

Complaint

119 F.T.C.

IN THE MATTER OF

SCHNUCK MARKETS, 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-3585. Complaint, June 8, 1995--Decision, June 8, 1995

This consent order requires, among other things, the Missouri-based corporation to divest 24 stores in the St. Louis area to Commission-approved purchasers, and requires the respondent, for ten years, to obtain Commission approval before acquiring an interest in a supermarket, or another entity that operates a supermarket, in the relevant area.

Appearances

For the Commission: *Ronald B. Rowe, Arthur J. Nolan, Jim Fishkin and Marc Schneider.*

For the respondent: *James Rill, Chris McAvoy and Judy Oldham, Collier, Shannon, Rill & Scott, Washington, D.C.*

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 respondent Schnuck Markets, Inc. ("Schnucks"), a corporation subject to the jurisdiction of the Commission, has acquired certain assets of National Holdings, Inc. and certain affiliates ("National"), in violation 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 that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

DEFINITIONS

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

a. "*Supermarket*" means a full-line retail grocery store with annual sales of at least two million dollars 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 foodstuffs, which may include salt, sugar, flour, sauces, spices, coffee, and tea; and other grocery products, including nonfood items such as soaps, detergents, paper goods, other household products, and health and beauty aids.

b. "*St. Louis MSA*" means the metropolitan statistical area consisting of the following areas: in Missouri, the counties of Franklin, Jefferson, Lincoln, St. Charles, St. Louis, Warren, and the city of St. Louis; in Illinois, the counties of Clinton, Jersey, Madison, Monroe, and St. Clair.

SCHNUCK MARKETS, INC.

2. Respondent Schnucks is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri, with its office and principal place of business located at 11420 Lackland Road, St. Louis, MO.

3. Respondent Schnucks is, and at all times relevant herein has been, engaged in the operation of supermarkets in Missouri and Illinois.

4. Respondent Schnucks 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.

ACQUISITION

5. On or about November 23, 1994, Schnucks entered into an agreement with National to acquire all of the supermarkets owned and operated by National in Illinois, Missouri, Louisiana, Mississippi, and Alabama, and Schnucks entered into an agreement with Schwegmann Giant Super Markets, Inc. ("Schwegmann")

whereby Schwegmann agreed to purchase, concurrent with the closing of the transaction between National and Schnucks, approximately 28 National supermarkets located in Louisiana, Mississippi, and Alabama, which operate under the "Canal Villere," "That Stanley!," and "The Real Superstore" trade names.

TRADE AND COMMERCE

6. Relevant lines of commerce in which to analyze the acquisition described herein are the retail sale of food and grocery products in supermarkets, and narrower markets contained therein.

7. Relevant sections of the country in which to analyze the acquisition described herein are the St. Louis MSA, and narrower markets contained therein.

MARKET STRUCTURE

8. The retail sale of food and grocery products in supermarkets in the relevant sections of the country is concentrated, whether measured by the Herfindahl-Hirschmann Index (commonly referred to as "HHI") or by two-firm and four-firm concentration ratios.

ENTRY CONDITIONS

9. Entry into the retail sale of food and grocery products in supermarkets in the relevant sections of the country is difficult and would not be timely, likely, or sufficient to prevent anticompetitive effects in the relevant sections of the country.

ACTUAL COMPETITION

10. Prior to the acquisition described herein, Schnucks and National were actual competitors in the relevant lines of commerce and sections of the country.

EFFECTS

11. The effect of the acquisition may be substantially to lessen competition in the relevant lines of commerce in the relevant sections of the country in violation 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, in the following ways, among others:

- a. By eliminating direct competition between supermarkets owned or controlled by Schnucks and supermarkets owned or controlled by National;
- b. By increasing the likelihood that Schnucks will unilaterally exercise market power; and
- c. By increasing the likelihood of, or facilitating, collusion or coordinated interaction,

Each of which increases the likelihood that the prices of food, groceries or services will increase, and the quality and selection of food, groceries or services will decrease, in the relevant sections of the country.

VIOLATIONS CHARGED

12. The acquisition by Schnucks of assets of National violates 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.

APPENDIX I

ASSET MAINTENANCE AGREEMENT

This Asset Maintenance Agreement ("Agreement") is by and between Schnuck Markets, Inc. ("Schnucks"), a corporation organized under the laws of the State of Missouri, with its principal offices located at 11420 Lackland Road, St. Louis, MO, and the Federal Trade Commission ("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, Schnucks, pursuant to an agreement dated November 23, 1994, agreed to purchase certain assets of National Holdings, Inc. and certain affiliates (hereinafter "Acquisition"); 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 agreement containing consent order, the Commission is required to place it on the public record for a period of sixty (60) days for public comment 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 agreement is not reached preserving the *status quo ante* of the assets to be divested as described in paragraph II.A. of the agreement containing consent order ("Assets") during the period prior to their divestitures, when those Assets will be in the hands of Schnucks, that any divestiture resulting from any administrative proceeding challenging the legality of the Acquisition might not be possible, or might produce a less than effective remedy; and

Whereas, the Commission is concerned that prior to divestiture to the acquirer, it may be necessary to preserve the continued viability and competitiveness of the Assets; and

Whereas, the purpose of this Agreement and of the consent order is to preserve the Assets pending the divestiture to the acquirer approved by the Federal Trade Commission under the terms of the order, in order to remedy any anticompetitive effects of the Acquisition; and

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

Whereas, Schnucks 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, in consideration of the Commission's agreement that, unless the Commission determines to reject the consent order, it will not seek further relief from the parties with respect to the Acquisition, except that the Commission may exercise any and all rights to enforce this Agreement and the consent order annexed hereto and made a part thereof, and, in the event the required divestiture is not accomplished, to appoint a trustee to seek divestiture of the Assets, the Parties agree as follows:

TERMS OF AGREEMENT

1. Schnucks agrees to execute, and upon its issuance to be bound by, the attached consent order. The Parties further agree that each term defined in the attached consent order shall have the same meaning in this Agreement.

2. Unless the Commission brings an action to seek to enjoin the proposed Acquisition pursuant to Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. 53(b), and obtains a temporary restraining order or preliminary injunction blocking the proposed Acquisition, Schnucks will be free to close the Acquisition after 11:59 p.m., March 8, 1995.

3. Schnucks agrees that from the date this Agreement is accepted until the earliest of the dates listed in subparagraphs 3.a - 3.b it will comply with the provisions 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; or

b. On the day the divestiture set out in the consent order has been completed.

4. From the time Schnucks acquires the Assets until the divestiture set out in the consent order has been completed, Schnucks shall maintain the viability, competitiveness and marketability of the Assets, and shall not cause the wasting or deterioration of the Assets, nor shall it sell, transfer, encumber or otherwise impair their marketability or viability.

5. Should the Commission seek in any proceeding to compel Schnucks to divest itself of the Assets or to seek any other injunctive or equitable relief, Schnucks shall not raise any objection based upon the expiration of the applicable Hart-Scott-Rodino Antitrust Improvements Act waiting period or the fact that the Commission has not sought to enjoin the Acquisition. Schnucks also waives all rights to contest the validity of this Agreement.

6. 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 Schnucks to its principal offices, Schnucks shall permit any duly authorized representative or representatives of the Commission:

a. Access during the office hours of Schnucks, 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 Schnucks relating to compliance with this Agreement; and

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

7. This Agreement shall not be binding until approved by the Commission.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition by Schnuck Markets, Inc. ("Schnucks"), the respondent, of certain assets owned and operated by National Holdings, Inc. and certain affiliates ("National") in Illinois, Missouri, Louisiana, Mississippi, and Alabama, and Schnucks having entered into an agreement whereby Schwegmann Giant Super Markets, Inc. ("Schwegmann") agreed to purchase, concurrent with the closing of the transaction between National and Schnucks, approximately 28 National supermarkets located in Louisiana, Mississippi, and Alabama, and the respondent, 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 respondent with violations of the Clayton Act and Federal Trade Commission Act;

Respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by 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 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 comments 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:

1. Respondent Schnuck Markets, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Missouri, with its office and principal place of business located at 11420 Lackland Road, St. Louis, MO.

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.

It is ordered, That, as used in this order, the following definitions shall apply:

A. "*Respondent*" or "*Schnuck Markets, Inc.*" means Schnuck Markets, Inc., its predecessors, subsidiaries, divisions, and groups and affiliates controlled by Schnuck Markets, Inc., their successors and assigns, and their directors, officers, employees, agents, and representatives.

B. "*Assets to be divested*" means the supermarket assets described in paragraph II.A. of this order.

C. "*Commission*" means the Federal Trade Commission.

D. "*Supermarket*" means a full-line 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 foodstuffs, which may include salt, sugar,

flour, sauces, spices, coffee, and tea; and other grocery products, including nonfood items such as soaps, detergents, paper goods, other household products, and health and beauty aids.

E. The term "*St. Louis MSA*" means the metropolitan statistical area consisting of the following areas: in Missouri, the counties of Franklin, Jefferson, Lincoln, St. Charles, St. Louis, Warren, and the city of St. Louis; in Illinois, the counties of Clinton, Jersey, Madison, Monroe, and St. Clair.

II.

It is further ordered, That:

A. Respondent shall divest, absolutely and in good faith, within twelve months from the date this order becomes final:

1. The following supermarkets located in the city of St. Louis, Missouri:

- a. National store no. 15 located at 2700 S. Grand Avenue, St. Louis, MO;
- b. National store no. 30 located at 5433 Southwest Avenue, St. Louis, MO;
- c. National store no. 50 located at 8945 Riverview Drive, St. Louis, MO; and
- d. National store no. 60 located at 1605 S. Jefferson, St. Louis, MO.

2. The following supermarkets located in St. Louis County, Missouri:

- a. National store no. 26 located at 8823 Ladue Road, Ladue, MO;
- b. National store no. 45 located at 6 S. Old Orchard, Webster, MO;
- c. National store no. 46 located at 10431 St. Charles, St. Ann, MO;
- d. National store no. 47 located at 13041 New Halls Ferry, Florissant, MO;
- e. National store no. 62 located at 421 N. Kirkwood Road, Kirkwood, MO;

f. National store no. 63 located at 7434 Olive Street Road, University City, MO;

g. National store no. 77 located at 4432 Lemay Ferry Road, Mehlville, MO;

h. National store no. 85 located at 14855 Clayton Road, Chesterfield, MO;

i. Schnucks store no. 103 located at 9719 Crestwood Road, Crestwood, MO;

j. Schnucks store no. 124 located at 3661 Reavis Barracks, St. Louis, MO;

k. Schnucks store no. 130 located at 10223 Lewis & Clark, Bellefontaine, MO; and

l. Schnucks store no. 195 located at 6965 Parker Road, St. Louis, MO.

3. The following supermarkets located in St. Charles County, Missouri:

a. National store no. 22 located at 850 Jungerman, St. Peters, MO; and

b. Schnucks store no. 126 located at 1355 South 5th Street, St. Charles, MO.

4. The following supermarkets located in Jefferson County, Missouri:

a. National store no. 65 located at 1200 Sugar Creek Square, Fenton, MO; and

b. National store no. 70 located at 215 Arnold Cross Road, Arnold MO.

5. The following supermarkets located in Madison County, Illinois:

a. National store no. 35 located at 1716 Vandalia Road, Collinsville, IL; and

b. Schnucks store no. 175 located at 1435 Vaughn Road, Wood River, IL.

6. The following supermarkets located in St. Clair County, Illinois:

a. National store no. 64 located at 1290 Camp Jackson Road, Cahokia, IL; and

b. National store no. 80 located at 4 Market Place, Fairview Heights, IL.

The assets to be divested shall include the supermarket business operated, and all assets, leases, properties, business and goodwill, tangible and intangible, utilized in the supermarket operations at the locations listed above, but shall not include those assets consisting of or pertaining to Schnucks or National trade names, trade dress, trade marks, service marks, and such other intangible assets that respondent also utilizes in its business at locations other than those listed above.

B. Respondent shall divest the assets to be divested 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 is to ensure the continuation of the assets to be divested as ongoing viable enterprises engaged in the supermarket business and to remedy the lessening of competition resulting from the acquisition alleged in the Commission's complaint.

C. Pending divestiture of the assets to be divested, respondent shall take such actions as are necessary to maintain the viability, competitiveness, and marketability of the assets to be divested to comply with paragraphs II. and III. of this order and to prevent the destruction, removal, wasting, deterioration, or impairment of the assets to be divested except in the ordinary course of business and except for ordinary wear and tear.

D. Respondent shall comply with all the terms of the Asset Maintenance Agreement attached to this order and made a part hereof as Appendix I. The Asset Maintenance Agreement shall continue in effect until such time as all assets to be divested have been divested as required by this order.

III.

It is further ordered, That:

A. If respondent has not divested, absolutely and in good faith and with the Commission's prior approval, the assets to be divested within twelve months from the date this order becomes final, the Commission may appoint a trustee to divest any of the assets to be divested. In the event that 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, 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 the respondent 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, respondent shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, 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. If respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after written notice by the staff of the Commission to respondent of the identity of any proposed trustee, respondent shall be deemed to have consented to the selection of the proposed trustee.

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the assets to be divested.

3. Within ten (10) days after appointment of the trustee, respondent shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestitures required by this order.

4. The trustee shall have twelve (12) months from the date the Commission or court approves the trust agreement described in

paragraph III. B. 3. to accomplish the divestitures, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period, the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend this 12-month period only one (1) time for one (1) year.

5. The trustee shall have full and complete access to the personnel, books, records, and facilities related to the assets to be divested or to any other relevant information, as the trustee may request. Respondent shall develop such financial or other information as such trustee may reasonably request and shall cooperate with the trustee. Respondent shall take no action to interfere with or impede the trustee's accomplishment of the divestitures. 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, for a court-appointed trustee, by the court.

6. 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 respondent's absolute and unconditional obligation to divest at no minimum price. The divestitures shall be made in the manner and to the acquirer or acquirers as set out in paragraph II. of this order; provided, however, if the trustee receives *bona fide* offers for an asset to be divested from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest such asset to the acquiring entity or entities selected by respondent from among those approved by the Commission.

7. 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 the 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 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 the respondent, 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 assets to be divested to satisfy paragraph II. of this order.

8. Respondent shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

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 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 assets to be divested.

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

IV.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, respondent shall not, without the prior approval of the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

A. Acquire any ownership or leasehold interest in any facility that has operated as a supermarket within six (6) months of the date of such proposed acquisition in the St. Louis MSA.

B. Acquire any stock, share capital, equity, or other interest in any entity that owns any interest in or operates any supermarket or

owned any interest in or operated any supermarket within six (6) months of such proposed acquisition in the St. Louis MSA.

Provided, however, that these prohibitions shall not apply to the construction of new facilities by respondent or the acquisition of or leasing of a facility that has not operated as a supermarket within six (6) months of respondent's offer to purchase or lease.

V.

It is further ordered, That, for a period of ten (10) years commencing on the date this order becomes final:

A. Respondent shall neither enter into nor enforce any agreement that restricts the ability of any person (as defined in Section 1(a) of the Clayton Act, 15 U.S.C. 12(a)) acquiring any supermarket owned or operated by respondent, any leasehold interest in any supermarket, or any interest in any retail location used as a supermarket on or after January 1, 1995 in the St. Louis MSA to operate a supermarket at that site; provided however, that nothing in this paragraph shall prevent respondent from entering into or enforcing any agreement requiring its approval of any sublease, assignment, or change in occupancy, which approval shall not be unreasonably withheld; provided further that use of a site for the operation of a supermarket shall not be a basis for withholding such approval.

B. Respondent shall not remove any equipment from a supermarket owned or operated by respondent in the St. Louis MSA prior to a sale, sublease, assignment, or change in occupancy, except for replacement or relocation of such equipment in or to any other supermarket owned or operated by respondent in the ordinary course of business, or as part of any negotiation for a sale, sublease, assignment, or change in occupancy of such supermarket.

VI.

It is further ordered, That:

A. Within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until respondent has fully complied with the provisions of paragraphs II. or III. of this order,

respondent shall submit to the Commission verified written reports setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with paragraphs II. and III. of this order. Respondent shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with paragraphs II. and III. of the order, including a description of all substantive contacts or negotiations for the divestiture and the identity of all parties contacted. Respondent shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

B. One year (1) from the date this order becomes final, annually for the next nine (9) years on the anniversary of the date this order becomes final, and at other times as the Commission may require, respondent shall file verified written reports with the Commission setting forth in detail the manner and form in which it has complied and is complying with this order.

VII.

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

VIII.

It is further ordered, That, for the purpose of determining or securing compliance with this order, respondent shall permit any duly authorized representative of the Commission:

A. Upon five days' written notice to respondent, 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 respondent relating to any matters contained in this order; and

B. Upon five days' written notice to respondent and without restraint or interference from it, to interview respondent or officers, directors, or employees of respondent in the presence of counsel.

CONCURRING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

The complaint alleges a geographic market comprising "the St. Louis MSA, and narrower markets contained therein." Although I question the broad geographic market alleged, the investigational record contains sufficient information to support a finding of reason to believe with respect to small, discrete geographic markets located within the broad regions alleged in the complaint, and the stores to be divested were selected with a view to remedying competitive concerns in the small, discrete markets.

In addition, the complaint alleges as the product market "the retail sale of food and grocery products in supermarkets, and narrower markets contained therein." A serious argument can be made that the market should include sales of food and groceries in certain stores other than traditional supermarkets. Since the investigational record suggests that the concentration is high even if additional sales are included in the market, the issue need not be resolved at this time. Accordingly, I concur in the decision to accept the consent agreements.

IN THE MATTER OF

GLAXO PLC

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-3586. Complaint, June 14, 1995--Decision, June 14, 1995*

This consent order requires, among other things, a British drug company to divest, within nine months, Wellcome's worldwide research and development assets for non-injectable drugs, or else agree to have a Commission-appointed trustee to complete the transaction. In addition, the consent order requires Glaxo, for a period of ten years, to obtain Commission approval before acquiring more than one percent interest in any entity involved in the clinical development, manufacture or sale of migraine drugs.

Appearances

For the Commission: *Claudia R. Higgins* and *Ann B. Malester*.

For the respondent: *Charles E. Koch, Simpson, Thatcher & Bartlett*, New York, N.Y.

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondent Glaxo plc ("Glaxo"), a British corporation subject to the jurisdiction of the Commission, has proposed to acquire all of the capital stock of Wellcome plc ("Wellcome"), a British corporation subject to the jurisdiction of the Commission, in violation 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, ("FTC Act"), 15 U.S.C. 45; and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. RESPONDENT

1. Respondent Glaxo plc is a corporation organized, existing, and doing business under and by virtue of the laws of England with its