

Complaint

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IN THE MATTER OF

THE KROGER COMPANY, ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 7 OF
THE CLAYTON ACT AND THE FEDERAL TRADE COMMISSION ACT

Docket C-2067. Complaint, Oct. 26, 1971—Decision, Oct. 26, 1971

Consent order requiring the Nation's third largest chain supermarket headquartered in Cincinnati, Ohio, to divest three of its food departments in stores located in Dayton, Ohio, and for a period of ten years not to acquire without prior Commission approval five or more stores with annual sales of more than \$5 million or more than 5 percent of the food store sales in any city or county in the United States; these prohibitions apply in sixteen states and certain portions of four others.

COMPLAINT

The Federal Trade Commission has reason to believe that the Kroger Company has made certain acquisitions from Federated Department Stores, Inc., as hereinafter described, in violation of Section 7 of the Clayton Act, as amended (15 U.S.C., Section 18), and in violation of Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C., Section 45). Accordingly the Commission hereby issues its complaint, stating its charges with respect thereto as follows:

DEFINITIONS

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

(a) "Supermarket"—a food department in a nonfood store or a food store with annual sales of one million dollars or more.

(b) "Food Department in a Nonfood Store"—a department selling grocery and other food products (for preparation and consumption away from the premises), located in an establishment primarily engaged in selling other than food products.

(c) "Dayton Marketing Area"—the metropolitan Dayton area encompassing Greene, Miami, Montgomery, and Preble Counties in the State of Ohio.

(d) "Food Stores"—retail establishments primarily engaged in selling food for home preparation and consumption.

RESPONDENTS

2. Respondent, the Kroger Company ("Kroger"), is a corporation organized and existing under the laws of the State of Ohio, with its

offices and principal place of business at 1014 Vine Street, Cincinnati, Ohio.

3. Kroger is a fully integrated food distributor; it is principally engaged in the ownership and operation of approximately 1500 retail food stores in 23 states. Kroger also manufactures and processes food and kindred products, including breads, roasted coffee, packaged and canned milk, and candy. In 1969, Kroger ranked third in terms of sales in the United States among companies operating retail food stores.

4. From the period January 1, 1960 through December 31, 1969, Kroger made some 42 separate acquisitions. These acquisitions involved about 90 food stores, 33 drug stores, 6 wholesalers, 2 food departments, 2 meat processors, and a hatchery. The aggregate sales of these companies in the years prior to acquisition approximated \$200 million.

5. At all times relevant herein, Kroger purchased, sold and shipped products in interstate commerce throughout the United States, and was engaged in commerce as "commerce" is defined in the Clayton Act and in the Federal Trade Commission Act.

6. Respondent, Federated Department Stores, Inc., ("Federated"), is a corporation organized and existing under the laws of the State of Delaware, with its offices and principal place of business at 222 West Seventh Street, Cincinnati, Ohio.

7. Federated is principally engaged in the ownership and operation of conventional department stores and discount operations throughout the United States. For the fiscal year ending January 31, 1970, Federated had net sales and other income of \$1.999 billion. Among these discount operations are several Gold Circle Discount Stores located in Columbus and Dayton, Ohio. These stores, which retail a broad line of soft goods, each normally occupy approximately 120,000 square feet of which about 24,000 square feet is devoted to a food department. Federated first opened two Gold Circle Stores in 1967 in Columbus and in 1969, Federated opened three Gold Circle Stores in Dayton and one more Gold Circle Store in Columbus. The food departments in the Dayton Gold Circle Stores were operated by Federated prior to the subject acquisition. The food departments in the Columbus Gold Circle Stores are operated by a third party.

8. At all times relevant herein, Federated and Gold Circle purchased, sold and shipped products in interstate commerce throughout the United States and were engaged in commerce as "commerce" is defined in the Clayton Act and the Federal Trade Commission Act.

ACQUISITION

9. Kroger acquired the food departments of each of the three Gold Circle Stores located in the Dayton marketing area through a lease agreement between Kroger and Federated, dated May 22, 1970, and effective May 24, 1970.

TRADE AND COMMERCE

10. There is a steady stream of commerce involved in the distribution of groceries and other food store products from manufacturers located throughout the United States to consumers residing in the Dayton marketing area through supermarkets and other food stores. Total food store sales in the Dayton marketing area approximated \$330 million in 1969.

11. Kroger is the leading food store operator in the Dayton marketing area. Kroger's \$66 million in food store sales represented about 20 percent of total food store sales in the Dayton marketing area.

12. The four leading food store operators in the Dayton marketing area accounted for approximately 42 percent of the 1969 food store sales. The eight largest food store operators in the Dayton marketing area accounted for approximately 56 percent of the 1969 food store sales.

13. Supermarkets account for about 70 percent of all food store sales in the Dayton marketing area. Total supermarket sales in the area approximated \$225 million in 1969. Kroger is the leading supermarket operator in the Dayton market area. The sales of Kroger's 25 supermarkets represented about 29 percent of the area's supermarket sales in 1969.

14. The four leading companies in the supermarket business in the Dayton marketing area accounted for approximately 62 percent of the 1969 supermarket sales in the Dayton marketing area. The eight leading companies accounted for over 82 percent of the 1969 supermarket sales in the area.

15. In 1969, the food departments of the Gold Circle Stores in Dayton, one of which was open for six months of the year and the other two of which were each open for only two months, had aggregate sales of \$2.8 million. During 1970, prior to the acquisitions by Kroger, these food departments had sales of \$3.4 million. From January 1, 1970, to June 30, 1970, the Gold Circle supermarkets in Dayton accounted for about 2.5 percent of the area's food store sales and almost 3.5 percent of the area's supermarket sales.

EFFECTS OF ACQUISITION

16. The acquisition of the three Gold Circle food departments in Dayton, Ohio by Kroger constitutes an unfair method of competition and an unfair act or practice.

17. The effects of said acquisition may be to substantially lessen competition or to tend to create a monopoly in the sale and distribution of groceries and other food store products by supermarkets and by all food stores in the Dayton marketing area, among other ways, as follows:

(a) Actual and potential competition between Kroger and Gold Circle in the distribution and sale of groceries and other food store products in the Dayton marketing area has been eliminated.

(b) Concentration in the retail distribution of groceries and other food store products increased in the Dayton marketing area.

(c) Gold Circle has been eliminated as a substantial independent competitive factor in the distribution and sale of groceries and other food store products in the Dayton marketing area.

(d) Further mergers and acquisitions in the food industry may be encouraged.

VIOLATIONS

18. The acquisition of the three Gold Circle food departments in the Dayton marketing area by Kroger, constitutes a violation of Section 7 of the Clayton Act (15 U.S.C. 18) as amended, and a violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45) as amended.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the Kroger Company, a corporation, and Federated Department Stores, Inc., a corporation, respondents herein, with a violation of Section 7 of the Clayton Act, as amended (15 U.S.C. Section 18), and of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C., Section 45); and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent, 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.

Respondent Federated Department Stores, Inc., is a corporation organized and existing under the laws of the State of Delaware, with its offices and principal place of business at 222 West Seventh Street, Cincinnati, Ohio.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents and the proceeding is in the public interest.

ORDER

I

It is ordered, That within nine (9) months from the effective date of this order, respondent the Kroger Company ("Kroger") shall cease operating the food departments in each of the premises in Dayton, Ohio, leased to Kroger by the leases executed by Kroger, as tenant, and Federated Department Stores, Inc. ("Federated"), as landlord, on May 22, 1970, and Kroger shall not thereafter resume operation of the food departments in any of said premises at any time during the term of said leases, including any renewal term thereof; and Federated shall take no action to require Kroger to continue to operate or resume operation of the said premises after the effective date of this order, and shall cooperate with Kroger in Kroger's cessation of the aforesaid operation within the said nine (9) month period. Any assignment of the aforesaid leases, or any new leases of the aforesaid premises for operation as food departments commencing upon the termination of Kroger's operation of those premises, to any food store chain having more than \$500 million annual food store sales or more than five percent (5%) of the Dayton, Ohio marketing area food store sales (according to the Fairchild Publications' "1971 Distribution of Food Store Sales In 288 Cities"), shall be subject to prior approval by the Commission; any such assignment or new lease to any other party engaged in the operation of food stores shall not be consummated without providing ten (10) days' prior notification to the Commission.

II

It is further ordered, That:

(A) For a period of ten (10) years from the effective date of this order, to the extent specified in subparagraphs (B) and (C) below, Kroger shall not 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 food store or the whole or any part of a food department in a non-food store, where such acquisition involves:

(1) Five (5) or more food stores or food departments in non-food stores, or

(2) Annual food store or food department sales of more than five million dollars (\$5,000,000), or

(3) Combined (Kroger and the food stores or food departments to be merged or acquired) food store or food department sales of more than five percent (5%) of total food store sales in any city or county in the United States.

(B) The prohibition contained in subparagraph (A) shall apply to any merger or acquisition of food stores or food departments in non-food stores located in the following described areas of the United States: The States of Alabama, Arkansas, Georgia, Illinois, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, North Carolina, Ohio, Tennessee, West Virginia, Wisconsin; those portions of the States of Pennsylvania and Virginia west of the 78th meridian; that portion of the State of Texas east of the 100th meridian; and those portions of the State of California located south of an east-west line through the northern boundary of the City of Fresno and within the standard metropolitan statistical areas of San Francisco-Oakland and Stockton.

(C) The prohibition contained in subparagraph (A) shall also apply to any merger or acquisition of food stores or food departments in non-food stores located in any city or county in those portions of the United States not described in subparagraph (B), if Kroger is then operating any food stores or food departments in non-food stores in such city or county.

(D) For a period of ten (10) years from the effective date of this order, Kroger shall not merge with or acquire, directly or indirectly, through subsidiaries or in any other manner, any food store or food department in a non-food store for which prior ap-

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proval is not required pursuant to subparagraphs (A)-(C) without providing sixty (60) days' prior notification to the Commission, or, when the time schedule does not permit such notification, without providing a letter to the Commission within ten (10) days after the agreement or understanding in principle is reached, stating that the time schedule does not permit sixty (60) days' prior notification and setting forth the reasons why such prior notification cannot be made; *Provided, however*, That for mergers or acquisitions involving not more than four (4) food stores or food departments in non-food stores and representing annual food store or food department sales of not more than five million dollars (\$5,000,000), notification to the Commission shall be provided within thirty (30) days following the consummation of such merger or acquisition.

III

It is further ordered, That, within sixty (60) days from the effective date of this order, and every sixty (60) days thereafter until Part I of this order has been fully complied with, Kroger and Federated shall each submit a verified written report to the Federal Trade Commission setting forth in detail the manner and form in which they intend to comply, are complying, or have complied, with this order.

IN THE MATTER OF

THE BRIDIE CORPORATION, ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION AND THE TRUTH IN LENDING ACTS