

Modifying Order

116 F.T.C.

IN THE MATTER OF

S.C. JOHNSON & SON, INC.

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-3418. Consent Order, Mar. 16, 1993--Modifying Order, Nov. 8, 1993*

This order reopens the proceeding and modifies the Commission's consent order issued on March 16, 1993 (116 FTC 184), by removing the requirements that the respondent hold separate and divest the international Renuzit assets to a Commission-approved acquirer. The Commission concluded that the hold separate and divestiture requirements are imposing costs on the respondent and that there do not appear to be any competitive reasons to retain the divestiture requirement.

ORDER REOPENING PROCEEDING AND MODIFYING ORDER

On July 8, 1993, S.C. Johnson & Son, Inc. ("Johnson") filed a Request To Reopen and Modify 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. The request was placed on the public record, and the thirty-day comment period expired on August 23, 1993. No comments were received.

In the request, Johnson asks that the Commission reopen and modify the order to eliminate any remaining obligation under paragraph II to divest the "Renuzit air freshener business outside the United States and all non-domestic territories or countries in North America, north of and including Panama, the Caribbean and Cuba" ("international Renuzit assets"). In the alternative, Johnson requests that the Hold Separate Agreement ("Hold Separate"), dated December 17, 1992, and made a part of the order, be terminated promptly since Johnson has completed the sale of all of the North American Renuzit assets.

The order defines the "Renuzit Assets" as including all of Drackett's right, title and interest in and to both its air freshener products business, including the "Renuzit" brand, and its furniture care products business, including the "Endust" and "Behold" brands.¹ The order only requires divestiture of the production facilities associated with either air freshener or furniture care products if desired by the acquirer. In defining the Renuzit Assets, the order does not distinguish domestic assets from international assets nor does it exclude the international Renuzit assets from the divestiture and hold separate requirements. The complaint identified the relevant geographic market for continuous and instant action air fresheners products as being the United States.

On May 14, 1993, the Commission approved Johnson's divestitures of the Endust and Behold furniture care products business to Sara Lee Corporation ("Sara Lee") and the North American Renuzit air freshener products business to The Dial Corp. ("Dial"). As it lacked international operations, Dial did not acquire the international Renuzit air freshener business from Johnson, and following the divestitures on May 18, 1993, Johnson retained the international Renuzit assets.

Johnson asserts that reopening and modifying the order to eliminate Johnson's obligation to divest the remaining international Renuzit assets will serve the public interest. The international Renuzit assets, which were not included in the divestiture to Dial, consist of certain air freshener patents, trademarks, inventory and technology necessary to market Renuzit air freshner products outside of North America. Johnson does not request a reopening

¹ Paragraph I.G. of the order states: "Renuzit Assets" means all of Drackett's rights, title and interest in and to:

(1) Air freshener products, including, but not limited to the brands and trademarks "Renuzit," "Renuzit Adjustable," "Renuzit Roommate," "Renuzit Freshell," "Renuzit Fragrance Jar," "Renuzit Aerosol," and "Renuzit Fresh'n Dry";

(2) Furniture care products, including, but not limited to, the brands and trademarks "Endust" and "Behold," but excluding the brand and trademark "Mr. Muscle" outside the United States; and

(3) All of Drackett's assets and business associated with the development, production, distribution, and sale for resale of air freshener products and furniture care products and as further delineated in the subparagraphs of Schedule A, attached hereto and made a part hereof.

Part 2 of Schedule A lists assets that Johnson need not divest if the acquirer does not need them. See order, paragraph II.A.

and modification on the basis of a change of fact or law. Johnson claims that the requested order modification will have no impact on competition in the U.S. market for continuous and instant action air freshener products as defined in the complaint. Furthermore, Johnson argues that the remedial purposes of the order have been fully satisfied by the divestiture of the domestic Renuzit air freshener business to Dial.

After reviewing respondent's Request, the Commission has concluded that the public interest warrants reopening and modifying the language of Schedule A, Part 2 of the order to relieve Johnson of any further obligation to divest the international Renuzit assets.² With the elimination of any remaining divestiture obligations, the Hold Separate will terminate by its terms. Accordingly, there is no need to modify the Hold Separate itself.

Reopening and Modifying 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 modification. A satisfactory showing sufficient to require such reopening is made when a request 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), at 4.³

² In the Request, Johnson also proposes to acquire from Dial the existing Renuzit technology and related information reasonably necessary for Johnson to operate the international Renuzit business. The proposed acquisition covers "existing manufacturing specifications, process specifications, manufacturing formulas, toxicology data and reports, safety and other regulatory data, and any machinery specifications for equipment used to manufacture Renuzit air freshener products." Request, at 4. Johnson's proposal qualifies as an acquisition of "any assets used or previously used . . . in the manufacture or production of air freshener products." Order, VI(3). Therefore, prior Commission approval is required by the Order for this proposed acquisition. Because the international assets have no competitive significance in the domestic air freshener market and the proposed acquisition will not affect U.S. competition, the Commission is giving its approval to this acquisition by separate letter.

³ 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.*

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 requested 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) (unpublished), 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 burden of showing, other than by conclusory statements, why an order should be modified.⁴ 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 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.⁵

⁴ The Commission may properly decline to reopen an order if the 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 respondents to submit affidavits in support of petitions to reopen and modify.

⁵ *See Federated Department Stores Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

The Order Should Be Reopened and Modified

Johnson has shown that public interest considerations warrant reopening and modifying the order to remove its obligations to divest the international Renuzit assets and abide by the Hold Separate.⁶ Johnson appears to have met its burden of showing a threshold injury caused by the continued operation of the order. Johnson claims that in view of the divestiture to Dial of the North American Renuzit assets, of Dial's lack of interest in acquiring the international Renuzit assets and of the allegation in the complaint that the relevant geographic market is the United States, the requirement of the order that Johnson hold the international Renuzit assets separate and divest them is causing it unforeseen harm and having a negative impact on Johnson's ability to compete. Johnson also asserts that there is an affirmative need to release it from its obligation to divest these assets in order to remove the impediment to competition. Johnson argues that since it has completed the divestitures of substantially all of the Renuzit Assets, the Hold Separate has already achieved its purpose and the continuing harm from its application was not contemplated by the order.

In T&N plc, Docket No. C-3312 (November 6, 1991), the Commission found that respondent demonstrated an affirmative need to modify the order by showing that requiring T&N to divest remaining inventory not wanted by the acquirer could create an impediment to T&N's ability to compete effectively. The Commission further found that T&N demonstrated that the continued application of the hold separate requirements to the remaining inventory imposed considerable costs on respondent's operations and limited its ability to respond to changes in the market. In *Chevron Corp.*, Docket No. C-3147, 105 FTC 228 (1985), the Commission held that the costs associated with continuing a hold separate agreement after a respondent has complied substantially with the divestiture requirements of the order are relevant in determining whether to reopen and

⁶ As previously noted, Johnson does not request a reopening and modification on the basis of a change of law or fact.

modify an order on public interest grounds. The continued costs that Johnson will incur by the continued application of the divestiture and hold separate requirements of the order compare closely to the costs that the Commission recognized as the threshold injury showings in T&N and Chevron.

There appears to be no reason to retain the requirement that Johnson divest the international Renuzit assets. Because Johnson has completed the divestiture of the North American Renuzit air freshener assets to Dial, the remedial purposes of the order have been fully accomplished. The complaint identified the relevant geographic market in this matter as the United States, and the divestiture to Dial of the domestic Renuzit business completely cured the competitive concerns raised by the complaint and order. The international Renuzit business appears to have no effect on competition in the U.S. air freshener market. No imports of international Renuzit products occur in North America. Thus, there is no need, based on domestic competitive concerns, to require Johnson to divest the international Renuzit assets.

Balancing the reasons favoring the requested modification against any reason not to make the modification justifies modifying the order in the public interest. The harm and costs to Johnson associated with the continuing divestiture and hold separate requirements seem significant. On the other hand, it does not appear that there would be any benefits to domestic competition from retaining the requirement to divest the international assets. Where the potential harm to the respondent outweighs any further need for the order, the Commission may modify the order in the public interest to allow the respondent to retain the relevant assets.⁷

⁷ In T&N, *supra*, the Commission modified the divestiture requirements of the order to permit the respondent to retain inventory not wanted by the acquirer. In Chevron, *supra*, the Commission reopened and modified the order to eliminate the hold separate requirement after the respondent had completed the majority of the divestitures required by the order. In *Batus, Inc.*, Docket No. C-3099, 104 FTC 632 (1984), the Commission modified the order to excuse the respondent, which had been ordered to divest department stores sufficient to reduce its sales volume by \$20 million, from divesting any additional department stores. The respondent had received Commission approval for divestitures totaling \$17.9 million in sales volume, and the Commission determined that requiring an additional divestiture was unnecessary.

In conclusion, Johnson has made a sufficient showing that public interest considerations support its Request that the Commission reopen and modify the order to remove the requirements that it hold separate and divest the international Renuzit assets. The hold separate and divestiture requirements are imposing costs on Johnson. Moreover, there do not appear to be any competitive reasons to retain the divestiture requirement.

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 Schedule A, Part 2 of the order be, and hereby is, modified by including the following paragraph:

(6) The international Renuzit assets, which are comprised of the air freshener patents, trademarks, inventory and technology reasonably necessary to produce Renuzit air freshener products for sale outside of the United States and all non-domestic territories or countries in North America, north of and including Panama, the Caribbean and Cuba.

CONCURRING STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III

Because of its successful effort to fulfill the core obligations in the order, the respondent's obligation to divest the international Renuzit assets became extremely difficult and costly. Were this obligation intended by the Commission as fencing-in relief, or were it to support the core relief in the order in any way, the removal of that obligation would not be warranted by the respondent's petition. But because I am not aware of any remedial purpose served by this obligation, the considerable costs that it appears to impose on the respondent justify its removal. Accordingly, I concur in the decision to modify the order.

IN THE MATTER OF

OSRAM SYLVANIA INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3471. Complaint, Nov. 17, 1993--Decision, Nov. 17, 1993*

This consent order prohibits, among other things, a Massachusetts-based corporation from misrepresenting the light output, wattage, and energy cost savings of any of its light bulbs, except for certain specialty bulbs. The respondent is also required to disclose, whenever it claims electricity cost savings or any environmental benefits for its bulbs, that the bulbs produce less light than the bulbs to which they are compared, if true.

Appearances

For the Commission: *Phoebe Morse, Sara Greenberg and Joel Winston.*

For the respondent: *David Grossi, Bowditch & Dewe, Worcester, MA. and Robert Paul, Shaw Pittman, Potts & Trowbridge, Washington, D.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that OSRAM SYLVANIA Inc., a corporation, hereinafter sometimes referred to as respondent, has violated the provisions 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, alleges:

PARAGRAPH 1. Respondent OSRAM SYLVANIA Inc. is a Delaware corporation, with its offices and principal place of business located at 100 Endicott Street, Danvers, MA.