IN THE MATTER OF

COLLINS BUICK, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE TRUTH IN LENDING ACT, THE CONSUMER LEASING ACT, REGULATION Z AND THE FEDERAL TRADE COMMISSION ACT

Docket C-3426. Complaint, May 10, 1993--Decision, May 10, 1993

This consent order prohibits, among other things, a Kentucky auto dealership and its principal operating officer from misrepresenting -- in advertising any extension of consumer credit or any consumer lease -- the financing or other terms of the advertised transaction, and from violating certain provisions of the Truth in Lending Act or the Consumer Leasing Act.

Appearances

For the Commission: *David Medine, Carole L. Reynolds* and *Beverly R. Childs.*

For the respondents: *Randall Gardner, Barowitz & Goldsmith,* Louisville, KY.

COMPLAINT

The Federal Trade Commission, having reason to believe that Collins Buick, Inc., a corporation, and William Kevin Collins, individually and as an officer of the corporation, hereinafter sometimes referred to as respondents, have violated the Truth in Lending Act ("TILA"), 15 U.S.C. 1601-1661, as amended, and its implementing Regulation Z, 12 CFR 226, the Consumer Leasing Act ("CLA"), 15 U.S.C. 1667-1667e, as amended, and its implementing Regulation M, 12 CFR 213, and the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45-58, as amended, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint and alleges:

PARAGRAPH 1. Collins Buick, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Kentucky, with its principal place of business located at 4120 Bardstown Road, Louisville, Kentucky.

PAR. 2. William Kevin Collins is an individual and an officer and director of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His business address is 4120 Bardstown Road, Louisville, Kentucky.

PAR. 3. In the ordinary course and conduct of their business, and at least since January 1, 1991, respondents have been engaged in the dissemination of advertisements that promote, directly or indirectly, credit sales and other extensions of other than open end credit in consumer credit transactions, as the terms "advertisement," "credit sale," and "consumer credit," are defined in the TILA and Regulation Z. In the ordinary course and conduct of their business, and at least since January l, 1991, respondents have been engaged in the dissemination of advertisements that promote, directly or indirectly, consumer leases, as the terms "advertisement," and "consumer lease," are defined in the CLA and Regulation M.

PAR. 4. The acts and practices of respondents alleged in this complaint have been and are in or affecting commerce, as "commerce" is defined in the FTC Act.

COUNT I

PAR. 5. Respondents, in the course and conduct of their business, in numerous instances including but not limited to Exhibits A and B, have disseminated or caused to be disseminated advertisements that state an initial, low monthly payment and an initial number of payments. Respondents' advertisements fail to disclose that the financing to be signed at purchase requires the consumer to make a substantial balloon payment, or a second series of installment payments, at the conclusion of the initial payments.

PAR. 6. Respondents' aforesaid practice constitutes a deceptive act or practice, in violation of Section 5(a) of the FTC Act, 15 U.S.C. 45(a).

COUNT II

PAR. 7. Respondents, in the course and conduct of their business, on numerous occasions have disseminated, or caused to be disseminated, advertisements that state an initial number and amount of payments required to reply the indebtedness, but fail to state the terms of repayment, by failing to disclose the amount of the final, balloon payment, or the number and amount of the second series of installment payments, required at the end of the initial payments, based on the financing to be signed at purchase.

PAR. 8. Respondents' aforesaid practice violates Section 144 of the TILA, 15 U.S.C. 1664, and Section 226.24(c) of Regulation Z, 12 CFR 226.24(c).

COUNT III

PAR. 9. Respondents, in the course and conduct of their business, on numerous occasions have disseminated, or caused to be disseminated, advertisements that state the amount or percentage of any down payment, the number of payments or period of repayment, or the amount of any payment, but fail to state all of the terms required by Regulation Z, as follows: the amount or percentage of the down payment, the terms of repayment, and the annual percentage rate, using that term or the abbreviation "APR."

PAR. 10. Respondents' aforesaid practice violates Section 144 of the TILA, 15 U.S.C. 1664, and Section 226.24(c) of Regulation Z, 12 CFR 226.24(c).

COUNT IV

PAR. 11. Respondents, in the course and conduct of their business, on numerous occasions have disseminated, or caused to be

disseminated, advertisements that state the amount of any payment, the number of required payments, or that any or no down payment or other payment is required at consummation of the lease, but fail to state all of the terms required by Regulation M, as applicable and as follows: that the transaction advertised is a lease; the total amount of any payment such as a security deposit or capitalized cost reduction required at the consummation of the lease or that no such payments are required; the number, amount, due dates or periods of scheduled payments and the total of such payments under the lease; and a statement of whether or not the lessee has the option to purchase the leased property and at what price and time (the method of determining the price may be substituted for disclosure of the price).

PAR. 12. Respondents' aforesaid practice violates Section 184 of the CLA, 15 U.S.C. 1667c, and Section 213.5(c) of Regulation M, 12 CFR 213.5(c).

EXHIBIT A

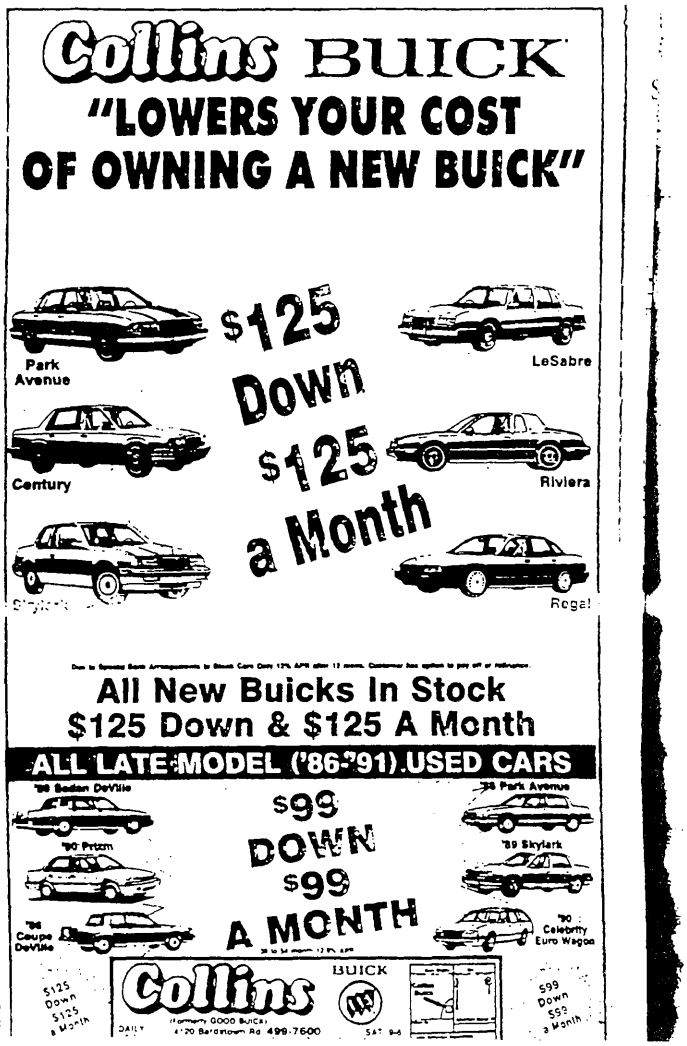
Collins BUICK
"LOWERS YOUR COST OF OWNING A NEW BUICK"
Park Avenue
LeSabre
$125 Down $125 a Month
Century
Riviera
Regal
All New Buicks In Stock
$125 Down & $125 A Month
ALL LATE-MODEL ('86-'91) USED CARS
$99 DOWN $99 A MONTH
Collins BUICK

EXHIBIT B


MORE THAN YOU EXPECT!
CAR Show
Kentucky Fairgrounds
April 4-7
1991 PARK AVE.
NOW WAS $26,000.00
$21,900
19 To Choose From
Free
JAMAICA VACATION
Enjoy a week on the beach in beautiful Jamaica. Airfare from Atlanta & accommodations included with any new car purchase.
$149.00 Per Month
Any Used Car In Stock
Over 200 Cars To Choose From
1986-1991 Models
Hurry For Best Selection
BEST OF SHOW
1990 REGAL LTD.
Demo
SAVE THOUSANDS
1990 SKYLARKS
Loaded
$8995
8 To Choose From
Collins
Open Daily
9AM to 8PM
Saturday 9AM to 6PM
Sunday Noon to 6PM
BUICK
2 Miles from the Watterson on Bardstown Road and 5 miles from the Snyder Freeway
499-7600
JUST 60 SECONDS FROM BILL COLLINS FORD
COLLINS BUICK

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft complaint that the Bureau of Consumer Protection proposed to present to the Commission for its consideration and that, if issued by the Commission, would charge the respondents with violation of the Truth in Lending Act, 15 U.S.C. 1601 *et seq.* and its implementing Regulation Z, 12 CFR 226, the Consumer Leasing Act, 15 U.S.C. 1667 *et seq.* and its implementing Regulation M, 12 CFR 213 and the Federal Trade Commission Act, 15 U.S.C. 45 *et seq.*; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said 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, and waivers and other provisions as required by the Commission's Rules; and

The Commission having considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts and Regulation, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Collins Buick, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Kentucky, with its principal office and place of business located at 4120 Bardstown Road, Louisville, Kentucky.

2. Respondent William Kevin Collins is an individual and officer and director of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His business address is 4120 Bardstown Road, Louisville, Kentucky.

3. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I.

It is ordered, That respondent Collins Buick, Inc., a corporation, its successors and assigns and its officers, and William Kevin Collins, individually and as an officer of the corporate respondent, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division, or any other device, in connection with any advertisement to promote directly or indirectly any extension of consumer credit, as "advertisement," and "consumer credit" are defined in the TILA and Regulation Z, do forthwith cease and desist from:

A. Misrepresenting in any manner, directly or by implication, the terms of financing the purchase of a vehicle, including but not limited to whether there may be a balloon payment or second series of installment payments, and the amount of any balloon payment or the number and amount of any second series of installment payments.

B. Stating any number or amount of payment(s) required to repay the debt, without stating accurately, clearly and conspicuously, all of the terms required by Regulation Z, as follows:

(1) The amount or percentage of the down payment;

(2) The terms of repayment, including the amount of any balloon payment, or the number and amount of any second series of installment payments, and

(3) The annual percentage rate, using that term or the abbreviation "APR." If the annual percentage rate may be increased after consummation of the credit transaction, that fact must also be disclosed.

(Section 144 of the TILA, 15 U.S.C. 1664, and Section 226.24(c) of Regulation Z, 12 CFR 226.24(c), as more fully set out in Section 226.24(c) of the Federal Reserve Board's Official Staff Commentary to Regulation Z, 12 CFR 226.24(c)).

C. Stating the amount or percentage of any down payment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, without stating, clearly and conspicuously, all of the terms required by Regulation Z, as follows:

(1) The amount or percentage of the down payment;

(2) The terms of repayment, and

(3) The annual percentage rate, using that term or the abbreviation "APR." If the annual percentage rate may be increased after consummation of the credit transaction, that fact must also be disclosed.

(Section 144 of the TILA, 15 U.S.C. 1664, and Section 226.24(c) of Regulation Z, 12 CFR 226.24(c)).

D. Stating a rate of finance charge without stating the rate as an "annual percentage rate" using that term or the abbreviation "APR," as required by Regulation Z. If the annual percentage rate may be increased after consummation, the advertisement shall state that fact. The advertisement shall not state any other rate, except that a simple annual rate or periodic rate that is applied to an unpaid balance may be stated in conjunction with, but not more conspicuously than, the annual percentage rate.

(Section 144 of the TILA, 15 U.S.C. 1664, and Section 226.24(b) of Regulation Z, 12 CFR 226.24(b)).

E. Failing to state only those terms that actually are or will be arranged or offered by the creditor, in any advertisement for credit that states specific credit terms, as required by Regulation Z. (Section 144 of the TILA, 15 U.S.C. 1664, and Section 226.24(a) of Regulation Z, 12 CFR 226.24(a)).

II.

It is ordered, That respondent Collins Buick, Inc., a corporation, its successors and assigns and its officers, and William Kevin Collins, individually and as an officer of the corporate respondent, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division, or any other device, in connection with any advertisement to aid, promote or assist directly or indirectly any consumer lease, as "advertisement," and "consumer lease" are defined in the CLA and Regulation M, do forthwith cease and desist from:

A. Stating the amount of any payment, the number of required payments, or that any or no down payment or other payment is required at consummation of the lease, unless all of the following items are disclosed, clearly and conspicuously, as applicable, as required by Regulation M:

(1) That the transaction advertised is a lease;

(2) The total amount of any payment such as a security deposit or capitalized cost reduction required at the consummation of the lease, or that no such payments are required;

(3) The number, amounts, due dates or periods of scheduled payments, and the total of such payments under the lease;

(4) A statement of whether or not the lessee has the option to purchase the leased property and at what price and time (the method of determining the price may be substituted for disclosure of the price), and

(5) A statement of the amount or method of determining the amount of any liabilities the lease imposes upon the lessee at the end of the term and a statement that the lessee shall be liable for the difference, if any, between the estimated value of the leased property and its realized value at the end of the lease term, if the lessee has such liability.

(Section 184 of the CLA, 15 U.S.C. 1667c, and Section 213.5(c) of Regulation M, 12 CFR 213.5(c)).

B. Stating that a specific lease of any property at specific amounts or terms is available unless the lessor usually and customarily leases or will lease such property at those amounts or terms, as required by Regulation M.

(Section 184 of the CLA, 15 U.S.C. 1667c, and Section 213.5(a) of Regulation M, 12 CFR 213.5(a)).

III.

It is further ordered, That respondents, their successors and assigns shall distribute a copy of this order to any present or future officers, agents, representatives, and employees having responsibility with respect to the subject matter of this order and that respondents, their successors and assigns shall secure from each such person a signed statement acknowledging receipt of said order.

IV.

It is further ordered, That respondents, their successors and assigns shall promptly notify the Commission at least thirty (30) days prior to any proposed change in the corporate entity such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of the order.

V.

It is further ordered, That for five years after the date of service of this order respondents, their successors and assigns shall maintain and upon request make available all records that will demonstrate compliance with the requirements of this order.

VI.

It is further ordered, That respondents, their successors and assigns shall, within sixty days (60) days of the date of service of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

PROMODES, S.A., ET AL.

Docket 9228. Show Cause Order, May 12, 1993

ORDER TO SHOW CAUSE

On May 17, 1990, the Federal Trade Commission issued an order against Promodes, S.A. and Red Food Stores, Inc. (collectively, "respondents") in Docket No. 9228. Paragraph II of the order, among other things, requires respondents to divest six specific supermarkets in the Chattanooga, Tennessee Metropolitan Statistical Area, by March 1, 1991, to an acquirer or acquirers that receives the prior approval of the Commission. Paragraph II of the order also requires respondents to maintain the viability and marketability of the supermarkets pending divestiture. Paragraph III of the order provides for the appointment of a trustee to divest the supermarkets in the event respondents have not accomplished the divestitures mandated by paragraph II of the order in a timely manner.

Respondents did not divest the supermarkets by March 1, 1991, as required by paragraph II of the order. On January 6, 1992, the Commission appointed Neill A. Thompson, III, as trustee pursuant to paragraph III of the order. Since his appointment, Mr. Thompson has divested one supermarket pursuant to the order and has filed an application for Commission approval to divest another. By letter dated May 12, 1993, the Commission extended the trustee's time to divest certain of the supermarkets covered by the order, but did not extend the time to divest the supermarkets described in paragraphs II(A)(1) ("the Lee Highway store") and II(A)(2) ("the Fort Oglethorpe store") of the order.

The trustee made all reasonable efforts to obtain offers for the Lee Highway and Fort Oglethorpe stores. Despite these efforts, he was unable to divest the supermarkets. It now appears to the Commission that it is extremely unlikely that the Lee Highway and

Fort Oglethorpe stores can be divested within a reasonable time. Certain structural problems with the building housing the Lee Highway store make it unattractive to potential acquirers. These problems arose subsequent to the order and are beyond the control of the respondents to correct. Although the trustee's compliance reports indicate that at one time there was some interest in purchasing this store, that interest has dissolved in large part due to the structural problems of the building that arose subsequent to the order.

Also subsequent to the order, new supermarkets have opened in the immediate vicinity of the Fort Oglethorpe store, resulting in a substantial decrease in its sales and creating considerable doubt about its future viability as a supermarket. In addition, no potential acquirer has shown a specific interest in this supermarket.

The order does not expressly provide for the termination of the respondents' obligation under paragraph II to divest in the event that the trustee appointed pursuant to paragraph III is not able to divest all the supermarkets. Accordingly, respondents continue to be obligated to divest the supermarkets and to maintain the supermarkets pending divestiture. However, the record in this case establishes that it is extremely unlikely that the required divestiture of the Lee Highway and Fort Oglethorpe stores can be accomplished within a reasonable time, notwithstanding the trustee's good faith efforts to divest the stores. The costs to respondents of further divestiture efforts therefore are an inequitable and unbargained-for element of the consent order.[1]

In view of the foregoing, the Commission has determined in its discretion that it is in the public interest to reopen the proceeding in Docket No. 9228 and modify the order in this case by setting aside paragraphs II(A)(1) and II(A)(2).

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[1] We distinguish the costs imposed on a respondent by continued attempts to comply with an order requirement made ineffectual by subsequent events from the kinds of costs ordinarily imposed by an order. For example, certain definable and predictable costs are always associated with a respondent's compliance obligations under a consent order. These costs are accepted by the respondent as part of the settlement of the case.

Accordingly, the Commission hereby issues this Order to Show Cause why the proceeding in Docket No. 9228 should not be reopened to modify the order as described above.

In accordance with Section 3.72 of the Commission's Rules of Practice and Procedure, 16 CFR 3.72, respondents have thirty (30) days from the date of service of this order to file an answer to this Order to Show Cause or be deemed to have accepted the action proposed herein.

IN THE MATTER OF

KKR ASSOCIATES, L.P., ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3253. Consent Order, June 13, 1989--Modifying Order, May 13, 1993

This order denies in part and grants in part a petition to reopen the proceeding and to modify the Commission's consent order issued June 13, 1989 (111 FTC 670) by requiring only notification to the Commission, instead of prior approval, for acquisitions of relevant products, if respondents are not at that time engaged in that relevant product market. The Commission concluded that changed conditions of fact warranted reopening and modifying the order. However, the respondents' request to eliminate entirely the prior approval clause was denied.

ORDER GRANTING IN PART AND DENYING IN PART REQUEST TO REOPEN AND MODIFY ORDER ISSUED JUNE 13, 1989

On January 13, 1993, respondents KKR Associates, L.P., et al., ("KKR")[1] filed a Petition to Reopen Proceedings and Modify Consent Order ("Petition") pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice and Procedure, 16 CFR 2.51. Respondents request that the Commission delete paragraph V of the order in Docket No. C-3253 ("order") that became final on June 22, 1989. Paragraph V prohibits respondents, for a ten-year period, from acquiring without prior Commission approval, firms that produce or hold branded trademarks related to the relevant products. Alternatively, respondents request that paragraph V of the order be

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[1] The Petition was filed by all the named respondents to the order in Docket No. C-3253: KKR Associates, L.P., a limited partnership; Kohlberg Kravis Roberts & Co., L.P., a limited partnership; RJR Nabisco, Inc. (successor by merger to RJR Acquisition Corporation), a corporation; Whitehall Associates, L.P. (formerly known as RJR Associates, L.P.), a limited partnership; RJR Nabisco Holdings Group, Inc. (formerly known as RJR Holdings Corp.), a corporation; Henry R. Kravis, a natural person; Robert I. MacDonnell, a natural person; Michael W. Michelson, a natural person; Paul E. Raether, a natural person; and George R. Roberts, a natural person.

modified to include only packaged nuts as a relevant product. In conjunction with that alternative, respondents request that a "poison pill" provision be added that would allow them to acquire, without the Commission's prior approval, an interest in or assets of a company not involved in the production or marketing of packaged nuts at the time of respondents' acquisition announcement, even if subsequently the acquisition candidate acquires an interest in another company involved in the production or marketing of packaged nuts. If such a situation occurred, respondents' proposed modification would, require them to hold separate and then divest the packaged nut-related assets of the subsequently acquired company. Respondents also request such other lesser relief as appears just and proper to the Commission.

For the reasons discussed below, the Commission has determined that respondents have shown that changed conditions of fact require reopening and modifying the order. The Commission has determined to grant a modification of the order more limited than that requested by respondents. Specifically, we will require only notification, instead of prior approval, for acquisitions of relevant products if respondents are not at that time engaged in that relevant product market. The Commission has also determined that respondents have not at this time demonstrated that it is in the public interest to modify the order to include a poison pill provision.

The Complaint And Order

The complaint alleged that KKR's acquisition of RJR Nabisco would substantially lessen competition in the United States in three branded food product markets -- packaged nuts, shelf-stable oriental foods (including shelf-stable oriental entrees, noodles, vegetables and soy sauce) ("shelf-stable oriental foods"), and catsup -- in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the FTC Act, 15 U.S.C. 45. The order settled those charges by requiring KKR to divest assets and businesses, of either RJR or Beatrice/Hunt-Wesson, associated with the development, production, distribution and sale, of branded packaged nuts, shelf-stable

oriental foods and catsup.[2] On October 3, 1989, the Commission approved the divestiture of the Chun King business of Nabisco to a joint venture between Yeo Hiap Seng Ltd. and Fullerton (Overseas) Holdings Private Ltd. On October 5, 1989, the Commission approved the divestiture of the Fisher Nut division of Beatrice/Hunt-Wesson to The Procter & Gamble Co. On December 28, 1989, the Commission approved the divestiture of RJR Nabisco's Del Monte Corporation processed food divisions (including catsup) to DMPF Holdings Corp. The divestitures were made in a timely manner.

For a period of ten years until June 22, 1999, paragraph V of the order prohibits each respondent from acquiring, without prior Commission approval, any interest in any company that is engaged in the production of any relevant product, or that owns or licenses a branded trademark used in connection with the sale of any relevant product. Paragraph V provides that prior Commission approval is not required for (1) acquisitions by the corporate respondents of used equipment for not more that $500,000 and (2) acquisitions by the individual and partnership respondents, for investment purposes only, of an interest of not more than 5 percent in any concern.

Respondents' Petition

Respondents assert in their Petition that reopening and modification are required by changed conditions of fact and public interest considerations.[3] The change of fact alleged by respondents is KKR's sale of the Beatrice Company to ConAgra, Inc. Thus, respondents assert, when the Order was entered, KKR controlled both RJR Nabisco and Beatrice/Hunt Wesson, which created an overlap in each of the relevant product markets. As required by the order, respondents divested certain assets defined in the order used in manufacturing relevant products. Subsequently, respondents

[2] Paragraph I.p. of the order defines "relevant products" as "branded: catsup/ketsup, shelf-stable oriental entrees, shelf-stable oriental noodles, shelf-stable oriental vegetables, soy sauce and packaged nuts."

[3] Respondents do not assert any changed conditions of law.

divested absolutely and completely any continuing interest in Beatrice/Hunt Wesson. Petition at 5-6. Because they no longer have an interest in Beatrice/Hunt Wesson, respondents claim that there has been a change in circumstances requiring a reopening and modification of the order.

Respondents also assert that reopening and modification are warranted by public interest considerations. According to the respondents, the prior approval requirement of paragraph V of the order unfairly burdens KKR's merchant banking activities and burdens competition in financial markets. Petition at 9-11. Respondents assert that public interest concerns dictate that the prior approval provision be removed because it is a barrier to the free flow of capital. *Id.* at 11. Respondents claim that the public disclosure and delay inherent in the prior approval process effectively prevent KKR from acquiring any interest in any company that has any involvement in manufacturing a relevant product or is a licensor or licensee of a trademark used in connection with a relevant product. *Id.* at 10.

Standards For Reopening And Modification

Section 5(b) of the FTC Act, 15 U.S.C. 45(b), provides that the Commission shall reopen an order to consider whether it should be modified if the respondent "makes a satisfactory showing that changed conditions of law or fact" require such modification. A satisfactory showing sufficient to require such reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of it inequitable or harmful to competition. Louisiana-Pacific Corp., Docket No. 4C-2956, Letter to John C. Hart (June 5, 1986) ("L-P Letter") at 4.[4]

The Commission may modify an order when, although changed circumstances would not require reopening, the Commission

[4] *Cf United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992), where the court noted that "[a] decision to reopen does not necessarily entail a decision to modify the order. Reopening may occur even where the petition itself does not plead facts requiring modification." *Id.*

determines that the public interest requires such action. *Id.* Therefore, Section 2.51 of the Commission's Rules of Practice invites respondents in petitions to reopen to show how the public interest warrants the modification. In the case of a request for modification based on public interest grounds, a petitioner must demonstrate as a threshold matter some affirmative need to modify the order. *See* Damon Corp., Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (March 29, 1983) ("Damon Letter") at 2. If the showing of need is made, the Commission will balance the reasons favoring the requested modification against any reasons not to make the modification. *Id.* The Commission will also consider whether the particular modification sought is appropriate to remedy the identified harm.

Whether the request to reopen is based on changed conditions or on public interest considerations, the burden is on the respondent to make the requisite satisfactory showing. The language of section 5(b) plainly anticipates that the petitioner must make a "satisfactory showing" of changed conditions to obtain reopening of the order. The legislative history also makes it clear that the petitioner has the burden of showing, other than by conclusory statements, why an order should be modified.[5] If the Commission determines that the petitioner has made the required showing, the Commission must reopen the order to consider whether modification is required and, if so, the nature and extent of the modification. The Commission is not required to reopen the order, however, if the petitioner fails to meet its burden of making the satisfactory showing required by the statute. The petitioner's burden is not a light one given the public interest in repose and the finality of Commission orders.[6]

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[5] The Commission may properly decline to reopen an order if a request is "merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modification of the order." S. Rep. No. 96-500, 96th Cong., 1st Sess. 9-10 (1979). *See also* Section 2.51(b) of the Commission's Rules of Practice (requiring affidavits in support of petitions to reopen and modify).

[6] *See Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support finality of orders).

Respondents Have Demonstrated Changed Conditions Of Fact that Require Reopening And Modifying The Order

Respondents assert that KKR's divestiture of its interest in Beatrice/Hunt-Wesson constitutes a change in circumstances that requires reopening and modifying the order. Today, having completed the divestiture requirements of the order and having sold Beatrice/Hunt-Wesson, KKR no longer exercises control over any firm engaged in the manufacture and sale of two of the relevant products under the order: branded catsup and branded shelf-stable oriental foods. KKR currently competes in only one relevant product market, branded packaged nuts. Respondents have demonstrated that KKR's exit from the branded catsup and shelf-stable oriental foods markets eliminates the need for the prior approval provision as it is currently written, because an acquisition in either of these markets could not give rise to a competitive overlap.

KKR no longer owns interests or assets in the shelf-stable oriental foods or catsup markets. There appears, therefore, to be little need for the Commission to review KKR's first acquisition back into either of these relevant product markets, because at time of that acquisition respondents would not be competing in that market. KKR's first acquisition back into a relevant product market from which it had exited would simply substitute one seller for another without affecting market concentration or otherwise affecting competition. Although at the time the order was entered the remedial purpose of the prior approval provision for future acquisitions in the relevant markets was clear, respondents' subsequent exit from two of these markets eliminates the need to review their re-entry. Accordingly, respondents have shown a change of fact that requires reopening the order as it is currently written.

Having determined to reopen the order, the Commission next considers whether the order should be modified and, if so, how. In this matter, respondents' exit, and current absence, from the market