

IN THE MATTER OF

T&N PLC

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

Docket C-3312. Consent Order, Nov. 8, 1990—Modifying Order, Nov. 13, 1991

This order reopens the proceeding and modifies the Commission's 1990 order [113 FTC 1016], regarding the divestiture of certain thinwall engine bearing assets. The Commission has determined that the potential harm to respondent's ability to compete outweighs any further need to require a divestiture of the remaining VanAm inventory.

ORDER REOPENING PROCEEDING
AND MODIFYING ORDER

On September 24, 1991, respondent T&N plc ("T&N") filed a "Request for Confirmation that T&N has Discharged its Obligation to Divest the Thinwall Engine Bearing Assets or, in the Alternative, to Reopen the Proceeding and Modify the Consent Order" ("Request") pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Rule 2.51 of the Commission's Rules of Practice, 16 CFR 2.51. T&N seeks acknowledgement that it has fully complied with its obligations under paragraph III of the consent order in Docket No. C-3312 ("order") to divest the thinwall engine bearing assets or, in the alternative, a modification of paragraph I.10(a) of the order to relieve it of any further divestiture obligations under paragraph III.

Paragraph III of the order requires T&N to divest the "thinwall engine bearing assets" by November 21, 1991. Paragraph I.10(a) defines the term "thinwall engine bearing assets" to include, among other things:

All assets relating to the sale, marketing and distribution of bearings for U.S. gasoline engine applications manufactured by Vandervell directed to the U.S. aftermarket that are based at VanAm's facility in Tucker, Georgia, including, but not limited to, all customer lists, inventory (to be repackaged in plain boxes), and assignment of the building lease and all agreements with sales agencies and fee warehouses, excluding any trademarks or trade names[.]

To date T&N has received Commission approval for a divestiture to

Automotive Components Limited ("ACL") of all the thinwall engine bearing assets required to be divested, with the exception of part of the VanAm inventory.

T&N asserts that the language and purpose of the order do not require it to divest all the VanAm inventory. T&N asserts that where the order requires the divestiture of "all" of a particular asset, it uses the word "all." Paragraph I.10(a) does not call for the divestiture of "all inventory." In addition, T&N urges that requiring the divestiture of the remaining VanAm inventory would be inconsistent with the Commission's unconditional approval of the divestiture to ACL. The Commission notified T&N by letter dated January 30, 1991, that it had approved the divestiture to ACL. That letter did not explicitly require T&N to take any further action to satisfy its obligation under paragraph III. Furthermore, T&N notes that at the time the Commission approved the divestiture to ACL, the Commission was aware of the fact that ACL did not intend to acquire all of the VanAm inventory. In light of the above, T&N asserts that it has complied fully with its obligation under paragraph III to divest the thinwall engine bearing assets.

T&N's arguments are not persuasive. The language of paragraph I.10(a) clearly requires T&N to divest all of the VanAm inventory. T&N's argument ignores the fact that the definition at paragraph I.10(a) begins with the language "all assets relating to the sale, marketing and distribution of bearings for U.S. gasoline engine applications manufactured by Vandervell directed to the U.S. after-market that are based at VanAm's facility in Tucker, Georgia," (emphasis added). By T&N's own reasoning, because the order expressly uses the word "all" it requires the divestiture of "all assets." The definition identifies a number of assets, such as customer lists and inventory, required to be divested. In enumerating those particular assets the definition uses the language: "including, but not limited to," (emphasis added). The particular assets enumerated in paragraph I.10(a), such as "all customer lists," operate not as words of limitation, but rather as words to describe some of the assets included within the universe of "all assets." The inventory falls within this universe, and T&N is required to divest all of it.

Furthermore, assuming *arguendo* that its construction of paragraph I.10(a) is correct, T&N fails to explain what part of the inventory it is required to divest. The Commission has explicitly stated in some orders, for example, that the assets in question be divested at the

election of the acquirer. *See e.g.*, Flowers Industries, Inc., Docket No. 9148, 102 FTC 1700 (1983). The Commission has not done so in this case.

Finally, T&N's assertion that the Commission should have attached some condition to its approval of the divestiture to ACL is unfounded. Nothing in the order required the Commission to take such action in the event T&N chose to divest something less than all the thinwall engine bearing assets. The order does not require T&N to divest the assets to a single acquirer. The language of paragraph III(A) states that the divestiture of the thinwall assets "shall be only to an acquirer (or acquirers) that receive the prior approval of the Commission," (emphasis added), clearly recognizing the fact that the divestiture of the thinwall engine bearing assets might require T&N to enter into one or more transactions. Similarly, the Commission did not condition its approval of the divestiture to ACL upon T&N's divestiture of the tri-metal heavywall engine bearing assets required by paragraph IV of the order. The Commission obviously did not thereby relieve T&N of its obligation to divest those assets.

Accordingly, the Commission believes that T&N has not fulfilled its obligation to divest the thinwall engine bearing assets and will treat T&N's Request as a petition to reopen and modify the order.

T&N asserts that it would be in the public interest to reopen and modify the order to relieve it of the obligation to divest the remaining thinwall engine bearing assets. T&N has not requested, and the Commission has not considered, reopening and modification of the order on the basis of changed conditions of fact or law. Pursuant to Rule 2.51, the Request was placed on the public record for ten days. No comments were received.

After reviewing respondent's Request, the Commission has concluded that the public interest warrants reopening the order and modifying the language of paragraph I.10(a) to relieve T&N of any further obligation to divest thinwall engine bearing assets.

Reopening and Modification of a Commission Order.

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), provides that the Commission "shall reopen" an order to consider whether it should be modified if the respondent "makes a satisfactory showing that changed conditions of law or fact require such order to be altered, modified, or set aside in whole or in part."¹ The language

¹ Section 5(b) provides,

[T]he Commission shall reopen any such order to consider whether such order (including any affirmative
(footnote cont'd)

of Section 5(b) plainly anticipates that the burden is on the petitioner to make the satisfactory showing of changed conditions to obtain a reopening. T&N has not requested relief on these grounds.

The Commission may also modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest requires such action. Respondents are invited in requests to reopen to show how the public interest warrants the requested modification. 16 CFR 2.51(b). In the case of a request for modification based on this ground, a petitioner must demonstrate as a threshold matter some affirmative need to modify the order. See *Damon Corp.*, Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (March 24, 1983) (unpublished) ("Damon Letter"), at 2. For example, it may be in the public interest to modify an order "to relieve any impediment to effective competition that may result from the order." *Damon Corp.*, Docket No. C-2916, 101 FTC 692 (1983). Once this showing of need is made, the Commission will balance the reasons favoring the requested modification against any reasons not to make the modification. See *Damon Letter* at 2; see, e.g., *Chevron Corp.*, Docket No. C-3147, 105 FTC 228 (1985) (public interest warrants modification where potential harm to respondent's ability to compete outweighs any further need for the order). The Commission will also consider whether the particular modification sought is appropriate to remedy the identified harm. *Damon Letter* at 4.

The Order Should Be Reopened and Modified

T&N has demonstrated an affirmative need to modify the order. *Damon Corp.*, *supra*. T&N has demonstrated that the goals of the divestiture have been achieved and that requiring T&N to divest the remaining VanAm inventory could create an impediment to ACL's, as well as T&N's, ability to compete effectively.

ACL neither wants nor needs any additional VanAm inventory. ACL acquired from T&N the exclusive right to use the VanAm trademark until February, 1992, and the non-exclusive right to use the trademark until March, 1993. ACL acquired the rights to the VanAm

relief provision contained in such order) should be altered, modified, or set aside, in whole or in part, if the person, partnership, or corporation involved files a request with the Commission which makes a satisfactory showing that changed conditions of law or fact require such order to be altered, modified, or set aside, in whole or in part.

The 1980 amendment to Section 5(b) did not change the standard for order reopening and modification, but "codified[d] existing Commission procedures by requiring the Commission to reopen an order if the specified showing is made," S. Rep. No. 96-500, 96th Cong., 2d Sess. 9-10 (1979), and added the requirement that the Commission act on petitions to reopen within 120 days of filing.

trademark to allow it to enter the market in an orderly fashion and to establish its presence in the market before developing its own trademark. Accordingly, it acquired sufficient quantities of the VanAm inventory to service its needs for that period of time. The order as currently written, however, requires T&N to divest all of the VanAm inventory, whether or not ACL wants or needs that additional inventory. If ACL, nonetheless, acquired the additional inventory, it would incur costs it did not anticipate in acquiring the rest of the thinwall engine bearing assets, which could undermine its ability to compete.

T&N is also being harmed by the continued operation of the Asset Maintenance and Improvement Agreement ("Asset Agreement"). The Asset Agreement prohibits T&N from integrating the McConnellsville facility it obtained from JP Industries into its other operations until it has accomplished the divestitures required by the order.² T&N has demonstrated that the Asset Agreement imposes considerable costs on its operations and limits its ability to respond to changes in the market, thereby reducing its ability to compete effectively.

The reasons favoring modification outweigh any reasons for retaining the order as written. Requiring T&N to divest the remaining inventory would not provide any competitive benefit, since there is no reason to believe that such a divestiture would facilitate entry of a new competitor.

The purpose of the thinwall engine bearing assets divestiture is "to remedy the lessening of competition resulting from the acquisition of [JP Industries] by T&N," order at ¶ III, by establishing an acquirer, in this case ACL, as a viable competitor in the market. The order does not seek to reduce competition by depriving T&N of the assets it needs to compete. Here, T&N has divested most of the thinwall engine bearing assets as required by the order and in doing so has satisfied the purpose of the order by establishing ACL as a competitor in the market.³ Having determined that ACL would be a viable competitor

² On September 10, 1991, the Commission approved T&N's application to divest the tri-metal heavywall engine bearing assets to Babbitt Bearings, Inc. T&N and Babbitt Bearings closed that transaction on September 18, 1991.

³ In *Batus, Inc.*, Docket No. C-3099, 104 FTC 632 (1984), the Commission modified the order to eliminate the respondent's remaining obligation to divest assets where the respondent had demonstrated a good faith effort to comply fully with the divestiture requirements of the order and had divested most of those assets. The Commission modified the order in *Chevron, supra*, to eliminate a hold separate agreement where the respondent had submitted divestiture applications for all the assets required to be divested and the Commission had approved the divestitures with the exception of one application. The final divestiture application was awaiting Commission action. The Commission held that the potential harm resulting from the costs of continuing the hold separate agreement outweighed any need to keep it in effect. The hold separate had "accomplished its primary objectives" and was therefore eliminated.

without obtaining all the VanAm inventory, the Commission sees no need to require T&N to divest the remaining VanAm inventory. In addition, modification of the order to relieve T&N of its remaining divestiture obligation will also result in the termination of T&N's continuing obligations under the Asset Agreement.

Having balanced the reasons favoring the requested modification against those opposing the modification, the Commission has determined that the potential harm to respondent's ability to compete outweighs any further need to require a divestiture of the remaining VanAm inventory. *Chevron Corp., supra*. In addition, T&N has shown that the modification it seeks would eliminate that impediment.

Accordingly, *it is ordered*, that the proceeding be, and it hereby is, reopened for the purpose of modifying the order entered therein;

It is further ordered, That Paragraph I.10(a) be, and hereby is, amended to read:

All assets relating to the sale, marketing and distribution of bearings for U.S. gasoline engine applications manufactured by Vandervell directed to the U.S. aftermarket that are based at VanAm's facility in Tucker, Georgia, including, but not limited to, all customer lists, at the option of the acquirer all or part of VanAm's inventory (to be repackaged in plain boxes), and assignment of the building lease and all agreements with sales agencies and fee warehouses, excluding any trademarks or trade names;

IN THE MATTER OF
NINTENDO OF AMERICA INC.

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

Docket C-3350. Complaint, Nov. 14, 1991—Decision, Nov. 14, 1991.

This consent order prohibits, among other things, a Redmond, Wa., based corporation from fixing the prices at which its dealers advertise and sell Nintendo home video-game hardware to consumers. In addition, the consent order requires the respondent to mail a letter to all of its dealers advising them of the order and that they can advertise and sell the products at any price without adverse action by Nintendo.

Appearances

For the Commission: *L. Barry Costilo, Kevin J. Arquit, and Michael E. Antalics.*

For the respondent: *Robert A. Longman, Mudge, Rose, Guthrie, Alexander & Ferdon, New York, N.Y.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, (15 U.S.C. 41 *et seq.*), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Nintendo of America Inc. (hereinafter "Nintendo" or "respondent") has violated the provisions of Section 5 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint stating its charges as follows:

PARAGRAPH 1. The respondent is a corporation organized, existing and doing business under and by virtue of the laws of the State of Washington, with its principal place of business at 4820-150th Ave., N.E., Redmond, Washington. Respondent is a wholly-owned subsidiary of Nintendo Co. Ltd., with its principal place of business in Kyoto, Japan.

PAR. 2. Respondent is now, and for some time has been, engaged in the offering for sale, sale and distribution of home video game