

IN THE MATTER OF

PROMODES, S.A., ET AL.

Docket 9228. Consent Order, May 17, 1990--Modifying Order, May 20, 1993

This order reopens the proceeding and modifies the Commission's consent order issued May 17, 1990 (113 FTC 372) by requiring the Tennessee company to divest a specific Red Food supermarket in Chattanooga, rather than the store specified in East Ridge. The Commission concluded that the respondents had demonstrated that the public interest warranted the change, and therefore it approved the substitution.

ORDER GRANTING REQUEST TO REOPEN AND MODIFY

Promodes, S.A. ("Promodes") and The Red Food Stores, Inc. ("Red Food") filed a Petition to Reopen and Modify Consent Order ("Petition") in Docket No. 9228 on January 29, 1992, pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commissions Rules of Practice and Procedure, 16 CFR 2.51. Promodes and Red Food (collectively, "respondents") request that the Commission reopen and modify the consent order issued by the Commission on May 17, 1990 ("order"), which became final on May 29, 1990, to substitute a supermarket that they are not required to divest for one that paragraph II.A.4 of the order requires them to divest.

For the reasons discussed below, the Commission has determined that respondents have not shown that changed conditions of fact require reopening the order but that they have demonstrated that it is in the public interest to reopen and modify the order for the limited purpose of the substitution of assets to be divested.

I. The Complaint And Order

The complaint in this case alleged that if Red Food, a subsidiary of Promodes, consummated the acquisition of seven supermarkets located in the Chattanooga, Tennessee Metropolitan Statistical Area ("MSA") from The Kroger Company ("Kroger"), the effect may be

substantially to lessen competition in the retail sale of food and grocery items in supermarkets in the Chattanooga, Tennessee MSA 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. The order, which was issued with respondents' consent, requires respondents to divest six specific supermarkets in the Chattanooga, Tennessee MSA within nine months of the date the order became final, or March 1, 1991. The order states that one purpose of the divestiture is to remedy the lessening of competition resulting from the acquisition. To date respondents have not divested all six of the supermarkets as required by the order. On January 6, 1992, the Commission appointed Neill A. Thompson, III, trustee to divest the supermarkets, pursuant to paragraph III.A of the order. On March 11, 1992, the Commission approved the Trustee Agreement entered into by respondents and the trustee, which among other things allowed the trustee to market the substitute supermarket in addition to those covered by the order. The Trustee Agreement does not, however, authorize Mr. Thompson to divest the substitute store unless and until the Commission modifies its order to effect the substitution.

II. Promodes' And Red Food's Petition

The trustee has found an acquirer of the substitute store, and has filed an application for the Commission's approval of that divestiture. Respondents, therefore now request that the Commission modify paragraph II.A.4 of the order by deleting the Red Food supermarket, formerly a Kroger store, located at 5080 South Terrace, East Ridge, Tennessee (the "South Terrace store"), which Red Food owns, and substitute the Red Food supermarket located at 2101 Dayton Boulevard, Red Bank, Tennessee (the "Dayton Boulevard store"), which Red Food leases. If the Commission makes this substitution, the pending divestiture application may be approved and the trustee may complete this divestiture.

Respondents assert that the substitution is warranted because of changed conditions of fact and the public interest.¹ They state that a dramatic change in the nature of competition in Chattanooga and the recent recession have made the stores “commercially unattractive and unsalable as going concerns,” causing respondents’ inability to effect the divestiture. Petition at 4. Respondents assert that financially powerful supermarket chains have entered and expanded in Chattanooga. They state that since “the 1989 Kroger store acquisition, Red Food has had to contend with the entry of four Food Lions, four Food Max’s ... and three Save-a-Lots.” Petition at 4-5. Respondents assert that as a result of this increased competition, the South Terrace store has suffered declining sales and increasing losses, which have made it difficult for respondents and the Trustee to attract potential buyers. Petition at 5-6. Moreover, respondents state that the recession has increasingly made it difficult for prospective purchasers to obtain credit from banks. Petition at 6.

Respondents argue that the public interest would best be served by approving the substitution. They state that the properties subject to divestiture have been performing poorly, that Red Food’s sales in Chattanooga have declined while total food sales have risen and that Red Food’s net income has decreased. Therefore, respondents argue, they will be unduly injured if the South Terrace store is sold for a nominal amount. Respondents claim that they need the value of the South Terrace store to offset some of Red Food’s losses and to improve other Red Food stores in order to remain competitive in the market. Respondents assert that this constitutes the affirmative need showing required for modification made under the public interest standard. Respondents state that the equities favor a substitution because the Dayton Boulevard store’s divestiture will be more procompetitive than the divestiture of the South Terrace store. Therefore, respondents claim, the Dayton Boulevard store is better situated to accomplish the remedial purposes of the order and may speed or encourage divestiture of the entire package of stores.

¹ Respondents do not assert any changes of law that would require reopening the order.

III. Standards For Reopening And Modification

Section 5(b) of the FTC 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 modification. A satisfactory showing sufficient to require such reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of it inequitable or harmful to competition. *Louisiana-Pacific Corp.*, Docket No. C-2956, Letter to John C. Hart (June 5, 1986) (“L-P Letter”) at 4.²

The Commission may modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest requires such action. *Id.* Therefore, Section 2.51 of the Commission’s Rules of Practice invites respondents in petitions to reopen to show how the public interest warrants the modification. In the case of a request for modification based on public interest grounds, 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 29, 1983) (“Damon Letter”) at 2. If the showing of need is made, the Commission will balance the reasons favoring the requested modification against any reasons not to make the modification. *Id.* The Commission will also consider whether the particular modification sought is appropriate to remedy the identified harm.

Whether the request to reopen is based on changed conditions or on public interest considerations, the burden is on the respondent to make the requisite satisfactory showing. The language of Section 5(b) plainly anticipates that the petitioner must make a “satisfactory showing” of changed conditions to obtain reopening of the order. The legislative history also makes it clear that the petitioner has the

² *Cf. United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992), where the court noted that “[a] decision to reopen does not necessarily entail a decision to modify the order. Reopening may occur even where the petition itself does not plead facts requiring modification.” *Id.*

burden of showing other than by conclusory statements, why an order should be modified.³ If the Commission determines that the petitioner has made the required showing, the Commission must reopen the order to consider whether modification is required and, if so, the nature and extent of the modification. The Commission is not required to reopen the order, however, if the petitioner fails to meet its burden of making the satisfactory showing required by the statute. The petitioner's burden is not a light one given the public interest in repose and the finality of Commission orders.⁴

IV. Promodes And Red Food Have Failed To Demonstrate Changed Conditions Of Fact That Require Reopening Of The Order

Promodes' and Red Food's factual arguments are based on increased competition faced by the South Terrace store and the recession. They claim they have "made all reasonable efforts to divest the store." Previously, however, on February 27, 1991, respondents had filed a Motion for Extension of Time to Divest, and in denying the motion the Commission determined that respondents had not shown that they had made adequate efforts to divest during the divestiture period. None of the information accompanying the Petition alters this conclusion. In addition, respondents have not shown that the new entry has adversely affected their ability to divest the South Terrace store. As the Petition recognizes, the Food Lion store nearby opened in 1988 before the Kroger acquisition and thus the resulting order, and therefore cannot constitute a changed condition of fact. Respondents have also not shown that the K-Marts referred to in the Petition are within the product market defined in the complaint and order or that the product market has

³ The Commission may properly decline to reopen an order if a request is "merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modification of the order." S. Rep. No. 96-500, 96th Cong., 1st Sess. 9-10 (1979). See also Rule 2.51(b), which requires affidavits in support of petitions to reopen and modify.

⁴ See *Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

changed such that these non-supermarket stores should be included in the market. Accordingly, only the new Food Max is a changed condition of fact. Even as to that store, however, respondents have not shown that the opening of this single store is so significant an event that it either prevents divestiture of the South Terrace store or eliminates the need to achieve the divestiture as required by the order. Moreover, the poor financial performance of the stores cannot be claimed to be totally unexpected because two of the stores to be divested were not acquired from Kroger but were Red Food stores from the beginning, and thus respondents should have been well aware of their financial strength when they agreed to divest them.⁵

Finally, respondents have not demonstrated that they need the revenue from the sale of the South Terrace store to remain competitive in the market. Even if the Commission concluded that Red Food must develop a new retail format to remain viable in the long term, and even if divestiture would be at a minimal price, respondents have not shown that an unrestricted sale of the South Terrace store would be critical to respondents' competitive efforts. Moreover, Red Food in a wholly-owned subsidiary of Promodes, a major European grocery retailer, and as such, should have access to Promodes' financial resources. Promodes and Red Food have not shown that Promodes does not have access to sufficient funds to enable Red Food to improve the stores if it cannot sell the South Terrace store for a large sum.

Moreover, respondents have not shown that the purported changes of fact, if correct, eliminate the need to divest the South Terrace store. The purpose of the divestiture of the South Terrace store, as stated in the order, is to ensure the continuation of the asset as an ongoing, viable supermarket engaged in the same business in which the property is presently employed and to remedy the lessening of competition resulting from respondents' acquisition of the Chattanooga, Tennessee Kroger stores. Respondents have not

⁵ The Petition also compares current sales to sales at the time of the acquisition of Kroger. However, to assert a changed condition of fact, the proper comparison is between current sales and sales at the time the order became final.

shown any changes that reduce or eliminate the need for that remedy. Also, none of the changes asserted by respondents require the substitution of stores.

V. Promodes And Red Food Have Demonstrated An Affirmative Need To Modify The Order And Have Demonstrated That Modification Is In The Public Interest

In a request to modify an order based on the public interest, a petitioner must demonstrate as a threshold matter an affirmative need to modify the order. For example, the Commission may determine that the public interest requires reopening of an order if the respondent demonstrates that the order impedes competition.⁶

The record in this matter raises substantial doubt as to the continued competitive viability of the South Terrace supermarket. Moreover, the South Terrace property has been assessed for a value that is vastly greater than the price at which it likely could be sold for the purpose of operation as a supermarket. Therefore, there is considerable risk that the owner of this store (either respondents or a potential purchaser) will not continue to operate it as a substantial competitor in the market. But the threat to the viability of the South Terrace store alone does not establish affirmative need.

Were no alternative relief proposed that adequately addressed the competitive problem alleged in the Commission's complaint, there would be no affirmative need to modify the order. The threat to the viability of the South Terrace store would not be lessened by relieving respondents of their obligation to divest that store. But respondents propose to divest a viable supermarket in exchange for being relieved of their obligation to divest the South Terrace store. In assessing the effect on competition here, what is relevant is the likely state of competition if the South Terrace store is divested as required by the order relative to the likely state of competition under the alternative proposed by respondents. The respondents' proposal

⁶ See *Damon Corp.*, 101 FTC 689 (1983). See also *Union Carbide*, Docket No. C-2902 (Mar. 15, 1991).

would produce a viable independent competitor in the relevant market, whereas the order's requirement to divest the South Terrace store likely would not. Thus, the harm to competition that is likely to result from divestiture of the South Terrace store as required by the order is sufficient to establish an affirmative need here.

After establishing an affirmative need, the Commission's public interest test first set out in *Damon* requires a balancing of the reasons favoring the requested modification against any reasons not to make the modification. Here, the reasons in favor of the modification outweigh the reasons for retaining the order's requirement.

An application to approve the divestiture of the Dayton Boulevard store already has been submitted to the Commission, whereas a successful and timely divestiture of the South Terrace store appears less likely to occur. Moreover, the proposed modification appears likely to offer a stronger remedy than that in the order; therefore there appears to be little reason not to grant the requested modification.

The Dayton Boulevard store appears to be a viable supermarket with a positive sales history. It has outperformed the other Kroger stores acquired by Red Food. Although it is smaller than the South Terrace store, its average weekly sales and average weekly sales per square foot have increased in the past two years whereas the South Terrace store's average weekly sales and average weekly sales per square foot have been decreasing. Thus, the Dayton Boulevard store had greater total sales in fiscal 1991 than the South Terrace store, and this trend continued in fiscal 1992. In addition, more customers frequent the Dayton Boulevard store than the South Terrace store. The Dayton Boulevard store is much more likely to achieve profitability than the South Terrace store. The facts, as presented in the Petition, demonstrate that the divestiture of the Dayton Boulevard store will likely have a greater impact on the market and will go further to restore the market to its state prior to the acquisition of the Kroger stores by Red Food. Other evidence that the Dayton Boulevard store offers a better competitive remedy is the fact that the trustee, an agent independent of respondents, has found

an acquirer for that store and has been unable to find an acquirer for the South Terrace store.

In the absence of the requested change there is a considerable risk that the remedial purposes of the order will not be achieved either because the South Terrace store will not be divested or because it will fail as a supermarket within a short period of time after divestiture. Because the Dayton Boulevard store has greater long term prospects as a supermarket, and because an acquirer has been found for that store, the substitution will provide superior relief than the order now provides. In these circumstances it is in the public interest to reopen and modify the order.

VI. Conclusion

Accordingly, *it is ordered*, that this matter be reopened and that the order in Docket No. 9228 be, and hereby is, modified, as of the effective date of this order, as follows:

Paragraph II.A.4 of the order is modified to delete “the Red Food supermarket, which was formerly a Kroger store, located at 5080 South Terrace, East Ridge, Tennessee,” and paragraph II.A.4 is rewritten as follows:

The Red Food supermarket, which was formerly a Kroger store, located at 2101 Dayton Boulevard, Red Bank, Tennessee.

Commissioner Owen dissenting with respect to part IV of this order.

CONCURRING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

I concur with the decision of the Commission to reopen and modify the order, thereby permitting divestiture of the Dayton Boulevard store in lieu of the divestiture of the South Terrace store that was required by the order. Given the respondents’ offer to make

a comparable or possibly superior divestiture in the near future¹ and the alleged uncertain competitive viability of the South Terrace store in the relevant market, modification is in the public interest to accomplish the remedial purposes of the order.

I concur in rejecting as a basis for reopening the allegations that the required divestiture of the South Terrace store would be less profitable for the respondents than would an unrestricted sale. This is a variation of arguments that the Commission considered and rejected in *Louisiana-Pacific Corp.*, 112 FTC 547, 560-63 (1989).² Divestiture under an order is required without regard to price,³ and the possibility that a respondent might obtain a higher price by selling the assets outside the relevant market neither excuses the obligation to divest nor constitutes a reason for reopening the order.⁴

In the unusual circumstances of this case, I agree that the alleged uncertainty concerning the competitive viability of the South Terrace store in the relevant market is sufficient to warrant reopening in the public interest. Such a showing ordinarily would not be sufficient to warrant elimination of a divestiture requirement. The respondents, however, have offered a substitute divestiture that appears more likely to accomplish the remedial purposes of the

¹ The trustee has identified a potential acquirer for the Dayton Boulevard store and has submitted a request for prior approval of that transaction. The Trustee Agreement between the Respondents and the Commission-appointed trustee, which was approved by the Commission, expressly permitted the trustee to market stores identified by the respondents in addition to the stores required by the order to be divested. The trustee has not identified a potential acquirer for the South Terrace store.

² *Civil penalty reimposed in United States v. Louisiana-Pacific Corp.*, 1990-2 Trade Cas. Paragraph 69,166 (D. Or. 1990), *aff'd*, 967 F.2d 1372 (9th Cir. 1992); *see also RSR Corp.*, 88 FTC 800, 895 (1976), *aff'd*, 602 F.2d 1317 (9th Cir. 1979), *cert. denied*, 445 U.S. 927 (1980) ("[T]he possibility [of] . . . some loss of value . . . can be of no relevance to the determination of proper relief in a Section 7 case.")

³ *See United States v. Beatrice Foods Co.*, 344 F. Supp. 104, 116-17 (D. Minn. 1972), *aff'd*, 493 F.2d 1259, 1275 (8th Cir. 1974), *cert. denied*, 429 U.S. 961 (1975).

⁴ The respondents' appraisal of the South Terrace store "and the real estate on which it sits," Petition at 9, at a value greater than the price at which the respondents assert the property could be sold as a grocery may be helpful to assess the likely future competitive viability of the store in the relevant market, but such appraisals should be treated cautiously. Assets to be sold under a divestiture order often will sell for less, because of the element of compulsion. In addition, property valuations may vary widely, depending on the circumstances in and conditions under which they are made. *See United States v. Louisiana-Pacific Corp.*, 554 F. Supp. 504, 510 (D. Or. 1982) (citing eight different "valuations" of divestiture property and concluding that the property "was worth what defendant could get for it.")

order in the near term than would adherence to the divestiture required by the order.⁵ For that reason, I concur in the decision to reopen and modify the order.

STATEMENT OF COMMISSIONER DEBORAH K. OWEN

I concur in reopening and modifying the Consent Order in this matter to substitute the Dayton Boulevard supermarket for the supermarket listed in order paragraph II.A(4) (the South Terrace store). This substitution is clearly in the public interest. However, I dissent from the finding of the Commission that this order modification is not also warranted by changes of fact. I believe that changes in market conditions in the Chattanooga area since issuance of the order have indeed created circumstances today that warrant modification. Among other factors, the extent of entry by several competing supermarket chains has altered the competitive atmosphere in this market. As the Commission itself recognizes, “(t)he record in this matter raises substantial doubt as to the continued competitive viability of the South Terrace supermarket.” Presumably, when the Commission originally decided to include the South Terrace store in the list of properties to be divested, it did not perceive any such threat to the store’s continued viability. Thus, certain facts must have changed to alter the status of this supermarket. The Commission has acknowledged that new entry in the vicinity of the Fort Oglethorpe store, listed in order paragraph II.A(2), may warrant removing the obligation to divest that store.¹ Just as the opening of new supermarkets in the Fort Oglethorpe neighborhood may justify order modification as to that store, I believe that new entrants in other areas have altered competition in the Chattanooga grocery store market to such a degree that this change, along with other changed conditions, warrants modification.

⁵ See *Mid Con Corp.*, 111 FTC 100 (1988); *Mid Con Corp.*, Docket 9198, Letter to Priscilla Mims, Esq. (Dec. 11, 1987) (unpublished).

¹ See Order to Show Cause, D-9228 (May 13, 1993).

Modifying Order

116 F.T.C.

IN THE MATTER OF

PROMODES, S.A., ET AL.

Docket 9228. Consent Order, May 17, 1990--Modifying Order, May 21, 1993

This order reopens the proceeding and modifies the Commission's consent order issued May 17, 1990 (113 FTC 372) by setting aside paragraphs II.A.1 and II.A.2, thereby relieving the respondents of the obligation to divest the two stores described in those paragraphs.

ORDER REOPENING AND MODIFYING ORDER ISSUED MAY 17, 1990

On May 12, 1993, the Commission issued an Order to Show Cause within 30 days why the 1990 order in Docket No. 9228 should not be modified to set aside paragraphs II.A.1. and II.A.2.

On May 14, 1993, respondents Promodes, S.A. and The Red Food Stores, Inc. filed their Answer of Respondents to Order to Show Cause, stating that respondents agree with the Commission's proposal and urge the Commission to enter an order deleting paragraphs II.A.1 and II.A.2 to make clear that respondents no longer have an obligation to divest the two stores described in those paragraphs.

Accordingly, *it is ordered*, that this matter be and it hereby is reopened and that paragraph II of the order in this matter be modified, as of the date this order becomes final, to set aside paragraphs II.A.1. and II.A.2.