

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Robert Pitofsky, Chairman**
 Sheila F. Anthony
 Mozelle W. Thompson
 Orson Swindle
 Thomas B. Leary

_____)	
In the Matter of)	
)	
Philip Morris Companies, Inc.,)	
a corporation,)	
)	Docket No. C-3987
and)	
)	
Nabisco Holdings Corp.,)	
a corporation.)	
_____)	

DECISION AND ORDER

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

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts

as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

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

1. Respondent Philip Morris Companies, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Virginia, with its office and principal place of business located at 120 Park Avenue, New York, New York 10017.
2. Respondent Nabisco Holdings Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 7 Campus Drive, Parsippany, New Jersey 07054.
3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondents and the proceeding is in the public interest.

ORDER

I.

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

A.

- B. “Nabisco” means Nabisco Holdings Corp., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Nabisco Holdings Corp. (including, but not limited to, Nabisco, Inc.), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “Respondents” means Philip Morris and Nabisco, individually and collectively.
- D. “Commission” means Federal Trade Commission.
- E. “Hershey” means Hershey Foods Corporation, a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal place of business at 100 Crystal A Drive, Hershey, Pennsylvania 17033, and any of its subsidiaries, successors and assigns.
- F. “Jel Sert” means The Jel Sert Company, a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois with its principal place of business at Highway 59 and Conde Street, West Chicago, Illinois 60186, and any of its subsidiaries, successors and assigns.
- G. “Acquisition” means the proposed acquisition by Philip Morris of Nabisco as described in the June 25, 2000, Agreement and Plan of Merger between Philip Morris and Nabisco.
- H. “Dry-Mix Desserts” means, individually and collectively, dry-mix gelatin, dry-mix pudding, and no-bake desserts.
- I. “Dry-mix gelatin” means sugar-based or sugar-free, flavored, powdered gelatin products that, when combined with water, produce a flavored gelatin dessert.
- J. “Dry-mix pudding” means a sugar-based or sugar-free powder, typically made with flour, sweetener, and flavoring, that when combined with milk or water, produces a soft, thickened, dessert.
- K. “No-bake desserts” means three-stage dessert mixes (for a crust, filling, and topping) that, when combined with milk or water and butter or margarine, produce a cheesecake or other dessert.
- L. “Baking Powder” means a powder used as a leavening agent in making baked goods that consists of a carbonate, an acid substance, and starch or flour.

- M. “Intense Mints” means strong mint-flavored candies such as Altoids, Ice Breakers or Cool Blast, but not including traditional mint candies such as Life Savers.

and manufacturing know-how and processes, and quality control data, including but not limited to all rights of Nabisco to the Davis and Fleischmann's trade names and trademarks in the United States for any product;

2. all assets utilized in the manufacture and packaging of Baking Powder, including the production equipment located in the Nabisco plant located in Exeter, Ontario, Canada, but not including the plant or any equipment at the plant that is not used in the production of Baking Powder;
3. all customer lists, vendor lists, catalogs, sales promotion literature and advertising materials, and product literature;
4. all rights, titles and interests in and to the contracts entered into in the ordinary course of business with customers (together with associated bid and performance bonds), suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors, consignees, including, without limitation, all contracts with any third party for the supply of Baking Powder;
5. all inventory, including raw materials, packaging materials, work-in-process and finished goods;
6. all commitments and orders for the purchase of goods that have not been shipped;
7. all rights under warranties and guarantees, express or implied; and
8. all studies, reports, books, records and files, and all items of prepaid expense.

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

- P. "Nabisco Intense Mints Assets" means all assets, businesses and goodwill, tangible and intangible, of Nabisco that are related to the manufacture, marketing or sale of Intense Mints in or into the United States, including without limitation, the following:
1. all intellectual property, inventions, technology, trademarks, trade names, trade secrets, know-how, trade dress, service marks, copyrights, patents, formulations, specifications and manufacturing know-how and processes, and quality control data, including but not limited to all rights of Nabisco to the Ice Breakers, Breath Savers, Breath Savers Cool Blast, and Neutrazin trade names and trademarks in the United States for any product (including but not limited to Ice Breakers gum);

2. all assets utilized in the manufacture and packaging of Intense Mints, including the production equipment located in the Nabisco plant located in Holland, Michigan, but not including the plant or any equipment at the plant that is not used in the production of Intense Mints;
3. all customer lists, vendor lists, catalogs, sales promotion literature and advertising materials, and product literature;
4. all rights, titles and interests in and to the contracts entered into in the ordinary course of business with customers (together with associated bid and performance bonds), suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors, consignees, including, without limitation, all contracts with any third party for the supply of Intense Mints;
5. all inventory, including raw materials, packaging materials, work-in-process and finished goods;
6. all commitments and orders for the purchase of goods that have not been shipped;
7. all rights under warranties and guarantees, express or implied; and
8. all studies, reports, books, records and files, and all items of prepaid expense.

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

- Q. “Hershey Agreement” means the Asset and Stock Sale Agreement among Nabisco, Inc., Kraft Foods, Inc., Hershey Foods Corporation and Hershey Chocolate & Confectionery Corporation dated as of November 5, 2000.
- R. “Jel Sert Agreement” means the Asset Sale Agreement between Nabisco, Inc. and The Jel Sert Company dated as of November 5, 2000.
- S. “Acquirer-Dry-Mix Desserts” means Jel Sert, or the entity that acquires the Nabisco Dry-Mix Desserts Assets pursuant to Paragraphs II or V of this Order, as applicable.
- T. “Dry-Mix Desserts Divestiture Agreement” means all agreements between Respondents and any Acquirer-Dry-Mix Desserts, and all amendments, exhibits, attachments, related agreements (including, but not limited to, any supply agreements) and schedules thereto, including, but not limited to, the Jel Sert Agreement.

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

II.

IT IS FURTHER ORDERED that:

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

Respondents, Respondents shall immediately rescind the transaction with Jel Sert and shall divest the Nabisco Dry-Mix Desserts Assets within 120 days of rescission to an Acquirer-Dry-Mix Desserts that receives the prior approval of the Commission pursuant to a Dry-Mix Desserts Divestiture Agreement that receives the prior approval of the Commission.

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

2. PROVIDED, HOWEVER, that if Respondents divest the Nabisco Baking Powder Assets to Jel Sert prior to the date this Order becomes final, Respondents will include and enforce a provision in the Jel Sert Agreement requiring that the transaction be rescinded if the Commission determines not to make the Order final or if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that Jel Sert is not an acceptable purchaser of the Nabisco Baking Powder Assets or that the manner in which the divestiture was accomplished is not an acceptable manner of divestiture. PROVIDED FURTHER, that if the Commission so notifies

to the extent they can be made by the current Nabisco personnel on the current Nabisco equipment relating to Baking Powder with commercially reasonable efforts. Such supply agreement must be approved by the Commission as part of the Baking Powder Divestiture Agreement.

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

IV.

IT IS FURTHER ORDERED that:

- A. Respondents shall divest or cause to be divested, absolutely and in good faith, at no minimum price, the Nabisco Intense Mint Assets as an ongoing business.
- B. 1. The divestiture shall be made to Hershey no later than ten (10) business days after Respondent Philip Morris consummates the Acquisition, and shall be pursuant to and in accordance with the Hershey Agreement.
2. PROVIDED, HOWEVER, that if Respondents divest the Nabisco Intense Mints Assets to Hershey prior to the date this Order becomes final, Respondents will include and enforce a provision in the Hershey Agreement requiring that the transaction be

- C. Respondents shall comply with all the terms of the Intense Mints Divestiture Agreement (which agreement shall not vary or contradict, or be construed to vary or contradict, the terms of this Order or the Order to Maintain Assets), and such agreement shall be deemed incorporated by reference into this Order. Failure to comply with the Intense Mints Divestiture Agreement shall constitute a failure to comply with this Order.
- D. Pending divestiture of the Nabisco Intense Mints Assets, Respondents shall take such actions as are reasonably necessary to maintain the viability and marketability of the Nabisco Intense Mints Assets and to prevent the destruction, removal, wasting, deterioration, sale, disposition, transfer, or impairment of any of the Nabisco Intense Mints Assets, except for ordinary wear and tear and as would otherwise occur in the ordinary course of business.
- E. At the request of the Acquirer-Intense Mints, Respondents shall supply to the Acquirer-Intense Mints, for such period as the Acquirer-Intense Mints may request, up to one (1) year from the date the Nabisco Intense Mint Assets are divested, on reasonable commercial terms and provisions, at Respondents' Cost or at such lower price as Respondents and the Acquirer-Intense Mints may otherwise agree, for distribution and sale by the Acquirer-Intense Mints, such quantities and types of Intense Mints as may be requested by the Acquirer-Intense Mints from among those manufactured or sold by Nabisco prior to the Acquisition or as may be introduced, developed or modified by the Acquirer-Intense Mints to the extent they can be made by the current Nabisco personnel on the current Nabisco equipment relating to Intense Mints with commercially reasonable efforts. Such supply agreement must be approved by the Commission as part of the Intense Mints Divestiture Agreement.
- F. The purpose of the divestiture of the Nabisco Intense Mints Assets is to ensure the continued use of the Nabisco Intense Mints Assets in the same business in which they were engaged at the time of the announcement of the proposed Acquisition, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

V.

IT IS FURTHER ORDERED that:

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

- B. In the event that the Commission or the Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this Paragraph shall

5. The trustee shall have full and complete access, subject to any legally recognized privilege of Respondents, to the personnel, books, records and facilities related to the Nabisco Dry-Mix Desserts Assets, the Nabisco Baking Powder Assets, and/or the Nabisco Intense Mints Assets or to any other relevant information, as the trustee may

whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in Paragraph V.A. of this Order.
10. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestitures required by this Order.
11. The trustee shall also divest such additional ancillary assets and businesses and effect such arrangements as are necessary to assure the marketability, viability and competitiveness of the Nabisco Dry-Mix Desserts Assets, the Nabisco Baking Powder

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.

VII.

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

VIII.

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

IX.

IT IS FURTHER ORDERED that, for the purpose of det3 Tw65 Tw (approvals. Respondents shall include

records and documents in the possession or under the control of Respondents relating to any matter contained in this Order; and

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

X.

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

By the Commission.

Donald S. Clark
Secretary

SEAL

ISSUED: February 22, 2001