

Complaint

IN THE MATTER OF
THE KROGER COMPANY AND FRED MEYER,
INC.

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

Docket C-3917; File No. 991 0024
Complaint, January 10, 2000--Decision, January 10, 2000

This consent order addresses the merger of respondent Jobsite Holdings, Inc., a wholly-owned subsidiary of Kroger, with and into Fred Meyer, through which Fred Meyer will become a wholly-owned subsidiary of Kroger. The consent order requires, among other things, to divest eight specific supermarkets in relevant markets, five of which were owned by Kroger and three of which were owned by Fred Meyers prior to the merger. From the time of the merger until the completion of the divestitures, respondents must maintain the competitiveness and viability of the assets to be divested.

Participants

For the Commission: *Phillip L. Broyles, Daniel P. Ducore, Alan A. Fisher, Jill M. Frumin, Jonathan Kanter, Richard Liebeskind, Valicia A. Spriggs, and Gregory S. Vistnes.*

For the Respondents: *Deborah L. Feinstein, Arnold & Porter; and Brian Byrne and David I. Gelfand, Cleary, Gottlieb, Steen & Hamilton.*

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.

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("Kroger") has entered into an agreement to acquire all of the voting securities of respondent Fred Meyer, Inc. ("Fred Meyer"), 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 ONE: 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 nonfood items such as soaps, detergents, paper goods, other household products, and health and beauty aids.

THE KROGER CO.

PARAGRAPH TWO: 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 45202.

PARAGRAPH THREE: Respondent Kroger, directly and through Dillon Companies, Inc., its wholly-owned domestic subsidiary, is, and at all times relevant herein has been, engaged in the operation of supermarkets in Alabama, Arizona, Arkansas,

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Colorado, Georgia, Illinois, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, North Carolina, Ohio, Oklahoma, South Carolina, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming. Kroger and its wholly-owned domestic subsidiaries operate approximately 1,410 supermarkets in these states under the Kroger, Fry's, Dillons, King Soopers, City Markets, 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.

PARAGRAPH FOUR: 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.

FRED MEYER, INC.

PARAGRAPH FIVE: Respondent Fred Meyer is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 3800 S.E. 22nd Avenue, Portland, Oregon 97202.

PARAGRAPH SIX: Respondent Fred Meyer is, and at all times relevant herein has been, engaged in the operation of supermarkets in Alaska, Arizona, California, Idaho, Montana, Nevada, New Mexico, Oregon, Texas, Utah, Washington, and Wyoming. Fred Meyer operates approximately 800 supermarkets under the Fred Meyer, Smith's Food & Drug Centers, Ralph's, Quality Food Centers, Price Rite, Food 4 Less, Cala, Bell, and FoodsCo. trade names. Fred Meyer had \$14.88 billion in total sales for the fiscal year that ended on January 31, 1999.

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PARAGRAPH SEVEN: Respondent Fred Meyer 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

PARAGRAPH EIGHT: On or about October 18, 1998, Kroger, Fred Meyer, and Jobsite Holdings, Inc. (“Jobsite”), a wholly-owned subsidiary of Kroger, entered into an Agreement and Plan of Merger pursuant to which Jobsite will merge with and into Fred Meyer and Fred Meyer will become a wholly-owned subsidiary of Kroger. The total value of the proposed merger is approximately \$15 billion.

TRADE AND COMMERCE

PARAGRAPH NINE: 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.

PARAGRAPH TEN: 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.

PARAGRAPH ELEVEN: 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

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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.

PARAGRAPH TWELVE: 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.

PARAGRAPH THIRTEEN: 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. Prescott, Arizona;
- b. Sierra Vista, Arizona;
- c. Yuma, Arizona;
- d. Cheyenne, Wyoming;
- e. Green River, Wyoming;
- f. Rock Springs, Wyoming; and
- g. Price, Utah.

MARKET STRUCTURE

PARAGRAPH FOURTEEN: The Prescott, Arizona; Sierra Vista, Arizona; Yuma, Arizona; Green River, Wyoming; Rock Springs, Wyoming; and Price, Utah relevant markets are highly concentrated, whether measured by the Herfindahl-Hirschman

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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 Fred Meyer would have a combined market share of near or greater than 35% in each geographic market. The post-acquisition HHIs in the geographic markets range from 2,793 to 10,000.

PARAGRAPH FIFTEEN: The Cheyenne, Wyoming, relevant market is highly concentrated. The market will remain highly concentrated as a result of this acquisition, and will be significantly more concentrated than it would have been but for this acquisition.

ENTRY CONDITIONS

PARAGRAPH SIXTEEN: Entry would not be timely, likely, or sufficient to prevent anticompetitive effects in the relevant markets.

ACTUAL COMPETITION

PARAGRAPH SEVENTEEN: Kroger and Fred Meyer are actual and direct competitors in and near Prescott, Arizona; Sierra Vista, Arizona; Yuma, Arizona; Green River, Wyoming; Rock Springs, Wyoming; and Price, Utah.

ACTUAL POTENTIAL COMPETITION

PARAGRAPH EIGHTEEN: Kroger is an actual potential competitor against Fred Meyer in and near Cheyenne, Wyoming. But for the acquisition, Kroger and Fred Meyer would have become direct competitors in the Cheyenne, Wyoming, relevant market. The acquisition will eliminate that competition.

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EFFECTS

PARAGRAPH NINETEEN: 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 Fred Meyer;
- b. by eliminating actual potential competition between supermarkets owned or controlled by Kroger and supermarkets owned or controlled by Fred Meyer;
- c. by increasing the likelihood that Kroger will unilaterally exercise market power; and
- d. 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

PARAGRAPH TWENTY: The Agreement and Plan of Merger between Kroger and Fred Meyer, pursuant to which Jobsite will merge with and into Fred Meyer and Fred Meyer will become a wholly-owned subsidiary of Kroger, violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and the proposed acquisition would, if consummated, violate

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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.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this tenth day of January, 2000, issues its complaint against said respondents.

By the Commission, Commissioner Leary not participating.

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The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition by The Kroger Co. ("Kroger") of Fred Meyer, Inc. ("Fred Meyer"), and it now appearing that Kroger and Fred Meyer, 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

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

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Fleming Companies, Inc. ("Fleming"), having purchased some of the assets to be divested under the terms of the Consent Agreement, Fleming having expressed an intention to resell some of those assets to another purchaser, and Fleming having executed the Consent Agreement; 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 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 received, and having modified the Decision & Order in certain respects, 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 45202.
2. Respondent Fred Meyer is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 3800 Southeast 22nd Avenue, Portland, Oregon 97202.
3. Fleming is a corporation organized, existing and doing business under and by virtue of the laws of the State of Oklahoma, with its principal place of business located at 6301 Waterford Boulevard, Oklahoma City, Oklahoma 73126.

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4. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding, of the Respondents, and of Fleming, 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. Kroger, after consummation of the Acquisition, includes Fred Meyer.
- B. “Fred Meyer” means Fred Meyer, Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Fred Meyer, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “Respondents” means Kroger and Fred Meyer, individually and collectively.
- D. “Fleming” means Fleming Companies, Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Fleming Companies, Inc., and the respective directors, officers,

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employees, agents, representatives, successors, and assigns of each.

- E. “Commission” means the Federal Trade Commission.
- F. “Acquisition” means Kroger’s proposed acquisition of Fred Meyer pursuant to the Agreement dated October 18, 1998.
- G. “Assets To Be Divested” means the Schedule A Assets, the Schedule B Assets, and the Schedule C Assets.
- H. “Schedule A Assets” means the Supermarkets identified in Schedule A of 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 Supermarket business operated at those locations, but shall not include those assets consisting of or pertaining to any of the Respondents’ trade marks, trade dress, service marks, or trade names.
- I. “Schedule B Assets” means the Supermarkets identified in Schedule B of 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 Supermarket business operated at those locations, but shall not include those assets consisting of or pertaining to any of the Respondents’ trade marks, trade dress, service marks, or trade names.
- J. “Schedule B Wyoming Assets” means the Supermarkets identified in Schedule B of this Order that are located in Green River, Wyoming, and Rock

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Springs, Wyoming, 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 Supermarket business operated at those locations, but shall not include those assets consisting of or pertaining to any of the Respondents' trade marks, trade dress, service marks, or trade names.

- K. "Schedule C Assets" means the Supermarkets identified in Schedule C of 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 Supermarket business operated at those locations, but shall not include those assets consisting of or pertaining to any of the Respondents' trade marks, trade dress, service marks, or trade names.
- L. "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 nonfood items such as soaps, detergents, paper goods, other household products, and health and beauty aids.
- M. "Supermarkets To Be Divested" means the Supermarkets identified in Schedule A, Schedule B, and Schedule C of this Order.

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- N. "Albertson's" means Albertson's, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at East Parkcenter Boulevard, Boise, Idaho 83726.
- O. "Nash-Finch" means Nash-Finch Company, a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 7600 France Avenue South, P.O. Box 355, Minneapolis, Minnesota 55440.
- P. "Albertson's Agreement" means the Purchase Agreement between Albertson's and Kroger executed on March 31, 1999, for the divestiture by Respondents to Albertson's of the Schedule A Assets.
- Q. "Fleming Agreement" means the Purchase Agreements between Fleming Companies, Inc. and Kroger executed on March 31, 1999, and April 7, 1999, for the divestiture by Respondents to Fleming Companies, Inc. of the Schedule B Assets.
- R. "Nash-Finch Agreement" means the Purchase Agreement between Nash-Finch and Smith's Food & Drug Centers, Inc., a wholly-owned subsidiary of Fred Meyer, executed on March 31, 1999, for the divestiture by Respondents to Nash-Finch of the Schedule C Assets.
- S. "Acquirer(s)" means Albertson's, Fleming Companies, Inc., Nash-Finch, and/or any other entity or entities approved by the Commission to acquire the Assets To Be Divested pursuant to this Order, individually and collectively.

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- T. “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 Schedule A Assets to Albertson’s, in accordance with the Albertson’s Agreement (which agreement 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 Schedule A Assets to Albertson’s pursuant to the Albertson’s Agreement 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 Albertson’s is not an acceptable acquirer or that the Albertson’s Agreement is not an acceptable manner of divestiture, then Respondents shall immediately rescind the transaction with Albertson’s and shall divest the Schedule A Assets 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 only in a manner that receives the prior approval of the Commission.

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- B. Respondents shall divest, absolutely and in good faith, the Schedule B Assets to Fleming in accordance with the Fleming Agreement (which agreement 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 Schedule B Assets to Fleming pursuant to the Fleming Agreement 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 Fleming is not an acceptable acquirer or that the Fleming Agreement is not an acceptable manner of divestiture, then Respondents shall immediately rescind the transaction with Fleming, and shall divest the Schedule B Assets 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 only in a manner that receives the prior approval of the Commission.

- C. Respondents shall divest, absolutely and in good faith, the Schedule C Assets to Nash-Finch, in accordance with the Nash-Finch Agreement (which agreement shall not be construed to vary or contradict the terms of this Order), no later than

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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 Schedule C Assets to Nash-Finch pursuant to the Nash-Finch Agreement 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 Nash-Finch is not an acceptable acquirer or that the Nash-Finch Agreement is not an acceptable manner of divestiture, then Respondents shall immediately rescind the transaction with Nash-Finch and shall divest the Schedule C Assets 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 only in a manner that receives the prior approval of the Commission.

- D. Respondents shall obtain all required Third Party Consents prior to the closing of the Albertson's Agreement, the Fleming Agreement, the Nash-Finch Agreement, or any other agreement pursuant to which the Assets To Be Divested are divested to an Acquirer.
- E. 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 alleged in the Commission's complaint.

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III.

IT IS FURTHER ORDERED that, if Fleming purchases any Schedule B Wyoming Assets, Fleming shall sell or otherwise convey, directly or indirectly, any such Schedule B Wyoming Assets, only to an Acquirer approved by the Commission and only in a manner that receives the prior approval of the Commission. Fleming shall comply with this Paragraph until three (3) years after the date this Order becomes final.

IV.

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.

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- B. If a trustee is appointed by the Commission or a court pursuant to Paragraph IV.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 IV.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

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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 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

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entity or entities selected by Kroger from among those approved by the Commission.

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.

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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 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.

V.

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

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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;

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- 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 conduct any “going out of business,” “close-out,” “liquidation” or similar sales or promotions at or relating to any Supermarket To Be Divested; and
- G. 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.

VI.

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 Yavapai, Cochise, or Yuma counties in Arizona; Laramie or Sweetwater counties in Wyoming; or Carbon County in Utah.

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- 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 Yavapai, Cochise, or Yuma counties in Arizona; Laramie or Sweetwater counties in Wyoming; or Carbon County in Utah.

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 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 C.F.R. § 803.20), Kroger shall not consummate the transaction until twenty 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.

Decision and Order

VII.

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 January 1, 1998, in Yavapai, Cochise, or Yuma counties in Arizona; Laramie or Sweetwater counties in Wyoming; or Carbon County in Utah, 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 Yavapai, Cochise, or Yuma counties in Arizona; Laramie or Sweetwater counties in Wyoming; or Carbon County in Utah, 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.

VIII.

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

Decision and Order

II, IV, and V 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, IV, and V 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, IV, and V 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.

IX.

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.

Decision and Order

X.

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 and Fleming 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 or Fleming relating to any matters contained in this Order; and
- B. Without restraint or interference from Respondents and Fleming, to interview Respondents, Fleming, or officers, directors, or employees of Respondents or Fleming in the presence of counsel.

By the Commission, Commissioner Leary not participating.

SCHEDULE A

All Supermarkets in Price, Utah, in which Kroger had a financial interest prior to the consummation of the Acquisition, including, but not limited to, the Supermarket operated under the name "City Market" at 760 Price River Drive, Price, Utah 84501.

Decision and Order

SCHEDULE B

1. All Supermarkets in Rock Springs, Wyoming, in which Kroger had a financial interest prior to the consummation of the Acquisition, including, but not limited to, the Supermarket operated under the name "City Market" at 401 N. Center, Rock Springs, Wyoming 82901.
2. All Supermarkets in Green River, Wyoming, in which Kroger had a financial interest prior to the consummation of the Acquisition, including, but not limited to, the Supermarket operated under the name "City Market" at 400 Uinta Avenue, Green River, Wyoming 82935.
3. All Supermarkets in Prescott, Arizona, in which Kroger had a financial interest prior to the consummation of the Acquisition, including, but not limited to, the Supermarket operated under the name "Fry's" at 1519 W. Gurley Road, Prescott, Arizona 86301.
4. All Supermarkets in Yuma, Arizona, in which Kroger had a financial interest prior to the consummation of the Acquisition, including, but not limited to, the Supermarket operated under the name "Fry's" at 2600 West 16th Street, Yuma, Arizona 85364.
5. All Supermarkets in Sierra Vista, Arizona, in which Fred Meyer had a financial interest prior to the consummation of the Acquisition, including, but not limited to, the Supermarket operated under the name "Smith's" at 85 South Highway 92, Sierra Vista, Arizona 85635.

Analysis to Aid Public Comment

SCHEDULE C

All Supermarkets in Cheyenne, Wyoming, in which Fred Meyer had a financial interest prior to the consummation of the Acquisition, including, but not limited to:

1. the Supermarket operated under the name “Smith’s” at 1600 East Pershing Boulevard, Cheyenne, Wyoming 82001; and
2. the Supermarket operated under the name “Smith’s” at 3745 East Lincoln Way, Cheyenne, Wyoming 82001.

**ANALYSIS OF THE PROPOSED CONSENT ORDER
TO AID PUBLIC COMMENT****I. Introduction**

The Federal Trade Commission (“Commission”) has accepted for public comment from The Kroger Co. (“Kroger”) and Fred Meyer Stores, Inc. (“Fred Meyer”) (collectively “the Proposed Respondents”) an Agreement Containing Consent Order (“the proposed consent order”). The Proposed Respondents have also reviewed a draft complaint contemplated by the Commission. The proposed consent order is designed to remedy likely anticompetitive effects arising from the merger of Jobsite Holdings, Inc. (“Jobsite”), a wholly-owned subsidiary of Kroger, with and into Fred Meyer (the “Merger”), through which Fred Meyer will become a wholly-owned subsidiary of Kroger.

II. Description of the Parties and the Proposed Acquisition

Kroger, an Ohio corporation headquartered in Cincinnati, Ohio, operates over 1,400 supermarkets in 23 states. Kroger's supermarkets operate under the "Kroger," "Fry's," "Dillons," "King Soopers," "City Markets," and "Gerbes" trade names. In the states where Kroger competes with Fred Meyer, Kroger operates supermarkets in Arizona under the "Fry's" trade name and in Utah and Wyoming under the "City Market" and "King Sooper" trade names. Kroger has plans to open a supermarket in Cheyenne, Wyoming, under the "King Sooper" trade name. Kroger had \$26.57 billion in United States revenues for the fiscal year that ended on December 27, 1997. Following the merger, Kroger will remain the largest supermarket firm in the United States.

Fred Meyer, a Delaware corporation headquartered in Portland, Oregon, operates approximately 800 supermarkets in 12 western states. Fred Meyer's supermarkets operate under the "Smith's Food & Drug Centers" trade name in Arizona, Utah, and Wyoming, as well as the "Fred Meyer" trade name in Arizona and Utah, and the "Price Rite" trade name in Arizona. Fred Meyer had \$14.88 billion in total sales for the fiscal year that ended on January 31, 1999.

Pursuant to the Merger proposed by Kroger and Fred Meyer, Jobsite will merge with and into Fred Meyer and Fred Meyer will become a wholly-owned subsidiary of Kroger. As a result of the Merger, Fred Meyer's outstanding shares of common stock will be extinguished and the holder of each such share will be entitled to receive one newly-issued share of common stock of Kroger in exchange for each extinguished share of Fred Meyer common stock. The total equity value of the proposed merger is approximately \$15 billion.

Analysis to Aid Public Comment

III. The Draft Complaint

The draft complaint alleges that the relevant line of commerce (*i.e.*, the product market) is the retail sale of food and grocery items in supermarkets. 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.

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 other 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.

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. These other stores operate significantly different retail formats. 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.

Analysis to Aid Public Comment

According to the draft complaint, the relevant sections of the country (*i.e.*, the geographic markets) in which to analyze the acquisition are the areas in and near the following cities and towns: (a) Prescott, Arizona; (b) Sierra Vista, Arizona; (c) Yuma, Arizona; (d) Cheyenne, Wyoming; (e) Green River, Wyoming; (f) Rock Springs, Wyoming; and (g) Price, Utah.

Kroger and Fred Meyer are actual and direct competitors in and near Prescott, Sierra Vista, Yuma, Green River, Rock Springs, and Price. Kroger is an actual potential competitor against Fred Meyer in and near the Cheyenne relevant market. But for the acquisition, Kroger and Fred Meyer would become direct competitors in the Cheyenne relevant market. The acquisition will eliminate that competition.

According to the draft complaint, the Prescott, Sierra Vista, Yuma, Arizona; Green River, Rock Springs, Wyoming; and Price, Utah, relevant markets are highly concentrated, whether measured by the Herfindahl-Hirschman Index (commonly referred to as “HHI”)¹ or by two-firm and four-firm concentration ratios. The acquisition would substantially increase concentration in each market. Kroger and Fred Meyer would have a combined market share of near or greater than 35% in each geographic market. The post-acquisition HHIs in the geographic markets range from 2,793 to 10,000.

The draft complaint further alleges that the Cheyenne, Wyoming, relevant market is also highly concentrated. The market will remain highly concentrated as a result of this acquisition, and will be significantly more concentrated than it would have been but for the acquisition.

According to the draft complaint, entry is difficult and would not be timely, likely, or sufficient to prevent anticompetitive effects in the relevant geographic markets.

¹ The HHI is a measurement of market concentration calculated by summing the squares of the individual market shares of all the participants.

Analysis to Aid Public Comment

According to the draft complaint, the Agreement and Plan of Merger between Kroger and Fred Meyer, pursuant to which Jobsite will merge with and into Fred Meyer and Fred Meyer will become a wholly-owned subsidiary of Kroger, may substantially lessen competition in the relevant markets 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, by eliminating direct competition between supermarkets owned or controlled by Kroger and supermarkets owned or controlled by Fred Meyer; by eliminating actual potential competition between supermarkets owned or controlled by Kroger and supermarkets owned or controlled by Fred Meyer; by increasing the likelihood that Kroger will unilaterally exercise market power; and by increasing the likelihood of, or facilitating, collusion or coordinated interaction among the remaining supermarket firms. Each of these effects 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.

IV. Terms of the Proposed Consent Order

The proposed consent order will remedy the Commission's competitive concerns about the proposed acquisition. Under the terms of the proposed consent order, the Proposed Respondents must divest eight specific supermarkets in the relevant markets. Five of the supermarkets that the Proposed Respondents must divest are currently owned and operated by Kroger (of which two operate under the "Fry's" banner and three operate under the "City Market" banner), and three of the supermarkets are currently owned and operated by Fred Meyer (all of which operate under the "Smith's" banner). The Proposed Respondents must divest: (1) two Fred Meyer "Smith's" in Cheyenne, Wyoming, to Nash-Finch Company ("Nash-Finch"), one of the largest food wholesalers in the United States and an operator of many company-owned

Analysis to Aid Public Comment

supermarkets; (2) one Kroger "City Market" in Price, Utah, to Albertson's, Inc., one of the largest retail food and drug chains operating in the United States; and (3) two Kroger "Fry's," two Kroger "City Markets," and one Fred Meyer "Smith's" in various locations to Fleming Companies, Inc. ("Fleming"), the second-largest supermarket wholesaler in the United States and an operator of many company-owned supermarkets. These divestitures include every Kroger supermarket or every Fred Meyer supermarket in each relevant market. Each upfront buyer owns no supermarkets in the same market where it is acquiring one or more divested supermarkets from the Proposed Respondents. The specific supermarkets that the Proposed Respondents must divest to Nash-Finch, Albertson's, and Fleming are listed below.

The two supermarkets that the Proposed Respondents must divest to Nash-Finch in accordance with the agreement between Kroger and Nash-Finch dated March 31, 1999, are:

1. Smith's store no. 175 operating under the "Smith's Food & Drug Centers" trade name, located at 1600 E. Pershing Blvd., Cheyenne, Wyoming 82001 (Laramie County); and
2. Smith's store no. 176 operating under the "Smith's Food & Drug Centers" trade name, located at 3745 East Lincoln Way, Cheyenne, Wyoming 82001 (Laramie County).

The one supermarket that the Proposed Respondents must divest to Albertson's in accordance with the agreement between Kroger and Albertson's dated March 31, 1999, is:

1. Kroger store no. 27 operating under the "City Market" trade name, located at 760 Price River Dr., Price, Utah 84501 (Carbon County).

Analysis to Aid Public Comment

The five supermarkets that the Proposed Respondents must divest to Fleming in accordance with the agreements between Kroger and Fleming dated March 31, 1999, and April 7, 1999, are:

1. Kroger store no. 24 operating under the "City Market" trade name, located at 401 N. Center, Rock Springs, Wyoming 82901 (Sweetwater County);
2. Kroger store no. 23 operating under the "City Market" trade name, located at 400 Uinta Drive, Green River, Wyoming 82935 (Sweetwater County);
3. Kroger store no. 9 operating under the "Fry's" trade name, located at 1519 W. Gurley Street, Prescott, Arizona 86305 (Yavapai County);
4. Smith's store no. 305 operating under the "Smith's Food & Drug Centers" trade name, located at #85 South Hwy. 92, Sierra Vista, Arizona 85635 (Cochise County); and
5. Kroger store no. 47 operating under the "Fry's" trade name, located at 2600 W. 16th Street, Yuma, Arizona 85364 (Yuma County).

From the time Jobsite merges with and into Fred Meyer until the divestitures have been completed, the Proposed Respondents are required to maintain the viability, competitiveness, and marketability of the assets to be divested, must not cause their wasting or deterioration, and cannot sell, transfer, or otherwise impair their marketability or viability.

Analysis to Aid Public Comment

The proposed consent order specifically requires that the divestitures occur no later than twenty days after Jobsite merges with and into Fred Meyer and Fred Meyer becomes a wholly-owned subsidiary of Kroger or four months after the Proposed Respondents signed the proposed consent order (April 29, 1999), whichever is earlier. The proposed consent agreement also requires Kroger to include rescission provisions in its upfront buyer agreements that allow it to rescind the transaction(s) if the Commission, after the comment period, decides to reject any of the upfront buyers. If Kroger divests the supermarkets to be divested prior to the date the proposed consent order becomes final, and if, at the time the Commission decides to make the proposed consent order final, the Commission notifies Kroger that any of the upfront buyers is not an acceptable acquirer or that any of the upfront buyer agreements is not an acceptable manner of divestiture, then Kroger must immediately rescind the transaction in question and divest those assets within three months after the proposed consent order becomes final. At that time, Kroger must divest those assets only to an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. In the event that any Commission-approved buyer is unable to take or keep possession of any of the supermarkets identified for divestiture, a trustee that the Commission may appoint has the power to divest any of the supermarkets or properties in the markets alleged in Paragraph 13 of the complaint that the Proposed Respondents own to remedy the anticompetitive effects alleged in the complaint.

The Commission's goal in evaluating possible purchasers of divested assets is to maintain the competitive environment that existed prior to the acquisition. When divestiture is an appropriate remedy for a supermarket merger, the Commission requires the merging parties to find a buyer for the divested stores. A proposed buyer must not itself present competitive problems. For example, the Commission is less likely to approve a buyer that already has a large retail presence in the relevant geographic area than a buyer without such a presence. The Commission is satisfied that the purchasers presented by the parties are well qualified to run the

Analysis to Aid Public Comment

divested stores and that divestiture to these purchasers poses no separate competitive issues.

For a period of ten years from the date the proposed consent order becomes final, Kroger is required to provide notice to the Commission prior to acquiring supermarket assets located in, or any interest (such as stock) in any entity that owns or operates a supermarket located in, Cochise, Yavapai, or Yuma counties, Arizona; Laramie or Sweetwater counties, Wyoming; or Carbon County, Utah. Kroger may not complete such an acquisition until it has provided information requested by the Commission. This provision does not restrict Kroger from constructing new supermarket facilities on its own; nor does it restrict Kroger from leasing facilities not operated as supermarkets within the previous six months.

For a period of ten years, the proposed consent order also prohibits Kroger from entering into or enforcing any agreement that restricts the ability of any person that acquires any supermarket, any leasehold interest in any supermarket, or any interest in any retail location used as a supermarket on or after January 1, 1998, to operate a supermarket at that site if such supermarket was formerly owned or operated by Kroger in Cochise, Yavapai, or Yuma counties, Arizona; Laramie or Sweetwater counties, Wyoming; or Carbon County, Utah. In addition, Kroger may not remove fixtures or equipment from a store or property owned or leased in Cochise, Yavapai, or Yuma counties, Arizona; Laramie or Sweetwater counties, Wyoming; or Carbon County, Utah, that is no longer in operation as a supermarket, except (1) prior to a sale, sublease, assignment, or change in occupancy or (2) to relocate such fixtures or equipment in the ordinary course of business to any other supermarket owned or operated by Kroger.

Analysis to Aid Public Comment

The Proposed Respondents are required to provide to the Commission a report of compliance with the proposed consent order within thirty days following the date on which they signed the proposed consent and every thirty days thereafter until the divestitures are completed. Kroger is required to provide to the Commission a report of compliance annually for a period of ten years. The obligations of Jobsite under the proposed consent order will terminate upon consummation of the proposed acquisition.

V. Opportunity for Public Comment

The proposed consent order has been placed on the public record for 60 days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After 60 days, the Commission will again review the agreement and the comments received and will decide whether it should withdraw from the agreement or make the proposed consent order final.

By accepting the proposed consent order subject to final approval, the Commission anticipates that the competitive problems alleged in the complaint will be resolved. The purpose of this analysis is to invite public comment on the proposed consent order, including the proposed sale of supermarkets to Nash-Finch, Albertson's, and Fleming, in order to aid the Commission in its determination of whether to make the proposed consent order final. This analysis is not intended to constitute an official interpretation of the proposed consent order nor is it intended to modify the terms of the proposed consent order in any way.

Complaint

IN THE MATTER OF
HOECHST AG AND RHÔNE-POULENC S.A.

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

Docket C-3919; File No. 9910071

Complaint, January 18, 2000--Decision, January 18, 2000

This consent order addresses the merger of Respondent Glaxo Wellcome plc ("Glaxo") and Respondent SmithKline Beecham plc ("SB"). The order, among other things, requires the respondents (1) to divest all of SB's worldwide rights and intellectual property relating to its antiemetic drug, Kytril, to F. Hoffman LaRoche; (2) to divest SB's intellectual property rights to manufacture and market ceftazidime (an injectable antibiotic used to treat serious hospital-borne infections) to Abbott Laboratories; (3) to divest SB's worldwide rights and intellectual property relating to its antiviral drugs, Famvir and Denavir, to Novartis Pharm AG and Novartis Pharmaceuticals Corporation; and (4) to return to Cantab Pharmaceuticals plc all rights to use Cantab's DISC technology for the development of a prophylactic herpes vaccine. The order also requires the respondents (5) to divest Glaxo's United States and Canadian Zantac trademark rights to Pfizer; (6) to assign or relinquish all of SB's relevant intellectual property rights and options to the drug renzapride (used to treat irritable bowel syndrome) to Alizyme plc; (7) to assign all of Glaxo's relevant intellectual property rights to GI147211C, a topoisomerase I inhibitor (used to treat certain types of cancer), to Gilead Sciences, Inc.; and (8) to assign all of SB's relevant intellectual property rights and relinquish all options to regain control over frovatriptan (used to treat migraine headaches) to Vernalis Ltd.

Participants

For the Commission: *Molly S. Boast, Laura I. Brem, Linda D. Cunningham, Daniel P. Ducore, Wallace W. Easterling, Elizabeth A. Jex, Roy B. Levy, Ann Malester, Robert R. Pickett, Elizabeth A. Schneirov, and Gregory S. Vistnes.*

For the Respondents: *Alec Chang and William Pelster, Skadden Arps Slate Meagher & Flom, L.L.P., and Jessica Biggio, Steven Sunshine, and David Wales, Shearman & Sterling.*