technical, scientific or safety information on infant formula with any other infant formula

manufacturer or from licensing proprietary information or technology, provided that such information does not relate to the advertising of infant formula directly to the consumer through the mass media.

Further provided, however, that nothing contained in this order shall prohibit respondent from taking action to challenge or prevent advertising, promotion or marketing practices that it reasonably believes would be false or deceptive within the meaning of Section 5 of the FTC Act, the Lanham Act or otherwise contrary to law.

III.

It is further ordered, That respondent shall:

A. Within thirty (30) days of the date this order becomes final, provide a copy of this order to all of its directors, officers, management employees, and sales representatives with any responsibility for the manufacture, sale or marketing of infant formula in the United States, its territories and possessions.

B. For a period of five (5) years from the date on which this order becomes final, and within thirty (30) days of the date on which any person becomes a director, officer, management employee, or sales representative of respondent with responsibility for the manufacture, sale or marketing of infant formula in the United States, its territories and possessions, provide a copy of this order to such person.

C. Require each person to whom a copy of this order is furnished pursuant to subparagraphs III A. and B. of this order, except directors and sales representatives, to sign and submit to respondent within thirty (30) days of the receipt thereof a statement that: (1) acknowledges receipt of this order; (2) represents that the undersigned has read and understands this order; and (3) acknowledges that the undersigned has been advised and understands that non-compliance with this order may subject respondent to liability.

IV.

It is further ordered, That respondent shall:

A. File a verified, written report with the Commission within ninety (90) days of the date this order becomes final, and annually thereafter for five (5) years on the anniversary of the date this order becomes final, and at such other times as the Commission may by written notice to respondent require, setting forth in detail the manner and form in which it has complied and is complying with this order.

B. For a period of five (5) years from the date this order becomes final, maintain and make available to Commission staff for inspection and copying upon reasonable notice, records adequate to describe in detail any action taken in connection with the activities covered by parts I-IV of this order; and

C. Notify the Commission at least thirty (30) days prior to any proposed change in respondent that may affect compliance with this order, including, but not limited to, dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, change of name, or change of address.

Commissioner Azcuenaga concurring in part and dissenting in part.

SEPARATE STATEMENT OF COMMISSIONER MARY L. AZCUENAGA
CONCURRING IN PART AND DISSENTING IN PART

Today the Commission settles its case charging Abbott Laboratories ("Abbott") with an unlawful conspiracy and with an unlawful exchange of information. When the Commission initiated its administrative case in 1992, I supported the complaint only to the extent that it alleged an unlawful "conspiracy with others to refrain from advertising infant formula through the mass media directly to the consumer." Nothing has happened since then to change my view. I concur in the issuance of the consent order only insofar as it prohibits Abbott Laboratories from agreeing with its competitors to refrain from or otherwise restrict the lawful advertising or marketing of infant formula. I dissent from the prohibition against the intentional exchange of information relating to advertising. In some circumstances, a prohibition against exchanging certain kinds of information might be an appropriate fencing-in requirement to remedy an unlawful conspiracy. Here, however, the prohibition relates to a separate cause of action that I cannot support.

Some factual context is useful to understand the theories of the case.¹ Three firms dominate the United States market for infant formula. In 1990, Abbott was the leading firm with a market share of more than 50 percent. Complaint paragraph 2; Abbott Answer.² Mead Johnson & Company was the second largest producer with a share of approximately 30 percent, and American Home Products had a share of approximately 7 percent.³ Two other firms, Loma Linda Foods, Inc., and Milupa, had very small shares of the market.⁴ The Infant Formula Council ("IFC") is the industry trade association and, in the early 1980's, the IFC comprised those five firms.⁵

In selling its formula, Abbott did not market directly to consumers but rather employed so-called "ethical" marketing of formula through health care professionals, including the provision of free formula for use in hospitals, free samples in "discharge kits," free samples and promotional materials to pediatricians, and financial assistance to pediatric facilities.⁶ According to complaint counsel, members of the industry believed that a major barrier to entry was the need to establish a nationwide sales force to call on doctors and hospitals, and mass media, direct-to-consumer advertising was perceived as a means to overcome the barrier.⁷

In the early 1980's, consumer activists criticized some companies, notably Nestle Corporation, for promoting infant formula directly to consumers, especially to poor women in developing countries.⁸ On May 21, 1981, the World Health Organization adopted the International Code of Marketing of Breastmilk Substitutes ("WHO Code"), which restricted both direct-to-consumer advertising and many forms of "ethical" marketing, including

¹ My understanding of the facts of course might be different had they been explored in a full adversary hearing.

² The citations in this statement are to documents in the public record. Because the consent agreement was reached just before the administrative trial was to commence, there is no formal administrative trial record. The parties, however, had filed their trial briefs, their exhibits and objections to exhibits, and a stipulated order admitting exhibits into the record. Order Receiving Exhibits Into Evidence, August 4, 1993. Public Record Vol. 4, at 2932.

³ The market shares of Mead and AHP are alleged in the complaints against those firms that were filed in district court.

⁴ Complaint Counsel's Trial Brief ("CCTB"), Public Record Vol. 4, at 2946.

⁵ *Id.*

⁶ CCTB, Public Record Vol. 4, at 2951.

⁷ *Id.* at 2949-50.

⁸ Respondent's Trial Brief ("RTB"), Public Record Vol. 3, at 2755.

prohibitions against such practices as the provision of free samples, special sales, donations of equipment and materials referring to a brand, and sales bonuses and sales goals for marketing personnel.⁹

After adoption of the WHO Code, over the dissenting vote of the United States, activists increased pressure on domestic producers to adhere to the WHO Code.¹⁰ Legislation to implement provisions of the WHO Code was introduced on the federal and local level.¹¹

On April 30, 1982, then-Surgeon General Koop wrote to the Executive Director of the Infant Formula Council about the WHO Code. Dr. Koop said in his letter that the United States agreed with the basic aims of the Code, but that companies were free to make their own decisions about whether to adopt it. In an appendix to the letter, Dr. Koop stated:

The Department of Justice advises that a unilateral decision by your company to adhere to specific provisions of the Code, in and of itself, should not raise problems under the antitrust laws, and joint adoption of parts of the Code may not necessarily raise such problems. If any questions arise regarding antitrust enforcement intentions in a specific situation, the Department of Justice has a business review procedure to provide prompt guidance. (*See* 28 CFR 50)¹²

After receiving Dr. Koop's letter, the IFC began to develop an industry code to counter the WHO Code. Mr. Gelardi, the IFC's Executive Director, testified that the association's purpose was to develop a code that could be proposed as an alternative if legislative action to implement the WHO Code seemed imminent.¹³ Other testimony suggested that members of the industry believed that voluntary industry adherence to a less restrictive code might blunt the demands for legislative action.¹⁴ From the beginning, the IFC planned to submit its proposed code to the Department of Justice under the business review procedure.¹⁵

⁹ *Id.* at 2756.

¹⁰ Rule 3.24(A)(5) Order Specifying Facts as to Which There is no Substantial Controversy ("Order Specifying Facts"), August 26, 1993, Public Record Vol. 4, at 3088-3090.

¹¹ RTB, Public Record Vol. 3, at 2757-58.

¹² Koop Letter, Public Record Vol. 1, at 115, 120.

¹³ Excerpts from Gelardi Deposition, Public Record Vol. 2, at 1072, 1073-76.

¹⁴ Excerpts from Deposition of Lael Johnson, Public Record Vol. 2, at 1104.

¹⁵ Gelardi Deposition at 1082.

A. The Conspiracy Count

Paragraph 8 of the complaint alleges that “[d]uring the 1980’s, respondent entered into a conspiracy with others to refrain from advertising infant formula through the mass media directly to the consumer.” The statutory prerequisite for imposing a remedy at this stage of the proceeding, no administrative trial having been conducted, is a finding of “reason to believe” that the law has been violated. 15 U.S.C. 45(a).

Although the facts are controverted, a sufficiently clear outline of the evidence exists to support a “reason to believe” determination that at the time the infant formula manufacturers began to draft a proposed code, they agreed to refrain from advertising during the preparation and presentation of the code to the Department of Justice. Dr. Glen Blix, identified by complaint counsel as the witness who would produce direct evidence of a conspiracy,¹⁶ provided an affidavit stating that he was an employee of Loma Linda Foods until 1987 and that he was Loma Linda’s representative to the IFC.¹⁷ He stated that he had attended virtually all IFC board meetings during the relevant period. Dr. Blix also said that the IFC decided to adopt a code to address the concern of activists, but that the proposed code was to be less restrictive than the WHO Code. He stated:

There was a consensus among IFC members early on during discussions of the IFC code that the code would prohibit direct promotions to the consumer. I understood that the little direct advertising that was taking place at that time would be discontinued. Loma Linda did cease its advertisements, not only in consumer publications such as *American Baby*, but also in church publications, because of this understanding, as did other infant formula manufacturers that may have been advertising at the time. It was generally felt that the cessation of advertising was important in order to demonstrate to the consumer activists and the Department of Justice that the code was simply reiterating current practices in the industry; thereby making a favorable review more likely. Although all IFC members emphasized during these discussions that the code would be voluntary, it was generally understood that all IFC members would abide by the code during these discussions and after the code was completed.¹⁸

¹⁶ CCTB, Public Record, Vol. 4, at 2984-85.

¹⁷ Blix Affidavit, Public Record Vol. 3, at 2221-2.

¹⁸ *Id.* at 2225-26.

Although direct and cross examination of Dr. Blix at trial could have been useful, the affidavit alone distinctly points to the existence of an agreement among competitors to forgo advertising at the outset of the code drafting process. That is a very different matter from developing a code that would bind individual companies only by their voluntary action and only after the code received the blessing of the Department of Justice. Complaint counsel argue that circumstantial evidence also supports an inference that Abbott participated in that conspiracy. They assert that firms discontinued advertising during the discussions of the IFC Code and that a successful presentation to the Department of Justice depended in part on the absence of any change in established marketing practices in the industry.¹⁹ Not surprisingly, Abbott, in its Trial Brief, disagrees strongly with the proposed inferences. Abbott argues that the firms previously had discontinued mass-media advertising in response to activist pressure and were merely engaged in petitioning activities protected by the First Amendment.²⁰ Assuming *arguendo* that the IFC's development of an industry code for presentation to the Department of Justice by way of the business review procedure was protected by the First Amendment, that protection would not extend to an agreement among competitors to refrain from advertising during the pendency of the review process. On balance, I find reason to believe that Abbott engaged in an unlawful conspiracy.

B. *The Exchange of Information Count*

The complaint alleges, as a violation of Section 5 of the Federal Trade Commission Act distinct from the conspiracy theory, that Abbott exchanged information with competitors, and the order prohibits Abbott from "intentionally exchanging information" relating to advertising with other infant formula manufacturers. The finding that exchanging information about advertising is unlawful is a novel and potentially far reaching extension of existing antitrust prohibitions that has the potential to chill, if not prohibit, many competitively neutral or procompetitive discussions.

Paragraph ten of the complaint alleges that Abbott and the other members of the IFC agreed to exchange information "concerning

¹⁹ CCTB, Public Record Vol. 4, at 2972-85.

²⁰ RTB, Public Record Vol. 3, at 2790.

each company's marketing practices," and that the exchanges occurred in the process of drafting guidelines on advertising. Paragraph eleven of the complaint alleges that as a result of the exchanges, "uncertainty relating to the marketing practices of competing manufacturers was reduced and competition was lessened."

Although one might assume from reading the complaint that the firms had exchanged copies of documents or otherwise revealed their most secret marketing strategies, complaint counsel did not pursue any such theory. In fact, complaint counsel's trial brief does not identify any confidential marketing information exchanged at IFC meetings and does not suggest that proof of such an exchange would be offered at trial.²¹

The core of the information exchange claim is that "Abbott and its competitors discussed the various types of marketing that they believed were important to them and the types of marketing practices that they could live without."²² This sort of exchange is inherent in any joint effort to draft a code, and Abbott did not deny its participation in the drafting process. Its defense was that the IFC members disclosed only information that was already public, such as Abbott's firm adherence to ethical marketing.²³

The theory of competitive harm from such an exchange is that it reduced competitive uncertainty. Complaint counsel argued:

There clearly was uncertainty among the companies concerning what their competitors were considering vis-a-vis marketing practices and implementation of the WHO Code during the early 1980's. The companies did not have access to the confidential future marketing plans of their competitors. This uncertainty was reduced during the code discussions and the likelihood of anticompetitive, interdependent behavior was increased. If the code discussions had not taken place, the uncertainty about their competitors' marketing plans may well have led the various companies to develop plans to institute consumer marketing sooner than they actually did.²⁴

The uncertainty was about whether a competitor would begin mass marketing direct to consumers.

²¹ CCTB, Public Record Vol. 4, at 2994-3000.

²² CCTB, Public Record Vol. 4, at 2995.

²³ RTB, Public Record Vol. 3, at 2798-99.

²⁴ CCTB, Public Record Vol. 4, at 2998-98.

Complaint counsel cite no authority for the proposition that exchanging information about advertising plans is unlawful, relying instead on *United States v. Container Corp.*, 393 U.S. 333 (1969). That case, however, involved an agreement to exchange current price information for use in determining whether to reduce prices to meet competition, and the Court found that the exchange had the effect of stabilizing prices. It is a considerable step from prohibiting an ongoing agreement to exchange current prices to prohibiting discussion of an industry code that reveals company positions on advertising.

Complaint counsel cited only one other case, *United States v. Champion International Corp.*, 1979-2 Trade Cas. (CCH) paragraph 62862, at 78,989 (D. Ore. 1979), in which the parties exchanged information that was available from public sources. The district court, however, distinguished between lawful exchanges of information and unlawful agreements:

Meetings between competitors are not illegal even when coupled with the exchange of information about each participant's interest in upcoming sales. A line must be drawn, however, between the mere exchange of information and an implied agreement to act on this information.²⁵

The court's finding of liability was based on finding an unlawful agreement. Its distinction between lawful exchanges of information and unlawful agreements would be eliminated under the theory of this order, for which the Commission has offered no limiting principle.

Before condemning a business practice as an unfair method of competition in violation of Section 5, the Commission should be confident that the practice is competitively harmful and that the remedy will not unnecessarily impair competitively neutral or procompetitive business activity. It is appropriate to use the "penumbra" of Section 5 of the FTC Act to challenge anticompetitive conduct that cannot be challenged under traditional theories derived from the Sherman and Clayton Acts, but in doing so, the Commission has a responsibility to ensure that conduct so outlawed is, in fact, anticompetitive.

Even acceding to the somewhat unlikely assumption that the companies did discuss their confidential advertising plans during the

²⁵ 1979-2 Trade Cas. (CCH) at 78,990.

discussion of the proposed IFC Code, the competitive significance of the discussions seems questionable, because whatever uncertainty may have existed about competitors' advertising plans would be short lived. Advertising is unlike secret discounts or rebates, which a competitor may not be able to verify. Rather, it is the nature of advertising that a competitor will learn almost instantly of a new advertising campaign and can take appropriate competitive steps to respond.

In this case, any competitive harm can be traced directly to the unlawful agreement not to advertise during the drafting of the code, not to an information exchange. Assuming that the infant formula manufacturers agreed not to advertise during the process of developing a code, the agreement would eliminate any uncertainty about their competitors' plans. To the extent that any of the firms harbored any idea of reneging on the agreement, they presumably would not disclose it during the code discussions. Absent an agreement, it is not clear that the exchange of information would have had any anticompetitive effect.

The meetings to discuss the IFC Code had a legitimate business purpose, to develop an alternative to the WHO Code that could be used in lobbying legislative bodies. The meetings cannot fairly be analogized to the proverbial meeting of competitors in a smoke-filled room to reach agreement on prices. Abbott's General Counsel recognized the antitrust sensitivity of developing a marketing code at the outset of the process, but believed that the submission of a proposed code to the Department of Justice through the business review process could overcome the problem.²⁶ Dr. Koop's letter to the Infant Formula Council lends support to that view. He suggested that joint adoption of parts of the WHO Code might be lawful and invited the IFC to seek guidance through the business review procedure.²⁷ In an analogous situation, the Commission had issued an advisory opinion to the Wine Institute, which then represented more than half of domestic wine producers, approving the adoption of a Code of Advertising Standards that encouraged the "voluntary forbearance by industry members from the use of advertising themes perceived as socially undesirable" *The Wine Institute*, 91 FTC

²⁶ Excerpts from Johnson transcript, Public Record Vol.2, at 1088, 1091.

²⁷ The code was submitted to the Department under the business review procedure in July 1985, but the request for review was subsequently withdrawn after the Department requested a significant amount of information from the companies.

1190 (1978). Although the wine industry's code did not ban mass media advertising, the commission's advisory opinion clearly accepts industry advertising codes as lawful in some circumstances.

If an exchange of information among competitors that reduces competitive uncertainty is a violation of Section 5, it is difficult to understand how competitors will be able to discuss almost any form of joint activity. In the Container Corp. case, the Court found a violation on the basis of evidence not just of a reduction of uncertainty about discount levels, but also of evidence that prices had been stabilized. In this case, there is no indication that as a result of the exchange of information, as distinguished from the conspiracy, prices were stabilized, output was reduced, or other anticompetitive effects occurred. More importantly, there is no suggestion that the Commission would require such proof before imposing liability. Indeed, it appears that the Commission would not.

Virtually all legitimate discussions among competitors will reduce competitive uncertainty in the same sense that the IFC discussions revealed information about the firms' advertising plans. For example, the recent DOJ/FTC Statements of Antitrust Enforcement Policy in the Health Care Area indicate that certain hospital joint ventures involving high tech or other expensive equipment and certain joint purchasing arrangements do not raise antitrust concerns. In meetings to discuss such proposed joint activities, the competitors almost certainly will make disclosures that reduce competitive uncertainty by revealing their own purchasing plans or plans to acquire high tech equipment. Does the Commission intend to outlaw such discussions, and, if not, by what reasoning does it distinguish them from the instant case?

In creating new causes of action under the FTC Act, the Commission has a responsibility to identify the competitive harm it seeks to prevent and to articulate a theory of liability that does not extend beyond that harm, including whatever limiting principles may be necessary. In this case, I believe the Commission has failed to carry out those serious responsibilities.

IN THE MATTER OF

REDMOND PRODUCTS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3479. Complaint, Feb. 10, 1994--Decision, Feb. 10, 1994*

This consent order prohibits, among other things, a Minnesota-based manufacturer of hair care products and its officer from making unsubstantiated representations regarding the environmental benefits of any cosmetic product in the future.

Appearances

For the Commission: *Michael Dershowitz and Kevin M. Bank.*

For the respondents: *John French, Faegre & Benson, Minneapolis, MN.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Redmond Products, Inc., a corporation, and Thomas M. Redmond, individually and as an officer of said corporation ("respondents"), have violated provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Redmond Products, Inc. is a Minnesota corporation, with its principal office or place of business at 18930 West 78th Street, Chanhassen, Minnesota.

Respondent Thomas M. Redmond is an officer of the corporate respondent. Individually or in concert with others, he formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices alleged in this complaint. His principal office or place of business is the same as that of the corporate respondent.

PAR. 2. Respondents have advertised, labeled, offered for sale, sold and distributed certain aerosol hair spray products to the public, including Aussie Mega Styling Spray and New Zealand Hair Paradise