

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

COMMISSIONERS: **Timothy J. Muris, Chairman**
 Sheila F. Anthony
 Mozelle W. Thompson
 Orson Swindle
 Thomas B. Leary

In the Matter of)	
)	
DIAGEO PLC,)	
a public limited company,)	
)	Docket No. C-4032
and)	
)	
VIVENDI UNIVERSAL S.A.,)	
a French societe anonyme.)	
)	
)	

ORDER TO HOLD SEPARATE AND MAINTAIN ASSETS

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition by Respondent Diageo plc (“Diageo”) and Pernod Ricard S.A. of certain voting securities and assets of the Seagram Spirits and Wine business conducted by various subsidiaries of Respondent Vivendi Universal S.A. (“Vivendi Universal”), and Respondents having been furnished thereafter with a copy of a draft Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents Diageo and Vivendi Universal 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

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 said Acts, and that a Complaint should issue stating its charges in that respect, and having determined to accept the executed Consent Agreement and to place 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 issues its Complaint, makes the following jurisdictional finding and issues this Order to Hold Separate and Maintain Assets:

1. Respondent Diageo is a public limited company organized, existing and doing business under and by virtue of the laws of England and Wales, with its office and principal place of business located at 8 Henrietta Place, London W1M 9AG, England. Diageo's principal subsidiary in the United States is headquartered at Six Landmark Square, Stamford, CT 06901.
2. Respondent Vivendi Universal is a societe anonyme organized, existing and doing business under and by virtue of the laws of France, with its office and principal place of business located at 42, avenue de Friedland, 75380 Paris Cedex, France. Vivendi Universal's principal subsidiary in the United States is headquartered at 375 Park Avenue, New York, NY, 10152.
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 to Hold Separate and Maintain Assets, the definitions in the Consent Agreement and the attached Decision and Order shall apply.

II.

IT IS FURTHER ORDERED that, as of the SSWG Acquisition Date:

- A. Respondent Diageo shall maintain the viability, marketability, and competitive vigor of the Malibu Rum Assets, and shall prevent the destruction, removal, wasting or deterioration of the Malibu Rum Assets, except for ordinary wear and tear and as otherwise would occur in the ordinary course of business. Respondent Diageo shall not sell, transfer, encumber or otherwise impair the viability, marketability or competitiveness of the Malibu Rum Assets.

- B. Respondent Diageo shall maintain the operations of the Malibu Rum Assets in the regular and ordinary course of business and in accordance with past practice (including regular repair and maintenance of the Malibu Rum Assets) and shall use its best efforts to preserve the existing relationships with suppliers, vendors, customers, employees, and others having business relations with the Malibu Rum Assets. Such responsibilities include, but are not limited to:
1. providing the Malibu Rum Assets with sufficient working capital to operate the Malibu Rum Assets at least at current rates of operation, to meet all capital calls with respect to the Malibu Rum Assets and to carry on, at least at their scheduled pace, all capital projects, business plans and promotional activities for the Malibu Rum Assets;
 2. continuing, at least at their scheduled pace, any additional expenditures for the Malibu Rum Assets authorized prior to the date the Consent Agreement was signed by Respondents;
 3. making available for use by the Malibu Rum Assets funds sufficient to perform all necessary routine maintenance to, and replacements of, the Malibu Rum Assets;
 4. providing the Malibu Rum Assets with such funds as are necessary to maintain the viability, competitive vigor, and marketability of the Malibu Rum Assets;
 5. providing such support services to the Malibu Rum Assets as are being provided to this business by Respondent Diageo as of the date the Consent Agreement was signed by Respondents; *provided, however*, Respondent Diageo's personnel providing such support services shall retain and maintain all Malibu Rum Confidential Business Information on a confidential basis, and, except as is permitted by the Decision and Order in this matter and by this Order to Hold Separate and Maintain Assets, such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any person whose employment involves the Held Separate Business.
- C. Respondent Diageo shall maintain a work force of equivalent size, training, and expertise as has been associated with the Malibu Rum Assets.
- D. Respondent Diageo shall provide the Malibu Rum Employees with financial incentives to continue in their employment positions pending divestiture of the Malibu Rum Assets, including providing them with the same employee benefits offered by Respondent Diageo to similarly situated employees, regularly scheduled raises and bonuses, and a vesting of all pension benefits (as permitted by law) until the divestiture of the Malibu Rum Assets is completed.

- E. Respondent Diageo shall provide the Malibu Rum Key Employees with the following;
1. a retention incentive equal to at least ten (10) percent of the employee's annual salary (including any bonuses) as of the date the Order to Hold Separate and Maintain Assets in this matter is issued by the Commission to be paid to those Malibu Rum Key Employees who continue their employment with Respondent Diageo until the divestiture of the Malibu Rum Assets is completed;
 2. the Malibu Rum Key Employees who accept employment with the Commission-approved Acquirer shall be offered an additional retention incentive equal to twenty (20) percent of such employee's annual salary under the following terms:
 - a. ten (10) percent to be paid at the beginning of the employee's employment with the Commission-approved Acquirer, and ten (10) percent to be paid upon the employee's completion of one (1) year of employment with the Commission-approved Acquirer; and
 - b. a severance payment if, less than twelve (12) months after the date on which such employee commences employment with the Commission-approved Acquirer, the Commission-approved Acquirer terminates the employment of such employee for reasons other than cause. The amount of such severance payment shall be equal to the payment that such employee would have received had he or she remained in the employ of Respondent Diageo and been terminated at such time, less any severance payment actually paid by the Commission-approved Acquirer.
- F. Respondent Diageo shall not interfere with the employment by the Commission-approved Acquirer of any Malibu Rum Key Employee, shall not offer any incentive to such employees to decline employment with the Commission-approved Acquirer or to accept other employment with Respondent Diageo, and shall remove any impediments that may deter such employees from accepting employment with the Commission-approved Acquirer, including, but not limited to, any confidentiality provisions relating to Malibu Rum or any non-compete or confidentiality provisions of employment or other contracts with Respondent Diageo that would affect the ability of those individuals to be employed by the Commission-approved Acquirer.

III.

IT IS FURTHER ORDERED that:

- A. Respondent Diageo shall, as of the SSWG Acquisition Date, hold the Held Separate Business as a separate and independent business apart from the Diageo U.S. Spirits Business and from all Malibu Rum Employees, except to the extent that Respondent Diageo must exercise direction and

control over the Held Separate Business to assure compliance with this Order to Hold Separate and Maintain Assets, the Consent Agreement or the Decision and Order in this matter, and except as otherwise provided in this Order to Hold Separate and Maintain Assets.

B. Respondent Diageo:

1. shall not provide, disclose or otherwise make available, directly or indirectly, any Malibu Rum Confidential Business Information to the Held Separate Business or to any Captain Morgan Rum Employee;
2. shall prevent all Malibu Rum Employees and all Diageo U.S. Spirits Business Employees from soliciting, accessing, or using, directly or indirectly, any Captain Morgan Rum Confidential Business Information for any reason or purpose;
3. shall institute procedures and requirements to ensure that the Held Separate Business and the Captain Morgan Rum Employees:
 - a. do not provide, disclose or otherwise make available, directly or indirectly, any Captain Morgan Rum Confidential Business Information to the Diageo U.S. Spirits Business or to any Malibu Rum Employee; and
 - b. do not solicit, access or use any Malibu Rum Confidential Business Information for any reason or purpose;
4. shall institute procedures and requirements to ensure that all Diageo Firewalled Senior Executives:
 - a. do not provide, disclose or otherwise make available, directly or indirectly, any Captain Morgan Confidential Business Information to the Diageo U.S. Spirits Business or to any Malibu Rum Employee; and
 - b. do not provide, disclose or otherwise make available, directly or indirectly, any Malibu Rum Confidential Business Information to the Held Separate Business or to any Captain Morgan Rum Employee,

and shall within thirty (30) Business Days after the SSWG Acquisition Date require each Diageo Firewalled Senior Executive to sign a non-disclosure agreement pursuant to which each such Person agrees to comply with the terms of this Paragraph; and

5. shall enforce the terms of this Paragraph III.B. as to:

- a. the Diageo U.S. Spirits Business and Diageo U.S. Spirits Employees;
- b. all Malibu Rum Employees;
- c. the Held Separate Business; and
- d. all Captain Morgan Rum Employees,

and shall take such action to the extent necessary to cause each such Person to comply with the terms of this Paragraph III.B., including all actions that Respondent Diageo would take to protect its own trade secrets and confidential information.

C. Respondent Diageo shall, within thirty (30) Business Days of the SSWG Acquisition Date, require each Malibu Rum Employee to sign a non-disclosure/confidentiality agreement pursuant to which such Person(s) will be required to comply with the provisions of Paragraph III. of this Order to Hold Separate and Maintain Assets. These Persons must maintain all Malibu Rum Confidential Business Information on a confidential basis and they shall be prohibited from:

- 1. disclosing, providing, discussing, exchanging, circulating, or otherwise furnishing Malibu Rum Confidential Business Information to or with any Person whose employment involves the Held Separate Business; or
- 2. soliciting, accessing, or using, directly or indirectly, any Captain Morgan Rum Confidential Business Information for any reason or purpose.

These Persons shall not be involved in any way in the management, research, development, production, marketing, advertising, promotion, distribution, sales, after-sales support, or financial operations of any products of the Held Separate Business.

D. Respondent Diageo shall, within thirty (30) Business Days of the SSWG Acquisition Date, require each Captain Morgan Rum Employee to sign a non-disclosure/confidentiality agreement pursuant to which such Person(s) will be required to comply with the provisions of Paragraph III. of this Order to Hold Separate and Maintain Assets. These Persons must maintain all Captain Morgan Rum Confidential Business Information on a confidential basis and they shall be prohibited from:

- 1. disclosing, providing, discussing, exchanging, circulating, or otherwise furnishing any Captain Morgan Rum Confidential Business Information to or with any Malibu Rum Employee or any Diageo U.S. Spirits Employee; or
- 2. soliciting, accessing, or using, directly or indirectly, any Malibu Rum Confidential Business Information for any reason or purpose.

The Captain Morgan Rum Employees shall not be involved in any way in the management, research, development, production, marketing, advertising, promotion, distribution, sales, after-sales support, or financial operations of any products or businesses of Respondent Diageo other than the Held Separate Business.

- E. Respondent Diageo shall, within ten (10) Business Days of the SSWG Acquisition Date, circulate to all Malibu Rum Employees, to all Diageo U.S. Spirits Employees, to all Diageo Firewalled Senior Executives, to all employees of any Diageo business outside the United States that will distribute or sell Captain Morgan Rum pending the divestiture of the Malibu Rum Assets, and to all employees of the Held Separate Business a notice of this Order to Hold Separate and Maintain Assets and Consent Agreement, in the form attached as Appendix A to this Order to Hold Separate and Maintain Assets.
- F. Respondent Diageo shall, within thirty (30) Business Days of the date this Order to Hold Separate and Maintain Assets becomes final, establish written procedures, to be submitted for approval to any Interim Monitor the Commission may appoint, covering the management, maintenance, and independence of the Held Separate Business consistent with the provisions of this Order to Hold Separate and Maintain Assets.
- G. *Provided, however*, this Order to Hold Separate and Maintain Assets does not prohibit Respondent Diageo from :
 - 1. providing to, or procuring for, the Held Separate Business corporate or administrative services;
 - 2. engaging in activities designed to achieve efficiencies resulting from the SSWG Acquisition, *provided that* any such activity: (i) does not reveal any Malibu Rum Confidential Business Information to any employee of the Held Separate Business, (ii) does not include any Malibu Rum Employees, and (iii) is conducted by employees who have no direct role in the sales, marketing or development of brand strategies of Malibu Rum or Captain Morgan Rum and who have signed a non-disclosure/confidentiality agreement pursuant to which such Person(s) have agreed to disclose such information only to other Persons who have signed the non-disclosure/confidentiality agreement pursuant to this Paragraph III.
- H. The purpose of this Paragraph III is:
 - 1. to ensure that, pending divestiture of the Malibu Rum Assets and except as otherwise provided in this Order to Hold Separate and Maintain Assets: (a) no Captain Morgan Rum Confidential Business Information is exchanged between the Held Separate Business and the Diageo U.S. Spirits Business or the Malibu Rum Employees; and (b) no Malibu Rum Confidential Business Information is exchanged between Respondent Diageo and the Held Separate Business;

2. to prevent interim harm to competition pending divestiture of the Malibu Rum Assets; and
3. to help remedy the lessening of competition resulting from the SSWG Acquisition alleged in the Commission's complaint.

IV.

IT IS FURTHER ORDERED that:

- A. At any time after Respondents sign the Consent Agreement, the Commission may appoint an Interim Monitor to assure that:
 1. Respondent Diageo expeditiously complies with all of its obligations and performs all of its responsibilities as required by this Order to Hold Separate and Maintain Assets and by the attached Decision and Order (collectively, "the Orders"); and
 2. Respondent Vivendi Universal expeditiously complies with all of its obligations and performs all of its functions required by the attached Decision and Order.
- B. If an Interim Monitor is appointed pursuant to Paragraph IV.A. of this Order to Hold Separate and Maintain Assets or Paragraph VII.A. of the Decision and Order in this matter, Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Interim Monitor:
 1. The Commission shall select the Interim Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If neither Respondent has opposed, in writing, including the reasons for opposing, the selection of a proposed Interim Monitor within ten (10) days after notice by the staff of the Commission to each Respondent of the identity of any proposed Interim Monitor, Respondents shall be deemed to have consented to the selection of the proposed Interim Monitor.
 2. The Interim Monitor shall have the power and authority to monitor each Respondent's respective compliance with the terms of the Orders, and shall exercise such power and authority and carry out the duties and responsibilities of the Interim Monitor in a manner consistent with the purposes of the Orders and in consultation with the Commission.
 3. Within ten (10) days after appointment of the Interim Monitor, each Respondent shall execute an agreement that, subject to the prior approval of the Commission, confers on the Interim Monitor all the rights and powers necessary to permit the Interim Monitor to monitor the Respondent's compliance with the relevant terms of the Orders in a manner consistent with the

purposes of the Orders.

4. The Interim Monitor shall serve until:

- a. the Malibu Rum Assets have been divested in a manner that fully satisfies the requirements of the Orders and the Commission-approved Acquirer is fully capable of, independently of Respondent Diageo, producing or procuring, directly or indirectly, Malibu Rum acquired pursuant to a Divestiture Agreement; and
- b. the last obligation under the Orders pertaining to the Interim Monitor's service has been fully performed.

Provided, however, that the Commission may extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Orders.

5. Subject to any demonstrated legally recognized privilege, the Interim Monitor shall have full and complete access to each Respondent's personnel, books, records, documents, records kept in the normal course of business, facilities and technical information, and to any other relevant information as the Interim Monitor may reasonably request, relating to the Respondent's compliance with its obligations under the Orders, including, but not limited to, its obligations relating to the Malibu Rum Assets and the Held Separate Business. Each Respondent shall cooperate with any reasonable request of the Interim Monitor and shall take no action to interfere with or impede the Interim Monitor's ability to monitor the Respondent's compliance with the Orders.
6. The Interim Monitor shall serve, without bond or other security, at the expense of Respondent(s) on such reasonable and customary terms and conditions as the Commission may set. The Interim Monitor shall have authority to employ, at the expense of the relevant Respondent, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Monitor's duties and responsibilities. The Interim Monitor shall account for all expenses incurred, including fees for services rendered, subject to the approval of the Commission. The Commission may, among other things, require the Interim Monitor and each of the Monitor's consultants, accountants, attorneys and other representatives and assistants to sign an appropriate confidentiality agreement relating to Commission materials and information received in connection with the performance of the Interim Monitor's duties.
7. Each Respondent shall indemnify the Interim Monitor and hold the Interim Monitor harmless against any losses, claims, damages, liabilities or expenses arising out of, or in connection with, the performance of the Interim Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations 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 Interim Monitor.

8. If the Commission determines that the Interim Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Interim Monitor in the same manner as provided in Paragraph IV.A. of this Order to Hold Separate and Maintain Assets or Paragraph VII.A. of the Decision and Order in this matter.
 9. The Commission may on its own initiative or at the request of the Interim Monitor issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Orders.
 10. Respondent Diageo shall report to the Interim Monitor in accordance with the requirements of Paragraph IX.A. of the Decision and Order and/or as otherwise provided in any agreement approved by the Commission. Respondent Vivendi Universal shall report to the Interim Monitor in accordance with the requirements of Paragraph IX.B of the Decision and Order. The Interim Monitor shall evaluate the reports submitted to it by each Respondent, and any reports submitted by the Commission-approved Acquirer with respect to the performance of each Respondent's obligations under the Orders or the Divestiture Agreement. Within one (1) month from the date the Interim Monitor receives these reports, the Interim Monitor shall report in writing to the Commission concerning compliance by each Respondent with the provisions of the Orders.
 11. Each Respondent may require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, such agreement shall not restrict the Interim Monitor from providing any information to the Commission.
- C. The Interim Monitor appointed pursuant to Paragraph IV.A. of this Order Hold Separate and Maintain Assets in this matter may be the same Person appointed as Divestiture Trustee pursuant to Paragraph VIII.A. of the Decision and Order in this matter.

V.

IT IS FURTHER ORDERED that Respondent Diageo shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate Respondent 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 this Order to Hold Separate and Maintain Assets.

VI.

IT IS FURTHER ORDERED that for the purposes of determining or securing compliance with this Order to Hold Separate and Maintain Assets, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondent Diageo made to its principal United States office, Respondent Diageo shall permit any duly authorized representatives of the Commission:

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

VII.

IT IS FURTHER ORDERED that this Order to Hold Separate and Maintain Assets shall terminate on the earlier of:

- A. Three (3) business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or
- B. The day after the divestiture of all of the Malibu Rum Assets, as described in and required by the attached Decision and Order, is completed.

By the Commission.

Donald S. Clark
Secretary

SEAL

ISSUED: December 19, 2001

APPENDIX A

TO THE ORDER TO HOLD SEPARATE AND MAINTAIN ASSETS NOTICE OF DIVESTITURE AND REQUIREMENT FOR CONFIDENTIALITY

On [date], Diageo plc (“Diageo”) and Vivendi Universal S.A., hereinafter referred to collectively as “Respondents,” entered into an Agreement Containing Consent Orders (“Consent Agreement”) with the Federal Trade Commission (“FTC”) relating to the divestiture of certain assets. That Consent Agreement includes two orders. The Decision and Order requires the divestiture of assets relating to the Malibu Rum business of Diageo. These assets are hereinafter referred to as the “Malibu Rum Assets.” The Order to Hold Separate and Maintain Assets (“the Hold Separate Order”) requires that the U.S. distilled spirits business of Joseph E. Seagram & Sons, Inc. (“JES”), which, among other things, is responsible for developing global brand strategies for the Captain Morgan Rum business in the U.S. and worldwide, be held separate and apart from Diageo’s U.S. Spirits Business pending the divestiture of the Malibu Rum Assets under the Decision and Order. JES is hereinafter referred to as the Held Separate Business. The Hold Separate Order also requires Diageo to commit that no confidential information of the Captain Morgan Rum business will be disclosed to the Malibu brand team (designated as the “Malibu Rum Employees,” on the attached list of employees), and that no confidential information relating to Malibu Rum will be disclosed to employees of the Held Separate Business.

Under the Decision and Order, Diageo is required to divest the Malibu Rum Assets to an acquirer that must be approved by the FTC. That divestiture, however, has not occurred, and certain requirements of the second order – the Hold Separate Order – are now in place to hold the Held Separate Business separate from Diageo’s U.S. Spirits Business pending completion of the divestiture of the Malibu Rum Assets, and to prevent the disclosure of confidential Malibu Rum information to the Held Separate Business, and to prevent the disclosure of confidential Captain Morgan Rum information to any Malibu Rum Employees on the attached list. You are receiving this notice because you are either (i) an employee for an entity that is part of the Held Separate Business, (ii) a Malibu Rum Employee, (iii) an employee of the Diageo U.S. Spirits Business (Guinness UDV North America), or (iv) an employee of a Diageo IMC outside of the United States that will be distributing both Captain Morgan Rum and Malibu Rum until the Malibu Rum Assets are divested.

The Held Separate Business must be managed and maintained as a separate, ongoing business, independent of Diageo’s U.S. Spirits Business until the Malibu Rum Assets are divested. All competitive information relating to the Held Separate Business and, in particular, those operations related to Captain Morgan Rum, must be retained and maintained by the persons involved in the operation of those businesses on a confidential basis, and such persons must not provide, discuss, exchange, circulate, or otherwise furnish any such information to or with any other person whose employment involves Diageo’s U.S. Spirits Business, or any other person who is a Malibu Rum Employee as shown on the attached list. In addition, persons involved in Diageo’s Malibu Rum

business must not provide, discuss, exchange, circulate, or otherwise furnish any similar information to or with any other person whose employment involves the Held Separate Business.

Any violation of the Decision and Order, or the Hold Separate Order may subject Diageo to civil penalties and other relief as provided by law. If you have questions regarding the contents of this notice, the confidentiality of information, the Decision and Order or the Hold Separate Order, you should contact _____ at ____ - ____ - _____.