

Interlocutory Orders, Etc.

JOHNSON & JOHNSON

Docket No. C-4154 Order, May 31, 2006

Order reopening and setting aside a final order where the respondent did not acquire the assets at issue.

ORDER REOPENING AND SETTING ASIDE ORDER

On April 24, 2006, Johnson & Johnson (“J&J”) filed a “Petition to Reopen and Set Aside Decision and Order” (“Petition”) to set aside the Order in Docket No. C-4154 (“Order”). J&J bases the Petition on changes of fact in that the Order was premised upon its acquisition of Guidant Corporation (“Guidant”), but it did not in fact acquire Guidant. For the reasons stated below, the Commission has determined to grant the Petition and has reopened and set aside the Order.¹

I. BACKGROUND

This matter arose from J&J’s proposed acquisition of Guidant. On or about December 14, 2004, J&J entered into an agreement to acquire Guidant. The Commission determined that the proposed acquisition raised competitive concerns in the drug eluting stent (“DES”), endoscopic vessel harvesting (“EVH”), and proximal anastomotic assist devices markets.

J&J agreed to settle the matter, and on November 2, 2005, the Commission accepted an agreement containing consent order. On December 27, 2005, the Commission issued the final Order, which

¹ In connection with the Petition, J&J requested that the Commission eliminate the public comment period on the Petition. A press release was issued on the Petition on April 28, 2006, starting the comment period and noting J&J’s request to eliminate it. The Commission has determined to end the comment period on the Petition prior to its normal 30-day expiration.

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required J&J to license DES intellectual property to Abbott Laboratories, to divest its EVH Business to Datascope Corp. (“Datascope”), and to end its distribution agreement with Novare Surgical Systems, Inc., all within 15 business days of acquiring Guidant. In addition to divesting the EVH Business to Datascope, J&J was also required to provide transitional services to Datascope and enter into a supply agreement with Datascope. On November 2, 2005, the Commission appointed KPMG, LLP (“KPMG”) as Interim Monitor pursuant to Paragraph V. of the Order to monitor J&J’s compliance with the provisions of the Order related to the divestiture of the EVH Business.

Before J&J could complete its acquisition of Guidant, however, Boston Scientific Corporation (“BSC”) made a competing bid for Guidant. Eventually, Guidant agreed to be acquired by BSC, and on January 25, 2006, Guidant terminated its agreement with J&J. Petition at 3. On April 20, 2006, the Commission accepted for public comment an agreement containing consent order with BSC, and on April 21, 2006, BSC closed on its acquisition of Guidant.

Although J&J was not required to divest the EVH Business until after it acquired Guidant, J&J made the decision to go ahead with the divestiture even though it had not completed the acquisition of Guidant. Accordingly, on January 3, 2006, J&J divested the EVH Business to Datascope and has provided transitional services and a supply of product to Datascope. Petition at 3. KPMG has been monitoring J&J’s compliance with its obligations under the Order and the agreement with Datascope. Petition at 3.

II. THE PETITION

On April 24, 2006, J&J filed the Petition. The impetus for the Petition was the desire of J&J to end the role of the Interim Monitor, and the expense of paying for the Monitor’s services, now that it no longer is going to acquire Guidant. J&J asserts that the termination of its agreement to acquire Guidant is a change of fact that eliminates the need for the Order. Petition at 5. Although J&J did

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divest the EVH Business to Datascope, it no longer has any incentive to undercut the viability of the EVH Business because it is not acquiring the competing business of Guidant. Petition at 5. Included in the Petition is an affidavit of Eric Harris, Assistant General Counsel of J&J.

III. STANDARD FOR REOPENING AND MODIFYING A FINAL ORDER

The Order may be reopened and modified on the grounds set forth in § 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b). First, Section 5(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 require². 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.³

Second, Section 5(b) provides that the Commission may also reopen and 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

² See *Supplementary Information, Amendment to 16 CFR 2.51(b)*, announced August 15, 2001, (“Amendment”).

³ 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”). 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.”).

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requested modification.⁴ In the case of “public interest” requests, FTC Rule of Practice 2.51(b) requires an initial “satisfactory showing” of how modification would serve the public interest before the Commission determines whether to reopen an order and consider all of the reasons for and against its modification.

A “satisfactory showing” requires, with respect to public interest requests, that the requester make a *prima facie* showing of a legitimate public interest reason or reasons justifying relief. A request to reopen and modify will not contain a “satisfactory showing” if it is merely conclusory or otherwise fails to set forth by affidavit(s) specific facts demonstrating in detail the reasons why the public interest would be served by the modification.⁵ This showing requires the requester to demonstrate, for example, that there is a more effective or efficient way of achieving the purposes of the order, that the order in whole or part is no longer needed, or that there is some other clear public interest that would be served if the Commission were to grant the requested relief. In addition, this showing must be supported by evidence that is credible and reliable.

If, after determining that the requester has made the required showing, the Commission decides to reopen the order, the Commission will then consider and balance all of the reasons for and against modification. In no instance does a decision to reopen an order oblige the Commission to modify it,⁶ and the burden remains on the requester in all cases to demonstrate why the order should be reopened and modified. The petitioner's burden is not a light one in view of the public interest in repose and the finality of

⁴ Hart Letter at 5; 16 C.F.R. § 2.51.

⁵ 16 C.F.R. § 2.51.

⁶ See *United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992) (reopening and modification are independent determinations).

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Commission orders.⁷ All information and material that the requester wishes the Commission to consider shall be contained in the request at the time of filing.⁸

IV. THE ORDER WILL BE REOPENED AND SET ASIDE

The Commission has determined to reopen and set aside the Order as requested by J&J. The Order was premised on the assumption that J&J would acquire Guidant. The Order explicitly states that the purpose of the Order is “to remedy the lessening of competition alleged in the Commission’s complaint.” Order ¶¶ II.G., III.K., IV.D. The complaint alleges that the agreement between J&J and Guidant violates Section 5 of the FTC Act, Complaint ¶ 22, and “the [acquisition of Guidant by J&J], if consummated, would constitute a violation of Section 7 of the Clayton Act . . . and Section 5 of the FTC Act. . . .” Complaint ¶ 23. The acquisition agreement between J&J and Guidant has been terminated, and the acquisition was never consummated. Accordingly, the basic premise of the Order, the unlawful acquisition that it was designed to remedy, did not come to pass. Therefore there is no reason to keep the Order in place. This conclusion is not changed by the fact that J&J divested the EVH Business to Datascope, even though it was not required to do so.⁹ Absent the competitive concerns tied to the proposed acquisition of Guidant, the Commission has no reason to be concerned about J&J’s conduct in connection with the sale of the EVH Business. The Commission does not routinely enter orders in connection with the sale of a business from one company to another, but does so only

⁷ See *Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

⁸ 16 C.F.R. § 2.51(b).

⁹ J&J was required to divest the EVH Business no later than 15 business days after it acquired Guidant. Because it never acquired Guidant, that deadline would never arrive.