

IN THE MATTER OF

SUPERMARKET DEVELOPMENT CORPORATION, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF
THE CLAYTON AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACTS

Docket C-3224. Complaint, Mar. 17, 1988—Decision, Mar. 17, 1988

This consent order requires, among other things, Furr's, a wholly owned subsidiary of Supermarket Development Corporation, to divest supermarkets in 12 towns and cities in Texas and New Mexico, to obtain prior Commission approval for future acquisitions by Furr's of grocery stores located in the geographic area covered by the El Paso division, and to hold separate the El Paso division until the required divestitures are completed.

Appearances

For the Commission: *Joan Greenbaum.*

For the respondents: *Joseph A. DeFrancis, Latham & Watkins, Washington, D.C. Joushua F. Greenberg and Michael Malina, Kay, Scholer, Fierman, Hays & Handler, New York City.*

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 respondents, Supermarket Development Corp. ("SDC" or "Furr's") and SSI Associates, L.P. ("Safeway"), entities subject to the jurisdiction of the Federal Trade Commission, have entered into an agreement, described in paragraph 10 herein, that, if consummated, would violate the provisions of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45; that said agreement and the actions of the respondents to implement that agreement constitute violations of Section 5 of the FTC Act, 15 U.S.C. 45; 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 as follows:

I. DEFINITIONS

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

Supermarket means any full-line retail food store with annual sales

of not less than \$1.5 million, and which sells primarily a wide variety of canned or frozen foods; dry groceries; non-edible grocery items; fresh meat, poultry and produce (vegetables and fruits). In addition, these stores often sell delicatessen items, bakery items, fresh fish, or other specialty items.

II. SUPERMARKET DEVELOPMENT CORP.

2. Respondent, Supermarket Development Corp., is a corporation organized and existing under the laws of the State of Texas, with executive offices located in Dallas, Texas.

3. SDC owns one hundred percent of the voting securities of Furr's, Inc. and controls the operations of Furr's, Inc.

4. Furr's, Inc. is a corporation organized and existing under the laws of the state of Texas, with its principal place of business in Lubbock, Texas.

5. For the year ending December 31, 1986, SDC had net sales of \$906,331,507.

6. Furr's is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

III. SSI ASSOCIATES, L.P.

7. SSI Associates, L.P. ("Safeway"), is a limited partnership organized and existing under the laws of the State of Delaware, with its principal place of business in San Francisco, California.

8. Safeway owns 96.4 percent of the voting securities of Safeway Stores, Inc. and controls the operations of Safeway Stores, Inc.

9. Safeway Stores, Inc. is a corporation organized and existing under the laws of the state of Delaware, with its principal place of business in Oakland, California.

10. For the year ending January 3, 1987, Safeway had net sales of \$20,311,480,000.

11. Safeway is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

IV. THE ACQUISITION

12. On or about April 9, 1987, SDC entered into an agreement with Safeway whereby SDC will purchase the El Paso Division of Safeway ("El Paso Division"), which comprises one closed and 59 open conven-

tional supermarkets; one food warehouse; a milk plant; and an ice cream plant. Almost half of the El Paso Division's stores are in Albuquerque, New Mexico, and El Paso, Texas. The rest of the Division's stores are in smaller metropolitan areas and towns in New Mexico and Texas. All are operated under the "Safeway" trade name and are conventional supermarkets. In 1986, the El Paso Division had grocery sales of \$530 million. There are nineteen cities and towns in which SDC's Furr's stores and Safeway both operate grocery stores.

V. TRADE AND COMMERCE

A. *Relevant Line of Commerce*

13. A relevant line of commerce in which to analyze Furr's acquisition of the El Paso Division is the retail sale and distribution of food and grocery items in supermarkets.

B. *Relevant Section of the Country*

14. Relevant sections of the country are individual cities and towns in the portions of West Texas and New Mexico served by the El Paso Division.

VI. MARKET STRUCTURE

15. Retail sale and distribution of food and grocery items in supermarkets in each of the following relevant sections of the country is extremely concentrated, whether measured by Herfindahl-Hirschman Indices ("HHI") or by two-firm and four-firm concentration ratios: Fort Stockton and Pecos in Texas; and Alamogordo, Artesia, Clovis, Espanola, Hobbs, Las Vegas, Lovington, Portales, Roswell and Silver City in New Mexico.

VII. BARRIERS TO ENTRY

16. Entry into the markets set out in paragraph 15 herein, in the event of substantial price rises, is unlikely.

VIII. ACTUAL COMPETITION

17. SDC and Safeway are actual competitors in the markets alleged herein.

IX. EFFECT

18. The effect of the acquisition, if consummated, may be substantially to lessen competition in relevant product markets in relevant sections of the country in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, in the following ways, among others:

- a. by eliminating direct competition between SDC and Safeway;
 - b. by increasing the likelihood that SDC will unilaterally exercise market power; and
 - c. by increasing the likelihood of, or facilitating, collusion where the acquisition would significantly increase already high concentration;
- all of which increase the likelihood that firms will increase prices and restrict the output of food and groceries both in the near future and for a longer period of time.

X. VIOLATIONS CHARGED

19. The proposed acquisition of Safeway stores in the twelve markets described above in paragraph 15 would, if consummated, violate Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

20. The Acquisition agreement set forth in paragraph 12 herein constitutes a violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the acquisition of certain assets of SSI Associates, L.P. ("Safeway") by Furr's, Inc., a wholly owned subsidiary of Supermarket Development Corporation (hereinafter collectively "Furr's"), and Furr's and Safeway, having been furnished with a copy of a draft complaint that the Bureau of Competition proposed to present to the Commission for its consideration, and which, if issued by the Commission, would charge Furr's and Safeway with violations of the Clayton Act and Federal Trade Commission Act; and

Respondents Furr's and Safeway, their attorneys, 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 aforesaid draft of complaint, 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 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 respondents have violated the said Acts, 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 sixty (60) days, and having duly considered the com-

ments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

SDC, which owns 100 percent voting securities and controls Furr's, Inc., is a corporation organized and existing under the laws of the State of Texas with its executive offices located at 1500 Diamond Shamrock Tower, Dallas, Texas;

Furr's, Inc., is a corporation organized and existing under the laws of the State of Texas with its executive offices located at 1708 Avenue G., Lubbock, Texas (hereinafter, SDC and Furr's will be referred to as "Furr's");

SSI Associates, L.P., which owns 96.4 percent of the voting securities of Safeway and controls Safeway, is a limited partnership organized and existing under the laws of the State of Delaware with its executive offices located c/o Kohlberg Kravis Roberts & Company, 101 California Street, San Francisco, California;

Safeway is a corporation organized and existing under the laws of the State of Delaware, with its executive offices located at 201 Fourth Street, Oakland, California (hereinafter, SSI and Safeway will be referred to as "Safeway").

The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Furr's and Safeway, and the proceeding is in the public interest.

ORDER

I.

As used in this order, the following definitions shall apply:

(A) "*Furr's*" means Furr's, Inc., its predecessors, subsidiaries, divisions, groups and affiliates controlled by Furr's and their respective directors, officers, employees, agents and representatives and their respective successors and assigns, and Supermarket Development Corporation, its predecessors, subsidiaries, divisions, groups and affiliates controlled by Supermarket Development Corporation and their respective directors, officers, employees, agents and representatives and their respective successors and assigns.

(B) "*Safeway*" means Safeway, its predecessors, subsidiaries, divisions, groups and affiliates controlled by Safeway and their respective directors, officers, employees, agents and representatives and their respective successors and assigns and SSI Associates, L.P., its prede-

cessors, subsidiaries, divisions, groups and affiliates controlled by SSI Associates, L.P. and their respective directors, officers, employees, agents and representatives and their respective successors and assigns.

(C) "*Acquisition*" means Furr's acquisition of the assets of Safeway's El Paso Division.

(D) "*El Paso Division*" means the sixty grocery stores of Safeway in its El Paso Division, inventory, an administrative building, a distribution center and all related real property and facilities, excluding the dairy and ice cream plants.

(E) "*Assets to be divested*" means the assets described in paragraph II (A), also known as "*II (A) properties*."

(F) "*To be acquired store*" means a retail grocery store in the El Paso Division.

II.

It is ordered, That:

(A) Furr's shall divest, absolutely and in good faith, within nine months from the date this order becomes final, either a store to be acquired or a grocery store presently operated by Furr's in each of the following locations: (a) Alamogordo, New Mexico; (b) Artesia, New Mexico; (c) Clovis, New Mexico; (d) Espanola, New Mexico; (e) Fort Stockton, Texas; (f) Hobbs, New Mexico; (g) Las Vegas, New Mexico; (h) Lovington, New Mexico; (i) Pecos, Texas; (j) Portales, New Mexico; (k) Roswell, New Mexico; and (l) Silver City, New Mexico.

(B) Furr's and Safeway shall maintain the viability and marketability of the assets required to be divested and shall not cause or permit the destruction, removal or impairment of any assets or business to be divested except in the ordinary course of business and except for ordinary wear and tear.

(C) The divestitures required by paragraph II (A) shall be divested to an acquirer or acquirers, and only in a manner, that receives the prior approval of the Commission. The purpose of the divestiture and agreements is to ensure the continuation of the assets as ongoing, viable enterprises engaged in the retail sale of groceries and to remedy the lessening of competition resulting from the acquisition as alleged in the Commission's complaint.

(D) If Furr's has not secured approval from the Commission of a divestiture of all the properties within the nine-month period specified in paragraph II (A), Furr's consents to the appointment by the Commission of a trustee to divest the properties. In the event that the Commission brings an action pursuant to Section 5 (l) of the Federal

Trade Commission Act, 15 U.S.C. 45(l), or any other statute enforced by the Commission, Furr's consents to the appointment of a trustee in such action. The appointment of a trustee shall not preclude the Commission from seeking civil penalties and other relief available to it for any failure by Furr's to comply with this order.

(E) If a trustee is appointed by the Commission or a court pursuant to paragraph II (D) of this order, Furr's consents to the following terms and conditions regarding the trustee's duties and responsibilities:

1. The Commission shall select the trustee, subject to Furr's consent, which shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures.

2. The trustee shall have the power and authority to divest any properties listed in paragraph II (A) in any location listed therein in which a store has not been divested or for which a contract of sale has not been approved by the Commission within the time period for divestiture in paragraph II (A). The trustee shall have six months from the date of appointment to accomplish the divestiture, which shall be subject to the prior approval of the Commission and, if the trustee is appointed by a court, subject also to the prior approval of the court.

3. If, at the end of the six-month period, the trustee has not secured approval of divestiture as required by paragraph II (A), the trustee may, if the Commission requires in order to accomplish the divestiture, add such other assets acquired pursuant to the acquisition as are required to effectuate the divestiture of the II (A) properties.

4. The trustee shall have full and complete access to the personnel, books, records and facilities of any store that the trustee has the duty to divest, and Furr's shall develop such financial or other information relevant to the assets to be divested as such trustee may reasonably request. Furr's shall cooperate with the trustee, and shall take no action to interfere with or impede the trustee's accomplishment of the divestiture.

5. The power and authority of the trustee to divest shall be at the most favorable price and terms available consistent with the order's absolute and unconditional obligation to divest and the purposes of the divestiture as stated in paragraph II (C).

6. The trustee shall serve at the cost and expense of Furr's on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall account for all monies derived from the sale and all expenses incurred. After approval by the Commission or the court of the account of the trustee, including fees for his or her

services, all remaining monies shall be paid to Furr's and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee divesting the trust property.

7. Within 20 days of the appointment of the trustee, Furr's shall, subject to the Commission's prior approval, and consistent with provisions of this order, transfer to the trustee all rights and powers necessary to permit the trustee to cause divestiture and sign agreements for the divestiture of the trust properties.

8. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed.

9. The trustee shall report in writing to the Commission and Furr's every sixty days concerning the trustee's efforts to accomplish divestiture.

(F) The Agreement to Hold Separate shall continue in effect until such time as a store in each of the locations listed in paragraph II (A) has been divested either by Furr's or a trustee.

III.

It is further ordered, That within sixty days after the date of service of this order, and every sixty days thereafter until Furr's and Safeway have fully complied with the provisions of paragraph II of this order, Furr's and Safeway shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying with, or have complied with that provision. Furr's and Safeway shall include in compliance reports, among other things that are required from time to time, a full description of contacts or negotiations for the divestiture of the II (A) properties, including the identity of all parties contacted. Furr's and Safeway also shall include in compliance reports copies of all written communications to and from such parties, and all internal memoranda, reports and recommendations concerning divestiture.

IV.

It is further ordered, That for a period commencing on the date of service of this order and continuing for ten years from and after the date of service of this order, Furr's shall cease and desist from acquiring, without the prior approval of the Federal Trade Commission, directly or indirectly, through subsidiaries or otherwise, any retail grocery store, including any facility that has been operated as a retail grocery store within six months of the date of the offer to purchase the facility, or any interest in a retail grocery store or any interest in

any individual, firm, partnership, corporation or other legal or business entity that directly or indirectly owns or operates a retail grocery store in the following cities or towns: Albuquerque, New Mexico; Alamogordo, New Mexico; Artesia, New Mexico; Carlsbad, New Mexico; Clovis, New Mexico; El Paso, Texas; Espanola, New Mexico; Fort Stockton, Texas; Hobbs, New Mexico; Las Cruces, New Mexico; Las Vegas, New Mexico; Lovington, New Mexico; Midland, Texas; Odessa, Texas; Pecos, Texas; Portales, New Mexico; Roswell, New Mexico; Santa Fe, New Mexico; and Silver City, New Mexico.

Provided, however, That these prohibitions shall not relate to the construction of new facilities by Furr's or the leasing of a facility by Furr's not presently a grocery store in those locations.

One year from the date of service of this order and annually thereafter, Furr's shall file with the Commission a verified written report of its compliance with this paragraph.

V.

For the purposes of determining or securing compliance with this order, and subject to any legally recognized privilege, upon written request and on reasonable notice to Furr's or Safeway made to their principal offices, Furr's and Safeway shall permit any duly authorized representatives of the Commission:

1. Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts and correspondence, memoranda and other records and documents in the possession or under the control of Furr's or Safeway relating to any matters contained in this order; and

2. Upon five days' notice to Furr's or Safeway and without restraint or interference from them, to interview officers or employees of Furr's or Safeway, who may have counsel present, regarding such matters.

It is further ordered, That Furr's shall notify the Commission at least thirty days prior to any change in its corporate structure that may affect compliance obligations arising out of 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 or any other change.

CONCURRING STATEMENT OF CHAIRMAN DANIEL OLIVER

This case concerns an effort by Supermarket Development Corporation—and Furr's, a wholly owned subsidiary—to acquire the El Paso Division of Safeway Stores, including sixty grocery stores and a vari-

ety of other assets. The order the Commission has accepted requires Furr's, *inter alia*, to divest one store in each of twelve towns in Texas and New Mexico, and creates an elaborate mechanism to ensure that those divestitures are made. In particular, the order requires Furr's to hold the entire Safeway El Paso Division separate from its own operations until it makes the twelve divestitures. Moreover, if Furr's fails to make the divestitures within nine months, a trustee will be appointed to assume that responsibility. The order also requires Furr's to seek Commission approval—over a ten year period—of any acquisition of a retail grocery store in any of nineteen areas in Texas and New Mexico, including Albuquerque and Santa Fe, New Mexico; and El Paso, Odessa, and Midland, Texas.¹

As a consequence of these provisions, the consent order process has prevented Furr's from immediately integrating the El Paso Division into its own operations. As a result, Furr's has not yet been able to take advantage of the efficiencies associated with the acquisition, and consumers have not yet received the benefits of the acquisition, in the form of lower prices, better service, and other advantages.

Consent orders frequently have adverse effects of this sort, but those effects are usually outweighed by the need to prevent or undo the anticompetitive aspects of the mergers they address. In this matter, however, there is good reason to think that the order need not have been imposed. In its earlier consultations with the Commission staff, Furr's evinced a willingness to remedy all of the possibly anticompetitive aspects of the acquisition *prior* to its consummation. If the Commission had accepted that approach, the consent order would not have been necessary. Moreover, Furr's would have been able to take advantage of the efficiencies the acquisition offers immediately, and to begin offering lower prices and other advantages to consumers immediately, instead of many months later. In short, in my view, the public interest would have been better served by accepting the Furr's "fix-it-first" approach.

I regret that the Commission chose instead—in July 1987—to authorize our staff to seek to enjoin the entire acquisition. I opposed that decision because I felt that it was premature in light of the proposals that Furr's had made. I have nevertheless voted to accept the consent order because that course is preferable to the litigation alternative.

¹ In addition to the concerns with the consent order noted in the text, I do not believe that the prior approval provision in the order should apply to any markets other than the twelve in which divestitures are required. The Commission has determined that the appropriateness of prior approval provisions depends on "industry market structure and market conditions." *American Medical International*, 104 FTC 1, 224 (1984); accord, *Hospital Corp. of America*, 106 FTC 361, 514-15 (1985), *aff'd*, 807 F.2d 1381 (7th Cir. 1986), *cert. denied*, No. 86-1492 (U.S. May 3, 1987). It is not clear from the record that "market conditions and market structure in [the seven additional markets] are such that all such acquisitions . . . necessarily [would be] anticompetitive." See *American Medical International*, 104 FTC at 225; see also *Hospital Corp. of America*, 106 FTC at 513-17.

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Interlocutory Order

IN THE MATTER OF

DETROIT AUTO DEALERS ASSOCIATION, INC., ET AL.

Docket 9189. Interlocutory Order, April 8, 1988

ORDER

Counsel for General Motors respondents, having informed the Commission of the death of respondent William M. Packer, Jr., moved for dismissal of the complaint against Mr. Packer. Complaint counsel had no objection to the motion. Therefore,

It is ordered, That the complaint against Mr. Packer be, and it hereby is, dismissed.

Commissioner Bailey not participating.