

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

0210174

COMMISSIONERS: Timothy J. Muris, Chairman
Sheila F. Anthony
Mozelle W. Thompson
Orson Swindle
Thomas B. Leary

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

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition by Respondent Nestlé Holdings, Inc., of certain voting securities of Respondent Dreyer’s Grand Ice Cream Holdings, Inc., which as a result of the transaction will be the parent of Respondent Dreyer’s Grand Ice Cream, Inc., hereinafter referred to as “Respondents,” and Respondents having been furnished thereafter with a copy of a draft Complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents Nestlé Holdings, Inc., and Dreyer’s Grand Ice Cream, Inc., with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders ("Consent Agreement"), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft Complaint, a statement that the signing of said Consent 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, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, 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 Respondents have violated Section 5 of the Federal Trade Commission Act and that the Acquisition, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement containing the Decision and Order on the public record for a period of thirty (30) days, the Commission hereby issues its Complaint, makes the following jurisdictional finding and issues this Order to Maintain Assets:

1. Respondent Nestlé Holdings, Inc., is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 383 Main Avenue, Fifth Floor, Norwalk, Connecticut 06851. Respondent Nestlé Holdings, Inc., is a subsidiary of and controlled by Nestlé S.A., a corporation organized, existing, and doing business under, and by virtue of, the laws of Switzerland, with its principal executive offices located at Avenue Nestlé 55, CH-1800 Vevey, Switzerland.
2. Respondent Dreyer's Grand Ice Cream Holdings, Inc., is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 5929 College Avenue, Oakland, California 94618.
3. Respondent Dreyer's Grand Ice Cream, Inc., is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 5929 College Avenue, Oakland, California 94618.
4. The Commission has jurisdiction of the subject matter of this proceeding and of Respondents and the proceeding is in the public interest.

ORDER

I.

IT IS ORDERED that, as used in this Order to Maintain Assets, the following definitions shall apply:

- A. "Nestlé" means Nestlé Holdings Inc., its parent Nestlé S.A., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Nestlé Holdings Inc., including, up until the Acquisition Date, but not limited to, Nestlé Ice Cream Company, LLC ("NICC"), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

- B. "Nestlé S.A." means Nestlé S.A., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Nestlé S.A., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. "Dreyer's" means Dreyer's Grand Ice Cream Holdings, Inc. (referred to as New December, Inc. in the Acquisition Agreement) and Dreyer's Grand Ice Cream, Inc., their directors, officers, employees, agents and representatives, predecessors, successors, and assigns; their joint ventures, subsidiaries, divisions, groups and affiliates controlled by Dreyer's Grand Ice Cream Holdings, Inc. or Dreyer's Grand Ice Cream, Inc., including from and after the Acquisition Date NICC, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- D. "Respondents" means Nestlé and Dreyer's, individually and collectively.
- E. "Commission" means the Federal Trade Commission.
- F. "CoolBrands" means CoolBrands International Inc., a corporation organized, existing and doing business under and by virtue of the laws of Canada, with its office and principal place of business located at 4175 Veterans Highway, Ronkonkoma, New York 11779. CoolBrands includes, but is not limited to, Integrated Brands, Inc.
- G. "Acquisition" means the proposed acquisition of voting securities of Dreyer's by Nestlé pursuant to the Agreement and Plan of Merger and Contribution executed by Nestlé and Dreyer's on or about June 16, 2002.
- H. "Acquisition Agreement" means the Agreement and Plan of Merger and Contribution executed by Nestlé and Dreyer's on or about June 16, 2002, as amended, pursuant to which the Acquisition is to be accomplished.
- I. "Acquisition Date" means the date that Nestlé closes its contemplated acquisition of Dreyer's stock pursuant to the Acquisition Agreement.
- J. "Commission Approved Acquirer" means the acquirer of the Assets To Be Divested which receives the prior approval of the Commission pursuant to Paragraph II of the Decision and Order, including CoolBrands unless at the time the Commission determines to make the Decision and Order final, the Commission notifies Respondents that CoolBrands is not an acceptable purchaser of the Assets To Be Divested.
- K. "Assets To Be Divested" means the Ice Cream Assets To Be Divested and the Distribution Assets.
- L. "Material Confidential Information" means competitively sensitive or proprietary

information not independently known to an entity from sources other than the entity to which the information pertains, and includes, but is not limited to, all customer lists, price lists, marketing methods, patents, technologies, processes, know-how, or other trade secrets.

Provided, however, any term used in this Order to Maintain Assets that is not otherwise defined in this Paragraph I has the same meaning as defined in the Consent Agreement and the Decision and Order.

II.

IT IS FURTHER ORDERED that:

- A. Respondents shall take such actions as are reasonably necessary to maintain the viability and marketability of the Assets To Be Divested, and to prevent the destruction, removal, wasting, deterioration, sale, disposition, transfer or impairment of any of the Assets To Be Divested, except for ordinary wear and tear and as would otherwise occur in the ordinary course of business. Provided, however, that from and after the Acquisition Date, this obligation shall be the responsibility of Dreyer's.
- B. Except to the extent necessary to assure compliance with this Order to Maintain Assets, the Consent Agreement, and the Decision and Order, Respondents shall not allow any person not involved in the management or operations of the Assets To Be Divested to have access to any Material Confidential Information concerning the Assets To Be Divested.

III.

IT IS FURTHER ORDERED that:

- A. At any time after the Commission issues this Order to Maintain Assets (hereinafter "Order"), the Commission may appoint an Interim Monitor to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by this Order.
- B. If an Interim Monitor is appointed pursuant to Paragraph III.A. of this Order, Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Interim Monitor:
 - 1. The Commission shall select the Interim Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed Interim Monitor within ten (10) days after notice by the staff of the

Commission to Respondents of the identity of any proposed Interim Monitor, Respondents shall be deemed to have consented to the selection of the proposed Interim Monitor;

2. The Interim Monitor shall have the power and authority to monitor Respondents' compliance with the terms of this Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Interim Monitor in a manner consistent with the purposes of this Order and in consultation with the Commission;
3. Within ten (10) days after appointment of the Interim Monitor, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, confers on the Interim Monitor all the rights and powers necessary to permit the Interim Monitor to monitor Respondents' compliance with the terms of this Order in a manner consistent with the purposes of this Order;
4. The Interim Monitor shall serve until the last obligations under the Order have been fully performed other than any indemnification or breach obligations under such agreements; provided, however, that the Commission may extend or modify this period as may be necessary or appropriate to accomplish the purposes of this Order;
5. The Interim Monitor shall have full and complete access, subject to any legally recognized privilege of Respondents, to Respondents' personnel, books, records, documents, facilities and technical information relating to the research, development and manufacture of Dreamery, Godiva ice cream or Whole Fruit, or to any other relevant information, as the Interim Monitor may reasonably request, including, but not limited to, all documents and records kept in the normal course of business that relate to the manufacture of Dreamery, Godiva ice cream or Whole Fruit. Respondents shall cooperate with any reasonable request of the Interim Monitor. Respondents shall take no action to interfere with or impede the Interim Monitor's ability to monitor Respondents' compliance with this Order;
6. The Interim Monitor shall serve, without bond or other security, at the expense of Respondents, on such reasonable and customary terms and conditions as the Commission may set. The Interim Monitor will be obligated to sign an appropriate confidentiality agreement relating to performance of the Interim Monitor's duties. The Interim Monitor shall have authority to employ, at the expense of Respondents, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Monitor's duties and responsibilities. The Interim Monitor shall account for all expenses incurred, including fees for his or her services, subject to the approval of the Commission;

7. Respondents shall indemnify the Interim Monitor and hold the Interim Monitor harmless against any losses, claims, damages, liabilities or expenses arising out of, or in connection with, the performance of the Interim Monitor's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparations for, or defense of, any claim whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Interim Monitor;
 8. If the Commission determines that the Interim Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Interim Monitor in the same manner as provided in Paragraph III.A. of this Order.
 9. The Commission may on its own initiative or at the request of the Interim Monitor issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order;
 10. Respondents shall report to the Interim Monitor in accordance with the requirements of Paragraph III.B. of this Order and/or as otherwise provided in any trust agreement approved by the Commission. The Interim Monitor shall evaluate the reports submitted to it by the Respondents. Within one (1) month from the date the Interim Monitor receives these reports, the Interim Monitor shall report in writing to the Commission concerning compliance by Respondents with the provisions of this Order. These responsibilities of the Interim Monitor shall continue until the last obligations under the Order have been fully performed, unless otherwise directed by the Commission.
- C. The Interim Monitor appointed pursuant to Paragraph III.A. of this Order to Maintain Assets or Paragraph IV.A. of the Decision and Order may be the same person appointed as the trustee pursuant to Paragraph V.A. of the Decision and Order in this matter.

IV.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate Respondents such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of this Order.

V.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written

request with reasonable notice to Respondents, Respondents shall permit any duly authorized representative of the Commission:

- A. Access, during office hours and in the presence of counsel, to all facilities and access to inspect and copy all non-privileged books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Respondents relating to any matter contained in this Order; and
- B. Upon five (5) days' notice to Respondents and without restraint or interference from them, to interview officers, directors, or employees of Respondents, who may have counsel present, regarding any such matters.

VI.

IT IS FURTHER ORDERED that this Order to Maintain Assets shall terminate on the earlier of:

- A. Three (3) business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or
- B. Three (3) business days after the divestiture of the Assets To Be Divested pursuant to Paragraph II or Paragraph V of the Decision and Order. Provided, however, that if Respondents divest the Assets To Be Divested to CoolBrands prior to the date the Commission issues the Decision and Order, and if at the time the Commission issues the Decision and Order it notifies Respondents that CoolBrands is not an acceptable acquirer of the Assets To Be Divested or that the manner in which the divestiture was accomplished was not acceptable, then Respondents must comply with this Order and this Order shall then terminate three (3) business days after the subsequent divestiture of the Assets To Be Divested pursuant to Paragraph II or Paragraph V of the Decision and Order.

By the Commission.

C. Landis Plummer
Acting Secretary

SEAL

ISSUED: June 25, 2003