IN THE MATTER OF

VERRAZZANO TRADING CORPORATION, ET AL.

Docket 9038. Interlocutory Order, Mar. 17, 1978

Order directing the filing of a memorandum and answer thereto setting forth further arguments as to unconstitutionality of certain provisions of the Wool and Textile Acts.

ORDER WITH RESPECT TO BRIEFING OF CONSTITUTIONAL ISSUES

In preparation for oral argument in this matter, the Commission has noted that respondents take the position in their appeal brief that certain provisions of the Wool Products Labeling Act, 15 U.S.C. 68 and the Textile Fiber Products Identification Act, 15 U.S.C. 70 are unconstitutional insofar as they may require posting of a bond as a condition of continued importation by an importer found to have violated the Acts.

Respondents contend that they did not argue the constitutional issue before the administrative law judge because of his alleged position that the constitutional issue was not a proper one for consideration by the agency, a position that complaint counsel have maintained in their reply brief. Respondents contend that this matter should be remanded to the administrative law judge to consider their constitutional arguments.

While the Commission has made no final determination with respect to the contentions raised by the parties in their briefs regarding whether or not the Commission should review the constitutionality of laws it enforces, the Commission does believe that the constitutional issue is a question of law and can be adequately considered by the Commission if it determines to take it up, upon written briefs, without the need for further proceedings before an administrative law judge.[1] Accordingly, respondents should submit within 20 days from the date of this order a memorandum setting forth their constitutional arguments, if they desire that such further arguments be considered by the Commission. Complaint counsel shall respond within 15 days. Therefore,

It is ordered, That if respondents desire that the Commission consider further arguments as to the unconstitutionality of certain provisions of 15 U.S.C. 68 and 15 U.S.C. 70, they shall file a

[1] In reaching this determination the Commission has reviewed respondents' Motion received May 17, 1976; complaint counsel's "Reply to Respondents' Motion for a Subpoena Duces Tecum" received June 2, 1976; complaint counsel's "Motion to Strike" received May 18, 1976; respondents' reply thereto received June 14, 1976; respondents' "Reply to Complaint Counsel's Reply. . ." dated June 21, 1976; and Judge Teetor's "Ruling on Motion to Strike" of July 14, 1976.

memorandum within 20 days of service of this order setting forth such further arguments. Complaint counsel shall thereupon file an answer within 15 days of receipt of respondents' memorandum.

IN THE MATTER OF

JOHNSON PRODUCTS COMPANY, INC.

MODIFIED ORDER, IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2788. Complaint, Feb. 10, 1976 — Modified Order, Mar. 20, 1978

This order modifies a consent order issued February 10, 1976, 41 FR 11172, 87 F.T.C. 206, which was remanded to the Commission for reconsideration by the Court of Appeals for the Seventh Circuit. Modifications in the order exclude references to the advertising firm, restrict provisions of the order to hair straightening products, and are designed to eliminate the significant differences between the original order and that of a competitive company *(Revlon, Inc.)*.

ORDER MODIFYING ORDER TO CEASE AND DESIST

On February 10, 1976 the Commission rejected an attempt by respondent Johnson Products Co., Inc. to withdraw from an executed consent order agreement and, on that date, the Commission entered a final cease and desist order. Thereafter, respondent petitioned the Court of Appeals for the Seventh Circuit to review and set aside the order, contending, *inter alia,* that the Commission patently abused its discretion by refusing to permit respondent to withdraw from the consent agreement in the face of its claim that the Commission had engaged in an "unfair and arbitrary discrimination between similarly situated competitors. . ." (*i.e.,* Revlon, Inc. and respondent). The Court stayed enforcement of the order and remanded the matter to the Commission, noting the prospect that the proceeding might be reopened and modified to eliminate some or all of the critical disparities between the *Revlon* and *Johnson* orders.

After extended negotiations, the parties executed an agreement, which will be treated as a petition to reopen this proceeding, containing an order to cease and desist. The modifications contained in this agreement substantially eliminate the significant differences between the *Revlon* and *Johnson* orders.

The Commission has duly considered the modifications encompassed in the agreement and has determined that the order should be so modified. Accordingly,

It is ordered, That the proceeding be, and it hereby is, reopened.

It is further ordered, That the order to cease and desist, as it applies to respondent Johnson Products Company, Inc., be, and it hereby is, modified by striking the section entitled "Order" and substituting therefor the following:

ORDER

I. *It is ordered,* That respondent Johnson Products Company, Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale, or distribution of Ultra Sheen Creme Relaxer (Ultra Sheen Relaxer) or any hair care product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

A. Representing in writing, orally, visually, or in any other manner, directly or by implication, that:

1. Any hair straightening product is comfortable, gentle or safe.
2. Any hair straightening product is easy to use or to apply.
3. Any hair straightening product feels cool to skin or scalp.

B. Representing, in any manner, directly or by implication, the efficacy of any hair straightening product or the ingredients therein, unless, at the time such representation is made, respondent has in its possession a reasonable basis, consisting of competent and reliable controlled tests to support such representation; or misrepresenting in any manner the nature of any such product or its ingredients or the effect of any such product or its ingredients on hair or skin or any other structure of the body.

C. Representing, in any manner, directly or by implication, the safety of any hair care product or the ingredients therein, unless at the time such representation is made, respondent has in its possession a reasonable basis, consisting of competent and reliable controlled tests, to support such representation. For purposes of this provision, failure to disclose facts shall not constitute a representation.

D. Disseminating or causing to be disseminated any advertisement of Ultra Sheen Relaxer or any hair straightening product of similar composition, which fails to disclose, clearly and conspicuously, with nothing to the contrary or in mitigation thereof, the following statement exactly as it appears below:

> WARNING: Follow directions carefully to avoid skin and scalp irritation, hair breakage and eye injury.

II. *It is further ordered,* That respondent Johnson Products Company, Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection

with the advertising, offering for sale, sale, or distribution of Ultra Sheen Relaxer or any hair care product, do forthwith cease and desist from:

A. Disseminating or causing to be disseminated by United States mail or by any means in or having an effect upon commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase of any such product, any advertisement which contains a representation prohibited by Paragraph I of this order or which omits a disclosure for such product required by Paragraph I of this order.

B. Disseminating or causing to be disseminated by any means, for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase of any such product in or having an effect on commerce as "commerce" is defined in the Federal Trade Commission Act, as amended, any advertisement which contains a representation prohibited by Paragraph I of this order or which omits a disclosure for such product required by Paragraph I of this order.

III. *It is further ordered,* That respondent Johnson Products Company, Inc., a corporation, its successors and assigns and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device in connection with the offering for sale, sale, or distribution of Ultra Sheen Relaxer or any hair straightening product of similar composition in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from failing to include clearly and conspicuously on the information panel of the product package (*i.e.,* the package containing the immediate container of the professional or home use hair straightening product), on the package insert, and on the label of the relaxer container of any such product, with nothing to the contrary or in mitigation thereof, the following disclosures exactly as they appear below:

WARNING:

1. This product contains sodium hydroxide (lye). You must follow directions carefully to avoid skin and scalp burns, hair loss, and eye injury.

2. Do not use if scalp is irritated or injured.

3. Do not use on bleached hair. Do not use on permanently colored hair which is breaking, splitting or otherwise damaged. For hair that has been permanently colored and shows no sign of damage, use only mild strength formula.

4. If you have previously relaxed your hair, relax only the new growth, as described in the directions.

5. If the relaxer causes skin or scalp irritation, rinse out immediately and wash with shampoo in the kit. If irritation persists or if hair loss occurs, consult a physician.

6. If the relaxer gets into eyes, rinse immediately and consult a physician.

Provided, however, that if such hair straightening product is offered for sale, sold or distributed without a neutralizing shampoo, respondent will disclose the following in place of Warning No. 5 above:

5. If the relaxer causes skin or scalp irritation, rinse out immediately and wash with a non-alkaline shampoo (ph below 7). If irritation persists, or if hair loss occurs, consult a physician.

Provided further, however, that respondent may use existing retail product packages, package inserts, and container labels if such packages, inserts and labels conform to the order entered in this matter on February 10, 1976.

IV. *It is further ordered,* That respondent shall distribute a copy of this order to its present and future officers, directors, and operating division and that respondent secure from each such person a signed statement acknowledging receipt of the order.

V. *It is further ordered,* That respondent maintain complete business records relative to the manner and form of its continuing compliance with the terms and provisions of this order. Each record shall be retained by respondent for at least three years after it is made.

VI. *It is further ordered,* That respondent notify the Commission at least thirty days prior to any proposed change in respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation or corporations, the creation or dissolution of subsidiaries, a change in the corporate name or address, or any other change in the corporation which may affect compliance obligations arising out of this order.

VII. *It is further ordered,* That the respondent herein shall, within sixty (60) days after service of this order, file with the Commission a written report setting forth in detail the manner and form of its compliance with this order; *provided, however,* that such compliance report need not contain materials or information previously submitted to the Commission to demonstrate compliance with the order entered in this matter on February 10, 1976.

IN THE MATTER OF

FERRARA IMPORTS, LTD., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND WOOL PRODUCTS LABELING ACTS

Docket C-2918. Complaint, Mar. 24, 1978—Decision, Mar. 24, 1978

This consent order, among other things, requires a New York City importer and manufacturer of men's clothing to cease misrepresenting, or failing to affix to their products, required fiber disclosure labels. The firm is additionally required to furnish affected customers with a copy of the order.

Appearances

For the Commission: *Jerry R. McDonald.*
For the respondents: *Melvin Kynter,* New York City.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and the Wool Products Labeling Act of 1939, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Ferrara Imports, Ltd., a corporation, and Louis Ferrara, individually and as an officer of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Acts and the rules and regulations promulgated under the Wool Products Labeling Act of 1939, and it now 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 Ferrara Imports, Ltd. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business located at 655 Madison Ave., New York, New York.

Respondent Louis Ferrara is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

Respondents are engaged in the business of manufacturing men's clothing, including but not limited to men's suits, and the sale and distribution of said items of clothing.

PAR. 2. Respondents, now and for some time last past, have imported for introduction into commerce, introduced into commerce,

sold, transported, distributed, delivered for shipment, shipped, and offered for sale, in commerce, as "commerce" is defined in the Wool Products Labeling Act of 1939, wool products as "wool product" as defined therein.

PAR. 3. Certain of said wool products were misbranded by respondents within the intent and meaning of Section 4(a)(1) of the Wool Products Labeling Act of 1939 and the rules and regulations promulgated thereunder, in that they were falsely and deceptively stamped, tagged, labeled, or otherwise identified with respect to the character and amount of the constituent fibers contained therein.

Among such misbranded wool products, but not limited thereto, were samples, swatches or specimens used to effect sales of certain wool blend men's suits stamped, tagged, labeled or otherwise identified by respondents as "35% wool, 50% polyester and 15% other fibers," whereas, in truth and in fact, said products contained substantially different fibers and amounts of fibers than represented.

PAR. 4. Certain of said wool products were further misbranded by respondents in that they were not stamped, tagged, labeled, or otherwise identified as required under the provisions of Section 4(a)(2) of the Wool Products Labeling Act of 1939 and in the manner and form as prescribed by the rules and regulations promulgated under said Act.

Among such misbranded wool products, but not limited thereto, were wool products, namely samples, swatches or specimens used to effect sales of wool blend men's suits, with labels on or affixed thereto, and wool blend men's suits, with no labels on or affixed thereto, which failed to disclose the percentage of the total fiber weight of the said wool products, exclusive of ornamentation not exceeding 5 per centum of said total fiber weight, of (1) wool, (2) reprocessed wool, (3) reused wool, (4) each fiber other than wool, when said percentage by weight of such fiber is 5 per centum or more, and (5) the aggregate of all other fibers.

PAR. 5. The acts and practices of the respondents as set forth above were, and are, in violation of the Wool Products Labeling Act of 1939 and the rules and regulations promulgated thereunder, and constituted, and now constitute, unfair methods of competition and unfair and deceptive acts and practices, in or affecting commerce, under the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption

hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the New York Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act, as amended, and the Wool Products Labeling Act of 1939; and,

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and,

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Ferrara Imports, Ltd. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 655 Madison Ave., New York, New York.

Respondent Louis Ferrara is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation, and his address is the same as that of said corporation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Ferrara Imports, Ltd., a corporation, its successors and assigns, and its officers, and Louis Ferrara, individually and as an officer of said corporation, and respondents' representatives, agents, and employees, directly or through and corporation, subsidiary, division or any other device, in connection with the introduction or importing for introduction, or manufacture for introduction, into commerce, or the offering for sale, sale,

transportation, distribution, delivery for shipment or shipment, in commerce, of wool products as "commerce" and "wool product" are defined in the Wool Products Labeling Act of 1939, do forthwith cease and desist from misbranding such products by:

1. Falsely and deceptively stamping, tagging, labeling, or otherwise identifying such products.

2. Failing to securely affix to or place on, each such product a stamp, tag, label, or other means of identification showing in a clear and conspicuous manner each element of information required to be disclosed by Section 4(a)(2) of the Wool Products Labeling Act of 1939.

It is further ordered, That respondents mail a copy of this order to each of their customers that purchased the wool products which gave rise to this complaint.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the individual respondent named herein promptly notify the Commission of each change in business or employment status, which includes discontinuance of his present business or employment and each affiliation with a new business or employment, for ten (10) years following the effective date of this order. Such notice shall include respondent's current business address and a description of the business or employment in which he is engaged as well as a description of his duties and responsibilities. The expiration of the notice provision of this paragraph shall not affect any other obligations arising under this order.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

JIM WALTER CORPORATION

Docket 8986. Interlocutory Order, Mar. 30, 1978

Denial of respondent's petition for reconsideration of final order and accompanying opinion, for reopening the proceeding for issuance of an environmental impact statement, for tolling statutory time for filing petition for review, and for oral argument.

ORDER DENYING PETITION FOR RECONSIDERATION AND OTHER RELIEF

Respondent, Jim Walter Corporation ("Jim Walter") has filed a petition for reconsideration of the Commission's Final Order and accompanying Opinion, for reopening the proceeding to receive certain affidavits, for issuance of an environmental impact statement, for tolling the statutory time for filing a petition for review in the court of appeals, and finally, for oral argument on these issues.

Jim Walter's petition for reconsideration seeks modification of the Commission's Final Order so that it may retain Carey-Canadian Mines, Ltd. ("Carey-Canadian"), a Canadian subsidiary of Panacon Corporation ("Panacon"), engaged in the mining of asbestos fiber, as well as the Philip Carey Division plant at Elizabethtown, Kentucky, which is engaged in the manufacture of urethane foam insulation.

The threshold question which must be faced in connection with a petition for reconsideration filed pursuant to Rule 3.55 is whether the petition raises issues which petitioner had a prior opportunity to address before the Commission. Respondent has been on notice since the commencement of this proceeding that, if liability were found, effective relief might encompass divestiture of all of the Panacon assets acquired by the Celotex Corporation.[1] Allowing respondent yet another opportunity to suggest an appropriate remedy in this case would serve to bifurcate the Commission's adjudicative proceedings into a liability phase, concluding upon issuance of a final order, and a remedy phase, commencing with a petition for reconsideration. Hence, for reasons of administrative efficiency and fairness to all parties, respondent's petition for reconsideration and for reopening of the record may be denied as not in accordance with Rule 3.55.

[1] The Administrative Law Judge's order would have required respondent to divest all of the assets of the Philip Carey Division of Panacon, including the Elizabethtown plant. I.D. P. 64-65. Although the Law Judge did not order divestiture of Carey-Canadian, complaint counsel urged on appeal that the Commission order divestiture of Celotex's new Goldsboro plant, as well as all Panacon assets, including Carey-Canadian. CAB at 26-27. Thus, respondent has been on notice from the onset of this litigation that Carey-Canadian might be divested and of possible obstacles to such divestiture, stemming from Canada's Foreign Investment Review Act, 21-22 Eliz. II, c. 46 (Can.), which was enacted on September 12, 1973, more than ten months prior to the issuance of the complaint.

Even considering the merits of respondent's petition, our decision remains the same. Only restoration of a viable competitive entity can mitigate the substantial harm to competition brought about by respondent's acquisition. As we have recently emphasized in a related context, the Commission must typically rely upon an inference that the acquired firm, which was a viable entity prior to its acquisition, is likely to be an effective future competitor after divestiture. *Fruehauf Corporation, Inc.*, Dkt. No. 8972 (Slip Op. at 35–36) (Feb. 22, 1978 [91 F.T.C. 132]); *RSR Corporation*, 88 F.T.C. 873, 894 (1976). Since the passage of time might weaken this inference, it is essential that divestiture incorporate all additions and improvements made to the original assets. That the Elizabethtown plant was under construction by Philip Carey at the time of the acquisition and had not yet begun operations is therefore of little consequence. Its value to a healthy, independent Philip Carey must be presumed in the absence of convincing proof to the contrary.

With respect to Carey-Canadian, Jim Walter highlights in its petition the percentage of Carey-Canadian sales to Philip Carey roofing plants. While such data is clearly material to formulation of an effective remedy, (see Commission Opinion at 49), it only represents part of the picture. As we noted previously, the Philip Carey division has purchased as much as 40 to 55 percent of its fiber needs from Carey-Canadian. Since most of this asbestos is apparently utilized for production of asphalt and tar roofing products, divestiture of Carey-Canadian is necessary to insure Philip Carey's ready access to supply of an essential raw material in addition to its successful reinstatement as a vigorous competitor in the product market found relevant in this case.[2]

Petitioner further argues that divestiture of Carey-Canadian cannot be accomplished without the approval of the Canadian Government and that political developments in the Province of Quebec, including the threat of nationalization, will be a "substantial negative factor" for prospective purchasers. We do not understand Jim Walter to contend that divestiture of Carey-Canadian is impossible, only that it cannot be accomplished in a facile manner. It is clearly inappropriate at this time to prognosticate on the likelihood of finding a Canadian purchaser for the subject assets or on the possibility of obtaining Canadian approval in the event a non-Canadian purchaser is found. Any insurmountable difficulties which do arise are best considered in the context of compliance.

[2] Even if the percentage of Philip Carey's output attributed to asphalt and tar roofing products utilizing asbestos is relatively small, the contribution to profit may be proportionately greater. And, of course, that does not take into account Carey-Canadian's own substantial contribution to the viability of Panacon prior to the acquisition by Jim Walter. (*See* CX-39-0)

Jim Walter has also petitioned the Commission for issuance of a detailed environmental impact statement or a statement as to why an environmental impact statement is not required. In support of its petition, respondent argues that the Commission's order could result in violation of antipollution laws in the event respondent divests to a "notorious polluter." At the outset, we do not believe an environmental impact statement need be prepared in connection with an order issued in an adjudicative proceeding. See Rule 1.82(d). Even were that rule inapplicable, we find nothing here to justify the filing of an impact statement.

Respondent's argument necessarily requires several difficult assumptions. We are required first to assume that potential purchasers will violate the law and second that Federal, state, and local environmental agencies are powerless to prevent transgressions of the law. We are also asked to assume that Jim Walter would divest to such a purchaser and that the Commission would concur in the transaction.

Further, a review of the case law confirms our view that the Commission's order cannot by any stretch of the imagination be characterized as a "major Federal action significantly affecting the quality of the human environment" 42 U.S.C. 4332(2)(c)(1970). The order here represents a partial return to the status quo existing prior to the acquisition. And like divestiture orders generally, the order affects only the ownership of existing plants and facilities; it does not necessarily entail the creation of new capacity or the consumption of additional environmental resources. *See Gifford-Hill & Co., Inc* v. *FTC,* 389 F. Supp.167, 175 (D.D.C. 1974), *aff'd,* 523 F.2d 730 (D.C. Cir. 1975); *National Ass'n of Gov't Employees* v. *Rumsfeld,* 413 F. Supp. 1224, 1229–30 (D.D.C. 1976); *Duke City Lumber Co.* v. *Baty,* 382 F. Supp. 362, 375 (D.D.C. 1974), *aff'd in part,* 539 F.2d 220 (D.C. Cir. 1976).

It is ordered, therefore, that respondent's petition for reconsideration of the Final Order and accompanying Opinion in this proceeding for reopening the proceeding for issuance of an environmental impact statement, for tolling the statutory time for filing a petition for review, and for oral argument is hereby denied.

Chairman Pertschuk did not participate.