

IN THE MATTER OF

KKR ASSOCIATES, L.P.

SET ASIDE 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--Set Aside Order, Oct. 31, 1995*

This order reopens a 1989 consent order--which required KKR Associates to divest, within twelve months, certain assets and businesses associated with RJR Nabisco or Beatrice/Hunt-Wesson, and prohibited them from making certain acquisitions without prior Commission approval--and sets aside the prior approval provisions of the consent order pursuant to the Commission's Prior Approval Policy Statement. Under that Policy Statement, the Commission presumes that the public interest requires reopening the prior approval provisions in outstanding merger orders and making them consistent with the policy.

ORDER SETTING ASIDE ORDER

On July 19, 1995, the respondents, KKR Associates, L.P., et al.,¹ filed their Petition To Reopen Proceedings and To Modify Consent Order ("Petition") in this matter. KKR asks that the Commission reopen and modify the 1989 consent order, as modified in 1993,² 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, and consistent with the Statement of Federal Trade Commission Policy Concerning Prior Approval and Prior Notice Provisions, issued June 21, 1995 ("Prior Approval Policy Statement").³ KKR in its Petition requests that the Commission reopen and set aside the order in Docket No. C-3253 or, in the alternative, reopen and modify the order by deleting the

¹ All respondents in this matter joined in the Petition, and they are: KKR Associates, L.P., a limited partnership; Kohlberg Kravis Roberts & Company, 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 Inc. (for itself and as successor to RJR Nabisco Holdings Group, Inc.), a corporation; RJR Nabisco Holdings Corp. (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 (collectively, "respondents").

² The Commission previously modified the June 13, 1989, consent order in this matter on May 13, 1993.

³ 60 Fed. Reg. 39,745-47 (August 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241, at 20,991 (June 21, 1995).

requirement in paragraph V that KKR seek prior Commission approval for certain acquisitions.⁴ The Petition was on the public record for thirty days; two comments were received.

The Commission, in its Prior Approval Policy Statement, "concluded that a general policy of requiring prior approval is no longer needed," citing the availability of the premerger notification and waiting period requirements of Section 7A of the Clayton Act, commonly referred to as the Hart-Scott-Rodino ("HSR") Act, 15 U.S.C. 18a, to protect the public interest in effective merger law enforcement. Prior Approval Policy Statement, at 2. The Commission announced that it will "henceforth rely on the HSR process as its principal means of learning about and reviewing mergers by companies as to which the Commission had previously found a reason to believe that the companies had engaged or attempted to engage in an illegal merger." As a general matter, "Commission orders in such cases will not include prior approval or prior notification requirements." *Id.*

Narrow prior approval or prior notification provisions may be necessary to protect the public interest in some circumstances. The Commission said in its Prior Approval Policy Statement that "a narrow prior approval provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for the provision, attempt the same or approximately the same merger." The Commission also said that "a narrow prior notification provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for an order, engage in an otherwise unreportable anticompetitive merger." *Id.*, at 3.

The Commission in its Prior Approval Policy Statement announced its intention "to initiate a process for reviewing the retention or modification of these existing requirements" and invited respondents subject to such requirements "to submit a request to reopen the order." *Id.*, at 4. The Commission determined that, "when a petition is filed to reopen and modify an order pursuant to . . . [the

⁴ KKR's Petition incorrectly characterizes the notice obligation of paragraph V.B. of the modified order, *i.e.*, that respondents give the Commission notice of re-entry into a relevant product market within 10 days of such an acquisition, as a "prior notice" requirement. Petition, at 4. The Petition also incorrectly states that by the 1993 modification, the Commission substituted a prior notification provision in the place of a prior approval provision for oriental foods and catsup, but not for packaged nuts. In fact, the 1993 modification excepted from the prior approval obligation an acquisition of any relevant product so long as no respondent owns any interest in a company selling such relevant product (including packaged nuts). In such instance, all that is needed is 10 days' notice of re-entry.

Prior Approval Policy Statement], the Commission will apply a rebuttable presumption that the public interest requires reopening of the order and modification of the prior approval requirement consistent with the policy announced" in the Statement. *Id.*

The presumption is that setting aside the prior approval requirement in paragraph V of the order in Docket No. C-3253 is in the public interest. Nothing to overcome the presumption has been presented, and nothing in the record, including the original complaint and order, and the two public comments, suggests that the exceptions described in the Prior Approval Policy Statement are warranted. Based on the record in this matter, there is no evidence that a prior notification provision is needed. At this time, KKR Associates and its related entities do not own any interest in the relevant products identified in the order, and thus there is no credible risk that in the future KKR Associates or its related entities will engage in anticompetitive acquisitions in the relevant markets. RJR Nabisco remains in the packaged nut market, but based on the record it appears that an acquisition by RJR of any of the competitively significant firms in the packaged nut market likely would be reportable under the HSR Act. Thus, the Commission has determined to reopen the proceeding in Docket No. C-3253 and set aside the order.⁵

Accordingly, *It is hereby ordered*, That this matter be, and it hereby is, reopened, and that the Commission's order issued on June 13, 1989, and modified on May 13, 1993, be, and it hereby is, set aside as of the effective date of this order.

⁵ KKR completed the divestitures required by the order in 1989; the only remaining obligation under the order is the prior approval requirement in paragraph V and the attendant reporting obligations.

Complaint

120 F.T.C.

IN THE MATTER OF

PORT WASHINGTON REAL ESTATE BOARD, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3625. Complaint, Nov. 6, 1995--Decision, Nov. 6, 1995*

This consent order prohibits, among other things, a New York brokerage service from restricting the use of exclusive agency listings, fixing commission splits between listing and selling brokers, restricting or prohibiting members from holding open houses or using "For Sale" signs, restricting brokers from advertising free services to property owners, and excluding from membership brokers who do not operate a full-time office in the territory served by the Board's multiple listing service.

Appearances

For the Commission: *Alan B. Loughnan, Michael J. Bloom and William Baer.*

For the respondent: *Stephen Limmer, Schiffmacher, Cullen, Farrell & Limmer, Port Washington, N.Y.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act (15 U.S.C. 41 *et seq.*), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Port Washington Real Estate Board, Inc. (hereinafter "PWREB" or "respondent"), a corporation, has violated the provisions of Section 5 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint stating its charges as follows:

PARAGRAPH 1. As used in this complaint:

(1) *"Multiple listing service"* means a clearinghouse through which member real estate brokerage firms exchange information on listings of real estate properties and share commissions with other members.