

Respondents have also reviewed a draft complaint. The Commission has now issued the complaint and Proposed Order. The Proposed Consent Agreement is designed to remedy the likely anticompetitive effects arising from the merger of Nestlé and Dreyer's.

## II. The Parties and the Transaction

Nestlé S.A., the world's largest food company, is headquartered in Switzerland. Nestlé Holdings, Inc., a wholly owned subsidiary of Nestlé S.A., manufactures, distributes, and sells the Häagen-Dazs brand of superpremium ice cream, as well as such frozen novelty products as Drumstick, Bon Bons, IceScreamers, Dole Fruit Bars, Butterfinger ice cream bars, and the Nestlé Crunch Bar. Sales in 2001 of all Nestlé ice cream products totaled approximately \$800 million.

Dreyer's manufactures, distributes, and sells the Dreamery brand of superpremium ice cream, as well as the Godiva brand of superpremium ice cream under a long-term license with Godiva Chocolatier, Inc., and the Starbucks brand of superpremium ice cream products under a joint venture with Starbucks Corporation. Dreyer's also manufactures, distributes and sells such other products as the Dreyer's brand of premium ice cream in thirteen western states and Texas, the Edy's brand of premium ice cream throughout the remaining regions of the United States, and the Whole Fruit line of sorbet. Dreyer's total sales in 2001 were approximately \$1.4 billion. As a result of the transaction, Respondent Dreyer's Grand Ice Cream Holdings, Inc., will be the parent of Respondent Dreyer's Grand Ice Cream, Inc.

On June 16, 2002, Nestlé and Dreyer's signed an Agreement and Plan of Merger and Contribution whereby Nestlé and Dreyer's would combine their ice cream businesses. The transaction will increase Nestlé's interest in Dreyer's from 23 percent to approximately 67 percent. At the time Nestlé and Dreyer's announced the merger, the transaction was valued at approximately \$2.8 billion.

## III. The Complaint

The complaint alleges that the relevant line of commerce (*i.e.*, the product market) in which to analyze the acquisition is the sale of superpremium ice cream to the retail channel. Superpremium ice cream contains more butterfat and less air than premium or economy ice creams. Therefore, superpremium ice cream is higher in fat than the other two segments of ice cream. Ice cream also is differentiated on the quality of ingredients, with

superpremium containing more expensive and higher quality inputs. Finally, superpremium ice cream is priced significantly higher than premium or economy ice creams. Superpremium ice cream manufacturers set their prices based on various factors, including the price of other superpremium ice creams. When Dreyer's expanded into superpremium ice cream in 1999, the price of other superpremium ice creams declined.

The complaint alleges that the relevant geographic market in which there are competitive problems related to the acquisition is the United States. The superpremium ice cream market is highly concentrated when measured by the Herfindahl-Hirschman Index (commonly referred to as the "HHI").<sup>1</sup> The post-acquisition HHI would increase over 1,600 points, from 3,501 to 4,897 and the merging parties would have a combined market share of over 55%.

The complaint further alleges that entry would not be likely or sufficient to prevent anticompetitive effects in the United States. It would be very difficult for an entrant with a new or unknown brand to successfully take a sufficient amount of sales from superpremium ice cream incumbents to remain profitable. Furthermore, a superpremium ice cream entrant would face great difficulty developing a nationwide Direct Store Delivery ("DSD") distribution network comparable to either of the merging parties.

The complaint also alleges that Nestlé's acquisition of Dreyer's, if consummated, may substantially lessen competition in the relevant line of commerce in the relevant market in violation of section 7 of the Clayton Act, as amended, 15 U.S.C. 45, by eliminating direct competition between Nestlé and Dreyer's; by eliminating Dreyer's as an important competitive constraint in the relevant market; by increasing the likelihood that the combined Nestlé/Dreyer's will unilaterally exercise market power; and by increasing the likelihood of, or facilitation of, collusion or coordinated interaction in the United States.

## IV. The Terms of the Agreement Containing Consent Order

The Proposed Consent Agreement will remedy the Commission's competitive concerns about the proposed acquisition. Proposed Consent Agreement Paragraph II.A. requires that Proposed Respondents divest: (1) All

assets, businesses, and goodwill related to the manufacture, marketing, or sale of the Dreamery, Godiva and Whole Fruit brands, and (2) all assets related to Nestlé's distribution of frozen dessert products. These assets, collectively referred to as the "assets to be divested," will be divested to CoolBrands International, Inc. ("CoolBrands") no later than ten (10) days after Nestlé acquires Dreyer's. Proposed Respondents are not obligated to divest those Nestlé distribution assets that CoolBrands elects not to acquire. Proposed Respondents may license back from CoolBrands the rights to use the "Whole Fruit" name for fruit bars for a period not to exceed one (1) year.

The Proposed Consent Agreement requires Proposed Respondents to divest Nestlé's distribution assets to CoolBrands because virtually all superpremium ice cream currently is sold through DSD. This means that the distributor physically places the product on retailers' shelves, and the retailer does not purchase the product until after it is actually delivered to the store.

Paragraph II.B. provides that if the Commission determines that CoolBrands is not an acceptable purchaser of the assets to be divested, or if the divestiture is not accomplished in an acceptable manner, Proposed Respondents shall immediately rescind the sale of the assets to be divested to CoolBrands and divest those assets at no minimum price to another purchaser that receives the prior approval of the Commission within 120 days of the date the Order becomes final.

Paragraph II.C. of the Proposed Consent Agreement requires that, prior to divesting, Proposed Respondents obtain the consent of Godiva Chocolatier, Inc. ("Godiva Chocolatier"), to the assignment of the license agreement between Godiva Chocolatier and Dreyer's for the manufacture, distribution and sale of Godiva ice cream to the acquirer.

Paragraph II.D. of the Proposed Consent Agreement requires Proposed Respondents to maintain the viability and marketability of the assets to be divested. The proposed respondents are also required to maintain the assets pursuant to the Order to Maintain Assets. Paragraph II.E. requires that for a period not to exceed one (1) year from the date that CoolBrands obtains the assets to be divested, Proposed Respondents will supply CoolBrands with the types and quantities of Dreamery, Godiva, and Whole Fruit products that CoolBrands requests at a price no greater than Proposed Respondents' production costs.

<sup>1</sup> The HHI is a measurement of market concentration calculated by summing the squares of the individual market shares of all participants.