

IN THE MATTER OF
MTH HOLDINGS, INC., ET AL.

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

Docket C-3266. Complaint, Oct. 6, 1989—Decision, Oct. 6, 1989

This consent order requires, among other things, MTH, an investment banking firm, to divest grocery stores in Vermont and New York to eliminate antitrust concerns that would be created by its acquisition of GU Acquisition Corporation, a holding company that owns and operates the Grand Union Company grocery store chain. In addition, for ten years, MTH must seek prior FTC approval before acquiring any grocery stores in any of the New York or Vermont counties in which the divestitures must be made.

Appearances

For the Commission: *David Conn, Daniel P. Ducore and Ronald B. Rowe.*

For the respondents: *William Pelster, Mohr, Skadden, Arps, Meagher & Flom, Washington, D.C. Mark Leddy, Cleary, Gottlieb, Steen & Hamilton, Washington, D.C. and Kenneth E. Newman, Donovan, Leisure, Newton & Irvine, New York City.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that the respondents, MTH Holdings, Inc. and GU Acquisition Corporation, corporations subject to the jurisdiction of the Commission, have entered into an agreement, described in paragraph 8 herein, that, if consummated, would violate the provisions of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45; that said agreement and the actions of the respondents to implement that agreement constitute violations of Section 5 of the FTC Act, 15 U.S.C. 45; and it appearing to the Commission that a proceeding by it in respect thereof would be in the

public interest, hereby issues its complaint, stating its charges as follows:

DEFINITIONS

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

a. "*Retail grocery store*" means any retail food store of 10,000 or more square feet and which sells primarily a variety of canned or frozen foods; dry groceries; nonedible grocery items; fresh meat, poultry and produce (vegetables and fruits) and which often sells delicatessen items, bakery items, fresh fish or other specialty items.

b. "*P & C*" means P & C Food Markets, Inc., its parents, including The Penn Traffic Company and MTH Holdings, Inc., predecessors, subsidiaries, divisions and groups controlled by P & C and their respective directors, officers, partners, employees, agents and representatives, and their successors and assigns.

c. "*Grand Union*" means The Grand Union Company, an indirect wholly owned subsidiary of GU Acquisition Corporation, through which GU Acquisition Corporation is engaged in the retail grocery business. Grand Union includes its parents, predecessors, subsidiaries, divisions, groups and affiliates controlled by GU Acquisition Corporation and their respective directors, officers, employees, agents, partners, and representatives, and their respective successors and assigns.

MTH HOLDINGS

2. Respondent MTH Holdings, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of New York with its executive offices located at 331 Madison Avenue, New York, New York.

3. Respondent MTH Holdings is, and at all times relevant herein has been, engaged in the retail sale and distribution of food and grocery items in retail grocery stores. For the year ending December 31, 1988, P & C, a subsidiary of MTH Holdings, Inc., had net sales of \$1.1 billion.

4. Respondent MTH Holdings 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.

GU ACQUISITION CORPORATION

5. Respondent GU Acquisition Corporation is a corporation organized, existing and doing business under and by virtue of the laws of Delaware with its executive offices located at 25 Old Kings Highway Road, Darien, Connecticut.

6. Respondent GU Acquisition Corporation is, and at all times relevant herein has been, engaged in the retail sale and distribution of food and grocery items in retail grocery stores. For the year ending December 31, 1988, Grand Union, a subsidiary of GU Acquisition Corporation, had net sales of \$2.5 billion.

7. Respondent GU Acquisition Corporation 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

8. On or about April 11, 1989, MTH Holdings and Salomon Inc entered into an agreement with GU Acquisition Corporation whereby MTH Holdings and Salomon Inc will purchase the assets and operations of Grand Union. There are 22 cities and towns where both Grand Union and P & C operate retail grocery stores.

TRADE AND COMMERCE

A. Relevant Line of Commerce

9. A relevant line of commerce in which to analyze MTH Holdings' and Salomon Inc's acquisition of GU Acquisition Corporation is the retail sale and distribution of food and grocery items in retail grocery stores.

B. Relevant Sections of the Country

10. Relevant sections of the country are the following towns and cities:

- a. Cobleskill, New York;
- b. Oneonta, New York;
- c. Ticonderoga, New York:

- d. Barre/Montpelier/Berlin, Vermont;
- e. Bennington, Vermont;
- f. Brattleboro, Vermont;
- g. Burlington, Vermont Metropolitan Statistical Area;
- h. Manchester, Vermont;
- i. Morrisville, Vermont;
- j. Rutland/North Clarendon/West Rutland, Vermont;
- k. Springfield, Vermont; and
- l. Windsor, Vermont.

MARKET STRUCTURE

11. The retail sale of food and grocery items in retail grocery stores in the relevant sections of the country is highly concentrated, whether measured by the Herfindahl-Hirschmann Index ("HHI") or by two-firm and four-firm concentration ratios.

ENTRY CONDITIONS

12. Entry into the retail sale of food and grocery items in retail grocery stores in the relevant sections of the country described in paragraph 10 is difficult.

ACTUAL COMPETITION

13. Grand Union and P & C are actual competitors in the relevant line of commerce and sections of the country described in paragraphs 9 and 10.

EFFECTS

14. 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, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, in the following ways, among others:

- a. By eliminating direct competition between Grand Union and P & C;
- b. By increasing the likelihood that P & C will unilaterally exercise market power; or
- c. By increasing the likelihood of, or facilitating, collusion

all of which increases the likelihood that firms will increase prices and restrict output of food and groceries both in the near future and for a longer period of time.

VIOLATIONS CHARGED

15. The proposed acquisition of Grand Union by MTH Holdings and Salomon Inc violates Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and would, if consummated, violate Section 7 of the Clayton Act, 15 U.S.C. 18 and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission ("the Commission"), having initiated an investigation of the transaction pursuant to which MTH Holdings, Inc. ("MTH") and Salomon Inc ("Salomon") will acquire the issued and outstanding stock of GU Acquisition Corporation, ("GUAC") and MTH and GUAC (collectively, "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 the 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, 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

The Commission having thereafter considered the matter and having determined that it had reason to believe that respondents have violated Section 5 and Section 7, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent MTH Holdings, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of New

York with its executive offices located at 331 Madison Avenue, New York, New York.

2. Respondent GU Acquisition Corporation is a corporation organized, existing and doing business under and by virtue of the laws of Delaware with its executive offices located at 25 Old Kings Highway Road, Darien, Connecticut.

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

ORDER

I.

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

a. "*Acquisition*" means MTH's acquisition of the issued and outstanding common stock of GUAC.

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

c. "*GND Holdings Corporation*" means the entity formed by MTH and Salomon to acquire GUAC. GND Holdings Corporation includes its successors and assigns.

d. "*The Grand Union Company*" means an indirect wholly owned subsidiary of GUAC, through which GUAC is engaged in the retail grocery business. The Grand Union Company includes its parents, predecessors, subsidiaries, divisions, groups and affiliates controlled by GUAC and their respective directors, officers, employees, agents, partners, and representatives, and their respective successors and assigns.

e. "*GUAC*" means GU Acquisition Corporation, its parents, predecessors, subsidiaries, divisions, groups and affiliates controlled by GUAC and their respective directors, officers, employees, agents, partners, and representatives, and their respective successors and assigns.

f. "*MTH*" means MTH Holdings, Inc., its parents, predecessors, subsidiaries, divisions, groups and affiliates controlled by MTH (including P&C Food Markets, Inc.) and their respective directors, officers, employees, agents, partners, and representatives, and their respective successors and assigns.

g. "*Respondents*" means GUAC and MTH.

h. "*Retail grocery store*" means any retail food store of 10,000 or

more square feet and which sells primarily a variety of canned or frozen foods; dry groceries; non-edible grocery items; fresh meat, poultry and produce (vegetables and fruits) and which often sells delicatessen items, bakery items, fresh fish or other specialty items.

i. "*Schedule A Properties*" means the assets and businesses listed in Schedule A of this order.

j. "*Schedule B Properties*" means the assets and businesses listed in Schedule B of this order.

k. "*Properties*" means the Schedule A Properties and the Schedule B Properties.

II.

It is ordered, That:

(A) Within nine (9) months of the date this order becomes final, the respondents shall divest, absolutely and in good faith (a) the Schedule A Properties, as well as any additional assets and businesses that (i) the respondents may at their discretion include as a part of the assets to be divested and are acceptable to the acquiring entity and the Commission, or (ii) the Commission shall require to be divested to ensure the divestiture of the Schedule A Properties as ongoing, viable enterprises, engaged in the businesses in which the Properties are presently employed. *Provided, however*, the respondents may only divest the stores of P&C Food Markets, Inc. listed in Schedule A if such stores have been operated consistent with past practices and the respondents have in no way acted to reduce the value or competitive viability of such stores. *Provided, further*, the respondents shall have twelve (12) months from the date this order becomes final to divest, absolutely and in good faith the Schedule A property in Bennington, Vermont.

(B) The Agreement to Hold Separate, attached hereto and made a part hereof as Appendix I, shall continue in effect until such time as the respondents have divested either the Schedule A Properties or a trustee has divested the Schedule B Properties or until such other time as the Agreement to Hold Separate provides, and the respondents shall comply with all terms of said Agreement.

(C) Divestiture of the Properties shall be made only to an acquirer or acquirers that receive the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. The purpose of the divestiture of the Properties is to ensure the

continuation of the assets as ongoing, viable retail grocery stores engaged in the same businesses in which the Properties are presently employed and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint.

(D) The respondents shall take such action as is necessary to maintain the viability and marketability of the Properties and shall not cause or permit the destruction, removal or impairment of any assets or businesses to be divested except in the ordinary course of business and except for ordinary wear and tear.

III.

It is further ordered, That:

(A) If the respondents have not divested, absolutely and in good faith and with the Commission's approval, the Schedule A Properties within the time set out in paragraph II(A), the respondents shall consent to the appointment by the Commission of a trustee to divest the Schedule B Properties. In the event that the Commission brings an action pursuant to 5 (1), of the Federal Trade Commission Act, 15 U.S.C. 45 (1), or any other statute enforced by the Commission, the respondents shall consent to the appointment of a trustee in such action. The appointment of a trustee shall not preclude the Commission from seeking civil penalties or any other relief available to it for any failure by the respondents to comply with this order.

(B) If a trustee is appointed by the Commission or a court pursuant to paragraph III(A) of this order, the respondents shall consent to the following terms and conditions regarding the trustee's duties and responsibilities:

(1) The Commission shall select the trustee, subject to the consent of the respondents, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures.

(2) The trustee shall have the power and authority to divest the Schedule B Properties.

(3) The trustee shall have eighteen (18) months from the date of appointment to accomplish the divestiture, which shall be subject to the prior approval of the Commission and, if the trustee is appointed by a court, subject also to the prior approval of the court. If, however, at the end of the eighteen-month period the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a

reasonable time, the divestiture period may be extended by the Commission, or by the court for a court-appointed trustee. *Provided, however,* that the Commission or court may only extend the divestiture period two (2) times.

(4) The trustee shall have full and complete access to the personnel, books, records and facilities related to those assets that the trustee has the duty to divest. The respondents shall develop such financial or other information as such trustee may reasonably request and shall cooperate with any reasonable request of the trustee. The respondents shall take no action to interfere with or impede the trustee's accomplishment of the divestitures.

(5) Subject to the respondents' absolute and unconditional obligation to divest at no minimum price and the purpose of the divestiture as stated in paragraph II(C) of this order, the trustee shall use his or her best efforts to negotiate the most favorable price and terms available with each acquiring entity for the divestiture of the Schedule B Properties. The divestiture shall be made in the manner set out in paragraph II(C); *provided, however,* if the trustee receives bona fide offers from more than one acquiring entity or entities, and if the Commission determines to approve more than one such purchaser, the trustee shall divest to the acquiring entity or entities selected by the respondents from among those approved by the Commission.

(6) The trustee shall serve at the cost and expense of the respondents, on such reasonable and customary terms and conditions as the Commission or a court may set, including the employment of accountants, attorneys or other persons reasonably necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the sale and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of the respondents 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 Schedule B Properties.

(7) Within sixty (60) days after appointment of the trustee, and subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, the respondents shall execute a trust agreement that transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture.

(8) If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraph III (A) of this order.

(9) The trustee shall report in writing to the respondents and the Commission every sixty (60) days from the date of appointment concerning the trustee's efforts to accomplish divestiture.

IV.

It is further ordered, That, within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until the respondents have fully complied with the provisions of paragraphs II and III of this order, the respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying or have complied with those provisions. The respondents shall include in their compliance reports, among other things that are required from time to time, a full description of substantive contacts or negotiations for the divestiture of assets or businesses specified in paragraph II of this order, including the identity of all parties contacted. The respondents also shall include in their compliance reports, copies of all written communications to and from such parties, all internal memoranda, reports and recommendations concerning divestiture, and a description of the status of all regulatory proceedings filed in accordance with this order.

V.

It is further ordered, That, for a period commencing on the date this order becomes final and continuing for ten (10) years, the respondents shall cease and desist from acquiring, without the prior approval of the Federal Trade Commission, directly or indirectly, through subsidiaries or otherwise, any retail grocery store or leasehold interest in any retail grocery store, including any facility that has operated as a retail grocery store within six (6) months of the date of the offer of purchase, or any interest in or the stock or share capital of any entity that owns any interest in or operates any retail grocery store or any interest in or the stock or share capital of any entity that owned any interest in or operated any retail grocery store within six (6) months of the date of the offer of purchase in the following counties:

1. Chittenden County, Vermont
2. Windham County, Vermont
3. Rutland County, Vermont
4. Washington County, Vermont
5. Lamoille County, Vermont
6. Windsor County, Vermont
7. Bennington County, Vermont
8. Essex County, New York
9. Schoharie County, New York
10. Otsego County, New York.

(Hereinafter "Retail Grocery Interests"). *Provided, however*, that these prohibitions shall not relate to the construction of new facilities or the leasing of facilities that have not operated as retail grocery stores within six months of the date of the offer to lease. *Provided, further*, that the respondents may acquire, for investment purposes only, an interest of not more than five (5) percent of the stock or share capital of any concern. *Provided, additionally*, only if, the respondents have provided the Commission with thirty (30) days prior notice of the acquisition set out in this proviso, these prohibitions shall not relate to the acquisition of an interest in the stock or capital share of any concern that has no Retail Grocery Interests at the time the respondents announce to the public an intention to acquire an interest in the concern and has no more than 40,000 square feet of Retail Grocery Interests at the time of the acquisition of the stock or capital share of said concern.

One (1) year from the date this order becomes final and annually for nine (9) years thereafter the respondents shall file with the Federal Trade Commission a verified written report of their compliance with this paragraph.

VI.

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

SCHEDULE A

Assets, Interests and Businesses

The retail grocery stores presently owned or operated by The Grand Union Company or by P&C Food Markets, Inc. in the following locations:

1. One (1) in Morrisville, Vermont;
2. One (1) in Barre/Montpelier/Berlin, Vermont;
3. One (1) in Windsor, Vermont;
4. One (1) in Springfield, Vermont;
5. One (1) in Brattleboro, Vermont;
6. One (1) in Bennington, Vermont;
7. One (1) in Manchester, Vermont;
8. Two (2) in the Rutland, Vermont area, which area shall include North Clarendon and West Rutland, Vermont;
9. Four (4) in the Burlington, Vermont, Metropolitan Statistical Area;
10. One (1) in Cobleskill, New York;
11. One (1) in Ticonderoga, New York; and
12. One (1) in Oneonta, New York.

The assets to be divested shall include the grocery business operated, all assets, inventory, leases, properties, business and goodwill, tangible and intangible, utilized in the distribution or sale of groceries at the listed locations.

SCHEDULE B

Assets, Interests and Businesses

All the retail grocery stores presently owned or operated by The Grand Union Company in the following locations:

1. Chittenden County, Vermont
2. Windham County, Vermont
3. Rutland County, Vermont
4. Washington County, Vermont
5. Lamoille County, Vermont
6. Windsor County, Vermont
7. Bennington County, Vermont
8. Ticonderoga, New York
9. Schoharie County, New York
10. Otsego County, New York.

The assets to be divested shall include the grocery business operated, all assets, inventory, leases, properties, business and goodwill, tangible and intangible, utilized in the distribution or sale of groceries at the listed locations.

Complaint

112 F.T.C.

IN THE MATTER OF

ROBERT G. KOSKI, D.O.

DISMISSAL ORDER IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket 9225. Complaint, Feb. 13, 1989—Dismissal Order, Oct. 10, 1989*

The Federal Trade Commission issued a complaint against Dr. Robert G. Koski alleging that he conspired to boycott Marquette General Hospital, to prevent it from opening a clinic. In light of newly discovered evidence, the Commission has decided to dismiss the complaint.

Appearances

For the Commission: *David R. Pender* and *Paul J. Nolan*.

For the respondent: *Larry J. Saylor, Miller, Canfield, Paddock & Stone*, Detroit, Mi. and *Richard D. Carr*, Munising, Mi.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Robert G. Koski, D.O. ("respondent"), has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating in that respect its charges as follows:

PARAGRAPH 1. Respondent is a doctor of osteopathy licensed by the State of Michigan. He specializes in the practice of anesthesia, and practices in the Upper Peninsula of Michigan in Dickinson County. His office address is Dickinson County Memorial Hospital, 400 Woodward Avenue, Iron Mountain, Michigan.

PAR. 2. Respondent has been on the active Medical Staff of Dickinson County Memorial Hospital ("Medical Staff") since at least September, 1986. The Medical Staff is composed of physicians and other health care practitioners who have privileges to attend patients at Dickinson County Memorial Hospital. The Medical Staff's physician members constitute almost all of the practicing physicians in Dickinson County.

PAR. 3. Respondent has been a member of the Dickinson-Iron County Medical Society since at least September, 1986. The Dickinson-Iron Medical Society is composed of physicians in the private practice of medicine in Dickinson County and in Iron County, in the Upper Peninsula of Michigan. The Dickinson-Iron County Medical Society's physician members constitute almost all of the practicing physicians in Dickinson County, in Iron County, and on the Medical Staff.

PAR. 4. Except to the extent that competition has been restrained as alleged herein, the respondent has been and now is in actual or potential competition with other physicians or health care practitioners in the provision of health care services in or near Dickinson County. The respondent is engaged in the business of providing health care services to patients for a fee.

PAR. 5. The Delta County Medical Society is composed of physicians in the private practice of medicine in Delta County in the Upper Peninsula of Michigan. The Delta County Medical Society's physician members constitute almost all of the practicing physicians in Delta County.

PAR. 6. The acts and practices of the respondent, including those herein alleged, are in or affect commerce within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

PAR. 7. Dickinson County Hospitals, a non-profit organization, operates two hospitals in Dickinson County—Dickinson County Memorial Hospital, a 110-bed hospital in the city of Iron Mountain, and Anderson Hospital, a 19-bed hospital in the city of Norway. The Veterans' Administration operates the only other hospital in Dickinson County. Residents of the county receive most of their health care services from physicians and other health care practitioners on the Medical Staff, including respondent Koski, and from Dickinson County Memorial Hospital. For diagnosis and treatment using some complex medical procedures, or by physicians who practice specialties not available in Dickinson County, residents of Dickinson County usually travel to physicians and/or hospitals in Green Bay, Wisconsin (approximately 85 miles south of Dickinson County), Marquette, Michigan (approximately 85 miles north of Dickinson County), or Marshfield, Wisconsin (approximately 140 miles southwest of Dickinson County).

PAR. 8. Marquette General Hospital, which is located in the city and

