

Modifying Order

125 F.T.C.

IN THE MATTER OF

RITE AID CORPORATION

MODIFYING ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT*Docket C-3546. Consent Order, Dec. 15, 1994--Modifying Order, May 18, 1998*

This order reopens a 1994 consent order -- that required the respondent to divest the Bucksport asset and two other pharmacies -- and this order modifies the consent order by eliminating the requirement to divest a retail pharmacy in Bucksport, Maine, that the company acquired when it bought the LaVerdiere's chain of drug stores, and this order substitutes the prior approval requirement with prior notification and waiting period requirements.

ORDER REOPENING AND MODIFYING ORDER

On March 3, 1998, Rite Aid Corporation ("Rite Aid"), the respondent named in the above-referenced consent order ("order") issued by the Commission on December 15, 1994, filed its Petition to Reopen and Vacate Consent Order ("Petition"). Rite Aid asks that the Commission reopen and set aside the order 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 and Procedure, 16 C.F.R. 2.51, based on changed facts and the public interest 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").¹ The thirty-day public comment period on Rite Aid's Petition ended on April 14, 1998. No comments were received.

The Commission has determined to grant, in part, Rite Aid's Petition by reopening the order and modifying it to set aside the requirements of paragraph II, but to deny the request to set aside the order in its entirety. Rather, the Commission has determined to substitute for the prior approval requirement of paragraph IV prior notification and waiting period requirements based on those of Section 7A of the Clayton Act, 15 U.S.C. 18a, commonly referred to as the Hart-Scott-Rodino ("HSR") Act, for all non-HSR reportable acquisitions otherwise meeting the specifications of paragraph IV.

The complaint in this matter alleges that Rite Aid's acquisition of the voting stock of LaVerdiere's Enterprises, Inc. ("LEI"), would

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

violate Section 5 of the FTC Act and Section 7 of the Clayton Act, 15 U.S.C. 18, by lessening competition and tending to create a monopoly in the market for the sale of prescription drugs in retail stores in the cities or towns of Bucksport, Maine; Lincoln, Maine; and Berlin, New Hampshire.

The resulting order became final on December 21, 1994.² paragraph II of the order requires Rite Aid to divest within 12 months either the LEI Pharmacy Assets or the Rite Aid Pharmacy Assets, as those assets are defined in the order, in Bucksport, Lincoln, and Berlin. Paragraph III provides for the appointment of a trustee should Rite Aid fail to divest within the required period; paragraph IV prohibits, for ten years, specified acquisitions in the three cities or towns without prior Commission approval; and paragraph V specifies Rite Aid's notification and reporting obligations. The purpose of the divestitures is to remedy the lessening of competition in the market for the sale of prescription drugs in retail stores in the three specified cities and towns.³ Rite Aid failed to divest within the time required, and the Commission approved the appointment of Mr. R. Steven Thing as trustee, on February 8, 1996.⁴ The trustee found acquirers for the Berlin, New Hampshire, and Lincoln, Maine, Pharmacy Assets, and those assets were divested on January 16, 1997, and March 10, 1997, respectively. Although his term was extended, the trustee failed to find an acquirer for the Bucksport, Maine, assets ("Bucksport Assets") before his term expired on September 12, 1997.

In its Petition, Rite Aid describes its and the trustee's efforts to divest and asserts, with supporting affidavits, that despite these efforts, an acquirer for the Bucksport Assets has not been found. The trustee believes that the value of the Bucksport Assets now is reduced to such an extent that "it is unlikely that any prudent businessperson that is capable of operating a pharmacy as a viable competitor in the local market place would purchase either Rite Aid store in Bucksport, Maine"⁵ Rite Aid also asserts that the prior approval provision of the order should be eliminated in light of the availability of the premerger notification and waiting period requirements of the HSR Act and "because there is nothing in the record to suggest that Rite

² 118 FTC 1206 (1994).

³ Order ¶ II.

⁴ Rite Aid subsequently paid civil penalties of \$900,000 to settle the Commission's allegations that it failed to divest and to comply with other provisions of the order.

⁵ Affidavit of R. Steven Thing at 3.

Aid would engage in the same acquisition as alleged in the complaint
....⁶

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 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").⁷

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. Hart Letter at 5.; 16 C.F.R. 2.51. In such a case, the respondent must demonstrate as a threshold matter some affirmative need to modify the order.⁸ For example, it may be in the public interest to modify an order "to relieve any impediment to effective competition that may result from the order." *Damon Corp.*, 101 FTC 689, 692 (1983). 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. Damon Letter at 2. The Commission also will consider whether the particular modification sought is appropriate to remedy the identified harm. *Id.* at 4.

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 it 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

⁶ Petition at 12.

⁷ 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.").

⁸ Letter to Joel E. Hoffman, *Damon Corp.*, C-2916 [1979-1983 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 22,207 at 22,585 (March 29, 1983) ("Damon Letter").

specific facts demonstrating in detail the nature of the changed conditions and the reasons why these 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 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.⁹

After Rite Aid failed to divest as required by the order, the trustee made every effort to divest the Bucksport Assets. Immediately after his appointment, he pursued inquiries made by three parties who expressed an initial interest in the Bucksport Assets. One even submitted a contract, but ultimately withdrew it after performing a more detailed evaluation. The trustee now asserts that no prudent businessperson would acquire the Bucksport Assets.

Although the fact that the passage of time has reduced the value of the assets was foreseeable and thus does not constitute the change in fact necessary to compel reopening the order, it would be futile to continue to require Rite Aid to divest and inequitable to require it to keep paying a trustee to attempt the same. Accordingly, Rite Aid has demonstrated an affirmative need to reopen the order.

Having demonstrated an affirmative need to reopen the order, Rite Aid must also demonstrate that the reasons to set aside the divestiture requirements outweigh the need to continue to impose those obligations on it. The purpose of this particular divestiture was to increase competition in Bucksport, Maine. An acquirer could not be found, however, and the evidence indicates that the value of the Bucksport Assets is now so reduced that such an acquirer will not be found, regardless of additional effort. The diligent attempts of the trustee to market the Bucksport Assets demonstrate that further attempts to divest, even at no minimum price, are likely to be fruitless.¹⁰ The continued costs imposed by this provision now

⁹ *See Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

¹⁰ The respondents made the same showing in *Promodes, S.A.*, Docket No. 9228, in which the trustee accomplished divestiture of only some of the supermarkets to be divested, *Order Granting Request to Reopen and Modify*, 117 FTC 37 (1994), and in *Cooper Industries, Inc.*, Docket No. C-3469, in which the trustee failed to find an acquirer of the license and assets to be divested, *Order Reopening and Modifying Order* (December 15, 1997).

outweigh any benefit to be gained from continuing to compel a divestiture that almost certainly cannot be achieved, and, accordingly, this divestiture obligation of the order should be set aside.

In its Petition, Rite Aid also asks the Commission to vacate the prior approval provisions of paragraphs IV, which prohibits Rite Aid, for ten years, from making any acquisition of interests in or assets of specified entities without the prior approval of the Commission. Rite Aid contends that the prior approval is unwarranted "because there is nothing in the record to suggest that Rite Aid would engage in the same acquisition as alleged in the complaint. . . ." ¹¹

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 the HSR Act 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.

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

¹¹ Petition at 12.

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 presumption is that setting aside the prior approval requirement of paragraph IV is in the public interest. The record contains no evidence suggesting that this matter presents the limited circumstances identified in the Prior Approval Policy Statement as appropriate for retaining a narrow prior approval provision, *i.e.*, a credible risk that, but for the prior approval provision, the respondent would attempt the same or approximately the same merger.

Prior notification, however, is appropriate for acquisitions in the markets specified because there is a credible risk that Rite Aid could engage in future anticompetitive acquisitions that would not be subject to the premerger notification and waiting period requirements of the HSR Act. Although the acquisition leading to the order exceeded the HSR Act threshold, the relevant markets subject to the order are local, and the acquisition of an interest in or the assets of any concern that engaged in the business of selling prescription drugs at retail stores within the six months preceding such acquisition could fall below the size-of-transaction threshold in the HSR Act.

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

It is further ordered, That the order be, and it hereby is, modified to eliminate the divestiture requirement of paragraph II as to the Bucksport Assets, as of the effective date of this order; and

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

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

or towns listed in paragraph I.(J) of this order. Provided, however, that these prohibitions shall not relate to the construction of new facilities.

The prior notification required by this paragraph IV 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"), 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 respondent and not of any other party to the transaction. Respondent shall provide the Notification to the Commission at least thirty (30) 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, respondent shall not consummate the transaction until twenty (20) 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, prior notification shall not be required by this paragraph 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.

IN THE MATTER OF

STONE CONTAINER CORPORATION

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

Docket C-3806. Complaint, May 18, 1998--Decision, May 18, 1998

This consent order prohibits, among other things, the Illinois-based corporation from requesting, suggesting, or advocating that any manufacturer or seller of linerboard raise, fix, or stabilize prices or price levels, or engage in any other pricing action with regard to sales of linerboard to third parties. In addition, the consent order prohibits the respondent from entering into, attempting to enter into, or maintaining any combination, conspiracy, agreement or program with any manufacturer or seller of linerboard to fix, raise, establish or maintain prices, price levels, or any other pricing action.

Appearances

For the Commission: *Geoffrey Green, Michael Antalics and William Baer.*

For the respondent: *William Fifield, Sidley & Austin, Dallas, TX.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Stone Container Corporation, a corporation, hereinafter sometimes referred to as respondent or "Stone Container," has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Stone Container Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 150 N. Michigan Avenue, Chicago, Illinois. Stone Container is the largest manufacturer of linerboard in the United States.

PAR. 2. In January 1993, Stone Container unsuccessfully attempted to increase the price for all grades of linerboard by \$30 per ton, to take effect the following March. Stone Container believed