IN THE MATTER OF

RECKITT & COLMAN PLC

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

Docket C-3571. Consent Order, April 4, 1995--Set Aside Order, March 24, 1998

This order reopens and sets aside a 1995 consent order with Reckitt & Colman, (119 FTC 380), thus removing the Commission's prior approval requirement for acquiring the assets of or the rights related to any carpet deordorizer businesses in the United States.

ORDER SETTING ASIDE ORDER

On December 5, 1997, Reckitt & Colman plc ("R&C"), the respondent named in the above-referenced consent order ("order") issued by the Commission on April 4, 1995, filed its Petition to Reopen and Modify Consent Order ("Petition") in this matter. R&C asks that the Commission reopen and modify the order 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, and consistent with the Statement of Federal Trade Commission Concerning Prior Approval and Prior Notice Provisions, issued on June 21, 1995 ("Prior Approval Policy Statement").[1] The Petition requests that the Commission reopen and modify the order to eliminate the prior approval provision set forth in paragraph VI of the order, or, in the alternative, substitute a prior notification requirement for the prior approval requirement. The thirty-day public comment period on the Petition ended on January 13, 1998. No comments were received. For the reasons discussed below, the Commission has determined to grant R&C's Petition.

The complaint in this matter alleges that R&C's agreement with Eastman Kodak Company ("Kodak"), L&F Products, Inc. ("L&F"), a wholly-owned subsidiary of Kodak, and Sterling Winthrop Inc., a wholly-owned subsidiary of L&F, to acquire the household products, professional products and personal products businesses of L&F violated Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45, and Section 7 of the Clayton Act, as amended,

[1] 60 Fed. Reg. 39,745-47 (Aug. 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241.

15 U.S.C. 18, by lessening competition and tending to create a monopoly in the carpet deodorizer products business in the United States.[2]

The order required R&C to divest the "Carpet Deodorizer Assets" and "Rug Cleaning Assets," as defined in paragraphs I.H and I.J, respectively, of the order.[3] On February 23, 1995, the Commission approved R&C's application to divest the "Rug Cleaning Assets" to Playtex Products, Inc. On August 21, 1995, the Commission approved R&C's application to divest the "Carpet Deodorizer Assets" to Block Drug Co., Inc. Under the order, R&C is prohibited for a ten-year period from acquiring without the prior approval of the Commission any stock or related assets of any concern engaged in the "Carpet Deodorizer Products" business in the United States.[4]

The Commission, in its Prior Approval Policy Statement, "concluded that a general policy of requiring prior approval is no longer needed," citing the availability of the premerger notification and waiting period requirements of Section 7A of the Clayton Act, commonly referred to as the Hart-Scott-Rodino ("HSR") Act, 15 U.S.C. 18a, to protect the public interest in effective merger law enforcement.[5] The Commission announced that it will "henceforth rely on the HSR process as its principal means of learning about and reviewing mergers by companies as to which the Commission had previously found a reason to believe that the companies had engaged or attempted to engage in an illegal merger." As a general matter, "Commission orders in such cases will not include prior approval or prior notification requirements."[6]

The Commission stated that it will continue to fashion remedies as needed in the public interest, including ordering narrow prior approval or prior notification requirements in certain limited circumstances. The Commission said in its Prior Approval Policy Statement that "a narrow prior approval provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for the provision, attempt the same or approximately the same merger." The Commission also said that "a narrow prior notification provision may be used where there is a credible risk that a company that engaged or

[2] Complaint ¶¶ V, VI, and VII.

[3] Order ¶¶ I.H and I.J, II and III.

[4] Order ¶ VI.

[5] Prior Approval Policy Statement at 2.

[6] *Id.*

attempted to engage in an anticompetitive merger would, but for an order, engage in an otherwise unreportable anticompetitive merger."[7] As explained in the Prior Approval Policy Statement, the need for a prior notification requirement will depend on circumstances such as the structural characteristics of the relevant markets, the size and other characteristics of the relevant markets, the size and other characteristics of the market participants, and other relevant factors.

The Commission also announced, in its Prior Approval Policy Statement, its intention "to initiate a process for reviewing the retention or modification of these existing requirements" and invited respondents subject to such requirements "to submit a request to reopen the order."[8] The Commission determined that, "when a petition is filed to reopen and modify an order pursuant to . . . [the Prior Approval Policy Statement], the Commission will apply a rebuttable presumption that the public interest requires reopening of the order and modification of the prior approval requirement consistent with the policy announced" in the Statement.[9]

The presumption is that setting aside the general prior approval requirement of paragraph VI is in the public interest. There is no evidence in the record that suggests that this matter presents any of the circumstances identified by the Prior Approval Policy Statement as appropriate for retaining a narrow prior approval provision, nor is there any indication of the circumstances that would warrant the substitution of a prior notice provision for the prior approval provision. There is nothing to suggest that the respondent would attempt the same or essentially the same merger that gave rise to the original complaint. In addition, it appears likely that future mergers within the relevant market would be HSR reportable. R&C completed the divestitures required by the order. Accordingly, nothing to overcome the presumption having been presented, and because the only remaining obligation under the order is the prior approval requirement in paragraph VI and the attendant reporting requirements, the Commission has determined to reopen the proceeding in Docket No. C-3571 and set aside the order.

Accordingly, *It is hereby ordered,* That this matter be, and it hereby is, reopened, and that the Commission's order issued on April 4, 1995, be, and it hereby is, set aside as of the effective date of this order.

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[7] *Id.* at 3.

[8] *Id.* at 4.

[9] *Id.*

IN THE MATTER OF

HAROLD A. HONICKMAN, ET AL.

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

Docket 9233. Consent Order, July 25, 1991--Set Aside Order, March 31, 1998

This order reopens and sets aside a 1991 consent order (modified in July 1992 and March 1993) with Harold A. Honickman, (115 FTC 623), thus removing the Commission's prior approval requirement for acquiring the assets of or the rights related to any bottling operation in the New York metropolitan area.

ORDER SETTING ASIDE ORDER

On November 5, 1997, Harold A. Honickman ("Honickman") filed a Petition To Modify Consent Order ("Petition") in Docket No. 9233 ("order") 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, and consistent with the Statement of Federal Trade Commission Policy Concerning Prior Approval and Prior Notice Provisions ("Prior Approval Policy Statement").[1] The Petition requests that the Commission reopen and modify the order to terminate the prior approval provision set forth in paragraph II of the order. The Petition was placed on the public record for thirty days and no comments were received. The Commission has determined to terminate the prior approval provision of the order by setting aside the order.

The Commission, in its Prior Approval Policy Statement, "concluded that a general policy of requiring prior approval is no longer needed," citing the availability of the premerger notification and waiting period requirements of Section 7A of the Clayton Act, commonly referred to as the Hart-Scott-Rodino ("HSR") Act, 15 U.S.C. 18a, to protect the public interest in effective merger law enforcement.[2] The Commission announced that it will "henceforth rely on the HSR process as its principal means of learning about and reviewing mergers by companies as to which the Commission had previously found a reason to believe that the companies had engaged or attempted to engage in an illegal merger." As a general matter,

[1] 60 Fed. Reg. 39,745-47 (Aug. 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241.

[2] Prior Approval Policy Statement at 2.

"Commission orders in such cases will not include prior approval or prior notification requirements."[3]

The Commission stated that it will continue to fashion remedies as needed in the public interest, including ordering narrow prior approval or prior notification requirements in certain limited circumstances. The Commission said in its Prior Approval Policy Statement that "a narrow prior approval provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for the provision, attempt the same or approximately the same merger." The Commission also said that "a narrow prior notification provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for an order, engage in an otherwise unreportable anticompetitive merger."[4] As explained in the Prior Approval Policy Statement, the need for a prior notification requirement will depend on circumstances such as the structural characteristics of the relevant markets, the size and other characteristics of the market participants, and other relevant factors.

The Commission also announced, in its Prior Approval Policy Statement, its intention "to initiate a process for reviewing the retention or modification of these existing requirements" and invited respondents subject to such requirements "to submit a request to reopen the order."[5] The Commission determined that, "when a petition is filed to reopen and modify an order pursuant to . . . [the Prior Approval Policy Statement], the Commission will apply a rebuttable presumption that the public interest requires reopening of the order and modification of the prior approval requirement consistent with the policy announced" in the Statement.[6]

There is no evidence in the record that suggests that this matter presents any of the circumstances identified by the Prior Approval Policy Statement as appropriate for retaining a narrow prior approval provision, nor is there any indication of the circumstances that would warrant the substitution of a prior notice provision for the prior approval provision. There is nothing to suggest that Honickman would attempt the same or essentially the same acquisition that gave

[3] *Id.*

[4] *Id.* at 3.

[5] *Id.* at 4.

[6] *Id.*

rise to the original complaint. In addition, it appears likely that future acquisitions that may have adverse competitive consequences within the relevant market would be HSR reportable. Nothing to overcome the presumption having been presented, the Commission has determined to reopen the proceeding and set aside the order because deleting the prior approval requirement, in effect, would eliminate all of Honickman's future obligations under the order.[7]

Accordingly, *It is ordered*, That this matter be, and it hereby is, reopened, and that the order be, and it hereby is, set aside as of the effective date of this order.

Commissioner Azcuenaga recused.

[7] *See, e.g.*, S.C. Johnson & Son, Inc., Docket No. C-3418, Order Setting Aside Order (January 4, 1996).

IN THE MATTER OF

TRW INC.

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

Docket C-3790. Complaint, April 6, 1998--Decision, April 6, 1998

This consent order requires, among other things, the Ohio-based corporation to divest, to an acquirer approved by the Commission and the Dept. of Defense, BDM's SETA service contract with the BMDO and all of BDM's assets associated with the performance of that contract within 120 days from the date TRW consummates its proposed acquisition of BDM. The consent order also requires TRW to provide technical assistance to the acquirer for a period of one year.

Appearances

For the Commission: *Nicholas Koberstein, Yolanda Gruendel, Ann Malester* and *William Baer.*

For the respondent: *Tom D. Smith, Jones, Day, Reavis & Pogue*, Washington, D.C.

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondent, TRW Inc. ("TRW"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire all of the voting securities of BDM International Inc. ("BDM"), a corporation subject to the jurisdiction of the Commission, in violation of Section 5 of the Federal Trade Commission Act ("FTC Act"), as amended, 15 U.S.C. 45, and that such acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45; and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. RESPONDENT

1. Respondent TRW is a corporation organized and existing under and by virtue of the laws of the State of Ohio, with its principal executive offices located at 1900 Richmond Road, Cleveland, Ohio.

II. ACQUIRED COMPANY

2. BDM is a corporation organized and existing under and by virtue of the laws of the State of Delaware, with its principal executive offices located at 1501 BDM Way, McLean, Virginia.

III. JURISDICTION

3. TRW and BDM are, and at all times relevant herein have been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and are corporations whose business is in or affects commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

IV. THE ACQUISITION

4. On November 20, 1997, TRW and BDM entered into an Agreement and Plan of Merger whereby TRW will acquire all of the issued and outstanding common shares of BDM for approximately $942 million (the "Acquisition").

V. THE RELEVANT MARKETS

5. The relevant lines of commerce in which to analyze the effects of the acquisition are: (a) the research, development, manufacture and sale of a ballistic missile defense system for the United States Department of Defense ("BMD System"); and (b) the provision of systems engineering and technical assistance services to the United States Ballistic Missile Defense Organization ("SETA Services").

6. The United States is the relevant geographic area in which to analyze the effects of the acquisition in both relevant lines of commerce.

VI. STRUCTURE OF THE MARKETS

7. The market for the research, development, manufacture and sale of a BMD System is highly concentrated whether measured by the Herfindahl-Hirschmann Index ("HHI") or the two-firm and four-firm concentration ratios ("concentration ratios"). Respondent is a member of one of only two teams competing to supply a BMD System to the United States Department of Defense.

8. The market for SETA Services is highly concentrated whether measured by the HHI or by concentration ratios. BDM has been the only provider of SETA Services since 1994.

9. Respondent, through the Acquisition, would be engaged in both the research, development, manufacture and sale of a BMD System and the provision of SETA Services.

VII. BARRIERS TO ENTRY

10. New entry into the market for the research, development, manufacture and sale of a BMD System would be difficult and unlikely. The time required to develop the necessary expertise to manufacture a BMD System would far exceed two years. The cost to develop the necessary technology to manufacture a BMD System would be prohibitively high.

11. New entry into the market for the provision of SETA Services would be untimely. The Department of Defense intends to award a BMD System procurement contract within the next six months. It would not be possible for a firm to develop the necessary expertise to provide SETA Services in that time.

VIII. EFFECTS OF THE ACQUISITION

12. The effects of the Acquisition, if consummated, may be substantially to lessen competition or to tend to create a monopoly in the market for a BMD System in the United States in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, in the following ways, among others:

a. Respondent may gain access to competitively sensitive non-public information concerning the other BMD System manufacturers, so that actual competition between respondent and the other BMD System manufacturers will be reduced; and

b. Respondent may be in a position to disadvantage the other BMD System manufacturers, so that actual competition between respondent and the other BMD System manufacturers will be reduced.

IX. VIOLATIONS CHARGED

13. The Acquisition described in paragraph four, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

14. The Agreement and Plan of Merger described in paragraph four constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the proposed acquisition by respondent of all of the outstanding voting common stock of BDM International Inc. ("BDM"), and the respondent having been furnished thereafter with a copy of a draft of complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an Agreement to Hold Separate and an Agreement Containing Consent Order, an admission by respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said Agreements is for settlement purposes only and does not constitute an admission by respondent 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 the respondent has violated the said Acts, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed Agreement Containing Consent Order and Agreement to Hold Separate and placed such Agreements on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure described 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 TRW Inc. ("TRW") is a corporation organized, existing and doing business under and by virtue of the laws of the

State of Ohio, with its office and principal place of business located at 1900 Richmond Road, Cleveland, Ohio.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, 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. *"Respondent"* or *"TRW"* means TRW Inc., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by TRW Inc., and the respective directors, officers, employees, agents, and representatives, successors, and assigns of each.

B. *"BDM"* means BDM International Inc., a Delaware corporation with its principal place of business at 1501 BDM Way, McLean, VA, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by BDM International Inc., and the respective directors, officers, employees, agents, and representatives, successors, and assigns of each.

C. *"Commission"* means the Federal Trade Commission.

D. *"Ballistic Missile Defense Organization"* means the agency of the Department of Defense that is chartered by the Secretary of Defense under Department of Defense Directive 5134.9 and mandated by Congress to develop ballistic missile defense systems.

E. *"SETA Services Operations"* means all assets, properties, business and goodwill, tangible and intangible, held by BDM and used in the provision of SETA Services to the Ballistic Missile Defense Organization under contract HQ0006-95-C-0006, including, without limitation, the following:

1. All rights, obligations and interests in contract HQ0006-95-C-0006 between the Ballistic Missile Defense Organization and BDM, or any subcontract of a contract between any entity and the Ballistic Missile Defense Organization where such subcontract is between BDM and such entity;

2. All machinery, fixtures, equipment, vehicles, transportation facilities, furniture, tools and other tangible personal property;

3. All customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, research materials, financial information, technical information, management information and systems, software, software licenses, inventions, trade secrets, intellectual property, patents, technology, know-how, specifications, designs, drawings, processes and quality control data;

4. All rights, title and interests in and to owned or leased real property, together with appurtenances, licenses and permits;

5. All rights, title 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 and consignees;

6. All rights under warranties and guarantees, express or implied;

7. All books, records, and files;

8. All data developed, prepared, received, stored or maintained under contract HQ0006-95-C-0006, or any predecessor contract or subcontract to support the operations of the Ballistic Missile Defense Organization;

9. All items of prepaid expense; and

10. All employment contracts.

F. *"SETA Services"* means systems engineering and technical assistance services provided by BDM to the Ballistic Missile Defense Organization pursuant to HQ0006-95-C-0006 or any predecessor contract.

G. *"Proposed acquisition"* means TRW's proposed acquisition of all the voting securities of BDM pursuant to an Agreement and Plan of Merger dated November 20, 1997.

H. *"Non-public BMDO information"* means any information not in the public domain furnished by any company or the Ballistic Missile Defense Organization to BDM in its capacity as provider of SETA Services under contract HQ0006-95-C-0006 or any predecessor contract or subcontract.

II.

It is further ordered, That:

A. Respondent shall divest, absolutely and in good faith, within one hundred and twenty (120) days from the date the proposed acquisition is consummated, the SETA Services Operations, and shall also divest such additional ancillary assets as are necessary to assure the continued ability of the acquirer to provide SETA Services.

B. Respondent shall divest the SETA Services Operations only to an acquirer that receives the prior approval of the Commission and the Department of Defense and only in a manner that receives the prior approval of the Commission. The purpose of the divestiture is to ensure the continued provision of SETA Services in the same manner as provided by BDM at the time of the proposed divestiture, at no increased cost to the Ballistic Missile Defense Organization, and to remedy the lessening of competition resulting from the proposed acquisition as alleged in the Commission's complaint.

C. Pending divestiture of the SETA Services Operations, respondent shall take such actions as are necessary to ensure the continued provision of SETA Services, to maintain the viability and marketability of the assets used to provide SETA Services, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the assets used to provide SETA Services, except for ordinary wear and tear.

D. Upon reasonable notice from the acquirer or from the Ballistic Missile Defense Organization to respondent, respondent shall provide such technical assistance to the acquirer as is reasonably necessary to enable the acquirer to provide SETA Services in substantially the same manner and quality as provided by BDM prior to divestiture. Such assistance shall include reasonable consultation with knowledgeable employees and training at the acquirer's facility for a period of time sufficient to satisfy the acquirer's management that its personnel are appropriately trained in the skills necessary to perform the SETA Services. Respondent shall convey all know-how necessary to perform SETA Services in substantially the same manner and quality employed or achieved by BDM prior to divestiture. However, respondent shall not be required to continue providing such assistance for more than one year from the date of the divestiture. Respondent shall charge the acquirer at a rate no more than its own costs for providing such technical assistance.

E. At the time of the execution of a purchase agreement between respondent and a proposed acquirer of the SETA Services Operations, respondent shall provide the acquirer with a complete list of all current full-time, non-clerical, salaried employees of BDM engaged in the provision of SETA Services on the date of the purchase agreement. Such list shall state each such individual's name, position, address, telephone number, and a description of the duties of and work performed by the individual in connection with the SETA Services Operations.

F. Respondent shall provide the proposed acquirer with an opportunity to inspect the personnel files and other documentation relating to the individuals identified in paragraph II.E of this order to the extent permissible under applicable laws. For a period of six (6) months following the divestiture, respondent shall further provide the acquirer with an opportunity to interview such individuals and negotiate employment contracts with them.

G. Respondent shall provide all current employees identified in paragraph II.E of this order with financial incentives to continue in their employment positions pending divestiture of the SETA Services Operations, and to accept employment with the acquirer at the time of the divestiture. Such incentives shall include continuation of all employee benefits offered by BDM until the date of the divestiture, and vesting of all pension benefits.

H. For a period of two (2) years commencing on the date of the individual's employment by the acquirer, respondent shall not re-hire any of the individuals identified in paragraph II.E of this order who accept employment with the acquirer.

I. Prior to divestiture, respondent shall not transfer any of the individuals identified in paragraph II.E of this order whose employment responsibilities involve access to non-public BMDO information to any other positions.

J. Respondents shall comply with all terms of the Agreement to Hold Separate, attached to this order and made part hereof as Appendix I.

III.

It is further ordered, That:

A. If respondent has not divested, absolutely and in good faith and with the Commission's prior approval, the SETA Services Operations within one hundred and twenty (120) days from the date the proposed