



BUREAU OF COMPETITION

UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
WASHINGTON, D.C. 20580

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SEP 28 1987

John M. Mee, Esquire  
McAfee & Taft  
Tenth Floor  
Two Leadership Square  
Oklahoma City, Oklahoma 73102

Re: Godfrey Company  
Docket No. C-3066

Mr. Mee:

This is in response to your letter of August 19, 1987, requesting the Bureau of Competition's opinion as to whether Fleming Companies, Inc. ("Fleming") would be deemed a "successor" to Godfrey Company ("Godfrey") under the order in Docket No. C-3066, as a result of Fleming's acquisition of Godfrey stock and the proposed merger of a subsidiary of Fleming with and into Godfrey.

Your request, and information we received from Godfrey, represent that the transaction will be accomplished by the merger of Transitory of Wisconsin, Inc. ("Transitory"), a newly-formed subsidiary of Fleming with no assets or business, with and into Godfrey. Subsequently, the separate corporate existence of Transitory will cease and Godfrey, as the surviving corporation, will become a wholly-owned subsidiary of Fleming. The Godfrey common stock held by Godfrey's public shareholders will be converted into common stock of Fleming.

You have also provided Fleming's Guidelines for the Operation of Godfrey Company, ("Guidelines"), and the Agreement and Plan of Reorganization ("Agreement") concerning the proposed transaction, which indicate, among other things, that following consummation of the proposed transaction, Godfrey will maintain separate offices, which will be located in Waukesha and Marshfield, Wisconsin. Further, the retail grocery stores, both affiliated and corporately owned by Godfrey, will continue to be supplied from Godfrey's warehouses. The books of account, records, minute books, accounting documentation, and fixed asset records of Godfrey will be held by and maintained by Godfrey

management in Waukesha, Wisconsin. Godfrey will maintain its own bank accounts from which it will pay invoices, local statements of account and payroll. The management of Godfrey will be free to hire and fire personnel, and will be able to draw upon the human resources of Fleming to fill positions as it sees fit. "Matters pertaining to sales policies, credit practices, product prices and fees for services" will be set by local Godfrey management. In addition, following consummation of the proposed merger, there will be no common officers or directors between Godfrey and Fleming, although an officer of Fleming may serve as a Godfrey board member. Day-to-day management decisions of Godfrey will be made by its current President and Chief Executive Officer, James H. DeWees, and his staff. The operating and capital budgets of Godfrey will be developed by Godfrey's management, but will be forwarded to Fleming for review, modification and integration with Fleming's corporate goals. Finally, in regard to matters concerning taxes, local Godfrey management will be responsible for local property tax matters, state income tax returns and the franchise tax returns. Matters concerning federal taxation will be reported on a consolidated basis with Fleming.

You further represent that approximately 20 percent of Godfrey's needs will be purchased through Fleming's central procurement program in an effort to reduce Godfrey's costs and produce efficiencies consistent with Fleming's buying power. Godfrey may also avail itself of numerous other services and assistance offered to Godfrey by Fleming, specifically: a cash management program, central accounts payable system, fixed assets and payroll accounting, risk management and insurance, distribution and marketing advice, and retail service programs.

Consideration of whether a purchaser of a corporate respondent becomes bound as a successor to the order begins with Golden State Bottling Co. v. NLRB, 414 U.S. 168 (1973). There the Supreme Court balanced the interests of the independent entity whose rights had not been adjudged and the interest in effectuating the policies of the agency as embodied in its order. As the Court observed regarding NLRB orders, "[t]he Board's orders run to the evader and the bona fide purchaser, not because the act of evasion or bona fide purchase is an unfair labor practice, but because the Board is obligated to effectuate the policies of the Act." 414 U.S. at 177. Certain factors have been considered by courts passing on the question whether a parent becomes bound as a successor to the respondent subsidiary. In United States v. Swingline, Inc., 1972 Trade Cas. (CCB) ¶74,102, p.92,601 (E.D.N.Y. 1972), the court looked at the operational relationship between the acquiring and acquired entities, citing NLRB v. Deena Artware, Inc., 361 U.S. 398 at 403 (1960).

Whether Fleming is bound as a successor depends in part, therefore, on the purpose of Paragraph III of the order in this matter. That paragraph, arising from the Commission's section 7 concerns, requires Godfrey to submit for the Commission's prior approval acquisitions of four or more retail grocery stores. Because Godfrey will remain subject to the order in any event, achieving the purposes of the order is not necessarily dependent upon Fleming being bound as a successor. Nevertheless, the relationship between Fleming and Godfrey could become such that Fleming becomes the "principal and [Godfrey] the agent". In that event, it might become necessary to hold Fleming as a successor to effectuate the purposes of the order. Consideration of that relationship is therefore necessary.

Based upon the assumption that the information and representations set forth in your request are accurate and complete, I am of the opinion that, following consummation of the proposed transaction, Fleming would not be a successor to Godfrey within the terms of the order in Docket No. C-3066. My opinion relies on the fact that Godfrey will remain a separate corporation with relative autonomy from Fleming (especially in that Godfrey will retain full control over "sales policies, . . . product prices and fees for services"). Further, Godfrey will remain subject to all of the provisions of the order, and Fleming's interest in Godfrey will be essentially that of a parent. Of course, Godfrey would continue to be bound by the order for the duration of the order's existence.

This opinion is restricted to the particular facts of this proposed transaction as you have represented them in your request. It assumes also that Fleming's relationship to Godfrey as described in your submission would not result in Fleming having such involvement in Godfrey's business that it would be necessary to bind Fleming as a successor in order to effectuate the purposes of the Commission's order. Moreover, I must emphasize that certain acquisitions by Fleming may be subject to the Commission's prior approval pursuant to Paragraph III of the order if they constitute indirect acquisitions by Godfrey, whether or not Fleming is a successor to Godfrey.

Your letter states that Fleming voluntarily agrees that, for the remaining term of the order, Fleming will not acquire an entity owning four or more retail grocery stores located within the Milwaukee Standard Metropolitan Statistical Area ("SMSA"), without first seeking and obtaining the Commission's approval, if the Bureau agrees to render the opinion that the order would not apply to Fleming after consummation of the proposed transaction. However, the Bureau cannot agree to render a particular opinion based upon such a commitment. Therefore, we have not accepted your offer to enter into such an agreement.

This staff opinion is not binding upon the Commission, and the Bureau may at any time reconsider, revoke, or rescind its opinion should it subsequently appear that the information submitted on behalf of the parties is inaccurate or incomplete, or if action has been taken in violation of the terms of the order. Further, this opinion will not preclude the Commission from taking any action it deems appropriate, including an action for civil penalties, for any violation of the order.

Sincerely yours,

Daniel P. Ducore  
Deputy Assistant Director  
Bureau of Competition

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