UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Robert Pitofsky, Chairman
Mary L. Azcuenaga
Janet D. Steiger
Roscoe B. Starek, III
Christine A. Varney

In the Matter of **THE STOP & SHOP COMPANIES, INC.,** a corporation; and **SSC ASSOCIATES, L.P.,** a limited partnership.	Docket No. C-3649

ORDER REOPENING AND MODIFYING ORDER

On January 6, 1997, respondent The Stop & Shop Companies, Inc. ("Stop & Shop")[1] filed a *Petition To Reopen and Modify Consent Order (Purity Supreme)* ("Petition"). In its Petition, Stop & Shop requests that the Commission reopen the order in Docket No. C-3649 ("Order") to set aside Paragraphs II.A.3.a. and II.A.6.a., which require Stop & Shop to divest Purity Supreme Store number 41 located at 630 American Legion Highway, Roslindale, Massachusetts ("the Roslindale store") and Purity Supreme store number 20 located at 525 Harvard Street, Brookline, Massachusetts ("the Brookline store"). The Petition addresses the remaining 2 of 17 supermarket divestitures required by the Order. The Commission previously approved Stop & Shop's applications for divestiture of the other 15 supermarkets.

For the reasons discussed below, the Commission has determined that Stop & Shop has demonstrated that it is in the public interest to reopen and modify the Order to set aside these divestiture obligations.

[1] On July 21, 1996, Koninklijke Ahold N.V., a Netherlands corporation, acquired substantially all of the outstanding voting shares of Stop & Shop.

I. THE COMPLAINT AND ORDER

This matter arose out of the 1995 acquisition by Stop & Shop of all of the supermarkets and related assets owned and operated by Purity Supreme, Inc. ("Purity"). The complaint in this matter charged that Stop & Shop's acquisition of Purity violated Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. Specifically, the complaint alleged that the effects of the acquisition may be substantially to lessen competition "in the retail sale of food and grocery products in supermarkets, and narrower markets contained therein"[2] in, among other markets, "Brookline [and] the Roslindale neighborhood in Boston . . . ."[3] At the time of Stop & Shop's acquisition of Purity, Stop & Shop and Purity directly competed in Brookline and Roslindale. The concern thus arose that Stop & Shop would likely be able unilaterally to raise prices in the Brookline and Roslindale markets.

The Commission accepted a consent agreement with Stop & Shop on October 18, 1995, and the resulting consent Order became final on April 8, 1996.[4] Under the terms of the Order, Stop & Shop is required to divest, among other stores, "absolutely and in good faith," the Roslindale and Brookline, Massachusetts supermarkets.[5] The purpose of these divestitures, as of the others, is to ensure the continuation of the Roslindale and Brookline stores as ongoing, viable enterprises engaged in the supermarket business and to remedy the lessening of competition resulting from the acquisition as alleged in the Commission's complaint.[6]

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[2] Complaint ¶ 9.

[3] Id. ¶ 12.c.

[4] Stop & Shop also entered into a separate consent agreement with the Massachusetts Attorney General. Generally, this agreement mirrors the terms of the Commission's consent agreement. See Commonwealth of Massachusetts v. SSC Associates, L.P. and Stop & Shop Companies, Inc., No. 95-12377NG (D. Mass. Oct. 18, 1995) (Consent Decree).

[5] Order ¶ II.A.

[6] Id. ¶ II.B.

[7] In support of its Petition, Stop & Shop provided the affidavits of Brian Hotarek, Vice President in charge of Real Estate and Development for the Stop & Shop Companies, Inc. ("Hotarek Affidavit"), and William C. Hamlin, Vice President, Chief Financial Officer and Secretary of C&S Wholesale Grocers, Inc. ("Hamlin Affidavit").

[8] Order ¶¶ II.A.3.a. and II.A.6.a.

[9] Stop & Shop does not assert that any change of law requires reopening the Order.

[10] Petition at 7-10.

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would enable Stop & Shop to close the stores, halting any further losses.[12]

III. STANDARD FOR REOPENING AND MODIFYING FINAL ORDERS

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" 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").[13]

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. Damon Corp., Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (March 29, 1983), 1979-83 Transfer Binder, FTC Complaints and Orders (CCH) ¶22,007 at 22,585 ("Damon Letter"), at 2. 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., Docket No. C-2916, 101 F.T.C. 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

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[12] Petition at 17. See also Hotarek Affidavit, ¶¶ 16 and 18.

[13] 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.").

modification sought is appropriate to remedy the identified harm. Damon Letter 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 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

that Sav-A-Lot's entry[14] took place shortly before the Order was issued by the Commission. Consequently, Sav-A-Lot's entry, as a factual matter, does not constitute the requisite significant change in circumstances that requires reopening of the Order. Likewise, with respect to the Brookline market, Star's entry took place approximately five months before the Order in this matter was issued by the Commission. Thus, as a factual matter, Star's entry does not constitute a changed fact that would warrant modification of the Order with respect to the Brookline store.

Trader Joe's entry in Brookline also does not constitute a changed fact that eliminates the need for the divestiture of the Brookline store. Trader Joe's potential entry into the relevant market was not an unforeseen event; the record indicates that Trader Joe's was actively looking for sites for stores in the relevant Boston metropolitan area market, which includes Roslindale and Brookline, considerably before the Order was issued by the Commission. More important, however, the Commission does not consider the Trader Joe's store to be a "supermarket" as that term is defined in the Order and its entry into the Brookline market thus does not remedy the competitive harm resulting from Stop & Shop's acquisition of the Purity supermarket in Brookline. See Order ¶ I.E.

B. Public Interest Considerations

Stop & Shop has demonstrated an affirmative need to modify the Order. The record in this case shows that Stop & Shop has made good faith efforts to locate purchasers for both the Roslindale and Brookline stores, but has been unable to divest the two stores. Stop & Shop engaged the services of a well-known investment banking firm to prepare offering packages to potential

[14] Although Sav-A-Lot offers many items sold through supermarkets, Stop & Shop has not demonstrated that the Sav-A-Lot carries all relevant product categories identified in Paragraph I.E. of the Order. Nor has it demonstrated that the Sav-A-Lot carries the variety of brands and sizes within a category that would be found in Stop & Shop's comparable supermarkets. Nonetheless, it is evident that the Sav-A-Lot is attracting business away from Stop & Shop's supermarkets.

and fixtures for $1 and to subsidize the rent, but again no acquirers expressed interest. In sum, none of the parties contacted was interested in acquiring either the Roslindale or the Brookline store.

When the Order was entered, the Commission believed that the Roslindale and Brookline stores were divestable, and there is no indication that Stop & Shop has not properly maintained and operated these stores since entry of the Order. The declining sales and losses experienced by the Roslindale and Brookline supermarkets thus do not appear to be caused by any failure of Stop & Shop to maintain them. Rather, the declining sales and losses appear to be primarily related to the recent entry by Star and Sav-A-Lot. Although the entries occurred prior to the Order becoming final, neither Commission staff nor Stop & Shop anticipated the extent of competitive impact these two entrants have had on the Roslindale and the Brookline store, respectively.

The increased competition in Roslindale and Brookline has adversely affected the Roslindale and Brookline supermarkets' viability and marketability, and it appears that the two stores will continue to sustain significant losses. Consequently, continuation of the requirement to divest and the requirement to maintain the viability and marketability of the stores, which are steadily losing sales, imposes unanticipated costs on Stop & Shop that it asserts impede its ability to compete in the relevant markets. See Promodes, S.A., et al., Order Granting Request to Reopen and Modify Order Issued May 17, 1990 (January 28, 1994). This constitutes the affirmative need showing under the public interest test.

The remedial purpose of the Order was to restore and increase competition in, among other markets, the Boston metropolitan area through the sale of a specified number of supermarkets, including the Roslindale and Brookline stores. Stop & Shop was able to divest all of the specified stores except the stores located in Roslindale and Brookline. These two stores could not be divested in more than fifteen months[15] of serious efforts by Stop & Shop and the investment banker it retained to assist it in its divestiture efforts. Given Stop & Shop's efforts to divest, and the limited time remaining on the Brookline store's lease, it is extremely unlikely that the stores can be divested consistent with the terms of the Order.

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[15] Stop & Shop began its divestiture efforts immediately after signing the consent agreement in October 1995.

Stop & Shop asserts that it is suffering continuing losses due to the operation of the Roslindale and Brookline stores, which are competitively harming Stop & Shop. Because it is extremely unlikely that the stores can be divested, whether by Stop & Shop or by a trustee appointed by the Commission, the remedial purpose of the Order will not be achieved. Accordingly, on balance, the need to achieve the marginal benefit of divesting two non-competitive supermarkets is outweighed by the continuing costs that the divestiture obligation is imposing on Stop & Shop.

Therefore, IT IS ORDERED that this matter be, and it hereby is, reopened and that the Commission's Order be, and it hereby is, modified to set aside Paragraph II.A.3.a. and Paragraph II.A.6.a, as of the effective date of this order.

By the Commission, Commissioner Azcuenaga dissenting, and Commissioner Starek concurring in the result only.

Donald S. Clark
Secretary

ISSUED: June 20, 1997

SEAL

DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA
in The Stop and Shop Companies, Inc., Docket C-3649

The Commission today permits Stop and Shop to avoid its obligation under the order to divest two stores in the Boston, Massachusetts, area, because Stop and Shop has failed to divest the stores and the continuing effort to do so is costly. Although I did not agree that these two stores should be required to be divested,[1] the respondent's obligation under a final order of the Commission should not be so readily excused. The Commission's action opens the door for all respondents to postpone divestiture, claim that the effort is costly, and avoid the obligation under the order.

The order in this matter provides for the appointment of an independent trustee to accomplish divestiture if Stop and Shop fails to do so in a timely manner, but no trustee has been appointed. In Promodes, S.A.,[2] cited as precedent for modifying this order, the obligation to divest was set aside only after a trustee had been appointed and had failed to locate an acquirer for the stores required to be divested. The inability of the trustee to find an acquirer was cited in Promodes as "evidence that divestiture of the two stores [was] extremely unlikely." I concurred in Promodes,[3] on the ground that "[i]f the trustee cannot identify potential buyers, continued imposition of the divestiture requirement no longer serves the public interest." Comparable evidence of the public interest is not available here, because no independent trustee has been appointed. We have instead allegations of burden resulting from costs that surely were anticipated at the time the order was signed. See Louisiana-Pacific Corporation, 112 F.T.C. 547 (1989).

I dissent.

Attachment

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[1] See Separate Statement of Commissioner Mary L. Azcuenaga, Concurring in Part and Dissenting in Part, in The Stop and Shop Companies, Inc., Docket C-3649 (April 8, 1996).

[2] Promodes, S.A., Order Granting Request To Reopen and Modify Order Issued May 17, 1990 (Jan. 28, 1994), reprinted in 5 Trade Reg. Rep. (CCH) ¶ 23,540.

[3] A copy of my concurring statement in Promodes is attached.

CONCURRING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA
in Promodes, S.A., Docket 9228

I concur in the decision to reopen and modify the order, relieving the respondents of the obligation to divest certain supermarkets in Chattanooga, Tennessee. The Commission-appointed trustee, during a 21-month period, has not accomplished the required divestitures. In classic understatement, the Commission concludes that the trustee's lack of success is "evidence that divestiture of the two stores is extremely unlikely."

A Commission-appointed trustee serves as a neutral arbiter to establish whether the divestiture required by the order can be accomplished (assuming the trustee's good faith and diligence and the absence of evidence that the respondent has frustrated the trustee's efforts). If the trustee cannot identify potential buyers, continued imposition of the divestiture requirement no longer serves the public interest. In these circumstances, the requirement imposes costs, and the respondent need not make a particularized showing of those costs.

The Commission has in the past recognized that an obligation to divest particular assets may be modified in the public interest when the respondent "has been unable to find an acquirer [for those assets] at any price." RSR Corporation, 98 F.T.C. 872 (1981); compare Louisiana-Pacific Corporation, 112 F.T.C. 547, 561 (1989) (asserted financial disadvantage distinguished from impossibility). The trustee having failed to effect divestiture, the requirement now should be lifted.