

IN THE MATTER OF

THE VONS COMPANIES, INC., ET AL.

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

Docket C-3233. Consent Order, Aug. 29, 1988--Modifying Order, May 24, 1996

This order reopens a 1988 consent order that settled allegations that The Vons Companies' ("Vons") acquisition of three Safeway divisions with stores in southern California and Nevada violated federal antitrust laws. This order modifies the consent order by replacing the 1988 order's prior-approval provision for acquisitions of supermarkets in Las Vegas, Nevada, or in numerous specified cities and towns in California, with a prior-notice provision for such acquisitions.

ORDER REOPENING AND MODIFYING ORDER

On November 15, 1995, The Vons Companies, Inc. ("Vons" or "respondent"), one of the respondents named in the consent order issued by the Commission on August 29, 1988, in Docket No. C-3233 ("order"), filed its Petition To Reopen and Modify Consent Orders ("Petition") in this matter.¹ Vons asks that the Commission reopen and modify the prior approval requirements of the order pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice and Procedure, 16 CFR 2.51, and consistent with the Statement of Federal Trade Commission Policy Concerning Prior Approval And Prior Notice Provisions, issued on June 21, 1995 ("Prior Approval Policy Statement" or "Statement").² The order requires Vons to seek the prior approval of the Commission to acquire any retail grocery store in a number of California cities and towns and in the city of Las Vegas, Nevada.³ In addition, paragraph IV(B) of the order contains a proviso that requires Vons to give the Commission 30-days' prior

¹ In its Petition, Vons also requested that the order in Docket No. C-3391 be reopened and similarly modified. The Commission has determined to deny Vons' Petition as to that order and has notified Vons by letter as to the reasons for its denial.

² 60 Fed. Reg. 39745-47 (Aug. 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241.

³ Although SSI Associates, L.P. ("SSI") and Safeway Stores, Incorporated ("Safeway"), a subsidiary of SSI, are also respondents, the order's prior approval provisions only apply to Vons. Order at ¶ IV(A) and ¶ IV(B).

written notice of certain acquisitions. The Petition further requests that the Commission clarify that "prior written notice" under paragraph IV(B) means a letter to the Secretary of the Commission and does not mean Hart-Scott-Rodino type notice and wait procedures.⁴ The thirty-day public comment period on Vons' Petition expired on January 8, 1996. No comments were received.

The Commission, in its Prior Approval Policy Statement, "concluded that a general policy of requiring prior approval is no longer needed," citing the availability of the premerger notification and waiting period requirements of Section 7A of the Clayton Act, commonly referred to as the Hart-Scott-Rodino ("HSR") Act, 15 U.S.C. 18a, to protect the public interest in effective merger law enforcement. Prior Approval Policy Statement at 2. The Commission announced that it will "henceforth rely on the HSR process as its principal means of learning about and reviewing mergers by companies as to which the Commission had previously found a reason to believe that the companies had engaged or attempted to engage in an illegal merger." As a general matter, "Commission orders in such cases will not include prior approval or prior notification requirements." *Id.*

The Commission stated that it will continue to fashion remedies as needed in the public interest, including ordering narrow prior approval or prior notification requirements in certain limited circumstances. The Commission said in its Prior Approval Policy Statement that "a narrow prior approval provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for the provision, attempt the same or approximately the same merger." The Commission also said that "a narrow prior notification provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for an order, engage in an otherwise unreportable anticompetitive merger." *Id.* at 3. As explained in the Prior Approval Policy Statement, the need for a prior notification requirement will depend on circumstances such as the structural characteristics of the relevant markets, the size and other characteristics of the market participants, and other relevant factors.

⁴ Petition at 1 and 3.

The Commission also announced, in its Prior Approval Policy Statement, its intention "to initiate a process for reviewing the retention or modification of these existing requirements" and invited respondents subject to such requirements "to submit a request to reopen the order." *Id.* at 4. The Commission determined that, "when a petition is filed to reopen and modify an order pursuant to . . . [the Prior Approval Policy Statement], the Commission will apply a rebuttable presumption that the public interest requires reopening of the order and modification of the prior approval requirement consistent with the policy announced" in the Statement. *Id.*

The complaint in this matter ("complaint") alleged that Vons, SSI and Safeway had entered into an agreement, that, if consummated, would violate 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, by substantially lessening competition in the retail sale and distribution of food and grocery items in retail grocery stores in certain localized markets in California.⁵

The complaint alleged that a substantial lessening of competition would result from the elimination of direct competition between Vons and Safeway in the relevant markets; the increase in the likelihood that Vons would unilaterally exercise market power in the relevant markets; and the increase in concentration and in the likelihood of collusion in certain already highly concentrated markets.

The presumption is that setting aside the prior approval requirements in this order is in the public interest. However, there has been no showing that the competitive conditions that gave rise to the complaint and the order no longer exist. Moreover, the relevant markets are localized and the acquisition price of a retail grocery store could fall well below the HSR size-of-transaction threshold. Therefore, the record evidences a credible risk that Vons could engage in future anticompetitive acquisitions that would not be subject to the premerger notification and waiting period requirements of the HSR Act. Accordingly, pursuant to the Prior Approval Policy Statement, the Commission has determined to modify paragraphs IV(A) and IV(B) of the order to substitute a prior notification requirement for the prior approval requirement.⁶

⁵ The relevant sections of the United States are the following areas in California: Barstow; Yucca Valley; Camarillo; South San Diego County; Santa Clarita Valley; Coachella Valley; Santa Barbara; Montecito; and Goleta. Complaint ¶ 11.

⁶ Vons has stated that it has no objection to the substitution of prior notification provisions for the prior approval provisions of the order.

In addition to a prior approval requirement, paragraph IV(B) contains a proviso which requires Vons to give 30-days' written notice to the Commission prior to completing certain acquisitions. Such notice is not required to be given in accordance with the "Prior Notification to the Commission" procedure (as defined below) that is a part of the order, as now modified. Rather, the Commission's Rules of Practice and Procedure prescribe, and continue to prescribe, the method by which Vons must file such notice with the Commission. See 16 CFR 4.2 & 4.4. Therefore, the order, as modified, does not require Vons to follow the "Prior Notification to the Commission" procedure when providing notice to the Commission in those circumstances covered by the order's paragraph IV(B) proviso prior notice requirement.

Accordingly, *It is ordered*, That this matter be, and it hereby is reopened; and

It is further ordered, That paragraph IV(A) of the order be, and it hereby is, modified, as of the effective date of this order, to read, as follows:

(A) For a period commencing on the date this order becomes final and continuing for ten (10) years thereafter, Vons shall cease and desist from acquiring, without Prior Notification to the Commission (as defined below), directly or indirectly, through subsidiaries or otherwise, any retail grocery store, including any facility that has been operated as a retail grocery store within six (6) months of the date of the offer by Vons to purchase the facility, or any interest in a retail grocery store, or any interest in any individual, firm, partnership, corporation or other legal or business entity that directly or indirectly owns or operates a retail grocery store, in the following cities or towns:

Las Vegas, Nevada
Bakersfield, California
Santa Clarita, California
Camarillo, California
Ventura, California
Thousand Oaks, California
Victorville, California
Barstow, California

Carlsbad, California
Vista, California
Escondido, California
Poway, California
Rancho Bernardo, California
South San Diego County,
California (that portion of San
Diego County, California that

Coachella Valley, California	is south of the Miramar Naval
(an area including the cities	Air Station)
and towns of Palm Springs,	Santa Barbara, Montecito and
Palm Desert, Indian Wells,	Goleta, California
Indio, Cathedral City, Rancho	Palmdale, California
Mirage, La Quinta, and	Lancaster, California
Coachella)	Simi Valley, California
Yucca Valley, California	Moreno Valley, California
Solana Beach, California	

Provided, however, that this paragraph IV(A) shall not be deemed to require Prior Notification to the Commission for the construction of new facilities by Vons or the purchase or lease by Vons of a facility that has not been operated as a retail grocery store at any time during the six (6) month period immediately prior to the purchase or lease by Vons in those locations.

"Prior Notification to the Commission" required by paragraphs IV(A) and IV(B) shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations, as amended (hereinafter referred to as "the Notification Form"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of Vons and not of any other party to the transaction. Vons shall provide the Notification Form to the Commission at least thirty days prior to consummating any such transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information, Vons shall not consummate the transaction until twenty days after substantially complying with such request for additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. Notwithstanding, Vons shall not be required to provide Prior Notification to the Commission pursuant to this order for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a.

It is further ordered, That paragraph IV(B) of the order be, and it hereby is, modified, as of the effective date of this order, to read, as follows:

(B) For a period commencing on the date this order becomes final and continuing for ten (10) years thereafter, Vons shall cease and desist from acquiring, without Prior Notification to the Commission (as defined in paragraph IV(A)), directly or indirectly, through subsidiaries or otherwise, any retail grocery store, including any facility that has been operated as a retail grocery store within six (6) months of the date of the offer to purchase the facility, or any interest in a retail grocery store, or any interest in any individual, firm, partnership, corporation or other legal or business entity that directly or indirectly owns or operates any retail grocery store in: (1) the city of San Bernardino, California; or (2) the city of Riverside, California; or (3) the counties of Los Angeles and Orange, California; provided, however, that upon thirty (30) days prior written notice to the Commission, Vons may acquire, directly or indirectly, through subsidiaries or otherwise, any such retail grocery stores, so long as, in any twelve (12) month period, commencing on the date this order becomes final and continuing thereafter for ten (10) years, the number of such retail grocery stores acquired, directly or indirectly, does not exceed: (1) two in the city of San Bernardino, California; (2) two in the city of Riverside, California; and (3) ten in the counties of Los Angeles and Orange, California. Provided further, however, that these prohibitions shall not relate to the construction of new facilities by Vons or the purchase or lease by Vons of a facility that was not operated as a retail grocery store at any time during the six (6) month period immediately prior to the purchase or lease by Vons in those locations.

Complaint

121 F.T.C.

IN THE MATTER OF

N.W. AYER & SON, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3660. Complaint, May 31, 1996--Decision, May 31, 1996*

This consent order prohibits, among other things, the New York-based advertising agency from misrepresenting the absolute or comparative amount of cholesterol, total fat, saturated fat, or any other fatty acid in eggs or in any meat, dairy, or poultry product, and from misrepresenting the existence or results of any test or study.

Appearances

For the Commission: *Theodore H. Hoppock.*

For the respondent: *Bertrand M. Lanchner*, in-house counsel,
New York, N.Y.

COMPLAINT

The Federal Trade Commission, having reason to believe that N.W. Ayer & Son, Inc. d/b/a NW Ayer, Inc. ("respondent"), a corporation, has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent is a Delaware corporation with its offices and principal place of business at 825 Eighth Avenue, New York, New York.

PAR. 2. Respondent, at all times relevant to this complaint, was an advertising agency of Eggland's Best, Inc., and prepared and disseminated advertisements to promote the sale of Eggland's Best eggs and other egg products to consumers. These products are "foods" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.