

Complaint

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IN THE MATTER OF

THE GRAND UNION COMPANY

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SECTION 7
OF THE CLAYTON ACT

Docket C-1350. Complaint, June 21, 1968—Decision, June 21, 1968

Consent order prohibiting a large grocery chain with headquarters in East Paterson, N.J. from acquiring for a period of 10 years, without prior approval of the Commission, any grocery store or chain of more than five units, or whose annual sales exceed \$5 million, or whose combined annual sales of respondent and proposed acquired store exceeds 5 percent of the trade area sales.

COMPLAINT

The Federal Trade Commission, having reason to believe that The Grand Union Company has violated the provisions of Section 7 of the Clayton Act, as amended (15 U.S.C. Section 18), through its acquisition of the assets and business of Stevens Markets, Inc., and it appearing that a proceeding by the Commission in respect thereto would be to the interest of the public, issues this complaint stating its charges as follows:

I. DEFINITIONS

1. "Food stores" are establishments primarily selling food for home preparation and consumption. This definition corresponds to Bureau of Census Major Group Classification No. 54.

2. "Grocery stores" are food store establishments primarily selling (1) a wide variety of canned or frozen foods such as vegetables, fruits and soups; (2) dry groceries, either packaged or in bulk, such as tea, coffee, cocoa, dried fruits, spices, sugar, flour and crackers; and (3) other processed food and nonedible grocery items. In addition, these establishments often sell smoked and prepared meats, fresh fish and poultry, fresh vegetables and fruits, and fresh or frozen meats. This definition corresponds to Bureau of Census Industry Classification No. 5411.

II. THE GRAND UNION COMPANY

3. The Grand Union Company is named a respondent herein and is hereafter referred to as "Grand Union." It is a corporation organized and existing under the laws of the State of Delaware, with its principal office and place of business located at 100 Broadway, East Paterson, New Jersey, 07407.

4. Grand Union engages principally in the grocery store business, operating 510 such stores with sales of \$768 million in 1966 and ranking among the nation's 10 largest grocery store chains in that year. Grand Union also operated 31 Grand Way department stores in 1966, and engaged in shopping center development enterprises, Triple-S trading stamp distribution, and performance incentive program sales through subsidiary and affiliate corporations. Grand Union has generated an increasing cash flow for several years, rising to \$19 million in 1966.

5. In 1963, Grand Union's Florida division operated 31 grocery stores, 27 of which were located in Dade and Broward Counties, Florida. Grand Union ranked third in sales among Dade County food chains and fifth in sales among Broward County food chains in 1963.

6. At all times relevant herein, Grand Union purchased products in interstate commerce and engaged in "commerce" within the meaning of the Clayton Act.

III. STEVENS MARKETS, INC.

7. Stevens Markets, Inc. (hereafter "Stevens"), prior to the acquisition of substantially all its assets and business by Grand Union, was a corporation organized and existing under the laws of the State of Florida with its principal office and place of business located at 5701 NW., 35th Ave., Miami, Florida 33142.

8. Stevens was the leading independent grocery store company in both Dade and Broward Counties, Florida, ranking sixth and seventh respectively among food chains in those counties in 1963. From its founding with one store in 1948, Stevens expanded to 9 modern grocery stores with sales of \$31.7 million and profits of \$17,000 in 1963.

9. At all times relevant herein, Stevens purchased products in interstate commerce and engaged in "commerce" within the meaning of the Clayton Act.

IV. NATURE OF TRADE AND COMMERCE

A. Generally

10. Food stores account for the largest single segment of retail trade in the United States. In 1963, food store sales were approximately \$57 billion, or 23% of all retail trade in the United States. Grocery stores account for by far the largest portion of food store sales. In 1963, the 245,000 grocery stores in the United States represented 77% of the number of food store establishments, and their \$53 billion in sales represented over 92% of all food store sales.

11. Grocery stores are recognized as a separate class of retail establishment, distinguished by their trade in a wide variety of food and other high-volume low-markup consumer goods.

12. Concentration in the grocery store industry is high and has been increasing. Between 1949 and 1963 the number of grocery stores in the nation declined from 359,000 to 245,000. During the same period the share of grocery store sales accounted for by the top twenty companies increased from 26% in 1948 to 34% in 1963.

13. Mergers and acquisitions have been responsible for a substantial portion of the increase in concentration in the grocery store industry. Between 1949 and 1964 the nation's top twenty grocery store companies acquired 297 companies operating 3,063 grocery stores with sales of \$3.1 billion.

14. The competitive impact of mergers and concentration in the grocery store industry, and of the growth of national chains, has been felt both in local and regional markets on both the selling and buying side of the market.

One of the significant effects of the merger movement and the trend toward concentration in the grocery store industry has been that mergers have become a substitute for the entry of new competition. The merger movement has eliminated potential competition, has tended to remove the threat of entry and the restraining influence which entry has upon noncompetitive behavior, and has tended to discipline the market behavior of smaller competitors reluctant to enter into competitive warfare with chains many times their size and with many times their resources. The merger movement and the trend toward concentration have tended to dampen the vigor of competition by increasing an awareness of multimarket interdependence among grocery store chains which face one another in several markets.

On the buying side of the market, suppliers have tended to favor the large chains, including Grand Union, with preferences and advantages over other purchasers by reason of the chains' economic power as large buyers. The merger movement and the trend toward concentration have also weakened the ability of independent grocery store chains to compete and have tended to precipitate additional acquisitions and mergers and the disappearance of such independent chains from the grocery store and food store industries.

15. Grand Union has been a leading participant in the food and grocery store merger movement, with \$197 million in acquired grocery store sales ranking it fifth in acquired sales among grocery store chains in the period 1949 to 1964. Grand Union's series of fifteen acquisitions between 1951 and 1958 were the subject to Commission proceed-

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ings in Docket No. 8458 from January 1962 to June 1965. In August, 1965, Grand Union exchanged its supermarket in Orlando, Florida with Food Fair Stores Inc., the 4th largest national chain in 1966, for the Food Fair store at Winchester, Virginia; and in January, 1967, acquired from Stop & Shop, Inc., the nation's 14th largest chain, the fixtures and equipment of its stores located in Greenwich and Stamford, Connecticut.

B. The Local Markets

16. *The Greater Miami Marketing Area*, consisting of Dade County, Florida, has been among the fastest growing areas of the country, increasing from a population of 495,084 in 1950 to about 1,160,000 in 1966. Concentration in the sale of grocery and related products through food stores in the Greater Miami Marketing Area is high, with the four largest food store chains accounting for 48% of the \$377 million in food store sales in 1963. Combined, third-ranked Grand Union and sixth-ranked Stevens accounted for 15% of 1963 food store sales in that area.

17. *The Greater Marketing Area of Broward* consists of Broward County, Florida, an area that has grown rapidly from about 84,000 people in 1950 to one-half million in 1966. The share of food store sales held by four leading chains increased from 54% in 1963 to 57% in 1966, a period during which fifth-ranked Grand Union and seventh-ranked Stevens combined to become the fourth largest food chain in that area by 1966.

V. THE VIOLATION OF THE CLAYTON ACT

18. On May 3, 1964, Grand Union acquired substantially all the assets and business of Stevens, pursuant to an agreement dated March 27, 1964, for a consideration in excess of \$4.8 million.

EFFECTS OF THE VIOLATION CHARGED

19. The effects of the acquisition of Stevens by Grand Union, as alleged in paragraph 18, have been or may be substantially to lessen competition or to tend to create a monopoly in the sale of grocery and related products through food or grocery stores in the Greater Marketing Areas of Miami or Broward, or in portions thereof, in violation of Section 7 of the Clayton Act, in the following among other ways:

- (a) Substantial actual or potential competition has been eliminated between Grand Union or Stevens;
- (b) The combination of the assets and business of Stevens may so increase Grand Union's facilities, financial, market and buying power

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as to provide decisive competitive advantages over independent food store and grocery store operators;

(c) New entry into the food store or grocery store business may be inhibited or prevented;

(d) The acquisition challenged herein, separately and in the context of the merger movement described in paragraphs 12 and 13, contributes to an overall tendency toward increasing concentration and arresting tendencies toward declining concentration in the food and grocery store industries and forms a part of a tendency toward oligopoly and a deterioration in the vigor of competition as described in paragraph 14;

(e) Members of the consuming public have been denied the benefits of free and unrestricted competition between Stevens and Grand Union.

20. The acquisition by respondent, as alleged above, constitutes a violation of Section 7 of the Clayton Act, as amended (15 U.S.C. Section 18).

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 Bureau of Restraint of Trade proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of Section 7 of the Clayton Act, as amended; and

The respondent 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 Section 7 of the Clayton Act, as amended, 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 thirty (30) days, now in further conformity with the procedure prescribed in § 2.34(b) of its Rules,

the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent The Grand Union Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 100 Broadway, in the city of East Paterson, State of New Jersey 07407.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent.

ORDER

I

It is ordered, That for a period of ten (10) years following the effective date of this Order, The Grand Union Company shall not (A) merge with or acquire, directly or indirectly, through subsidiaries, or in any other manner, except with the prior approval of the Commission upon written application, the whole or any part of any grocery store (an establishment classified in Industry No. 5411, Standard Industrial Classification Manual, 1967 revision, or a grocery department in a nonfood store), where such acquisition or merger involves (1) five or more grocery stores, (2) annual grocery store sales of more than five (5) million dollars, or (3) combined (respondent and the grocery stores to be acquired or merged) grocery store sales of more than five (5) percent of total grocery or food store sales in any city or county in the United States; and (B) without sixty (60) days prior notification to the Commission, merge with or acquire, directly or indirectly, through subsidiaries or in any other manner, any grocery store establishment for which prior approval is not required pursuant to subparagraph A.

II

Within thirty (30) days from the effective date of this Order, and annually thereafter until it has fully complied with this Order, Grand Union shall submit a verified written report to the Federal Trade Commission setting forth in detail the manner and form in which it intends to comply, is complying, or has complied with this Order.

III

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this Order to each person having authority to approve grocery store acquisitions and mergers.

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IN THE MATTER OF

WINN-DIXIE STORES, INC.

MODIFIED ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION
OF SECTION 7 OF THE CLAYTON ACT

Docket C-1110. Complaint, Sept. 14, 1966—Decision, June 24, 1968

Order modifying a consent order dated September 14, 1966, 70 F.T.C. 611, which prohibited a chain grocery firm from acquiring any grocery stores without Commission approval, by limiting prohibited acquisitions to grocery chains with (1) five or more stores, (2) annual sales over \$5 million, or (3) a combined market share of over 5 percent in any trade area.

ORDER REOPENING PROCEEDING AND MODIFYING ORDER

Respondent, by petition filed February 21, 1968, has requested that this proceeding be reopened and that the order, which issued on September 14, 1966, be modified.

The agreement containing a consent order which was accepted by the Commission in final disposition of this matter provides, in part, that:

* * * in the event that the Federal Trade Commission issues any Order or Rule which is less restrictive than the provisions of this Order, in any proceeding involving mergers or acquisitions by a grocery store chain, then the Commission shall, upon the application of respondent, pursuant to Rule 3.28 of the Commission's Rules of Practice, reopen this proceeding in order to make whatever revisions, if any, are necessary to bring the restrictions imposed upon respondent herein into conformity with those imposed upon its competitors.

As grounds for its present request, respondent contends that assurances of voluntary compliance recently accepted by the Commission in disposition of two matters involving acquisitions by grocery store chains are "less restrictive" than its order, and that an assurance of voluntary compliance, upon acceptance by the Commission, is an "order" as that term is defined in the Administrative Procedure Act. The Chief, Division of Mergers, in his answer to respondent's petition, does not agree with this latter argument. However, with a minor revision agreed to by respondent, he does not oppose the modification requested.

The Commission has determined that the order should be modified for reasons other than those advanced by respondent.

By order recently issued, the Commission accepted an agreement containing a consent order in final disposition of a matter involving an acquisition by a grocery store chain, The Grand Union Company. Respondent under its present order is prohibited from making any

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acquisition of any retail food or grocery stores in the United States, for a period of ten years, without prior Commission approval. Prior Commission approval under the *Grand Union* order is limited to certain categories of grocery store acquisitions, with the added requirement for sixty days prior notification to the Commission of any grocery store acquisition for which prior approval is not required. Thus, the order issued in the *Grand Union* matter is less restrictive than respondent's order.

Under the circumstances, the Commission is of the opinion that this proceeding should be reopened and the order modified to conform to the restrictions imposed in the *Grand Union* order. Accordingly,

It is ordered, That this matter be, and it hereby is, reopened.

It is further ordered, That the order issued in this matter on September 14, 1966, be, and it hereby is, modified to read as follows:

It is ordered, That, for a period of ten (10) years from November 14, 1966, Winn-Dixie Stores, Inc., shall not (A) merge with or acquire, directly or indirectly, through subsidiaries, or in any other manner, except with the prior approval of the Commission upon written application, the whole or any part of any grocery store (an establishment classified in Industry No. 5411, Standard Industrial Classification Manual, 1967 revision, or a grocery department in a nonfood store), where such acquisition or merger involves (1) five or more grocery stores, (2) annual grocery store sales of more than five (5) million dollars, or (3) combined (respondent and the grocery stores to be acquired or merged) grocery store sales of more than five (5) percent of total grocery or food store sales in any city or county in the United States; and (B) without sixty (60) days prior notification to the Commission, merge with or acquire, directly or indirectly, through subsidiaries or in any other manner, any grocery store establishment for which prior approval is not required pursuant to subparagraph A.

Within thirty (30) days from the effective date of this Order, and annually thereafter until it has fully complied with this Order, Winn-Dixie Stores, Inc., shall submit a verified written report to the Federal Trade Commission setting forth in detail the manner and form in which it intends to comply, is complying, or has complied with this Order.

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this Order to each person having authority to approve grocery store acquisitions and mergers.

IN THE MATTER OF

S.S.S. COMPANY ET AL.

ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT*Docket 8646. Complaint, Sept. 14, 1964—Decision, June 26, 1968*

Order requiring an Atlanta, Ga., manufacturer of drug preparations and its advertising agency to cease misrepresenting that respondent's preparations will relieve tiredness or weakness unless expressly limited to a symptom caused by deficiency of vitamins supplied by such preparation, that the use of the preparation will aid the prevention of iron or vitamin deficiency, that iron deficiency anemia can be self-diagnosed or determined without medical or laboratory tests, and making other misleading claims for the effectiveness of "S.S.S. Tonic" or "S.S.S. Tablets."

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the S.S.S. Company, a corporation, and Tucker Wayne & Company, a corporation, herein-after referred to as respondents, have violated the provisions 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 its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent S.S.S. Company is a corporation, organized and existing under the laws of the State of Georgia, with its office and principal place of business located at 71 University Avenue, SW., in the city of Atlanta, State of Georgia.

Respondent Tucker Wayne & Company is a corporation, organized and existing under the laws of the State of Georgia, with its office and principal place of business located at 1175 Peachtree Street, NE., in the city of Atlanta, State of Georgia.

PAR. 2. Respondent S.S.S. Company, is now, and has been for more than one year last past, engaged in the sale and distribution of preparations containing ingredients which come within the classification of drugs as the term "drug" is defined in the Federal Trade Commission Act.

The designations used by respondent S.S.S. Company for the said preparations, the formulae thereof and directions for use are as follows: