
IN THE MATTER OF
ADAMS DAIRY COMPANY ET AL. AND THE KROGER CO.

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

Docket 7596. Complaint, Sept. 24, 1959—Decision, May 25, 1964

Consent order requiring two associated distributors of fluid milk, ice cream, cottage cheese and other dairy products in the States of Missouri, Kansas, Illinois, and Kentucky and a supermarket chain of retail grocery stores

Complaint

65 F.T.C.

in those States, to end their conspiracy to fix or maintain retail prices for their products and differentials between their selling price and that of competitors; to cease coercing competitors to maintain agreed upon differentials, guaranteeing retailers a fixed margin of profit, charging a lower price in one area than in another to destroy competition.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act (38 Stat. 717, 15 U.S.C.A. Sec. 41 *et seq.*, 52 Stat. 111), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Adams Dairy Company, a corporation; Adams Dairy, Inc., a corporation; and The Kroger Company,* a corporation, more particularly described and referred to hereinafter as respondents, have violated the provisions of 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 names the previously mentioned corporations, each and all as respondents herein, and issues its complaint against each of the named parties, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Adams Dairy Company is a corporation organized and existing under the laws of the State of Missouri, with its principal office and place of business located at R.D. Mize Road, Blue Springs, Missouri.

Respondent Adams Dairy, Inc., is a corporation organized and existing under the laws of the State of Missouri with its principal office and place of business located at 5425 Easton Avenue, St. Louis, Missouri.

Respondent The Kroger Company is a corporation organized and existing under the laws of the State of Ohio, with its principal office and place of business located at 35 East Seventh Street, Cincinnati, Ohio.

PAR. 2. Respondents Adams Dairy Company and Adams Dairy, Inc., hereinbefore named and described, are engaged in the distribution and sale of fluid milk, ice cream, cottage cheese, and other miscellaneous dairy products (hereinafter referred to as dairy products) at wholesale to customers located in the States of Missouri, Kansas, Illinois, and Kentucky. Adams Dairy Company had sales of approximately six million dollars in 1956 and Adams Dairy, Inc., had sales of approximately three million dollars in 1957. There has been and is now a pattern and course of interstate commerce in the processing, distribution and sale by respondents, Adams Dairy Company and Adams Dairy, Inc., of said dairy products within the intent and meaning of the Federal Trade Commission Act.

*The correct corporate name is The Kroger Co.

Respondent The Kroger Company, (hereinafter referred to as Kroger), is engaged in the operation of retail grocery stores located in a number of the various states, including the States of Missouri, Kansas, Illinois and Kentucky. Kroger had net sales in excess of one and one-half billion dollars in 1957.

Respondent Kroger, in connection with the operation of its retail grocery stores, handles dairy products for resale to the consumer. There has been and is now a pattern and course of interstate commerce in the purchase and sale of said dairy products by said respondent Kroger within the intent and meaning of the Federal Trade Commission Act.

PAR. 3. Each of the respondents, Adams Dairy Company and Adams Dairy, Inc., is in substantial competition with numerous other dairy concerns operating in the States of Missouri, Kansas, Illinois and Kentucky, in the processing, distribution and sale of dairy products, except to the extent that competition has been hindered, lessened, restricted and eliminated by the unfair methods of competition and unfair acts and practices hereinafter set forth.

Respondent Kroger is in competition with numerous other retail grocery concerns in the States of Missouri, Kansas, Illinois, and Kentucky, except to the extent that competition has been hindered, lessened, restricted, and eliminated by the unfair methods of competition and the unfair acts and practices hereinafter set forth.

PAR. 4. For many years, and continuing to the present time, respondents Adams Dairy Company and Adams Dairy, Inc. (hereinafter designated as respondent dairies), and The Kroger Company, have maintained and effectuated a conspiracy, combination, agreement and understanding in the sale and distribution of dairy products in restraint of trade of said products as is more fully set out in Paragraphs Five and Six hereof.

PAR. 5. As a part of, pursuant to and in furtherance of the aforesaid agreement, understanding, combination and conspiracy, respondents have, for many years past and to the present time, performed and pursued the following acts, policies and practices:

1. Fixed prices and price differentials in the sale of dairy products and coerced competitors into maintaining prices and price differentials in said products.

2. Respondent Kroger, in connection with the sale at retail of the dairy products of respondent dairies, has engaged and is engaging in the following acts and practices, among others:

- (a) Charging lower prices for the dairy products of respondent dairies, directly and through the use of coupons, free merchandise or other devices furnished by respondent dairies, in certain areas than those charged elsewhere;

Order

65 F.T.C.

(b) Engaging in price wars in the sale of dairy products in certain areas with the purpose of or the natural and probable effect of injuring and destroying competition in said dairy products;

(c) Denying to competitors and potential competitors of respondent dairies a reasonable opportunity to compete for the dairy product purchases of respondent Kroger and otherwise giving respondent dairies preferential treatment in its retail stores.

3. Respondent dairies have subsidized the acts, practices and policies of respondent Kroger set out in paragraph 2 hereof in the sale and distribution of dairy products in certain areas within the states above named by the following means, among others:

(a) Selling said products to said respondent Kroger in certain areas at prices lower than those charged elsewhere by said respondent dairies, including prices that were below cost;

(b) Furnishing coupons, free merchandise and other devices for use in the retail sale of the dairy products of respondent dairies by respondent Kroger in certain areas and not elsewhere;

(c) Guaranteeing a fixed profit margin to respondent Kroger in its sale of said dairy products regardless of the price at which such products are sold to the consumer;

(d) Contributing advertising allowances to respondent Kroger upon terms not accorded or offered to all competing purchasers of dairy products on proportionally equal terms.

PAR. 6. The conspiracy, combination, agreement and understanding and the acts and practices of respondents pursuant to and in furtherance of same, as alleged herein, have had and do have the effect of hindering, lessening, restricting, restraining, destroying and eliminating competition in the processing and sale of dairy products; have had and do have a tendency to unduly hinder competition or to create in respondents a monopoly; have constituted an attempt to monopolize; have foreclosed markets and access to markets to competitors in the processing, distribution and sale of dairy products; are all to the prejudice of competitors of respondents and to the public; and constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER GRANTING MOTION TO DISMISS COMPLAINT AND ACCEPTING
CONSENT ORDERS TO CEASE AND DESIST

The hearing examiner, pursuant to Section 3.6(a) of the Rules of Practice, has certified to the Commission a series of motions by respondents in this and two related cases. Respondent Adams Dairy,

Inc. (Adams of St. Louis), moves that the complaint against it be dismissed on the ground that as of January 1, 1964, it ceased doing business, sold all of its assets to a non-affiliated company, and has entered into a covenant not to re-enter the dairy business in competition with the purchaser. Complaint counsel has stated that he does not object to granting of the motion provided that it is without prejudice to Commission action in the unlikely event that Adams of St. Louis should resume its operations. The Commission has concluded that, in view of the complete termination of business by Adams of St. Louis, no purpose would be served by further proceedings here and its motion to dismiss should be granted.

Respondents Adams Dairy Company (Adams of Kansas City) and The Kroger Co. have requested that the proceedings be disposed of by acceptance of consent orders to cease and desist. Complaint counsel joins in these motions. The Commission has determined that good cause exists for permitting utilization of the consent-order procedure and that the agreements that have been entered into afford an adequate basis for disposition of these proceedings. It is therefore appropriate that the Commission itself initially decide these matters and forthwith issue its decision and orders.

The Commission hereby accepts the agreements, makes the following jurisdictional findings, and enters the following order:

1. Respondent Adams Dairy Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri, with its office and principal place of business located at R. D. Mize Road, Blue Springs, Missouri.
2. Respondent The Kroger Co. (incorrectly named in the complaint as The Kroger Company) is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business located at 1014 Vine Street, Cincinnati, Ohio.
3. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and of the respondents.

It is ordered, That respondent Adams Dairy Company, a corporation, its officers, directors, agents, representatives, and employees, directly or through any corporate or other device, in the offering for sale, sale, or distribution of packaged fresh fluid milk, cream, and cottage cheese, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from entering into, carrying out, or continuing any combination, conspiracy, agreement or understanding with The Kroger Co. or any other purchaser of any such products of respondent Adams Dairy Company not a party

Order

65 F.T.C.

hereto and not a subsidiary or affiliate of said respondent, to do or perform any of the following acts, practices, or things:

1. Fix or maintain any retail price of such product;
2. Fix or maintain an agreed amount of differential between the retail price for any such product and the retail price of any competing third party selling the same quantity of such product either in containers made of different material or through home delivery;
3. Coerce any retail or other competitor to fix or maintain an agreed amount of differential between the retail price for any such product and the retail price of any competing third party selling the same quantity of such product either in containers made of different material or through home delivery;
4. Guarantee to any retailer a minimum or a fixed margin of profit between in-store cost and retail price of any such product;
5. Charge a lower price for any such product in one area than the price charged for the same product in any other area for the purpose of destroying competition;
6. Sell any such product at an unreasonably low price for the purpose of destroying competition.

Provided, however, That nothing contained herein shall be interpreted as prohibiting respondent herein from granting a price reduction or other allowance on any such product to meet, in good faith, an equally low price or allowance of a competitor, or any price reduction or allowance which is otherwise lawful.

Provided, however, That nothing contained herein shall be interpreted as prohibiting respondent herein from establishing, maintaining, or enforcing any resale price agreement in any manner excepted from the provisions of the Federal Trade Commission Act by virtue of the McGuire Act amendments to said Act or any other applicable statute, whether now in effect or hereafter enacted, or from complying with the requirements of any law or ordinances.

It is further ordered, That respondent The Kroger Co., incorrectly named in the complaint as The Kroger Company, a corporation, its directors, officers, agents, representatives and employees, directly or through any corporate or other device, in the offering for sale, sale or distribution of packaged fresh fluid milk, cream, and cottage cheese, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from entering into, carrying out, or continuing any combination, conspiracy, agreement, or understanding with Adams Dairy Company, or with any other supplier of any such products to The Kroger Co. not a party hereto and not a sub-

sidiary or affiliate of said respondent, to do or perform any of the following acts, practices, or things in the following area:

All counties within the State of Kansas lying to the east of a continuous line formed by the western boundaries of the counties of Doniphan, Atchison, Jackson, Pottawatomie, Riley, Geary, Wabaunsee, Osage, Franklin, Anderson, Allen, Neosho and Labette; all counties within the State of Missouri; all counties within the State of Illinois lying to the south of a continuous line formed by the northern boundaries of the counties of Calhoun, Greene, Macoupin, Montgomery, Fayette and Effingham and to the west of a continuous line formed by the eastern boundaries of the counties of Effingham, Clay, Wayne, Hamilton, Saline and Pope; and the counties of Ballard, Carlisle, McCracken, Graves, Calloway and Marshall within the State of Kentucky.

1. Fix or maintain, with respect to the resale by said respondent of any such product purchased from such supplier:

- (a) the retail price of such product;
- (b) a fixed margin of profit between the in-store cost and any agreed upon retail price of such product; or
- (c) any agreed amount of differential between said respondent's retail price for such product of such supplier and the retail price of any competing third party selling the same quantity of the same product either in containers made of different material or through home delivery.

2. Coerce any competing third party on its sale of any such product either in containers made of different material or through home delivery to fix or maintain any agreed amount of differential between such party's retail price and respondent's retail price for the same quantity of such product of such supplier.

3. Charge a lower retail price for any such product sold by respondent in one part of such area than the retail price charged by respondent for the same product of such supplier in any other part of such area for the purpose of destroying competition.

Provided, however, That nothing contained herein shall be interpreted as prohibiting The Kroger Co. from requesting or receiving from a supplier a price reduction or other allowance on any such product to meet, in good faith, an equally low price or allowance of such supplier's competitor, or any price reduction or allowance which is otherwise lawful.

Provided, however, That nothing contained herein shall be interpreted as prohibiting The Kroger Co. from establishing, maintaining, or enforcing any resale price agreement in any manner excepted from

Complaint

65 F.T.C.

the provisions of the Federal Trade Commission Act by virtue of the McGuire Act amendments to said Act or any other applicable statute, whether now in effect or hereafter enacted, or from complying with the requirements of any law or ordinances.

It is further ordered, That respondents Adams Dairy Company and The Kroger Co., shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist.

It is further ordered, That the motion of respondent Adams Dairy, Inc., to dismiss the complaint against it be, and it hereby is, granted.