

IN THE MATTER OF

DEL MONTE FOODS COMPANY, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT*Docket C-3569. Complaint, April 11, 1995--Decision, April 11, 1995*

This consent order requires, among other things, Del Monte Corporation and Pacific Coast Producers to terminate the purchase option agreement and the provisions of the supply agreement that relate to planning for the 1995 canning season within three days after this order becomes final, and to terminate the remaining provisions of the supply agreement by June 30, 1995. In addition, the order requires the California-based respondents to obtain, for ten years, Commission approval before acquiring any stock or assets of a United States canned fruit manufacturer and before entering into a variety of marketing, packing, or other agreements with competitors.

Appearances

For the Commission: *Ronald B. Rowe* and *Marimichael O. Skubel*.

For the respondents: *Terry Calvani* and *Terrence A. Callan*, *Pillsbury, Madison & Sutro*, San Francisco, CA.

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that Del Monte Foods Company, through its wholly-owned subsidiary Del Monte Corporation, and Pacific Coast Producers have entered into an agreement 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, as amended, 15 U.S.C. 45; and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, pursuant to Section 11(b) of the Clayton Act, 15 U.S.C. 21(b), and Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), stating its charges as follows:

THE RESPONDENTS

1. Respondent Del Monte Foods Company is a Maryland corporation, with its office and principal place of business at One Market Plaza, San Francisco, California.

2. Respondent Del Monte Corporation, a wholly-owned subsidiary of Del Monte Foods Company, is a New York corporation, with its office and principal place of business at One Market Plaza, San Francisco, California.

3. Respondent Pacific Coast Producers ("PCP") is a California corporation, with its office and principal place of business at 631 N. Cluff Avenue, Lodi, California.

4. Del Monte Corporation is a leading producer of canned fruit (peaches, pears, fruit cocktail, and fruit mix, which consists primarily of peaches and pears, that are processed and canned) in the United States.

5. PCP is a leading producer of canned fruit in the United States.

6. At all times relevant herein, Del Monte Foods Company and Del Monte Corporation (hereinafter collectively referred to as "Del Monte") and PCP 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 each is a corporation whose business is in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

DEL MONTE/PCP AGREEMENTS

7. On May 4, 1992, Del Monte Foods Company, through its wholly-owned subsidiary Del Monte Corporation, entered into an agreement with PCP, whereby PCP provides to Del Monte virtually all of PCP's output of canned fruit, canned tomatoes, and canned apricots ("Supply Agreement"). The Supply Agreement between Del Monte and PCP provides that PCP prepares, manufactures, processes, packages and loads for shipping canned fruit. Under the Supply Agreement, Del Monte markets the canned fruit output of PCP. Del Monte makes all the pricing decisions; arranges the "bookings," or orders with the customers; and directs PCP as to what products Del Monte will need manufactured for the coming pack year. Del Monte runs the combined canned fruit businesses of the respondents. The Supply Agreement went into effect on July 1, 1992, continues for six

years, and runs for successive five-year periods unless the Supply Agreement is terminated by either party, upon two years' written notice and a \$10 million penalty.

8. On May 4, 1992, Del Monte Foods Company, through its wholly-owned subsidiary Del Monte Corporation, entered into an agreement with PCP pursuant to which Del Monte acquired and PCP conveyed an exclusive and irrevocable option to purchase certain rights in, and title to, certain assets of PCP, including long term contracts with growers ("Option Agreement").

TRADE AND COMMERCE

9. The relevant line of commerce in which to analyze the effects of the Supply Agreement and Option Agreement is the manufacture and sale of canned fruit.

10. The relevant section of the country in which to analyze the effects of the Supply Agreement and the Option Agreement is the United States.

MARKET STRUCTURE

11. The manufacture and sale of canned fruit in the United States is highly concentrated, whether measured by the Herfindahl-Hirschmann Index or by two-firm and four-firm concentration ratios.

ENTRY CONDITIONS

12. Entry into the manufacture and sale of canned fruit in the United States is difficult and would be neither timely, likely, nor sufficient to prevent anticompetitive effects in the relevant line of commerce in the relevant section of the country.

ACTUAL COMPETITION

13. Prior to entering into the Supply Agreement and the Option Agreement, Del Monte and PCP were actual competitors in the relevant line of commerce in the relevant section of the country. As a result of the Supply Agreement and Option Agreement, PCP has been removed from the market as an independent entity, and Del Monte has acquired the business of PCP.

EFFECTS

14. The effect of the Supply Agreement and the Option Agreement may be substantially to lessen competition in the relevant line of commerce in the relevant section of the country in any of the following ways, among others:

- a. By eliminating direct competition between Del Monte and PCP;
- b. By increasing the likelihood that Del Monte will unilaterally exercise market power; or
- c. By increasing the likelihood of, or facilitating, collusion or coordinated action among firms that manufacture and sell canned fruit.

VIOLATIONS CHARGED

15. The agreements entered into by Del Monte and PCP violate Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the supply agreement entered into between Del Monte Foods Company through its wholly-owned subsidiary, Del Monte Corporation, and Pacific Coast Producers (hereinafter collectively "respondents") and respondents, having been furnished with a copy of a draft complaint that the Bureau of Competition proposed to present to the Commission for its consideration, and which, if issued by the Commission, would charge respondents with violations of the Clayton Act and Federal Trade Commission Act; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, 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 the respondents have violated the said Acts, 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, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Del Monte Foods Company is a Maryland corporation, with its office and principal place of business at One Market Plaza, San Francisco, California.
2. Respondent Del Monte Corporation, a wholly-owned subsidiary of Del Monte Foods Company, is a New York corporation, with its office and principal place of business at One Market Plaza, San Francisco, California.
3. Respondent Pacific Coast Producers is a California corporation, with its office and principal place of business at 631 N. Cluff Avenue, Lodi, California.
4. 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.

It is ordered, That, as used in this order, the following definitions shall apply:

A. "*Del Monte Corporation*" means Del Monte Corporation, its predecessors, subsidiaries, divisions, groups and affiliates controlled by Del Monte Corporation, and their respective directors, officers, employees, agents, and their respective successors and assigns.

B. "*Del Monte*" means Del Monte Foods Company, its predecessors, subsidiaries (including Del Monte Corporation), divisions, groups and affiliates controlled by Del Monte Foods Company, and their respective directors, officers, employees, agents, and their respective successors and assigns.

C. "*PCP*" means Pacific Coast Producers, its predecessors, subsidiaries, divisions, groups and affiliates controlled by Pacific Coast Producers, and their respective directors, officers, employees, members, agents, and their respective successors and assigns.

D. "*Respondents*" means PCP and Del Monte (including Del Monte Corporation).

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

F. "*Canned Fruit*" means peaches, pears, fruit cocktail, and fruit mix, which consists primarily of diced peaches and diced pears, that are processed and canned.

G. "*Option Agreement*" means the Option Agreement between Del Monte Corporation and Pacific Coast Producers entered into on May 4, 1992, pursuant to which Del Monte acquired and PCP conveyed an exclusive and irrevocable option to purchase certain rights in, and title to, certain assets of PCP, including long term contracts with growers.

H. "*Supply Agreement*" means the Supply Agreement between Del Monte Corporation and Pacific Coast Producers entered into on May 4, 1992, pursuant to which Del Monte agreed to purchase virtually all of PCP's output of Canned Fruit, canned tomatoes, and canned apricots.

I. "*Spot Market*" means ad hoc inter-canner transactions for Canned Fruit placed on an irregular basis where all Canned Fruit ordered under such an arrangement is delivered within nine weeks of placing the order.

J. "*Tri Valley Growers*" means Tri Valley Growers, its predecessors, subsidiaries, divisions, groups and affiliates controlled by Tri Valley Growers, and their respective directors, officers, employees, members, agents, and their respective successors and assigns.

II.

It is further ordered, That:

A. Within three (3) days after the date this order becomes final, respondents shall terminate the Option Agreement;

B. Within three (3) days after the date this order becomes final, respondents shall declare null and void the following paragraphs of the Supply Agreement: paragraph two, subparagraphs (b), (c), (e),

and (f), paragraph twenty-three, paragraph twenty-four, and paragraph twenty-five as it relates to the budget for canning after June 30, 1995; and

C. On or before June 30, 1995, respondents shall absolutely and in good faith terminate the Supply Agreement.

III.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, Del Monte shall not, without the prior approval of the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

A. Acquire any stock, share capital, equity, or other interest in any concern, corporate or non-corporate, engaged, at the time of such acquisition or within the two years preceding such acquisition, in the manufacture of any type of Canned Fruit in the United States; provided, however, that an acquisition shall be exempt from the requirements of this paragraph if it is solely for the purpose of investment and Del Monte will not hold more than one percent of the shares of any publicly traded class of security; or

B. Acquire any assets, other than in the ordinary course of business, used for or used anytime within the two years preceding such acquisition (and still suitable for use for) the manufacture of any type of Canned Fruit in the United States; provided, however, that an acquisition of assets will be exempt from the requirements of this paragraph if the purchase price of the assets-to-be-acquired is less than \$1,500,000.00, and the purchase price of all assets used for, or previously used for (and still suitable for use for) the manufacture of any type of Canned Fruit in the United States that Del Monte has acquired from the same person (as that term is defined in the premerger notification rules, 16 CFR 801.1(a)(1)) in the twelve-month period preceding the proposed acquisition, when aggregated with the purchase price of the to-be-acquired assets, does not exceed \$1,500,000.

IV.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, unless Del Monte is required to seek

prior approval from the Commission pursuant to paragraph III, and unless Del Monte has obtained such prior approval, Del Monte shall not, without providing advance written notification to the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise, acquire any assets, other than in the ordinary course of business, used for or used anytime within the two years preceding such acquisition for (and still suitable for use for) the manufacture of any type of Canned Fruit in the United States.

The notification required by this paragraph shall be provided to the Commission at least thirty (30) days prior to the acquisition. Such notification shall include a description of the assets to be acquired, the purchase price, the name of the person from whom the assets are to be acquired, including the name of the individual employed by such person that is most knowledgeable about the proposed acquisition, Del Monte's purpose in acquiring the assets from such person, and the use to which Del Monte intends to put such assets. Del Monte shall comply with reasonable requests from Commission staff for additional information within ten (10) days of service of such requests.

V.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, Del Monte shall not, without the prior approval of the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

A. Except with respect to agreements covered by paragraphs VII and VIII, enter into any agreement or other arrangement to purchase or market any type of Canned Fruit with any corporate or non-corporate entity, engaged, at the time of entering into such agreement or other arrangement or within two years preceding entering into such agreement or other arrangement, in the manufacture of any type of Canned Fruit in the United States; provided, however, that entering into such an agreement or other arrangement will be exempt from the requirements of this paragraph if the agreement or other arrangement is for the purchase of Canned Fruit on the Spot Market; or

B. Enter into any agreement or other arrangement with Tri Valley Growers to have any type of Canned Fruit manufactured on Del Monte's behalf.

VI.

It is further ordered, That

A. For a period of five (5) years from the date this order becomes final, Del Monte shall not, without the prior approval of the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise, except with respect to agreements covered by paragraphs V, VII, and VIII, enter into any agreement or other arrangement to have Canned Fruit manufactured on Del Monte's behalf ("co-pack agreement") with any corporate or non-corporate entity, engaged, at the time of entering into such co-pack agreement or within the two years preceding entering into such co-pack agreement, in the manufacture of any type of Canned Fruit in the United States;

B. For a period beginning on the fifth anniversary of the date this order becomes final until ten years from the date this order becomes final, Del Monte shall not, without providing advance written notification to the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise, except with respect to agreements covered by paragraphs V, VII, and VIII, enter into any agreement or other arrangement to have Canned Fruit manufactured on Del Monte's behalf ("co-pack agreement") with any corporate or non-corporate entity, engaged, at the time of entering into such co-pack agreement or within the two years preceding entering into such co-pack agreement, in the manufacture of any type of Canned Fruit in the United States. Said notification shall be provided to the Commission by Del Monte thirty (30) days before the entity begins manufacturing the Canned Fruit pursuant to such co-pack agreement. Said notification shall include a copy of the proposed co-pack agreement and all schedules and attachments. Del Monte shall comply with reasonable requests from Commission staff for additional information concerning such co-pack agreements within ten (10) days of service of such requests.

VII.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, respondents shall not, without the prior approval of the Commission, directly or indirectly, through

subsidiaries, partnerships, or otherwise, enter into an agreement requiring PCP to manufacture any type of Canned Fruit on behalf of Del Monte ("co-pack agreement"); provided, however, that such a co-pack agreement between Del Monte and PCP will be exempt from the requirements of this paragraph if the aggregate of all co-pack agreements entered into in any calendar year meet all of the following criteria: 1) the amount of retail sizes (net weight under two pounds) does not exceed ten percent of PCP's output of Canned Fruit, measured in basic cases (24 2 ½ can sizes), manufactured in the same year as the Canned Fruit manufactured pursuant to the co-pack agreements; 2) the amount of peaches grown by PCP used for the co-pack agreements does not exceed 8,000 tons in any year and none of PCP's peaches is used for retail sizes manufactured pursuant to the co-pack agreements; and 3) the total amount of the Canned Fruit manufactured pursuant to the co-pack agreements a) in each of the years 1995 and 1996 constitutes forty percent or less of PCP's output of Canned Fruit manufactured in each of those years, measured in basic cases; and b) in each year thereafter constitutes thirty percent or less of PCP's output of Canned Fruit manufactured in that year, measured in basic cases.

VIII.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, unless respondents are required to seek prior approval from the Commission pursuant to paragraph VI, and unless respondents have obtained such prior approval, respondents shall not, without providing advance written notification to the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise, enter into a co-pack agreement with each other. Said notification shall be provided to the Commission by PCP on or before March 1 of each year in which Del Monte and PCP plan to enter into a co-pack agreement. Said notification shall include a copy of the proposed co-pack agreement, all schedules and attachments, the amount of the planned co-pack stated in basic cases (24 2 ½ can sizes) and the amount, stated in basic cases, for PCP's planned production of Canned Fruit for the same year.

IX.

It is further ordered, That:

A. Within thirty (30) days after the date this order becomes final and every sixty (60) days thereafter until the Supply Agreement is terminated, respondents shall submit to the Commission a verified written report setting forth in detail the steps taken to comply with paragraph II of the order; and

B. One year (1) from the date this order becomes final, annually for the next nine (9) years on the anniversary of the date this order becomes final, and at such other times as the Commission may require, respondents shall file a verified written report with the Commission setting forth in detail the manner and form in which each has complied and is complying with the provisions of this order.

X.

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

XI.

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

A. 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 such respondent relating to any matters contained in this order; and

B. Upon five days' notice to such respondent and without restraint or interference from it, to interview officers, directors, or employees

of such respondent, who may have counsel present, regarding such matters.

CONCURRING STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III

Some provisions of the present order -- paragraph VII is the extreme example -- seem to prescribe the behavior of Del Monte and Pacific Coast Producers ("PCP") with an unfortunate degree of detail. As a general proposition, I prefer clear, simple, easily enforceable cease-and-desist language over orders that establish complex metes and bounds for permissible conduct.

In this case, however, the order is unlikely to place undue constraints on the parties' operations. In particular, the "regulatory"-looking proviso to paragraph VII clearly constitutes a substantial accommodation -- *i.e.*, an exception to what would otherwise be a moratorium on co-pack arrangements between Del Monte and PCP -- designed to allow the parties to realize efficiencies. To the extent that the parties need even more latitude than that proviso affords, paragraph VII allows them to seek the Commission's approval for a more extensive co-pack arrangement. Thus, if the parties wish to expand their co-pack agreement beyond what the proviso to paragraph VII contemplates, the paragraph operates as it should: it puts on the parties the burden of establishing that a more extensive arrangement will yield net efficiencies.

IN THE MATTER OF

HEALTHSOUTH REHABILITATION CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT*Docket C-3570. Complaint, April 12, 1995--Decision, April 12, 1995*

This consent order requires, among other things, HEALTHSOUTH, an Alabama-based corporation, to divest Nashville Rehabilitation Hospital and related assets in Nashville, TN. within twelve months to a Commission approved entity. If the divestiture is not completed on time, the Commission is permitted to appoint a trustee to complete the transaction. In addition, the consent order requires HEALTHSOUTH to terminate management contracts to operate rehabilitation units at Medical Center East in Birmingham, AL. and Roper Hospital in Charleston, S.C. Also, the consent order requires HEALTHSOUTH, for ten years, to obtain Commission approval before merging, by acquisition, lease, management contract or otherwise, any of its rehabilitation hospital facilities in any of the three areas with any competing facilities in those areas.

Appearances

For the Commission: *Oscar Voss* and *Mark Horoschak*.

For the respondent: *Jeffrey Schmidt* and *Todd Miller*, Pillsbury, Madison & Sutro, Washington, D.C.

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 HEALTHSOUTH Rehabilitation Corporation (hereinafter sometimes referred to as "respondent" or "HEALTHSOUTH") has entered into an agreement whereby HEALTHSOUTH will merge with ReLife, Inc. ("ReLife"); that the merger agreement violates Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, as amended; that the proposed acquisition, if consummated, would violate 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 it appearing to the Commission that a proceeding by it in respect thereof would be in the