

Order

IN THE MATTER OF

NESTLÉ HOLDINGS, INC.

**ORDER REOPENING AND MODIFYING ORDER**

On March 23, 2005, Dreyer's Grand Ice Cream Holdings, Inc., and Dreyer's Grand Ice Cream, Inc. (collectively, "Respondents") filed their "Request to Reopen Proceedings and Modify Decision and Order" ("Request"). Respondents seek to modify certain terms of the divestiture agreements with CoolBrands International Inc. ("CoolBrands") at the request of CoolBrands. Specifically, Respondents seek to modify the Order in Docket No. C-4082 ("Order") to allow Respondents to continue to provide Administrative Services to CoolBrands for an additional one year beyond the twenty-one months provided in Paragraph II.H. of the Order.<sup>1</sup> Respondents also seek prior Commission approval to modify the divestiture agreements to correspond to the requested modifications. Commission approval is required because Respondents were required to divest pursuant to a divestiture agreement that received the prior approval of the Commission. For the reasons stated below, the Commission has determined to grant the Request and has reopened and modified the Order and granted approval to the modifications to the divestiture agreements.<sup>2</sup>

---

<sup>1</sup> Respondents had previously sought and received an extension of this provision from one year to twenty-one months.

<sup>2</sup> In connection with the Request, Respondents requested that the Commission eliminate the public comment period on the Request. Respondents provided no compelling reason for the Commission to vary from its normal procedures. A press release was issued shortly after the Request was filed. The Commission has determined to deny the request to eliminate the comment period.

Order

## **I. BACKGROUND**

This matter arose from Nestlé's 2003 acquisition of Dreyer's, valued at approximately \$2.8 billion. In order to resolve competitive concerns regarding the combination of the parties' ice cream businesses, the Consent Order required Respondents to divest assets and to enter several (confidential) arrangements with CoolBrands. In particular, the Order required the Respondents to divest: (1) all assets, businesses, and goodwill related to the manufacture, marketing, or sale of the Dreamery, Godiva ice cream 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," were divested to CoolBrands on July 5, 2003. Also under the Order, Dreyer's is required to supply CoolBrands with the types and quantities of Dreamery, Godiva ice cream, and Whole Fruit products that CoolBrands requests at a price no greater than Dreyer's production costs for a period not to exceed one (1) year. At the request of CoolBrands, Dreyer's must provide distribution services for the CoolBrands' Dreamery, Godiva ice cream, and Whole Fruit products for a period not to exceed one (1) year in any areas of the U.S. where Dreyer's previously distributed these products. Respondents must also provide technical and administrative services to CoolBrands, as needed, for a period not to exceed one (1) year. Finally, the Respondents must supply sufficient volumes of additional ice cream products to CoolBrands to enable CoolBrands to profitably distribute Dreamery, Godiva ice cream, and Whole Fruit superpremium products, for a period not to exceed five (5) years.

## **II. THE REQUEST**

The impetus for the Respondents' Request was the desire of CoolBrands to have certain changes made to the divestiture agreements to enable it to compete more effectively. The Request seeks to reopen and modify the Order to extend the period under which Dreyer's will provide certain Administrative Services to CoolBrands, pursuant to the Transitional Services Agreement, for

## Order

an additional one year, until April 2006. The current agreement expired on April 1, 2005. CoolBrands explains that the loss of the Weight Watchers ice cream business, the integration of Kraft's yogurt business, and the sudden death of Mr. Richard Smith, an important member of the management team, has strained its management's time and prevented it from assuming the responsibilities covered by the Transitional Services Agreement. Affidavit of David J. Stein, President and CEO of CoolBrands ("Stein Affidavit") at ¶ 5.

### III. STANDARD FOR REOPENING AND MODIFYING A FINAL ORDER

The Order may be reopened and modified on the grounds set forth in § 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b). Section 5(b) provides that the Commission shall reopen an order to consider whether it should be modified if the respondent "makes a satisfactory showing that changed conditions of law or fact" so require.<sup>3</sup> A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of it inequitable or harmful to competition.<sup>4</sup>

---

<sup>3</sup> See *Supplementary Information, Amendment to 16 CFR 2.51(b)*, announced August 15, 2001, ("Amendment").

<sup>4</sup> S. Rep. No. 96-500, 96th Cong., 2d Sess. 9 (1979) (significant changes or changes causing unfair disadvantage); *Louisiana-Pacific Corp.*, Docket No. C-2956, Letter to John C. Hart (June 5, 1986), at 4 (unpublished) ("Hart Letter"). See also *United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992) ("A decision to reopen does not necessarily entail a decision to modify the Order. Reopening may occur even where the petition itself does not plead facts requiring modification.").

Order

Section 5(b) also provides that the Commission may reopen and modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest so requires. Respondents are therefore invited in petitions to reopen to show how the public interest warrants the requested modification.<sup>5</sup> In the case of “public interest” requests, FTC Rule of Practice 2.51(b) requires an initial “satisfactory showing” of how modification would serve the public interest before the Commission determines whether to reopen an order and consider all of the reasons for and against its modification.

A “satisfactory showing” requires, with respect to public interest requests, that the requester make a *prima facie* showing of a legitimate public interest reason or reasons justifying relief. A request to reopen and modify will not contain a “satisfactory showing” if it is merely conclusory or otherwise fails to set forth by affidavit(s) specific facts demonstrating in detail the reasons why the public interest would be served by the modification.<sup>6</sup> This showing requires the requester to demonstrate, for example, that there is a more effective or efficient way of achieving the purposes of the order, that the order in whole or part is no longer needed, or that there is some other clear public interest that would be served if the Commission were to grant the requested relief. In addition, this showing must be supported by evidence that is credible and reliable.

If, after determining that the requester has made the required showing, the Commission decides to reopen the order, the Commission will then consider and balance all of the reasons for and against modification. In no instance does a decision to reopen

---

<sup>5</sup> Hart Letter at 5; 16 C.F.R. § 2.51.

<sup>6</sup> 16 C.F.R. § 2.51.

## Order

an order oblige the Commission to modify it,<sup>7</sup> and the burden remains on the requester in all cases to demonstrate why the order should be reopened and modified. The petitioner's burden is not a light one in view of the public interest in repose and the finality of Commission orders.<sup>8</sup> All information and material that the requester wishes the Commission to consider shall be contained in the request at the time of filing.<sup>9</sup>

#### **IV. THE ORDER WILL BE REOPENED AND MODIFIED IN THE PUBLIC INTEREST**

The Commission has determined to reopen and modify the Order as requested by Respondents. CoolBrands has shown that unanticipated changes in demand for its products have stretched its management resources, and the extension will better enable it to compete in the long term. Dreyer's has already agreed to the extension.

Specifically, CoolBrands recently lost the Weight Watchers ice cream business. Stein Affidavit at ¶ 6. Management was also involved in time-consuming litigation with Weight Watchers over the cancellation of the contract. CoolBrands recently acquired Kraft's yogurt business, and has been working hard to integrate this business. Stein Affidavit at ¶ 7. Mr. Smith's death has also impacted CoolBrands' business, causing a realignment of management duties. Stein Affidavit at ¶ 8. These developments

---

<sup>7</sup> See *United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9<sup>th</sup> Cir. 1992) (reopening and modification are independent determinations).

<sup>8</sup> See *Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

<sup>9</sup> 16 C.F.R. § 2.51(b).

Order

have prevented CoolBrands from taking over the services covered by the Transition Services Agreement.

Respondents seek the modification under either change of fact or public interest grounds. Although the possibility that CoolBrands might lose the Weight Watchers ice cream business and acquire the Kraft yogurt business were not anticipated at the time the Order was entered, it is not clear that these changes to CoolBrands' business are unforeseeable "changes of fact" within the meaning of Section 5(b) of the FTC Act. Nevertheless, holding CoolBrands to the twenty-one month limit on obtaining Administrative Services from Dreyer's, with the resulting disruption to its operations and ability to compete, would likely diminish CoolBrands' competitive effectiveness. It is therefore in the public interest to make the change to enable CoolBrands to continue to compete in the market without disruption of its operations. Moreover, because the extension is designed to benefit the acquirer of the divested assets, and not the respondent, it is clearer that the change is in the public interest. CoolBrands has taken steps to ensure that it will be able to take over these functions by the extended deadline, and has expressed confidence that it will be able to do so. Stein Affidavit at ¶ 13.

Although the Commission has determined that Respondents have satisfied the public interest standard, the case for modification is not overwhelming. The deadlines for transitional services contained in Commission Orders are designed to provide the acquirer of divested assets with a reasonable amount of time to prepare to compete effectively in the market, and are not intended to create a long-term relationship between the seller of the assets and the acquirer. Having now extended the transitional services deadline twice at the request of CoolBrands, it is very unlikely that the Commission would further extend the deadline.

Accordingly,

**IT IS ORDERED**, That this matter be, and it hereby is, reopened; and

Order

**IT IS FURTHER ORDERED**, That paragraph II.H. of the Order be, and it hereby is, modified, as of the effective date of this order, to read as follows:

- H. At the request of the Commission Approved Acquirer, for a period not to exceed thirty- three (33) months 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 shall charge no more than its Service Cost of providing the Administrative Services.

Order

IN THE MATTER OF

**CHICAGO BRIDGE & IRON COMPANY N.V.**

**ORDER APPROVING RESPONDENTS' APPLICATION  
FOR APPROVAL OF MONITOR TRUSTEE AND  
MONITOR TRUSTEE AGREEMENT**

The Commission's Final Order in this matter required Respondents to retain a Monitor Trustee within 30 days of the Commission's Order becoming final. Respondents Chicago Bridge & Iron filed an Application for Approval of Proposed Monitor Trustee and Monitor Trustee Agreement on May 26, 2005. On June 3, 2005, Complaint Counsel filed a response indicating that they do not oppose Respondents' choice of Monitor Trustee and the Monitor Trustee Agreement is acceptable. The Commission has decided to approve Respondents' Application. Accordingly,

**IT IS ORDERED THAT** Respondents' Application to retain Mr. Paul J. Vallero as the Monitor Trustee in this matter is **APPROVED**; and

**IT IS FURTHER ORDERED THAT** the Monitor Trustee Agreement executed between Mr. Vallero and Respondents CB&I is **APPROVED**.

By the Commission.