

IN THE MATTER OF

PROMODES, S.A., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 7 THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT*Docket 9228. Complaint, Apr. 20, 1989—Decision, May 17, 1990*

This consent order requires, among other things, Red Food Stores, Inc., a subsidiary of Promodes S.A., a French grocery company, to divest six supermarkets; requires the divestiture to be made to a Commission-approved acquirer or acquirers within nine months after the order becomes final; and if the respondents do not divest in that time, requires that the respondents shall consent to the appointment by the Commission of a trustee to divest the properties.

Appearances

For the Commission: *Marimichael O. Skubel* and *Ronald B. Rowe*.

For the respondents: *Elaine M. Russo, Sherman & Sterling*, New York, N.Y.

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 ("Commission"), having reason to believe that the respondents, Promodes, S.A., a foreign corporation, Red Food Stores, Inc. (collectively "Red Food"), a wholly-owned subsidiary of Promodes, S.A., and The Kroger Company ("Kroger"), corporations subject to the jurisdiction of the Commission, have entered into an agreement pursuant to which Red Food will purchase the supermarket assets of Kroger in Chattanooga, Tennessee, that, if completed, 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 ("FTC Act"), 15 U.S.C. 45; that said offer, and the actions of the respondents to implement that offer, constitute violations of Section 5 of the FTC Act; and that a proceeding by the Commission in respect thereof would be in the public interest, hereby issues its complaint pursuant to Section 11 of the Clayton Act, 15 U.S.C. 21, and Section

5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), stating its charges as follows:

DEFINITIONS

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

a. "*Supermarkets*" means any full-line retail food stores of 10,000 or more square feet, and which sell primarily a wide variety of canned or frozen foods; dry groceries; non-edible grocery items; fresh meat, poultry and produce (vegetables and fruits), and which often sell delicatessen items, bakery items, fresh fish or other specialty items.

b. "*Red Food*" means Red Food Stores, Inc., its parent Promodes, S.A., and its subsidiaries, divisions and groups controlled by Red Food and their respective directors, officers, employees, agents and representatives, and their successors and assigns.

c. "*Kroger*" means The Kroger Company, its subsidiaries, divisions, and groups controlled by Kroger and their respective directors, officers, employees, agents and representatives, and their successors and assigns.

THE PARTIES

2. Respondent Promodes, S.A., is an alien corporation organized and existing under the laws of France, which is engaged in, among other things, owning and operating supermarkets, hypermarkets and other types of retail grocery operations in the United States, France and Italy.

3. Respondent Red Food Stores, Inc. ("*Red Food*"), a wholly-owned subsidiary of Promodes, S.A., an alien corporation organized and existing under the laws of France, is a Delaware corporation with its principal place of business at 5901 Shallowford Road, Chattanooga, Tennessee, which owns and operates 52 supermarkets located in Georgia and Tennessee.

4. Respondent The Kroger Company ("*Kroger*") is an Ohio corporation, with its principal place of business at 1014 Vine Street, Cincinnati, Ohio.

5. In 1988, Red Food had sales of \$537 million in Tennessee and Georgia.

6. Red Food 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.

7. Kroger 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.

THE ACQUISITION

8. On or about March 24, 1989, Red Food and Kroger entered into an agreement pursuant to which Red Food intends to purchase the Chattanooga, Tennessee, supermarket assets and operations of Kroger. Red Food and Kroger both operate supermarkets in the Chattanooga, Tennessee Metropolitan Statistical Area ("MSA"). If the acquisition is consummated as currently proposed by Red Food, the total value of the acquisition will be approximately \$6.5 million. Through this proposed asset acquisition, Red Food will acquire all the supermarket assets of Kroger in Chattanooga, Tennessee.

TRADE AND COMMERCE

Relevant Line of Commerce

9. A relevant line of commerce in which to analyze Red Food's acquisition of Kroger is the retail sale of food and grocery items in supermarkets.

Relevant Section of the Country

10. The relevant section of the country is the Chattanooga MSA, which consists of Hamilton, Sequatchie, and Marion counties in Tennessee, and Catoosa, Walker, and Dade counties in Georgia.

MARKET STRUCTURE

11. Retail sale of food and grocery items in supermarkets in the relevant section of the country is highly concentrated, whether measured by the Herfindahl-Hirschmann Index ("HHI") or by two-firm and four-firm concentration ratios.

ENTRY CONDITIONS

12. Entry into the retail sale of food and grocery items in supermarkets in the relevant section of the country is difficult or unlikely.

ACTUAL COMPETITION

13. Red Food and Kroger are actual competitors in the relevant section of the country located in the Chattanooga MSA.

EFFECTS

14. The effect of the acquisition, if consummated, may be substantially to lessen competition in the relevant line of commerce in the relevant section 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 Red Food and Kroger;
- b. By increasing the likelihood that Red Food will unilaterally exercise market power; or
- c. By increasing the likelihood of, or facilitating, collusion where the acquisition would significantly increase already high levels of concentration;

all of which increases the likelihood that firms will increase prices and restrict output of food and groceries both in the near future and for a longer period of time.

VIOLATIONS CHARGED

15. The proposed acquisition of Kroger by Red Food violates Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45 and 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.

Chairman Oliver and Commissioner Machol dissenting.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondents named in the caption hereof with violation of Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, as amended, and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the 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 Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of the Commission's rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Promodes, S.A., is a corporation organized and existing under the laws of France. Its principal executive offices have the following mailing address: B.P. 17, 14127 Mondeville Cedex, France.

2. Respondent Red Food Stores, Inc., is a Delaware corporation with its principal place of business at 5901 Shallowford Road, Chattanooga, Tennessee.

3. 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.

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

- a. "*Commission*" means the Federal Trade Commission.
- b. "*Promodes*" means Promodes, S.A., its parents, predecessors, subsidiaries, divisions, groups and affiliates controlled by Promodes and their respective directors, officers, employees, agents, and representatives, and their respective successors and assigns.
- c. "*Red Food*" means Red Food Stores, Inc., its parents, predecessors, subsidiaries, divisions, groups and affiliates controlled by Red Food and their respective directors, officers, employees, agents, and representatives, and their respective successors and assigns.
- d. "*Kroger*" means The Kroger Company, its parents, predecessors,

subsidiaries, divisions, groups and affiliates controlled by Kroger and their respective directors, officers, employees, agents, and representatives, and their respective successors and assigns.

e. "*Respondents*" means Promodes and Red Food.

f. "*Chattanooga, Tennessee MSA*" means the metropolitan statistical area comprised of the following counties: Hamilton, Marion, and Sequatchie in Tennessee, and Catoosa, Walker, and Dade in Georgia.

g. "*Acquisition*" means respondents' acquisition of the seven grocery stores owned by Kroger located in the Chattanooga, Tennessee MSA.

h. "*Supermarket*" means any retail food store of 10,000 or more square feet and which sells primarily a variety of canned or frozen foods; dry groceries; non-edible grocery items; fresh meat, poultry and produce (vegetables and fruits) and which often sells delicatessen items, bakery items, fresh fish or other specialty items.

i. "*Assets to be divested*" means the assets described in Paragraph II(A), also known as "II(A) Properties."

II.

It is ordered, That:

(A) Within nine (9) months after this order becomes final, respondents shall divest, absolutely and in good faith,

(1) The Red Food supermarket, currently operating under the trade name "Festival," which was formerly a Kroger store, located at 6901 Lee Highway, Chattanooga, Tennessee;

(2) The Red Food supermarket, currently operating under the trade name "Festival," which was formerly a Kroger store, located at 114 Battlefield Parkway, Fort Oglethorpe, Georgia;

(3) The Red Food supermarket, currently operating under the trade name "Festival," which was formerly a Kroger store, located at 4803 Highway 58, Chattanooga, Tennessee;

(4) The Red Food supermarket, which was formerly a Kroger Store, located at 5080 South Terrace, East Ridge, Tennessee;

(5) The Red Food supermarket located at 401 West Martin Luther King Boulevard, Chattanooga, Tennessee; and

(6) The Red Food supermarket located at 2278 Elm Avenue, South Pittsburg, Tennessee.

The assets to be divested shall include the grocery business

operated, all assets, leases, properties, business and goodwill, tangible and intangible, utilized in the distribution or sale of groceries at the listed locations.

(B) Divestiture of the II(A) Properties shall be made only to an acquirer or acquirers that receive the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. The purpose of the divestiture of the II(A) Properties is to ensure the continuation of the assets as ongoing, viable supermarkets engaged in the same businesses in which the Properties are presently employed and to remedy the lessening of competition resulting from the acquisition as alleged in the Commission's complaint.

(C) Respondents shall take such action as is necessary to maintain the viability and marketability of the II(A) Properties and shall not cause or permit the destruction, removal or impairment of any assets or businesses to be divested except in the ordinary course of business and except for ordinary wear and tear.

III.

It is further ordered, That:

(A) If respondents have not divested, absolutely and in good faith and with the Commission's approval, the II(A) Properties within nine (9) months after this order becomes final, respondents shall consent to the appointment by the Commission of a trustee to divest the II(A) 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, respondents shall consent to the appointment of a trustee in such action. The appointment of a trustee shall not preclude the Commission from seeking civil penalties or any other relief available to it for any failure by respondents to comply with this order.

(B) If a trustee is appointed by the Commission or court pursuant to Part III(A) of this order, respondents shall consent to the following terms and conditions regarding the trustee's duties and responsibilities:

1. The Commission shall select the trustee, subject to the consent of respondents, which consent 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 the II(A) Properties that have not been divested by respondents within the time period for divestiture in Part II. The trustee shall have twelve (12) months from the date of appointment to accomplish the divestiture of the II(A) Properties, 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. If, however, at the end of the twelve-month period the trustee has submitted a plan of divestiture for the Commission's approval or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission or by the court for a court-appointed trustee; *provided, however*, that the Commission or court may only extend the divestiture period two (2) times.

3. The trustee shall have full and complete access to the personnel, books, records, and facilities related to those assets that the trustee has the duty to divest. Respondents shall develop such financial or other information as the trustee may reasonably request and shall cooperate with the trustee. Respondents shall take no action to interfere with or impede the trustee's accomplishment of the divestiture.

4. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to respondents' absolute and unconditional obligation to divest at no minimum price and the purposes of the divestiture as stated in Part II.

5. The trustee shall serve without bond or other security at the cost and expense of respondents on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have authority to retain at the cost and expense of respondents such consultants, accountants, attorneys, business brokers, appraisers and other representatives and assistants as are reasonably necessary to assist in the divestiture. The trustee shall account for all monies derived from the divestiture 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 respondents 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 II(A) Properties. Nothing herein shall be construed to limit the trustee's compensation to an amount not in excess of monies derived from the sale.

6. Within fifteen (15) days after appointment of the trustee and subject to the prior approval of the Commission and, if the trustee was appointed by a court, subject also to the prior approval of the court, respondents shall execute a trust agreement that transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture of the II(A) Properties.

7. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as in Paragraph III of this order.

8. The trustee shall report in writing to respondents and the Commission every sixty (60) days from the date the trust agreement is executed concerning the trustee's efforts to accomplish divestiture.

IV.

It is further ordered, That, within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until respondents have fully complied with the provisions of Paragraph II of this order, Red Food 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, or have complied with those provisions. Red Food shall include in its compliance report, among other things that are required from time to time, a full description of substantive contacts or negotiations for the divestiture of assets or businesses specified in Paragraph II of this order, including the identity of all parties contacted. Red Food shall include in its compliance report, copies of all written communications to and from such parties, all internal memoranda, reports, and recommendations concerning divestiture.

V.

It is further ordered, That, for a period commencing on the date this order becomes final and continuing for ten (10) years, respondents shall cease and desist from acquiring without the prior approval of the Federal Trade Commission, directly or indirectly, through subsidiaries or otherwise, any supermarket or leasehold interest in any supermarket located in the Chattanooga, Tennessee MSA, including any facility that has operated as a supermarket within six (6) months of the date of the offer of purchase, or any interest in or the stock or

share capital of any entity that owns any interest in or operates any supermarkets located in the Chattanooga, Tennessee MSA, or any interest in or the stock or share capital of any entity that owned any interest in or operated any supermarket located in the Chattanooga, Tennessee MSA within six (6) months of the date of the offer of purchase. *Provided, however,* that these prohibitions shall not relate to the construction of new facilities or the leasing of facilities that have not operated as supermarkets within six months of the date of the offer to lease. One (1) year from the date this order becomes final and annually for nine (9) years thereafter respondents shall file with the Federal Trade Commission a verified written report of their compliance with this paragraph.

VI.

It is further ordered, That respondents shall notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in the corporation such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation, dissolution or sale of subsidiaries or any other change that may affect compliance obligations arising out of the order.

Complaint

113 F.T.C.

IN THE MATTER OF

ARCHER-DANIELS-MIDLAND COMPANY, ET AL.

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

Docket C-3289. Complaint, May. 22, 1990—Decision, May 22, 1990

This consent order requires, among other things, Archer-Daniels-Midland Company and its subsidiary, ADM Milling Co., to divest certain wheat flour mills within twelve months of the date this order becomes final and to comply with all the terms of the Agreement to Hold Separate. If respondents do not divest the properties within twelve months of the order, the order requires that they shall consent to the appointment by the Commission of a trustee to divest the properties. Respondents are also required to obtain FTC approval, for a period of 10 years, before acquiring any assets located in the southeast portion of the U.S. used for the production, distribution or sale of bulk bakery wheat flour.

Appearances

For the Commission: *Barbara K. Shapiro* and *Marc G. Schildkraut*.

For the respondents: *Owen Johnson, Akin, Gump, Strauss, Hauer & Feld*, Washington, D.C.

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondents Archer-Daniels-Midland Company and ADM Milling Co., a wholly-owned subsidiary of Archer-Daniels-Midland Company (hereinafter collectively referred to as "ADM"), both corporations subject to the jurisdiction of the Commission, have acquired certain assets of Dixie Portland Flour Mills, Inc., Dixie Portland of Georgia, Inc., The White Lily Foods Company ("hereinafter collectively referred to as Dixie Portland") in violation of 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 ("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 pursuant to Section 11 of the Clayton Act, 15 U.S.C. 21 and