

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-

ing the order.¹ These changed conditions make the continued application of the order without the modification LS&CO now seeks inequitable and harmful to competition.

The Complaint and Order and LS&CO's Petition

The Commission issued its complaint in this matter on May 5, 1976, charging LS&CO with illegally fixing the retail prices of its blue jeans and other products, in violation of Section 5 of the FTC Act.² The consent order was issued on July 12, 1978, and prohibits LS&CO from engaging in resale price maintenance ("RPM") and from using various non-price vertical restraints to further or implement RPM.³

LS&CO now requests the Commission to modify the order by adding a paragraph 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 (or its subsidiaries or affiliates) in a lawful joint venture.⁴ LS&CO plans to establish retail stores that sell only LS&CO products ("OLS stores"). One aspect of this plan includes the formation of a joint venture with an LS&CO customer, Designs, Inc. ("Designs"), that will operate OLS stores in one part of the country.⁵ Because the order restricts LS&CO's ability to influence prices charged by retailers authorized to sell LS&CO products, LS&CO believes that "as to the contemplated joint venture

¹ Because LS&CO has demonstrated that changed conditions of fact require reopening and modifying the order, the Commission need not consider whether reopening is warranted under the public interest standard.

² 92 FTC at 171-75.

³ Paragraph I of the order prohibits LS&CO from, among other things, "[f]ixing, establishing, controlling or maintaining, directly or indirectly, the price at which any dealer may advertise, promote, offer for sale or sell any product at retail." 92 FTC at 176. "Dealer" is defined as "any person, partnership, corporation, or firm authorized by Levi Strauss & Co. to sell any product." *Id.* LS&CO is also prohibited from limiting participation in cooperative advertising funds or otherwise disciplining dealers who fail to adhere to RPM. Nor may it require its dealers to report cheaters, or itself conduct any other type of surveillance program to enforce resale prices. Finally, paragraph I also prohibits LS&CO from restricting the classes of customers to whom its dealers may sell when such restrictions are in furtherance of RPM. *Id.* at 176-77.

⁴ Petition at 2.

⁵ Memorandum in Support of Request to Reopen the Proceedings and for Modification of Consent Decree at 1 ("Petition Memorandum").

. . . the literal language of the order may prohibit LS&CO's involvement, making modification necessary before the joint venture is consummated."⁶

In support of its Petition, LS&CO argues that the relief it seeks is required by changed conditions and is in the public interest. When the order was issued, LS&CO, for practical purposes, did not own, or partially own, any retail operations.⁷ Instead, it was engaged almost exclusively in manufacturing and sold its apparel products to independent retailers throughout the United States. Recently, LS&CO concluded that the planned OLS retail stores are important to LS&CO's "overall marketing and product vision."⁸ A similar marketing approach has been adopted by many of LS&CO's competitors who have formed and currently operate "brand-only" retail stores. LS&CO thus asserts that the order, without the clarifying language it now seeks, restricts it from competing in the retail market and, consequently, "cause[s] [LS&CO] significant competitive harm not envisioned by the consent order."⁹ LS&CO also argues that the order was "never intended to impose a restriction on LS&CO's ability to compete at retail," and that the order does not expressly prohibit LS&CO from undertaking any form of vertical integration.¹⁰ LS&CO believes that modifying the order will allow it to engage in the same lawful conduct (without disturbing the main purposes of the order) in which its competitors are free to engage and are in fact engaging, to the benefit of competition and, ultimately, consumers of apparel products.

⁶ *Id.* at 2. LS&CO believes that the order should not be construed to apply to a retail outlet wholly-owned by LS&CO, because LS&CO does not actually "authorize" such an outlet to sell any products. Nevertheless, to avoid any uncertainty concerning application of the order to LS&CO's wholly-owned retail operations, LS&CO requests that the order be modified to authorize the formation and operation of wholly-owned LS&CO retail stores. *Id.* at 2, 5-6. The Commission believes that "dealer" as used in the order does not apply to retailers that are wholly-owned by LS&CO, in light of *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984) (coordinated activity of parent and wholly-owned subsidiary to be viewed as that of a single enterprise).

⁷ LS&CO "owned a small retail operation selling closeouts in the east, but had no meaningful presence in the retail market." *Id.* at 5.

⁸ *Id.* at 1.

⁹ *Id.* at 1-2.

¹⁰ *Id.*

Standards for Opening 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 petitioner “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 a plaction of it inequitable or harmful to competition.¹¹

The burden is on the petitioner 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.¹² 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.¹³

LS&CO Has Shown that Changed Conditions of Fact Require Reopening and Modifying the Order

The 1976 complaint in this matter describes LS&CO as the largest apparel manufacturer in the world engaged in the manufacture, sale and distribution of a “wide variety of wearing apparel for men,

¹¹ Louisiana-Pacific Corp., Docket No. C-2956, Letter to John C. Hart (June 5, 1986) (“L-P Letter”) at 4. 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.”

¹² 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.

¹³ See *Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

women and children, including but not limited to jeans, slacks, shorts, shirts, jackets and related items.”¹⁴ At the time, LS&CO sold its products directly to numerous retail dealers located throughout the United States who in turn resold the products to the general public. Currently, LS&CO is the second largest producer of denim jeans in the United States¹⁵ but faces competition from numerous other branded jeans manufacturers, many of which have vertically integrated into retailing through company-owned stores.¹⁶ In addition, competition also is provided by a proliferation in private label jeans manufactured for and marketed by large retailers.¹⁷

When the order was issued, LS&CO, like its competitors, had no meaningful retail presence. Since the order was entered, however, many of LS&CO’s competitors have integrated into retailing, in order to showcase their products, market their complete lines, and demonstrate to their own retailer-customers the benefits of promoting the manufacturer’s products. In view of these changed conditions, the order exerts an unintended chilling effect on LS&CO’s ability to participate in retailing in response to this development, because LS&CO may not influence “directly or indirectly, the price at which any dealer may advertise, promote, offer for sale or retail.”¹⁸ The order’s restriction on influence prices charged by retailers products inhibits LS&CO from becoming lawful retail joint ventures.

LS&CO has made a satisfactory showing that changed conditions require the Commission to reopen the proceeding. The significant change in circumstances identified by LS&CO in support of its Petition is the fact that since the order was issued, “brand-only” retail stores have been established by many of LS&CO’s competitors. LS&CO would like to open similar stores in a proposed joint venture with Designs, as part of an overall business strategy responsive to, among other things, competition in the marketing of casual apparel and jeans in the United States.

LS&CO believes that establishment of the OLS stores is “vital to LS&CO.’s long-term competitive interests.”¹⁹ It hopes that the OLS

¹⁴ 92 FTC at 172.

¹⁵ Petition Memorandum at 7.

¹⁶ *Id.*

¹⁷ *Id.* at 7-8.

¹⁸ 92 FTC at 176.

¹⁹ Declaration of Robert D. Rockey, President of Levi Strauss North America paragraph 2.

stores will position the Levi's brand in an environment that emphasizes LS&CO's image, values and reputation, and provides consumers with the opportunity, in one store, to see a broad assortment of Levi's products. LS&CO also believes that once the OLS stores demonstrate the viability of dedicating retail space and substantial product assortments to LS&CO products, retailers may be persuaded to dedicate space to "focus areas" and in-store shops developed for the Levi's brands they carry.²⁰

OLS stores are unlikely adversely to affect competition among apparel retailers in the United States. United States retail apparel sales are highly fragmented. More than 250,000 stores carry apparel products; of these, more than 200,000 stores sell only apparel and accessories, and 50,000 stores are primarily department, chain or general merchandise stores.²¹ Even the largest retailers account for only a small percentage of apparel and jeans sales.²² Based on this data, LS&CO's OLS stores will account for a small fraction of the overall jeans volume and even less of overall casual apparel sales.²³

The record evidence suggests that LS&CO lacks market power in the manufacturing of jeans and other casual wear and that the proposed joint venture will not have market power in apparel retailing. Without market power at either level of distribution, LS&CO's retailing venture would be unlikely to give rise to anticompetitive effects. In the absence of likely anticompetitive effects, the order as modified would permit LS&CO flexibility to adopt new marketing strategies that may increase competition and benefit consumers.

A modification of the order to clarify that it does not prohibit LS&CO from entering into otherwise lawful retail joint ventures is consistent with past Commission action involving other orders against *per se* unlawful conduct. In *American Standard, Inc.*, 108 FTC 181 (1986), and *General Railway Signal Co.*, 110 FTC 143 (1987), the Commission modified a 1964 consent order²⁴ to permit

²⁰ Petition Memorandum at 13.

²¹ Petition Memorandum at 10-11.

²² *Id.*

²³ LS&CO's annual jeans volume in the United States amounts to approximately 57.5 million units of a total of about 300 million jeans units sold. The United States casual apparel industry has annual sales of approximately 2 billion units with LS&CO's products accounting for about 97 million units. *Id.* at 11-12.

²⁴ See *General Railway Signal Co.*, 66 FTC 882 (1964), order reopened and modified to provide for expiration (Aug. 29, 1994).

the respondents to engage "in conduct . . . ancillary to and reasonably necessary for the formation or operation of a joint venture that is lawful under the antitrust laws."²⁵ The order against the signaling companies broadly prohibited agreements with "any other person, persons or business entity not a party hereto." Concluding that the order was aimed at collusive agreements, the Commission modified the order so that the respondents could participate in otherwise lawful joint venture activity.²⁶ Like the proposed modifications in General Railway Signal, LS&CO is requesting that the order be modified to permit lawful joint ventures.²⁷

The requested modification also is consistent with the Commission's previous action in *Liquid Air Corporation of North America, et al.*, Docket No. C-2990, 94 FTC 390 (1979), and *L'Air Liquide S.A.*, Docket No. C-3216, 110 FTC 19 (1987).

In those matters, the respondents,²⁸ in a joint petition, requested the Commission to modify the respective orders because, in essence, they required the respondents to obtain the prior approval of the Commission before undertaking purely internal business activities.²⁹ The Commission granted the petition on public interest grounds, stating that the respondents had shown that the orders "impose[d] substantial costs on the respondents because they require[d] the respondents to obtain the prior approval of the Commission in connection with the respondents, wholly internal activities."³⁰ The Commission determined that "[s]uch internal activities would raise no competitive

²⁵ 108 FTC at 183.

²⁶ *Id.* at 181.

²⁷ Lawful joint ventures can generate efficiencies such as economies of scale, sharing risks, synergies resulting from pooling complementary resources and facilitating entry into new markets. *See, e.g., Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 20-23 (1979); *Brunswick Corp.*, 94 FTC 1174, 1265 (1979), *aff'd in part and modified in part sub nom. Yamaha Motor Co. v. FTC*, 657 F.2d 971 (8th Cir. 1981), *cert. denied*, 456 U.S. 915 (1982). *See also Copperweld Corp.*, 467 U.S. at 768, where the Court stated that "joint ventures, and various vertical agreements, hold the promise of increasing a firm's efficiency and enabling it to compete more effectively. Accordingly, such combinations are judged under a rule of reason, an inquiry into market power and market structure designed to assess the combination's actual effect."

²⁸ At the time, L'Air Liquide was the parent of Liquid Air Corporation.

²⁹ For example, under the orders, L'Air Liquide would have to obtain the prior approval of the Commission for a transaction in which it caused its subsidiary, Liquid Air Corporation, to acquire all or any part of another L'Air Liquide subsidiary.

³⁰ *See* Order Reopening and Modifying Orders Issued on September 5, 1979, Against Liquid Air Corporation of North America and on July 15, 1987, Against *L'Air Liquide Societe Anonyme Pour L'Etude Et L'Exploitation Des Precedes Georges Claude*, 111 FTC 135, 137 (1988).

questions. . . .”³¹ The Commission, citing *Copperweld Corp.*, 467 U.S. 752, concluded that application of the orders’ prior approval provisions to respondents’ “wholly internal activities” would not be consistent with the principle that the coordinated activity of a parent and its wholly-owned subsidiaries must be viewed as that of a single enterprise for Federal antitrust law purposes.³²

The Commission has recognized the need to avoid applying a consent order aimed at particular unlawful conduct to inhibit conduct that is lawful. For example, in *Adolph Coors Company*, 112 FTC 191, 197 (1989), the Commission found that a general prohibition against Coors’ hindering, suppressing or eliminating competition between or among distributors was unduly restrictive and overbroad and could have a chilling effect on Coors’ ability to implement certain distributional efficiencies.

In light of the competitive developments in the casual apparel and jeans retail distribution channels, the minimal foreclosure of these channels by implementation of the proposed LS&CO/Designs joint venture, and the fact that LS&CO’s competitors are not restricted by similar orders and indeed operate retail stores exclusively featuring their respective brands, the order should be modified to permit LS&CO to enter into lawful joint ventures in retailing. LS&CO will remain subject to all the requirements of the order in its dealings with independent retailer-customers. Any attempt by LS&CO to influence pricing by its independent dealers (including Designs, when acting in its capacity as an independent dealer) will remain subject to the requirements of the order in this case.

LS&CO has made a satisfactory showing that reopening the proceeding and modifying the order is warranted by changed conditions of fact. Granting the Petition permits LS&CO to operate in the same manner as its competitors who have moved to a new marketing strategy. The order, as modified, retains the prohibition against fixing the prices at which independent retailers resell LS&CO products (as well as its other prohibitions).

Accordingly, *it is ordered*, That this matter be and it hereby is reopened and that the Commission’s order in Docket No. 9081 be and it hereby is modified to include a new ending paragraph, as follows:

³¹ *Id.*

³² *Id.*

Provided, however, that the provisions of this 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 respondent, or its subsidiaries or affiliates, in a lawful joint venture.

Set Aside Order

IN THE MATTER OF

ARMSTRONG CORK COMPANY

SET ASIDE ORDER IN REGARD TO ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT
AND SEC. 2(a) OF THE CLAYTON ACT*Docket C-1010. Consent Order, Nov. 3, 1965--Set Aside Order, Dec. 23, 1994*

The Federal Trade Commission has set aside a 1965 consent order with Armstrong Cork Company, (68 FTC 849), pursuant to the Commission's Sunset Policy Statement, under which the Commission presumes that the public interest requires terminating competition orders that are more than 20 years old.

ORDER REOPENING PROCEEDING
AND SETTING ASIDE ORDER

On September 6, 1994, Armstrong World Industries, Inc. ("Armstrong"), the successor to Armstrong Cork Company, filed a Petition to Reopen Proceedings and Set Aside Order ("Petition") in this matter. Armstrong requests that the Commission set aside the 1965 consent order in this matter pursuant to Rule 2.51 of the Commission's Rules of Practice, 16 CFR 2.51, and the Statement of Policy With Respect to Duration of Competition Orders and Statement of Intention to Solicit Public Comment With Respect to Duration of Consumer Protection Orders, issued July 22, 1994, published at 59 Fed. Reg. 45, 286-92 (Sept. 1, 1994) ("Sunset Policy Statement"). In the Petition, Armstrong affirmatively states that it has not engaged in any conduct violating the terms of the order. The Request was placed on the public record, and the thirty-day comment period expired on October 14, 1994. No comments were received.

The Commission in its July 22, 1994, Sunset Policy Statement said, in relevant part, that "effective immediately, the Commission will presume, in the context of petitions to reopen and modify existing orders, that the public interest requires setting aside orders in effect for more than twenty years."¹ The Commission's order in Docket No. C-1010 was issued on November 3, 1965, and has been in effect for more than twenty-nine years. Consistent with the Commission's July 22, 1994, Sunset Policy Statement, the presumption is that

¹ See Sunset Policy Statement, 59 Fed. Reg. at 45,289.