

Complaint

IN THE MATTER OF

NESTLÉ HOLDINGS, 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-4082; File No. 0210174
Complaint, June 25, 2003--Decision, November 6, 2003*

This consent order addresses an agreement between Respondent Nestlé Holdings, Inc. -- a subsidiary of Nestle S.A., the world's largest food company -- and Respondent Dreyer's Grand Ice Cream Holdings, Inc. to combine their ice cream businesses. The order, among other things, requires the respondents to divest (1) all assets, businesses, and goodwill related to the manufacture, marketing, or sale of the Dreamery, Godiva and Whole Fruit brands, and (2) all assets related to Nestlé's distribution of frozen dessert products, to CoolBrands International, Inc. or another acquirer approved by the Commission. An accompanying Order to Maintain Assets requires the respondents to maintain the viability and marketability of the assets to be divested. In addition, the order requires the respondents, for one year, to supply CoolBrands with the types and quantities of Dreamery, Godiva, and Whole Fruit products that it requests at a price no greater than the respondents' production costs. The order also requires the respondents, at the request of CoolBrands, for one year to distribute Dreamery, Godiva, and Whole Fruit for CoolBrands in any areas of the U.S. where Respondent Dreyer's previously distributed these products.

Participants

For the Commission: *Renee S. Henning, Jill M. Frumin, Shai A. Littlejohn, Christopher L. Marvine, Samuel I. Sheinberg, Jeanne H. Liu, Catharine M. Moscatelli, Michael G. Cowie, Kenneth A. Libby, Eric D. Rohlck,, Daniel P. Ducore,, Michael Vita, Haj Hadeishi, David Schmidt, Gabe Dagen, and Art Del Buono.*

For the Respondents: *James Rill, Roxann E. Henry, John G. Calender, and Oral Pottinger, Howrey Simon Arnold & White, and Ilene Gotts and Joseph D. Larson, Wachtell, Lipton, Rosen & Katz.*

Complaint

COMPLAINT

Pursuant to the provision of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Nestlé Holdings, Inc. (“Nestlé”), Dreyer’s Grand Ice Cream Holdings, Inc., and Dreyer’s Grand Ice Cream, Inc. (Dreyer’s Grand Ice Cream Holdings, Inc., and Dreyer’s Grand Ice Cream, Inc., are hereinafter referred to as “Dreyer’s”), 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, as amended, 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 Nestle

1. Respondent Nestlé Holdings Inc., is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 383 Main Avenue, Fifth Floor, Norwalk, Connecticut 06851. Nestle Holdings, Inc., is a subsidiary of, and controlled by, Nestlé S.A., a corporation organized, existing, and doing business under and by virtue of the laws of Switzerland, with its principal executive offices located at Avenue Nestlé 55, CH-1800 Vevey, Switzerland.

2. Respondent Nestlé is, and at all times relevant herein has been, among other things, engaged in the production, sales and distribution of superpremium ice cream to customers located throughout the United States.

3. Respondent Nestlé and its affiliates, in 2002, had total worldwide sales of all products of approximately 89.2 billion Swiss francs and United States sales of all products of approximately \$ 11.8 billion. Respondent Nestlé and its affiliates,

Complaint

in 2002, had United States sales of all superpremium ice cream products of approximately \$ 340 million. Nestlé sells superpremium ice cream in the United States under the Häagen-Dazs brand.

4. Respondent Nestlé 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.

II. Respondent Dreyer's

5. Respondent Dreyer's Grand Ice Cream, Inc., is 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 5929 College Avenue, Oakland, California 94618.

6. Respondent Dreyer's Grand Ice Cream Holdings, Inc., is 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 5929 College Avenue, Oakland, California 94618. Respondent Dreyer's Grand Ice Cream Holdings, Inc., as a result of the transaction, will be the parent of Respondent Dreyer's Grand Ice Cream, Inc.

7. Respondent Dreyer's is, and at all times relevant herein has been, among other things, engaged in the production, sales, and distribution of superpremium ice cream to customers located throughout the United States.

8. Respondent Dreyer's, in 2002, had total worldwide sales of all products of approximately \$ 1.3 billion, and United States sales of all products of approximately \$ 1.3 billion. Respondent Dreyer's, in 2002, had United States sales of all superpremium ice cream products of approximately \$ 108 million. Dreyer's sells superpremium ice cream in the United States under the Dreamery, Godiva, and Starbucks brands. Dreyer's planned to introduce a

Complaint

new superpremium ice cream in the United States through its joint venture with Mars, Incorporated.

9. Respondent Dreyer's 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

10. On or about June 16, 2002, Respondents Nestlé and Dreyer's executed an agreement for Respondents Nestlé and Dreyer's to combine their ice cream businesses. The value of the proposed acquisition is approximately \$2.8 billion.

IV. The Relevant Product Market

11. The relevant product market in which it is appropriate to assess the effects of the proposed acquisition is the sale of superpremium ice cream products to the retail channel because, *inter alia*:

- (a) superpremium ice cream contains more butterfat and less air than premium or economy ice creams;
- (b) superpremium ice cream contains more expensive and higher quality ingredients than premium or economy ice creams; and
- (c) superpremium ice cream is priced significantly higher than premium or economy ice creams.

12. Total United States sales (at retail) of all superpremium ice cream products are approximately \$ 604.7 million. The parties sell superpremium ice cream products through different retail channels of distribution, including supermarkets, mass merchants, club stores, and convenience stores.

Complaint

V. The Relevant Geographic Market

13. The relevant geographic market in which it is appropriate to assess the effects of the Acquisition in the relevant line of commerce is the United States or a narrow region therein.

VI. Concentration

14. The relevant market is highly concentrated and the proposed acquisition, if consummated, will substantially increase that concentration, as follows:

(a) In the superpremium ice cream market, Nestlé has approximately a 36.5% share (in dollars) across all channels. Dreyer's has approximately a 19.1% share (in dollars) across all channels.

(b) After the acquisition, Respondents will have a market share of approximately 55.6% (in dollars) of the superpremium ice cream market identified in paragraphs 12 and 13 above.

(c) The acquisition raises the HHI from 3,501 to 4,897, an increase of 1,396 points.

VII. Conditions of Entry

15. Entry into the relevant market would not be likely, or sufficient to prevent the anticompetitive effects in the relevant market because, *inter alia*,

(a) an entrant with a new or unknown brand is unlikely to successfully take a sufficient amount of sales from superpremium ice cream incumbents to remain profitable; and

(b) a superpremium ice cream entrant would face great difficulty developing a nationwide Direct Store Delivery network comparable to either of the merging parties.

Complaint

VIII. Violations Charged

16. Nestlé and Dreyer's compete in the sale of superpremium ice cream in the United States.

17. The effect of the proposed acquisition, if consummated, may be to substantially lessen competition in the sale of superpremium ice cream in the United States in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and Section 7 of the Clayton Act, 15 U.S.C. § 18, in the following ways, among others:

(a) by eliminating direct competition in the sale of superpremium ice cream between Nestlé and Dreyer's;

(b) by eliminating Dreyer's as an important competitive constraint in the relevant market, *e.g.*, when Dreyer's expanded into superpremium ice cream in 1999, the price of other superpremium ice creams decreased significantly;

(c) by increasing the likelihood that the combination of Nestlé and Dreyer's will unilaterally exercise market power; and

(d) by increasing the likelihood of, or facilitation of, collusion or coordinated interaction; each of which increases the likelihood that prices will be higher with the acquisition than they would be absent the acquisition.

IX. Illegal Acquisition

18. The Agreement entered into between Respondents Nestlé and Dreyer's to combine their ice cream businesses constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, 15 U.S.C. § 18.

Complaint

WHEREFORE, THE PREMISES CONSIDERED, THE Federal Trade Commission on this twenty-fifth day of June, 2003, issues its Complaint against Respondents Nestlé and Dreyer's.

By the Commission.

Decision and Order

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition by Respondent Nestlé Holdings, Inc., of certain voting securities of Respondent Dreyer's Grand Ice Cream Holdings, Inc., which as a result of the transaction will be the parent of Respondent Dreyer's Grand Ice Cream, Inc., hereinafter referred to as "Respondents," and Respondents having been furnished thereafter with a copy of a draft 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 Nestlé Holdings, Inc., and Dreyer's Grand Ice Cream, Inc., 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 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

Decision and Order

consideration of public comments, and having carefully considered the comments received from interested persons, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order (“Order”):

1. Respondent Nestlé Holdings, Inc., is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 383 Main Avenue, Fifth Floor, Norwalk, Connecticut 06851. Respondent Nestlé Holdings, Inc., is a subsidiary of and controlled by Nestlé S.A., a corporation organized, existing, and doing business under, and by virtue of, the laws of Switzerland, with its principal executive offices located at Avenue Nestlé 55, CH-1800 Vevey, Switzerland.
2. Respondent Dreyer’s Grand Ice Cream Holdings, Inc., is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 5929 College Avenue, Oakland, California 94618.
3. Respondent Dreyer’s Grand Ice Cream, Inc., is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 5929 College Avenue, Oakland, California 94618.
4. The 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:

Decision and Order

- A. "Nestlé" means Nestlé Holdings Inc., its parent Nestlé S.A., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Nestlé Holdings Inc., including, up until the Acquisition Date, but not limited to, Nestlé Ice Cream Company, LLC ("NICC"), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. "Nestlé S.A." means Nestlé S.A., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Nestlé S.A., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. "Dreyer's" means Dreyer's Grand Ice Cream Holdings, Inc. (referred to as New December, Inc. in the Acquisition Agreement) and Dreyer's Grand Ice Cream, Inc., their directors, officers, employees, agents and representatives, predecessors, successors, and assigns; their joint ventures, subsidiaries, divisions, groups and affiliates controlled by Dreyer's Grand Ice Cream Holdings, Inc. or Dreyer's Grand Ice Cream, Inc., including from and after the Acquisition Date NICC, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- D. "Respondents" means Nestlé and Dreyer's, individually and collectively.
- E. " Commission" means the Federal Trade Commission.
- F. "CoolBrands" means CoolBrands International Inc., a corporation organized, existing and doing business under and by virtue of the laws of Canada, with its office and principal place of business located at 4175 Veterans

Decision and Order

Highway, Ronkonkoma, New York 11779. CoolBrands includes, but is not limited to, Integrated Brands, Inc.

- G. "Acquisition" means the proposed acquisition of voting securities of Dreyer's by Nestlé pursuant to the Agreement and Plan of Merger and Contribution executed by Nestlé and Dreyer's on or about June 16, 2002.
- H. "Acquisition Agreement" means the Agreement and Plan of Merger and Contribution executed by Nestlé and Dreyer's on or about June 16, 2002, as amended, pursuant to which the Acquisition is to be accomplished.
- I. "Acquisition Date" means the date that Nestlé closes its contemplated acquisition of Dreyer's stock pursuant to the Acquisition Agreement.
- J. "Commission Approved Acquirer" means the acquirer of the Assets To Be Divested which receives the prior approval of the Commission pursuant to Paragraph II of the Order, including CoolBrands unless at the time the Commission determines to make this Order final, the Commission notifies Respondents that CoolBrands is not an acceptable purchaser of the Assets To Be Divested.
- K. "Assets To Be Divested" means the Ice Cream Assets To Be Divested and the Distribution Assets. Provided, however, that Assets To Be Divested shall not include accounts receivable and cash and cash equivalents arising or accruing on or prior to the date Respondents divest the Assets To Be Divested; or inventory of raw materials, packaging materials, work in progress or finished goods of NICC.
- L. "Integrated Brands Agreement" means the Amended and Restated Asset Purchase and Sale Agreement by and among Dreyer's Grand Ice Cream, Inc., New December, Inc., Nestle Ice Cream Company, LLC and Integrated Brands, Inc., dated as of March 3, 2003, as amended on March 17,

Decision and Order

2003, April 16, 2003, and June 4, 2003, including all schedules and exhibits.

- M. "Divestiture Agreement" means the Integrated Brands Agreement or any other agreement for the divestiture of the Assets To Be Divested that receives the prior approval of the Commission.
- N. "Godiva ice cream" means all ice cream sold under the name "Godiva."
- O. "Dreamery" means all ice cream sold under the name "Dreamery."
- P. "Whole Fruit" means all sorbet sold under the name "Whole Fruit."
- Q. "Ice Cream Assets To Be Divested" means all of Dreyer's rights, title and interests in the assets related to Dreamery, Godiva ice cream and Whole Fruit that are included within the definition of Ice Cream Assets in the Integrated Brands Agreement. Provided, however, that all of Dreyer's rights, title and interests in all registered and unregistered trademarks, trade names and trade dress related to Dreamery products, Godiva ice cream products, and Whole Fruit products, including, but not limited to all rights of Dreyer's to the Dreamery, Cherry Chip Ba Da Bing, Fortunate Vanilla, Strawberry Fields and What Flavor Do You Dream In trade names and trademarks in the United States for any product, all rights of Dreyer's to the Godiva trade names and trademarks in the United States for any product, including all rights of Dreyer's under the License Agreement dated as of December 1, 1998 between Godiva Chocolatier, Inc., and Dreyer's, as amended, but not including the name, logo, trade dress, trademarks or tradenames of "Dreyer's" or "Edy's," are included within the definition of Ice Cream Assets To Be Divested. Provided further, that a listing of all sales of Dreamery,

Decision and Order

Godiva ice cream or Whole Fruit since 1999, including sales by customer and by stock keeping unit, is included within the definition of Ice Cream Assets To Be Divested.

Provided further, that all other assets of Dreyer's that relate primarily (50% or more as measured by revenue) to Dreamery, Godiva ice cream or Whole Fruit are included within the definition of Ice Cream Assets To Be Divested.

Provided further, that notwithstanding anything to the contrary in the foregoing, manufacturing plants, equipment and distribution assets are excluded from the definition of Ice Cream Assets To Be Divested.

- R. "Distribution Assets" means all assets related to the distribution of frozen dessert products by NICC, including, but not limited to, warehouses, warehouse fixtures and equipment, trucks, forklifts, pallet jacks, pallets and all permits, licenses, approvals and authorizations related to the business of distributing frozen dessert products. Provided, however, that (i) freezer cabinets; (ii) assets not exclusively related to NICC's distribution of frozen products; and (iii) retailer authorizations not related exclusively to the Ice Cream Assets To Be Divested are excluded from the definition of Distribution Assets.
- S. "Mars" means Mars, Incorporated, a corporation organized, existing and doing business under and by virtue of the laws of Delaware, with its office and principal place of business located at 6885 Elm Street, McLean, Virginia 22101. Mars includes, but is not limited to, Masterfoods USA, a division of Mars, Inc.
- T. "Mars Termination Agreement" means the Termination and Transition Agreement dated March 31, 2003, among Dreyer's, Mars and M&M/Mars/Dreyer's Grand Ice Cream LLC.
- U. "Starbucks" means Starbucks Corporation, a corporation organized, existing and doing business under and by virtue

Decision and Order

of the laws of Washington, with its office and principal place of business located at 2401 Utah Avenue South, Seattle, Washington 98134.

- V. “Ben & Jerry’s” means Ben & Jerry’s Homemade Ice Cream, Inc., a corporation organized, existing and doing business under and by virtue of the laws of Vermont, with its office and principal place of business located at 30 Community Drive, South Burlington, Vermont 05403.
- W. “Production Cost” means the cost of manufacturing an item, including the reasonably allocated actual cost of raw materials (which includes packaging), direct labor, and reasonably allocated factory overhead.
- X. “Service Cost” means the direct material, labor and out of pocket expenses, including reasonably allocated overhead, incurred to provide the service.
- Y. “Administrative Services” means provision of certain administrative services, including but not limited to, order processing, warehousing, shipping, accounting, and information transitioning services.
- Z. “Non-Public Commission Approved Acquirer Information” means any proprietary information of the Commission Approved Acquirer related to the Assets To Be Divested or the business of the Commission Approved Acquirer obtained by Respondents in the course of fulfilling its obligations under the Order.
- AA. “Person” means any individual, partnership, firm, corporation, association, trust, unincorporated organization or other entity.

Decision and Order

II.

IT IS FURTHER ORDERED that:

- A. Respondents shall divest the Assets To Be Divested, as on-going businesses, absolutely and in good faith, at no minimum price, to CoolBrands pursuant to and in accordance with the Divestiture Agreement no later than the later of (i) July 1, 2003 or (ii) ten (10) days after the Acquisition Date. Provided, however, that from and after the Acquisition Date, this obligation shall be the responsibility of Dreyer's. Respondents shall comply with all the terms of the 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. Provided, however, that from and after the Acquisition Date, this obligation shall be the responsibility of Dreyer's. Failure to comply with the Divestiture Agreement shall constitute a failure to comply with this Order. Provided, however, that as to the Distribution Assets, Respondents shall not be obligated to divest those portions of the Distribution Assets that are excluded under the Integrated Brands Agreement or that CoolBrands has elected not to acquire pursuant to the Integrated Brands Agreement. Provided further, that Respondents may license back from CoolBrands the rights to use the "Whole Fruit" name, logo, trademark, and trade dress solely in connection with the manufacture, distribution and sale of fruit bars for a period not to exceed one (1) year. Provided further, that if any document or other material included within the Assets To Be Divested is required to be retained by Respondents by requirements of law, or for tax purposes or for defending lawsuits, Respondents may retain a copy of such materials for use only for such purposes.
- B. Provided, however, that if Respondents divest the Assets To Be Divested to CoolBrands prior to the date this Order

Decision and Order

becomes final, Respondents will include and enforce a provision in the Divestiture 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 CoolBrands is not an acceptable purchaser of the Assets To Be Divested or that the manner in which the divestiture was accomplished is not an acceptable manner of divestiture. Provided, however, that from and after the Acquisition Date, this obligation shall be the responsibility of Dreyer's. Provided further, that if the Commission so notifies Respondents, Respondents shall immediately rescind the transaction with CoolBrands and shall divest the Assets To Be Divested within 120 days of the date the Order becomes final to a Commission Approved Acquirer pursuant to a Divestiture Agreement that receives the prior approval of the Commission. Provided, however, that from and after the Acquisition Date, this obligation shall be the responsibility of Dreyer's. Respondents shall comply with all the terms of the 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 Divestiture Agreement shall constitute a failure to comply with this Order. Provided, however, that from and after the Acquisition Date, this obligation shall be the responsibility of Dreyer's. Provided further, that as to the Distribution Assets, Respondents shall not be obligated to divest those portions of the Distribution Assets that the Commission Approved Acquirer has elected not to acquire pursuant to the Divestiture Agreement. Provided further, that Respondents may license back from the Commission Approved Acquirer the rights to use the "Whole Fruit" name, logo, trademark, and trade dress solely in connection with the manufacture, distribution and sale of fruit bars for a period not to exceed one (1) year. Provided further, that if

Decision and Order

any document or other material included within the Assets To Be Divested is required to be retained by Respondents by requirements of law or for tax purposes or for defending lawsuits, Respondents may retain a copy of such materials for use only for such purposes.

- C. Dreyer's shall obtain the consent of Godiva Chocolatier, Inc., to the assignment of the License Agreement dated as of December 1, 1998 between Godiva Chocolatier, Inc., and Dreyer's, as amended, to the Commission Approved Acquirer prior to closing on the Divestiture Agreement.
- D. Pending divestiture of the Assets To Be Divested, Respondents shall take such actions as are reasonably necessary to maintain the viability and marketability of the Assets To Be Divested and to prevent the destruction, removal, wasting, deterioration, sale, disposition, transfer, or impairment of any of the Assets To Be Divested, except for ordinary wear and tear and as would otherwise occur in the ordinary course of business. Provided, however, that from and after the Acquisition Date, this obligation shall be the responsibility of Dreyer's.
- E. At the request of the Commission Approved Acquirer, for a period not to exceed one (1) year from the date Respondents divest the Assets To Be Divested, Dreyer's shall supply such types and quantities of Dreamery, Godiva ice cream and Whole Fruit as are requested by the Commission Approved Acquirer at a price that does not exceed Dreyer's Production Costs. In supplying product to the Commission Approved Acquirer, Dreyer's shall give priority to the demand for product of the Commission Approved Acquirer.
- F. At the request of the Commission Approved Acquirer, for a period not to exceed one (1) year from the date Respondents divest the Assets To Be Divested, Dreyer's shall distribute Dreamery, Godiva ice cream and Whole Fruit for the Commission Approved Acquirer in any of those areas of the

Decision and Order

country where prior to the Acquisition Dreyer's distributed the products itself at a price that does not exceed Dreyer's Service Costs. In distributing product for the Commission Approved Acquirer, Dreyer's shall utilize its distribution assets in an efficient manner and shall not discriminate against the Commission Approved Acquirer and in favor of its own products. Provided, however, that nothing in this Order shall prohibit Respondents from entering into contracts or arrangements in the ordinary course of business to distribute product for the Commission Approved Acquirer for periods beyond one (1) year.

- G. At the request of the Commission Approved Acquirer, for a period not to exceed one (1) year from the date Respondents divest the Assets To Be Divested, Dreyer's shall provide technical assistance to the Commission Approved Acquirer to enable the Commission Approved Acquirer to manufacture Dreamery, Godiva ice cream and Whole Fruit to the same quality and at the same efficiency as achieved by Dreyer's prior to the Acquisition. In providing technical assistance to the Commission Approved Acquirer, Dreyer's shall charge no more than its Service Cost of providing the technical assistance. Among other things, Dreyer's shall allow the Commission Approved Acquirer reasonable and timely access to Dreyer's manufacturing facilities for the purpose of inspecting manufacturing operations relating to the production of Dreamery, Godiva ice cream and Whole Fruit.
- H. At the request of the Commission Approved Acquirer, for a period not to exceed one (1) year from the date Respondents divest the Assets To Be Divested, Dreyer's shall provide Administrative Services to the Commission Approved Acquirer sufficient to enable the Commission Approved Acquirer to operate the Assets To Be Divested in a viable and competitive manner. In providing Administrative Services to the Commission Approved Acquirer, Dreyer's

Decision and Order

shall charge no more than its Service Cost of providing the Administrative Services.

- I. At the request of the Commission Approved Acquirer, Dreyer's shall enter into an agreement with the Commission Approved Acquirer for a period not to exceed five (5) years whereby Dreyer's will supply sufficient volumes of frozen dessert products to the Commission Approved Acquirer in a manner designed to enable the Commission Approved Acquirer to operate the Distribution Assets at a profit. Entry into and compliance with the Integrated Brands Agreement meets this requirement.
- J. Within ten (10) days of the date this Order becomes final, Dreyer's shall modify the joint venture agreement between Dreyer's and Starbucks to make it a non-exclusive joint venture and allow Starbucks to manufacture, distribute and sell ice cream, including ice cream under the "Starbucks" trade name, apart from the joint venture.
- K. The purpose of the divestiture of the Assets To Be Divested is to ensure the continued use of the Assets To Be Divested in the same business in which such assets were engaged at the time of the announcement of the Acquisition by Respondents and to remedy the lessening of competition that would result from the Acquisition as alleged in the Commission's complaint.

III.

IT IS FURTHER ORDERED that:

- A. Except in the course of performing their obligations under this Order or the Divestiture Agreement, Respondents shall not provide, disclose or otherwise make available any Non-Public Commission Approved Acquirer Information to any Person and shall not use any Non-Public Commission Approved Acquirer Information for any reason or purpose.

Decision and Order

- B. Respondents shall disclose Non-Public Commission Approved Acquirer Information only to those Persons who require such information for the purposes of fulfilling Respondents' obligations under this Order or the Divestiture Agreement, and only such part of the Non-Public Commission Approved Acquirer Information that is so required.
- C. Respondents shall enforce the terms of this Paragraph III as to any Person and take such action as is necessary to cause each such Person to comply with the requirements of this Paragraph III, including all actions that Respondents would take to protect their own trade secrets and proprietary information.
- D. The requirements of this Paragraph III do not apply to that part of the Non-Public Commission Approved Acquirer Information that Respondents demonstrate (i) was or becomes generally available to the public other than as a result of a disclosure by Respondents; (ii) was available, or becomes available, to Respondents on a non-confidential basis, but only if, to the knowledge of Respondents, the source of such information is not in breach of a contractual, legal, fiduciary, or other obligation to maintain the confidentiality of the information; or (iii) was independently developed by Respondents without reference to any Non-Public Commission Approved Acquirer Information.

IV.

IT IS FURTHER ORDERED that:

- A. At any time after Respondents sign the Consent Agreement in this matter, the Commission may appoint an Interim Monitor to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by this Order.

Decision and Order

- B. If an Interim Monitor is appointed pursuant to Paragraph IV.A. of this Order, Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of each Interim Monitor:
1. The Commission shall select the Interim Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed Interim Monitor within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Interim Monitor, Respondents shall be deemed to have consented to the selection of the proposed Interim Monitor;
 2. The Interim Monitor shall have the power and authority to monitor Respondents' compliance with the terms of this Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Interim Monitor in a manner consistent with the purposes of this Order and in consultation with the Commission;
 3. Within ten (10) days after appointment of the Interim Monitor, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, confers on the Interim Monitor all the rights and powers necessary to permit the Interim Monitor to monitor Respondents' compliance with the terms of this Order in a manner consistent with the purposes of this Order;
 4. The Interim Monitor shall serve until the last obligations under Paragraph II of this Order have been fully performed other than any indemnification or breach obligations under such agreements; provided, however, that the Commission may extend or modify this period as may be necessary or appropriate to accomplish the purposes of this Order;

Decision and Order

5. The Interim Monitor 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 research, development and manufacture of Dreamery, Godiva ice Cream or Whole Fruit, or to any other relevant information, as the Interim Monitor may reasonably request, including, but not limited to, all documents and records kept in the normal course of business that relate to the manufacture of Dreamery, Godiva ice Cream or Whole Fruit. Respondents shall cooperate with any reasonable request of the Interim Monitor. Respondents shall take no action to interfere with or impede the Interim Monitor's ability to monitor Respondents' compliance with this Order;
6. The Interim Monitor shall serve, without bond or other security, at the expense of Dreyer's, on such reasonable and customary terms and conditions as the Commission may set. The Interim Monitor will be obligated to sign an appropriate confidentiality agreement relating to performance of the Interim Monitor's duties. The Interim Monitor shall have authority to employ, at the expense of Dreyer's, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Monitor's duties and responsibilities. The Interim Monitor shall account for all expenses incurred, including fees for his or her services, subject to the approval of the Commission;
7. Dreyer's shall indemnify the Interim Monitor and hold the Interim Monitor harmless against any losses, claims, damages, liabilities or expenses arising out of, or in connection with, the performance of the Interim Monitor'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,

Decision and Order

gross negligence, willful or wanton acts, or bad faith by the Interim Monitor;

8. If the Commission determines that the Interim Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Interim Monitor in the same manner as provided in Paragraph IV.A. of this Order.
9. The Commission may on its own initiative or at the request of the Interim Monitor issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order;
10. Respondents shall report to the Interim Monitor in accordance with the requirements of Paragraph IX of this Order and/or as otherwise provided in any trust agreement approved by the Commission. The Interim Monitor shall evaluate the reports submitted to it by the Respondents. Within one (1) month from the date the Interim Monitor receives these reports, the Interim Monitor shall report in writing to the Commission concerning compliance by Respondents with the provisions of this Order. These responsibilities of the Interim Monitor shall continue until the last obligations under the Order have been fully performed, unless otherwise directed by the Commission.

V.

IT IS FURTHER ORDERED that:

- A. If Respondents have not divested, absolutely and in good faith, the Assets To Be Divested within the time period required by Paragraph II of this Order, the Commission may appoint a trustee to divest the Assets To Be Divested in a manner that satisfies the requirements of Paragraph II.
- B. In the event that the Commission or the Attorney General brings an action pursuant to § 5(l) of the Federal Trade

Decision and Order

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 Assets To Be Divested.
 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

Decision and Order

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 Assets To Be Divested 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.
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

Decision and Order

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 Assets To Be Divested.
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.

Decision and Order

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 may also divest such additional ancillary assets and effect such arrangements related to the Assets To Be Divested, as approved by the Commission, that the trustee demonstrates are necessary to accomplish divestiture of the Assets To Be Divested.
12. The trustee shall have no obligation or authority to operate or maintain the Assets To Be Divested.
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 Dreyer's shall allow Mars to terminate its agreements and joint ventures with Dreyer's without paying any termination fees or expenses pursuant to and in accordance with the Mars Termination Agreement. Dreyer's shall comply with all the terms of the Mars Termination 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 Mars Termination Agreement shall constitute a failure to comply with this Order. Prior to the dissolution of the agreements and joint venture between Mars and Dreyer's, as enumerated in the Mars

Decision and Order

Termination Agreement, Dreyer's shall fully comply with its obligations under the agreements and joint venture. In the conduct of its business, Dreyer's will not discriminate against Mars and in favor of its own products in connection with fulfilling its obligations under the agreements and joint venture referred to herein.

VII.

IT IS FURTHER ORDERED that Dreyer's shall allow Ben & Jerry's to terminate its distribution agreement with Dreyer's effective December 31, 2003 without paying any termination fees or expenses, provided that Ben & Jerry's gives written notice to Dreyer's requesting such termination by July 31, 2003. Prior to the termination of the distribution agreement, Dreyer's shall fully comply with its obligations under the agreement. In the conduct of its business, Dreyer's will not discriminate against Ben & Jerry's and in favor of its own products in connection with fulfilling its obligations under the distribution agreement referred to herein.

VIII.

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, (A) any ownership, leasehold, or other interest, in whole or in part, in any of the Assets To Be Divested except as provided in Section 2.4(c) of the Integrated Brands Agreement; or (B) any ownership, leasehold, or other interest, in whole or in part, in any Person engaged in the distribution of ice cream through direct store delivery in the United States (excluding Puerto Rico), where the consideration paid is \$7,500,000 or more.

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

Decision and Order

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 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.

IX.

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.A through II.H. and II.J. of this Order, and annually thereafter on the anniversary of the date this Order becomes final, 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 their respective obligations under this Order and 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

Decision and Order

with 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.

X.

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 the Order.

XI.

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.

Decision and Order

XII.

IT IS FURTHER ORDERED that this Order shall terminate on November 6, 2013.

By the Commission, Commissioner Harbour not participating.

Order

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition by Respondent Nestlé Holdings, Inc., of certain voting securities of Respondent Dreyer's Grand Ice Cream Holdings, Inc., which as a result of the transaction will be the parent of Respondent Dreyer's Grand Ice Cream, Inc., hereinafter referred to as "Respondents," and Respondents having been furnished thereafter with a copy of a draft 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 Nestlé Holdings, Inc., and Dreyer's Grand Ice Cream, Inc., 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 an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft 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 accepted the executed Consent Agreement and placed such Consent Agreement containing the Decision and Order on the public record for a period of thirty (30) days, the

Order

Commission hereby issues its Complaint, makes the following jurisdictional finding and issues this Order to Maintain Assets:

1. Respondent Nestlé Holdings, Inc., is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 383 Main Avenue, Fifth Floor, Norwalk, Connecticut 06851. Respondent Nestlé Holdings, Inc., is a subsidiary of and controlled by Nestlé S.A., a corporation organized, existing, and doing business under, and by virtue of, the laws of Switzerland, with its principal executive offices located at Avenue Nestlé 55, CH-1800 Vevey, Switzerland.
2. Respondent Dreyer's Grand Ice Cream Holdings, Inc., is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 5929 College Avenue, Oakland, California 94618.
3. Respondent Dreyer's Grand Ice Cream, Inc., is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 5929 College Avenue, Oakland, California 94618.
4. The 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:

- A. "Nestlé" means Nestlé Holdings Inc., its parent Nestlé S.A., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by

Order

Nestlé Holdings Inc., including, up until the Acquisition Date, but not limited to, Nestlé Ice Cream Company, LLC ("NICC"), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

- B. "Nestlé S.A." means Nestlé S.A., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Nestlé S.A., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. "Dreyer's" means Dreyer's Grand Ice Cream Holdings, Inc. (referred to as New December, Inc. in the Acquisition Agreement) and Dreyer's Grand Ice Cream, Inc., their directors, officers, employees, agents and representatives, predecessors, successors, and assigns; their joint ventures, subsidiaries, divisions, groups and affiliates controlled by Dreyer's Grand Ice Cream Holdings, Inc. or Dreyer's Grand Ice Cream, Inc., including from and after the Acquisition Date NICC, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- D. "Respondents" means Nestlé and Dreyer's, individually and collectively.
- E. "Commission" means the Federal Trade Commission.
- F. "CoolBrands" means CoolBrands International Inc., a corporation organized, existing and doing business under and by virtue of the laws of Canada, with its office and principal place of business located at 4175 Veterans Highway, Ronkonkoma, New York 11779. CoolBrands includes, but is not limited to, Integrated Brands, Inc.
- G. "Acquisition" means the proposed acquisition of voting securities of Dreyer's by Nestlé pursuant to the Agreement

Order

and Plan of Merger and Contribution executed by Nestlé and Dreyer's on or about June 16, 2002.

- H. "Acquisition Agreement" means the Agreement and Plan of Merger and Contribution executed by Nestlé and Dreyer's on or about June 16, 2002, as amended, pursuant to which the Acquisition is to be accomplished.
- I. "Acquisition Date" means the date that Nestlé closes its contemplated acquisition of Dreyer's stock pursuant to the Acquisition Agreement.
- J. "Commission Approved Acquirer" means the acquirer of the Assets To Be Divested which receives the prior approval of the Commission pursuant to Paragraph II of the Decision and Order, including CoolBrands unless at the time the Commission determines to make the Decision and Order final, the Commission notifies Respondents that CoolBrands is not an acceptable purchaser of the Assets To Be Divested.
- K. "Assets To Be Divested" means the Ice Cream Assets To Be Divested and the Distribution Assets.
- L. "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.

Order

II.

IT IS FURTHER ORDERED that:

- A. Respondents shall take such actions as are reasonably necessary to maintain the viability and marketability of the Assets To Be Divested, and to prevent the destruction, removal, wasting, deterioration, sale, disposition, transfer or impairment of any of the Assets To Be Divested, except for ordinary wear and tear and as would otherwise occur in the ordinary course of business. Provided, however, that from and after the Acquisition Date, this obligation shall be the responsibility of Dreyer's.
- 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 Assets To Be Divested to have access to any Material Confidential Information concerning the Assets To Be Divested.

III.

IT IS FURTHER ORDERED that:

- A. At any time after the Commission issues this Order to Maintain Assets (hereinafter "Order"), the Commission may appoint an Interim Monitor to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by this Order.
- B. If an Interim Monitor is appointed pursuant to Paragraph III.A. of this Order, Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Interim Monitor:

Order

1. The Commission shall select the Interim Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed Interim Monitor within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Interim Monitor, Respondents shall be deemed to have consented to the selection of the proposed Interim Monitor;
2. The Interim Monitor shall have the power and authority to monitor Respondents' compliance with the terms of this Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Interim Monitor in a manner consistent with the purposes of this Order and in consultation with the Commission;
3. Within ten (10) days after appointment of the Interim Monitor, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, confers on the Interim Monitor all the rights and powers necessary to permit the Interim Monitor to monitor Respondents' compliance with the terms of this Order in a manner consistent with the purposes of this Order;
4. The Interim Monitor shall serve until the last obligations under the Order have been fully performed other than any indemnification or breach obligations under such agreements; provided, however, that the Commission may extend or modify this period as may be necessary or appropriate to accomplish the purposes of this Order;
5. The Interim Monitor 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 research, development and manufacture of Dreamery, Godiva ice cream or Whole Fruit, or to any other relevant information,

Order

as the Interim Monitor may reasonably request, including, but not limited to, all documents and records kept in the normal course of business that relate to the manufacture of Dreamery, Godiva ice cream or Whole Fruit. Respondents shall cooperate with any reasonable request of the Interim Monitor. Respondents shall take no action to interfere with or impede the Interim Monitor's ability to monitor Respondents' compliance with this Order;

6. The Interim Monitor shall serve, without bond or other security, at the expense of Respondents, on such reasonable and customary terms and conditions as the Commission may set. The Interim Monitor will be obligated to sign an appropriate confidentiality agreement relating to performance of the Interim Monitor's duties. The Interim Monitor shall have 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 Interim Monitor's duties and responsibilities. The Interim Monitor shall account for all expenses incurred, including fees for his or her services, subject to the approval of the Commission;
7. Respondents shall indemnify the Interim Monitor and hold the Interim Monitor harmless against any losses, claims, damages, liabilities or expenses arising out of, or in connection with, the performance of the Interim Monitor'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, willful or wanton acts, or bad faith by the Interim Monitor;
8. If the Commission determines that the Interim Monitor has ceased to act or failed to act diligently, the Commission may

Order

appoint a substitute Interim Monitor in the same manner as provided in Paragraph III.A. of this Order.

9. The Commission may on its own initiative or at the request of the Interim Monitor issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order;
 10. Respondents shall report to the Interim Monitor in accordance with the requirements of Paragraph III.B. of this Order and/or as otherwise provided in any trust agreement approved by the Commission. The Interim Monitor shall evaluate the reports submitted to it by the Respondents. Within one (1) month from the date the Interim Monitor receives these reports, the Interim Monitor shall report in writing to the Commission concerning compliance by Respondents with the provisions of this Order. These responsibilities of the Interim Monitor shall continue until the last obligations under the Order have been fully performed, unless otherwise directed by the Commission.
- C. The Interim Monitor appointed pursuant to Paragraph III.A. of this Order to Maintain Assets or Paragraph IV.A. of the Decision and Order may be the same person appointed as the 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.

Order

V.

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.

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. Three (3) business days after the divestiture of the Assets To Be Divested pursuant to Paragraph II or Paragraph V of the Decision and Order. Provided, however, that if Respondents divest the Assets To Be Divested to CoolBrands prior to the date the Commission issues the Decision and Order, and if at the time the Commission issues the Decision and Order it notifies Respondents that CoolBrands is not an acceptable acquirer of the Assets To Be Divested or that the manner in which the divestiture was

Order

accomplished was not acceptable, then Respondents must comply with this Order and this Order shall then terminate three (3) business days after the subsequent divestiture of the Assets To Be Divested pursuant to Paragraph II or Paragraph V of the Decision and Order.

By the Commission.

Analysis

Analysis of Proposed Consent Order to Aid Public Comment**I. Introduction**

The Federal Trade Commission (“Commission”) has accepted for public comment from Nestlé Holdings, Inc. (“Nestlé”), Dreyer’s Grand Ice Cream Holdings, Inc., and Dreyer’s Grand Ice Cream, Inc. (“Dreyer’s”) (collectively, “Proposed Respondents”), an Agreement Containing Consent Order (“Proposed Consent Agreement”) including the Decision and Order (“Proposed Order”) and the Order to Maintain Assets. The Proposed Respondents have also reviewed a draft complaint. The Commission has now issued the complaint and Proposed Order. The Proposed Consent Agreement is designed to remedy the likely anticompetitive effects arising from the merger of Nestlé and Dreyer’s.

II. The Parties and the Transaction

Nestlé S.A., the world’s largest food company, is headquartered in Switzerland. Nestlé Holdings, Inc., a wholly owned subsidiary of Nestlé S.A., manufactures, distributes, and sells the Häagen-Dazs brand of superpremium ice cream, as well as such frozen novelty products as Drumstick, Bon Bons, IceScreamers, Dole Fruit Bars, Butterfinger ice cream bars, and the Nestlé Crunch Bar. Sales in 2001 of all Nestlé ice cream products totaled approximately \$800 million.

Dreyer’s manufactures, distributes, and sells the Dreamery brand of superpremium ice cream, as well as the Godiva brand of superpremium ice cream under a long-term license with Godiva Chocolatier, Inc., and the Starbucks brand of superpremium ice cream products under a joint venture with Starbucks Corporation. Dreyer’s also manufactures, distributes and sells such other products as the Dreyer’s brand of premium ice cream in thirteen western states and Texas, the Edy’s brand of premium ice cream throughout the remaining regions of the United States, and the Whole Fruit line of sorbet. Dreyer’s total sales in 2001 were

Analysis

approximately \$1.4 billion. As a result of the transaction, Respondent Dreyer's Grand Ice Cream Holdings, Inc., will be the parent of Respondent Dreyer's Grand Ice Cream, Inc.

On June 16, 2002, Nestlé and Dreyer's signed an Agreement and Plan of Merger and Contribution whereby Nestlé and Dreyer's would combine their ice cream businesses. The transaction will increase Nestlé's interest in Dreyer's from 23 percent to approximately 67 percent. At the time Nestlé and Dreyer's announced the merger, the transaction was valued at approximately \$2.8 billion.

III. The Complaint

The complaint alleges that the relevant line of commerce (*i.e.*, the product market) in which to analyze the acquisition is the sale of superpremium ice cream to the retail channel. Superpremium ice cream contains more butterfat and less air than premium or economy ice creams. Therefore, superpremium ice cream is higher in fat than the other two segments of ice cream. Ice cream also is differentiated on the quality of ingredients, with superpremium containing more expensive and higher quality inputs. Finally, superpremium ice cream is priced significantly higher than premium or economy ice creams. Superpremium ice cream manufacturers set their prices based on various factors, including the price of other superpremium ice creams. When Dreyer's expanded into superpremium ice cream in 1999, the price of other superpremium ice creams declined.

The complaint alleges that the relevant geographic market in which there are competitive problems related to the acquisition is the United States. The superpremium ice cream market is highly concentrated when measured by the Herfindahl-Hirschman Index (commonly referred to as the "HHI").¹ The post-acquisition HHI

¹ The HHI is a measurement of market concentration calculated by summing the squares of the individual market shares

Analysis

would increase over 1,600 points, from 3,501 to 4897 and the merging parties would have a combined market share of over 55%.

The complaint further alleges that entry would not be likely or sufficient to prevent anticompetitive effects in the United States. It would be very difficult for an entrant with a new or unknown brand to successfully take a sufficient amount of sales from superpremium ice cream incumbents to remain profitable. Furthermore, a superpremium ice cream entrant would face great difficulty developing a nationwide Direct Store Delivery (“DSD”) distribution network comparable to either of the merging parties.

The complaint also alleges that Nestlé’s acquisition of Dreyer’s, if consummated, may substantially lessen competition in the relevant line of commerce in the relevant market in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 45, by eliminating direct competition between Nestlé and Dreyer’s; by eliminating Dreyer’s as an important competitive constraint in the relevant market; by increasing the likelihood that the combined Nestlé/Dreyer’s will unilaterally exercise market power; and by increasing the likelihood of, or facilitation of, collusion or coordinated interaction in the United States.

IV. The Terms of the Agreement Containing Consent Order

The Proposed Consent Agreement will remedy the Commission’s competitive concerns about the proposed acquisition. Proposed Consent Agreement Paragraph II.A. requires that Proposed Respondents divest: (1) all assets, businesses, and goodwill related to the manufacture, marketing, or sale of the Dreamery, Godiva and Whole Fruit brands, and (2) all assets related to Nestlé’s distribution of frozen dessert products. These assets, collectively referred to as the “assets to be divested,” will be divested to CoolBrands International, Inc. (“CoolBrands”)

of all participants.

Analysis

no later than ten (10) days after Nestlé acquires Dreyer's. Proposed Respondents are not obligated to divest those Nestlé distribution assets that CoolBrands elects not to acquire. Proposed Respondents may license back from CoolBrands the rights to use the "Whole Fruit" name for fruit bars for a period not to exceed one (1) year.

The Proposed Consent Agreement requires Proposed Respondents to divest Nestlé's distribution assets to CoolBrands because virtually all superpremium ice cream currently is sold through DSD. This means that the distributor physically places the product on retailers' shelves, and the retailer does not purchase the product until after it is actually delivered to the store.

Paragraph II.B. provides that if the Commission determines that CoolBrands is not an acceptable purchaser of the assets to be divested, or if the divestiture is not accomplished in an acceptable manner, Proposed Respondents shall immediately rescind the sale of the assets to be divested to CoolBrands and divest those assets at no minimum price to another purchaser that receives the prior approval of the Commission within 120 days of the date the Order becomes final.

Paragraph II.C. of the Proposed Consent Agreement requires that, prior to divesting, Proposed Respondents obtain the consent of Godiva Chocolatier, Inc. ("Godiva Chocolatier"), to the assignment of the license agreement between Godiva Chocolatier and Dreyer's for the manufacture, distribution and sale of Godiva ice cream to the acquirer.

Paragraph II.D. of the Proposed Consent Agreement requires Proposed Respondents to maintain the viability and marketability of the assets to be divested. The proposed respondents are also required to maintain the assets pursuant to the Order to Maintain Assets. Paragraph II.E. requires that for a period not to exceed one (1) year from the date that CoolBrands obtains the assets to be divested, Proposed Respondents will supply CoolBrands with the types and quantities of Dreamery, Godiva, and Whole Fruit

Analysis

products that CoolBrands requests at a price no greater than Proposed Respondents' production costs. Paragraph II.F. further provides that at the request of CoolBrands, Proposed Respondents will distribute Dreamery, Godiva, and Whole Fruit for CoolBrands for a period not to exceed one (1) year in any areas of the U.S. where Dreyer's previously distributed these products. Paragraph II.G. requires Proposed Respondents to provide technical assistance to CoolBrands, as needed, for a period not to exceed one (1) year. Paragraph II.H. requires Proposed Respondents to provide administrative services to CoolBrands, as needed, for a period not to exceed one (1) year.

Paragraph II.I. requires that, for a period not to exceed five (5) years, Proposed Respondents will supply sufficient volumes of additional ice cream products (*e.g.*, premium ice creams or novelty products) to CoolBrands to enable CoolBrands to profitably distribute Dreamery, Godiva, and Whole Fruit superpremium products. This provision was included in the Proposed Consent Agreement because Nestlé's DSD system handles more products than the Dreamery, Godiva, and Whole Fruit superpremium products that CoolBrands is acquiring, and the provision will enable CoolBrands to operate profitably for a limited term while CoolBrands attempts to attract independent distribution business from unaffiliated third parties.

Paragraph II.J. requires that Proposed Respondents modify the joint venture agreement between Dreyer's and Starbucks to allow Starbucks to manufacture, distribute, and sell the Starbucks brand of ice cream and other ice cream products themselves or in collaboration with other third-parties. Under the existing joint venture agreement between Dreyer's and Starbucks, Dreyer's is the sole manufacturer, distributor and salesman for the Starbucks brand of superpremium ice cream.

Paragraph III limits the ways in which Proposed Respondents may utilize an information it acquires with respect to CoolBrands.

Paragraph IV of the Proposed Consent Agreement allows the

Analysis

Commission to appoint an Interim Monitor to monitor compliance with the terms of this Proposed Order. The Proposed Consent Agreement provides the Monitor Trustee with the power and authority to monitor the Proposed Respondents' compliance with the terms of the Proposed Consent Agreement, and full and complete access to personnel, books, records, documents, and facilities of the Proposed Respondents to fulfill that responsibility. In addition, the Interim Monitor may request any other relevant information that relates to the Proposed Respondents' obligations under the Proposed Consent Agreement. The Proposed Consent Agreement precludes Proposed Respondents from taking any action to interfere with or impede the Interim Monitor's ability to perform his or her responsibilities or to monitor compliance with the Proposed Consent Agreement.

The Interim Monitor may hire such consultants, accountants, attorneys, and other assistants as are reasonably necessary to carry out the Interim Monitor's duties and responsibilities. The Proposed Consent Agreement requires the Proposed Respondents to bear the cost and expense of hiring these assistants.

Paragraph V.A. of the Proposed Consent Agreement authorizes the Commission to appoint a divestiture trustee in the event Nestlé fails to divest the assets as required by the Proposed Consent Agreement.

Paragraph VI. of the Proposed Consent Agreement provides that Proposed Respondents allow, Mars, Incorporated ("Mars"), to terminate its agreements and joint ventures with Dreyer's. Mars' agreements with Dreyer's involved Dreyer's manufacturing and distributing ice cream products for Mars. Mars planned to have Dreyer's manufacture and distribute a new superpremium ice cream for Mars. Mars will now be free to enter this market on their own or as part of a new joint venture, or other arrangement, with a third party.

Paragraph VII. of the Proposed Consent Agreement requires Proposed Respondents to permit Unilever's Ben & Jerry's

Analysis

subsidiary to terminate its distribution agreement with Dreyer's by December 31, 2003. The existing distribution agreement between Dreyer's & Ben & Jerry's required Ben & Jerry's to give Dreyer's approximately nine (9) months notice prior to terminating distribution. This provision will reduce the notice period that Ben & Jerry's must provide.

Paragraph VIII. through XII. detail certain general provisions. Paragraph VIII. prohibits Proposed Respondents from acquiring, without providing the Commission with prior notice, any ownership or other interest in Dreamery, Godiva, or Starbucks superpremium ice cream brands or in any of the Nestlé distribution assets that CoolBrands is acquiring, or other DSD distribution assets. These are the assets that Proposed Respondents are divesting. The provisions regarding prior notice are consistent with the terms used in prior orders. The Proposed Consent Agreement does not restrict the Proposed Respondents from developing any new superpremium brands.

Paragraph IX. requires the Proposed Respondents to file compliance reports with the Commission, the first of which is due within thirty (30) days of the date on which the Proposed Consent Agreement becomes final, and every sixty (60) days thereafter until the divestitures are completed. Paragraph X. provides for notification to the Commission in the event of any changes in the corporate Proposed Respondents. Paragraph XI. requires Proposed Respondents to grant access to any authorized Commission representative for the purpose of determining or securing compliance with the Proposed Consent Agreement. Paragraph XII. terminates the Proposed Consent Agreement after ten (10) years from the date the Proposed Order becomes final.

V. Opportunity for Public Comment

The Proposed Consent Agreement has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the

Analysis

Commission will again review the Proposed Consent Agreement and the comments received and will decide whether it should withdraw from the agreement or make the Proposed Consent Agreement final.

By accepting the Proposed Consent Agreement subject to final approval, the Commission anticipates that the competitive problems alleged in the complaint will be resolved. The purpose of this analysis is to invite public comment on the Proposed Consent Agreement, including the proposed sale of assets to CoolBrands, in order to aid the Commission in its determination of whether to make the Proposed Consent Agreement final. This analysis is not intended to constitute an official interpretation of the Proposed Consent Agreement nor is it intended to modify the terms of the Proposed Consent Agreement in any way.

Complaint

IN THE MATTER OF

SURGICAL SPECIALISTS OF YAKIMA, P.L.L.C., ET AL.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-4101; File No. 0210242**Complaint, November 14, 2003--Decision, November 14, 2003*

This consent order, among other things, prohibits Respondent Surgical Specialists of Yakima ("SSY") -- which has 24 physician members in South Central Washington State that practice in five specialties: Ear Nose and Throat, OB/GYN, Ophthalmology, Plastic Surgery, and General Surgery -- and Cascade Surgical Partners ("CSP") and Respondent Yakima Surgical Associates ("YSA"), which are members of SSY -- from entering into or facilitating any agreement between or among any physicians: (1) to negotiate with payors on any physician's behalf; (2) to deal, to refuse to deal, or to threaten to refuse to deal with payors; (3) regarding the terms of dealing with any payor; or (4) not to deal individually with any payor, or to deal with any payor only through an arrangement involving SSY. The order also prohibits the respondents from facilitating exchanges of information between physicians concerning whether, or on what terms, to deal with a payor, and from attempting to engage in, or from inducing anyone to engage in, any action prohibited by the order. In addition, the order requires Respondent SSY to revoke the membership of either CSP or YSA; to distribute the complaint and order to all physicians who have participated in SSY, and to payors that negotiated or indicated an interest in negotiating contracts with SSY; and to terminate, at any payor's request and without penalty, its current contracts with respect to providing physician services.

Participants

For the Commission: *Joseph Lipinsky, Robert J. Schroeder, Charles A. Harwood, D. Bruce Hoffman, Louis Silvia and Mary T. Coleman.*

For the Respondents: *Douglas C. Ross, Davis Wright Tremaine, LLP.*