

I. BACKGROUND

This matter arose from Nestlé's acquisition of Dreyer's. On or about June 16, 2002, Respondents executed an agreement to combine their ice cream businesses. The value of the proposed acquisition was approximately \$2.8 billion. The Respondents filed the required pre-merger notification under the Hart Scott Rodino Act.

In order to resolve competitive concerns, the Consent 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, 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 provide technical and administrative services to CoolBrands, as needed, for a period not to exceed one (1) year. 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

On May 25, 2004, Respondents filed the Request. The impetus for the Request was the desire of CoolBrands to have certain changes made to the divestiture agreements to enable it to compete more effectively. The Request seeks to reopen and modify the Order to extend the period under which Dreyer's would produce Dreamery, Godiva ice cream, and Whole Fruit sorbet for CoolBrands for up to an additional year, until July 2005. The current co-packing agreement will expire on July 5, 2004. CoolBrands explains that the development of Atkins ice cream and novelties, which arose after the entry of the Order, has taxed its manufacturing capacity and has prevented it from taking Dreamery, Godiva ice cream and Whole Fruit in-house as originally planned. Affidavit of David J. Stein, President and Co-CEO of CoolBrands ("Stein Affidavit") at ¶¶ 38-41.

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.² 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.³

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.⁴ 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.

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.⁵ 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

² See *Supplementary Information, Amendment to 16 CFR 2.51(b)*, announced August 15, 2001, (“Amendment”).

³ 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.”).

⁴ Hart Letter at 5; 16 C.F.R. § 2.51.

⁵ 16 C.F.R. § 2.51.

Commission to modify it,⁶ 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.⁷ All information and material that the requester wishes the Commission to consider shall be contained in the request at the time of filing.⁸

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 capacity, and the extension will enable it to expand its capacity and move production of Dreamery, Godiva ice cream and Whole Fruit in-house in an orderly way, better enabling 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 ¶ 38. This new product launch has been extremely successful, and as a result CoolBrands has had to increase greatly its production of Atkins ice cream to meet demand. Stein Affidavit at ¶ 40. Positioned as a superpremium ice cream, the Atkins line increases CoolBrands' presence in the market. As a superpremium, it is delivered through the direct store delivery distribution systems that CoolBrands acquired as part of the divestiture, making the distribution systems more viable and less dependant on product from Dreyer's. In addition, CoolBrands has successfully launched new products under its Weight Watchers and Eskimo Pie brands, further taxing its manufacturing capacity. Stein Affidavit at ¶ 39. These developments are indications that CoolBrands is becoming a stronger competitor. In response to these changes, CoolBrands has begun an expansion of its manufacturing plant, but the expansion will take several months to complete. Stein Affidavit at ¶ 41.

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, the purpose of the co-packing agreement is, in part, to provide product while CoolBrands obtains its own lines, and increases its capacity. Accordingly, it is not clear that the rapid development of the "Atkins" and other lines is a "change of fact" within the meaning of Section 5(b) of the FTC Act. Nevertheless, holding CoolBrands to the one year limit on obtaining product from Dreyer's, with the resulting disruption to its operations and ability to compete with Dreamery, Godiva ice

⁶ See *United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992) (reopening and modification are independent determinations).

⁷ See *Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

⁸ 16 C.F.R. § 2.51(b).

cream, and Whole Fruit, 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 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. Although there is a competitive interest in separating the acquirer from being dependent on the respondent as quickly as possible,⁹ one additional year will, on balance, further the competitive goals of the Order.

Accordingly,

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

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

- E. At the request of the Commission Approved Acquirer, for a period not to exceed two (2) years from the date Respondents divest the Assets To Be Divested, Dreyer's shall supply such types and quantities of Dreamery, Godiva ice cream and Whole Fruit as are requested by the Commission Approved Acquirer at a price that does not exceed Dreyer's Production Costs. In supplying product to the Commission Approved Acquirer, Dreyer's shall give priority to the demand for product of the Commission Approved Acquirer.

By the Commission, Commissioner Harbour not participating.

Donald S. Clark
Secretary

⁹By virtue of actually producing the product for CoolBrands, Dreyer's would obtain some information about CoolBrands' sales and expected sales.