UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: Robert Pitofsky, Chairman
Mary L. Azcuenaga
Janet D. Steiger
Roscoe B. Starek, III
Christine A. Varney

In the Matter of DEL MONTE FOODS COMPANY, a corporation; DEL MONTE CORPORATION, a corporation; and PACIFIC COAST PRODUCERS, a corporation.	Docket No. C-3569

ORDER REOPENING AND MODIFYING ORDER

On May 24, 1996, Del Monte Foods Company and its wholly-owned subsidiary Del Monte Corporation ("Del Monte"), respondents named in the consent order issued by the Commission on April 11, 1995, in Docket No. C-3569 ("Order"), filed a Petition To Reopen and Modify Consent Order ("Petition") in this matter. On October 3, 1996, Pacific Coast Producers ("PCP"), a respondent subject to the requirements of Paragraphs VII and VIII of the Order, filed a Statement In Support of Petition to Reopen and Modify Consent Order ("Statement"). Del Monte and PCP ("Respondents"), in their Petition and Statement, respectively, ask 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 C.F.R. § 2.51, and consistent with the Statement of Federal Trade Commission Policy Concerning Prior Approval And Prior Notice Provisions, issued on June 21, 1995 ("Prior Approval Policy Statement").[1] Del Monte's Petition requests that the Commission reopen and modify the Order to remove the prior approval requirements and replace them with prior notice requirements by

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

deleting Paragraphs III, VI.A. and VII in their entirety, substituting the phrase "without providing advance written notification" for the prior approval requirement in Paragraph V, and modifying the current advance written notification requirement in Paragraph VI.B. of the Order by replacing the phrase "for a period beginning on the fifth anniversary of the date this order becomes final until ten years from the date this order becomes final" with the phrase "for a period of ten (10) years from the date this order becomes final."[2] The thirty-day public comment period on the Petition ended on July 1, 1996. No comments were received. For the reasons discussed below, the Commission has determined to grant the Petition in part and modify the Order as set forth herein.

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.[3] 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."[4]

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

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[2] Petition at 2. In its Statement, PCP requests that Paragraph VII be modified by replacing the prior approval requirement with the phrase "without providing advance written notification to the Commission," or otherwise in a manner consistent with the Prior Approval Policy Statement. Statement at 1.

[3] Prior Approval Policy Statement at 2.

[4] Id.

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."[5] 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."[6] 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.[7]

The presumption is that setting aside the general prior approval requirement in this Order is in the public interest. No facts have been presented that overcome this presumption, and nothing in the record suggests that Respondents would engage in the same transaction as alleged in the Complaint but for the existence of the prior approval provision. Accordingly, the Commission has determined to reopen the proceedings and modify the Order by deleting the prior approval provisions and by substituting prior notification provisions pursuant to the exception set out in the Prior Approval Policy Statement.

The record in this case evidences a credible risk that Respondents could engage in future anticompetitive transactions that would not be reportable under the HSR Act. Among other things, the challenged transactions that led to issuance of the Complaint and Order in this matter were not subject to the premerger notification and waiting period requirements of the HSR Act. The Complaint in this case charged that Del Monte's supply agreement with PCP, pursuant to which PCP was to provide to Del

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5 Id. at 3.

6 Id. at 4.

7 Id.

Monte virtually all of PCP's output of canned fruit, and Del Monte's option agreement with PCP, pursuant to which Del Monte acquired an irrevocable and exclusive option to purchase certain rights in, and title to, certain assets of PCP, including long term contracts with growers, substantially lessened competition in the manufacture and sale of canned fruit in the United States in violation of Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act. There has been no showing that the competitive conditions that gave rise to the Complaint and the Order no longer exist. Accordingly, pursuant to the Prior Approval Policy Statement, the Commission has determined to modify Paragraphs III, V, VI.A. and VII of the Order to substitute a prior notification requirement for the prior approval requirement in those provisions.

Del Monte's Petition requests that the prior approval requirements of the Order be removed, and prior notice requirements substituted, by deleting Paragraphs III, VI.A. and VII in their entirety, replacing the prior approval requirements in Paragraph V with an advance written notification requirement, and modifying the current advance written notification requirement in Paragraph VI.B. of the Order. PCP's Statement alternatively requests that Paragraph VII be modified by replacing the prior approval requirement with the phrase "without providing advance written notification to the Commission." However, Del Monte's request that Paragraph III be deleted in its entirety does not, for example, address the credible risk that future transactions now covered only by Paragraph III.A. of the Order could be anticompetitive but would not be reportable under the HSR Act. In addition, advance written notification, the form of prior notice which Respondents propose to substitute for the Order's prior approval requirements, is significantly different from the HSR-like prior notification which the Prior Approval Policy Statement states may be used in circumstances where narrow prior notification is appropriate.[8] There has been no showing that a deviation from this form of prior notification, which has been employed in all previous order modifications granted pursuant to the Prior Approval Policy Statement, is warranted in this case. Finally, Del Monte requests that the Commission modify the advance written notification provision in Paragraph VI.B. by replacing the phrase "for a period beginning on the fifth anniversary of the date this order becomes final until ten years from the date this order becomes final" with the phrase "for a period of ten (10) years from the date this order becomes final." The Prior Approval Policy Statement provides that:

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[8] Id. at 3 n.4.

> No presumption will apply to existing prior notice requirements, which have been adopted on a case-by-case basis and will continue to be considered on a case-by-case basis under the policy announced in this statement.[9]

Thus, Del Monte may not rely on the Statement in seeking such a modification. Furthermore, Del Monte has not alleged that changed conditions of law or fact or the public interest requires the Commission to reopen this provision of the Order. The Commission has determined that, consistent with the Prior Approval Policy Statement, the Order's prior approval requirements will be set aside and HSR-like prior notification substituted for acquisitions not otherwise reportable under the HSR Act. Respondents' requested modifications inconsistent with this determination are therefore denied.[10]

Finally, the Commission has determined to correct a typographical error in Paragraph VIII of the Order by changing the incorrect cross-reference to Paragraph VI in that provision to a correct cross-reference to Paragraph VII. Respondents have consented to this modification.

Accordingly, IT IS ORDERED that this matter be, and it hereby is, reopened;

IT IS FURTHER ORDERED that Paragraphs I, III, IV, V, VI.A., VII and VIII of the Commission's order issued on April 11, 1995, be, and they hereby are, modified, as of the effective date of this order, to read as follows:

I.

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

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[9] Id. at 4-5.

[10] Del Monte's Petition does not explicitly seek the precise modifications which the Commission has determined to grant. However, because Del Monte seeks reopening of the Order pursuant to the Prior Approval Policy Statement, it has invoked the Commission's authority to modify the Order consistent with the Statement. PCP's Statement expressly requests, as an alternative to the specific modification sought, modification "in a manner consistent with the Prior Approval Policy Statement." Statement at 1.

* * *

K. "Prior Notification" means the Prior Notifications required by Paragraphs III, V, VI.A. and VII of this order 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 the Notification to the Commission at least thirty 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, Respondents shall not consummate the transaction until twenty days after substantially complying with such request for additional information. Early termination of the waiting periods pursuant to the required Prior Notifications may be requested and, where appropriate, granted by letter from the Bureau of Competition. Notwithstanding the foregoing, Prior Notification shall not be required 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.

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III.

IT IS FURTHER ORDERED that, for a period of ten (10) years from the date this order becomes final, Del Monte shall not, without Prior Notification to the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

A. Acquire any stock, share capital, equity, or other interest in any concern, corporate or non-corporate, engaged, at the time of such acquisition or within the two years preceding such acquisition, in the manufacture of any type of Canned Fruit in the United States; provided, however, that an acquisition shall be exempt from the

requirements of this paragraph if it is solely for the purpose of investment and Del Monte will not hold more than one percent of the shares of any publicly traded class of security; or

B. Acquire any assets, other than in the ordinary course of business, used for or used anytime within the two years preceding such acquisition (and still suitable for use for) the manufacture of any type of Canned Fruit in the United States; provided, however, that an acquisition of assets will be exempt from the requirements of this paragraph if the purchase price of the assets-to-be-acquired is less than $1,500,000.00, and the purchase price of all assets used for, or previously used for (and still suitable for use for) the manufacture of any type of Canned Fruit in the United States that Del Monte has acquired from the same person (as that term is defined in the premerger notification rules, 16 C.F.R. § 801.1(a)(1)) in the twelve-month period preceding the proposed acquisition, when aggregated with the purchase price of the to-be-acquired assets, does not exceed $1,500,000.

IV.

IT IS FURTHER ORDERED that, for a period of ten (10) years from the date this order becomes final, unless Del Monte is required to give Prior Notification to the Commission pursuant to Paragraph III, and unless Del Monte has given such Prior Notification, Del Monte shall not, without providing advance written notification to the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise, acquire any assets other than in the ordinary course of business, used for or used anytime within the two years preceding such acquisition for (and still suitable for use for) the manufacture of any type of Canned Fruit in the United States.

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V.

IT IS FURTHER ORDERED that, for a period of ten (10) years from the date this order becomes final, Del Monte shall not, without Prior Notification to the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

A. Except with respect to agreements covered by Paragraphs VII and VIII, enter into any agreement or other arrangement to purchase or market any type of Canned Fruit with any corporate or non-corporate entity, engaged, at the time of entering into such agreement or other arrangement or within two years preceding entering into such agreement or other arrangement, in the manufacture of any type of Canned Fruit in the United States; provided, however, that entering into such an agreement or other arrangement will be exempt from the requirements of this paragraph if the agreement or other arrangement is for the purchase of Canned Fruit on the Spot Market; or

B. Enter into any agreement or other arrangement with Tri Valley Growers to have any type of Canned Fruit manufactured on Del Monte's behalf.

VI.

IT IS FURTHER ORDERED that

A. for a period of five (5) years from the date this order becomes final, Del Monte shall not, without Prior Notification to the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise, except with respect to agreements covered by Paragraphs V, VII, and VIII, enter into any agreement or other arrangement to have Canned Fruit manufactured on Del Monte's behalf ("co-pack agreement") with any corporate or non-corporate entity, engaged, at the time of entering into such co-pack agreement or within the two years preceding entering into such co-pack agreement, in the manufacture of any type of Canned Fruit in the United States;

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VII.

IT IS FURTHER ORDERED that, for a period of ten (10) years from the date this order becomes final, Respondents shall not, without Prior Notification to the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise, enter into an agreement requiring PCP to manufacture any type of Canned Fruit on behalf of Del Monte ("co-pack agreement"); provided, however, that such a co-pack agreement between Del Monte and PCP will be exempt from the requirements of this paragraph if the aggregate of all

co-pack agreements entered into in any calendar year meet all of the following criteria: 1) the amount of retail sizes (net weight under two pounds) does not exceed ten percent of PCP's output of Canned Fruit, measured in basic cases (24 2 1/2 can sizes), manufactured in the same year as the Canned Fruit manufactured pursuant to the co-pack agreements; 2) the amount of peaches grown by PCP used for the co-pack agreements does not exceed 8,000 tons in any year and none of PCP's peaches is used for retail sizes manufactured pursuant to the co-pack agreements; and 3) the total amount of the Canned Fruit manufactured pursuant to the co-pack agreements a) in each of the years 1995 and 1996 constitutes forty percent or less of PCP's output of Canned Fruit manufactured in each of those years, measured in basic cases; and b) in each year thereafter constitutes thirty percent or less of PCP's output of Canned Fruit manufactured in that year, measured in basic cases.

VIII.

IT IS FURTHER ORDERED that, for a period of ten (10) years from the date this order becomes final, unless Respondents are required to give Prior Notification to the Commission pursuant to Paragraph VII, and unless Respondents have given such Prior Notification, Respondents shall not, without providing advance written notification to the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise, enter into a co-pack agreement with each other. Said notification shall be provided to the Commission by PCP on or before March 1 of each year in which Del Monte and PCP plan to enter into a co-pack agreement. Said notification shall include a copy of the proposed co-pack agreement, all schedules and attachments, the amount of the planned co-pack stated in basic cases (24 2 1/2 can sizes) and the amount, stated in basic cases, for PCP's planned production of Canned Fruit for the same year.

By the Commission.

Donald S. Clark
Secretary

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ISSUED: October 31, 1996