

IN THE MATTER OF

THE VONS COMPANIES, INC.

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-3391. Complaint, Aug. 7, 1992--Decision, Aug. 7, 1992*

This consent order requires, among other things, a California-based national grocery chain to sell its Madonna Road supermarket in San Luis Obispo to an FTC-approved purchaser within twelve months or else consent to the appointment of a Commission-approved trustee to divest the property. The respondent is also required, for a period of 10 years, to obtain FTC approval before making similar acquisitions.

Appearances

For the Commission: *Steven A. Newborn* and *Paul R. Roark*.

For the respondent: *George P. Stone, Munger, Tolles & Olson*,
Los Angeles, CA. *Terrance Wallock*, in-house counsel, Arcadia, CA.

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 respondent, The Vons Companies, Inc., an entity subject to the jurisdiction of the Commission, entered into an agreement with Williams Bros. Markets, Inc. ("Williams Bros."), a corporation, that violated Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that pursuant to that agreement, Vons acquired certain business interests of Williams Bros., and that such acquisition constitutes a 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, and it appearing that a proceeding in respect thereof would be in the public interest, the Commission 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. THE RESPONDENT

1. Respondent Vons is a corporation organized, existing and doing business under and by virtue of the laws of the State of Michigan with its principal place of business located at 618 Michellinda Avenue, Arcadia, California.

2. For the year ending December 31, 1990, Vons had net sales of approximately \$5.3 billion.

3. Vons is engaged in the operation of retail supermarkets in various states throughout the United States.

II. THE ACQUIRED ASSETS

4. Williams Bros. is a corporation organized, existing and doing business under and by virtue of the laws of the State of California with its principal place of business located at 124 West Carmen Lane, Santa Maria, California.

5. For the year ending December 31, 1990, Williams Bros. had net sales of approximately \$218.6 million.

6. Prior to and at the time of the acquisition by Vons, Williams Bros. was primarily engaged in the operation of retail supermarkets in California.

III. JURISDICTION

7. At all times relevant herein, Vons has been, and is now engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, 15 U.S.C. 12, and is a corporation whose business is in or affects commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

8. At all times relevant herein, Williams Bros. has been, and is now, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, 15 U.S.C. 12, and is a corporation whose business is in or affects commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

IV. ACTS AND PRACTICES

9. On or about September 3, 1991, Vons and Williams Bros. entered into a letter of intent for the acquisition by Vons of the assets and operations of 18 Williams Bros. supermarkets in the central coastal area of California. Included in the acquisition were three supermarkets in and adjacent to the city of San Luis Obispo, California. On or about December 31, 1991, Vons and Williams Bros. entered into a purchase and sale agreement to transfer the assets and operations of the 18 Williams Bros. supermarkets to Vons. On or about January 28, 1992, the acquisition was consummated.

10. On September 6, 1991, after Vons had entered into a letter of intent to purchase the Williams Bros. stores, Vons agreed to sell its store in San Luis Obispo to a drugstore operator. On or about September 12, 1991, it entered into a formal agreement with the drugstore operator. On or about September 30, 1991, escrow closed on the transaction. This transaction and the one described in paragraph 9 were inextricably intertwined: the second would not have been made but for the first. Vons sacrificed short run profits to secure market power in the relevant market by agreeing to sell its store in the city of San Luis Obispo to a person that did not intend to operate it as a supermarket for a lower price than it was offered by a person who did intend to operate it as a supermarket.

V. RELEVANT MARKETS

11. For purposes of this complaint, the relevant line of commerce in which to analyze the effects of the acquisition of Williams Bros. by Vons is the retail sale and distribution of food and grocery items in supermarkets. "Supermarket" means a retail grocery store that carries a wide variety of food and grocery items in particular product categories, including bread and dairy products; refrigerated and frozen food and beverage products; fresh and prepared meats and poultry; produce, including fresh fruits and vegetables; shelf-stable food and beverage products, including canned and other types of packaged products; staple food stuffs, which may include salt, sugar, flour, sauces, spices, coffee and tea; and other grocery products,

including non-food items, which may include soaps, detergents, paper goods, and other products, and health and beauty aids.

12. For purposes of this complaint, a relevant section of the country or geographic market within which to analyze the effects of the acquisition of Williams Bros. by Vons is the area in and around the city of San Luis Obispo, California.

VI. MARKET STRUCTURE

13. The relevant market set forth in paragraphs 11 and 12 is highly concentrated, whether measured by Herfindahl-Hirschmann Indices or by two-firm concentration ratios. Vons has approximately a 50% share of that market.

14. Entry into the relevant market is difficult.

15. Prior to the transactions described in paragraphs 9 and 10, Vons and Williams Bros. were actual competitors in the relevant market.

VII. EFFECTS

16. The effect of the acquisition by Vons of the assets of Williams Bros. may be substantially to lessen competition in the relevant market 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 Vons and Williams Bros.;
- b. By eliminating Williams Bros. as a substantial independent competitive force;
- c. By facilitating the reduction of capacity in the relevant markets through Vons' sale of its store in the city of San Luis Obispo to a buyer not intending to operate it as a supermarket; and
- d. By significantly enhancing the likelihood of collusion, or independent coordination among retail supermarkets.

VIII. VIOLATIONS CHARGED

17. The asset purchase agreement and acquisitions, as set forth in paragraphs 9 and 10, 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.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Los Angeles Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Clayton Act and the Federal Trade Commission Act; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated 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, 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. Respondent The Vons Companies, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Michigan with its executive offices and principal

place of business located at 618 South Michellinda Avenue, Arcadia, California.

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

ORDER

I.

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

A. "*Acquisition*" means the acquisition by Vons of eighteen supermarkets from Williams Bros. Markets, Inc., in San Luis Obispo and Santa Barbara Counties in California.

B. "*Property to be divested*" means the supermarket at 1314 Madonna Road, San Luis Obispo, California, and shall include the supermarket business and all assets, title, leases, properties, interests, business, goodwill, rights and privileges, of whatever nature, tangible and intangible, except for the name "Williams Bros." and any other registered or unregistered trademarks and trade names, and, at the option of the purchaser, all fixtures, equipment and inventory (except private label inventory) generally located at and utilized in any way in conjunction with the retail sale of food and groceries at such supermarket.

C. "*Respondent*" or "*Vons*" means The Vons Companies, Inc., subsidiaries, divisions and groups, and their respective directors, officers, employees, agents, partners, and representatives, and any successors or assigns of any of the foregoing.

D. "*Supermarket*" means a retail grocery store of 10,000 or more square feet that carries a wide variety of food and grocery items in particular product categories, including bread and dairy products; refrigerated and frozen food and beverage products; fresh and prepared meats and poultry; produce, including fresh fruits and vegetables; shelf-stable food and beverage products, including canned and other types of packaged products; staple food stuffs, which may include salt, sugar, flour, sauces, spices, coffee, and tea; and other grocery products, including nonfood items, which may

include soaps, detergents, paper goods, and other household products, and health and beauty aids.

E. "*Eligible Person*" means Albertson's Inc., Certified Grocers of California Ltd., Food 4 Less Supermarkets, Inc., Scolari of California, Inc., and Joie Scolari, and their respective successors, assigns, subsidiaries, divisions and groups.

II.

It is ordered, That,

A. Within twelve (12) months of the date this order becomes final, respondent shall divest, absolutely and in good faith, the Property to be Divested.

B. The divestiture shall be made only to (1) an eligible person or to (2) an acquirer that receives the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission. The purpose of the divestiture is to ensure the continuation of the Property to be Divested as an ongoing viable enterprise, engaged in the supermarket business, and to remedy the lessening of competition alleged in the Commission's complaint.

III.

It is further ordered, That respondent shall take such action as is necessary to maintain the viability and marketability of the Property to be Divested and shall not cause or permit the destruction, removal, wasting, deterioration or impairment of the Property to be Divested except in the ordinary course of business and except for ordinary wear and tear.

IV.

It is further ordered, That:

A. If respondent has not divested absolutely and in good faith and with the Commission's prior approval, the Property to be Divested as required by paragraph II of this order within twelve (12)

months of the date this order becomes final, respondent shall consent to the appointment of a trustee by the Commission to divest the Property to be Divested. In the event the Commission or the Attorney General brings an action pursuant to Section 5(1) of the Federal Trade Commission Act, 15 U.S.C. 45(1), or any other statute enforced by the Commission, respondent 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 or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(1) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Vons to comply with this order.

B. If a trustee is appointed by the Commission or a court pursuant to paragraph IV. A. of this order, respondent 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 respondent, 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, subject to the prior approval of the Commission, have the exclusive power and authority to divest the Property to be Divested.

3. The trustee shall have eighteen (18) months from the date of appointment to accomplish the divestiture, which shall be subject to the prior approval of the Commission. 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, or by the Court for a court-appointed trustee.

4. The trustee shall have full and complete access to the personnel, books, records and facilities relating to the Property to be Divested, or any other relevant information, as the trustee may reasonably request. Respondent shall develop such financial or other information as such trustee may reasonably request and shall cooperate with any reasonable request of the trustee. Respondent shall

take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by respondent 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 respondent's absolute and unconditional obligation to divest at no minimum price and the purpose of the divestiture as stated in paragraph II. B 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 Property to be Divested. The divestiture shall be made in the manner set out in paragraph II; *provided, however*, that if the trustee receive *bona fide* offers from more than one acquiring entity, 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 respondent from among those approved by the Commission.

6. The trustee shall serve, without bond or other security, at the cost and expense of respondent, 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 respondent, 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 respondent and the trustee's power shall be terminated. The trustee's compensation shall be based at least in a significant part on a commission arrangement contingent on the trustee's divesting the Property to be Divested.

7. Respondent 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, respondent 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 IV. A of this order.

10. The Commission or, 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 Property to be Divested.

12. The trustee shall report in writing to respondent and to the Commission every sixty (60) days concerning the trustee's efforts to accomplish divestiture.

V.

It is further ordered, That, within ninety (90) days after the date this order becomes final and every sixty (60) days thereafter until respondent has fully complied with paragraph II of this order, respondent shall submit to the 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 the order. Respondent shall include in its compliance reports, among other things that are required from time to time, a full description of all substantive contacts or negotiations for the divestiture required by this order, including the identity of all parties contacted. Respondent also shall include in its compliance reports copies of all written communications to and from such parties, and all internal memoranda, reports, and recommendations concerning divestiture.

VI.

It is further ordered, That, for a period of ten (10) years after the date this order becomes final, respondent shall cease and desist from acquiring, directly or indirectly, through subsidiaries or otherwise, without the prior approval of the Commission:

A. Any supermarket or leasehold interest in any supermarket in San Luis Obispo County, California, or any facility that has operated as a supermarket in San Luis Obispo County within six (6) months of the date of the accepted offer of purchase, or any equity or other interest in or the stock or share capital of any entity that owns any interest in or operates any supermarket in San Luis Obispo County, or any equity or other interest in or the stock and share capital of any entity that owned any interest in or operated any supermarket in San Luis Obispo County within six (6) months of the date of the accepted offer of purchase;

B. Any supermarket or leasehold interest in any supermarket anywhere in the United States that has operated as a supermarket within six (6) months of the date of the accepted offer of purchase if Vons, directly or indirectly, has within nine (9) months of the date of the accepted offer closed or sold all of its supermarkets (which must be at least one) within seven miles of the supermarket to be acquired, to a purchaser other than an ongoing viable enterprise engaged in the supermarket business in a manner consistent with such purchaser continuing to operate such supermarket as an ongoing, viable supermarket; and

C. *Provided, however*, that paragraphs VI. A and B shall not be deemed to require prior approval by the Commission of the construction of new facilities by Vons. *Provided further*, that acquisitions resulting in an interest of not more than 1% of the outstanding voting securities of publicly traded companies, solely for the purpose of investment, or an interest of not more than 5% of the outstanding voting securities of Certified Grocers of California, Ltd. solely for the purpose of investment are not subject to paragraphs VI. A and B of this order; acquisitions of voting securities of a publicly traded company shall not be subject to paragraphs VI. A and B of this order solely by reason of the ownership, directly or indirectly, by such publicly traded company of less than 5% of the outstanding voting securities of a company that owns an interest in or operates a supermarket; and

Beginning on August 29, 1992, and annually thereafter for ten (10) years, the respondent shall file with the Commission a verified written report of respondent's compliance with sections A and B of this paragraph.

VII.

It is further ordered, That, for the purpose of determining or securing compliance with this order, subject to any legally recognized privilege, and upon written request with reasonable notice, respondent shall permit any duly authorized representative or representatives of the Commission:

A. Access, during the office hours of respondent 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 respondent relating to any matters contained in this order;

B. Upon five (5) days' notice to interview officers or employees of respondent, who may have counsel present, regarding such matters.

VIII.

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

CONCURRING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

I concur in the complaint and order insofar as they are based on Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, but do not reach the question whether the Williams Bros. acquisition also violated Section 7 of the Clayton Act, 15 U.S.C. 18.

IN THE MATTER OF

NATIONAL CENTER FOR NUTRITION, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3393. Complaint, Aug. 10, 1992--Decision, Aug. 10, 1992*

This consent order prohibits, among other things, the Virginia marketer of the Ultrafast liquid diet program from misrepresenting the efficacy of any very-low-calorie diet program, and requires the respondent to possess competent and reliable scientific evidence to substantiate any claims about the success of patients on any diet program in achieving or maintaining weight loss. It also requires that claims about the safety of the program be accompanied by a clear disclosure that physician monitoring is needed to minimize the potential for health risks.

Appearances

For the Commission: *Richard F. Kelly, Michael C. McCarey and Walter C. Gross, III.*

For the respondent: *David Smith, Pierson, Semmes & Bemis, Washington, D.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that National Center for Nutrition, Inc., a corporation, (hereinafter "respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent National Center for Nutrition, Inc., is a Virginia corporation, with its offices and principal place of business at 8560 Cinderbed Road, Suite 1500, Newington, Virginia.

PAR. 2. Respondent is engaged, and has been engaged, in the sale and offering for sale of the physician-supervised Ultrafast very-