

IN THE MATTER OF

RED APPLE 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 9266. Consent Order, Feb. 28, 1995--Modifying Order, Sept. 13, 1996

This order reopens a 1995 consent order -- that required the New York-based companies and their officer to divest six supermarkets to a Commission-approved acquirer or acquirers -- and this order modifies the consent order by terminating their obligation to divest a supermarket in the Chelsea area of Manhattan, New York.

ORDER REOPENING AND MODIFYING ORDER

On April 29, 1996, Red Apple Companies, Inc., John A. Catsimatidis, Supermarket Acquisition Corp., and Sloan's Supermarkets, Inc. (formerly Designcraft Industries, Inc.) (collectively, "respondents"), the respondents named in the consent order issued by the Commission on February 28, 1995, in Docket No. 9266, filed their "Motion Requesting Federal Trade Commission to Issue Order Reopening and Modifying Consent Order Issued on February 28, 1995" ("Petition"), seeking to reopen and set aside the order in Docket No. 9266 ("order") that directs respondents to divest six supermarkets in certain areas of New York County, New York by March 6, 1996. On August 23, 1996, respondents withdrew their request for a reopening and modification of the order as to the divestiture requirements in the Upper East Side and Greenwich Village. On September 6, 1996, respondents withdrew their request as to the Upper West Side. Accordingly, the only provision that the respondents continue to seek to modify is paragraph II.A.3, requiring a divestiture in Chelsea. For the reasons stated below, the Commission has determined to grant the Petition.

The order requires respondents to divest six supermarkets, one in each of the four relevant markets consisting of the Upper West Side, the Upper East Side, Greenwich Village and Chelsea, plus two more in two of three of the relevant markets, by March 6, 1996.¹ Paragraph II.A.3 of the order requires respondents to divest a supermarket

¹ Only one divestiture is required in Chelsea. Respondents may choose in which two of the other three markets they will divest the additional two supermarkets.

located at 188 Ninth Avenue (store no. 441) "or the nearest alternate supermarket owned or operated by any respondent."

On March 5, 1996, the day before the divestiture deadline contained in the order, respondents filed a "Motion Requesting Federal Trade Commission to Issue Order Reopening and Modifying Consent Order Issued on February 28, 1995" ("Original Petition"). Subsequently, in response to a letter from staff detailing specific concerns with the Original Petition and indicating that staff was prepared to recommend denial of the Original Petition unless material that would constitute a sufficient showing was submitted, on April 29, 1996, respondents withdrew the Original Petition and filed the Petition with additional arguments and supporting materials.

I. STANDARD FOR REOPENING AND MODIFYING FINAL ORDERS

Section 5(b) of the Federal Trade Commission Act provides that the Commission shall reopen an order to consider whether it should be modified if the respondent "makes a satisfactory showing that changed conditions of law or fact" so require. A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of it inequitable or harmful to competition. S. Rep. No. 96-500, 96th Cong., 2d Sess. 9 (1979) (significant changes or changes causing unfair disadvantage); *Louisiana-Pacific Corp.*, Docket No. C-2956, Letter to John C. Hart (June 5, 1986), at 4 (unpublished) ("Hart Letter").²

Section 5(b) also provides that the Commission may modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest so requires. Respondents are therefore invited in petitions to reopen to show how the public interest warrants the requested modification.³ In such a case, the respondent must demonstrate as a threshold matter some affirmative need to modify the order.⁴ For example, it may be in the public interest to modify an order "to relieve any impediment

² See also *United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992) ("A decision to reopen does not necessarily entail a decision to modify the order. Reopening may occur even where the petition itself does not plead facts requiring modification.").

³ Hart Letter at 5; 16 CFR 2.51.

⁴ *Damon Corp.*, Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (March 29, 1983), at 2 ("Damon Letter"), reprinted in [1979-1983 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 22,207.

to effective competition that may result from the order."⁵ Once such a showing of need is made, the Commission will balance the reasons favoring the requested modification against any reasons not to make the modification.⁶ The Commission also will consider whether the particular modification sought is appropriate to remedy the identified harm.⁷

The language of Section 5(b) plainly anticipates that the burden is on the petitioner to make a "satisfactory showing" of changed conditions to obtain reopening of the order. The legislative history also makes clear that the petitioner has the burden of showing, other than by conclusory statements, why an order should be modified. The Commission "may properly decline to reopen an order if a request is merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modification of the order." S. Rep. No. 96-500, 96th Cong., 1st Sess. 9-10 (1979); *see also* Rule 2.51(b) (requiring affidavits in support of petitions to reopen and modify). If the Commission determines that the petitioner has made the necessary showing, the Commission must reopen the order to consider whether modification is required and, if so, the nature and extent of the modification. The Commission is not required to reopen the order, however, if the petitioner fails to meet its burden of making the satisfactory showing required by the statute. The petitioner's burden is not a light one in view of the public interest in repose and the finality of Commission orders. *See Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

II. THE PETITION

Respondents request that the Commission modify the order to eliminate the divestiture requirement in Chelsea. Respondents base their Petition on changed conditions of fact and public interest considerations.⁸ The changes of fact alleged by respondents include the entry into the market of Rite Aid under a new format (Rite Aid Food Mart); that other new entry has occurred and will occur in the future; that respondents' market share has declined due to sales of

⁵ *Damon Corp.*, Docket No. C-2916, 101 FTC 689, 692 (1983).

⁶ Damon Letter at 2.

⁷ Damon Letter at 4.

⁸ Respondents do not assert that any change of law requires reopening the order.

supermarkets; that divestiture in Chelsea will eliminate respondents as a competitor in that market; and that operating losses and declining sales are such that divestiture will further weaken respondents as competitors.⁹ Respondents assert that the losses imposed by the requirement to maintain the stores will harm respondents and prevent them from being vigorous competitors, and that this constitutes the affirmative need for the modification under the public interest standard.¹⁰

Respondents claim that they have "made diligent efforts (Catsimatidis Declaration ¶¶ 3-8) to divest,"¹¹ to no avail. John Catsimatidis asserts that he has been in contact with numerous persons concerning the divestiture, but no viable purchasers have come forward.¹² The only purchasers who have come forward have not been able to arrange adequate financing to finalize a transaction.¹³

Respondents assert that the competitive environment has substantially changed in ways that were not foreseeable at the time the order was entered.¹⁴ In addition, they assert that a number of strong competing supermarket chains have entered the market or expanded and that this is scheduled to continue;¹⁵ that they could not have known that Rite Aid would enter the market with its Food Mart format; that respondents' market share has declined due to sales of stores; and that store operating losses and declining sales are such that divestiture will further weaken respondents as competitors.¹⁶

Respondents state that Price/Costco has entered the market with a 116,000 square foot supermarket in Staten Island. Also, Price/Costco plans to open a 120,000 square foot supermarket on 34th Street between Eighth and Ninth Avenues during the summer of 1997.¹⁷ Respondents assert that "[b]ased on size alone, the inference is overwhelming that this store, like a Macy's, will compete on a citywide basis, *i.e.*, in each of the four areas in issue here."¹⁸ In

⁹ Petition at 19.

¹⁰ Petition at 26-27.

¹¹ Petition at 3.

¹² Declaration of John A. Catsimatidis, Petition Exhibit A ("Catsimatidis Decl."), at ¶ 6.

¹³ Catsimatidis Decl. at ¶ 7.

¹⁴ Petition at 19.

¹⁵ Petition at 4-5.

¹⁶ Petition at 23-24.

¹⁷ Petition at 20-21; Declaration of Matt Wanning (June 23, 1996), ("Wanning Decl.").

¹⁸ Petition at 21.

addition, according to the Petition, the imminent opening of the Chelsea Market will further eliminate the need for relief in that area.¹⁹

Respondents state in addition that there has been enormous entry of drug stores, some of which allocate 50% of their space to food and supermarket items, and which are lower cost and have a competitive advantage over respondents' operations.²⁰

The Petition asserts that "the geographic markets set forth in the order did not foresee or contemplate the developments of the last year."²¹

Respondents also assert that their market share has diminished since the order became final.²² At the time respondents entered into the consent agreement, they owned three supermarkets in Chelsea. Currently, they own one, having sold two to Rite Aid.²³

Finally, respondents assert that divestiture would cause further losses and weaken their competitive position.²⁴ Respondents argue that the divestiture of their only remaining supermarket in Chelsea will cause them to exit the market and will weaken respondents competitively with no corresponding benefit to competition. These losses constitute the affirmative need to modify the order. In addition, the large amount of entry reduces the need for the order as written, and the sale of supermarkets to Rite Aid (which has opened Rite Aid Food Marts at the locations) has in substance accomplished the purposes of the divestiture, thus favoring modification.²⁵

As part of the Petition, respondents submitted consumer surveys regarding the Rite Aid Food Marts.²⁶ Respondents also submitted several declarations, audited and unaudited financial statements, and news articles, among other things.

III. IT IS IN THE PUBLIC INTEREST TO GRANT THE PETITION

Respondents assert that the modification of the order is necessary for them to remain effective competitors. Respondents currently only have one supermarket in Chelsea, and divestiture of that supermarket would cause them to exit the market. Respondents assert that it is in

¹⁹ Petition at 15.

²⁰ Petition at 22-23.

²¹ Petition at 23.

²² Petition at 23.

²³ Petition at 6-7.

²⁴ Petition at 24.

²⁵ Petition at 26.

²⁶ Exhibit 1 to Wanning Decl.

the public interest to reopen and modify the order to prevent them from exiting the market. For the reasons discussed below, it is in the public interest to reopen and modify the order as requested by respondents.²⁷

Respondents have an affirmative need for the modification because compliance with the order would require them to exit the Chelsea market. Divestiture of respondents' only supermarket in Chelsea will harm respondents in a way not contemplated by the order, by requiring them to exit.

In addition, the reasons in favor of the modification outweigh the reasons to retain the order as written. The purpose of the divestiture requirement, as stated in the order, is to ensure the continuation of the assets to be divested as ongoing, viable enterprises engaged in the supermarket business and to remedy the lessening of competition resulting from the acquisitions as alleged in the Commission's complaint. Divestiture of respondents' sole remaining supermarket will not restore competition in the market. Instead, it will simply replace one competitor with another. In addition, there is no reason to believe that the supermarket will be more viable when operated by another firm than it will be in the hands of respondents. Although respondents themselves, by selling supermarkets for non-supermarket use, have created the situation where divestiture will not improve competition in Chelsea, there is no longer any reason to continue to require divestiture in this market other than to punish respondents.²⁸ However, to the extent that respondents merit punishment for their conduct, that is a matter best addressed through an action for violation of the order. The Commission expressly reserves the right to pursue such an action with regard to the failure to divest a supermarket in Chelsea, as well as any other violations of the order.²⁹

Commissioner Starek concurring in the result only.

²⁷ Because the Petition is granted on public interest grounds, the Commission has not reached the question of whether it also meets the standards under change of fact. The Commission notes, however, that the entry discussed by respondents is not within the product and/or geographic markets alleged in the complaint and order. Accordingly, respondents have a heavy burden to demonstrate that conditions have changed so significantly that those markets are no longer appropriate.

²⁸ There may, of course, be circumstances under which a divestiture would improve competition and accomplish an order's remedial purposes even though that divestiture would result in a respondent's exit from a market.

²⁹ Respondents have agreed to pay a civil penalty of \$600,000 to settle the Commission's claims for failure to divest a supermarket in Chelsea, as well as failure to divest the other supermarkets as required by the order.

Complaint

122 F.T.C.

IN THE MATTER OF

JORDAN, McGRATH, CASE & TAYLOR, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3684. Complaint, Sept. 18, 1996--Decision, Sept. 18, 1996*

This consent order requires, among other things, the New York advertising agency for Doan's pills to have competent and reliable scientific evidence, consisting of at least two clinical studies, to support any claim that any over-the-counter analgesic is more effective than any other such drug in relieving any particular kind of pain. In addition, the consent order requires the advertising agency to have scientific evidence to support claims regarding the efficacy, safety, benefits or performance of any over-the-counter internal analgesic.

*Appearances*For the Commission: *Loren G. Thompson and Shira Modell.*For the respondent: *Stuart Friedel, David & Gilbert, New York, N.Y.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Jordan, McGrath, Case & Taylor, Inc., a corporation ("respondent"), 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 Jordan, McGrath, Case & Taylor, Inc., is a New York corporation with its principal office or place of business at 445 Park Avenue, New York, New York.

PAR. 2. Respondent, at all times relevant to this complaint, was an advertising agency of Ciba-Geigy Corporation or CIBA Self-Medication, Inc., and prepared and disseminated advertisements to promote the sale of Doan's analgesic products. Doan's analgesic products are "drugs" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

PAR. 3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

PAR. 4. Respondent has disseminated or caused to be disseminated advertisements for Doan's analgesic products, including,