

IN THE MATTER OF

SCHWEGMANN GIANT SUPER MARKETS, INC.

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

Docket C-3584. Consent Order, June 2, 1995--Modifying Order, Feb. 24, 1997

This order reopens a 1995 consent order -- that required the Louisiana-based corporation to divest several supermarkets in the New Orleans area -- and this order modifies the consent order by replacing a provision requiring Schwegmann to obtain prior Commission approval for certain transactions, with a prior notice provision for any acquisition of retail supermarkets in the New Orleans area that Schwegmann makes through June 6, 2005. The Commission determined that the changed provisions are warranted and consistent with the Statement of FTC Policy Concerning Prior Approval and Prior Notice Provisions and therefore justified reopening the proceeding and modifying the order.

ORDER REOPENING AND MODIFYING ORDER

On November 21, 1996, Schwegmann Giant Super Markets, Inc. ("Schwegmann" or "respondent"), the respondent named in the consent order issued by the Commission on June 2, 1995, in docket No. C-3584 ("order"), filed its Petition To Reopen and Modify Consent Order ("Petition") in this matter. Schwegmann asks that the Commission reopen and modify the prior approval requirements of the order pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice and Procedure, 16 CFR 2.51, and consistent with the Statement of Federal Trade Commission Policy Concerning Prior Approval And Prior Notice Provisions, issued on June 21, 1995 ("Prior Approval Policy Statement" or "Statement").¹ The order requires Schwegmann to seek the prior approval of the Commission to acquire any supermarket in the New Orleans metro area. The thirty-day public comment period on Schwegmann's Petition expired on December 26, 1996. No comments were received.

The Commission, in its Prior Approval Policy Statement, "concluded that a general policy of requiring prior approval is no longer needed," citing the availability of the premerger notification

¹ 60 Fed. Reg. 39745-47 (Aug. 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241.

and waiting period requirements of Section 7A of the Clayton Act, commonly referred to as the Hart-Scott-Rodino ("HSR") Act, 15 U.S.C. 18a, to protect the public interest in effective merger law enforcement. Prior Approval Policy Statement at 2. The Commission announced that it will "henceforth rely on the HSR process as its principal means of learning about and reviewing mergers by companies as to which the Commission had previously found a reason to believe that the companies had engaged or attempted to engage in an illegal merger." As a general matter, "Commission orders in such cases will not include prior approval or prior notification requirements." *Id.*

The Commission stated that it will continue to fashion remedies as needed in the public interest, including ordering narrow prior approval or prior notification requirements in certain limited circumstances. The Commission said in its Prior Approval Policy Statement that "a narrow prior approval provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for the provision, attempt the same or approximately the same merger." The Commission also said that "a narrow prior notification provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for an order, engaged in an otherwise unreportable anticompetitive merger." *Id.* at 3. As explained in the Prior Approval Policy Statement, the need for a prior notification requirement will depend on circumstances such as the structural characteristics of the relevant markets, the size and other characteristics of the market participants, and other relevant factors.

The Commission also announced, in its Prior Approval Policy Statement, its intention "to initiate a process for reviewing the retention or modification of these existing requirements" and invited respondents subject to such requirements "to submit a request to reopen the order." *Id.* at 4. The Commission determined that, "when a petition is filed to reopen and modify an order pursuant to . . . [the Prior Approval Policy Statement], the Commission will apply a rebuttable presumption that the public interest requires reopening of the order and modification of the prior approval requirement consistent with the policy announced" in the Statement. *Id.*

The complaint in this matter ("complaint") alleged that Schnuck Markets, Inc. ("Schnuck") entered into an agreement with National Holdings, Inc. ("National") to acquire certain supermarkets and that

Schwegmann and Schnuck had entered into an agreement for the acquisition of certain supermarkets acquired from National that, if consummated, would violate 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, by substantially lessening competition in the retail sale and distribution of food and grocery items in supermarkets in the New Orleans metro area.

The complaint alleged that a substantial lessening of competition would result from the elimination of direct competition between Schwegmann and National in the relevant market; the increase in the likelihood that Schwegmann would unilaterally exercise market power in the relevant market; and the increase in concentration and in the likelihood of collusion or coordinated interaction.

The presumption is that setting aside the prior approval requirements in this order is in the public interest. However, there has been no showing that the competitive conditions that gave rise to the complaint and the order no longer exist. Moreover, the relevant market is localized and the acquisition price of a supermarket could fall well below the HSR size-of-transaction threshold. Therefore, the record evidences a credible risk that Schwegmann could engage in future anticompetitive acquisitions that would not be subject to the premerger notification and waiting period requirements of the HSR Act. Accordingly, pursuant to the Prior Approval Policy Statement, the Commission has determined to modify paragraph IV of the order to substitute a prior notification requirement for the prior approval requirement.²

Accordingly, *It is ordered*, That this matter be, and it hereby is, reopened; and

It is further ordered, That paragraph IV of the order be, and it hereby is, modified, as of the effective date of this order, to read as follows:

It is further ordered, That, for a period commencing on the date this order becomes final and continuing for ten (10) years thereafter, Schwegmann shall cease and desist from acquiring, without Prior Notification to the Commission (as defined below), directly or indirectly, through subsidiaries or otherwise, any supermarket, including any facility that has been operated as a supermarket within six (6) months of the date of the offer by Schwegmann to purchase

² Schwegmann has stated that it has no objection to the substitution of prior notification provisions for the prior approval provisions of the order.

the facility, or any interest in a supermarket, or any interest in any individual, firm partnership, corporation or other legal or business entity that directly or indirectly owns or operates a supermarket in the New Orleans metro area.

Provided, however, that this paragraph IV(A) shall not be deemed to require Prior Notification to the Commission for the construction of new facilities by Schwegmann or the purchase or lease by Schwegmann of a facility that has not been operated as a supermarket at any time during the six (6) month period immediately prior to the purchase or lease by Schwegmann in those locations.

"Prior Notification to the Commission" required by paragraph IV shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations, as amended (hereinafter referred to as "the Notification Form"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of Schwegmann and not of any other party to the transaction. Schwegmann shall provide the Notification Form to the Commission at least thirty (30) days prior to consummating any such transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information, Schwegmann shall not consummate the transaction until twenty (20) days after substantially complying with such request for additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. Schwegmann shall not be required to provide Prior Notification to the Commission pursuant to this order for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a.

Complaint

123 F.T.C.

IN THE MATTER OF

WORLD MEDIA T.V., INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3717. Complaint, Feb. 25, 1997--Decision, Feb. 25, 1997*

This consent order prohibits, among other things, the California-based advertising production and distribution corporation from making pain relief or pain elimination claims in infomercials for any device without possessing competent and reliable scientific evidence to support such claims and prohibits the respondent from representing that any endorsement or testimonial represents the typical experience with the product, unless the claim is substantiated or it is accompanied by a prominent disclaimer.

Appearances

For the Commission: *Lesley Anne Fair.*

For the respondent: *Edward Glynn, Venable, Baetjer, Howard & Civiletti, Washington, D.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that World Media T.V., Inc. ("respondent"), a corporation, has violated the 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 is a California corporation, with its principal office or place of business at 5205 Avenidas Encinas, Suite A, Carlsbad, CA. respondent engages in the creation, production, and media placement of advertising, including but not necessarily limited to infomercials.

PAR. 2. Respondent, at all times relevant to this complaint, was an advertising agency, production company, and media buyer for Natural Innovations, Inc. and has directed, participated in, and assisted others in the creation and dissemination to the public of advertisements that offer for sale the Stimulator, a "device" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act. The Stimulator is a purported pain relief device that emits a weak electric spark when activated.