

INTERLOCUTORY, MODIFYING,
VACATING, AND MISCELLANEOUS
ORDERS

IN THE MATTER OF

**KONINKLIJKE AHOLD N.V.,
AND
BRUNO'S SUPERMARKETS, INC.**

Docket No. C-4027. Order, July 10, 2007

Order approving respondents request to reopen and terminate the Commission's Decision and Order, dated January 16, 2002 as it applies to Bruno's, BI-LO, LLC, and their ultimate parent entity, Lone Star Fund V (U.S.), L.P.

ORDER REOPENING AND MODIFYING ORDER

On March 29, 2007, respondent Bruno's Supermarkets, Inc. ("Bruno's"), its owner BI-LO, LLC ("BI-LO"), BI-LO Holding, LLC ("BI-LO Holding"), the direct parent of BI-LO and Bruno's, and BI-LO's and BI-LO Holding's ultimate parent entity, Lone Star Fund V (U.S.), L.P. (collectively "Lone Star" or "Bruno's Respondents"), filed a Petition requesting the Commission to reopen and set aside the order in this matter ("Order") insofar as it applies to respondent Bruno's.¹ In its Petition, Lone Star states that the Bruno's Respondents have exited the relevant markets and that the Order should therefore be set aside as to Bruno's.

Lone Star's Petition was filed pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b), and Section 2.51

¹ Petition of Lone Star to Reopen and Modify Decision and Order ("Petition") at 1. In 2005, Lone Star became a successor to respondent Koninklijke Ahold N.V. ("Ahold") under the Order after Ahold sold all of its interests in BI-LO and BI-LO Holding to Lone Star. Subsequently, in response to a petition filed by Ahold, the Commission reopened and set aside the Order as it applies to Ahold. In the matter of Koninklijke Ahold, N.V. and Bruno's Supermarkets, Inc., Docket No. C-4027, Order Reopening and Modifying Order (July 21, 2006).

Interlocutory Orders, Etc.

of the Commission's Rules of Practice and Procedure, 16 C.F.R. § 2.51. In its Petition, Lone Star asserts that changed circumstances eliminate the continuing need for the Order as it relates to Bruno's. Lone Star also contends the requested modification is in the public interest.² The Petition was placed on the Public Record and the thirty-day comment period closed on May 9, 2007. No comments were received. The Commission has reviewed Lone Star's Petition and has determined to reopen and set aside the Order as to Bruno's.

The Order that Lone Star seeks to modify resulted from Ahold's acquisition of Bruno's in 2001. The acquisition raised competitive concerns in the retail sale of food and grocery products in supermarkets located in "areas in and near Sandersville, Georgia and Milledgeville, Georgia."³ At the time, Ahold and Bruno's were direct competitors in Sandersville and Milledgeville and the Complaint alleged, among other things, that the acquisition would eliminate direct competition between Ahold and Bruno's in these areas.⁴ To remedy the competitive concerns raised by the acquisition, the Order required Ahold to divest its BI-LO supermarket in Milledgeville, Georgia (located in Baldwin County), and its BI-LO supermarket in Sandersville, Georgia (located in Washington County).⁵ Ahold divested the two supermarkets on December 14, 2001, and December 17, 2001, respectively. In 2005, Ahold sold BI-LO Holding to Lone Star. As a result, Ahold no longer owned or operated supermarkets in Baldwin and Washington Counties, Georgia, the relevant areas subject to the remaining compliance obligations under the Order, and the Bruno's Respondents became the successor to Ahold's compliance obligations under the remaining operative provisions of the Order.

² Petition at 2.

³ Complaint, Docket No. C-4027, ¶¶ 9-13.

⁴ *Id.* ¶ 17.

⁵ Order ¶ II.

Interlocutory Orders, Etc.

The Order's remaining operative provisions prohibit Bruno's, for a ten-year period ending on January 21, 2012, from (1) acquiring any supermarket in Baldwin or Washington Counties without providing advance written notice to the Commission; (2) entering into or enforcing any agreement that restricts the ability of any person acquiring any location used as a supermarket to operate a supermarket at that site if the supermarket was formerly owned or operated by Ahold or Bruno's in either Baldwin or Washington Counties; and (3) with certain exceptions, removing any fixtures or equipment from any property owned or leased by Ahold or Bruno's in Baldwin and Washington Counties that no longer operates as a supermarket.⁶ Bruno's is also required to file annual reports of its compliance with the Order until 2012, notify the Commission prior to any corporate changes that may affect compliance obligations arising out of the Order, and permit the Commission access, upon reasonable request, to all records and employees.⁷

Section 5(b) of the Federal Trade Commission 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" require such modification.⁸ 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

⁶ Id. ¶¶ IV and V.

⁷ Id. ¶¶ VI, VII and VIII.

⁸ Section 5(b) provides, in part:

[T]he Commission shall reopen any such order to consider whether such order (including any affirmative relief provision contained in such order) should be altered, modified, or set aside, in whole or in part, if the person, partnership, or corporation involved files a request with the Commission which makes a satisfactory showing that changed conditions of law or fact require such order to be altered, modified, or set aside, in whole or in part.

Interlocutory Orders, Etc.

harmful to competition.⁹ The Commission may also modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest requires such action.¹⁰ Thus, Section 2.51 of the Commission's Rules of Practice and Procedure, as amended, invites respondents in petitions to reopen to show how the public interest warrants the modification. In the case of a request for modification based on public interest grounds, a petitioner must make a *prima facie* "satisfactory showing" of a legitimate public interest reason or other reasons justifying the requested modification.¹¹ In this instance, however, we do not need to assess the sufficiency of Bruno's public interest showing because Bruno's has made the requisite satisfactory showing that changed conditions of fact require the Order to be reopened and set aside as to the Bruno's Respondents.

The record shows that on April 22, 2005, Lone Star entered into a Master Store Purchase Agreement with C&S Wholesale Grocers, Inc. ("C&S"), and its affiliate Southern Family Markets Acquisition LLC, pursuant to which the Bruno's Respondents sold certain supermarkets to C&S. As part of the sale, Bruno's sold its remaining two BI-LO supermarkets in Baldwin County, Georgia to C&S.¹² Bruno's also sold its one remaining Washington County, Georgia BI-LO supermarket to South Harris Street Partners. That store, however, had been closed since March 12, 2004, and was not

⁹ See S. Rep. No. 96-500, 96th Cong., 2nd 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); 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.").

¹⁰ See *United States v. Louisiana-Pacific Corp.*, 967 F.2d at 1376-77.

¹¹ See Requests to Reopen, Supplementary Information, 65 Fed. Reg. 50,636, 50,637 (Aug. 21, 2001) amending 16 C.F.R. § 2.51(b).

¹² Petition at 6.

Interlocutory Orders, Etc.

an operating concern at the time of the sale to South Harris Street Partners.¹³ As a result, Bruno's no longer owns or operates supermarkets in Baldwin and Washington Counties, Georgia, the relevant areas that are the subject of the Order's remaining operative provisions.¹⁴ C&S, through its counsel, has acknowledged and agreed that it would continue to comply with the obligations of the Order as Bruno's successor to those requirements. Further, Bruno's has stated that it has no present intention to re-enter Baldwin County or Washington County.¹⁵

Bruno's exit from the relevant markets eliminates the continuing need for the Order's remaining requirements to apply to Bruno's and thus is a sufficient changed circumstance to support setting aside the Order as to Bruno's.¹⁶ Setting aside Paragraph IV. of the Order (the prior notification provision) as to Bruno's is also consistent with the *Statement of the Federal Trade Commission Policy Concerning Prior Approval and Prior Notice Provisions*, issued June 21, 1995 ("Prior Approval Policy Statement").¹⁷ There is no evidence that a

¹³ *Id.* at 6.

¹⁴ Order ¶¶ IV-VIII.

¹⁵ Supplemental Affidavit of Marc L. Lipshy, Vice President of Bruno's Supermarkets, Inc. (June 18, 2007). See also Supplemental Affidavit of Brian Carney, Chief Financial Officer, BI-LO Holding, LLC (June 15, 2007).

¹⁶ *Koninklijke Ahold, N.V. and Bruno's Supermarkets, Inc.*, Docket No. C-4027, Order Reopening and Modifying Order (July 21, 2006) ("Ahold no longer owns or operates supermarkets in Baldwin and Washington Counties, Georgia, the relevant areas that are subject of the Order's remaining operative provisions"). See also *Entergy Corporation, et al.*, Docket No. C-3998, Order Reopening and Setting Aside Order (July 1, 2005) ("the factual premise underlying the concerns that led to entry of the Order, . . . arose specifically from the acquisition of Entergy's ownership interest in Gulf South The sale of Gulf South constitutes a substantial change that eliminates the continuing need for the Order's requirements"); *Union Carbide Corporation*, 108 F.T.C. 184 (1986) (order modified because respondent had clearly exited a business covered by the order and had demonstrated it had no intention of re-entering the business).

¹⁷ 60 Fed. Reg. 39,745-47 (August 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241, at 20,991 (June 21, 1995).

Interlocutory Orders, Etc.

prior notification provision is needed as to Bruno's as Bruno's and its related entities do not own any interest in any supermarket operation in the relevant markets identified in the Order. Although Bruno's remains in the supermarket business in areas that are not addressed by the Order, an acquisition by Bruno's of any competitively significant supermarket operation in the relevant markets likely would be reportable under the Hart-Scott-Rodino Act, 15 U.S.C. 18a.¹⁸

Accordingly, **IT IS ORDERED** that this matter be, and it hereby is, reopened; and that the Commission's Order issued on January 16, 2002 be, and it hereby is, set aside as to Bruno's Respondents as of the effective date of this Order, but will continue in effect with respect to Bruno's successor, C&S Wholesale Grocers, Inc.

By the Commission.

¹⁸ In its Prior Approval Policy Statement, the Commission states 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 . . . [and that as a general matter] Commission orders in such cases will not include prior approval or prior notification requirements." *Id.* at 2. See *KKR Associates, L.P.*, 120 F.T.C. 879 (October 31, 1995) (setting aside order containing prior approval provision pursuant to Prior Approval Policy Statement).

Interlocutory Orders, Etc.

IN THE MATTER OF

**WHOLE FOODS MARKET, INC.,
AND
WILD OATS MARKETS, INC.**

Docket No. 9324. Order, August 7, 2007

Order staying the Commission action during the pendency of other federal court proceedings.

ORDER STAYING ADMINISTRATIVE PROCEEDINGS

On June 6, 2007, the Commission filed a complaint and motions for a temporary restraining order and a preliminary injunction against Respondents in the United States District Court for the District of Columbia. On June 7, 2007, the District Court issued a Temporary Restraining Order preventing Respondent Whole Foods Market, Inc., from consummating any acquisition of any stock, assets, or other interest, directly or indirectly, in Respondent Wild Oats Markets, Inc., pending the District Court's decision on the Commission's motion for a preliminary injunction.

On June 28, 2007, Commission issued the complaint in this administrative action. The Commission retained adjudicative responsibility for the matter. Rule 3.42(a), 15 C.F.R. § 3.42(a). On July 17, 2007, the Respondents in this matter filed their respective Answers to the Complaint.

In light of the pendency of the federal court proceedings, the Commission, as a matter of discretion, has determined to stay these proceedings pursuant to Rule 3.51, 16 C.F.R. § 3.51.

Accordingly,

IT IS ORDERED THAT this administrative proceeding is stayed pending the proceedings in the collateral federal district court