

IN THE MATTER OF

PROMODES, S.A., ET AL.

Docket 9228. Consent Order, May 17, 1990--Modifying Order, Jan. 28, 1994

This order reopens the proceeding and modifies the Commission's consent order issued May 17, 1990 (113 FTC 372) by deleting paragraphs II.A.3 and II.A.6, thereby ending the respondents' obligation to divest two Red Food Supermarkets in Tennessee. The Commission determined that the respondents demonstrated that this action would be in the public interest.

ORDER GRANTING REQUEST TO REOPEN AND MODIFY

Promodes, S.A. ("Promodes") and The Red Food Stores, Inc. ("Red Food") filed a Motion Requesting Federal Trade Commission To Issue Order Reopening and Modifying Consent Order Issued May 17, 1990 ("Petition") in Docket No. 9228 on October 12, 1993,¹ 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. 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 terminate the obligation to divest certain supermarkets in Chattanooga, Tennessee.

For the reasons discussed below, the Commission has determined that respondents have demonstrated that it is in the public interest to reopen and modify the order.

I. The Complaint and Order

The order, which became final on May 29, 1990, settled charges that respondents' April 22, 1989, acquisition of seven supermarkets in Chattanooga from The Kroger Company violated Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the FTC Act, 15 U.S.C. 45. The order required respondents to divest, the stores listed in paragraph II.A. of the order (the "II(A) Properties") by March 1, 1991. Respondents failed to divest the stores by the deadline, however, and on January 6, 1992, the Commission appointed Neill A.

¹ Respondents filed a confidential version of the Petition on October 1, 1993, but did not file the public version until October 12.

Thompson, III, trustee to divest the supermarkets pursuant to paragraph III.A of the order.

Pursuant to a contract arranged by the trustee, on December 21, 1992, Red Food divested its Martin Luther King store, as required by paragraph II.A.5 of the order, to Mr. Jeffrey Mitchell, previously a Red Food store manager.

On December 22, 1992, the trustee requested that the Commission extend for one year his time to divest the remaining stores. On January 28, 1993, respondents requested a substitution of a store in the place of one required to be divested, and on February 3, 1993, the trustee filed an application to divest the substitute store. The Commission granted a nine-month extension as to four stores on May 12, 1993. Also on that date, the Commission issued an order to Show Cause why the order should not be reopened and modified to eliminate two stores from the divestiture requirement of the order due to the fact that no serious interest had been shown in those stores and it was unlikely that any divestitures could be achieved within a reasonable time. Respondents did not object, and on May 21, 1993, the Commission issued an order to set aside the requirement to divest the stores identified in paragraphs II.A.1 and II.A.2 of the order. The previous day, on May 20, 1993, the substitution and divestiture were approved.

On behalf of Smith & Woods, the acquirer of the substitute store, the trustee filed a divestiture application on June 21, 1993, for one of the two remaining stores. However, the trustee withdrew the application after Smith & Woods determined it was no longer interested in any further acquisitions of Red Food stores. To date, accordingly, two stores remain to be divested. The trustee's time to divest expired on October 6, 1993.

II. Respondents' Petition

Respondents are requesting relief from any further divestiture obligations. Respondents' Petition is based on changes of fact and public interest considerations. Additionally, respondents assert that, in any event, reopening and modifying the order is not necessary because their obligation to divest terminated by law upon the expiration of the trustee's time to divest.²

² Respondents do not assert any changes of law that would require reopening the order.

Respondents claim that there is no serious interest in either store to be divested because of the increased competition surrounding each store and because of the low sales volume of the two stores. Respondents claim that in the area of Red Food store 140 ("store 140") a new 50,000 square foot Food Max has been built and the continued strengthening of a new 30,000 square foot Food Lion has made it difficult for store 140 to compete effectively. There are two new Sav-A-Lots in the area surrounding Red Food store 129 ("store 129"), the other remaining store, and it is apparently rumored that a Food Lion is entering the market near store 129, making it difficult to divest. There has been a decline in sales at both stores to be divested. Petition at 8-9. Moreover, respondents claim that since the order was entered, Chattanooga has fallen into a recession and prospective purchasers have found it difficult to find financial support. Petition at 10.

Respondents claim that they need to end the losses being sustained by the two remaining stores to maintain Red Food's competitive vigor in the Chattanooga area. Removing the divestiture requirement would enable Red Food to close the stores, halting any further losses. Red Food has experienced a significant reduction in its profits in general, and the continuing losses incurred at the remaining stores will adversely affect its ability to compete, to the detriment of consumers. Petition at 10. Respondents assert that these losses constitute the affirmative need required to reopen the order under the public interest standard. Respondents claim that the continued obligation to divest the remaining stores inequitably injures Red Food's ability to compete and is contrary to the remedial purposes of the order. Petition at 12-13.

Citing United States v. Combustion Engineering, 364 F. SUPP. 181 (D. Conn. 1972), respondents also claim that, in any event, the obligation to divest the two stores terminated by law on the expiration of the trustee's term. Petition at 14. For the reasons set forth below, the Commission rejects this contention.

III. Standards for Reopening and Modification

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" so require. A

satisfactory showing sufficient to require 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. S. Rep. No. 96-500, 96th Cong., 2d Sess. 9 (1979) (significant changes or changes causing unfair disadvantage); *Louisiana-Pacific Corp.*, Docket No. C-2956, Letter to John C. Hart (June 5, 1986), at 4 (unpublished) (“Hart Letter”).³

Section 5(b) also provides that the Commission may modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest so requires. Respondents are therefore invited in petitions to reopen to show how the public interest warrants the requested modification. Hart Letter at 5; 16 CFR 2.51. In such a case, the respondent must demonstrate as a threshold matter some affirmative need to modify the order. *Damon Corp.*, Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (March 29, 1983), at 2 (unpublished) (“Damon Letter”). 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 689, 692 (1983). Once such a showing of need is made, the Commission will balance the reasons favoring the requested modification against any reasons not to make the modification. Damon Letter at 2. The Commission also will consider whether the particular modification sought is appropriate to remedy the identified harm. Damon Letter at 4.

The language of section 5(b) plainly anticipates that the burden is on the petitioner to make a “satisfactory showing” of changed conditions to obtain reopening of the order. The legislative history also makes clear that the petitioner has the burden of showing, other than by conclusory statements, why an order should be modified. 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) (requiring affidavits in support of

³ *See also United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992) (“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.”).

petitions to reopen and modify). If the Commission determines that the petitioner has made the necessary 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 in view of the public interest in repose and the finality of Commission orders. *See Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

IV. Promodes and Red Food Have Demonstrated an
Affirmative Need to Modify the Order and Have
Demonstrated that the Modification is in the Public Interest

The trustee appointed by the Commission under paragraph III of the order attempted unsuccessfully for twenty-one months to divest the two stores. There is no suggestion that the trustee failed to act diligently or to use his best efforts to accomplish the divestitures. The inability of the trustee to accomplish divestiture -- notwithstanding the extension of the trusteeship by nine months -- is evidence that divestiture of the two stores is extremely unlikely. Continuation of the requirement to divest and the requirement to maintain the viability and marketability of the stores -- which are steadily losing sales -- imposes unanticipated costs on the respondents that impede their ability to compete. Accordingly, respondents have demonstrated an affirmative need to modify the order.⁴

With regard to the second prong of the analysis -- whether respondents have shown that the reasons to set aside the divestiture requirement outweigh the need to continue to impose divestiture obligations on them -- the Commission notes that the purpose of the order was to increase competition through the divestiture of a specified number of supermarkets. In the wake of more than three years' efforts to divest the two stores at issue -- including twenty-one months of serious efforts by the trustee -- Red Food is losing money because of its continued operation of the two remaining stores. These

⁴The Commission has already relieved respondents of the divestiture obligation for two other stores. The Commission found it extremely unlikely that respondents would be able to divest the stores originally identified in paragraphs II.A.1. and II.A.2. and set aside those paragraphs on May 21, 1993.

losses have weakened Red Food's ability to compete -- a result plainly at odds with the objective of the order. In these circumstances -- the extreme unlikelihood that the stores can be divested, coupled with the financial and competitive costs that the divestiture requirement imposes on Red Food -- it is in the public interest to reopen and modify the order.⁵

The Commission, having determined to reopen and modify this order, also addresses a subsidiary assertion made by the respondents. Respondents assert in their Petition that their obligation to divest the stores terminated by law upon the expiration of the trustee's term, citing *United States v. Combustion Engineering*, 364 F. Supp. 181 (D. Conn. 1972). Contrary to respondents' assertions, that case is not comparable to the current matter. The language of the order in *Combustion Engineering* required that defendant "make continuous bona fide efforts to sell and consummate a sale" of the assets. The court held there that that language did not create an absolute obligation to divest. 364 F. Supp. at 186. Respondents' assertion that, as in *Combustion Engineering*, the order in Docket No. 9228 required them only "to make reasonable efforts to divest certain assets for a specified period of time," Petition at 14, is incorrect. The language of the current order requires that "[w]ithin nine (9) months after this order becomes final, respondents shall divest, absolutely and in good faith, order at paragraph II.A. This language creates an absolute obligation to divest the stores identified in paragraph II.⁶ The date contained in the order is a deadline, after which respondents are in violation of the divestiture obligation. The divestiture obligation contained in the order does not automatically terminate following that deadline. Moreover, the courts have held that under the language contained in this order, a respondent violates the order merely by failing to divest within the time allotted.⁷ Because the language of the consent order in *Combustion Engineering* differs substantially from that in the current order, that case does not support respondents' position.

⁵ Because the Petition is granted on the ground that it is in the public interest, the Commission need not address the question whether changes of fact justify the requested relief.

⁶ The use of the phrase "good faith" refers to the terms of the divestiture, and is not a limitation on the obligation to divest. *U.S. v. Beatrice*, 344 F. Supp. 104, 116 (D. Minn. 1972), *aff'd*, 493 F.2d 1259 (8th Cir. 1974), *cert. denied*, 420 U.S. 961 (1975).

⁷ See, *U.S. v. Papercraft Corp.*, 540 F.2d 131, 140 (3rd Cir. 1976); *U.S. v. Louisiana-Pacific Corp.*, Civil No. 81-813 RE slip op. at 2 (D. Ore. Feb. 23, 1982).

V. 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.3. and paragraph II.A.6. of the order are deleted from paragraph II of the order.

Commissioner Owen dissenting in part.

CONCURRING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

I concur in the decision to reopen and modify the order, relieving the respondents of the obligation to divest certain supermarkets in Chattanooga, Tennessee. The Commission-appointed trustee, during a 21-month period, has not accomplished the required divestitures. In classic understatement, the Commission concludes that the trustee's lack of success is "evidence that divestiture of the two stores is extremely unlikely."

A Commission-appointed trustee serves as a neutral arbiter to establish whether the divestiture required by the order can be accomplished (assuming the trustee's good faith and diligence and the absence of evidence that the respondent has frustrated the trustee's efforts). If the trustee cannot identify potential buyers, continued imposition of the divestiture requirement no longer serves the public interest. In these circumstances, the requirement imposes costs, and the respondent need not make a particularized showing of those costs.

The Commission has in the past recognized that an obligation to divest particular assets may be modified in the public interest when the respondent "has been unable to find an acquirer (for those assets) at any price." *RSR Corporation*, 98 FTC 872 (1981); *compare Louisiana-Pacific Corporation*, 112 FTC 547, 561 (1989) (asserted financial disadvantage distinguished from impossibility). The trustee having failed to effect divestiture, the requirement now should be lifted.

STATEMENT OF COMMISSIONER DEBORAH K. OWEN
CONCURRING IN PART AND DISSENTING IN PART

I concur in the decision to reopen and modify the consent order in this matter to relieve respondents' obligation to divest the South Pittsburg and Highway 58 supermarkets. This modification to the order is clearly in the public interest. However, I dissent from Commission's failure to find that this order modification is also warranted by changes in fact.

I believe that changes in market conditions following issuance of the order have indeed created circumstances today that warrant modification. Among other factors, entry by competing supermarket chains has altered the competitive atmosphere in the areas where the stores are located. Presumably, when the Commission originally decided to include these stores in the list of properties to be divested, it did not perceive any significant threat to their continued viability. Despite evidence suggesting that respondents have properly maintained the stores, each is now running significant operating losses. Thus, certain facts must have changed to alter the status of these supermarkets.

The Commission has already acknowledged that new entry in the vicinity of respondents' Fort Oglethorpe store, listed in order paragraph II.A.(2), may have warranted the removal of Red Food's obligation to divest that store.¹ In addition to other factors, new entrants near the South Pittsburg and Highway 58 supermarkets appear to have significantly altered the competitive conditions under which these two supermarkets operate. Just as the opening of new supermarkets in the Fort Oglethorpe neighborhood may have justified an order modification regarding that store, entry in the vicinity of the Highway 58 and South Pittsburg stores, along with other changed conditions, warrant the present modification.

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

IN THE MATTER OF

OCCIDENTAL PETROLEUM CORPORATION, ET AL.

MODIFIED FINAL ORDER, ETC., IN REGARD TO ALLEGED
VIOLATION OF SEC. 7 OF THE CLAYTON ACT AND
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9205. Final Order, Dec. 22, 1992--Modified Final Order, Feb. 3, 1994*

This modified final order requires Occidental, a California-based corporation, to divest certain PVC assets to a Commission-approved acquirer within twelve months and to provide to the acquirer all PVC technology used or developed by the respondent for use in connection with the PVC assets to be divested. The modified order also prohibits Occidental, for 10 years, from acquiring all or any part of the stock or assets of, or any interest in, any producer of PVC located in the United States, without prior Commission approval.

Appearances

For the Commission: *Eric D. Rohlck* and *Daniel P. Ducore*.

For the respondents: *Michael Sohn, Arnold & Porter*, Washington, D.C. *Louis Nizer, Phillips, Nizer, Benjamin, Krim & Ballon*, New York, N.Y. and *Robert D. Luss*, in-house counsel for respondent Occidental Chemical Corporation, Dallas, TX.

MODIFIED FINAL ORDER

The Commission issued a final order in this proceeding on December 22, 1992, and the respondents, Occidental Petroleum Corporation and Occidental Chemical Corporation (collectively "Occidental"), subsequently filed a petition for review of that order in the United States Court of Appeals for the Second Circuit. On November 15, 1993, the Commission and Occidental filed a joint motion asking that court to modify the Commission's final order pursuant to a stipulation between the Commission and Occidental. Commissioner Yao issued the attached statement and Commissioner Owen issued the attached dissent to the Commission's entry into the stipulation. On January 12, 1994, the court of appeals granted the parties' joint motion and entered its order modifying the Commission's final order of December 22, 1992.

* Final Order, etc. previously published at 115 FTC 1010 (1992).