

Complaint

IN THE MATTER OF

WINN-DIXIE STORES, 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-4001; File No. 0110022**Complaint, February 14, 2001--Decision, February 14, 2001*

This consent order addresses the acquisition by Respondent Winn-Dixie Stores, Inc., which operates more than 1,000 supermarkets in fourteen southeastern states and the Bahamas, of supermarkets and other assets of Jitney-Jungle Stores of America, Inc., an operator -- before effecting a Chapter 11 bankruptcy filing -- of supermarkets, gas stations, and liquor stores in six southern states. The order, among other things, prohibits the respondent, for ten years, from acquiring any interest in four identified Jitney-Jungle supermarkets without the prior approval of the Commission. The order also requires the respondent, for ten years, to provide written notice to the Commission prior to acquiring any interest in a supermarket owner or operator, or any facility that has operated as a supermarket within the previous six months, located in any of the relevant geographic markets at issue. In addition, the order prohibits the respondent, for ten years, from entering into or enforcing any agreement that restricts the ability of any acquirer -- of any supermarket, leasehold interest in a supermarket, or interest in any retail location used as a supermarket within certain areas -- to operate a supermarket at that site, if such supermarket was formerly owned or operated by the respondent.

Participants

For the Commission: *Michael Joel Bloom, Dara J. Diomande, Barbara Anthony, James A. Fishkin, Phillip L. Broyles, Kenneth A. Libby, and Daniel P. Ducore.*

For the Respondent: *Christopher J. MacAvoy, Howrey, Simon, Arnold & White.*

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"),

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having reason to believe that respondent Winn-Dixie Stores, Inc. ("Winn-Dixie") has entered into an agreement to acquire certain assets from Jitney-Jungle Stores of America, Inc. ("Jitney-Jungle"), an entity controlled by Bruckmann, Rosser, Sherrill & Co., L.P., 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:

Definitions

1. For the purposes of this complaint:
 - (a) "Supermarket" means a full-line retail grocery store that carries a wide variety of food and grocery items in particular product categories, including bread and dairy products; refrigerated and frozen food and beverage products; fresh and prepared meats and poultry; produce, including fresh fruits and vegetables; shelf-stable food and beverage products, including canned and other types of packaged products; staple foodstuffs, which may include salt, sugar, flour, sauces, spices, coffee, and tea; and other grocery products, including nonfood items such as soaps, detergents, paper goods, other household products, and health and beauty aids.
 - (b) "Jitney-Jungle" means Jitney-Jungle Stores of America, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Mississippi, with its office and principal place of business located at 1770 Ellis Avenue, Suite 200, Jackson, Mississippi 39202, and includes its subsidiaries, divisions, groups, and affiliates controlled by Jitney-Jungle, including Interstate Jitney Jungle Stores, Inc., Pump and Save, Inc., P&S

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Operations, Inc., Supermarket Cigarette Sales, Inc.,
Delchamps, Inc., and Southern Jitney Jungle Company,
Inc.

Winn-Dixie Stores, Inc.

2. Respondent Winn-Dixie is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Florida, with its office and principal place of business located at 5050 Edgewood Court, Jacksonville, Florida 32254.

3. Respondent Winn-Dixie is, and at all times relevant herein has been, engaged in the operation of supermarkets in 14 states and the Bahama Islands. Winn-Dixie operates 1,079 supermarkets under the Winn-Dixie trade names. Winn-Dixie had approximately \$13.7 billion in total sales for the fiscal year that ended on June 30, 2000.

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

Acquisition

5. On or about October 29, 2000, Winn-Dixie entered into an "Agreement for Purchase and Sale of Retail Grocery Stores By and Between Interstate Jitney Jungle Stores, Inc., Pump and Save, Inc., P&S Operations, Inc., Supermarket Cigarette Sales, Inc., Jitney-Jungle Stores of America, Inc., Delchamps, Inc., and Southern Jitney Jungle Company, Inc. and Winn-Dixie Stores, Inc." pursuant to which Winn-Dixie will acquire 72 supermarkets, 32 gas stations and two liquor stores from the Jitney-Jungle entities. The supermarkets, gas stations and liquor stores are located in Alabama, Florida, Louisiana, and Mississippi. The

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total value of the proposed acquisition is approximately \$85 million plus the value of inventory.

6. Interstate Jitney Jungle Stores, Inc., Pump and Save, Inc., P&S Operations, Inc., Supermarket Cigarette Sales, Inc., Jitney-Jungle Stores of America, Inc., Delchamps, Inc., and Southern Jitney Jungle Company, Inc. each filed a voluntary petition for reorganization relief pursuant to Chapter 11 of the United States Code, 11 U.S.C. § 101 et seq. as amended ("The Bankruptcy Code") on October 12, 1999. The proposed transaction is subject to approval by the United States Bankruptcy Court for the Eastern District of Louisiana, Docket No. 99-17191.

Trade and Commerce

7. 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.

8. 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 a variety of brand names and sizes. 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.

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

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and grocery products at supermarkets are not likely to shop elsewhere in response to a small price increase by supermarkets.

10. Retail stores other than supermarkets that sell food and grocery products, such as neighborhood "mom & pop" grocery stores, limited assortment 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 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.

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

- a. Niceville, Florida;
- b. Gulf Breeze, Florida;
- c. Destin, Florida; and
- d. the Gulfport-Biloxi area of Mississippi, which consists of the parts of Hancock, Harrison, and Jackson counties that include Waveland, Bay Saint Louis, Pass Christian, Long Beach, Gulfport, Biloxi, D'Iberville, and Ocean Springs, and narrower markets contained therein, including Gulfport and Biloxi.

Market Structure

12. The post-merger relevant markets are all highly concentrated, whether measured by the Herfindahl-Hirschman Index (commonly referred to as "HHI") or by the four-firm concentration ratio. The acquisition would substantially increase concentration in each market. The post-acquisition HHIs in the geographic markets range from approximately 2,400 to 10,000.

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Entry Conditions

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

Actual Competition

14. Winn-Dixie and Jitney-Jungle are actual and direct competitors in the relevant line of commerce and the relevant sections of the country.

Effects

15. 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 Winn-Dixie and supermarkets owned or controlled by Jitney-Jungle;
- b. by increasing the likelihood that Winn-Dixie 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.

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Violations Charged

16. The October 29, 2000, “Agreement for Purchase and Sale of Retail Grocery Stores By and Between Interstate Jitney Jungle Stores, Inc., Pump and Save, Inc., P&S Operations, Inc., Supermarket Cigarette Sales, Inc., Jitney-Jungle Stores of America, Inc., Delchamps, Inc., and Southern Jitney Jungle Company, Inc. and Winn-Dixie Stores, Inc.” violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and the proposed 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.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this fourteenth day of February, 2001, issues its complaint against said respondent.

Decision and Order

DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed acquisition by Respondent Winn-Dixie Stores, Inc. ("Winn-Dixie") of certain assets from Jitney-Jungle Stores of America, Inc. ("Jitney-Jungle"), an entity controlled by Bruckmann, Rosser, Sherrill & Co., L.P., and Respondent having been furnished with a copy of a draft Complaint that the Bureau of Competition proposed to present to the Commission for its consideration, and which, if issued by the Commission, would charge Respondent with violations of 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

Respondent, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order ("Consent Agreement"), an admission by Respondent of all the jurisdictional facts set forth in the aforesaid draft of Complaint, containing a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in such Complaint, 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 Respondent has violated the said Acts, and that 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 thirty (30) days for the receipt and consideration of public comments, 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 issues the following Decision and Order:

Decision and Order

- a. Respondent Winn-Dixie is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its office and principal place of business located at 5050 Edgewood Court, Jacksonville, Florida 32254.
- b. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondent, and the proceeding is in the public interest.

ORDER**I.**

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

A. "Winn-Dixie" or "Respondent" means Winn-Dixie Stores, Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Winn-Dixie, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. Winn-Dixie, after consummation of the Acquisition, includes the assets that it is acquiring from Jitney-Jungle.

B. "Jitney-Jungle" means Jitney-Jungle Stores of America, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Mississippi, with its office and principal place of business located at 1770 Ellis Avenue, Suite 200, Jackson, Mississippi 39202, and includes its subsidiaries, divisions, groups, and affiliates controlled by Jitney-Jungle, including Interstate Jitney Jungle Stores, Inc., Pump and Save, Inc., P&S Operations, Inc., Supermarket Cigarette Sales, Inc., Delchamps, Inc., and Southern Jitney Jungle Company, Inc.

C. "Acquisition" means the October 29, 2000, "Agreement for Purchase and Sale of Retail Grocery Stores By and Between Interstate Jitney Jungle Stores, Inc., Pump and Save, Inc., P&S

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Operations, Inc., Supermarket Cigarette Sales, Inc., Jitney-Jungle Stores of America, Inc., Delchamps, Inc., and Southern Jitney Jungle Company, Inc. and Winn-Dixie Stores, Inc.” pursuant to which Winn-Dixie will acquire certain assets from Jitney-Jungle and will merge them into Winn-Dixie.

D. "Commission" means the Federal Trade Commission.

E. "Supermarket" means a full-line retail grocery store that carries a wide variety of food and grocery items in particular product categories, including bread and dairy products; refrigerated and frozen food and beverage products; fresh and prepared meats and poultry; produce, including fresh fruits and vegetables; shelf-stable food and beverage products, including canned and other types of packaged products; staple foodstuffs, which may include salt, sugar, flour, sauces, spices, coffee, and tea; and other grocery products, including nonfood items such as soaps, detergents, paper goods, other household products, and health and beauty aids.

II.

IT IS FURTHER ORDERED that:

A. For a period of ten (10) years commencing on the date this Order becomes final, Respondent shall not, without the prior approval of the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise, acquire any stock, share capital, equity, or other interest in any supermarket or leasehold interest in any supermarket located at:

1. 65 Poinciana Boulevard, Destin, Florida 32541 (Walton County);
2. 1104 John Sims Parkway, Niceville, Florida 32578 (Okaloosa County);
3. 334 Gulf Breeze Parkway, Gulf Breeze, Florida 32561 (Santa Rosa County); and

4. 171 Porter Avenue, Biloxi, Mississippi 39530 (Harrison County),

including any facility that has operated as a supermarket at such location within six (6) months of the date of the proposed acquisition.

B. The purpose of this prohibition is to ensure the continuation of these assets 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.

III.

IT IS FURTHER ORDERED that, for a period of ten (10) years from the date this Order becomes final, Respondent 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 Okaloosa, Santa Rosa or Walton counties in Florida; Hancock, Harrison, Jackson or Lauderdale counties in Mississippi; St. Tammany Parish, Louisiana; or Mobile County, Alabama.

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 Okaloosa, Santa Rosa or Walton counties in Florida; Hancock, Harrison, Jackson or Lauderdale counties in Mississippi; St. Tammany Parish, Louisiana; or Mobile County, Alabama.

Provided, however, that advance written notification shall not apply to the construction of new facilities by Respondent or the

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acquisition of or leasing of a facility that has not operated as a Supermarket within six (6) months prior to Respondent'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 Respondent and not of any other party to the transaction. Respondent 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 C.F.R. § 803.20), Respondent 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.

IV.

IT IS FURTHER ORDERED that, for a period of ten (10) years commencing on the date this Order becomes final:

A. Respondent shall neither enter into nor enforce any agreement that restricts the ability of any person (as defined in Section 1(a) of the Clayton Act, 15 U.S.C. § 12(a)) 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, 2000, in Okaloosa, Santa Rosa or Walton counties

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in Florida; Hancock, Harrison, Jackson or Lauderdale counties in Mississippi; St. Tammany Parish, Louisiana; or Mobile County, Alabama to operate a Supermarket at that site if such Supermarket was formerly owned or operated by Respondent.

B. Respondent shall not remove any fixtures or equipment from a property owned or leased by Respondent in Okaloosa, Santa Rosa or Walton counties in Florida; Hancock, Harrison, Jackson or Lauderdale counties in Mississippi; St. Tammany Parish, Louisiana; or Mobile County, Alabama, 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; (2) to relocate such fixtures or equipment in the ordinary course of business to any other Supermarket owned or operated by Respondent; or (3) otherwise with the prior approval of the Commission.

V.

IT IS FURTHER ORDERED that, 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, Respondent shall file verified written reports with the Commission setting forth in detail the manner and form in which it has complied and is complying with this Order.

VI.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate Respondent, such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change the corporation that may affect compliance obligations arising out of the Order.

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VII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, upon written request with reasonable notice to Respondent, Respondent shall permit any duly authorized representative of the Commission:

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

B. Without restraint or interference from Respondent, to interview officers, directors, or employees of Respondent, who may have counsel present, regarding any such matters.

VIII.

IT IS FURTHER ORDERED that this Order shall terminate on February 14, 2011.

By the Commission.

Analysis

**Analysis of the Complaint and Proposed Consent Order to
Aid Public Comment**

Issued when the Commission tentatively approved a proposed consent order on January 8, 2001

I. Introduction

The Federal Trade Commission ("Commission") has accepted for public comment from Winn-Dixie Stores, Inc. ("Winn-Dixie" or "the Proposed Respondent") an Agreement Containing Consent Order ("the proposed consent order"). The Proposed Respondent has also reviewed a draft complaint that the Commission contemplates issuing. The proposed consent order is designed to furnish the Commission with prospective relief in the markets affected by the proposed acquisition by Winn-Dixie of supermarkets and other assets of Jitney-Jungle Stores of America, Inc. ("Jitney-Jungle"). A plan of sale pertaining to the supermarkets involved in this case has been confirmed by the United States Bankruptcy Court for the Eastern District of Louisiana in *In re Jitney-Jungle Stores of America*, Case No. 99-17191, on December 15, 2000.

II. Description of the Parties and the Proposed Acquisition

Jitney-Jungle, owned principally by Bruckmann, Rosser, Sherill & Co., an investment company, runs most of its stores under the names "Jitney-Jungle" and "Delchamps." Prior to its filing under Chapter 11 of the Bankruptcy Act on October 12, 1999, Jitney-Jungle operated nearly 200 supermarkets, and a lesser number of nearby gas stations and liquor stores, in Mississippi, Alabama, Louisiana, Florida, Arkansas, and Tennessee. Following that filing, Jitney-Jungle has closed more than 45 supermarkets and sold off at least ten (10) others. Following the solicitation of buyers for any and all of its stores, Jitney-Jungle proposed to sell 72 supermarkets to Winn-Dixie for a total purchase price of \$85 million. Following an auction held under the auspices of the bankruptcy court, and as limited by the proposed consent order, Winn-Dixie plans instead to acquire 68 of the Jitney-Jungle stores for a reduced consideration.

Analysis

Winn-Dixie is a Florida corporation headquartered in Jacksonville, Florida. It operates more than 1,000 supermarkets in fourteen southeastern states and the Bahamas. Winn-Dixie reported sales of \$14.1 billion for fiscal 1999.

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. They 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 a variety of brand names and sizes. 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. So called "supercenters" operated by mass merchants such as Wal-Mart, which have full-line supermarkets attached to general merchandise stores, are included in the product market.

Supermarkets compete primarily with other supermarkets that provide one-stop shopping for food and grocery products. Supermarkets base their food and grocery prices on the prices primarily of food and grocery products sold at nearby supermarkets. They do not regularly price-check food and grocery products sold at other types of stores such as club stores or limited assortment 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, limited assortment stores, convenience stores, specialty food stores (*e.g.*, seafood markets, bakeries, etc.), club stores, and mass

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merchants, do not effectively constrain most prices at supermarkets. These other stores operate significantly different retail formats and sell far more limited assortments of items. None of these formats would constrain a price increase taken by supermarkets.

The draft complaint alleges that the relevant sections of the country in which to analyze the acquisition include, among others, the areas in and near the following cities and towns: Niceville, Florida; Gulf Breeze, Florida; Destin, Florida; and the Gulfport-Biloxi area of Mississippi, which consists of the parts of Hancock, Harrison, and Jackson counties that include Waveland, Bay Saint Louis, Pass Christian, Long Beach, Gulfport, Biloxi, D'Iberville, and Ocean Springs, and narrower markets contained therein, including Gulfport and Biloxi (the "Relevant Geographic Markets").

Jitney-Jungle and Winn-Dixie are actual and direct competitors in all of the above listed markets. The acquisition will eliminate that competition. The draft complaint alleges that each of the post-merger markets would be highly concentrated, whether measured by the Herfindahl-Hirschman Index (commonly referred to as "HHI") or by four-firm concentration ratios.¹ The acquisition would substantially increase concentration in each market. Jitney-Jungle and Winn-Dixie would have a combined market share that ranges from slightly less than 34% to 100% in the Relevant Geographic Markets. The post-acquisition HHIs in the Relevant Geographic Markets range from just over 2,400 points to 10,000 points.

The draft complaint further alleges that 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

Notwithstanding all of this, Winn-Dixie's acquisition of Jitney-Jungle assets is not likely to create or enhance market power, or facilitate its exercise, to the extent that the imminent failure of Jitney-Jungle would cause those assets, or some of them, to exit the market. To that extent, post-acquisition performance in the relevant market is not likely to be worse than performance had the acquisition been blocked and the assets exited.

As previously indicated, Jitney-Jungle has sought protection from its creditors pursuant to Chapter 11 of the Bankruptcy Act. A review of that proceeding indicates that Jitney-Jungle will not be able to reorganize successfully under Chapter 11, and that but for the auction sale conducted under the auspices of the bankruptcy court Jitney-Jungle would be thrown into liquidation proceedings under Chapter 7 of the Bankruptcy Act. The key question, therefore, is whether Jitney-Jungle has made unsuccessful good-faith efforts to elicit reasonable alternative offers of acquisition of the Jitney-Jungle assets. Through a variety of means, including the retention of appropriate professionals to elicit offers for its assets and culminating in the previously mentioned auction sale under the auspices of the bankruptcy court, Jitney-Jungle has sought to elicit reasonable alternative bids. In the four Relevant Geographic Markets, Jitney-Jungle has been able to elicit bids that are timely, above the liquidation value of the assets, and otherwise acceptable to creditors. Therefore, the Commission concluded that in the Relevant Geographic Markets the proposed acquisition would be anticompetitive because it would eliminate substantial, direct, and ongoing competition. In all other areas where Winn-Dixie directly competes against Jitney-Jungle, Jitney-Jungle has been unable to elicit bids that are timely, likely, above liquidation value of the assets, and otherwise acceptable to creditors. Therefore, the other areas where Winn-Dixie and Jitney-Jungle directly compete are not being challenged.

The draft complaint alleges that Winn-Dixie's proposed acquisition of various supermarket assets of Jitney-Jungle, if consummated, may substantially lessen competition in the four

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Relevant Geographic 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 presently owned or controlled by Jitney-Jungle and supermarkets owned or controlled by Winn-Dixie; by increasing the likelihood that Winn-Dixie 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 raises 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 Geographic Markets alleged in the proposed complaint.

IV. Terms of the Agreement Containing Consent Order

The proposed consent order will furnish prospective relief in the markets affected by the proposed acquisition.² Under the terms of the proposed consent order, the Proposed Respondent must not, for a period of ten (10) years from the date the proposed consent order becomes final, acquire any interest in four identified Jitney-Jungle supermarkets without the prior approval of the Commission.

Also for a period of ten (10) years, the Proposed Respondent must provide written notice to the Commission prior to acquiring any interest in a supermarket owner or operator, or any facility that has operated as a supermarket within the previous six (6) months, located in any of the Relevant Geographic Markets. Following notice, Proposed Respondent may not complete such an acquisition until after it has provided any information requested

² Acceptance of the proposed consent order for public comment terminates the Hart-Scott-Rodino waiting period and enables Winn-Dixie immediately to acquire the Jitney-Jungle assets.

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by the Commission during a specified waiting period. This provision does not restrict the Proposed Respondent's construction of new supermarket facilities on its own; nor does it restrict the Proposed Respondent from leasing facilities not operated as supermarkets within the previous six (6) months.

The proposed consent order also prohibits the Proposed Respondent, for ten (10) years, from entering into or enforcing any agreement that restricts the ability of any acquirer of any supermarket, leasehold interest in a supermarket, or interest in any retail location used as a supermarket within Okaloosa, Santa Rosa or Walton counties in Florida; Hancock, Harrison, Jackson or Lauderdale counties in Mississippi; St. Tammany Parish, Louisiana; or Mobile County, Alabama on or after January 1, 2000, to operate a supermarket at that site if such supermarket was formerly owned or operated by the Proposed Respondent. In addition, the Proposed Respondent may not remove fixtures or equipment from a store or property owned or leased in these counties that is no longer in operation as a supermarket, except (1) prior to a sale, sublease, assignment, or change in occupancy, (2) to relocate such fixtures or equipment in the ordinary course of business to any other supermarket owned or operated by Proposed Respondent, or (3) otherwise with the prior approval of the Commission.

The Proposed Respondent is required to provide to the Commission a report of compliance with the consent order beginning one (1) year from the date the proposed consent order becomes final and annually for each of the following nine (9) years.

V. Opportunity for Public Comment

The proposed consent order has been placed on the public record for 30 days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the proposed consent order and the comments received and will

Analysis

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 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

PHILIP MORRIS COMPANIES, INC., ET AL.

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-3987; File No. 0010215

Complaint, December 7, 2000--Decision, February 22, 2001

This consent order addresses the acquisition by Respondent Philip Morris Companies, Inc. -- which, through its Kraft Foods Inc. subsidiary, is the nation's largest food and beverage company -- of Respondent Nabisco Holdings Corp., the nation's seventh largest food and beverage company. The order, among other things, requires the respondents to divest the Nabisco dry-mix desserts and baking powder businesses -- including the Royal brand of dry-mix gelatin dessert products; the Royal and My-T-Fine brands of dry-mix pudding dessert products; and the Royal brand of no-bake dessert products; and the Davis and Fleischmann's brands of baking power products -- to The Jel Sert Company. The order also requires the respondents to divest the Nabisco intense mints business, together with related Ice Breakers gum and Breath Savers mint businesses, to Hershey Foods Corporation. An accompanying Order to Maintain Assets requires the respondents to preserve and maintain the competitive viability of all the assets required to be divested, in order to insure that their competitive value will be maintained until the assets are actually divested.

Participants

For the Commission: *Joseph Brownman, Erika Brown-Lee, Anthony Saunders, Nathan J. Muyskens, Karen Harris, Phillip L. Broyles, Kenneth A. Libby, Elizabeth A. Piotrowski, Abraham L. Wickelgren, David Balan, Charissa P. Wellford, and Daniel P. O'Brien.*

For the Respondent: *Deborah L. Feinstein, Arnold & Porter, and Joel M Cohen, Davis Polk & Wardwell.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it