

IN THE MATTER OF

KKR ASSOCIATES, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND
SEC. 7 OF THE CLAYTON ACT

Docket C-3253. Complaint, June 13, 1989—Decision, June 13, 1989

This consent order requires, among other things, that the respondents divest either Beatrice or RJR assets used in the production and sale of packaged nuts, ketchup and oriental food, following KKR's acquisition of RJR Nabisco, Inc. Respondents are also required to hold RJR's assets and operations separate and apart from other entities owned by KKR, pending completion of the required divestitures.

Appearances

For the Commission: *Renee S. Henning.*

For the respondents: *Joseph A. DeFrancis, Latham & Watkins,*
Washington, D.C. and *Richard C. Weisberg, Latham & Watkins,*
New York City.

COMPLAINT

The Federal Trade Commission, having reason to believe that respondents, KKR Associates, a limited partnership; Kohlberg Kravis Roberts & Co. L. P. ("KKR & Co."), a limited partnership; RJR Acquisition Corporation ("RJR Acquisition"), a corporation; RJR Associates, L.P. ("RJR Associates"), a limited partnership; RJR Holdings Group, Inc. ("RJR Group"), a corporation; RJR Holdings Corp. ("RJR Holdings"), a corporation; Henry R. Kravis, a natural person; Robert I. MacDonnell, a natural person; Michael W. Michelson, a natural person; Paul E. Raether, a natural person; and George R. Roberts, a natural person (collectively, "Respondents"), all subject to the jurisdiction of the Federal Trade Commission, have acquired the majority of the stock of RJR Nabisco, Inc. ("RJR") in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45; and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. DEFINITIONS

1. For the purposes of this complaint, the following definitions apply:

a. "*Branded*" products as used herein includes all products other than products offered as generic products or with a retail establishment's private label.

b. "*KKR*" means KKR Associates, KKR & Co. and any corporations, partnerships, joint ventures, companies, subsidiaries, divisions, groups or affiliates that either KKR Associates or KKR & Co. controls directly or indirectly.

II. RESPONDENTS

2. Respondent KKR Associates is a New York limited partnership with its office and principal place of business at 9 West 57th Street, New York, New York.

3. Respondent KKR & Co. is a Delaware limited partnership with its office and principal place of business at 9 West 57th Street, New York, New York.

4. Respondent RJR Acquisition is a corporation organized under the laws of the State of Delaware with its office and principal place of business at 9 West 57th Street, New York, New York.

5. Respondent RJR Associates is a Delaware limited partnership with its office and principal place of business at 9 West 57th Street, New York, New York.

6. Respondent RJR Group is a corporation organized under the laws of the State of Delaware with its office and principal place of business located at 9 West 57th Street, New York, New York.

7. Respondent RJR Holdings is a corporation organized under the laws of the State of Delaware with its office and principal place of business at 9 West 57th Street, New York, New York.

8. Respondent Henry R. Kravis is a general partner in KKR Associates and KKR & Co. and is President of RJR Holdings, RJR Acquisition, and RJR Group with his office and principal place of business at 9 West 57th Street, New York, New York.

9. Respondent Robert I. MacDonnell is a general partner in KKR Associates and KKR & Co. with his office and principal place of business at 101 California Street, San Francisco, California.

10. Respondent Michael W. Michelson is a general partner in KKR Associates and KKR & Co. with his office and principal place of business at 101 California Street, San Francisco, California.

11. Respondent Paul E. Raether is a general partner in KKR Associates and KKR & Co. with his office and principal place of business at 9 West 57th Street, New York, New York.

12. Respondent George R. Roberts is a general partner in KKR Associates and KKR & Co. with his office and principal place of business at 101 California Street, San Francisco, California.

13. Respondents at all times relevant herein have been and are now engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and are either individuals or corporations or partnerships whose business or practices are in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

III. ACQUIRED COMPANY

14. RJR is a corporation organized and existing under the laws of the State of Delaware, with its office and principal place of business at 300 Galleria Parkway, Atlanta, Georgia.

15. RJR is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

IV. THE ACQUISITION

16. On or about November 30, 1988, RJR Holdings Corp., RJR Holdings Group, Inc. and RJR Acquisition entered into a purchase agreement with RJR pursuant to which RJR Acquisition agreed to purchase the majority of the capital stock of RJR. Purchase of the majority of the capital stock would give RJR Acquisition control of RJR. The total value of the proposed acquisition is approximately \$24.8 billion.

V. RELEVANT MARKETS

17. For purposes of this complaint, the relevant lines of commerce in which to analyze the respondents' acquisition of RJR are branded catsup/ketchup, shelf-stable oriental entrees, shelf-stable oriental noodles, shelf-stable oriental vegetables, soy sauce and packaged nuts.

18. For purposes of this complaint, the relevant sections of the country include the entire United States.

19. Production and distribution of branded catsup/ketchup, shelf-stable oriental entrees, shelf-stable oriental noodles, shelf-stable oriental vegetables, soy sauce and packaged nuts is highly concentrated, whether measured by Herfindahl-Hirschmann Indices ("HHI") or two-firm and four-firm concentration ratios.

20. Entry into the relevant markets set out in paragraphs 17 and 18 herein, is very difficult.

21. KKR and RJR are actual competitors in the production and distribution of branded catsup/ketchup, shelf-stable oriental entrees, shelf-stable oriental noodles, shelf-stable oriental vegetables, soy sauce and packaged nuts.

VI. EFFECTS

22. The effect of the acquisition may be substantially to lessen competition in the relevant markets described above in paragraphs 17 and 18 in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the FTC Act, 15 U.S.C. 45, in the following ways, among others:

- a. Eliminate actual competition between RJR and KKR;
- b. Significantly enhance the likelihood of collusion or interdependent coordination among the firms that produce or sell the relevant products in the United States.

VII. VIOLATION CHARGED

23. The acquisition as set forth in paragraph 16 herein violates 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.

DECISION AND ORDER

The Federal Trade Commission (the "Commission"), having initiated an investigation of the proposed acquisition (the "Acquisition") of the voting securities of RJR Nabisco, Inc. ("RJR") by RJR Holdings Corp. ("RJR Holdings"), all of whose voting securities are currently held by RJR Associates, L.P., through the tender offer by, and subsequent merger with and into RJR of, RJR Acquisition Corporation ("RJR Acquisition"), a wholly-owned subsidiary of RJR Holdings; and KKR Associates, a New York limited partnership, the general partners of KKR Associates, Kohlberg Kravis Roberts & Co. L.P. ("KKR & Co."), a Delaware limited partnership, the general partners

of KKR & Co., RJR Associates, L.P. ("RJR Associates"), a Delaware limited partnership, RJR Holdings, a Delaware corporation, RJR Acquisition Corporation ("RJR Acquisition"), a Delaware corporation, and RJR Holdings Group, Inc. ("RJR Group"), a Delaware corporation (collectively, "Respondents"), having been furnished thereafter with a copy of a draft of complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondents with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. 18; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order that was dated January 30, 1989, an admission by 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 respondents have violated Section 5 and Section 7, 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; and

Respondents and Commission counsel having thereafter submitted a revised executed agreement containing a consent order that was dated April 26, 1989, and that was the same as the January agreement, except for minor, non-substantive modifications occasioned by the April restructuring of RJR; and

The Commission having duly considered the comments filed by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its modified complaint, makes the following jurisdictional findings and enters the following modified order:

1. Respondent KKR Associates is a New York limited partnership with its office and principal place of business at 9 West 57th Street, New York, New York.

2. Respondent KKR & Co. is a Delaware limited partnership with its office and principal place of business at 9 West 57th Street, New York, New York.

3. Respondent RJR Acquisition is a corporation organized under the laws of the State of Delaware with its office and principal place of business at 9 West 57th Street, New York, New York.

4. Respondent RJR Associates is a Delaware limited partnership with its office and principal place of business at 9 West 57th Street, New York, New York.

5. Respondent RJR Group is a corporation organized under the laws of the State of Delaware with its office and principal place of business located at 9 West 57th Street, New York, New York.

6. Respondent RJR Holdings is a corporation organized under the laws of the State of Delaware with its office and principal place of business at 9 West 57th Street, New York, New York.

7. Respondent Henry R. Kravis is a general partner in KKR Associates and KKR & Co. and is President of RJR Holdings, RJR Acquisition, and RJR Group with his office and principal place of business at 9 West 57th Street, New York, New York.

8. Respondent Robert I. MacDonnell is a general partner in KKR Associates and KKR & Co. with his office and principal place of business at 101 California Street, San Francisco, California.

9. Respondent Michael W. Michelson is a general partner in KKR Associates and KKR & Co. with his office and principal place of business at 101 California Street, San Francisco, California.

10. Respondent Paul E. Raether is a general partner in KKR Associates and KKR & Co. with his office and principal place of business at 9 West 57th Street, New York, New York.

11. Respondent George R. Roberts is a general partner in KKR Associates and KKR & Co. with his office and principal place of business at 101 California Street, San Francisco, California.

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

ORDER

I.

As used in this order, the following definitions shall apply:

a. "*Respondents*" means KKR Associates, KKR & Co., RJR Acquisition, RJR Associates, RJR Group, and RJR Holdings, their predecessors and successors, and any corporations, partnerships, joint ventures, companies, subsidiaries, divisions, groups or affiliates that any respondent controls directly or indirectly, and their respective directors, officers, employees, agents, representatives, and their respective successors and assigns, as well as Henry R. Kravis, George R. Roberts, Robert I MacDonnell, Paul E. Raether and Michael W. Michelson, and any partnerships that they individually or collectively control.

b. "*Acquisition*" means any of the respondents' acquisitions of outstanding shares of RJR Nabisco, Inc.

c. "*Beatrice/Hunt-Wesson, Inc.*," is a Delaware corporation, with its principal place of business at 1645 W. Valencia Drive, Fullerton, California and its predecessors and successors, and any corporations, partnerships, joint ventures, companies, subsidiaries, divisions, groups or affiliates that Beatrice/Hunt-Wesson, Inc. controls directly or indirectly, and their respective directors, officers, employees, agents, representatives, and their respective successors and assigns.

d. "*Beatrice Parties*" means BCI Associates, L.P., BCI Associates II, L.P., KKR Partners II L.P., BCI Equity Associates, L.P., BCI Securities, L.P. and Beatrice Company and their predecessors and successors, and any corporations, partnerships, joint ventures, companies, subsidiaries, divisions, groups or affiliates that any Beatrice Party controls directly or indirectly, and their respective directors, officers, employees, agents, representatives, and their respective successors and assigns.

e. "*Branded*" products are used herein includes all products other than products offered as generic products or with a retail establishment's private label.

f. "*Chun King*" means the Chun King business of Nabisco Foods Company and includes all of RJR's assets and businesses associated with the development, production, distribution and sale of shelf-stable oriental entrees, shelf-stable oriental noodles, shelf-stable oriental

vegetables, and soy sauce. Associated assets and businesses are further delineated in the subparagraphs of Schedule A.

g. "*Commission*" means the Federal Trade Commission.

h. "*Control*" includes any situation in which any respondent or any of its principals, partners, directors, officers, employees, agents, representatives, or any of their respective successors or assigns constitutes a majority of a board of directors.

h-1. "*Del Monte Foods USA*" includes Del Monte Foods USA and Del Monte Manufacturing, Inc.

i. "*Food Assets and Businesses*" means Chun King, Del Monte Foods USA, the Planters LifeSavers Company and any other assets or businesses used in the product development, manufacture, distribution or sale of any edible products by Chun King, Del Monte Foods USA, or the Planters LifeSavers Company.

j. "*Henry R. Kravis*" means Henry R. Kravis, a natural person, general partner in KKR & Co. and KKR Associates, and President of RJR Holdings, RJR Acquisition, and RJR Group.

k. "*KKR Associates*" means KKR Associates, a New York limited partnership.

l. "*KKR & Co.*" means Kohlberg Kravis Roberts & Co. L.P., a Delaware limited partnership.

m. "*Robert I. MacDonnell*" means Robert I. MacDonnell, a natural person and general partner in KKR & Co. and KKR Associates.

n. "*Michael W. Michelson*" means Michael W. Michelson, a natural person and general partner in KKR & Co. and KKR Associates.

o. "*Paul E. Raether*" means Paul E. Raether, a natural person and general partner in KKR & Co. and KKR Associates.

p. "*Relevant Products*" means branded: catsup/ketchup, shelf-stable oriental entrees, shelf-stable oriental noodles, shelf-stable oriental vegetables, soy sauce and packaged nuts.

q. "*RJR*" means RJR Nabisco, Inc., its predecessors and successors, and any corporations, partnerships, joint ventures, companies, subsidiaries, divisions, groups or affiliates that RJR controls directly or indirectly, and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

r. "*RJR Acquisition*" means RJR Acquisition Corporation, a Delaware corporation and subsidiary of RJR Holdings.

s. "*RJR Associates*" means RJR Associates, L.P., a Delaware limited partnership of which KKR Associates is the general partner.

t. "*RJR Group*" means RJR Holdings Group, Inc., a Delaware corporation and subsidiary of RJR Holdings.

u. "*RJR Holdings*" means RJR Holdings Corp., a Delaware corporation.

v. "*George R. Roberts*" means George R. Roberts, a natural person, and a general partner in KKR & Co. and KKR Associates.

w. "*Schedule A Properties*" means the assets and businesses listed in Schedule A.

x. "*Schedule A-1 Properties*" means the assets and businesses listed in Schedule A-1.

y. "*Schedule B Properties*" means the assets and businesses listed in Schedule B.

z. "*Successors*" includes any partnership in which two or more of the general partners in KKR Associates or KKR & Co. are partners.

II.

It is ordered, That:

(A) The respondents shall divest, absolutely and in good faith, within twelve (12) months of the date this order becomes final, either the Schedule A Properties or the Schedule A-1 Properties, as well as any additional Food Assets and Businesses that (i) the respondents may at their discretion include as a part of the assets to be divested and are acceptable to the acquiring entity and the Commission, or (ii) the Commission shall require to be divested to ensure the divestiture of the Schedule A Properties or the Schedule A-1 Properties as ongoing, viable enterprises, engaged in the businesses in which the properties are presently employed.

(B) The Agreement to Hold Separate, attached hereto and made a part hereof as Appendix I, shall continue in effect until such time as the respondents have completed all of the Commission-approved divestitures of the Schedule A Properties or the Schedule A-1 Properties, or until such other time as the Agreement to Hold Separate provides, and the respondents shall comply with all terms of said Agreement.

(C) Divestiture of the Schedule A Properties or the Schedule A-1 Properties shall be made only to a buyer or buyers that receive the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission. The purpose of the divestiture of the Schedule A Properties or the Schedule A-1 Properties is to ensure the continuation of the assets as ongoing, viable enterprises engaged in the same businesses in which the properties are presently

employed, and to remedy the lessening of competition resulting from the acquisition as alleged in the Commission's complaint.

(D) The respondents shall take such action as is necessary to maintain the viability and marketability of the Schedule A Properties, and to prevent the destruction, removal or impairment of any assets or businesses to be divested except in the ordinary course of business and except for ordinary wear and tear.

(E) The individual respondents shall take no action that diminishes the viability or marketability of the Schedule A-1 Properties, or permits the destruction, removal or impairment of any assets or businesses to be divested except in the ordinary course of business and except for ordinary wear and tear. To the extent any individual respondent has any direct or indirect responsibility or fiduciary duty with regard to the A-1 Properties, that respondent shall take such action as is necessary to maintain the viability and marketability of the Schedule A-1 Properties.

III.

It is further ordered, That:

(A) If the respondents have not divested the Schedule A Properties or the Schedule A-1 Properties within the twelve-month period, the respondents shall consent to the appointment by the Commission of a trustee to divest the Schedule B Properties. In the event that the Commission brings an action pursuant to Section 5(1) of the Federal Trade Commission Act, 15 U.S.C. Section 45(1), or any other statute enforced by the Commission, the respondents shall consent to the appointment of a trustee in such action. The appointment of a trustee shall not preclude the Commission from seeking civil penalties or any other relief available to it for any failure by respondents to comply with this order.

(B) If a trustee is appointed by the Commission or a court pursuant to Part III(A) of this order, the respondents shall consent to the following terms and conditions regarding the trustee's duties and responsibilities:

(1) The Commission shall select the trustee, subject to the consent of the respondents, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures.

(2) The trustee shall have the power and authority to divest the Schedule B Properties. Provided, however, the trustee shall not have the power to divest the Planters LifeSavers Company if the Commission has approved and the respondents have divested, pursuant to this order, either (i) the assets and businesses associated with the development, production, distribution and sale of all relevant products within the Planters LifeSavers Company or (ii) the assets and businesses associated with the development, production, distribution and sale of all relevant products within Beatrice/Hunt-Wesson that develop, produce, distribute or sell the same relevant products as the Planters Lifesavers Company. Provided, further, the trustee shall not have the power to divest Del Monte Foods USA if the Commission has approved and the respondents have divested, pursuant to this order, (a) either (i) Chun King or (ii) the assets and businesses associated with the development, production, distribution and sale of all relevant products within Beatrice/Hunt-Wesson that develop, produce, distribute or sell the same relevant products as Chun King, and (b) either (i) the assets and businesses associated with the development, production, distribution and sale of all relevant products within Del Monte Foods USA or (ii) the assets and businesses associated with the development, production, distribution and sale of all relevant products within Beatrice/Hunt-Wesson that develop, produce, distribute or sell the same relevant products as Del Monte Foods USA. Provided, further, the trustee shall not have the power to divest Chun King if the Commission has approved and the respondents have divested, pursuant to this order, the assets and businesses associated with the development, production, distribution and sale of all relevant products within Beatrice/Hunt-Wesson that develop, produce, distribute or sell the same relevant products as Chun King.

(3) The trustee shall have eighteen (18) months from the date of appointment to accomplish the divestiture, which shall be subject to the prior approval of the Commission and, if the trustee is appointed by a court, subject also to the prior approval of the court. If, however, at the end of the eighteen-month period the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or by the court for a court-appointed trustee. Provided, however, that the Commission or court may only extend the divestiture period two (2) times.

(4) The trustee shall have full and complete access to the personnel,

books, records and facilities of any businesses that the trustee has the duty to divest. The respondents shall develop such financial or other information as such trustee may reasonably request and shall cooperate with the trustee. The respondents shall take no action to interfere with or impede the trustee's accomplishment of the divestitures.

(5) The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to the respondents' absolute and unconditional obligation to divest at no minimum price and the purpose of the divestitures as stated in Paragraph II C.

(6) The trustee shall serve at the cost and expense of the respondents, on such reasonable and customary terms and conditions as the Commission or a court may set, including the employment of accountants, attorneys or other persons reasonably necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the sale and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of the appropriate respondent and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the Schedule B Properties.

(7) Within sixty (60) days after appointment of the trustee, and subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, the respondents shall execute a trust agreement that transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture.

(8) If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in Part III (A) of this order.

(9) The trustee shall report in writing to the respondents and the Commission every sixty (60) days concerning the trustee's efforts to accomplish divestiture.

IV.

It is further ordered, That, within sixty (60) days after the date this order becomes final, and every sixty (60) days thereafter until the

respondents have fully complied with the provisions of paragraph II of this order, each respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying with, or has complied with that provision. The respondents shall include in compliance reports, among other things that are required from time to time, a full description of the contracts or negotiations for the divestiture of properties specified in paragraph II of this order, including the identity of all parties contacted. The respondents also shall include in their compliance reports copies of all material written communications to and from such parties, and all internal memoranda, reports and recommendations concerning the required divestitures.

V.

It is further ordered, That, for a ten (10) year period commencing on the date this order becomes final, each respondent (but in the case of an individual respondent, only so long as he remains a general partner, officer, director, or employee of a nonindividual respondent) shall cease and desist from acquiring, without the prior approval of the Federal Trade Commission, directly or indirectly, through subsidiaries, partnerships or otherwise, assets used or previously used in (and still suitable for use in), or any interest in, or the whole or any part of the stock or share capital of, any company that is engaged in the production of any relevant product, or that owns or licenses a branded trademark used in connection with the sale of any relevant product. Provided, however, that the corporate respondents may, in the ordinary course of business, make purchases of used equipment for not more than \$500,000. Provided further, that the individual and partnership respondents, and each pension, benefit or welfare plan or trust controlled by the corporate respondents may acquire, for investment purposes only, an interest of not more than five (5) percent of the stock or share capital of any concern. For the purposes of this proviso, any purchase by any such pension, benefit or welfare plan or trust made at the direction or suggestion of any individual or partnership respondent shall be included in the five (5) percent of the stock or share capital that the individual or partnership respondents may acquire.

VI.

It is further ordered, That, one (1) year from the date this order becomes final and for each of nine (9) years thereafter, each respondent shall file with the Commission a verified written report of its compliance with paragraph V.

VII.

It is further ordered, That, for the purpose of determining or securing compliance with this order, and subject to any legally recognized privilege, upon written request and on reasonable notice to any respondent made to its offices, the respondent shall permit any duly authorized representative of the Commission:

(1) Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of the respondents relating to any matters contained in this order; and

(2) Upon five (5) days' notice to any respondent and without restraint or interference from it, to interview officers, partners or employees of the respondent who may have counsel present regarding such matters.

VIII.

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

SCHEDULE A

Unless the Beatrice Parties divest the Schedule A-1 Properties pursuant to the terms of this order, the respondents shall divest all of RJR's assets and businesses associated with the development, production, distribution and sale of the relevant products. The divestiture shall include all of RJR's assets, properties, business and

goodwill, tangible and intangible, utilized in the manufacture or sale of such relevant products, including, without limitation, the following:

- (a) All machinery, fixtures, equipment, vehicles, furniture, tools and all other tangible personal property;
- (b) All customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, research materials, technical information, management information systems, software, inventions, trade secrets, technology, know-how, specifications, designs, drawings, processes and quality control data;
- (c) Inventory;
- (d) Accounts and notes receivable;
- (e) Intellectual property rights, patents, copyrights, trademarks and trade names, excluding the trademark or trade name "Nabisco";
- (f) All right, title and interest in and to owned or leased real property, together with appurtenances, licenses and permits;
- (g) All right, title and interest in and to the contracts entered into in the ordinary course of business with customers (together with associated bid and performance bonds), suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees;
- (h) All rights under warranties and guarantees, express or implied;
- (i) All books, records and files;
- (j) All items of prepaid expense; and
- (k) All known or unknown, liquidated or unliquidated, contingent or fixed, rights or causes of action which RJR has or may have against any third party, and all such rights that RJR has or may have in or to any asset or property relating primarily to the particular assets divested, excluding, however, all known or unknown, liquidated or unliquidated, contingent or fixed, causes of action that RJR has or may have to the extent they arise out of or are related to any liability, obligation or claim not to be assumed by the purchaser of such asset divested.

With respect to a class of similar assets (such as trucks) a fraction of the use of which has been devoted to the assets divested, such fraction of such class (or as close an approximation to such fraction as can be separately transferred) shall be included within the assets divested.

Provided, however, if the Beatrice Parties divest the Schedule A-1 Properties pursuant to the terms of this order associated with the development, production, distribution and sale of a particular relevant

product, the respondents shall not be required to divest RJR's assets and businesses associated with the development, production, distribution and sale of that relevant product, unless such assets and businesses are also assets and businesses associated with the development, production, distribution or sale of another relevant product.

SCHEDULE A-1

Unless the respondents divest the Schedule A Properties pursuant to the terms of this order, the Beatrice Parties shall divest all of the Beatrice/Hunt-Wesson, Inc. assets and businesses associated with the development, production, distribution and sale of the relevant products. The divestiture shall include all of Beatrice/Hunt-Wesson, Inc. assets, properties, business and goodwill, tangible and intangible, utilized in the manufacture or sale of such relevant products, including, without limitation, the following:

- (a) All machinery, fixtures, equipment, vehicles, furniture, tools and all other tangible personal property;
- (b) All customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, research materials, technical information, management information systems, software, inventions, trade secrets, technology, know-how, specifications, designs, drawings, processes and quality control data;
- (c) Inventory;
- (d) Accounts and notes receivable;
- (e) Intellectual property rights, patents, copyrights, trademarks and trade names, excluding the trademark or trade name "Beatrice";
- (f) All right, title and interest in and to owned or leased real property, together with appurtenances, licenses and permits;
- (g) All right, title and interest in and to the contracts entered into in the ordinary course of business with customers (together with associated bid and performance bonds), suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees;
- (h) All rights under warranties and guarantees, express or implied;
- (i) All books, records and files;
- (j) All items of prepaid expense; and
- (k) All known or unknown, liquidated or unliquidated, contingent or fixed, rights or causes of action which Beatrice/Hunt-Wesson, Inc.

has or may have against any third party, and all such rights that Beatrice/Hunt-Wesson, Inc. has or may have in or to any asset or property relating primarily to the particular assets divested, excluding, however, all known or unknown, liquidated or unliquidated, contingent or fixed, causes of action that Beatrice/Hunt-Wesson, Inc. has or may have to the extent they arise out of or are related to any liability, obligation or claim not to be assumed by the purchaser of such asset divested.

With respect to a class of similar assets (such as trucks) a fraction of the use of which has been devoted to the assets divested, such fraction of such class (or as close an approximation to such fraction as can be separately transferred) shall be included within the assets divested.

Provided, however, if the respondents divest the Schedule A Properties pursuant to the terms of this order associated with the development, production, distribution and sale of a particular relevant product, the Beatrice Parties shall not be required to divest the Beatrice/Hunt-Wesson, Inc. assets and businesses associated with the development, production, distribution and sale of that relevant product, unless such assets and businesses are also assets and businesses associated with the development, production, distribution or sale of another relevant product.

SCHEDULE B

The trustee shall divest the following divisions, businesses, or subsidiaries of RJR:

1. Del Monte Foods USA,
2. Planters Lifesavers Company,
3. Chun King.

The trustee shall also divest any additional Food Assets and Businesses that the Commission shall require to be divested to ensure the divestiture of the Schedule B Properties as ongoing, viable enterprises, engaged in the businesses in which the properties are presently employed. Notwithstanding the last paragraph of Schedule A and Schedule A-1, the trustee shall have the power and authority to divest all the Schedule B Properties, except as provided in paragraph III (B) (2) of this order.

APPENDIX I

AGREEMENT TO HOLD SEPARATE

This Agreement to Hold Separate (the "Agreement") is by and among KKR Associates, a New York limited partnership, the general partners of KKR Associates ("KKR Partners"), Kohlberg Kravis Roberts & Co. L.P. ("KKR & Co."), a Delaware limited partnership, the general partners of Kohlberg Kravis Roberts & Co. L.P. ("KKR & Co. Partners"), RJR Associates, L.P. ("RJR Associates"), a Delaware limited partnership, RJR Holdings Corp. ("RJR Holdings"), a Delaware corporation, RJR Acquisition Corporation ("RJR Acquisition"), a Delaware corporation, and RJR Holdings Group, Inc. ("RJR Group"), a Delaware corporation (collectively, "the Acquiring Parties"), and the Federal Trade Commission ("the Commission"), an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41 *et seq.* (collectively, "the Parties").

PREMISES

Whereas, RJR Acquisition, a wholly-owned subsidiary of RJR Holdings, all of whose voting securities are currently held by RJR Associates, commenced a tender offer on October 27, 1988, as amended, for up to 165,509,015 of the outstanding shares of RJR Nabisco, Inc. ("RJR"), with the intent of effecting a merger of RJR Acquisition into RJR, pursuant to which RJR would become a subsidiary of RJR Holdings (the "Acquisition"), all as contemplated by and provided for in that certain merger agreement entered into among RJR Holdings, RJR Acquisition, RJR Group and RJR dated as of November 30, 1988; and

Whereas, the Commission is now investigating the transaction to determine if the acquisition would violate any of the statutes enforced by the Commission; and

Whereas, if the Commission accepts the attached Agreement Containing Consent Order ("Consent Order"), the Commission must place it on the public record for a period of at least sixty (60) days and may subsequently withdraw such acceptance pursuant to the provisions of Section 2.34 of the Commission's Rules; and

Whereas, the Commission is concerned that if an understanding is not reached, preserving the status quo ante of certain of RJR's food assets and businesses during the period prior to the final acceptance of

the Consent Order by the Commission (after the 60-day public notice period), divestiture resulting from any proceeding challenging the legality of the acquisition might not be possible, or might be less than an effective remedy; and

Whereas, the Commission is concerned that if the acquisition is consummated, it will be necessary to preserve the Commission's ability to require the divestiture of properties described in Schedule A, Schedule A-1 and Schedule B to the Consent Order (the "Schedule A Properties," "Schedule A-1 Properties," and "Schedule B Properties," respectively) and the Commission's right to seek to restore RJR as a viable competitor; and

Whereas, the purpose of this agreement and the Consent Order is to preserve the Chun King business of Nabisco Foods Company as that business is defined in the Consent Order ("Chun King"), Del Monte Foods USA ("Del Monte Foods USA," as used herein, includes Del Monte Foods USA and Del Monte Manufacturing, Inc.) and the Planters LifeSavers Company as viable food companies pending the divestiture of the Schedule A Properties as viable, on-going enterprises, in order to remedy any anticompetitive effects of the acquisition and to preserve the assets and businesses as viable food companies in the event that divestiture is not achieved; and

Whereas, the acquiring parties' entering into this agreement shall in no way be construed as an admission by them that the acquisition is illegal; and

Whereas, the acquiring parties understand that no act or transaction contemplated by this agreement shall be deemed immune or exempt from the provisions of the antitrust laws or the Federal Trade Commission Act by reason of anything contained in this agreement.

Now, *therefore*, the parties agree, upon understanding that the Commission has not yet determined whether the acquisition will be challenged, and in consideration of the Commission's agreement that, unless the Commission determines to reject the Consent Order, it will not seek further relief from the acquiring parties with respect to the acquisition, except that the Commission may exercise any and all rights to enforce this agreement and the Consent Order to which it is annexed and made a part thereof, and in the event the required divestitures are not accomplished, to seek divestiture of such assets as are held separate pursuant to this agreement, as follows:

1. The acquiring parties agree to execute and be bound by the attached Consent Order.

2. The acquiring parties agree that, until the first to occur of (i) three business days after the Commission withdraws its acceptance of the Consent Order pursuant to the provisions of Section 2.34 of the Commission's rules; or (ii) if the Commission issues the Consent Order finally, until all of the divestitures required by the Consent Order have been completed, the acquiring parties shall hold all of RJR's assets and business operations separate and apart on the following terms and conditions:

a. All of RJR's assets and businesses shall be operated independently of the acquiring parties and independently of any other parties owned in whole or in part by any of the acquiring parties.

b. Except as permitted to the acquiring parties sitting on the "New Board" (as defined in subparagraph (h)), and as is necessary to assure compliance with this agreement, the acquiring parties shall not exercise direction or control over, or influence directly or indirectly, any of RJR's assets and businesses.

c. Except as required by law, and except to the extent that necessary information is exchanged in the course of evaluating the acquisition, defending investigations or litigation, preventing a default under the terms of the credit agreement among RJR Holdings and certain banks entered into in connection with the acquisition (the "Credit Agreement") or negotiating an agreement to dispose of assets, the acquiring parties shall not receive or have access to, or the use of, any "material confidential information" relating to RJR's "Food Assets and Businesses" not in the public domain, except as such information would be available to the acquiring parties in the normal course of business if the acquisition had not taken place. Any such information that is obtained pursuant to this subparagraph shall only be used for the purposes set out in this subparagraph. "Material confidential information," as used herein, means competitively sensitive or proprietary information not independently known to the acquiring parties from sources other than RJR, and includes but is not limited to customer lists, price lists, marketing methods, patents, technologies, processes, or other trade secrets. "Food Assets and Businesses," as used herein, means any assets and businesses used in the product development, manufacture, distribution or sale of any "relevant product" as the Consent Order defines that term. Provided, however, that assets and businesses associated with a particular relevant product shall not continue to be Food Assets and Businesses for the purposes of this Agreement to Hold Separate when the trustee

loses the power to divest such assets and businesses, pursuant to paragraph III (B) (2) of the Consent Order.

d. The acquiring parties shall not change the composition of the management of RJR's assets and businesses except that the directors serving on the "New Board" (as defined in subparagraph (h)), excluding directors who are officers, partners, employees or agents of KKR & Co. or KKR Associates, shall have the power to remove employees for cause, and the New Board shall have the power to remove any RJR employees not employed by or assigned to Chun King, Del Monte Foods USA, and the Planters LifeSavers Company.

e. The acquiring parties shall do nothing to diminish the viability and marketability of Chun King, Del Monte Foods USA, and the Planters LifeSavers Company, and shall not sell, transfer, encumber, or otherwise impair the marketability or viability of their assets (other than in the normal course of business).

f. The acquiring parties shall do nothing to diminish the normal working capital of the Food Assets and Businesses.

g. All material transactions out of the ordinary course of business and not otherwise precluded shall be subject to a majority vote of the New Board (as defined in subparagraph (h)).

h. The acquiring parties may adopt new Articles of Incorporation and By-laws, provided that they are not inconsistent with other provisions of this Agreement, and may cause the election of a new board of directors of RJR ("New Board") once they are majority shareholders of RJR. The acquiring parties may elect the directors to the New Board. Except as permitted by this agreement, the directors of RJR who are also partners, officers, employees or agents of KKR & Co. or KKR Associates shall not receive in their capacity as directors of RJR material confidential information relating to RJR's Food Assets and Businesses, and shall not disclose any such information received under this agreement to the acquiring parties or to any company owned in whole or in part by any of the acquiring parties. Nor shall such directors use such information to obtain any advantage for the acquiring parties or for any company owned in whole or in part by the acquiring parties. Said directors shall also not disclose to RJR any material confidential information relating to the Food Assets and Businesses of any company owned in whole or in part by any of the acquiring parties. Said directors of RJR shall enter into a confidentiality agreement prohibiting disclosure of confidential information. Such directors may participate in matters that come before the New Board

that do not concern Chun King, Del Monte Foods USA, and the Planters LifeSavers Company. Such directors may participate in matters that come before the New Board concerning Chun King, Del Monte Foods USA, and the Planters LifeSavers Company only for the limited purpose of considering: (i) capital expenditures in excess of \$5,000,000; (ii) sale of any capital assets for more than \$5,000,000; (iii) any decision relating to financing, restructuring or the issuance of indebtedness in the aggregate sum of more than \$5,000,000; (iv) preventing a default under the terms of the credit agreement; (v) negotiating incentive compensation arrangements for key managers solely for the purpose of facilitating the divestitures; or (vi) carrying out the Acquiring Parties' and RJR's responsibility to assure that the Schedule A and Schedule B Properties and such other properties as the Commission may elect to add under paragraph II of the Consent Order are maintained in such manner as will permit their divestiture as on-going, viable assets. Except as permitted by this agreement, such director shall not participate in, or attempt to influence the vote of any other director with respect to, any matters that would involve a conflict of interest if the acquiring parties and RJR were separate and independent entities. Meetings of the Board during the term of this agreement, shall be stenographically transcribed and the transcripts shall be retained for two (2) years after the termination of this agreement.

i. Nothing herein shall prevent the New Board from negotiating or entering into agreements to dispose of RJR's assets, provided that any such disposition with respect to properties potentially subject to the divestiture of the trustee under the Consent Order shall be made only to a buyer or buyers that receive the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.

j. The Board of RJR Holdings, RJR Group, or RJR Acquisition shall neither declare any cash dividend on any class of its stock nor permit the repayment of the principal of any loan from any acquiring party, other than RJR Holdings, RJR Group or RJR Acquisition, until the divestitures required pursuant to the Consent Order have been completed. The acquiring parties shall not borrow funds or issue dividends if the result would be to impair the Food Assets' and Businesses' viability, marketability, or ability to operate at their previously budgeted 1989 levels of expenditure on an annualized basis.

k. Should the Commission seek in any proceeding to compel the acquiring parties to divest themselves of the shares of RJR stock they shall acquire, or to compel the acquiring parties to divest any assets or businesses they may hold, or to seek any other injunctive or equitable relief, the acquiring parties shall not raise any objection based upon the expiration of the applicable Hart-Scott-Rodino Antitrust Improvements Act waiting period or the fact that the Commission has permitted RJR stock to be acquired. The acquiring parties also waive all rights to contest the validity of this agreement.

3. In the event the Commission has not finally approved and issued the Consent Order within one hundred twenty (120) days of its publication in the Federal Register, the acquiring parties may, at their option, terminate this Agreement to Hold Separate by delivering written notice of termination to the Commission, which termination shall be effective ten (10) days after the Commission's receipt of such notice, and this agreement shall thereafter be of no further force and effect. If this agreement is so terminated, the Commission may take such action as it deems appropriate, including but not limited to an action pursuant to Section 13 (b) of the Federal Trade Commission Act, 15 U.S.C. 53(b). Termination of this Agreement to Hold Separate shall in no way operate to terminate the Agreement Containing Consent Order to Cease and Desist that the acquiring parties have entered into in this matter.

4. For the purpose of determining or securing compliance with this agreement, subject to any legally recognized privilege, and upon written request with reasonable notice to the acquiring parties made to their offices, the acquiring parties shall permit any duly authorized representative or representatives of the Commission:

a. Access during the office hours of the acquiring parties and in the presence of counsel to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of the acquiring parties relating to compliance with this agreement; and

b. Upon five (5) days notice to the acquiring parties, and without restraint or interference from them, to interview partners, officers, directors or employees of the acquiring parties, who may have counsel present, regarding any such matters.

No information or documents obtained by the Commission pursuant to this agreement shall be divulged by any representative of the Commission to anyone outside the Commission. except in the case of

legal proceedings, in the case of a request from Congress, a Congressional Committee, or Congressional Subcommittee, for the purpose of securing compliance with this agreement or as otherwise required by law. Upon the termination of this agreement, all such information and documents shall, at the request of the acquiring parties, be returned to the acquiring parties or destroyed.

If, at any time, information or documents are furnished by the acquiring parties and the acquiring parties identify such documents as "Confidential," then the Commission shall provide to the acquiring parties ten (10) days notice or, if ten (10) days is not possible, as many days notice as possible prior to divulging such material.

5. This agreement shall not be binding until approved by the Commission.

Complaint

111 F.T.C.

IN THE MATTER OF

GENERAL RENT-A-CAR SYSTEMS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3255. Complaint, June 13, 1989—Decision, June 13, 1989*

This consent order requires, among other things, the Miami, Fla. national car rental company to disclose charges that are mandatory or are not reasonably avoidable to every consumer that inquires about the prices and also to disclose to consumers the car models they are to receive under the car size classification that each consumer selects.

Appearances

For the Commission: *Michael R. MacPhail* and *Joel C. Winston*.

For the respondents: *Donald L. Peusner*, Miami, Fla.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that respondents General Rent-A-Car Systems, Inc., a corporation, and General Rent-A-Car, Inc., a corporation, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it would be in the public interest, hereby issues its complaint stating its charges as follows:

PARAGRAPH 1. Respondent General Rent-A-Car Systems, Inc. is a corporation organized, existing, and doing business under and by virtue of the law of the State of Florida. Respondent General Rent-A-Car, Inc. is a corporation organized, existing, and doing business under and by virtue of the law of the State of Delaware. Respondents' offices and principal places of business are located at 2741 North 29th Avenue, Hollywood, Florida. Respondent General Rent-A-Car, Inc. is a wholly-owned subsidiary of respondent General Rent-a-Car Systems, Inc.

PAR. 2. Respondents, at all times mentioned herein, have maintained a substantial course of business, including the acts and