

IN THE MATTER OF

THE KROGER CO., 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-3905. Complaint, Nov. 8, 1999--Decision, Nov. 8, 1999*

This consent order, among other things, requires Kroger and Groub, supermarket corporations, to divest certain assets to Roundy's, Inc., which is one of the largest food wholesalers in the United States and an operator of company-owned supermarkets.

Participants

For the Commission: *Michael Rose, Laurel Price, Richard Parker, Jeremy Bulow and Alan Fisher.*

For the respondents: *Deborah Feinstein, Arnold & Porter, Washington, D.C. and Eric Moy, Barnes & Thornburg, Indianapolis, IN.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission ("Commission"), having reason to believe that respondent The Kroger Co. ("Kroger") has entered into an agreement to acquire substantially all of the assets of respondent The John C. Groub Company, Inc. ("Groub"), all subject to the jurisdiction of the Commission, in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; that such acquisition, if consummated, would violate 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:

DEFINITION

PARAGRAPH 1. For the purposes of this complaint, the term "Supermarket" means a full-line retail grocery store with annual sales of at least \$2 million 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 non-food items such as soaps, detergents, paper goods, other household products, and health and beauty aids.

THE KROGER CO.

PAR. 2. Respondent Kroger is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business located at 1014 Vine Street, Cincinnati, Ohio.

PAR. 3. Respondent Kroger, directly and through Dillon Companies, Inc., and Fred Meyer, Inc., its wholly-owned domestic subsidiaries, is, and at all times relevant herein has been, engaged in the operation of supermarkets in Alabama, Alaska, Arizona, Arkansas, California, Colorado, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Nevada, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, and Wyoming. Kroger and its wholly-owned domestic subsidiaries operate approximately 2,200 supermarkets in these states under the Kroger, Fry's, Dillons, King Soopers, City Markets, Fred Meyer, Smith's Food & Drug Centers, Ralph's, Quality Food Centers, Price Rite, Food 4 Less, Cala, Bell, FoodsCo., and Gerbes trade names. Kroger had approximately \$26.57 billion in total United States sales for the fiscal year that ended on December 27, 1997.

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

THE JOHN C. GROUB COMPANY, INC.

PAR. 5. Respondent Groub is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Indiana, with its office and principal place of business located at 900 "A" Avenue East, Seymour, Indiana.

PAR. 6. Respondent Groub is, and at all times relevant herein has been, engaged in the operation of supermarkets in Indiana. Groub operates approximately 30 supermarkets under the Jay C, Foods Plus, and Ruler Discount Foods trade names. Groub had \$251.8 million in total sales for the fiscal year 1997.

PAR. 7. Respondent Groub 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

PAR. 8. On or about October 12, 1998, Groub and Kroger LP I, a wholly-owned subsidiary of Kroger, executed a definitive Asset Purchase Agreement under which Kroger will acquire substantially all of the assets of Groub.

TRADE AND COMMERCE

PAR. 9. The relevant line of commerce (*i.e.*, the product market) in which to analyze the acquisition described herein is the retail sale of food and grocery products in supermarkets.

PAR. 10. Supermarkets provide a distinct set of products and services for consumers who desire to one-stop shop for food and grocery products. Supermarkets carry a full line and wide selection of both food and nonfood products (typically more than 10,000 different stock-keeping units ("SKUs")) as well as a deep inventory of those SKUs. In order to accommodate the large number of food and nonfood products necessary for one-stop shopping, supermarkets are large stores that typically have at least 10,000 square feet of selling space.

PAR. 11. Supermarkets compete primarily with other supermarkets that provide one-stop shopping for food and grocery products. Supermarkets primarily base their food and grocery prices

on the prices of food and grocery products sold at nearby supermarkets. Supermarkets do not regularly price-check food and grocery products sold at other types of stores and do not significantly change their food and grocery prices in response to prices at other types of stores. Most consumers shopping for food and grocery products at supermarkets are not likely to shop elsewhere in response to a small price increase by supermarkets.

PAR. 12. Retail stores other than supermarkets that sell food and grocery products, such as neighborhood "mom & pop" grocery stores, convenience stores, specialty food stores (*e.g.*, seafood markets, bakeries, etc.), club stores, military commissaries, and mass merchants, do not effectively constrain prices at supermarkets. None of these stores offers a supermarket's distinct set of products and services that enable consumers to one-stop shop for food and grocery products.

PAR. 13. The relevant sections of the country (*i.e.*, the geographic markets) in which to analyze the acquisition described herein are the areas in and near the following cities and towns:

- a. Columbus, Indiana, and
- b. Madison, Indiana.

MARKET STRUCTURE

PAR. 14. The Columbus and Madison, Indiana relevant markets are highly concentrated, whether measured by the Herfindahl-Hirschman Index (commonly referred to as "HHI") or by two-firm and four-firm concentration ratios. The acquisition would substantially increase concentration in each market. Kroger and Groub would have a combined market share in the geographic markets of Columbus and Madison of near or greater than 66% and 54%, respectively. The post-acquisition HHIs would be 5,254 in Columbus and 4,262 in Madison.

ENTRY CONDITIONS

PAR. 15. Entry would not be timely, likely, or sufficient to prevent anticompetitive effects in the relevant markets.

ACTUAL COMPETITION

PAR. 16. Kroger and Groub are actual and direct competitors in and near Columbus and Madison, Indiana.

EFFECTS

PAR. 17. The effect of the acquisition, if consummated, may be substantially to lessen competition in the relevant line 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 Kroger and supermarkets owned or controlled by Groub;
- b. By increasing the likelihood that Kroger 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

PAR. 18. The Asset Purchase Agreement between Kroger and Groub, pursuant to which Kroger will acquire substantially all of the assets of Groub, violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and the proposed acquisition would, if consummated, violate 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.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition by The Kroger Co. ("Kroger"), through its wholly-owned subsidiary, Kroger Limited Partnership I, of substantially all of the assets of The John C. Groub Company, Inc. ("Groub"), and it now appearing that Kroger and Groub, hereinafter sometimes referred to as "respondents," 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 respondents with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. 18; and

The 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, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and a 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 Kroger is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business located at 1014 Vine Street, Cincinnati, Ohio.

2. Respondent Groub is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Indiana, with its office and principal place of business located at 900 "A" Avenue East, Seymour, Indiana.

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

ORDER

I.

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

A. "*Kroger*" means The Kroger Co., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by The Kroger Co., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "*Groub*" means The John C. Groub Company, Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by The John C. Groub Company, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "*Respondents*" means Kroger and Groub, individually and collectively.

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

E. "*Acquisition*" means Kroger's proposed acquisition of substantially all of the assets of Groub pursuant to the *Asset Purchase Agreement Between Kroger Limited Partnership I and the John C. Groub, Company, Inc.* dated October 12, 1998.

F. "*Assets To Be Divested*" means the Supermarkets To Be Divested in this Order and all assets, leases, properties, government permits (to the extent transferable), customer lists, businesses and goodwill, tangible and intangible, related to or utilized in the Supermarkets To Be Divested, but shall not include those assets consisting of or pertaining to any of the respondents' trade marks, trade dress, service marks, or trade names.

G. "*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; frozen and refrigerated 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 non-food items such as soaps, detergents, paper goods, other household products, and health and beauty aids.

H. "*Supermarkets To Be Divested*" means the following Supermarkets:

1. Groub store no. 92 operating under the "Foods Plus" trade name, which is located at 1343 North National Road, Columbus, Indiana;

2. Groub store no. 89 operating under the "Jay C" trade name, which is located at 2540 Eastbrook Plaza, Columbus, Indiana; and

3. Kroger store no. 304 operating under the "Kroger" trade name, which is located at 748 Jefferson Court, Madison, Indiana.

I. "*Roundy's*" means Roundy's, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Wisconsin, with its principal place of business located at 23000 Roundy Drive, Pewaukee, Wisconsin.

J. "*Groub Agreement*" means the Purchase Agreement between Roundy's and Groub executed on June 10, 1999, for the divestiture by Groub of its stores listed in the Supermarkets To Be Divested.

K. "*Kroger Agreement*" means the Purchase Agreement between Roundy's and Kroger executed on June 22, 1999, for the divestiture by Kroger of its store listed in the Supermarkets To Be Divested.

L. "*Roundy's Agreements*" means the Groub Agreement and the Kroger Agreement.

M. "*Acquirer(s)*" means Roundy's and/or the entity or entities approved by the Commission to acquire the Assets To Be Divested pursuant to this order, individually and collectively.

N. "*Third Party Consents*" means all consents from any other person, including all landlords, that are necessary to effect the complete transfer to the Acquirer(s) of the Assets To Be Divested.

II.

It is further ordered, That:

A. Respondents shall divest, absolutely and in good faith, the Assets To Be Divested to Roundy's, in accordance with the Roundy's Agreements (which agreements shall not be construed to vary or contradict the terms of this order), no later than

1. Twenty (20) days after the date on which the Acquisition is consummated, or

2. Four (4) months after the date on which respondents sign the Agreement Containing Consent Order,

whichever is earlier.

Provided, however, that if respondents have divested the Assets To Be Divested to Roundy's pursuant to the Roundy's Agreements prior to the date the order becomes final, and if, at the time the Commission determines to make the order final, the Commission notifies respondents that Roundy's is not an acceptable Acquirer or that either the Kroger Agreement or the Groub Agreement is not an acceptable manner of divestiture, then respondents shall immediately rescind the respective transaction with Roundy's and shall divest the respective Assets To Be Divested within three (3) months of the date the order becomes final, absolutely and in good faith, at no minimum price, to an Acquirer that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission.

Provided, further, that respondents shall not be required to divest any front-end system, computer scanners, Kroger bascart, satellite dishes, leased cable lines, fixtures, equipment or inventory, at any Supermarket To Be Divested that the Acquirer of the Assets To Be Divested indicates that it does not want to acquire, if the Commission approves the divestiture to such Acquirer and approves the manner of the divestiture excluding such assets.

B. Respondents shall obtain all required Third Party Consents prior to the closing of the Roundy's Agreements, or any other agreement pursuant to which the Assets To Be Divested are divested to an Acquirer.

C. The purpose of the divestitures 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 as alleged in the Commission's complaint.

III.

It is further ordered, That:

A. If respondents have not divested, absolutely and in good faith and with the Commission's prior approval, the Assets To Be Divested within the time required by paragraph II of this order, the Commission may appoint a trustee to divest 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, respondents 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(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the respondents 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, respondents 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 respondents, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after receipt of written notice by the staff of the Commission to respondents of the identity of any proposed trustee, respondents 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, respondents 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 each divestiture 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 the period for no more than two (2) additional periods.

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. Respondents shall develop such financial or other information as such trustee may reasonably request and shall cooperate with the trustee. Respondents shall take no action to interfere with or impede the trustee's accomplishment of the divestitures. Any delays in divestiture caused by respondents 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 respondents' absolute and unconditional obligation to divest expeditiously at no minimum price. The divestitures shall be made in a manner that receives the prior approval of the Commission and to an Acquirer or Acquirers that receive the prior approval of the Commission; 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 Kroger from among those approved by the Commission; provided further, however, that Kroger shall select such entity within five (5) days of receiving notification of the Commission's approval.

7. The trustee shall serve, without bond or other security, at the cost and expense of respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of respondents, 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 divestitures 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 Kroger, 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.

8. Respondents 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 each divestiture required by this order.

11. In the event that the trustee determines that he or she is unable to divest the Assets To Be Divested in a manner consistent with the Commission's purpose as described in paragraph II, the trustee may divest additional ancillary assets of respondents and effect such arrangements as are necessary to satisfy the requirements of this order.

12. The trustee shall have no obligation or authority to operate or maintain the Assets To Be Divested.

13. The trustee shall report in writing to respondents and the Commission every sixty (60) days concerning the trustee's efforts to accomplish each divestiture required by this order.

IV.

It is further ordered, That respondents shall maintain the viability, marketability, and competitiveness of the Assets To Be Divested, and shall not cause the wasting or deterioration of the Assets To Be Divested, nor shall they cause the Assets To Be Divested to be operated in a manner inconsistent with applicable laws, nor shall they sell, transfer, encumber or otherwise impair the viability, marketability or competitiveness of the Assets To Be Divested. Respondents shall comply with the terms of this paragraph until such time as respondents have divested the Assets To Be Divested pursuant to the terms of this order. Respondents shall conduct or cause to be conducted the business

of the Assets To Be Divested in the regular and ordinary course and in accordance with past practice (including regular repair and maintenance efforts) and shall use their best efforts to preserve the existing relationships with suppliers, customers, employees, and others having business relations with the Assets To Be Divested in the ordinary course of business and in accordance with past practice. Respondents shall not terminate the operation of any Supermarket To Be Divested. Respondents shall continue to maintain the inventory of each Supermarket To Be Divested at levels and selections (*e.g.*, stock-keeping units) consistent with those maintained by such respondent(s) at such Supermarket in the ordinary course of business consistent with past practice. Respondents shall use best efforts to keep the organization and properties of each Supermarket To Be Divested intact, including current business operations, physical facilities, working conditions, and a work force of equivalent size, training, and expertise associated with the Supermarket. Included in the above obligations, respondents shall, without limitation:

A. Maintain operations and departments and not reduce hours at each Supermarket To Be Divested;

B. Not transfer inventory from any Supermarket To Be Divested other than in the ordinary course of business consistent with past practice;

C. Make any payment required to be paid under any contract or lease when due, and otherwise pay all liabilities and satisfy all obligations associated with any Supermarket To Be Divested, in each case in a manner consistent with past practice;

D. Maintain the books and records of each Supermarket To Be Divested;

E. Not display any signs or conduct any advertising (*e.g.*, direct mailing, point-of-purchase coupons) that indicates that any respondent is moving its operations at a Supermarket To Be Divested to another location, or that indicates a Supermarket To Be Divested will close;

F. Not remove the trade marks, trade dress, service marks, or trade names of respondents at any of the Supermarkets To Be Divested;

G. Not conduct any "going out of business," "close-out," "liquidation" or similar sales or promotions at or relating to any Supermarket To Be Divested; and

H. Not change or modify in any material respect the existing advertising practices, programs and policies for any Supermarket To Be Divested, other than changes in the ordinary course of business consistent with past practice for Supermarkets of the respondents not being closed or relocated.

V.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, Kroger shall not, directly or indirectly, through subsidiaries, partnerships, or otherwise, without providing advance written notification to the Commission:

A. Acquire any ownership or leasehold interest in any facility that has operated as a Supermarket within six (6) months prior to the date of such proposed acquisition in the counties of Bartholomew or Jefferson, Indiana; or

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 prior to such proposed acquisition in the counties of Bartholomew or Jefferson, Indiana.

Provided, however, that advance written notification shall not apply to the construction of new facilities by Kroger or the acquisition of or leasing of a facility that has not operated as a Supermarket within six (6) months prior to Kroger's offer to purchase or lease.

Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as the "Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such Notification, notification shall be filed with the Secretary of the Commission, Notification need not be made to the United States Department of Justice, and Notification is required only of Kroger and not of any other party to the transaction. Kroger shall provide the Notification to the Commission at least thirty (30) days prior to consummating any such transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning

of 16 CFR 803.20), Kroger shall not consummate the transaction until twenty (20) days after substantially complying with such request. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. Provided, however, that prior notification shall not be required by this paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a.

VI.

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

A. Kroger 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)) that acquires any Supermarket, any leasehold interest in any Supermarket, or any interest in any retail location used as a Supermarket on or after July 13, 1999, in the counties of Bartholomew or Jefferson, Indiana, to operate a Supermarket at that site if such Supermarket was formerly owned or operated by Kroger.

B. Kroger shall not remove any fixtures or equipment from a property owned or leased by Kroger in the counties of Bartholomew or Jefferson, Indiana, that is no longer in operation as a Supermarket, except (1) prior to and as part of a sale, sublease, assignment, or change in occupancy of such Supermarket; or (2) to relocate such fixtures or equipment in the ordinary course of business to any other Supermarket owned or operated by Kroger.

VII.

It is further ordered, That:

A. Within thirty (30) days after the date respondents signed the Agreement Containing Consent Order and every thirty (30) days thereafter until respondents have fully complied with the provisions of paragraphs II, III, and IV of this order, respondents shall submit to the Commission verified written reports setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with paragraphs II, III, and IV of this order. Respondents shall include in their 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, III, and IV of the order, including a description of all substantive contacts or negotiations for divestitures and the identity of all parties contacted. Respondents shall include in their compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

B. One (1) year 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, Kroger 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.

VIII.

It is further ordered, That respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents, 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 respondents that may affect compliance obligations arising out of the order.

IX.

It is further ordered, That, for the purpose of determining or securing compliance with this order, upon written request with five (5) days' notice, respondents shall permit any duly authorized representative of the Commission:

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

B. Without restraint or interference from respondents, to interview officers, directors, or employees of respondents in the presence of counsel.

IN THE MATTER OF

PROLONG SUPER LUBRICANTS, INC.

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

Docket C-3906. Complaint, Nov. 22, 1999--Decision, Nov. 22, 1999

This consent order, among other things, requires Prolong Super Lubricants, Inc., the marketer of one of the largest selling motor oil additives sold in the U.S., to have scientific substantiation for its claims regarding the performance, benefits, efficacy, attributes, or use of its product. The consent order prohibits the misrepresentation of the superiority or comparability of its product with respect to any other product, and the existence or results of any test, study, or research. In addition, the consent order prohibits the representation of user testimonials or endorsements, unless certain disclosures are made.

Participants

For the Commission: *Gerald Wright and Jeffrey Klurfeld.*

For the respondent: *Neil Goteiner, Braun & Martel, San Francisco, CA.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Prolong Super Lubricants, Inc., a corporation ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Prolong Super Lubricants, Inc. is a Nevada corporation with its principal office or place of business at 6 Thomas, Irvine, CA.
2. Respondent has advertised, labeled, offered for sale, sold, and distributed products to the public, including Prolong Engine Treatment Concentrate, a motor oil additive ("Prolong ETC").
3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.
4. Respondent has disseminated or has caused to be disseminated advertisements for Prolong ETC, including but not necessarily limited