

IN THE MATTER OF

KKR ASSOCIATES, L.P., ET AL.

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

Docket C-3253. Consent Order, June 13, 1989--Modifying Order, May 13, 1993

This order denies in part and grants in part a petition to reopen the proceeding and to modify the Commission's consent order issued June 13, 1989 (111 FTC 670) by requiring only notification to the Commission, instead of prior approval, for acquisitions of relevant products, if respondents are not at that time engaged in that relevant product market. The Commission concluded that changed conditions of fact warranted reopening and modifying the order. However, the respondents' request to eliminate entirely the prior approval clause was denied.

ORDER GRANTING IN PART AND DENYING IN PART
REQUEST TO REOPEN AND MODIFY ORDER ISSUED JUNE 13, 1989

On January 13, 1993, respondents KKR Associates, L.P., et al., ("KKR")¹ filed a Petition to Reopen Proceedings and Modify Consent Order ("Petition") pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice and Procedure, 16 CFR 2.51. Respondents request that the Commission delete paragraph V of the order in Docket No. C-3253 ("order") that became final on June 22, 1989. Paragraph V prohibits respondents, for a ten-year period, from acquiring without prior Commission approval, firms that produce or hold branded trademarks related to the relevant products. Alternatively, respondents request that paragraph V of the order be

¹ The Petition was filed by all the named respondents to the order in Docket No. C-3253: KKR Associates, L.P., a limited partnership; Kohlberg Kravis Roberts & Co., L.P., a limited partnership; RJR Nabisco, Inc. (successor by merger to RJR Acquisition Corporation), a corporation; Whitehall Associates, L.P. (formerly known as RJR Associates, L.P.), a limited partnership; RJR Nabisco Holdings Group, Inc. (formerly known as RJR Holdings Corp.), 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.

modified to include only packaged nuts as a relevant product. In conjunction with that alternative, respondents request that a "poison pill" provision be added that would allow them to acquire, without the Commission's prior approval, an interest in or assets of a company not involved in the production or marketing of packaged nuts at the time of respondents' acquisition announcement, even if subsequently the acquisition candidate acquires an interest in another company involved in the production or marketing of packaged nuts. If such a situation occurred, respondents' proposed modification would, require them to hold separate and then divest the packaged nut-related assets of the subsequently acquired company. Respondents also request such other lesser relief as appears just and proper to the Commission.

For the reasons discussed below, the Commission has determined that respondents have shown that changed conditions of fact require reopening and modifying the order. The Commission has determined to grant a modification of the order more limited than that requested by respondents. Specifically, we will require only notification, instead of prior approval, for acquisitions of relevant products if respondents are not at that time engaged in that relevant product market. The Commission has also determined that respondents have not at this time demonstrated that it is in the public interest to modify the order to include a poison pill provision.

The Complaint And Order

The complaint alleged that KKR's acquisition of RJR Nabisco would substantially lessen competition in the United States in three branded food product markets -- packaged nuts, shelf-stable oriental foods (including shelf-stable oriental entrees, noodles, vegetables and soy sauce) ("shelf-stable oriental foods"), and catsup -- 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. The order settled those charges by requiring KKR to divest assets and businesses, of either RJR or Beatrice/Hunt-Wesson, associated with the development, production, distribution and sale, of branded packaged nuts, shelf-stable

oriental foods and catsup.² On October 3, 1989, the Commission approved the divestiture of the Chun King business of Nabisco to a joint venture between Yeo Hiap Seng Ltd. and Fullerton (Overseas) Holdings Private Ltd. On October 5, 1989, the Commission approved the divestiture of the Fisher Nut division of Beatrice/Hunt-Wesson to The Procter & Gamble Co. On December 28, 1989, the Commission approved the divestiture of RJR Nabisco's Del Monte Corporation processed food divisions (including catsup) to DMPF Holdings Corp. The divestitures were made in a timely manner.

For a period of ten years until June 22, 1999, paragraph V of the order prohibits each respondent from acquiring, without prior Commission approval, any interest in 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. Paragraph V provides that prior Commission approval is not required for (1) acquisitions by the corporate respondents of used equipment for not more than \$500,000 and (2) acquisitions by the individual and partnership respondents, for investment purposes only, of an interest of not more than 5 percent in any concern.

Respondents' Petition

Respondents assert in their Petition that reopening and modification are required by changed conditions of fact and public interest considerations.³ The change of fact alleged by respondents is KKR's sale of the Beatrice Company to ConAgra, Inc. Thus, respondents assert, when the Order was entered, KKR controlled both RJR Nabisco and Beatrice/Hunt Wesson, which created an overlap in each of the relevant product markets. As required by the order, respondents divested certain assets defined in the order used in manufacturing relevant products. Subsequently, respondents

² Paragraph I.p. of the order defines "relevant products" as "branded: catsup/ketchup, shelf-stable oriental entrees, shelf-stable oriental noodles, shelf-stable oriental vegetables, soy sauce and packaged nuts."

³ Respondents do not assert any changed conditions of law.

divested absolutely and completely any continuing interest in Beatrice/Hunt Wesson. Petition at 5-6. Because they no longer have an interest in Beatrice/Hunt Wesson, respondents claim that there has been a change in circumstances requiring a reopening and modification of the order.

Respondents also assert that reopening and modification are warranted by public interest considerations. According to the respondents, the prior approval requirement of paragraph V of the order unfairly burdens KKR's merchant banking activities and burdens competition in financial markets. Petition at 9-11. Respondents assert that public interest concerns dictate that the prior approval provision be removed because it is a barrier to the free flow of capital. *Id.* at 11. Respondents claim that the public disclosure and delay inherent in the prior approval process effectively prevent KKR from acquiring any interest in any company that has any involvement in manufacturing a relevant product or is a licensor or licensee of a trademark used in connection with a relevant product. *Id.* at 10.

Standards For Reopening And Modification

Section 5(b) of the FTC Act, 15 U.S.C. 45(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" require such modification. A satisfactory showing sufficient to require such 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. *Louisiana-Pacific Corp.*, Docket No. 4C-2956, Letter to John C. Hart (June 5, 1986) ("L-P Letter") at 4.⁴

The Commission may modify an order when, although changed circumstances would not require reopening, the Commission

⁴ Cf. *United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992), where the court noted that "[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." *Id.*

determines that the public interest requires such action. *Id.* Therefore, Section 2.51 of the Commission's Rules of Practice invites respondents in petitions to reopen to show how the public interest warrants the modification. In the case of a request for modification based on public interest grounds, a petitioner must demonstrate as a threshold matter some affirmative need to modify the order. *See* Damon Corp., Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (March 29, 1983) ("Damon Letter") at 2. If the showing of need is made, the Commission will balance the reasons favoring the requested modification against any reasons not to make the modification. *Id.* The Commission will also consider whether the particular modification sought is appropriate to remedy the identified harm.

Whether the request to reopen is based on changed conditions or on public interest considerations, the burden is on the respondent to make the requisite satisfactory showing. The language of section 5(b) plainly anticipates that the petitioner must make a "satisfactory showing" of changed conditions to obtain reopening of the order. The legislative history also makes it clear that the petitioner has the burden of showing, other than by conclusory statements, why an order should be modified.⁵ If the Commission determines that the petitioner has made the required showing, the Commission must reopen the order to consider whether modification is required and, if so, the nature and extent of the modification. The Commission is not required to reopen the order, however, if the petitioner fails to meet its burden of making the satisfactory showing required by the statute. The petitioner's burden is not a light one given the public interest in repose and the finality of Commission orders.⁶

⁵ The Commission may properly decline to reopen an order if a request is "merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modification of the order." S. Rep. No. 96-500, 96th Cong., 1st Sess. 9-10 (1979). *See also* Section 2.51(b) of the Commission's Rules of Practice (requiring affidavits in support of petitions to reopen and modify).

⁶ *See Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support finality of orders).

Respondents Have Demonstrated Changed
Conditions Of Fact that Require Reopening
And Modifying The Order

Respondents assert that KKR's divestiture of its interest in Beatrice/Hunt-Wesson constitutes a change in circumstances that requires reopening and modifying the order. Today, having completed the divestiture requirements of the order and having sold Beatrice/Hunt-Wesson, KKR no longer exercises control over any firm engaged in the manufacture and sale of two of the relevant products under the order: branded catsup and branded shelf-stable oriental foods. KKR currently competes in only one relevant product market, branded packaged nuts. Respondents have demonstrated that KKR's exit from the branded catsup and shelf-stable oriental foods markets eliminates the need for the prior approval provision as it is currently written, because an acquisition in either of these markets could not give rise to a competitive overlap.

KKR no longer owns interests or assets in the shelf-stable oriental foods or catsup markets. There appears, therefore, to be little need for the Commission to review KKR's first acquisition back into either of these relevant product markets, because at time of that acquisition respondents would not be competing in that market. KKR's first acquisition back into a relevant product market from which it had exited would simply substitute one seller for another without affecting market concentration or otherwise affecting competition. Although at the time the order was entered the remedial purpose of the prior approval provision for future acquisitions in the relevant markets was clear, respondents' subsequent exit from two of these markets eliminates the need to review their re-entry. Accordingly, respondents have shown a change of fact that requires reopening the order as it is currently written.

Having determined to reopen the order, the Commission next considers whether the order should be modified and, if so, how. In this matter, respondents' exit, and current absence, from the market

does not support setting aside the prior approval provision in its entirety. Rather, it is appropriate to modify the order only with respect to respondents' re-entry into a relevant market. Respondents' "exit" from two of the relevant markets may be temporary.⁷ The Commission, therefore, has an interest in monitoring respondents' acquisitions in the relevant product markets from which they have exited so long as there is some likelihood that they will again be competitors in the relevant product markets. If respondents re-enter the branded catsup market or branded shelf-stable oriental foods market, they will return to the situation contemplated when the order was issued; the Commission will continue to have a significant enforcement interest in approving any subsequent acquisition of firms that produce, or have branded trademarks related to, these relevant products. Because the Commission has already concluded that there is a need to review increases in concentration in the order's relevant product markets, a prior approval for a second acquisition of such assets would be appropriate.⁸

A modification of the order allowing respondents to re-enter a market without the Commission's prior approval recognizes that the prior approval requirement is a limitation on KKR's investment

⁷ Respondents cite *In the Matter of Union Carbide Corporation*, Order Modifying Consent Order, September 28, 1977, 108 FTC 184 (1986), to support the requested modification on a the basis of changed conditions. In *Union Carbide*, respondent requested that the Commission modify the order to delete welding products and gas welding apparatus as products covered by the prior approval provision because respondents had divested all such assets and intended to stay out of the welding business. *Id.* at 188. The Commission modified the *Union Carbide* order because respondents had clearly exited a business covered by the order and had demonstrated that they had no intention of re-entering the business. KKR, in contrast, has not definitively stated an intention to remain out of these markets. Indeed, KKR's desire to be able to re-enter these markets unfettered by the order is the gravamen of its Petition.

⁸ Prior approval provisions are included in orders to ensure prior Commission review of future acquisitions in markets where potential anticompetitive effects have been identified. In the instant case, once respondents have re-entered a relevant product market, the Commission's interest in reviewing future acquisitions in that market re-emerges. In view of these considerations, and in light of the modifications ordered herein, respondents' Petition fails to demonstrate that deletion of paragraph V of the order in its entirety would be in the public interest.

activities.⁹ Although the costs imposed by the order were contemplated, it was not contemplated that these costs would apply to acquisitions of interests in a market in which respondents did not then compete. A prior approval provision in a Commission order contemplates that a respondent will continue to do business in the relevant market. A respondent's subsequent exit from the market eliminates the need for prior approval with respect to a re-entry acquisition. Under these circumstances, modifying the order is warranted to enable respondents to re-enter a relevant product market from which they have exited.¹⁰ Consequently, the order shall be modified to permit such re-entry, with notice to the Commission but without the Commission's prior approval. The notice requirement is appropriate to ensure that the Commission has the information necessary to enforce the prior approval provision for acquisitions subsequent to the re-entry.

Respondents Have Not Demonstrated An Affirmative Need
Under The Public Interest Standard That Would Justify
Adding A "Poison Pill" Provision To The Order

Respondents' Petition requests the addition of a "poison pill" provision. Respondents argue that a target of a hostile tender offer by respondents could defeat that offer simply by acquiring an interest in an overlapping product, such as a small regional nut packager. Once such an overlap was established, KKR would need prior Commission approval in order to pursue the tender offer. The

⁹ Respondents have indicated, based on their experience in the merchant banking field, that KKR's investment activities as individuals and as a merchant bank are significantly limited because billions of dollars cannot be invested in the relevant products without the Commission's prior approval. Respondents argue that when they have exited a market, a prior approval requirement only hinders their ability as a merchant banking firm to invest money in financial markets without obstacles. The unmodified order, according to respondents, will not promote competition, but will only cause a burden, or inefficiency, on financial markets.

¹⁰ Respondents have not exited the branded packaged nuts market. Therefore, the modification would not alter respondents' obligation to obtain the Commission's prior approval for an acquisition of packaged nuts assets unless and until respondents have exited that relevant product market.

public disclosure and delay inherent in the prior approval process, respondents argue, are likely to prevent KKR's tender offer from succeeding. In this manner, the Petition states, the order could have the unintended and undesirable effect of becoming a weapon for frustrating any possible investment by KKR. *See* Petition at 10.

Respondents' Petition, however, provides insufficient support for its assertion that KKR's future investment efforts' could be frustrated by such defensive acquisitions. Respondents have not expressly identified any actual KKR acquisitions that may have been frustrated by the poison pill strategy described. Nor have respondents offered any specific facts to demonstrate that the poison pill strategy is nonetheless a realistic basis of concern for the future. Indeed, respondents' supporting affidavit does not directly address the poison pill aspect of their Petition. Accordingly, respondents have failed to carry their burden of demonstrating an affirmative need under the public interest standard to warrant reopening the order and adding a poison pill provision.¹¹

The Commission's denial of this portion of respondents' Petition is, of course, without prejudice to renewed consideration upon a more complete showing. Should respondents pursue this relief through a second petition, the analysis might be aided by a presentation of facts tending to show that the poison pill defensive strategy is not only hypothetically possible, but also a realistic basis for concern. Such a showing could include facts as to the time strictures applicable to KKR's investment undertakings; facts concerning defensive strategies adopted by acquisition targets in the past; and facts relating to the practical ability of acquisition targets

¹¹ Respondents also provide insufficient support with respect to another proposed alternative--limitation of the order's prior approval requirement to permit acquisitions of firms deriving "*de minimis*" revenues from the manufacture of packaged nuts. *See* Petition at 3 n.1. The Petition provides no information demonstrating that (i) the applicability of the order's prior approval requirement to the acquisition of small packaged nut manufacturers results in any threshold injury to respondents or (ii) the reasons favoring establishment of *de minimis* exception at any particular level outweigh the reasons for continuing to impose the prior approval requirement.

to identify and acquire interests that would trigger a prior approval requirement under the order.¹²

Conclusion

Accordingly, *it is ordered*, that this matter be reopened and that the order in Docket No. C-3253 be, and it hereby is, modified, as of the effective date of this order.

Paragraph V of the order is rewritten and modified as follows:

It is further ordered, That:

A. 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.

¹² In support of their request, respondents cite *Atlantic Richfield Co.*, 55 Fed. Reg. 51,963 (1990), a Commission consent order that included a poison pill provision. The denial of respondents' request for a poison pill provision does not mean that such provisions should not be included in orders, but only that respondents have not shown that such a modification is warranted here. Unlike respondents' proposal, the Atlantic Richfield order (i) required that the poison pill assets be divested within a fixed period and to a purchaser approved by the Commission; (ii) authorized the Commission to appoint a trustee to effect the divestiture if Atlantic Richfield failed to do so; and (iii) imposed affirmative obligations on Atlantic Richfield to effect arrangements -- including the possible divestiture of ancillary assets and businesses -- necessary to assure the viability and competitiveness of the assets and businesses of the acquired entity. If respondents were to renew their request for a poison pill provision, respondents might wish either to include the features incorporated in prior consent order provisions of this nature, or to provide adequate justification for any variances.

1. *Provided, however*, that the corporate respondents may, in the ordinary course of business, make purchases of used equipment for not more than \$500,000.

2. *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.

B. The requirement of prior Commission approval set out in paragraph V.A. shall not apply to the acquisition of any asset 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 a relevant product, or that owns or licenses a branded trademark used in connection with the sale of a relevant product if, at the time of such acquisition, no respondent owns, directly or indirectly, any asset 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 that relevant product, or that owns or licenses a branded trademark used in connection with the sale of that relevant product, other than assets or interests already acquired without prior Commission approval pursuant to paragraphs V.A.1. or V.A.2. *Provided, however*, that for any such acquisition exempted from the requirements of paragraph V.A., by this paragraph V.B., each acquiring respondent shall provide notice to the Commission of such acquisition within ten (10) days of such acquisition.

Commissioner Azcuenaga concurring in the result.

Complaint

116 F.T.C.

IN THE MATTER OF

THE CLOROX COMPANY

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

Docket C-3427. Complaint, May 17, 1993--Decision, May 17, 1993

This consent order prohibits, among other things, a California-based manufacturer of various household and food products from misrepresenting the total fat, saturated fat, cholesterol, or sodium content of any salad dressing.

Appearances

For the Commission: *Ann V. Maher and Marianne Watts.*

For the respondent: *Eugene L. Lambert, Covington & Burling,*
Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that the Clorox Company, a corporation, hereinafter sometimes referred to as respondent, has violated provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it would be in the public interest, alleges:

PARAGRAPH 1. Respondent is a Delaware corporation with its office and principal place of business located at 1221 Broadway, Oakland, California.

PAR. 2. Respondent has advertised, offered for sale, sold, and distributed food products, including Hidden Valley Ranch Take Heart salad dressings (hereinafter, "Take Heart salad dressings").

PAR. 3. Respondent has disseminated or caused to be disseminated advertisements and promotional materials for Take Heart salad dressings, a "food" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.