

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

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

In the Matter of)
)
)
RED APPLE COMPANIES, INC.,)
a corporation;)
)
JOHN A. CATSIMATIDIS,)
an individual;) Docket No. 9266
)
SUPERMARKET ACQUISITION CORP.,)
a corporation; and)
)
DESIGNCRAFT INDUSTRIES, INC.)
(d/b/a Sloan's Supermarkets, Inc.),)
a corporation.)

)

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 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

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.

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.").

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 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

³ Hart Letter at 5; 16 C.F.R. § 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.

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

⁶ Damon Letter at 2.

⁷ Damon Letter at 4.

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 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

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

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 Petition at 6-7.

²⁴ Petition at 24.

²⁵ Petition at 26.

²⁶ Exhibit 1 to Wanning Decl.

²⁷ Because the Petition is granted on public interest grounds, the Commission has not reached the question of whether

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

By the Commission, Commissioner Starek concurring in the result only.

Donald S. Clark
Secretary

ISSUED: September 13, 1996

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.