

IN THE MATTER OF

CALIFORNIA AND HAWAIIAN SUGAR COMPANY, ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION
OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2858. Consent Order, Jan. 6, 1977--Modifying Order, Jan. 17, 1995

This order reopens a 1977 consent order (89 FTC 15) that settled allegations that the respondents deceptively advertised that sugar derived from Hawaiian sugar cane is different from or superior to other sugars, particularly those derived from beets. This order modifies the consent order so that the respondents may make claims about objective differences in granulated white sugars with respect to health, safety, nutritional quality, or purity, as long as they have competent and reliable evidence to substantiate such claims. The Commission found that the public interest warranted reopening and modifying the 1977 order.

ORDER REOPENING THE PROCEEDING AND
MODIFYING CEASE AND DESIST ORDER

On July 20, 1994, the California and Hawaiian Sugar Company ("C&H") filed a request to reopen the proceeding in Docket No. C-2858, *California & Hawaiian Sugar Co.*, 89 FTC 15 (1977), and to set aside or modify the order issued ("Request"), pursuant to Section 5(b) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice, 16 CFR 2.51. The Request was placed on the public record for 30 days for comment. C&H submitted additional material in support of its Request on September 12, 1994, November 16, 1994, and January 6, 1995.

I. THE ORDER

The Commission issued the complaint and its final decision and order in Docket No. C-2858 on January 6, 1977. The complaint alleged that C&H and its advertising agency misrepresented that there are differences in granulated sugars and that C&H sugar derived from Hawaiian sugar cane is different from and superior to other sugars in quality and purity. The complaint also alleged that the respondents failed to specify any consumer use of C&H sugar for

which C&H sugar is significantly different from, or superior to, other sugar. Finally, the complaint alleged that the respondents misrepresented that the failure of competitors to disclose the origin of their sugar is a material fact from which consumers could infer that the competing sugar comes from an inferior source.

Part 1(A)(i) of the order prohibits C&H from representing that:

there are differences in granulated sugars, or that C&H granulated sugar derived from Hawaiian sugar cane is superior to or different from sugar derived from sugar beets or sugar cane from places other than Hawaii, unless: (a) such represented difference or superiority relates to a consumer use of such sugar which is specified in the advertisement, (b) the difference or superiority is substantiated by competent and reliable evidence prior to making the representation, and (c) such substantiation includes competent and reliable evidence that the difference or superiority is discernible to or of benefit to the class of consumers to whom the representation is directed.

Part 1 (A)(ii), however, permits C&H to use the phrase "pure cane sugar from Hawaii" in any context where the quality of C&H sugar is not expressly or implicitly compared with the quality of any other sugar. Part 1 (A)(iii) of the order also states that an advertisement will not be deemed to contain an implied comparison as long as it does not make a representation regarding any competitor's sugar or a representation that C&H sugar possesses a depicted characteristic or quality to a degree different from competitors' sugar. Part 1 (B) prohibits C&H from representing that competitors do not disclose the source or origin of their sugar, unless C&H specifies a consumer use of sugar with respect to which C&H sugar is different from such competing sugar and the difference is substantiated.

II. STANDARD FOR REOPENING AND MODIFYING A FINAL ORDER OF THE COMMISSION

Section 5(b) of the FTC Act provides that the Commission shall reopen an order to consider whether it should be modified or vacated if a respondent "makes a satisfactory showing that changed conditions of law or fact" require the order to be modified or set aside. A satisfactory showing sufficient to require reopening is made when a petition to reopen identifies significant changes in circumstances and demonstrates that such changes eliminate the need for the order or make continued application of the order inequitable or harmful to competition. S. Rep. No. 500, 96th Cong., 2d Sess. 9

(1979) (significant changes or changes causing unfair disadvantage); *see Phillips Petroleum Co.*, Docket No. C-1088, 78 FTC 1573, 1575 (1971) (modification not required for changes reasonably foreseeable at time of consent negotiations); *Pay Less Drugstores Northwest, Inc.*, Docket No. C-3039, Letter to H.B. Hummelt (Jan. 22, 1982) (changed conditions must be unforeseeable, create severe competitive hardship and eliminate dangers order sought to remedy) (unpublished); *see also United States v. Swift & Co.*, 286 U.S. 106, 119 (1932) ("clear showing" of changes that have eliminated reasons for order or such that the order causes unanticipated hardship).

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. *See also Gautreaux v. Pierce*, 535 F. Supp. 423, 426 (N.D. Ill. 1982) (petitioner must show "exceptional circumstances, new, changed or unforeseen at the time the decree was entered"). The legislative history also makes clear that the petitioner has the burden of showing, by means other than conclusory statements, why an order should be modified.¹ If the Commission determines that the petitioner has made the necessary showing, the Commission must reopen the order to determine 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 of changed conditions 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 Dep't Stores, Inc. v. Moitie*, 452 U.S. 394 (1981) (strong public interest considerations support repose and finality); *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 296 (1974) ("sound basis for . . . [not reopening] except in the most extraordinary circumstances"); *RSR Corp. v. FTC*, 656 F.2d 718, 721-22 (D.C. Cir. 1981) (applying Bowman Transportation standard to FTC order).

Section 5(b) also provides that the Commission may modify an order when, although changed circumstances would not require

¹ The legislative history of amended Section 5(b), S. Rep. No. 500, 96th Cong., 2d Sess. 9-10 (1979), states:

Unmeritorious, time-consuming and dilatory requests are not to be condoned. A mere facial demonstration of changed facts or circumstances is not sufficient. . . . The Commission, to reemphasize, 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.

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. 16 CFR 2.51. Generally, 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. (Mar. 29, 1983), at 2 (unpublished) ("Damon Letter"); *Louisiana-Pacific Corp.*, Docket No. C-2956, Letter to John C. Hart, Esq. (June 5, 1986); *see Reader's Digest Ass'n, Inc.*, Docket Nos. C-626 and C-2075, 111 FTC 758-59 (1989) (reopening justified if "respondent demonstrates that the order impedes competition"). *See also Damon Corp.*, Docket No. 2916, 101 FTC 689, 692 (1983) (reopening in the public interest to modify an order "to relieve any impediment to effective competition that may result from the order").²

When a satisfactory showing of affirmative need is made, the Commission has balanced the reasons favoring the requested modification against any reasons not to make the modification. *Damon Letter* at 2; *accord Reader's Digest Ass'n*, 111 FTC at 759; *see, e.g., Chevron Corp.*, Docket No. C-3147, 3 Trade Reg. Rep. (CCH) ¶ 22,239 (Mar. 13, 1985) (public interest warrants modification where potential harm to respondent's ability to compete outweighs any further need for the order). The Commission also will consider whether the particular modification sought is appropriate to remedy the identified harm. *Damon Letter* at 4.

III. PETITIONER'S REQUEST

A. *C&H States Reopening Required by Changes in Law*

C&H believes that changes in law and Commission policy since issuance of the order and consideration of the public interest warrant its reopening. C&H does not state that changed facts require that the order be modified or set aside. Because we also conclude that reopening the order is in the public interest, we do not address the respondent's views regarding a change of law.

² *Cf. Service Corp. Int'l*, Docket No. 9071, (May 12, 1994), 59 Fed. Reg. 37,045 (July 20, 1994); *Tarra Hall Clothes, Inc.*, Docket No. C-2797 (Oct. 27, 1992), 57 Fed. Reg. 54,598 (Nov. 19, 1992). *Cf. United States v. United Shoe Machinery Corp.*, 391 U.S. 244 (1968).

B. C&H Argues Reopening Warranted in the Public Interest

C&H asserts that the public interest supports reopening the order. The company states that its share of the consumer granulated white sugar market in its primary market west-of-Chicago declined from approximately 36% in 1980 to 29% in 1993. In addition, on page 4 of its submission of January 6, 1995, C&H states, "Beginning in the late 1980's, American Crystal Sugar Company has been running an aggressive advertising program in the Upper Midwest focusing on the (unsubstantiated) claimed superiority of American Crystal granulated sugar."³ The claims in this campaign were similar to those barred under the C&H order, and C&H states that these advertisements were largely responsible for C&H's precipitous loss of market share in areas affected by the campaign.

Specifically, whereas the C&H and American Crystal shares were approximately equal in 1988 in Minneapolis at a little over 30% apiece, American Crystal today possesses a 55% share in this area versus an 18% share for C&H. This drop in share for C&H marked a reversal of an upward trend the company had experienced throughout the 1980's; its share of sales in Minneapolis had risen from about 12% in 1981 to about 32% in 1988. American Crystal's share, in contrast, had fluctuated between 35% and 25% until its 1988 advertising campaign, after which its share rose to 55%. See Affidavit of Thomas J. Wilson, Vice President, Grocery Sales and Marketing, C&H, appended to submission of January 6, 1995, and Exhibit D thereto. In Milwaukee, also in the Upper Midwest, C&H's share of sales had risen from about 10% in 1981 to about 24% in 1984, where it remained until 1988 and then began a gradual decline to about 16%. American Crystal, which in 1981 had only about a 2% share, increased that to about 25% in 1985. Following the introduction of its advertising campaign in the late 1980's, its share increased to about 30%. *Id.*, Exhibit D. The Affidavit details similar shifts occurring at about the same time in Dallas, where Imperial-Holly, another C&H competitor, had mounted a similar campaign. *Id.*

These assertions also find support in the Wilson Affidavit and its exhibits. C&H's request included some comparative advertisements

³ Memorandum of C&H Sugar Co. to Federal Trade Commission at 4 (Jan. 6, 1995).

from other companies,⁴ including Imperial-Holly, the competitor that successfully increased its share of the Dallas market, at least in part, at the expense of C&H. *See also* Request, Exhibits K-O.⁵

C&H states that these facts show that the order has not simply limited its ability to make comparative superiority claims touting its "pure cane sugar from Hawaii" over granulated sugar made from beets or granulated cane sugar from sources other than Hawaii, but that it also precludes it from making claims that generally would be considered "puffery."⁶ C&H states that the order has precluded the company from defending its product against claims of this same nature disseminated by its competitors. Therefore, C&H contends, the order improperly discriminates among competitors and places C&H at an undue competitive disadvantage.

C. Reopening Warranted in the Public Interest

The Commission believes that C&H has made a showing sufficient to warrant reopening the order in the public interest. We do not intend to suggest that a respondent may obtain reopening of an order merely by showing that its conduct is restricted while that of its competitors not under order is not limited. For example, the costs of complying with a disclosure requirement to cure past deception ordinarily will not warrant reopening, even though the cost of making the disclosure falls only on the petitioner. *See Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367, 112 S. Ct. 748, 760 (1992) (reopening not warranted simply because "it is no longer convenient to live with the terms of the consent order"). In this instance, however, the product being advertised is fungible, and the nature of

⁴ For example, an ad for Crystal Sugar shows a taste test with a grandmotherly spokesperson affirming that "It's not the same." An ad for Holly Sugar describes "Sugar that made everything taste better . . . A Sweet Little Secret Born in the Hills of Colorado." Imperial Sugar Company's advertisement features a consumer who says, "I'm here as a baking expert to tell you that Imperial Sugar is the finest sugar made." An ad for Dixie Crystal Sugar informs consumers that there is "no other sugar that stirs up, cooks up, bakes up better than Dixie Crystal" and that "the difference is crystal clear." Florida Crystal Sugar Company advertises its "minimally processed . . . Unbleached Cane Sugar" and informs consumers that "they'll love the difference! Smart & Sweet. Naturally."

⁵ Although the dates of the advertisements included in these exhibits are in the 1990's, we understand that earlier versions of similar advertising materials were disseminated in the late 1980's as C&H asserts.

⁶ The term "puffery" as used by the Commission here generally includes representations that ordinary consumers do not take literally, expressions of opinion not made as a representation of fact, subjective claims (taste, feel, appearance, smell) and hyperbole that are not capable of objective measurement. Deception Policy Statement, 103 FTC 110, 181 & n.42 (1984) (citing *Pfizer, Inc.*, 81 FTC 23, 64 (1972)).

competitive harm shown is related to this homogeneity as discussed below.

As alleged in the complaint accompanying the order and recognized both by C&H and the United States Beet Sugar Association ("USBSA"), which opposed the request for modification, white granulated sugar is a homogeneous product consisting of 99.9% sucrose. The remaining .1% comprises sulfites and other residue in trace amounts.⁷ Although objective claims of differences among such products would be difficult, if not impossible, to substantiate, it does not follow that the Commission should continue to ban comparative claims that are subjective, or product source or origin claims that appeal to the peculiarities of consumer preference as long as the advertising claims do not imply without substantiation material differences in the health, safety, nutritional quality, or purity of the product. Indeed, the Commission, in the past, has found that the origin of products may be material to consumers. *See Leonard F. Porter*, 88 FTC 546, 628 (1974) ("some substantial group [of consumers] would, all things being equal, prefer authentic Eskimo-crafted gifts and souvenir items to non-native made imports from other parts of the United States"). *Cf. FTC v. Algoma Lumber Co.*, 291 U.S. 67, 78 (1934) ("the public is entitled to get what it chooses, though the choice may be dictated by caprice or by fashion or perhaps by ignorance").

C&H states that the order improperly discriminates among competitors, since other companies freely make claims that C&H is prohibited from making under the order, or that it may make only under certain conditions. For example, C&H arguably cannot include in its advertising a subjective testimonial claim such as "I love C&H the best," or "C&H tastes best," without having to substantiate that consumers can typically and ordinarily discern the difference between C&H and other granulated sugars. The material in the Wilson Affidavit and its exhibits supports a conclusion that the order,

⁷ As C&H states in its request to reopen, "[T]here are some minor physiological differences between cane and beet sugars; the most important one being the photosynthesis carbon pathway, C₃ for beet and C₄ for cane. This distinction is responsible for the different constituent elements found in the final products in very trace amounts. Sugar refined from sugar beets will have traces (parts per million) of raffinose and betaine (a non-saccharide). Sugar refined from sugar cane will have traces (parts per million) of reducing sugars and high molecular weight polysaccharides C&H has no intention of basing an advertising campaign on minor physiological differences between granulated sugars or different methods used in the refining process." Request at 13. *See also* Opposition of the USBSA to Revised Request and Restated Petition of C&H to Modify or Vacate Consent Order at 4-5.

by restricting these sorts of claims, is impeding rather than encouraging competition. The effect of the competing advertising campaigns of companies, such as American Crystal, in Minneapolis and Milwaukee and of Imperial-Holly in Dallas, is to take advantage of C&H's inability to counter claims that either constitute puffery or relate to the source or origin of the product, or are other claims that should be substantiated.

Therefore, the Commission concludes that C&H has made a satisfactory showing that the public interest warrants reopening the order in this matter for consideration of the merits of the request. Having reopened the order, the Commission will consider whether the order should be modified.

IV. THE PUBLIC INTEREST WARRANTS MODIFICATION OF THE C&H ORDER

C&H states that the public interest justifies setting aside the order, or modifying its terms. It asserts that consumers have a constitutional right to receive uncensored truthful information and that market efficiency requires that consumers be given access to truthful information. Neither of these assertions supports setting aside the order.

The Commission believes, however, that the public interest warrants modification of the order to permit C&H to make limited comparative claims. This modification is justified on the narrow facts of this matter. In particular, the homogeneous nature of the product means that there are few truthful, nondeceptive comparisons that can be made among competing products. In order to promote their brands, sugar refiners must rely on the sort of subjective endorsement claims described above, or objective product source and origin claims that may appeal to individual consumer preferences. These are precisely the kinds of claims prohibited by the existing order. We believe, therefore, that these facts suggest strongly that the order as currently structured inhibits competition in the granulated sugar industry. *See United States v. United Shoe Machinery Corp.*, 391 U.S. 244 (1968).

The order against C&H was intended to protect consumers from misleading claims about the alleged superiority or difference of C&H sugar, not to stifle the respondent's ability to participate in healthy competition on the basis of truthful, nondeceptive advertising. We

are persuaded, therefore, that modification to permit puffery is warranted. The order will permit truthful and nondeceptive product source or product origin claims and claims of health, safety, nutritional quality, or purity, if supported by a reasonable basis consistent with the Commission's Policy Statement Regarding Advertising Substantiation, 49 Fed. Reg. 30,999 (Aug. 2, 1984), *appended to Thompson Medical Co.*, 104 FTC 648, 639 (1984).

The Commission denies the request that the order be set aside in its entirety, because C&H has not demonstrated why it should not continue to be required to substantiate objective product claims. The Commission also denies the request that the order be modified by adding to paragraph 1(B) a safe harbor allowing C&H to advertise that its competitors do not disclose the source or origin of their sugar, unless the advertisement claims that C&H sugar is different from other sugar with regard to health, safety, nutritional quality, or purity, although the modification ordered, the Commission believes, addresses the thrust of C&H's request.

Specifically, the Commission modifies the order by deleting Parts 1(A) (i) (a) and (c) as requested by C&H and by amending paragraph 1(B) of the original order to permit the company to represent truthfully that (1) C&H's granulated white sugar is derived from sugar cane and that other granulated white sugar is, or may be, derived from sugar beets; or (2) the label advertising or packaging of any brand of granulated white sugar other than C&H does not disclose the source or origin of its sugar, as long as such claims do not represent directly or by implication that C&H's granulated white sugar is superior to, or different from, sugar derived from sugar beets or derived from sugar cane from places other than Hawaii, with respect to health, safety, nutritional quality, or purity. This modification will limit the order so that it does not prohibit the sort of comparative puffery claims disseminated by C&H's competitors, or truthful, nondeceptive product source or origin claims while continuing to bar C&H from making deceptive comparative claims regarding health, safety, nutritional quality, or purity.

In addition, the Commission adds the word "objective" in paragraph 1 to clarify that the substantiation requirement applies to "objective" differences in granulated white sugars. The duty to substantiate will apply to such claims of differences and also to claims relating to health, safety, nutritional quality, or purity of any competitor's granulated sugar product. The words "granulated" and

"white" have been added to new paragraph 1(C) and throughout this order to clarify that the order does not apply to brown sugar.⁸ Finally, the phrase "health, safety, nutritional quality and purity" has been added in the provisions originally appearing as paragraphs 1 (A) (i), (ii) and (iii), consistent with the Request.

These modifications differ in part from those sought by C&H. The Request, however, sought in the alternative that the Commission grant "such other relief as it may deem fitting and just." Inasmuch as the Commission understands the thrust of the Request to achieve a modification that is less restrictive of the company's ability to make comparative advertising claims concerning the source and origin of various brands of granulated white sugar, the Commission believes this modification accomplishes that goal.

V. CONCLUSION

The Commission concludes that the order in this matter should be reopened and modified. Accordingly,

It is therefore ordered, That the proceeding is hereby reopened and the order issued on January 6, 1977, is hereby modified to read as follows:

ORDER

It is ordered, That respondents California and Hawaiian Sugar Company, a corporation, and Foote, Cone & Belding/Honig, Inc., a corporation, their successors and assigns, and their officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of granulated white

⁸ The Commission's action here is consistent with its approach in *Firestone Tire & Rubber Co.*, 81 FTC 398 (1972), *aff'd*, 481 F.2d 246 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973), in which the Commission issued an advisory opinion interpreting an order it previously issued that prohibited any representation "that the respondent's tires will be safe under all conditions of use" and required substantiation for representations regarding safety or performance characteristics of the tires. 112 FTC 609 (1989). The Commission determined that the provision "was not intended to apply to all representations regarding tire safety," and that it did not apply to generalized claims such as "Quality you can trust," and "Because so much is riding on your tires." *Id.* Instead, the provision applied to claims relating to a "specific, objectively verifiable tire characteristic" such as "Tests show our tires are 30% less likely to blow out on the highway" or "the indestructible tire." *Id.* at 610. Similarly, in this case, the complaint challenged quality and purity claims, but the order was not so limited. Here, therefore, as in *Firestone*, when the order is interpreted in light of the complaint, the resulting modification is consistent with the Commission's original intentions.

sugar packaged for retail consumption, forthwith cease and desist from:

1. Disseminating or causing the dissemination of any advertisement by means of the United States mail or in or having an effect upon commerce by any means, as "commerce" is defined in the Federal Trade Commission Act, which represents, directly or by implication, that there are objective differences with respect to health, safety, nutritional quality, or purity in granulated white sugars, including that C&H granulated white sugar derived from Hawaiian sugar cane is superior to or different from sugar derived from sugar beets or sugar cane from places other than Hawaii, unless the difference or superiority is substantiated by competent and reliable evidence prior to making the representation.

A. Provided, however, that it shall not be a violation of this order to use the phrase "pure cane sugar from Hawaii" as a means of identifying the geographic origin and type of granulated white sugar marketed under the C&H brand name in any context wherein the quality of the sugar marketed under the C&H brand is not expressly or implicitly compared with the health, safety, nutritional quality, or purity of any other sugar. Where an advertisement contains the phrase "pure cane sugar from Hawaii" and a depiction of C&H sugar, without any representation referring to the health, safety, nutritional quality, or purity of any competitor's sugar product, or any representation that C&H sugar possesses a depicted characteristic or quality related to health, safety, nutritional quality, or purity to a degree different from competitive brands of sugar, the advertisement will not be deemed to contain an implied comparison.

B. It is further provided, that if an advertisement makes a positive or absolute and truthful representation concerning C&H sugar without any representation concerning the health, safety, nutritional quality, or purity of any competitor's sugar product, or without any representation that C&H sugar possesses a depicted characteristic or quality related to health, safety, nutritional quality, or purity to a degree different from competitors' brands of sugar, the advertisement will not be deemed to contain an implied comparison under this order.

C. It is further provided, however, that the respondents may truthfully represent that (1) C&H's granulated white sugar is derived

from sugar cane and that other granulated white sugar is, or may be, derived from sugar beets; or (2) the label, advertising or packaging of any brand of granulated white sugar other than C&H does not disclose the source or origin of its sugar, as long as any such claims do not represent, directly or by implication, that C&H's granulated white sugar is superior to or different from sugar derived from sugar beets or sugar cane from places other than Hawaii, with respect to health, safety, nutritional quality, or purity.

2. Disseminating, or causing the dissemination of, any advertisement by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of any such product, in or having an effect upon commerce, as "commerce" is defined in the Federal Trade Commission Act, which contains any of the representations prohibited in paragraph one above.

Provided, however, that it shall not be considered a violation of this order for Foote, Cone & Belding/Honig, Inc., to make what would otherwise be a false or misleading claim or representation concerning the qualities of C&H sugars or competitive sugars if that respondent shows that it neither had any knowledge of the falsity of or misleading character of such representation nor had any reason to know, nor upon reasonable inquiry could have known its false, deceptive or misleading nature.

It is further ordered, That the respondent corporations shall forthwith distribute a copy of this order to each of their operating divisions.

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

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

Commissioner Starek and Commissioner Varney concurring in the result.

CONCURRING STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III

I concur in the result the Commission reaches in modifying the order in this matter -- because I believe the modification to be in the public interest -- but I do not join in the analysis the Commission uses to reach that result. For the first time and without explanation, the Commission extends the application of the so-called "affirmative need threshold" to consumer protection order modifications. Then, as it has in certain competition matters, the Commission drains that threshold of any content by finding, on selective and flimsy evidence, that the order has resulted in "competitive harm."

I. THE COMMISSION HAS NOT PREVIOUSLY APPLIED THE "AFFIRMATIVE NEED THRESHOLD" TO CONSUMER PROTECTION ORDERS

The majority states that when a petitioner seeks to reopen and modify an order on public interest grounds, "[g]enerally, the [petitioner] must demonstrate as a threshold matter some affirmative need to modify the order," and when a satisfactory showing of affirmative need is made, the Commission balances the reasons favoring the requested modification against any reasons not to make the modification.¹ The Commission cites as precedent an unpublished letter to counsel in Damon Corporation.² As I noted in my concurring statement in Service Corporation International, this "affirmative need threshold" is not required by any statute, rule of Commission practice, or judicial precedent; nor is it articulated consistently in Commission rulings.³ Indeed, this is the first time that the Commission has required a petitioner seeking modification of a consumer protection order on public interest grounds to demonstrate affirmative need.⁴

Even in modifications of competition orders, where the affirmative need threshold is cited, the Commission frequently has

¹ Order Reopening the Proceeding and Modifying Cease and Desist Order at 4.

² *Id.* (citing Damon Corp., Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (Mar. 29, 1983) (unpublished)).

³ Concurring Statement of Commissioner Roscoe B. Starek, III, in Service Corporation International, Docket No. 9071 (May 17, 1994).

⁴ See, e.g., Service Corp. Int'l, Docket No. 9071 (Order, May 12, 1994) ("SCI"); Tarra Hall Clothes, Inc., Docket No. C-2797 (Order, October 27, 1992); *Reader's Digest Assoc., Inc.*, 111 FTC 758 (1989); *Encyclopedia Britannica, Inc.*, 111 FTC 1 (1988); *Redman Indus., Inc.*, 110 FTC 636 (1988). Given that SCI and Tarra Hall make no mention either of affirmative need or of Damon, the majority's citation to these cases to support the Damon affirmative need standard is puzzling.

made no attempt to quantify the cost of the order or its impact on the petitioner's viability.⁵ For example, the Commission has found a showing of affirmative need based on the fact that the order might cause injury.⁶ In at least two antitrust order modifications, the Commission recited the Damon letter's affirmative need standard, but modified the order without finding affirmative need.⁷

Accordingly, the Commission's statement cited above is plainly wrong, and I am perplexed by the Commission's insistence on injecting the Damon letter's affirmative need threshold into this consumer protection order. The Commission offers absolutely no explanation for its departure from established practice.⁸ As I stated in SCI, rather than declare a separate affirmative need requirement and then find it satisfied by tenuous showings, the Commission should -- as it did in SCI -- integrate affirmative need and the interest in the repose and finality of Commission orders into the array of costs and benefits that we must weigh under the public interest rubric of Section 2.51.⁹ I believe that such an analysis supports the conclusion that the order in this case should be modified.

II. THE FINDING OF "AFFIRMATIVE NEED" IN THIS CASE DEMONSTRATES THE THRESHOLD'S LACK OF CONTENT

The Commission concludes that C&H has made a satisfactory showing that the public interest warrants reopening the order in this matter for consideration of the merits of the petition.¹⁰ The

⁵ E.g., U.S. Pioneer Elecs. Corp., Docket No. C-2755 (Order, April 8, 1992); *Lenox, Inc.*, 111 FTC 612 (1989); *Liquid Air Corp.*, 111 FTC 135 (1988); *National Tea Co.*, 111 FTC 109 (1988).

⁶ *Union Carbide Corp.*, 114 FTC 250 (1991).

⁷ *American Medical Assoc.*, Docket No. 9064 (Order, October 10, 1991); *Midcon Corp.*, 111 FTC 100 (1988).

⁸ Indeed, that this case spells a departure from the very recent SCI decision is illustrated by Commissioner Azcuenaga's dissenting statement in that matter, which stated that the Commission's order "fail[ed] to apply the correct legal standard under which the Commission addresses petitions to reopen and modify its orders," and "virtually ignore[d] the standard of 'affirmative need' ordinarily applied to petitions to reopen in the public interest." Dissenting Statement of Commissioner Mary L. Azcuenaga in SCI (May 16, 1994), at 1, 5.

⁹ Although there appears to be no principled basis for distinguishing between antitrust and consumer protection orders for purposes of modification law, the Commission has tended to apply differing analyses in these areas. If the Commission intends to establish a uniform legal framework for all order modifications, the better approach would be to adopt the integrated cost-benefit analysis employed in consumer protection orders rather than the convoluted framework of the Damon letter.

¹⁰ Order Reopening the Proceeding and Modifying Cease and Desist Order at 6. Although the Commission does not expressly state that C&H has demonstrated affirmative need, from its recitation of the affirmative need standard and its conclusion that the order should be reopened, one may infer a finding of affirmative need.

Commission recites C&H's statement that other sugar refiners advertise that their sugar is better than or different from other sugar and further states that a C&H affidavit and its exhibits support a conclusion that by restricting these sorts of claims, the order is impeding rather than encouraging competition. The Commission notes that the competing advertising campaigns take advantage of C&H's inability to counter claims that constitute puffery, relate to the source or origin of the product, or require substantiation. Accordingly, the Commission concludes that the order should be modified to permit C&H to make limited comparative claims.

In my view, the evidence C&H has proffered falls short of demonstrating that the order has caused it competitive harm. Although C&H has submitted an affidavit with exhibits showing that its share of sales in Minneapolis, Milwaukee, and Dallas declined once competitors began running advertising campaigns in those cities, this evidence does not support a conclusion that the campaigns were the cause (or even a cause) of the decline in C&H's sales or that the Commission's order precluded C&H from competing effectively. With respect to the Dallas market, the affidavit did not indicate what the companies' respective shares were before C&H's competitor began its campaign; C&H's loss of sales could easily have been the extension of a continuing trend. The affidavit presented no evidence to exclude the possibility that changes in price or any other competitive variable may also have been responsible for changes in sales in those three areas. C&H presented no data on any changes in its own advertising during the time period or in its couponing or other incentive policies that may have affected sales. It presented no evidence on the arrival of any other competitors in those areas. Moreover, although C&H's petition noted changes in the Hawaiian cane sugar industry, it did not explain why those changes or other factors may not have also contributed to the purported decline in its sales.

Furthermore, the evidence presented is highly selective: C&H did not present any data from other areas in its west-of-Chicago market where competitors may be advertising, so it is impossible to know the effect, if any, of such advertising on C&H's sales in areas other than Minneapolis, Milwaukee, and Dallas. Indeed, in its opposition to C&H's petition, the U.S. Beet Sugar Association claims that C&H is the leading producer of sugar west of Chicago and asserts that C&H's sales in the nine western states constituting its

primary market increased from 49% in 1985 to 52% in 1993. The sales data submitted by C&H appear to be inconsistent with the data submitted by the Association. Given this conflicting evidence, I cannot conclude that C&H has lost sales since issuance of the order in 1977. In short, although C&H presents some evidence suggesting an association between its competitors' advertising and sales of C&H sugar in three cities, this evidence is not sufficient to conclude that the order's restrictions have been responsible for the decline in C&H's sales.

III. THE PUBLIC INTEREST WARRANTS MODIFICATION OF THE ORDER

Notwithstanding its failure to demonstrate competitive hardship or a decline in sales due to the order, in my view C&H has made a persuasive case that the order prevents it from making certain nondeceptive, subjective preference claims that are being made by competitors. The Commission has previously held that the public interest can warrant an order modification on fairness grounds. *Tarra Hall Clothes, Inc.*, Docket No. C-2797, slip op. at 9, 10 n.24 (October 27, 1992) ("The Commission also may examine the entirety of circumstances to determine whether intrinsic fairness dictates that an order be modified. ... [M]aintaining a level playing field among competitors, to the extent practicable and justified by the facts, is of concern to the Commission."). In *Tarra Hall*, the Commission modified the order even though the petitioner failed to demonstrate that the order's bond requirement relating to imported wool products imposed a competitive hardship. Likewise, the Commission can modify the C&H order even though C&H has failed to demonstrate competitive hardship or a decline in sales stemming from the order's requirements.¹¹

The order's broad scope prohibits C&H from making comparative claims similar to those its competitors are making unless it can demonstrate that consumers discern or benefit from any claimed difference. Because the order limits C&H's ability to combat appealing image advertisements mounted by its competitors, C&H is not competing on a level playing field. C&H's submission on its sales in Minneapolis, Milwaukee, and Dallas provides at least some

¹¹ *Tarra Hall* is arguably distinguishable in that the Commission had already modified a similar bond requirement in several other orders imposed on *Tarra Hall*'s competitors. However, the public interest in ensuring a level playing field applies here as well.

support for this proposition. Furthermore, consumers may have an idiosyncratic preference for cane sugar over beet sugar, even if both products are 99.9% sucrose. Indeed, the vigor of the Beet Sugar Association's opposition to the requested modification suggests that this may be the case. Yet the current order prohibits C&H from informing consumers that other brands of sugar come from beet sugar.

Accordingly, I believe the order should be modified so that it does not prohibit the sort of comparative puffery claims disseminated by C&H's competitors or truthful, nondeceptive claims about the source or origin of sugar. Such a modification would be consistent with the Commission's prior interpretations of its orders. For example, the Commission made a similar modification in *General Motors*,¹² in which the order prohibited GM from representing that any automobile is superior in handling to any other automobile (with "handling" defined in a particular way) unless it had a reasonable basis for such representation. GM requested that the order be modified to re-define "handling" and to permit it to advertise specific aspects of the comparative handling of motor vehicles, without having to prove overall handling superiority. The Commission concluded, without any finding of affirmative need, that "to avoid any unintended restriction on the dissemination to the public of information material to purchasing decisions, the petitions are in the public interest and should be granted."¹³

Similarly, in *Firestone Tire & Rubber Co.*,¹⁴ the Commission issued an advisory opinion¹⁵ interpreting an order that prohibited any representation "that the respondent's tires will be safe under all conditions of use" and required substantiation for representations regarding safety or performance characteristics of the tires. The Commission determined that the provision "was not intended to apply to all representations regarding tire safety" and that it did not apply to generalized claims such as "Quality you can trust" and "Because so much is riding on your tires."¹⁶ Instead, the provision applied to claims relating to a "specific, objectively verifiable tire

¹² *General Motors Corp.*, 85 FTC 27 (1975), modified, 104 FTC 511 (1984).

¹³ 104 FTC at 512. The modified order retained the requirement that GM have a reasonable basis for vehicle handling claims.

¹⁴ 81 FTC 398 (1972), *aff'd*, 481 F.2d 246 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973).

¹⁵ 112 FTC 609 (1989).

¹⁶ *Id.*

characteristic," such as "[t]ests show our tires are 30%' less likely to blow out on the highway" or "the indestructible tire."¹⁷

In like manner, the complaint against C&H challenged quality and purity claims, but the order was not so limited. If one interprets the order in light of the complaint, as was done in Firestone, it is appropriate to modify the order to narrow the claims covered from general claims to specific, objectively verifiable claims. The arbitrary application of a demonstrably hollow legal framework is not necessary to reach this result.

Accordingly, I concur in the result, but not in the reasoning, of the Commission's decision to modify the order in Docket No. C-2858.

¹⁷ *Id.* at 610.

IN THE MATTER OF

BEE-SWEET, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION
OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3550. Complaint, Jan. 17, 1995--Decision, Jan. 17, 1995*

This consent order prohibits, among other things, a North Carolina corporation and its officer from representing that bee pollen products are effective as a cure or in mitigating certain conditions and physical ailments, and from misrepresenting the existence, contents, validity, results, conclusions, or interpretations of any test or study. In addition, the consent order requires the respondents to notify all sellers of the products, for the last 12 months, about the settlement with the Commission.

Appearances

For the Commission: *Ronald Waldman, Michael Bloom and Christian White.*

For the respondents: *Christopher D. Lane, Womble, Carlyle, Sandridge & Rice, Winston-Salem, N.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Bee-Sweet, Inc., a corporation, and Benny G. Morgan, individually and as an officer and director of said corporation, have 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 Bee-Sweet, Inc., is a North Carolina corporation, with its principal office or place of business at 10370 North, NC Highway 150, Clemmons, North Carolina.

Respondent Benny G. Morgan is an owner, officer, and director of the corporate respondent. Individually or in concert with others, Benny G. Morgan formulates, directs, and controls the acts and practices of the corporate respondent, including the acts and practices alleged in the complaint. Respondent Benny G. Morgan's principal