

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

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

I. DEFINITIONS

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

(A) "*ADM*" means Archer-Daniels-Midland Company and ADM Milling Co., their predecessors, subsidiaries, divisions, groups and affiliates controlled by Archer-Daniels-Midland Company or ADM Milling Co., and their respective directors, officers, employees, agents, and representatives, and their respective successors and assigns.

(B) "*Dixie Portland*" means Dixie Portland Flour Mills, Inc., Dixie Portland of Georgia, Inc., and The White Lily Foods Company, their predecessors, subsidiaries, divisions, groups and affiliates controlled by Dixie Portland Flour Mills, Inc., Dixie Portland of Georgia, Inc., or The White Lily Foods Company and their respective directors, officers, employees, agents, and representatives, and their respective successors and assigns.

(C) "*Bulk bakery wheat flour*" means wheat flour primarily sold to bakeries, manufacturers, or institutional users and delivered in unpackaged form.

II. THE RESPONDENTS

2. Respondent Archer-Daniels-Midland Company is a corporation organized under the laws of Delaware, with its principal office and place of business located at 4666 Faries Parkway, Decatur, Illinois.

3. Respondent ADM Milling Co. is a corporation organized and existing under the laws of Minnesota with its principal place of business at Suite 300, 4501 College Blvd., Leawood, Kansas.

4. Archer-Daniels-Midland Company and ADM Milling Co., at all times relevant herein, have been and are now engaged in commerce as the term "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and each is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

III. THE ACQUIRED COMPANY

5. Dixie Portland Flour Mills, Inc. is a corporation organized under the laws of Tennessee with its principal office and place of business located at 1755-D Lynnfield Road, Suite 107, Memphis, Tennessee.

6. Dixie Portland of Georgia, Inc., is a corporation organized and

existing under the laws of Georgia, with its principal office and place of business located at Old Milner Road, Milner Georgia.

7. The White Lily Foods Company is a corporation organized and existing under the laws of Delaware, with its principal office and place of business located at 218 Depot Avenue, Knoxville, Tennessee.

8. Dixie Portland Flour Mills, Inc., Dixie Portland of Georgia, Inc., and The White Lily Foods Company at all times relevant herein have been and are now engaged in commerce as the term "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and each is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

IV. THE ACQUISITION

9. On September 25, 1989, ADM entered into an Asset Purchase Agreement which contemplates the acquisition of all the assets and businesses of Dixie Portland other than Rustco Products Co. (hereinafter the "acquisition").

V. RELEVANT MARKETS

10. For purposes of this complaint, the relevant lines of commerce in which to assess the effects of ADM's acquisition of the assets of Dixie Portland is the production and sale of bulk bakery wheat flour.

11. For purposes of this complaint, the relevant sections of the country in which to assess the effects of ADM's acquisition of the assets of Dixie Portland is the southeastern United States, including eastern Tennessee, North Carolina, South Carolina, Georgia, Alabama, and Florida.

VI. MARKET STRUCTURE

12. The production and sale of bulk bakery wheat flour in the southeastern United States is concentrated, whether measured by the Herfindahl-Hirschmann Index or two-firm and four-firm concentration ratios.

VII. ENTRY CONDITIONS

13. Entry into production and sale of bulk bakery wheat flour in the southeastern United States is difficult.

VIII. COMPETITION

14. ADM and Dixie Portland are actual competitors in production and sale of bulk bakery wheat flour in the southeastern United States.

IX. EFFECTS

15. The effect of the acquisition may be substantially to lessen competition in production and sale of bulk bakery wheat flour in the southeastern United States in the following ways, among others:

(A) By eliminating direct and actual competition between ADM and Dixie Portland; and

(B) By significantly enhancing the likelihood of collusion or interdependent coordination among the firms that produce or sell bulk bakery wheat flour in the southeastern United States.

16. All of the above increase the likelihood that firms producing or selling bulk bakery wheat flour in the southeastern United States will increase prices and restrict output both in the near future and in the long term.

X. VIOLATION CHARGED

17. The asset purchase agreement and acquisition as set forth in paragraph 9 above 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.

Commissioner Calvani recused, and Commissioner Azcuenaga dissenting on the ground that the order provides inadequate relief.

DECISION AND ORDER

The Federal Trade Commission ("the Commission"), having initiated an investigation of the proposed acquisition by ADM Milling Co., a wholly owned subsidiary of Archer-Daniels-Midland Company, (hereinafter collectively "ADM"), of certain of the assets and businesses of Dixie Portland Flour Mills, Inc., Dixie Portland of Georgia, Inc., and The White Lily Foods Company, (hereinafter collectively "Dixie Portland"), which acquisition is more fully described at paragraph 6 below, and ADM having been furnished with a copy of a draft complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge ADM with violations of Section 7 of the Clayton Act as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act as amended, 15 U.S.C. 45; and

Respondents, 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 respondents have violated Section 5 and Section 7, and that the 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, 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:

1. Proposed respondent Archer-Daniels-Midland Company is a corporation organized under the laws of Delaware, with its principal office and place of business located at 4666 Faries Parkway, Decatur, Illinois.

2. Proposed respondent ADM Milling Co. is a corporation organized and existing under the laws of Minnesota with its principal place of business at Suite 300, 4501 College Blvd., Leawood, Kansas.

3. Dixie Portland Flour Mills, Inc., is a corporation organized under the laws of Tennessee with its principal office and place of business located at 1755-D Lynnfield Road, Suite 107, Memphis, Tennessee.

4. Dixie Portland of Georgia, Inc., is a corporation organized and existing under the laws of Georgia, with its principal office and place of business located at Old Milner Road, Milner, Georgia.

5. The White Lily Foods Company is a corporation organized and existing under the laws of Delaware, with its principal office and place of business located at 218 Depot Avenue, Knoxville, Tennessee.

6. On or about September 25, 1989, ADM Milling Co. and Dixie Portland entered into an agreement which contemplates the acquisition of certain assets and businesses of Dixie Portland by ADM Milling Co.

ORDER

I.

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

(A) "*Acquisition*" means the Asset Purchase Agreement entered into on September 25, 1989, in which ADM and Dixie Portland agreed that ADM will acquire certain of the assets and businesses of Dixie Portland.

(B) "*ADM*" means Archer-Daniels-Midland Company and ADM Milling Co., their predecessors, subsidiaries, divisions, groups and affiliates (including the assets and businesses of Dixie Portland as hereinafter defined) controlled by Archer-Daniels-Midland Company or ADM Milling Co., and their respective directors, officers, employees, agents, and representatives, and their respective successors and assigns.

(C) "*Properties to be divested*" means the assets and businesses of the wheat flour mills currently owned by Dixie Portland in Milner, Georgia, and in Knoxville, Tennessee.

(D) "*Assets and businesses*" include but are not limited to all assets, properties, business and goodwill, tangible and intangible, utilized in the transportation, production, distribution or sale of wheat flour or its raw materials that ADM will acquire from Dixie Portland, including, without limitation, the following:

1. All machinery, fixtures, equipment, vehicles, transportation facilities, furniture, tools and other tangible personal property;
2. All customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, research materials, technical information, management information systems, software, inventions, trade secrets, technology, know-how, specifications, designs, drawings, processes and quality control data;
3. Inventory and storage capacity;
4. All right, title and interest in and to owned or leased real property, together with appurtenances, licenses and permits;
5. All right, title and interest in and to the contracts entered into in the ordinary course of business with customers (together with associated bid and performance bonds), suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees;

6. All rights under warranties and guarantees, express or implied;
7. All books, records and files; and
8. All items of prepaid expense.

(E) "*Commission*" means the Federal Trade Commission.

(F) "*Dixie Portland*" means Dixie Portland Flour Mills, Inc., Dixie Portland of Georgia, Inc., and The White Lily Foods Company, their predecessors, subsidiaries, (other than Rustco Products, Co.) divisions, groups and affiliates controlled by Dixie Portland Flour Mills, Inc., Dixie Portland of Georgia, Inc., or The White Lily Foods Company and their respective directors, officers, employees, agents, and representatives, and their respective successors and assigns.

(G) "*Remaining properties to be divested*" means the properties to be divested. *Provided, however*, if ADM has divested, after receiving Commission approval, the assets and businesses of one of the wheat flour mills included in the properties to be divested, the remaining properties to be divested shall mean the assets and businesses of the remaining wheat flour mill within the properties to be divested. *Provided, further*, if ADM has divested, after receiving Commission approval, the assets and businesses of the wheat flour mill owned by Dixie Portland in Cleveland, Tennessee, the assets and businesses of the wheat flour mill owned by Dixie Portland in Knoxville, Tennessee shall be excluded from the Remaining Properties to be Divested.

(H) "*Southeast*" means North Carolina, South Carolina, Georgia, Alabama, Florida and that part of Tennessee east of Nashville.

(I) "*Viability and Competitiveness*" of the properties to be divested or the remaining properties to be divested means each such property has sufficient provision for transportation, wheat storage, cleaning, grinding, and milling; is capable of operating independently at the same output as currently (at competitive prices); and is capable of having the same competitive impact as it currently has in the bulk bakery wheat flour market.

II.

It is ordered, That:

(A) Within twelve (12) months of the date this order becomes final, ADM shall divest; absolutely and in good faith, the properties to be divested, along with any additional assets and businesses of Dixie Portland and other arrangements that may be necessary to assure the viability and competitiveness of the properties to be divested.

Provided, however, ADM may divest absolutely and in good faith, the assets and businesses of the wheat flour mills currently owned by Dixie Portland in Milner, Georgia, and in Cleveland, Tennessee, if the Commission, in its sole discretion, approves the substitute divestiture of the assets and businesses of such mills for the divestiture of the properties to be divested.

(B) ADM shall comply with all terms of the Agreement to Hold Separate, attached hereto and made a part hereof as Appendix I. Said Agreement shall continue in effect until such time as ADM has divested the properties to be divested or until such other time as the Agreement to Hold Separate provides.

(C) ADM shall divest the properties to be divested only to an acquiring entity or entities that receive the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. ADM shall demonstrate the viability and competitiveness of the properties to be divested in its application for approval of a proposed divestiture. The purpose of the divestiture of the properties to be divested is to ensure the continuation of the assets as ongoing, viable wheat flour mills engaged in the same businesses in which the properties to be divested are presently employed and to remedy the lessening of competition resulting from the acquisition as alleged in the Commission's complaint.

(D) ADM shall take such action as is necessary to maintain the viability and marketability of the properties to be divested and shall not cause or permit the destruction, removal or impairment of any assets or businesses it may have to divest except in the ordinary course of business and except for ordinary wear and tear.

III.

It is further ordered, That:

(A) If ADM has not divested, absolutely and in good faith and with the Commission's approval, the properties to be divested within twelve (12) months of the date this order becomes final, ADM shall consent to the appointment by the Commission of a trustee to divest the remaining properties to be divested, along with any additional assets and businesses of Dixie Portland and other arrangements that may be necessary to assure the viability and competitiveness of the remaining properties to be divested. *Provided, however*, if the Commission has not approved or disapproved a proposed divestiture within 120 days of

the date the application for such divestiture has been put on the public record, the running of the twelve (12) month period shall be tolled until the Commission approves or disapproves the divestiture. In the event the Commission or the Attorney General 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, ADM shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by ADM to comply with this order.

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

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

2. The trustees shall, subject to the prior approval of the Commission, have the exclusive power and authority to divest the remaining properties to be divested, along with any additional assets and businesses of Dixie Portland and other arrangements that may be necessary to assure the viability and competitiveness of the remaining properties to be divested.

3. The trustee shall have eighteen (18) months from the date of appointment to accomplish the divestiture. If, however, at the end of the eighteen-month period the trustee has submitted a plan of divestiture or believes that divestiture can be accomplished within a reasonable time, the divestiture period may be extended by the Commission. *Provided, however*, the Commission may only extend the divestiture period two (2) times.

4. The trustee shall have full and complete access to the personnel, books, records and facilities related to the remaining properties to be divested, or any other relevant information, as the trustee may reasonably request. ADM shall develop such financial or other information as such trustee may reasonably request and shall cooperate with any reasonable request of the trustee. ADM shall take

no action to interfere with or impede the trustee's accomplishment of the divestitures. Any delays in divestiture caused by ADM shall extend the time for divestiture under this paragraph in an amount equal to the delay, as determined by the Commission or the court for a court-appointed trustee.

5. Subject to ADM's absolute and unconditional obligation to divest at no minimum price and the purpose of the divestiture as stated in Paragraph II.(C) of this order, the trustee shall use his or her best efforts to negotiate the most favorable price and terms available with each acquiring entity for the divestiture of the remaining properties to be divested. The divestiture shall be made in the manner set out in Paragraph II, *provided, however*, if the trustee receives bona fide offers from more than one acquiring entity or entities, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity or entities selected by ADM from among those approved by the Commission.

6. The trustee shall serve, without bond or other security, at the cost and expense of ADM, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have authority to employ, at the cost and expense of ADM, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are reasonably necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the sale and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of ADM 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's divesting the remaining properties to be divested.

7. ADM shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, or liabilities arising in any manner out of, or in connection with, the trustee's duties under this order.

8. Within sixty (60) days after appointment of the trustee, and subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, ADM shall execute a trust agreement that transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture required by this order.

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

10. The Commission and, in the case of a court-appointed trustee, the court may on its own initiative or at the request of the trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this order.

11. The trustee shall have no obligation or authority to operate or maintain the remaining properties to be divested.

12. The trustee shall report in writing to ADM and to the Commission every sixty (60) days 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 ADM has fully complied with the provisions of Paragraphs II and III of this order, ADM shall submit to the Federal Trade Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying or has complied with those provisions. ADM shall include in its compliance reports, 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. ADM also shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and 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, ADM shall cease and desist from acquiring, without the prior approval of the Federal Trade Commission, directly or indirectly, through subsidiaries or otherwise, assets located in the Southeast used for or previously used for (and still suitable for use for) the production, distribution or sale of bulk bakery wheat flour. ADM shall also cease and desist from acquiring, without the prior approval of the Federal Trade Commis-

sion, directly or indirectly, through subsidiaries or otherwise, any interest in, or the stock or share capital of any entity that owns or operates assets located in the Southeast engaged in the production, distribution or sale of bulk bakery wheat flour. *Provided, however,* these prohibitions shall not relate to the construction of new facilities. One year from the date this order becomes final and annually for nine years thereafter, ADM shall file with the Federal Trade Commission a verified written report of its compliance with this paragraph.

VI.

It is further ordered, That, 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 ADM made to its principal office, ADM shall permit any duly authorized representatives of the Federal Trade Commission:

(A) Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of ADM relating to any matters contained in this order; and

(B) Upon five days notice to ADM and without restraint or interference from ADM, to interview officers or employees of ADM, who may have counsel present, regarding such matters.

VII.

It is further ordered, That ADM 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.

Commissioner Calvani recused, and Commissioner Azcuenaga dissenting on the ground that the order provides inadequate relief.

APPENDIX I

AGREEMENT TO HOLD SEPARATE

This Agreement to Hold Separate (the "Agreement") is by and

among Archer-Daniels-Midland Company, a corporation organized and existing under the laws of the State of Delaware, with its principal office and place of business located at 4666 Faries Parkway, Decatur, Illinois; ADM Milling Co., a corporation organized and existing under the laws of Minnesota, with its principal place of business at Suite 300, 4501 College Blvd., Leawood, Kansas (collectively referred to as 'ADM'); and the Federal Trade Commission^{*}(the "Commission"), an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.* (collectively, the "parties").

Premises

Whereas, on September 25, 1989, ADM entered into an asset purchase agreement which contemplates the acquisition of certain of the assets and businesses of Dixie Portland Flour Mills, Inc., Dixie Portland of Georgia, Inc., and The White Lily Foods Company (hereinafter the "acquisition"); and

Whereas, Dixie Portland Flour Mills, Inc. (with its principal executive address at 1755-D Lynnfield Road Suite 107, Memphis, Tennessee, Dixie Portland of Georgia, Inc., (with its principal office and place of business located at Old Milner Road, Milner, Georgia), and The White Lily Foods Company (with its principal office and place of business located at 218 Depot Avenue, Knoxville, Tennessee) (hereinafter "Dixie Portland") produce wheat flour; and

Whereas, the Commission is now investigating the acquisition to determine if it would violate any of the statutes enforced by the Commission; and

Whereas, if the Commission accepts the attached Agreement Containing Consent Order ("consent order"), the Commission must place it on the public record for a period of at least sixty (60) days and may subsequently withdraw such acceptance pursuant to the provisions of Section 2.34 of the Commission's Rules; and

Whereas, the Commission is concerned that if an understanding is not reached, preserving the *status quo ante* of Dixie Portland's assets and businesses during the period prior to the final acceptance of the consent order by the Commission (after the 60-day public notice period), divestiture resulting from any proceeding challenging the legality of the acquisition might not be possible, or might be less than an effective remedy; and

Whereas, the Commission is concerned that if the acquisition is

consummated, it will be necessary to preserve the Commission's ability to require the divestiture of the properties to be divested as described in Paragraph I of the consent order and the Commission's right to seek to restore Dixie Portland's wheat flour milling businesses as a viable competitor; and

Whereas, the purpose of this Agreement and the consent order is to:

(i) Preserve Dixie Portland's wheat flour milling business as a viable independent business pending the divestiture of the properties to be divested as viable and ongoing enterprises,

(ii) Remedy any anticompetitive effects of the acquisition, and

(iii) Preserve Dixie Portland's wheat flour mills as ongoing, viable wheat flour mills engaged in the same business in which they are presently employed in the event that divestiture is not achieved; and

Whereas, ADM entering into this Agreement shall in no way be construed as an admission by ADM that the acquisition is illegal; and

Whereas, ADM understands that no act or transaction contemplated by this Agreement shall be deemed immune or exempt from the provisions of the antitrust laws or the Federal Trade Commission Act by reason of anything contained in this Agreement.

Now, therefore, the parties agree, upon understanding that the Commission has not yet determined whether the acquisition will be challenged, and in consideration of the Commission's agreement that, unless the Commission determines to reject the consent order, it will not seek further relief from ADM with respect to the acquisition, except that the Commission may exercise any and all rights to enforce this Agreement and the consent order to which it is annexed and made a part thereof, and in the event the required divestitures are not accomplished, to seek divestiture of such assets as are held separate pursuant to this Agreement, as follows:

1. ADM agrees to execute and be bound by the attached consent order.

2. ADM agrees that from the date this Agreement is accepted until the earliest of the dates listed in subparagraphs 2.a—2.c, it will comply with the provisions of paragraph 3 of this Agreement:

a. three business days after the Commission withdraws its acceptance of the consent order pursuant to the provisions of Section 2.34 of the Commission's Rules;

b. 120 days after publication in the Federal Register of the consent

order, unless by that date the Commission has finally accepted such order,

c. the day after the divestitures required by the consent order have been completed.

3. ADM will hold Dixie Portland's assets and businesses associated with the transportation, production, distribution and sale of wheat flour and the acquisition of wheat as they are presently constituted, *except* for those assets and businesses associated exclusively with the wheat flour mills currently owned by Dixie Portland in Arkansas City, Kansas and Chicago, Illinois ("Dixie") separate and apart on the following terms and conditions:

a. Dixie, as it is presently constituted, shall be held separate and apart and shall be operated independently of ADM (meaning here and hereinafter, ADM excluding Dixie) except to the extent that ADM must exercise direction and control over Dixie to assure compliance with this Agreement.

b. ADM shall not exercise direction or control over, or influence directly or indirectly, Dixie or any of its operations or businesses; *provided, however*, that ADM may exercise only such direction and control over Dixie as is necessary to assure compliance with this Agreement.

c. ADM shall maintain the viability and marketability of Dixie and shall not sell, transfer, encumber (other than in the normal course of business), or otherwise impair its marketability or viability.

d. Except for the single ADM director, officer, employee, or agent serving on the "New Board" or "Management Committee" (as defined in subparagraph 3.h), ADM shall not permit any director, officer, employee, or agent of ADM to also be a director, officer or employee of Dixie.

e. Except as required by law, and except to the extent that necessary information is exchanged in the course of evaluating the acquisition, defending investigations or litigation, or negotiating agreements to dispose of assets, ADM shall not receive or have access to, or the use of, any of Dixie's "material confidential information" not in the public domain, except as such information would be available to ADM in the normal course of business if the acquisition had not taken place. Any such information that is obtained pursuant to this subparagraph shall only be used for the purpose set out in this subparagraph. ("Material confidential information," as used herein, means competitively sensitive or proprietary information not indepen-

dently known to ADM from sources other than Dixie, and includes but is not limited to customer lists, price lists, marketing methods, patents, technologies, processes, or other trade secrets).

f. ADM shall not change the composition of the management of Dixie except that the Dixie directors or members serving on the New Board or Management Committee (as defined in subparagraph 3.h) shall have the power to remove employees for cause.

g. All material transactions, out of the ordinary course of business and not precluded by subparagraphs 3.a—3.f hereof, shall be subject to a majority vote of the New Board or Management Committee (as defined in subparagraph 3.h).

h. ADM shall either separately incorporate Dixie and adopt new Articles of Incorporation and By-laws that are not inconsistent with other provisions of this Agreement or shall establish a separate business venture with articles of agreement covering the conduct of Dixie in accordance with this Agreement. ADM shall also elect a new three person board of directors of Dixie ("New Board") or Management Committee of Dixie ("Management Committee") once it is a majority owner of Dixie. ADM may elect the directors to the New Board or select the members of the Management Committee; *provided, however*, that such New Board or Management Committee shall consist of at least two current Dixie Portland directors, officers, or employees and no more than one ADM director, officer, employee, or agent. Except as permitted by this Agreement, the director of Dixie or member of the Dixie Management Committee who is also an ADM director, officer, employee or agent, shall not receive in his or her capacity as a director or Management Committee member of Dixie material confidential information and shall not disclose any such information received under this Agreement to ADM or use it to obtain any advantage for ADM. Said director of Dixie or member of the Management Committee who is also an ADM director, officer, employee or agent, shall enter a confidentiality agreement prohibiting disclosure of confidential information. Such director or Management Committee member shall participate in matters which come before the New Board or Management Committee only for the limited purpose of considering a capital investment or other transactions exceeding \$1,000,000 and carrying out ADM's and Dixie's responsibility to assure that properties to be divested are maintained in such manner as will permit their divestiture as ongoing, viable assets. Except as permitted by this Agreement, such Director or Management Committee member shall not participate in any matter, or attempt to influence the votes of the other directors or Management Committee members

with respect to matters that would involve a conflict of interest if ADM and Dixie were separate and independent entities. Meetings of the New Board or Management Committee during the term of this Agreement shall be stenographically transcribed and the transcripts retained for two (2) years after the termination of this Agreement.

i. All earnings and profits of Dixie shall be retained separately in Dixie. If necessary, ADM shall provide Dixie with sufficient working capital to operate at the current rate of operation.

j. Should the Federal Trade Commission seek in any proceeding to compel ADM (meaning here and hereinafter ADM including Dixie) to divest itself of Dixie or to compel ADM to divest any assets or businesses of Dixie that it may hold, or to seek any other injunctive or equitable relief, ADM shall not raise any objection based upon the expiration of the applicable Hart-Scott-Rodino Antitrust Improvements Act waiting period for the fact that the Commission has permitted the acquisition. ADM also waives all rights to contest the validity of this Agreement.

4. For the purpose of determining or securing compliance with this Agreement, subject to any legally recognized privilege, and upon written request with reasonable notice to ADM made to its principal office, ADM shall permit any duly authorized representative or representatives of the Commission:

a. Access during the office hours of ADM and in the presence of counsel to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of ADM relating to compliance with this Agreement;

b. Upon five (5) days notice to ADM, and without restraint or interference from it, to interview officers or employees of ADM, who may have counsel present, regarding any such matters.

5. This agreement shall not be binding until approved by the Commission.

ARCHER-DANIELS-MIDLAND COMPANY

J. R. Randall

President

ADM MILLING CO. -

H. D. Dale

Chairman

FEDERAL TRADE COMMISSION

Jay C. Shaffer

Acting General Counsel

IN THE MATTER OF

ILLINOIS CEREAL MILLS, INC., ET AL.

Docket 9213. Complaint, June 30, 1988—Dismissal Order, May 31, 1990*

The Commission has dismissed the complaint in this matter as to respondent Elders Grain, Inc., by granting a motion to that effect filed by complaint counsel. In certifying the motion to the Commission, the Administrative Law Judge agreed that continued prosecution of the case, with respect to this respondent, is no longer in the public interest because respondent has exited the dry corn milling industry.

ORDER DISMISSING COMPLAINT

Pursuant to Section 3.22 of the Commission's Rules of Practice, complaint counsel have moved that the Commission dismiss the complaint in this matter as to the respondent Elders Grain, Inc., and the Administrative Law Judge has certified the motion to the Commission, with his recommendation that the motion be granted. The motion is granted.

It is ordered, That the complaint in this matter be, and it hereby is, dismissed as to the respondent Elders Grain, Inc.

Commissioner Calvani recused.

*Complaint previously published at 113 FTC 273 (1990).