

IN THE MATTER OF

PROMODES, S.A., ET AL.

Docket 9228. Show Cause Order, May 12, 1993

ORDER TO SHOW CAUSE

On May 17, 1990, the Federal Trade Commission issued an order against Promodes, S.A. and Red Food Stores, Inc. (collectively, "respondents") in Docket No. 9228. Paragraph II of the order, among other things, requires respondents to divest six specific supermarkets in the Chattanooga, Tennessee Metropolitan Statistical Area, by March 1, 1991, to an acquirer or acquirers that receives the prior approval of the Commission. Paragraph II of the order also requires respondents to maintain the viability and marketability of the supermarkets pending divestiture. Paragraph III of the order provides for the appointment of a trustee to divest the supermarkets in the event respondents have not accomplished the divestitures mandated by paragraph II of the order in a timely manner.

Respondents did not divest the supermarkets by March 1, 1991, as required by paragraph II of the order. On January 6, 1992, the Commission appointed Neill A. Thompson, III, as trustee pursuant to paragraph III of the order. Since his appointment, Mr. Thompson has divested one supermarket pursuant to the order and has filed an application for Commission approval to divest another. By letter dated May 12, 1993, the Commission extended the trustee's time to divest certain of the supermarkets covered by the order, but did not extend the time to divest the supermarkets described in paragraphs II(A)(1) ("the Lee Highway store") and II(A)(2) ("the Fort Oglethorpe store") of the order.

The trustee made all reasonable efforts to obtain offers for the Lee Highway and Fort Oglethorpe stores. Despite these efforts, he was unable to divest the supermarkets. It now appears to the Commission that it is extremely unlikely that the Lee Highway and

Fort Oglethorpe stores can be divested within a reasonable time. Certain structural problems with the building housing the Lee Highway store make it unattractive to potential acquirers. These problems arose subsequent to the order and are beyond the control of the respondents to correct. Although the trustee's compliance reports indicate that at one time there was some interest in purchasing this store, that interest has dissolved in large part due to the structural problems of the building that arose subsequent to the order.

Also subsequent to the order, new supermarkets have opened in the immediate vicinity of the Fort Oglethorpe store, resulting in a substantial decrease in its sales and creating considerable doubt about its future viability as a supermarket. In addition, no potential acquirer has shown a specific interest in this supermarket.

The order does not expressly provide for the termination of the respondents' obligation under paragraph II to divest in the event that the trustee appointed pursuant to paragraph III is not able to divest all the supermarkets. Accordingly, respondents continue to be obligated to divest the supermarkets and to maintain the supermarkets pending divestiture. However, the record in this case establishes that it is extremely unlikely that the required divestiture of the Lee Highway and Fort Oglethorpe stores can be accomplished within a reasonable time, notwithstanding the trustee's good faith efforts to divest the stores. The costs to respondents of further divestiture efforts therefore are an inequitable and unbargained-for element of the consent order.¹

In view of the foregoing, the Commission has determined in its discretion that it is in the public interest to reopen the proceeding in Docket No. 9228 and modify the order in this case by setting aside paragraphs II(A)(1) and II(A)(2).

¹ We distinguish the costs imposed on a respondent by continued attempts to comply with an order requirement made ineffectual by subsequent events from the kinds of costs ordinarily imposed by an order. For example, certain definable and predictable costs are always associated with a respondent's compliance obligations under a consent order. These costs are accepted by the respondent as part of the settlement of the case.

Accordingly, the Commission hereby issues this Order to Show Cause why the proceeding in Docket No. 9228 should not be reopened to modify the order as described above.

In accordance with Section 3.72 of the Commission's Rules of Practice and Procedure, 16 CFR 3.72, respondents have thirty (30) days from the date of service of this order to file an answer to this Order to Show Cause or be deemed to have accepted the action proposed herein.

IN THE MATTER OF

KKR ASSOCIATES, L.P., ET AL.

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-3253. Consent Order, June 13, 1989--Modifying Order, May 13, 1993

This order denies in part and grants in part a petition to reopen the proceeding and to modify the Commission's consent order issued June 13, 1989 (111 FTC 670) by requiring only notification to the Commission, instead of prior approval, for acquisitions of relevant products, if respondents are not at that time engaged in that relevant product market. The Commission concluded that changed conditions of fact warranted reopening and modifying the order. However, the respondents' request to eliminate entirely the prior approval clause was denied.

ORDER GRANTING IN PART AND DENYING IN PART
REQUEST TO REOPEN AND MODIFY ORDER ISSUED JUNE 13, 1989

On January 13, 1993, respondents KKR Associates, L.P., et al., ("KKR")¹ filed a Petition to Reopen Proceedings and Modify Consent Order ("Petition") pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice and Procedure, 16 CFR 2.51. Respondents request that the Commission delete paragraph V of the order in Docket No. C-3253 ("order") that became final on June 22, 1989. Paragraph V prohibits respondents, for a ten-year period, from acquiring without prior Commission approval, firms that produce or hold branded trademarks related to the relevant products. Alternatively, respondents request that paragraph V of the order be

¹ The Petition was filed by all the named respondents to the order in Docket No. C-3253: KKR Associates, L.P., a limited partnership; Kohlberg Kravis Roberts & Co., L.P., a limited partnership; RJR Nabisco, Inc. (successor by merger to RJR Acquisition Corporation), a corporation; Whitehall Associates, L.P. (formerly known as RJR Associates, L.P.), a limited partnership; RJR Nabisco Holdings Group, Inc. (formerly known as RJR Holdings Corp.), a corporation; Henry R. Kravis, a natural person; Robert I. MacDonnell, a natural person; Michael W. Michelson, a natural person; Paul E. Raether, a natural person; and George R. Roberts, a natural person.