



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 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:

- 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 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, 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, 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 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

## 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 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 Commission notifies Respondents. 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 Commission notifies Respondents.

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 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 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 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.
- 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:

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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, 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 Commission Act, 15 U.S.C. § 45(l), or any other statute

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 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



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 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 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





