

**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

In the Matter of)	
)	
Philip Morris Companies, Inc.,)	
a corporation,)	
)	File No. 001-0215
and)	
)	
Nabisco Holdings Corp.,)	
a corporation.)	
)	

AGREEMENT CONTAINING CONSENT ORDERS

The Federal Trade Commission (“Commission”), having initiated an investigation of the acquisition of 100% of the voting stock of Nabisco Holdings Corp. (“Nabisco”) by Philip Morris Companies, Inc. (“Philip Morris”), and it now appearing that Philip Morris and Nabisco, hereinafter sometimes referred to as “Proposed Respondents,” are willing to enter into this Agreement Containing Consent Orders (“Consent Agreement”) to divest certain assets and provide for other relief:

IT IS HEREBY AGREED by and between Proposed Respondents, by their duly authorized officers and attorneys, and counsel for the Commission that:

1. Proposed Respondent Philip Morris is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Virginia, with its office and principal place of business located at 120 Park Avenue, New York, New York 10017.
2. Proposed Respondent Nabisco is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 7 Campus Drive, Parsippany, New Jersey 07054.
3. Proposed Respondents admit all the jurisdictional facts set forth in the draft of Complaint here attached.
4. Proposed Respondents waive:
 - a. any further procedural steps;

- b. the requirement that the Commission's Decision and Order and the Order to Maintain Assets, both attached hereto and made a part hereof, contain a statement of findings of fact and conclusions of law;
 - c. all rights to seek judicial review or otherwise to challenge or contest the validity of the Decision and Order or Order to Maintain Assets entered pursuant to this Consent Agreement; and
 - d. any claim under the Equal Access to Justice Act.
5. Proposed Respondents shall submit an initial report at the time that they execute this Consent Agreement and every thirty (30) days thereafter until the Decision and Order becomes final, pursuant to Section 2.33 of the Commission's Rules, 16 C.F.R. § 2.33, signed by the Proposed Respondents setting forth in detail the manner in which the Proposed Respondents have complied with, have prepared to comply with, and will comply with the Decision and Order and the Order to Maintain Assets. Such reports will not become part of the public record unless and until the accompanying Consent Agreement and Decision and Order are accepted by the Commission for public comment.
 6. Because there may be interim competitive harm before the divestitures are completed, and because divestiture or other relief resulting from a proceeding challenging the legality of the proposed acquisition might not be possible, or might be a less than effective remedy, the Commission may issue its Complaint and an Order to Maintain Assets in this matter at any time after it accepts the Consent Agreement for public comment.
 7. This Consent Agreement shall not become part of the public record of the proceeding unless and until it is accepted by the Commission. If this Consent Agreement is accepted by the Commission, it, together with the Complaint contemplated hereby, will be placed on the public record for a period of thirty (30) days and information in respect thereto publicly released. The Commission thereafter may either withdraw its acceptance of this Consent Agreement and so notify Proposed Respondents, in which event it will take such action as it may consider appropriate, or issue or amend its Complaint (as the circumstances may require) and issue its Decision and Order, in disposition of the proceeding.
 8. This Consent Agreement is for settlement purposes only and does not constitute an admission by Proposed Respondents that the law has been violated as alleged in the draft of Complaint here attached, or that the facts as alleged in the draft Complaint, other than jurisdictional facts, are true.
 9. This Consent Agreement contemplates that, if it is accepted by the Commission, the Commission may (1) issue and serve its Complaint corresponding in form and substance with the draft of Complaint here attached, (2) issue and serve its Order to Maintain

Assets, and (3) make information public with respect thereto. If such acceptance is not subsequently withdrawn by the Commission pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission may, without further notice to the Proposed Respondents, issue the attached Decision and Order containing an order to divest in disposition of the proceeding. When final, the Decision and Order and the Order to Maintain Assets shall have the same force and effect and may be altered, modified or set aside in the same manner and within the same time provided by statute for other orders. The Decision and Order and Order to Maintain Assets shall become final upon service. Delivery of the Complaint, Decision and Order and Order to Maintain Assets to Proposed Respondents by any means specified in Commission Rule 4.4(a), 16 C.F.R. § 4.4(a), shall constitute service. The Proposed Respondents waive any right they may have to any other manner of service. The Complaint may be used in construing the terms of the Decision and Order and Order to Maintain Assets, and no agreement, understanding, representation, or interpretation not contained in the Decision and Order, Order to Maintain Assets, or the Consent Agreement may be used to vary or contradict the terms of the Decision and Order or the Order to Maintain Assets.

10. By signing this Consent Agreement, Proposed Respondents represent and warrant that they can comply with the provisions of the attached Decision and Order and the Order to Maintain Assets, and that all parents, subsidiaries, affiliates, and successors necessary to effectuate the full relief contemplated by this Consent Agreement are parties to the Consent Agreement and are bound thereby as if they had signed this Consent Agreement and were made parties to this proceedings and to the orders.
11. Proposed Respondents have read the draft Complaint, Decision and Order, and Order to Maintain Assets contemplated hereby. Proposed Respondents understand that once the Decision and Order and Order to Maintain Assets have been issued, they will be required to file one or more compliance reports showing that they have fully complied with the orders. Proposed Respondents agree to comply with the proposed Decision and Order and Order to Maintain Assets, as applicable, from the date they sign this Consent Agreement. Proposed Respondents understand that they may be liable for civil penalties in the amount provided by law for each violation of the Decision and Order and Order to Maintain Assets, as applicable, after they become final.

Signed this ____ day of November, 2000

PHILIP MORRIS COMPANIES, INC.:

FEDERAL TRADE COMMISSION:

By: _____
G. Penn Holsenbeck
Vice President, Associate General
Counsel and Corporate Secretary

By: _____
Joseph S. Brownman
Attorney
Bureau of Competition

Deborah L. Feinstein
Counsel for Philip Morris
Companies, Inc.

Approved:

Phillip L. Broyles
Assistant Director
Bureau of Competition

NABISCO HOLDINGS CORP.:

By: _____
James A. Kirkman, III
Executive Vice President, General
Counsel and Secretary

Molly S. Boast
Senior Deputy Director
Bureau of Competition

Joel M. Cohen
Counsel for Nabisco Holdings Corp.

Richard G. Parker
Director
Bureau of Competition

**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 -
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, 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 finding and issues the following Decision and Order (“Order”):

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

ORDER

I.

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

- A. “Philip Morris” means Philip Morris Companies, Inc., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Philip Morris Companies, Inc. (including, but not limited to, Kraft Foods, Inc.), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- 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.
- N. “Nabisco Dry-Mix Desserts Assets” means all assets, businesses and goodwill, tangible and intangible, of Nabisco that are related to the manufacture, marketing or sale of Dry-Mix Desserts in or into the United States, including without limitation, the following:
 - 1. all intellectual property, inventions, technology, trademarks, trade names, trade secrets, know-how, trade dress, service marks, copyrights, patents, formulations,

specifications and manufacturing know-how and processes, and quality control data, including, but not limited to all rights of Nabisco to the Royal, Royalito, and My-T-Fine trade names and trademarks in the United States for any product;

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

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

- O. “Nabisco Baking Powder Assets” means all assets, businesses and goodwill, tangible and intangible, of Nabisco that are related to the manufacture, marketing or sale of Baking Powder in or into the United States, including without limitation, the following:
1. all intellectual property, inventions, technology, trademarks, trade names, trade secrets, know-how, trade dress, service marks, copyrights, patents, formulations, specifications and manufacturing know-how and processes, and quality control data, including but not limited to all rights of Nabisco to the Davis and Fleischmann’s trade names and trademarks in the United States for any product;
 2. all assets utilized in the manufacture and packaging of Baking Powder, including the production equipment located in the Nabisco plant located in Exeter, Ontario, Canada, but not including the plant or any equipment at the plant that is not used in the production of Baking Powder;

3. all customer lists, vendor lists, catalogs, sales promotion literature and advertising materials, and product literature;
4. all rights, titles and interests in and to the contracts entered into in the ordinary course of business with customers (together with associated bid and performance bonds), suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors, consignees, including, without limitation, all contracts with any third party for the supply of Baking Powder;
5. all inventory, including raw materials, packaging materials, work-in-process and finished goods;
6. all commitments and orders for the purchase of goods that have not been shipped;
7. all rights under warranties and guarantees, express or implied; and
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.
- E. The purpose of the divestiture of the Nabisco Dry-Mix Desserts Assets is to ensure the continued use of the Nabisco Dry-Mix Desserts Assets in the same businesses in which they were engaged at the time of the announcement of the proposed Acquisition, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

III.

IT IS FURTHER ORDERED that:

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

rescind the transaction with Jel Sert and shall divest the Nabisco Baking Powder Assets within 120 days of rescission to an Acquirer-Baking Powder that receives the prior approval of the Commission pursuant to a Baking Powder Divestiture Agreement that receives the prior approval of the Commission.

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

IV.**IT IS FURTHER ORDERED** that:

- A. Respondents shall divest or cause to be divested, absolutely and in good faith, at no minimum price, the Nabisco Intense Mint Assets as an ongoing business.
- B. 1. The divestiture shall be made to Hershey no later than ten (10) business days after Respondent Philip Morris consummates the Acquisition, and shall be pursuant to and in accordance with the Hershey Agreement.
2. PROVIDED, HOWEVER, that if Respondents divest the Nabisco Intense Mints Assets to Hershey prior to the date this Order becomes final, Respondents will include and enforce a provision in the Hershey Agreement requiring that the transaction be rescinded if the Commission determines not to make the Order final or if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that Hershey is not an acceptable purchaser of the Nabisco Intense Mints Assets or that the manner in which the divestiture was accomplished is not an acceptable manner of divestiture. PROVIDED FURTHER, that if the Commission so notifies Respondents, Respondents shall immediately rescind the transaction with Hershey and shall divest the Nabisco Intense Mints Assets within 120 days of rescission to an Acquirer-Intense Mints that receives the prior approval of the Commission pursuant to an Intense Mints Divestiture Agreement that receives the prior approval of the Commission.
3. PROVIDED FURTHER, that if the Acquirer-Intense Mints expresses a preference not to acquire any portion of the Nabisco Intense Mints Assets, and if the Commission approves such acquirer and the Intense Mints Divestiture Agreement excluding such portion of the Nabisco Intense Mints Assets, then Respondents shall not be required to divest that portion of the Nabisco Intense Mints Assets.
- C. Respondents shall comply with all the terms of the Intense Mints Divestiture Agreement (which agreement shall not vary or contradict, or be construed to vary or contradict, the terms of this Order or the Order to Maintain Assets), and such agreement shall be deemed incorporated by reference into this Order. Failure to comply with the Intense Mints Divestiture Agreement shall constitute a failure to comply with this Order.
- D. Pending divestiture of the Nabisco Intense Mints Assets, Respondents shall take such actions as are reasonably necessary to maintain the viability and marketability of the Nabisco Intense Mints Assets and to prevent the destruction, removal, wasting, deterioration, sale, disposition, transfer, or impairment of any of the Nabisco Intense Mints

Assets, except for ordinary wear and tear and as would otherwise occur in the ordinary course of business.

- E. At the request of the Acquirer-Intense Mints, Respondents shall supply to the Acquirer-Intense Mints, for such period as the Acquirer-Intense Mints may request, up to one (1) year 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 preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the Respondents to comply with this Order.

- C. If a trustee is appointed by the Commission or a court pursuant to Paragraph V.A. of this Order, Respondents shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:
1. The Commission shall select the trustee, subject to the consent of the Respondents, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after receipt of written notice by the staff of the Commission to Respondents of the identity of any proposed trustee, Respondents shall be deemed to have consented to the selection of the proposed trustee. The trustee may be the same person or entity as any trustee appointed pursuant to the Order to Maintain Assets.
 2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the Nabisco Dry-Mix Desserts Assets, the Nabisco Baking Powder Assets, and/or the Nabisco Intense Mints Assets.
 3. Within ten (10) days after appointment of the trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestitures required by this Order.
 4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in Paragraph V. C. 3. to accomplish the divestitures, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time or that consents can be obtained in a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend this period only two (2) times.
 5. The trustee shall have full and complete access, subject to any legally recognized privilege of Respondents, to the personnel, books, records and facilities related to the Nabisco Dry-Mix Desserts Assets, the Nabisco Baking Powder Assets, and/or the Nabisco Intense Mints Assets or to any other relevant information, as the trustee may request. Respondents shall develop such financial or other information as the trustee may request and shall cooperate with the trustee. Respondents shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondents shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, but shall divest expeditiously at no minimum price. The divestitures shall be made only to an acquirer that receives the prior approval of the Commission, and the divestitures and consents shall be accomplished only in a manner that receives the prior approval of the Commission; provided however, if the trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity or entities selected by Respondents from among those approved by the Commission; provided further, however, that Respondents shall select such entity within five (5) days of receiving written notification of the Commission's approval.
7. The trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of the Respondents, and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the Nabisco Dry-Mix Desserts Assets, the Nabisco Baking Powder Assets, and/or the Nabisco Intense Mints Assets.
8. Respondents shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for or defense of any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.
9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in Paragraph V.A. of this Order.
10. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the trustee issue such additional orders or

directions as may be necessary or appropriate to accomplish the divestitures required by this Order.

11. The trustee shall also divest such additional ancillary assets and businesses and effect such arrangements as are necessary to assure the marketability, viability and competitiveness of the Nabisco Dry-Mix Desserts Assets, the Nabisco Baking Powder Assets, and/or the Nabisco Intense Mints Assets, as applicable.
12. The trustee shall have no obligation or authority to operate or maintain the Nabisco Dry-Mix Desserts Assets, the Nabisco Baking Powder Assets, and/or the Nabisco Intense Mints Assets.
13. The trustee shall report in writing to Respondents and the Commission every sixty (60) days concerning the trustee's efforts to accomplish the divestitures and to obtain the necessary consents.

VI.

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

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

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

X.

IT IS FURTHER ORDERED that this Order shall terminate ten (10) years from the date this Order becomes final.

By the Commission.

Donald S. Clark
Secretary

SEAL

ISSUED: