

IN THE MATTER OF

RITE AID CORPORATION

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

Docket C-3546. Complaint, Dec. 15, 1994--Decision, Dec. 15, 1994

This consent order requires, among other things, Rite Aid, in conjunction with its acquisition of LaVerdiere's Enterprises, Inc., to divest the pharmacy assets either in its own Rite Aid stores, or in the LaVerdiere's stores it will acquire, in three specified cities, to a Commission-approved entity within 12 months of the order. If the divestitures are not accomplished within the time-frame, the Commission can appoint a trustee to accomplish them. In addition, the consent order requires the respondent, for a period of ten years, to obtain Commission approval before acquiring any assets or stocks in any entity engaged in the business of selling prescription drugs at retail outlets in the three designated cities.

Appearances

For the Commission: *Ann D. Malester, Catharine M. Moscatelli and E. Eric Elmore.*

For the respondent: *Lewis A. Noonberg, Piper & Marbury, Washington, D.C. Eric Saunders and Larry Bryant, Bernestein, Shur, Sawyer & Nelson, Portland, ME.*

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondent, Rite Aid Corporation, a corporation subject to the jurisdiction of the Federal Trade Commission, has agreed to acquire LaVerdiere's Enterprises, Inc., a corporation subject to the jurisdiction of the Federal Trade Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45; and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. THE RESPONDENT

1. Respondent Rite Aid Corporation ("Rite Aid") is a corporation organized and existing under the laws of the state of Delaware, with its principal place of business at 30 Hunter Lane, Camp Hill, Pennsylvania.

2. For purposes of this proceeding, respondent is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

II. THE ACQUIRED COMPANY

3. LaVerdiere's Enterprises, Inc. ("LEI") is a corporation organized and existing under the laws of the state of Maine, with its business address at Post Office Box 1014, Waterville, Maine.

4. LEI is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

III. THE ACQUISITION

5. On or about April 29, 1994, Rite Aid and LEI entered into a stock purchase agreement providing for the sale of LEI to Rite Aid, for consideration totaling approximately \$50 million ("Acquisition").

IV. THE RELEVANT MARKETS

6. For purposes of this complaint, the relevant line of commerce in which to analyze the effects of the Acquisition is the sale of prescription drugs in retail stores.

7. For purposes of this complaint, the relevant sections of the country in which to analyze the effects of the Acquisition are: Bucksport, Maine; Lincoln, Maine; and Berlin, New Hampshire.

8. The relevant markets set forth in paragraphs six and seven are highly concentrated, whether measured by Herfindahl-Hirschmann Indices ("HHI") or two-firm and four-firm concentration ratios.

9. Entry into the relevant markets is difficult or unlikely.
10. Rite Aid and LEI are actual competitors in the relevant markets.

V. EFFECTS OF THE ACQUISITION

11. The effect of the Acquisition may be substantially to lessen competition and to tend to create a monopoly in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45, in the following ways, among others:

- a. By eliminating direct actual competition between Rite Aid and LEI;
- b. By increasing the likelihood that Rite Aid will unilaterally exercise market power; and
- c. By increasing the likelihood of collusion in the relevant markets.

12. All of the above increase the likelihood that firms in the relevant markets will increase prices and restrict output both in the near future and in the long term.

VI. VIOLATIONS CHARGED

13. The acquisition agreement described in paragraph five constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

14. The acquisition described in paragraph five, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of respondent's proposed acquisition of certain voting stock of La-Verdiere's Enterprises, Inc., and respondent having been furnished thereafter with a copy of a draft of complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge respondent with viola-

tions of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the aforesaid draft of the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that respondent has violated the said Acts and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Rite Aid Corporation ("Rite Aid") is a corporation organized and existing under the laws of the State of Delaware with its office and principal place of business located at 30 Hunter Lane, Camp Hill, Pennsylvania.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I.

It is ordered, That, as used in this order, the following definitions shall apply:

A. "*Rite Aid*" means Rite Aid Corporation, its predecessors, subsidiaries, divisions, groups and affiliates controlled by Rite Aid,

and their directors, officers, employees, agents, representatives, and their successors and assigns.

B. “*Commission*” means the Federal Trade Commission.

C. “*Acquisition*” means the acquisition of all the voting stock of LaVerdiere’s Enterprises, Inc. (“LEI”) by respondent Rite Aid.

D. “*Acquirer*” means the party or parties to whom respondent Rite Aid divests the assets herein ordered to be divested.

E. “*Prescription drugs*” means ethical drugs available at retail only by prescription.

F. “*LEI Pharmacy Business*” means LEI’s business of selling prescription drugs at any of the retail stores listed in paragraph I.(J). of this order, but does not include LEI’s business of selling other products in those retail stores.

G. “*LEI Pharmacy Assets*” means all assets constituting the LEI, Pharmacy Business, excluding those assets pertaining to the LEI trade names, trade dress, trade marks and service marks, and including but not limited to:

1. Leases, at the Acquirer’s option;
2. Zoning approvals and registrations, at the Acquirer’s option;
3. Books, records, manuals, and operations reports relating to the LEI Pharmacy Business, but only if the divestiture is to an Acquirer that does not already operate a pharmacy in any location;
4. Inventory instructions, or, at the Acquirer’s option, lists of stock keeping units (“SKUs”), *i.e.*, all forms, package sizes and other units in which prescription drugs are sold and which are used in records of sales and inventories;
5. Lists of all prescription drug customers, including but not limited to third party insurers, including all files of names, addresses, and telephone numbers of the individual customer contacts, the unit and dollar amounts of sales, by product, to each customer, and store profit and loss statement(s);
6. All names and addresses of prescription drug manufacturers and distributors that supply to LEI or have supplied to LEI within the six months preceding the date this order becomes final; and
7. Goodwill, tangible and intangible, utilized in the sale of prescription drugs.

H. “*Rite Aid Pharmacy Business*” means Rite Aid’s business of selling prescription drugs at any of the retail stores listed in paragraph

I.(J). of this order, but does not include Rite Aid's business of selling other products in those retail stores.

I. "*Rite Aid Pharmacy Assets*" means all assets constituting the Rite Aid Pharmacy Business, excluding those assets pertaining to the Rite Aid trade names, trade dress, trade marks and service marks, and including but not limited to:

1. Leases, at the Acquirer's option;
2. Zoning approvals and registrations, at the Acquirer's option;
3. Books, records, manuals, and operations reports, relating to the Rite Aid Pharmacy Business, but only if the divestiture is to an Acquirer that does not already operate a pharmacy in any location;
4. Inventory instructions, or, at the Acquirer's option, lists of SKUS, *i.e.*, all forms, package sizes and other units in which prescription drugs are sold and which are used in records of sales and inventories;
5. Lists of all prescription drug customers, including but not limited to third party insurers, including all files of names, addresses, and telephone numbers of the individual customer contacts, the unit and dollar amounts of sales, by product, to each customer, and store profit and loss statement(s);
6. All names and addresses of prescription drug manufacturers and distributors that supply to Rite Aid or have supplied to Rite Aid within the six months preceding the date this order becomes final; and
7. Goodwill, tangible and intangible, utilized in the sale of prescription drugs.

J. "*Assets To Be Divested*" means either the LEI Pharmacy Assets constituting the LEI Pharmacy Business or the Rite Aid Pharmacy Assets constituting the Rite Aid Pharmacy Business in the following cities or towns:

1. Bucksport, Maine;
2. Lincoln, Maine; and
3. Berlin, New Hampshire.

K. "*Competitiveness, viability and marketability*" of the Assets To Be Divested mean that respondent shall continue the operation of the Assets To Be Divested in the ordinary course of business without

material change or alteration that would adversely affect the value or goodwill of the Assets To Be Divested.

II.

It is further ordered, That:

A. Respondent shall divest absolutely and in good faith, within twelve (12) months of the date this order becomes final, the Assets To Be Divested.

B. Respondent shall divest the Assets To Be Divested only to an acquirer or acquirers that receive the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. The purpose of the divestiture of the Assets To Be Divested is to ensure the continued use of the Assets To Be Divested as ongoing viable pharmacies engaged in the same businesses in which the Assets To Be Divested are presently employed and to remedy the lessening of competition resulting from the acquisition as alleged in the Commission's complaint.

C. Pending divestiture of the Assets To Be Divested, respondent shall take such actions as are necessary to maintain the competitiveness, viability and marketability of the Assets To Be Divested and to prevent the destruction, removal, wasting, deterioration, or impairment of any Assets To Be Divested except for ordinary wear and tear.

D. If a divestiture includes a lease of physical space, and if pursuant to that lease respondent through default of the lease or otherwise regains possession of the space, respondent must notify the Commission of such repossession within thirty (30) days and must redinvest such assets or interest pursuant to paragraph II of this order within six (6) months of such repossession. If respondent has not redinvested such assets or interest pursuant to paragraph II of this order within six (6) months of such repossession, the provisions of paragraph III shall apply to these assets.

III.

It is further ordered, That:

A. If respondent has not divested, absolutely and in good faith and with the Commission's prior approval, the Assets To Be Divested

within twelve (12) months of the date this order becomes final, the Commission may appoint a trustee to divest the Assets To Be Divested. In the event the Commission or the Attorney General brings an action pursuant to Section 5(1) of the Federal Trade Commission Act, 15 U.S.C. 45(1), or any other statute enforced by the Commission, respondent shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(1) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by respondent to comply with this order.

B. If a trustee is appointed by the Commission or a court pursuant to paragraph III.A. of this order, respondent shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

1. The Commission shall select the trustee, subject to the consent of respondent, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to respondent of the identity of any proposed trustee, respondent shall be deemed to have consented to the selection of the proposed trustee.

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the Assets To Be Divested.

3. Within ten (10) days after appointment of the trustee, respondent shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture required by this order.

4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph III.B.3. to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time,

the divestiture period may be extended by the Commission, or in the case of a court-appointed trustee by the court.

5. The trustee shall have full and complete access to the personnel, books, records, and facilities related to the Assets To Be Divested, or to any other relevant information, as the trustee may reasonably request. Respondent shall develop such financial or other information as such trustee may reasonably request and shall cooperate with the trustee. Respondent shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by respondent shall extend the time for divestiture under this paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission subject to respondent's absolute and unconditional obligation to divest at no minimum price. The divestiture shall be made in the manner and to the acquirer or acquirers as set out in paragraph II of this order. Provided, however, if the trustee receives bona fide offers from more than one acquirer, and if the Commission determines to approve more than one such acquirer, the trustee shall divest to the acquirer or acquirers selected by respondent from among those approved by the Commission.

7. The trustee shall serve, without bond or other security, at the cost and expense of respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have authority to employ, at the cost and expense of respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are reasonably necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of respondent and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the Assets To Be Divested.

8. Respondent shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, and respondent shall either defend against such claims or pay the trustee's expenses, including all reasonable fees of counsel and other expenses incurred in connection with the preparations for, or defense of any such claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraph III.A. of this order.

10. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this order.

11. The trustee shall have no obligation or authority to operate or maintain the Assets To Be Divested.

12. The trustee shall report in writing to respondent and to the Commission every sixty (60) days concerning the trustee's efforts to accomplish divestiture.

IV.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, respondent shall not, without the prior approval of the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise: (A) Acquire any stock, share capital, equity, leasehold or other interest in any concern, corporate or non-corporate, where such concern within the six months preceding such acquisition engaged in the business of selling prescription drugs at retail stores located in any of the cities or towns listed in paragraph I.(J). of this order; or (B) Acquire any assets used, within six months of the offer to acquire, for (and still suitable for use for) the business of selling prescription drugs at retail stores located in any of the cities or towns listed in paragraph I.(J). of this order. Provided, however, that these prohibitions shall not relate to the construction of new facilities.

V.

It is further ordered, That:

A. Within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until respondent has fully complied with the provisions of paragraphs II. and III. of this order, respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with those provisions. Respondent shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with paragraphs II and III of the order, including a description of all substantive contacts or negotiations for the divestiture and the identity of all parties contacted. Respondent also shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

B. One (1) year from the date this order becomes final, annually thereafter for the next nine (9) years on the anniversary of the date this order became final, and at such other times as the Commission may require, respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with paragraph IV. of this order.

VI.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of the order.

VII.

It is further ordered, That, for the purpose of determining or securing compliance with this order upon reasonable notice and subject to any legally recognized privilege, respondent shall permit any duly authorized representative of the Commission:

A. Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of respondent relating to any matters contained in this consent order; and

B. Upon five (5) days notice to respondent, and without restraint or interference from it, to interview officers, directors, or employees of respondent, who may have counsel present, regarding such matters.

IN THE MATTER OF

LEVI STRAUSS & CO.

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

Docket 9081. Consent Order, July 12, 1978--Modifying Order, Dec. 20, 1994

This order reopens a 1978 consent order (92 FTC 171), that settled allegations that the respondent had engaged in a number of anticompetitive practices, including fixing the resale prices at which retailers sold its products, and modifies the consent order by adding a provision to clarify that the order does not prohibit conduct by the respondent that is necessary to form and operate wholly-owned retail stores, or retail stores partially-owned by the respondent in lawful joint ventures. The Commission found that the respondent had satisfactorily met its burden of showing that changed conditions of fact required the modification.

ORDER REOPENING AND MODIFYING ORDER

On August 25, 1994, Levi Strauss & Co. ("LS&CO") filed a Petition To Reopen Proceedings And For Modification of Consent Decree ("Petition") pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b) ("FTC Act"), and Section 2.51 of the Commission's Rules of Practice and Procedure, 16 CFR 2.51 ("Rules"). The Petition asks the Commission to reopen the proceeding in Docket No. 9081 and modify the consent order issued by the Commission on July 12, 1978, *Levi Strauss & CO.*, 92 FTC 171 (1978) ("order"). Specifically, LS&CO requests that the Commission add a paragraph to the order stating that the order shall not be construed to prohibit conduct that is ancillary to and reasonably necessary for the formation and operation of retail stores either wholly-owned and operated or partially owned by LS&CO in a lawful joint venture. LS&CO's Petition was placed on the public record for thirty days, pursuant to Section 2.51 of the Rules, and two comments were received.

After reviewing the Petition and other relevant information, the Commission has determined to grant the Petition. LS&CO has shown changed conditions of fact that require reopening and modify-