UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Deborah Platt Majoras, Chairman**
Mozelle W. Thompson
Orson Swindle
Thomas B. Leary
Pamela Jones Harbour

In the Matter of	
NESTLÉ HOLDINGS, INC., a corporation,	
DREYER'S GRAND ICE CREAM HOLDINGS, INC., a corporation,	**Docket No. C-4082**
and	
DREYER'S GRAND ICE CREAM, INC., a corporation.	

ORDER REOPENING AND MODIFYING ORDER

On June 28, 2004, Nestlé Holdings, Inc. ("Nestlé"); and Dreyer's Grand Ice Cream Holdings, Inc., and Dreyer's Grand Ice Cream, Inc. (collectively, "Dreyer's") filed their "Request to Reopen Proceedings and Modify Decision and Order" ("Request"). Nestlé and Dreyer's (collectively, "Respondents") seek to modify certain terms of the divestiture agreements with CoolBrands International Inc. ("CoolBrands") at the request of CoolBrands. Specifically, Respondents seek to modify the Order in Docket No. C-4082 ("Order") to allow Respondents to continue to license the rights to use the "Whole Fruit" name on Dreyer's fruit bar line for an additional eighteen months beyond the one year provided in Paragraph II.A. of the Order and to allow Respondents to continue to provide Administrative Services to CoolBrands for an additional nine months beyond the one year provided in Paragraph II.H. of the Order.

Respondents also seek prior Commission approval to modify the divestiture agreements to correspond to the requested modifications. Commission approval is required because Respondents were required to divest pursuant to a divestiture agreement that received the prior approval of the Commission. For the reasons stated below, the Commission has determined to grant the Request and has reopened and modified the Order and granted approval to the modifications to the divestiture agreements.[1]

I. BACKGROUND

This matter arose from Nestlé's 2003 acquisition of Dreyer's, valued at approximately $2.8 billion. In order to resolve competitive concerns regarding the combination of the parties' ice cream businesses, the Consent Order required Respondents to divest assets and to enter several (confidential) arrangements with CoolBrands. In particular, the Order required the Respondents to divest: (1) all assets, businesses, and goodwill related to the manufacture, marketing, or sale of the Dreamery, Godiva ice cream and Whole Fruit brands, and (2) all assets related to Nestlé's distribution of frozen dessert products. These assets, collectively referred to as the "assets to be divested," were divested to CoolBrands on July 5, 2003. Also under the Order, Dreyer's is required to supply CoolBrands with the types and quantities of Dreamery, Godiva ice cream, and Whole Fruit products that CoolBrands requests at a price no greater than Dreyer's production costs for a period not to exceed one (1) year. At the request of CoolBrands,

[1] In connection with the Request, Respondents requested that the Commission eliminate the public comment period on the Request. A press release was issued on the Request on July 2, 2004, starting the comment period. Respondents also requested an extension of time for the deadlines in the Order. The Commission granted that request on July 20, 2004. In light of the granted time extension, the Commission has determined to deny the request to eliminate the comment period on the Request.

Dreyer's must provide distribution services for the CoolBrands' Dreamery, Godiva ice cream, and Whole Fruit products for a period not to exceed one (1) year in any areas of the U.S. where Dreyer's previously distributed these products. Respondents must also provide technical and administrative services to CoolBrands, as needed, for a period not to exceed one (1) year. Finally, the respondents must supply sufficient volumes of additional ice cream products to CoolBrands to enable CoolBrands to profitably distribute Dreamery, Godiva ice cream, and Whole Fruit superpremium products, for a period not to exceed five (5) years.

II. THE REQUEST

The impetus for the Respondents' June 28, 2004, Request was the desire of CoolBrands to have certain changes made to the divestiture agreements to enable it to compete more effectively.[2] The Request seeks to reopen and modify the Order to extend the period under which Dreyer's will manufacture and sell fruit bars under the "Whole Fruit" name for an additional eighteen months, until January 2006. The current trademark license expired on July 5, 2004. The Request also seeks to reopen and modify the Order to extend the period under which Dreyer's will provide certain Administrative Services to CoolBrands, pursuant to the Transitional Services Agreement, for an additional nine months, until April 2005. The current agreement expired on July 5, 2004. CoolBrands explains that the development of Atkins ice cream and novelties, which arose after the entry of the Order, has strained its manufacturing, distribution,

marketing and administrative resources. Affidavit of David J. Stein, President and Co-CEO of

[2] Respondents had previously filed on May 25, 2004, a request to reopen and modify the Order and grant prior approval for certain other changes to the divestiture agreements. The Commission granted that request on July 2, 2004.

CoolBrands ("Stein Affidavit") at ¶ 4.

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). 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 require.[3] 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.[4]

Section 5(b) also provides that the Commission may 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 requested modification.[5] 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.

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[3] *See Supplementary Information, Amendment to* 16 CFR 2.51(b), announced August 15, 2001, ("Amendment").

[4] 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.").

[5] Hart Letter at 5; 16 C.F.R. § 2.51.

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.[6] 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,[7] 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 Commission orders.[8] All information and material that the requester wishes the Commission to consider shall be contained in the request at

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[6] 16 C.F.R. § 2.51.

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

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

the time of filing.[9]

IV. ANALYSIS

The Commission has determined to reopen and modify the Order as requested by Respondents. CoolBrands has shown that unanticipated changes in demand for its products have stretched its manufacturing, distribution, marketing and administrative resources, and the extension will better enable it to compete in the long term. Dreyer's has already agreed to the extension.

Specifically, after the entry of the Order, CoolBrands entered into a license to produce and sell "low carb," full fat ice cream pints and novelties under the "Atkins" name. Stein Affidavit at ¶ 4. In addition, CoolBrands has successfully launched new products under its Weight Watchers and Eskimo Pie brands, further taxing its resources. Stein Affidavit at ¶ 4. These developments are indications that CoolBrands is becoming a stronger competitor.

Respondents seek the modification under either change of fact or public interest grounds. Although the possibility that CoolBrands might introduce Atkins brand ice cream, and the high demand for the product, was not anticipated at the time the Order was entered, it is not clear that the rapid development of the "Atkins" and other lines is an unforeseeable "change of fact" within the meaning of Section 5(b) of the FTC Act. Nevertheless, holding CoolBrands to the one year limit on licensing the "Whole Fruit" name to Dreyer's and on obtaining Administrative Services from Dreyer's, with the resulting disruption to its operations and ability to compete, would likely diminish CoolBrands' competitive effectiveness. It is therefore in the public interest to make the change to enable CoolBrands to continue to compete in the market without

[9] 16 C.F.R. § 2.51(b).

disruption of its operations. Moreover, because the extension is designed to benefit the acquirer of the divested assets, and not the respondent, it is clearer that the change is in the public interest.

Accordingly,

IT IS ORDERED, That this matter be, and it hereby is, reopened; and

IT IS FURTHER ORDERED, That paragraph II.A. of the Order be, and it hereby is, modified, as of the effective date of this order, to read as follows:

A. Respondents shall divest the Assets To Be Divested, as on-going businesses, absolutely and in good faith, at no minimum price, to CoolBrands pursuant to and in accordance with the Divestiture Agreement no later than the later of (i) July 1, 2003 or (ii) ten (10) days after the Acquisition Date. Provided, however, that from and after the Acquisition Date, this obligation shall be the responsibility of Dreyer's. Respondents shall comply with all the terms of the Divestiture Agreement (which agreement shall not vary or contradict, or be construed to vary or contradict, the terms of this Order or the Order to Maintain Assets), and such agreement shall be deemed incorporated by reference into this Order. Provided, however, that from and after the Acquisition Date, this obligation shall be the responsibility of Dreyer's. Failure to comply with the Divestiture Agreement shall constitute a failure to comply with this Order. Provided, however, that as to the Distribution Assets, Respondents shall not be obligated to divest those portions of the Distribution Assets that are excluded under the Integrated Brands Agreement or that CoolBrands has elected not to acquire pursuant to the Integrated Brands Agreement. Provided further, that Respondents may license back from CoolBrands the rights to use the "Whole Fruit" name, logo, trademark, and trade dress solely in connection with the manufacture, distribution and sale of fruit bars for a period not to exceed thirty (30) months. Provided further, that if any document or other material included within the Assets To Be Divested is required to be retained by Respondents by requirements of law, or for tax purposes or for defending lawsuits, Respondents may retain a copy of such materials for use only for such purposes.

IT IS FURTHER ORDERED, That paragraph II.H. of the Order be, and it hereby is, modified, as of the effective date of this order, to read as follows:

H. At the request of the Commission Approved Acquirer, for a period not to exceed twenty-one (21) months from the date Respondents divest the Assets To Be Divested, Dreyer's shall provide Administrative Services to the Commission Approved Acquirer sufficient to enable the Commission Approved Acquirer to operate the Assets To Be Divested in a viable and competitive manner. In providing Administrative Services to the Commission Approved Acquirer, Dreyer's shall charge no more than its Service Cost of providing the Administrative Services.

By the Commission, Commissioners Majoras and Harbour not participating.

Donald S. Clark
Secretary