

Complaint

IN THE MATTER OF

PHILIP MORRIS COMPANIES, INC., ET AL.

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

Docket C-3987; File No. 0010215

Complaint, December 7, 2000--Decision, February 22, 2001

This consent order addresses the acquisition by Respondent Philip Morris Companies, Inc. -- which, through its Kraft Foods Inc. subsidiary, is the nation's largest food and beverage company -- of Respondent Nabisco Holdings Corp., the nation's seventh largest food and beverage company. The order, among other things, requires the respondents to divest the Nabisco dry-mix desserts and baking powder businesses -- including the Royal brand of dry-mix gelatin dessert products; the Royal and My-T-Fine brands of dry-mix pudding dessert products; and the Royal brand of no-bake dessert products; and the Davis and Fleischmann's brands of baking power products -- to The Jel Sert Company. The order also requires the respondents to divest the Nabisco intense mints business, together with related Ice Breakers gum and Breath Savers mint businesses, to Hershey Foods Corporation. An accompanying Order to Maintain Assets requires the respondents to preserve and maintain the competitive viability of all the assets required to be divested, in order to insure that their competitive value will be maintained until the assets are actually divested.

Participants

For the Commission: *Joseph Brownman, Erika Brown-Lee, Anthony Saunders, Nathan J. Muyskens, Karen Harris, Phillip L. Broyles, Kenneth A. Libby, Elizabeth A. Piotrowski, Abraham L. Wickelgren, David Balan, Charissa P. Wellford, and Daniel P. O'Brien.*

For the Respondent: *Deborah L. Feinstein, Arnold & Porter, and Joel M Cohen, Davis Polk & Wardwell.*

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Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it

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by said Acts, the Federal Trade Commission, having reason to believe that Philip Morris Companies, Inc. ("Philip Morris") and Nabisco Holdings Corp. ("Nabisco") have entered into an agreement in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and that the terms of such agreement, were they to be implemented, would result in a violation of Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act, 15 U.S.C. § 18, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. Respondent Philip Morris

1. Respondent Philip Morris is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Virginia, with its office and principal place of business located at 120 Park Avenue, New York, New York 10017-5592.
2. Respondent Philip Morris is, and at all times relevant herein has been, among other things, engaged in the production, sales, and distribution of food products to customers located throughout the United States.
3. Respondent Philip Morris, in 1999, had total worldwide sales of all products of approximately \$79 billion, and United States sales of all products of approximately \$48 billion.
4. Respondent Philip Morris is, and at all times relevant herein has been, engaged in commerce, or in activities affecting commerce, within the meaning of Section 1 of the Clayton Act, 15 U.S.C. § 12, and Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

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II. Respondent Nabisco

5. Respondent Nabisco is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 7 Campus Drive, Parsippany, New Jersey 07054-0311.
6. Respondent Nabisco is, and at all times relevant herein has been, engaged in the manufacture, sale, and distribution of food products to customers located throughout the United States.
7. Respondent Nabisco, in 1999, had total worldwide sales of all products of approximately \$8.3 billion, and United States sales of all products of approximately \$5.9 billion.
8. Respondent Nabisco is, and at all times relevant herein has been, engaged in commerce, or in activities affecting commerce, within the meaning of Section 1 of the Clayton Act, 15 U.S.C. § 12, and Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

III. The Proposed Acquisition

9. On or about June 25, 2000, Respondents Philip Morris and Nabisco executed an agreement for Philip Morris to acquire Nabisco. The value of the proposed acquisition is approximately \$19.4 billion.

IV. Trade and Commerce

A. Dry-Mix Gelatin

10. Dry-mix gelatin is a sugar-based or sugar-free, flavored, powdered gelatin product that, when combined with water, produces a flavored gelatin dessert.

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11. Philip Morris, through its Kraft Foods Inc. subsidiary, produces and sells Jell-O brand dry-mix gelatin desserts.
12. Nabisco sells Royal and My-T-Fine brands of dry-mix gelatin desserts. The Royal and My-T-Fine dry-mix gelatin desserts are produced in Sheboygan, Wisconsin, for Nabisco by Enzo Pac, Inc., pursuant to a co-packing agreement.
13. Philip Morris and Nabisco are the only two significant sellers of branded dry-mix gelatin desserts in the United States.
14. Total United States sales (at wholesale) of all dry-mix gelatin desserts are about \$212 million.

B. Dry-Mix Pudding

15. Dry-mix pudding is a sugar-based or sugar-free powder, typically made with flour, sweetener, and flavoring, that when combined with milk or water, produces a soft, thickened, dessert.
16. Philip Morris, through its Kraft Foods Inc. subsidiary, produces and sells Jell-O brand dry-mix pudding.
17. Nabisco sells Royal and My-T-Fine brands of dry mix pudding. The Royal and My-T-Fine dry-mix puddings are produced in Sheboygan, Wisconsin, for Nabisco by Enzo Pac, Inc., pursuant to a co-packing agreement.
18. Philip Morris and Nabisco are the only two significant sellers of branded dry-mix pudding in the United States.
19. Total United States sales (at wholesale) of all dry-mix pudding desserts are about \$202 million.

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C. No-Bake Desserts

20. No-bake desserts are three-stage dessert mixes (for a crust, filling, and topping) that, when combined with milk or water and butter or margarine, produce a cheesecake or other dessert.
21. Philip Morris, through its Kraft Foods Inc. subsidiary, produces and sells Jell-O brand no-bake desserts.
22. Nabisco sells the Royal brand of no-bake desserts. The Royal no-bake desserts are produced in Sheboygan, Wisconsin, for Nabisco by Enzo-Pac, Inc., pursuant to a co-packing agreement.
23. Philip Morris and Nabisco are the only two significant sellers of no-bake desserts.
24. Total United States sales (at wholesale) of all no-bake desserts are about \$56 million.

D. Baking Powder

25. Baking powder is a leavening agent in making baked goods that consists of a carbonate, an acid substance, and starch or flour.
26. Philip Morris, through its Kraft Foods Inc. subsidiary, produces and sells the Calumet brand of baking powder.
27. Nabisco sells the Davis and Fleischmann's brands of baking powder. Nabisco produces its baking powders in Exeter, Canada.
28. Philip Morris and Nabisco are two of only three significant sellers of baking powder in the United States.

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29. Total United States revenues of all baking powder are about \$29 million.

E. Intense Mints

30. Intense mints are strong mint-flavored candies such as Altoids, Ice Breakers, and Cool Blasts, but not including traditional mint candies such as Life Savers.
31. Philip Morris produces and sells the Altoids brand of intense mints. Altoids are produced in the United Kingdom by Callard & Bowser - Suchard Inc., a division of Kraft Foods Inc., which is a subsidiary of Philip Morris.
32. Nabisco sells the Ice Breakers and Cool Blast brands of intense mints. The mix for Ice Breakers intense mints is pre-blended for Nabisco by Beacon Specialty, Grand Haven, Michigan. The mints are then pressed in Nabisco's Holland, Michigan, plant, and packaged for Nabisco by Packaging Coordinators, Philadelphia, Pennsylvania. Cool Blast intense mints are manufactured and packaged for Nabisco in Saltillo, Coahuila, Mexico, by Pissa, pursuant to a co-packing agreement.
33. Philip Morris and Nabisco are two of only three significant sellers of intense mints in the United States.
34. Total United States sales (at wholesale) of all intense mints are about \$250 million.

V. The Relevant Product Markets

35. The relevant product markets in which it is appropriate to assess the effects of the proposed acquisition are as follows:
- (a) the distribution and sale of dry-mix gelatin;
 - (b) the distribution and sale of dry-mix pudding;

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- (c) the distribution and sale of no-bake desserts;
- (d) the distribution and sale of baking powder; and
- (e) the distribution and sale of intense mints.

VI. The Relevant Geographic Markets

36. The relevant geographic markets in which it is appropriate to assess the effects of the proposed acquisition, in each relevant market, are:
- (a) the United States; and
 - (b) smaller areas within the United States.

VII. Concentration

37. The relevant markets are highly concentrated and the proposed acquisition, if consummated, will substantially increase that concentration, as follows:
- (a) In the dry-mix gelatin market, Philip Morris has approximately an 86% share of the market and Nabisco has approximately a 6% share. After the acquisition, the Philip Morris share will increase to approximately 92% and it will control virtually all sales of branded product. The acquisition will increase the Herfindahl-Hirschman Index (“HHI”) by more than 1000 points and result in market concentration of more than 8400 points.
 - (b) In the dry-mix pudding market, Philip Morris has approximately an 82% share and Nabisco has approximately a 9% share. After the acquisition, the Philip Morris share will increase to approximately 91% and it will control virtually all sales of branded product. The acquisition will increase the HHI by more than 1400 points and result in market concentration of more than 8300 points.

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- (c) In the no-bake desserts market, Philip Morris has approximately a 90% share and Nabisco has approximately a 6% share. After the acquisition, the Philip Morris share will increase to approximately 96%. The acquisition will increase the HHI by more than 1000 points and result in market concentration of more than 9200 points.
- (d) In the baking powder market, Philip Morris has approximately a 27% share and Nabisco has approximately a 17% share. After the acquisition, the Philip Morris share will increase to approximately 44% and it will have only one other significant competitor of branded products. The acquisition will increase the HHI by more than 900 points and result in market concentration of more than 4800 points.
- (e) In the intense mints markets, Philip Morris has approximately a 60% share and Nabisco has approximately a 15% share. After the acquisition, the Philip Morris share will increase to approximately 75% and it will have only one other significant competitor. The acquisition will increase the HHI by approximately 1800 points and result in market concentration of more than 5800 points.

VIII. Conditions of Entry

- 38. Entry into each relevant market would not be timely, likely, or sufficient to prevent the anticompetitive effects set forth in Paragraph 39, below.

IX. Effects

- 39. The proposed acquisition will eliminate competition between Philip Morris and Nabisco, and will enhance, increase, and facilitate the continued exercise by Philip Morris of its market power, as follows:
 - (a) By creating or increasing the likelihood that it will exercise unilateral market power; and

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(b)By creating or increasing the likelihood that it will engage in coordinated interaction with its remaining competitors;

each of which increases the likelihood that prices will increase, or not decrease as rapidly or as much as they otherwise would, or that the various services and promotional activities associated with these products will decrease (or not increase as much as they otherwise would) but for the merger.

X. Violations Charged

40. The agreement entered into between Respondents Philip Morris and Nabisco for Philip Morris to acquire Nabisco constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Further, the agreement, if consummated, would be a violation of Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act, 15 U.S.C. § 18.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this seventh day of December, 2000, issues its Complaint against Respondents Philip Morris and Nabisco.

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DECISION AND ORDER

The Federal Trade Commission (“Commission”) having initiated an investigation of the acquisition by Respondent Philip Morris Companies, Inc. of Respondent Nabisco Holdings Corp., and Respondents having been furnished thereafter with draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued, would charge 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 Consent Orders (“Consent Agreement”), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated Section 5 of the Federal Trade Commission Act and that the Acquisition, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint and an Order to Maintain Assets, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comments thereafter filed by interested persons pursuant to Rule 2.34 of the Commission’s Rules of Practice (16 C.F.R. § 2.34),

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now in further conformity with the procedure described in Commission Rule 2.34, the Commission hereby makes the following jurisdictional finding and issues the following Decision and Order (“Order”):

1. Respondent Philip Morris Companies, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Virginia, with its office and principal place of business located at 120 Park Avenue, New York, New York 10017.
2. Respondent Nabisco Holdings Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 7 Campus Drive, Parsippany, New Jersey 07054.
3. 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. “Philip Morris” means Philip Morris Companies, Inc., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Philip Morris Companies, Inc. (including, but not limited to, Kraft Foods, Inc.), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

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- B. “Nabisco” means Nabisco Holdings Corp., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Nabisco Holdings Corp. (including, but not limited to, Nabisco, Inc.), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “Respondents” means Philip Morris and Nabisco, individually and collectively.
- D. “Commission” means Federal Trade Commission.
- E. “Hershey” means Hershey Foods Corporation, a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal place of business at 100 Crystal A Drive, Hershey, Pennsylvania 17033, and any of its subsidiaries, successors and assigns.
- F. “Jel Sert” means The Jel Sert Company, a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois with its principal place of business at Highway 59 and Conde Street, West Chicago, Illinois 60186, and any of its subsidiaries, successors and assigns.
- G. “Acquisition” means the proposed acquisition by Philip Morris of Nabisco as described in the June 25, 2000, Agreement and Plan of Merger between Philip Morris and Nabisco.
- H. “Dry-Mix Desserts” means, individually and collectively, dry-mix gelatin, dry-mix pudding, and no-bake desserts.

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- I. “Dry-mix gelatin” means sugar-based or sugar-free, flavored, powdered gelatin products that, when combined with water, produce a flavored gelatin dessert.
- J. “Dry-mix pudding” means a sugar-based or sugar-free powder, typically made with flour, sweetener, and flavoring, that when combined with milk or water, produces a soft, thickened, dessert.
- K. “No-bake desserts” means three-stage dessert mixes (for a crust, filling, and topping) that, when combined with milk or water and butter or margarine, produce a cheesecake or other dessert.
- L. “Baking Powder” means a powder used as a leavening agent in making baked goods that consists of a carbonate, an acid substance, and starch or flour.
- M. “Intense Mints” means strong mint-flavored candies such as Altoids, Ice Breakers or Cool Blast, but not including traditional mint candies such as Life Savers.
- N. “Nabisco Dry-Mix Desserts Assets” means all assets, businesses and goodwill, tangible and intangible, of Nabisco that are related to the manufacture, marketing or sale of Dry-Mix Desserts in or into the United States, including without limitation, the following:
 - 1. all intellectual property, inventions, technology, trademarks, trade names, trade secrets, know-how, trade dress, service marks, copyrights, patents, formulations, specifications and manufacturing know-how and processes, and quality control data, including, but not limited to all rights of Nabisco to the Royal, Royalito, and My-T-Fine trade names and trademarks in the United States for any product;

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2. all customer lists, vendor lists, catalogs, sales promotion literature and advertising materials, and product literature;
3. all rights, titles and interests 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, consignees, including, without limitation, all contracts with any third party for the supply of Dry-Mix Desserts;
4. all inventory, including raw materials, packaging materials, work-in-process and finished goods;
5. all commitments and orders for the purchase of goods that have not been shipped;
6. all rights under warranties and guarantees, express or implied; and
7. all studies, reports, books, records and files, and all items of prepaid expense.

PROVIDED, HOWEVER, that the “Nabisco,” Red Triangle, and Colophon trademarks, trade names and trade designations are excluded from the definition of Nabisco Dry-Mix Desserts Assets.

- O. “Nabisco Baking Powder Assets” means all assets, businesses and goodwill, tangible and intangible, of Nabisco that are related to the manufacture, marketing or sale of Baking Powder in or into the United States, including without limitation, the following:

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1. all intellectual property, inventions, technology, trademarks, trade names, trade secrets, know-how, trade dress, service marks, copyrights, patents, formulations, specifications and manufacturing know-how and processes, and quality control data, including but not limited to all rights of Nabisco to the Davis and Fleischmann's trade names and trademarks in the United States for any product;
2. all assets utilized in the manufacture and packaging of Baking Powder, including the production equipment located in the Nabisco plant located in Exeter, Ontario, Canada, but not including the plant or any equipment at the plant that is not used in the production of Baking Powder;
3. all customer lists, vendor lists, catalogs, sales promotion literature and advertising materials, and product literature;
4. all rights, titles and interests 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, consignees, including, without limitation, all contracts with any third party for the supply of Baking Powder;
5. all inventory, including raw materials, packaging materials, work-in-process and finished goods;
6. all commitments and orders for the purchase of goods that have not been shipped;
7. all rights under warranties and guarantees, express or implied; and

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8. all studies, reports, books, records and files, and all items of prepaid expense.

PROVIDED, HOWEVER, that the “Nabisco,” Red Triangle, and Colophon trademarks, trade names and trade designations are excluded from the definition of Nabisco Baking Powder Assets.

- P. “Nabisco Intense Mints Assets” means all assets, businesses and goodwill, tangible and intangible, of Nabisco that are related to the manufacture, marketing or sale of Intense Mints in or into the United States, including without limitation, the following:
 1. all intellectual property, inventions, technology, trademarks, trade names, trade secrets, know-how, trade dress, service marks, copyrights, patents, formulations, specifications and manufacturing know-how and processes, and quality control data, including but not limited to all rights of Nabisco to the Ice Breakers, Breath Savers, Breath Savers Cool Blast, and Neutrazin trade names and trademarks in the United States for any product (including but not limited to Ice Breakers gum);
 2. all assets utilized in the manufacture and packaging of Intense Mints, including the production equipment located in the Nabisco plant located in Holland, Michigan, but not including the plant or any equipment at the plant that is not used in the production of Intense Mints;
 3. all customer lists, vendor lists, catalogs, sales promotion literature and advertising materials, and product literature;
 4. all rights, titles and interests in and to the contracts entered into in the ordinary course of business with customers (together with associated bid and performance bonds),

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suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors, consignees, including, without limitation, all contracts with any third party for the supply of Intense Mints;

5. all inventory, including raw materials, packaging materials, work-in-process and finished goods;
6. all commitments and orders for the purchase of goods that have not been shipped;
7. all rights under warranties and guarantees, express or implied; and
8. all studies, reports, books, records and files, and all items of prepaid expense.

PROVIDED, HOWEVER, that the “Nabisco,” Red Triangle, and Colophon trademarks, trade names and trade designations are excluded from the definition of Nabisco Intense Mints Assets.

- Q. “Hershey Agreement” means the Asset and Stock Sale Agreement among Nabisco, Inc., Kraft Foods, Inc., Hershey Foods Corporation and Hershey Chocolate & Confectionery Corporation dated as of November 5, 2000.
- R. “Jel Sert Agreement” means the Asset Sale Agreement between Nabisco, Inc. and The Jel Sert Company dated as of November 5, 2000.
- S. “Acquirer-Dry-Mix Desserts” means Jel Sert, or the entity that acquires the Nabisco Dry-Mix Desserts Assets pursuant to Paragraphs II or V of this Order, as applicable.

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- T. “Dry-Mix Desserts Divestiture Agreement” means all agreements between Respondents and any Acquirer-Dry-Mix Desserts, and all amendments, exhibits, attachments, related agreements (including, but not limited to, any supply agreements) and schedules thereto, including, but not limited to, the Jel Sert Agreement.
- U. “Acquirer-Baking Powder” means Jel Sert, or the entity that acquires the Nabisco Baking Powder Assets pursuant to Paragraphs III or V of this Order, as applicable.
- V. “Baking Powder Divestiture Agreement” means all agreements between Respondents and any Acquirer-Baking Powder, and all amendments, exhibits, attachments, related agreements (including, but not limited to, any supply agreements) and schedules thereto, including, but not limited to, the Jel Sert Agreement.
- W. “Acquirer-Intense Mints” means Hershey, or the entity that acquires the Nabisco Intense Mints Assets pursuant to Paragraphs IV or V of this Order, as applicable.
- X. “Intense Mints Divestiture Agreement” means all agreements between Respondents and any Acquirer-Intense Mints, and all amendments, exhibits, attachments, related agreements (including, but not limited to, any supply agreements) and schedules thereto, including, but not limited to, the Hershey Agreement.
- Y. “Cost” means cost of manufacturing an item, as determined by GAAP, including the actual cost of raw materials, direct labor, reasonably allocated factory overhead and reasonable, actual contracted services. The cost of raw materials and direct labor is the actual cost of materials and labor consumed to manufacture the item.

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II.

IT IS FURTHER ORDERED that:

- A. Respondents shall divest or cause to be divested, absolutely and in good faith, at no minimum price, the Nabisco Dry-Mix Desserts Assets as ongoing businesses.
- B. 1. The divestiture shall be made to Jel Sert no later than ten (10) business days after Respondent Philip Morris consummates the Acquisition, and shall be pursuant to and in accordance with the Jel Sert Agreement.
- 2. PROVIDED, HOWEVER, that if Respondents divest the Nabisco Dry-Mix Desserts Assets to Jel Sert prior to the date this Order becomes final, Respondents will include and enforce a provision in the Jel Sert Agreement requiring that the transaction be rescinded if the Commission determines not to make the Order final or if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that Jel Sert is not an acceptable purchaser of the Nabisco Dry-Mix Desserts Assets or that the manner in which the divestiture was accomplished is not an acceptable manner of divestiture. PROVIDED FURTHER, that if the Commission so notifies Respondents, Respondents shall immediately rescind the transaction with Jel Sert and shall divest the Nabisco Dry-Mix Desserts Assets within 120 days of rescission to an Acquirer-Dry-Mix Desserts that receives the prior approval of the Commission pursuant to a Dry-Mix Desserts Divestiture Agreement that receives the prior approval of the Commission.
- 3. PROVIDED FURTHER, that if the Acquirer-Dry-Mix Desserts expresses a preference not to acquire any portion of the Nabisco Dry-Mix Desserts Assets, and if the

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Commission approves such acquirer and the Dry-Mix Desserts Divestiture Agreement excluding such portion of the Nabisco Dry-Mix Dessert Assets, then Respondents shall not be required to divest that portion of the Nabisco Dry-Mix Desserts Assets.

- C. Respondents shall comply with all the terms of the Dry-Mix Desserts Divestiture Agreement (which agreement shall not vary or contradict, or be construed to vary or contradict, the terms of this Order or the Order to Maintain Assets), and such agreement shall be deemed incorporated by reference into this Order. Failure to comply with the Dry-Mix Desserts Divestiture Agreement shall constitute a failure to comply with this Order.
- D. Pending divestiture of the Nabisco Dry-Mix Desserts Assets, Respondents shall take such actions as are reasonably necessary to maintain the viability and marketability of the Nabisco Dry-Mix Desserts Assets and to prevent the destruction, removal, wasting, deterioration, sale, disposition, transfer, or impairment of any of the Nabisco Dry-Mix Desserts Assets, except for ordinary wear and tear and as would otherwise occur in the ordinary course of business.
- E. The purpose of the divestiture of the Nabisco Dry-Mix Desserts Assets is to ensure the continued use of the Nabisco Dry-Mix Desserts Assets in the same businesses in which they were engaged at the time of the announcement of the proposed Acquisition, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

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IT IS FURTHER ORDERED that:

- A. Respondents shall divest or cause to be divested, absolutely and in good faith, at no minimum price, the Nabisco Baking Powder Assets as an ongoing business.
- B. 1. The divestiture shall be made to Jel Sert no later than ten (10) business days after Respondent Philip Morris consummates the Acquisition, and shall be pursuant to and in accordance with the Jel Sert Agreement.
- 2. PROVIDED, HOWEVER, that if Respondents divest the Nabisco Baking Powder Assets to Jel Sert prior to the date this Order becomes final, Respondents will include and enforce a provision in the Jel Sert Agreement requiring that the transaction be rescinded if the Commission determines not to make the Order final or if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that Jel Sert is not an acceptable purchaser of the Nabisco Baking Powder Assets or that the manner in which the divestiture was accomplished is not an acceptable manner of divestiture. PROVIDED FURTHER, that if the Commission so notifies Respondents, Respondents shall immediately rescind the transaction with Jel Sert and shall divest the Nabisco Baking Powder Assets within 120 days of rescission to an Acquirer-Baking Powder that receives the prior approval of the Commission pursuant to a Baking Powder Divestiture Agreement that receives the prior approval of the Commission.
- 3. PROVIDED FURTHER, that if the Acquirer-Baking Powder expresses a preference not to acquire any portion of the Nabisco Baking Powder Assets, and if the Commission

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approves such acquirer and the Baking Powder Divestiture Agreement excluding such portion of the Nabisco Baking Powder Assets, then Respondents shall not be required to divest that portion of the Nabisco Baking Powder Assets.

- C. Respondents shall comply with all the terms of the Baking Powder Divestiture Agreement (which agreement shall not vary or contradict, or be construed to vary or contradict, the terms of this Order or the Order to Maintain Assets), and such agreement shall be deemed incorporated by reference into this Order. Failure to comply with the Baking Powder Divestiture Agreement shall constitute a failure to comply with this Order.
- D. Pending divestiture of the Nabisco Baking Powder Assets, Respondents shall take such actions as are reasonably necessary to maintain the viability and marketability of the Nabisco Baking Powder Assets and to prevent the destruction, removal, wasting, deterioration, sale, disposition, transfer, or impairment of any of the Nabisco Baking Powder Assets, except for ordinary wear and tear and as would otherwise occur in the ordinary course of business.
- E. At the request of the Acquirer-Baking Powder, Respondents shall supply to the Acquirer-Baking Powder, for such period as the Acquirer-Baking Powder may request, up to one (1) year from the date the Nabisco Baking Powder Assets are divested, on reasonable commercial terms and provisions, at Respondents' Cost or at such lower price as Respondents and the Acquirer-Baking Powder may otherwise agree, for distribution and sale by the Acquirer-Baking Powder, such quantities and types of Baking Powder as may be requested by the Acquirer-Baking Powder from among those manufactured or sold by Nabisco prior to the Acquisition or as may be introduced, developed or modified by the Acquirer-Baking Powder to the extent they can be made by the current Nabisco personnel on the current Nabisco equipment relating to Baking

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Powder with commercially reasonable efforts. Such supply agreement must be approved by the Commission as part of the Baking Powder Divestiture Agreement.

- F. The purpose of the divestiture of the Nabisco Baking Powder Assets is to ensure the continued use of the Nabisco Baking Powder Assets in the same business in which they were engaged at the time of the announcement of the proposed Acquisition, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

IV.

IT IS FURTHER ORDERED that:

- A. Respondents shall divest or cause to be divested, absolutely and in good faith, at no minimum price, the Nabisco Intense Mint Assets as an ongoing business.
- B. 1. The divestiture shall be made to Hershey no later than ten (10) business days after Respondent Philip Morris consummates the Acquisition, and shall be pursuant to and in accordance with the Hershey Agreement.
2. PROVIDED, HOWEVER, that if Respondents divest the Nabisco Intense Mints Assets to Hershey prior to the date this Order becomes final, Respondents will include and enforce a provision in the Hershey Agreement requiring that the transaction be rescinded if the Commission determines not to make the Order final or if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that Hershey is not an acceptable purchaser of the Nabisco Intense Mints Assets or that the manner in which the divestiture was accomplished is not an acceptable manner of divestiture. PROVIDED

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FURTHER, that if the Commission so notifies Respondents, Respondents shall immediately rescind the transaction with Hershey and shall divest the Nabisco Intense Mints Assets within 120 days of rescission to an Acquirer-Intense Mints that receives the prior approval of the Commission pursuant to an Intense Mints Divestiture Agreement that receives the prior approval of the Commission.

3. PROVIDED FURTHER, that if the Acquirer-Intense Mints expresses a preference not to acquire any portion of the Nabisco Intense Mints Assets, and if the Commission approves such acquirer and the Intense Mints Divestiture Agreement excluding such portion of the Nabisco Intense Mints Assets, then Respondents shall not be required to divest that portion of the Nabisco Intense Mints Assets.
- C. Respondents shall comply with all the terms of the Intense Mints Divestiture Agreement (which agreement shall not vary or contradict, or be construed to vary or contradict, the terms of this Order or the Order to Maintain Assets), and such agreement shall be deemed incorporated by reference into this Order. Failure to comply with the Intense Mints Divestiture Agreement shall constitute a failure to comply with this Order.
- D. Pending divestiture of the Nabisco Intense Mints Assets, Respondents shall take such actions as are reasonably necessary to maintain the viability and marketability of the Nabisco Intense Mints Assets and to prevent the destruction, removal, wasting, deterioration, sale, disposition, transfer, or impairment of any of the Nabisco Intense Mints Assets, except for ordinary wear and tear and as would otherwise occur in the ordinary course of business.
- E. At the request of the Acquirer-Intense Mints, Respondents shall supply to the Acquirer-Intense Mints, for such period as the Acquirer-Intense Mints may request, up to one (1) year

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from the date the Nabisco Intense Mint Assets are divested, on reasonable commercial terms and provisions, at Respondents' Cost or at such lower price as Respondents and the Acquirer-Intense Mints may otherwise agree, for distribution and sale by the Acquirer-Intense Mints, such quantities and types of Intense Mints as may be requested by the Acquirer-Intense Mints from among those manufactured or sold by Nabisco prior to the Acquisition or as may be introduced, developed or modified by the Acquirer-Intense Mints to the extent they can be made by the current Nabisco personnel on the current Nabisco equipment relating to Intense Mints with commercially reasonable efforts. Such supply agreement must be approved by the Commission as part of the Intense Mints Divestiture Agreement.

- F. The purpose of the divestiture of the Nabisco Intense Mints Assets is to ensure the continued use of the Nabisco Intense Mints Assets in the same business in which they were engaged at the time of the announcement of the proposed Acquisition, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

V.

IT IS FURTHER ORDERED that:

- A. If Respondents have not divested, absolutely and in good faith, the Nabisco Dry-Mix Desserts Assets, the Nabisco Baking Powder Assets, and/or the Nabisco Intense Mints Assets within the time periods required by Paragraphs II, III and IV of this Order, respectively, the Commission may appoint a trustee to divest such of the Nabisco Dry-Mix Desserts Assets, the Nabisco Baking Powder Assets, and/or the Nabisco Intense Mints Assets that have not been divested, in a manner that satisfies the requirements of Paragraphs II, III, and/or IV, as applicable.

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- B. In the event that the Commission or the Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the Respondents to comply with this Order.
- C. If a trustee is appointed by the Commission or a court pursuant to Paragraph V.A. of this Order, Respondents shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, 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. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after receipt of written notice by the staff of the Commission to Respondents of the identity of any proposed trustee, Respondents shall be deemed to have consented to the selection of the proposed trustee. The trustee may be the same person or entity as any trustee appointed pursuant to the Order to Maintain Assets.
 2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the Nabisco Dry-Mix Desserts Assets, the Nabisco Baking Powder Assets, and/or the Nabisco Intense Mints Assets.

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3. Within ten (10) days after appointment of the trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestitures required by this Order.
4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in Paragraph V. C. 3. to accomplish the divestitures, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time or that consents can be obtained in a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend this period only two (2) times.
5. The trustee shall have full and complete access, subject to any legally recognized privilege of Respondents, to the personnel, books, records and facilities related to the Nabisco Dry-Mix Desserts Assets, the Nabisco Baking Powder Assets, and/or the Nabisco Intense Mints Assets or to any other relevant information, as the trustee may request. Respondents shall develop such financial or other information as the trustee may request and shall cooperate with the trustee. Respondents shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondents shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

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6. 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, but shall divest expeditiously at no minimum price. The divestitures shall be made only to an acquirer that receives the prior approval of the Commission, and the divestitures and consents shall be accomplished only in a manner that receives the prior approval of the Commission; provided however, if the trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity or entities selected by Respondents from among those approved by the Commission; provided further, however, that Respondents shall select such entity within five (5) days of receiving written notification of the Commission's approval.
7. The trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestiture 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 Respondents, 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 Nabisco Dry-Mix Desserts Assets, the Nabisco

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Baking Powder Assets, and/or the Nabisco Intense Mints Assets.

8. Respondents shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for or defense of any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.
9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in Paragraph V.A. of this Order.
10. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestitures required by this Order.
11. The trustee shall also divest such additional ancillary assets and businesses and effect such arrangements as are necessary to assure the marketability, viability and competitiveness of the Nabisco Dry-Mix Desserts Assets, the Nabisco Baking Powder Assets, and/or the Nabisco Intense Mints Assets, as applicable.
12. The trustee shall have no obligation or authority to operate or maintain the Nabisco Dry-Mix Desserts Assets, the Nabisco Baking Powder Assets, and/or the Nabisco Intense Mints Assets.

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13. The trustee shall report in writing to Respondents and the Commission every sixty (60) days concerning the trustee's efforts to accomplish the divestitures and to obtain the necessary consents.

VI.

IT IS FURTHER ORDERED that, for a period commencing on the date this Order becomes final and continuing for ten (10) years, Respondents shall not, without providing advance written notification to the Commission, acquire, directly or indirectly, through subsidiaries or otherwise, any ownership, leasehold, or other interest, in whole or in part, in any of the assets required to be divested pursuant to Paragraphs II, III or IV of this Order.

Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as “the Notification”), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of Respondents and not of any other party to the transaction. Respondents shall provide two (2) complete copies (with all attachments and exhibits) of the Notification to the Commission at least thirty (30) days prior to consummating any such transaction (hereinafter referred to as the “first waiting period”). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondents shall not consummate the transaction until twenty (20) days after submitting such additional information or documentary material. Early termination of the waiting periods in this Paragraph may be requested and, where appropriate, granted by letter from the

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Bureau of Competition. Provided, however, that prior notification shall not be required by this Paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

VII.

IT IS FURTHER ORDERED that, within thirty (30) days after the date this Order becomes final and every sixty (60) days thereafter until Respondents have fully complied with the provisions of Paragraphs II through V of this Order, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with Paragraphs II through V of this Order and with the Order to Maintain Assets. Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with Paragraphs II through V of the Order, including a description of all substantive contacts or negotiations relating to the divestitures and the approvals. Respondents shall include in their compliance reports copies, other than of privileged materials, of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning the divestitures and approvals. The final compliance report required by this Paragraph VII shall include a statement that the divestitures have been accomplished in the manner approved by the Commission and shall include the dates the divestitures were accomplished.

VIII.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate Respondents such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any

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other change in the corporation that may affect compliance obligations arising out of the Order.

IX.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondents, Respondents shall permit any duly authorized representative of the Commission:

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

X.

IT IS FURTHER ORDERED that this Order shall terminate on February 22, 2011.

By the Commission.

Order

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission (“Commission”) having initiated an investigation of the proposed acquisition by Respondent Philip Morris Companies, Inc. of Respondent Nabisco Holdings Corp. and Respondents having been furnished thereafter with a copy of a draft of Complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing the proposed Decision and 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 Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated Section 5 of the Federal Trade Commission Act, and that the Acquisition, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act, and that a Complaint should issue stating its charges in that respect, and having determined to accept the executed Consent Agreement and to place such Consent Agreement containing the Decision and Order on the public record for a period of thirty (30) days, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues this Order to Maintain Assets:

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1. Respondent Philip Morris Companies, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Virginia, with its office and principal place of business located at 120 Park Avenue, New York, New York 10017.
2. Respondent Nabisco Holdings Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 7 Campus Drive, Parsippany, New Jersey 07054.
3. 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 to Maintain Assets, the following definitions shall apply:

- D. "Philip Morris" means Philip Morris Companies, Inc., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Philip Morris Companies, Inc.(including, but not limited to, Kraft Foods, Inc.), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- E. "Nabisco" means Nabisco Holdings Corp., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Nabisco Holdings Corp.(including, but not limited to, Nabisco, Inc.), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

Order

- F. “Respondents” means Philip Morris and Nabisco, individually and collectively.
- G. “Commission” means the Federal Trade Commission.
- H. “Acquisition” means the proposed acquisition by Philip Morris of Nabisco as described in the June 25, 2000, Agreement and Plan of Merger between Philip Morris and Nabisco.
- F. “Dry-Mix Desserts” means, individually and collectively, dry-mix gelatin, dry-mix pudding, and no-bake desserts.
- G. “Baking Powder” means a powder used as a leavening agent in making baked goods that consists of a carbonate, an acid substance, and starch or flour.
- H. “Intense Mints” means strong mint-flavored candies such as Altoids, Ice Breakers or Cool Blast, but not including traditional mint candies such as Life Savers.
- I. “Nabisco Dry-Mix Desserts Assets” shall have the same meaning as in the Decision and Order.
- J. “Dry-mix gelatin” means sugar-based or sugar-free, flavored, powdered gelatin products that, when combined with water, produce a flavored gelatin dessert.
- K. “Dry-mix pudding” means a sugar-based or sugar-free powder, typically made with flour, sweetener, and flavoring, that when combined with milk or water, produces a soft, thickened, dessert.
- L. “No-bake desserts” means three-stage dessert mixes (for a crust, filling, and topping) that, when combined with milk or water and butter or margarine, produce a cheesecake or other dessert.

Order

- M. “Nabisco Baking Powder Assets” shall have the same meaning as in the Decision and Order.
- N. “Nabisco Intense Mints Assets” shall have the same meaning as in the Decision and Order.
- O. “Asset Maintenance Trustee” means any trustee appointed pursuant to Paragraph III of this Order to Maintain Assets.
- P. “Divestiture Trustee” means the trustee appointed by the Commission pursuant to Paragraph V of the Decision and Order.
- Q. “Asset Maintenance Period” means the period of time which shall begin on the date Respondents sign the Agreement Containing Consent Orders and shall terminate as provided in Paragraph VI of this Order to Maintain Assets.
- R. “Material Confidential Information” means competitively sensitive or proprietary information not independently known to an entity from sources other than the entity to which the information pertains, and includes, but is not limited to, all customer lists, price lists, marketing methods, patents, technologies, processes, know-how, or other trade secrets.

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

II.

IT IS FURTHER ORDERED that, from the date this Order to Maintain Assets becomes final:

- A. Respondents shall take such actions as are reasonably necessary to maintain the viability and marketability of the Nabisco Dry-Mix Desserts Assets, the Nabisco Baking Powder Assets, and the Nabisco Intense Mints Assets, and to prevent

Order

the destruction, removal, wasting, deterioration, sale, disposition, transfer or impairment of any of the Nabisco Dry-Mix Desserts Assets, the Nabisco Baking Powder Assets, and the Nabisco Intense Mints Assets, except for ordinary wear and tear and as would otherwise occur in the ordinary course of business.

- B. Except to the extent necessary to assure compliance with this Order to Maintain Assets, the Consent Agreement, and the Decision and Order, Respondents shall not allow any person not involved in the management or operations of the Nabisco Dry-Mix Desserts Assets, the Nabisco Baking Powder Assets, or the Nabisco Intense Mints Assets to have access to any Material Confidential Information concerning the Nabisco Dry-Mix Desserts Assets, the Nabisco Baking Powder Assets, or the Nabisco Intense Mints Assets.

III.

IT IS FURTHER ORDERED that:

- A. At any time after the Commission issues this Order to Maintain Assets, the Commission may appoint an Asset Maintenance Trustee to ensure that Respondents comply with their obligations relating to the Nabisco Dry-Mix Desserts Assets, the Nabisco Baking Powder Assets, and the Nabisco Intense Mints Assets under the terms of Paragraph II of this Order to Maintain Assets and of any corresponding terms in the Consent Agreement and the Decision and Order.
- B. Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities and responsibilities of the Asset Maintenance Trustee appointed pursuant to Paragraph III.A.:
1. The Commission shall select the Asset Maintenance Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed, in writing, including the

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reasons for opposing, the selection of any proposed trustee within ten (10) days after receipt of written notice by the staff of the Commission to Respondents of the identity of any proposed trustee, Respondents shall be deemed to have consented to the selection of the proposed trustee.

2. The Asset Maintenance Trustee shall have the power and authority to monitor Respondents' compliance with the terms of Paragraph II of this Order to Maintain Assets and of any corresponding terms in the Consent Agreement and the Decision and Order.
3. Within ten (10) days after appointment of the Asset Maintenance Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, confers on the Asset Maintenance Trustee all the rights and powers necessary to permit the Asset Maintenance Trustee to monitor Respondents' compliance with the terms of this Order to Maintain Assets, the Consent Agreement, and the Decision and Order.
4. The Asset Maintenance Trustee shall serve for such time as is necessary to monitor Respondents' compliance with the provisions of Paragraph II of this Order.
5. The Asset Maintenance Trustee shall have full and complete access, subject to any legally recognized privilege of Respondents, to Respondents' personnel, books, records, documents, facilities and technical information relating to the Nabisco Dry-Mix Desserts Assets, the Nabisco Baking Powder Assets, and the Nabisco Intense Mints Assets, or to any other relevant information, as the Asset Maintenance Trustee may reasonably request, including, but not limited to, all documents and records kept in the normal course of business that relate to the Nabisco Dry-Mix Desserts Assets, the Nabisco Baking Powder Assets, and the Nabisco Intense Mints Assets. Respondents shall cooperate with any reasonable request of the Asset Maintenance Trustee. Respondents shall take no action to interfere with or impede

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the Asset Maintenance Trustee's ability to monitor Respondents' compliance with this Order to Maintain Assets, the Consent Agreement, and the Decision and Order.

6. The Asset Maintenance Trustee shall serve, without bond or other security, at the expense of the Respondents, on such reasonable and customary terms and conditions as the Commission may set. The Asset Maintenance Trustee shall have the authority to employ, at the expense of Respondents, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Asset Maintenance Trustee's duties and responsibilities.
7. Respondents shall indemnify the Asset Maintenance Trustee and hold the Asset Maintenance Trustee harmless against any losses, claims, damages, liabilities or expenses arising out of, or in connection with, the performance of the Asset Maintenance Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparations for, or defense of, any claim whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities or expenses result from misfeasance, gross negligence, wilful or wanton acts, or bad faith by the Asset Maintenance Trustee.
8. If the Commission determines that the Asset Maintenance Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute trustee in the same manner as provided in Paragraph III.A. of this Order to Maintain Assets.
9. The Commission may on its own initiative or at the request of the Asset Maintenance Trustee issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order to Maintain Assets, the Consent Agreement and the Decision and Order.

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10. The Asset Maintenance Trustee shall report in writing to the Commission concerning compliance by Respondents with the provisions of Paragraph II of this Order to Maintain Assets, the Consent Agreement and the Decision and Order, within twenty (20) days from the date of appointment and every thirty (30) days until the Respondents have completed all the divestitures required by the Decision and Order.

C. The Asset Maintenance Trustee may be the same person appointed as the Divestiture Trustee pursuant to Paragraph V.A. of the Decision and Order in this matter.

IV.

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

V.

IT IS FURTHER ORDERED that for the purposes of determining or securing compliance with this Order to Maintain Assets, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondents, Respondents shall permit any duly authorized representatives of the Commission:

A. Access, during office hours of Respondents and in the presence of counsel, to all facilities, and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession or under the control of Respondents relating to compliance with this Order to Maintain Assets; and

Order

- B. Upon five (5) days' notice to Respondents and without restraint or interference from Respondents, to interview officers, directors, or employees of Respondents, who may have counsel present, regarding such matters.

VI.

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

- A. Three (3) business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or
- B. For the Nabisco Dry-Mix Desserts Assets, three (3) business days after the divestiture of the Nabisco Dry-Mix Desserts Assets pursuant to Paragraph II or Paragraph V of the Decision and Order; for the Nabisco Baking Powder Assets, three (3) business days after the divestiture of the Nabisco Baking Powder Assets pursuant to Paragraph III or Paragraph V of the Decision and Order; and for the Nabisco Intense Mints Assets, three (3) business days after the divestiture of the Nabisco Intense Mints Assets pursuant to Paragraph IV or Paragraph V of the Decision and Order.

By the Commission.

Analysis

**Analysis to Aid Public Comment on the Provisionally
Accepted Consent Order**

Issued when the Commission tentatively approved a proposed consent order on December 7, 2000

I. Introduction

The Federal Trade Commission (“Commission”) has accepted for public comment from Philip Morris Companies, Inc. (“Philip Morris”) and Nabisco Holdings Corp. (“Nabisco”) an *Agreement Containing Consent Orders* (“Proposed Consent Order”). Philip Morris and Nabisco (“Proposed Respondents”) have also reviewed a Draft Complaint that the Commission contemplates issuing. The Commission and the Proposed Respondents have also agreed to an Order to Maintain Assets that requires the Proposed Respondents to maintain the competitive viability of certain assets pending divestiture. The Proposed Consent Order will remedy the likely anticompetitive effects in five relevant product markets arising from the proposed acquisition by Philip Morris of Nabisco.

II. Parties and Transaction

Proposed Respondent Philip Morris is a Virginia corporation with its headquarters and principal place of business at 120 Park Avenue, New York, New York 10017-5592. In 1999, Philip Morris had total worldwide sales of approximately \$79 billion, and total United States sales of approximately \$48 billion. Philip Morris, through its Kraft Foods Inc. subsidiary, is the nation’s largest food and beverage company.

Proposed Respondent Nabisco is a Delaware corporation with its headquarters and principal place of business located at 7 Campus Drive, Parsippany, New Jersey 07054-0311. In 1999, Nabisco had total worldwide sales of approximately \$8.3 billion, and total United States sales of approximately \$5.9 billion. Nabisco is the nation’s seventh largest food and beverage company.

Analysis

On June 25, 2000, Philip Morris and Nabisco entered into an agreement for Philip Morris to acquire Nabisco. The value of the transaction is approximately \$19.4 billion.

III. Proposed Complaint

According to the Draft Complaint that the Commission intends to issue, Philip Morris, through its Kraft Foods subsidiary, and Nabisco compete in the United States to sell and distribute (a) dry-mix gelatin, (b) dry-mix pudding, (c) no-bake desserts, (d) baking powder, and (e) intense mints.

The Commission is concerned that the proposed acquisition would eliminate substantial competition between Philip Morris and Nabisco, and increase concentration substantially, in each relevant market, and result in higher prices. The Commission stated it has reason to believe that the proposed acquisition would have anticompetitive effects and violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act.

IV. Competitive Concerns

A. Dry-Mix Gelatin Market

Total United States sales of all dry-mix gelatin dessert products are about \$212 million. In this market, Philip Morris, through its Jell-O brand, is the largest competitor with about an 86% share, and Nabisco, through its Royal brand, has about a 6% share. After the acquisition, Philip Morris will control approximately 92% of all dry-mix gelatin sales. The proposed acquisition will increase the Herfindahl-Hirschman Index ("HHI"), the customary measure of industry concentration, in the dry-mix gelatin market by more than 1000 points, and result in a market concentration of over 8400 points.

Analysis

B. Dry-Mix Pudding Market

Total United States sales of all dry-mix pudding dessert products are about \$202 million. In this market, Philip Morris, through its Jell-O brand, is the largest competitor with about an 82% share, and Nabisco, through its Royal and My-T-Fine brands, has about a 9% share. After the acquisition, Philip Morris will control approximately 91% of all dry-mix pudding sales. The proposed acquisition will increase the HHI by more than 1400 points and result in a market concentration of over 8300 points.

C. No-Bake Desserts Market

Total United States sales of all no-bake dessert products are about \$56 million. In this market, Philip Morris, through its Jell-O brand, is the largest competitor with about a 90% share, and Nabisco, through its Royal brand, has about a 6% share. After the acquisition, Philip Morris will control approximately 96% of all no-bake dessert sales. The proposed acquisition will increase the HHI by more than 1000 points, and result in a market concentration of over 9200 points.

D. Baking Powder Market

Total United States sales of all baking powder products are about \$29 million. In this market, Philip Morris, through its Calumet brand, has about a 27% share, and Nabisco, with its Davis and Fleischmann's brands, has about a 17% share. After the acquisition, Philip Morris will control approximately 44% of all United States baking powder sales. The proposed acquisition will increase the HHI by more than 900 points and result in market concentration of more than 4800 points.

E. Intense Mints Market

Total United States sales of all intense mints products are about \$250 million. In this market, Philip Morris, through its Altoids brand, has about a 60% share, and Nabisco, with its Ice Breakers

Analysis

and Cool Blast brands, has about a 15% share. After the acquisition, Philip Morris will control approximately 75% of all United States intense mints sales. The proposed acquisition would increase the HHI by approximately 1800 points and result in market concentration of more than 5800 points.

V. The Consent Order

The Proposed Consent Order, if finally issued by the Commission, would settle all of the charges alleged in the Commission's Draft Complaint. Under the terms of the Proposed Consent Order, Philip Morris and Nabisco will be required to divest the Nabisco dry-mix desserts and baking powder businesses to The Jel Sert Company and the intense mints business, together with related Ice Breakers gum and Breath Savers mint businesses, to Hershey Foods Corporation.

Philip Morris and Nabisco will be required to complete the required divestitures within ten (10) business days from the date they consummate their proposed acquisition. In the event Philip Morris and Nabisco do not complete the required divestitures in the time allowed, procedures for the appointment of a trustee to sell the assets have been agreed to and will be triggered. The Proposed Consent Order empowers the trustee to sell such additional ancillary assets as may be necessary to assure the marketability, viability, and competitiveness of the businesses that are required to be divested.

Accompanying the Proposed Consent Order is an *Order to Maintain Assets*. This order requires Philip Morris and Nabisco to preserve and maintain the competitive viability of all of the assets required to be divested in order to insure that the competitive value of these assets will be maintained after the merger but before the assets are actually divested.

VI. Opportunity for Public Comment

This Proposed Consent Order has been placed on the public record for thirty (30) days for receipt of comments from interested

Analysis

persons. Comments received during this period will become part of the public record. After the thirty (30) days, the Commission will again review the Proposed Consent Order and the comments received, and will decide whether it should withdraw from the agreement or make final the Consent Order in the agreement.

By accepting the Proposed Consent Order subject to final approval, the Commission anticipates that the competitive problems alleged in the Draft Complaint will be resolved. The purpose of this analysis is to invite and facilitate public comment concerning the Proposed Consent Order. It is not intended to constitute an official interpretation of the Proposed Consent Order, nor is it intended to modify the terms of the orders in any way.

Complaint

IN THE MATTER OF

INDIGO INVESTMENT SYSTEMS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-4003; File No. 0023015
Complaint, March 7, 2001--Decision, March 7, 2001

This consent order addresses an advertising campaign designed to sell Indigo, a stock trading program, conducted by Respondent Indigo Investment Systems, Inc. -- and Respondent Frank Alfonso, its chief executive officer -- through ads in various media, including investment magazines, Internet banner ads, and three websites. The order, among other things, requires the respondents -- with regard to the sale of any trading program -- to possess a reasonable basis for future representations about the amount of earnings, income, or profit, or the rate of return, that a user of such trading program could reasonably expect to attain; the usual or typical earnings, income, profit, or rate of return, achieved by users of such trading program or any part thereof; or any financial benefit or other benefit of any kind from the purchase or use of such trading program. The order also prohibits respondents, in connection with the sale of any trading program, from misrepresenting that hypothetical or simulated earnings data represent actual trading results; that users of such trading program can reasonably expect to trade with little risk; or the extent of risk to which users of the trading program are exposed. In addition, the order requires future benefits claims to be accompanied by the statement that the type of trading promoted involves high risks, and that traders can lose a significant amount of money.

Participants

For the Commission: *Janet M. Evans, C. Lee Peeler, and Russell Porter.*

For the Respondents: *Glenn Mitchell, Stein, Mitchell & Mezines.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Indigo Investment Systems, Inc., a corporation, and Frank Alfonso, individually and as an officer of the corporation ("respondents"), have violated the provisions of the Federal Trade