

Brown Bag Program

Perspectives on Merger Divestitures When There Is No Business Unit to Divest

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BILLY VIDGOR: Antitrust remedies, generally, and merger remedies, in particular, have become the subject of significant debate recently. Last year, the ABA Section of Antitrust Law had an extensive program on merger remedies. The European Union announced preferred ways to negotiate merger remedies. Most recently, the Bureau of Competition of the Federal Trade Commission issued its Statement on Negotiating Remedies.¹

The debate, while hot, is not new. Starting in 1976, Congress passed the Hart-Scott-Rodino Act to give the federal antitrust agencies a fair opportunity to challenge a merger prior to consummation and to preserve an ability to obtain an effective remedy. The concern then, and today, is how the court or an antitrust agency might effectively unscramble the eggs after a merger is consummated. This issue is persistent in analyzing merger remedies. Shortly after the Hart-Scott-Rodino Act was passed, the agencies did not regularly negotiate settlements, but over time they have negotiated divestitures rather than challenge transactions. Today, the norm in merger practice involves negotiating merger remedies to preserve the efficiencies of mergers while also restoring competition.

In the mid-1990s, the FTC studied the effectiveness of past merger consent orders and concluded that its policy was not sufficiently effective. So, the agency adopted a policy that preferred the divestiture of stand-alone businesses and a buyer up-front. However, there are situations

¹ FEDERAL TRADE COMM'N, BUREAU OF COMPETITION, STATEMENT OF THE FTC'S BUREAU OF COMPETITION ON NEGOTIATING MERGER REMEDIES, available at <http://www.ftc.gov/bc/bestpractices/bestpractices030401.htm>.

where firms must divest businesses that are integrated within larger entities that share significant production, distribution, and marketing resources. In such circumstances, the remedy requires segregating otherwise integrated companies—a so-called mix-and-match divestiture. This brings us full circle because mix-and-match divestitures require the agencies and parties to unscramble the eggs.

The FTC's recently issued statement demonstrates a continuing evolution in merger remedies. The statement reveals the agency's added flexibility as to when and how the agency will consider stand-alone divestitures versus a mix-and-match divestiture. Our expert panel today will discuss merger remedy analysis and give us some insight on how to walk our way through the divestiture of a mix-and-match set of assets.

Speaking today is **Kristin Adrian**, Senior Vice President, General Counsel of North America for Nestlé USA, Inc. Kristin has been involved with many mergers, two of which have raised significant remedy issues—the Nestlé/Dreyer's and the Nestlé/Ralston Purina transactions.² Kristin will share her thoughts on how merging parties address merger remedy issues.

Frank Bonvino is the Senior Vice President, General Counsel and Secretary of International Multifoods Corporation. International Multifoods was the buyer of the assets divested in connection with the General Mills/Pillsbury merger.³ Frank put together a forceful and persuasive team that convinced the agency to take one of the most complicated divestitures and accept that divestiture. As a matter of full disclosure, I recommended against that divestiture. So Frank can show me how I'm wrong.

Finally, **Mike Cowie** is the Assistant Director for the FTC Bureau of Competition. Mike has responsibility for FTC merger enforcement in the retail, food, and beverage industries, and for merger enforcement in the health care sector. Some of the more notable merger investigations that Mike has directed are Vlastic/Claussen (pickles), Nestlé/Dreyer's (ice cream), Kroger/Raley's (supermarkets), and Quest Diagnostics/Unilab (clinical labs). With that, let me ask Mike to start us off and give us some perspective on where we are in the merger remedy area.

MIKE COWIE: I don't speak for the Commission but will try to provide some perspective. As you know our Chairman, Tim Muris, has emphasized transparency in merger enforcement policy, both on the merits and on remedies. Since Tim Muris became Chairman we have issued two relatively detailed policy statements to clarify FTC policy in this area. One of those is the April 2003 statement of the FTC's Bureau of Competition on Negotiating Remedies.⁴ This is a twenty-page analysis that came out of our merger best practices initiative. Dan Ducore of the compliance division had a substantial role in the preparation of that statement. That's a source for information on the FTC policy in this area.

² Nestle Holdings, Inc. (*Nestlé/Dreyer's*), FTC Docket No. C-4082 (June 25, 2003) (Analysis of Proposed Consent Order to Aid Public Comment), available at <http://www.ftc.gov/os/2003/06/dreyeranalysis.htm>; Nestle Holdings, Inc. (*Nestlé/Ralston Purina*), FTC Docket No. C-4028 (Dec. 11, 2001) (Analysis of Proposed Consent Order to Aid Public Comment), available at <http://www.ftc.gov/os/2001/12/nestleanalysis.pdf>.

³ General Mills, Inc. (*General Mills/Pillsbury*), FTC File No. 001-0213 (Oct. 23, 2001), available at <http://www.ftc.gov/os/caselist/0010213.htm>.

⁴ BUREAU OF COMPETITION STATEMENT ON NEGOTIATING MERGER REMEDIES, *supra* note 1.

⁵ FEDERAL TRADE COMM'N, BUREAU OF COMPETITION, FREQUENTLY ASKED QUESTIONS ABOUT MERGER CONSENT ORDER PROVISIONS, available at <http://www.ftc.gov/bc/mergerfaq.htm>.

Another public statement intended to provide for transparency in this area is the March 2002 statement entitled “Frequently Asked Questions About Merger Consent Order Provisions.”⁵ This is ten-page analysis also available on the website. I would encourage anyone interested in the process to study those two documents. They both provide guidance in going forward with divestiture transactions or negotiations.

Before discussing the nature of the policy or the preference, I want to mention a few other publicly available pieces of information. We also have the 1999 study of the Commission’s divestiture process.⁶ This is a thirty-nine-page document that analyzes FTC consent orders from 1990 to 1994. Another publicly available document is a September 2002 United States General Accounting Office Report to Congress on FTC divestitures in retail markets.⁷ This is a 131-page analysis of FTC consent orders from 1990 to 2000 in four industries: grocery stores, drug stores, funeral services, and gas stations. Those are some of the publicly available sources for guidance.

What do these policy statements say about the FTC practice with respect to mix-and-match remedies? In general, they express a relatively strong bias against them.

I don’t mean to suggest that simply by releasing reports with lots of pages of information we necessarily have a crystal-clear policy, but I do think these publications add a lot of guidance. The one other source I want to mention is the public filings on individual cases. So, in addition to these policy statements, one can learn further about the FTC practices by looking at consent orders for investigated matters.

What do these policy statements say about the FTC practice with respect to mix-and-match remedies? In general, they express a relatively strong bias against them. The reasoning is that the market place, rather than FTC lawyers or FTC economists, is better suited to evaluate whether a set of assets can comprise a viable competitor. Again, if you have a stand-alone business functioning in the market place, we have a lot more confidence that the business unit can function as a competitor. When a mix-and-match of assets is proposed, that forces us to evaluate something that we may be less equipped to evaluate compared to the market place. Those policy statements express a relatively strong bias against mix-and-matches, but there is no per se rule against them. We have retained some flexibility to consider things as they arise in particular circumstances.

—MIKE COWIE

One thing I want to mention about mix-and-matches that I think is important to the business community is that it may affect the timing of getting your deal done. There has been an effort to speed up the merger process here, both in conducting the core second-request investigation and in evaluating remedies. We continue to try to make this process less burdensome and more efficient. If you look empirically at mix-and-match remedies, I think you will see that they take longer to accomplish than other remedies.

The General Mills/Pillsbury merger, which Billy Vigdor and Frank Bonvino were involved with, took a considerable period of time to complete.⁸ From the time the deal was announced to the announcement of the proposed consent order, about sixteen months passed. Another one from a few years ago that had a complicated remedy was Dow/Union Carbide.⁹ That also took about

⁶ FEDERAL TRADE COMM’N, BUREAU OF COMPETITION, A STUDY OF THE COMMISSION’S DIVESTITURE PROCESS (1999), available at <http://www.ftc.gov/os/1999/08/divestiture.pdf>.

⁷ GENERAL ACCOUNTING OFFICE, PUB NO. GAO-02-793, REPORT TO CONGRESSIONAL REQUESTERS, FEDERAL TRADE COMMISSION: STUDY NEEDED TO ASSESS THE EFFECTS OF RECENT DIVESTITURES ON COMPETITION IN RETAIL MARKETS (2002), available at <http://www.gao.gov/new.items/d02793.pdf>.

⁸ *General Mills/Pillsbury*, supra note 3.

⁹ The Dow Chem. Co. (*Dow/Union Carbide*), FTC Docket No. C-3999 (Feb. 5, 2001) (Analysis of Proposed Consent Order to Aid Public Comment), available at <http://www.ftc.gov/os/2001/02/dowunionana.pdf>.

sixteen months from the time the deal was announced to the announcement of the proposed consent order. Now, the Nestlé/Dryer's deal, in which Kristen Adrian was involved, took about eleven months from the announcement of the deal to the announcement of the consent order. Eleven months is not necessarily a model. We would like to do things faster. There are a lot of variables that affect the timing, not just the nature of the remedy. But, it does seem that mix-and-match remedies take longer to complete in part because they are more complicated to analyze on our end.

One other issue I wanted to touch upon that is relevant to mix-and-matches and other remedy issues is: What is the role of the FTC in overseeing, or supervising, the sale of the relevant assets? What should we expect of the merging parties in how they go about shopping the relevant assets?

A trade association in the retail industry, the National Grocers Association, submitted public comments to us in connection with our merger best practice initiatives. One of the things the National Grocers Association stated is that the FTC should do a better job in ensuring that the shopping of the assets is more public.¹⁰ And, in fact, the National Grocers Association advocated that we adopt a rule in which the merging parties would have to provide notice to the trade to publicize the fact that they were shopping the assets. The National Grocers Association reasoned that smaller businesses often do not learn that the assets were available until after the consent order is made public. They stated that the smaller businesses are at a disadvantage relative to larger chains that make more attractive divestiture buyers to the merging parties.

We have not adopted that proposed rule—providing notice to the trade. Instead, if you look at our April 2003 statement, we expressly recognized that the merging parties have some freedom in how they want to shop the assets they're putting together. Possibilities include putting together an offering memorandum by an investment banker that may seek competitive bids; direct negotiations between merging parties and a selected buyer; or an auction. In conducting our investigation we will often ask, "How did you shop it?" But we have not gone so far as to compel merging parties to provide public notice to the industry as advocated by the National Grocers Association.

Finally, before we switch over to Kristin Adrian of Nestlé, I want to mention one other issue that is always on our mind in mix-and-match and other complicated remedy situations. We do always have to consider the prospects of litigation. I know there have been some complaints in the past by the business community and the antitrust bar about the absence of effective judicial review in Europe. People have stated in the past that when the European Commission makes a decision it takes so long to get a judicial review of that decision that there is no effective review. I think there have been changes in that area. I'm not an EC expert, but I do know that there is at least the perception that there is limited judicial review of EC decisions.

That is clearly not the case here. In the remedy area, in particular, we have seen district courts behave very permissively on what is admissible in a preliminary injunction case. In *FTC v. Libbey*, the evidence related to the proposed fix was admissible.¹¹ The district court there considered all the evidence on the proposed fix. Likewise, in *U.S. v. Franklin Electric*, a district court in Wisconsin also considered the evidence concerning the proposed remedy.¹² I think what that means for FTC

¹⁰ NATIONAL GROCERS ASS'N, SUBMISSION OF THE NATIONAL GROCERS ASSOCIATION TO THE FEDERAL TRADE COMMISSION REGARDING MERGER ENFORCEMENT AND REMEDIES (2002), available at <http://www.ftc.gov/bc/bestpractices/021023nga.pdf>.

¹¹ *FTC v. Libbey, Inc.*, 211 F. Supp. 2d 34 (D.D.C. 2002), available at <http://www.ftc.gov/os/2002/04/ftclibbey.htm>.

¹² *U.S. v. Franklin Elec.*, 130 F. Supp. 2d 1025 (D. Wis. 2000), available at <http://www.usdoj.gov/atr/cases/f6400/6483.htm>.

staff is that, when we have a proposed remedy, we obviously have to pause before cavalierly dismissing it as inadequate. We have to ask ourselves “how would an independent judge evaluate this? How would this look to a district court?” That’s something *Libbey* and *Franklin Electric* require us to do.

Kristin, I know you’ve been through two substantial FTC second-request investigations in the past three years. I would appreciate hearing how you saw the process, including any constructive criticism on how the FTC handled those investigations.

KRISTIN ADRIAN: As a general background, I am not a specialist in antitrust matters. Two-and-a-half years ago in January of 2001, when we signed the transaction for the \$12 billion acquisition of Ralston Purina, it would have been very helpful for Nestlé if we had the statement on negotiating merger remedies that was published in April of this year. Although our outside counsel certainly knew all of the FTC’s policies and communicated them to us at various points in the transaction, I would have preferred access early in the process to something that was in writing and that was fairly comprehensive. I think that the FTC statement is well done and the information in the statement is certainly consistent with my two experiences. I appreciate the progress that has been made. I just wish the statement had been issued a few years ago. I assume that what’s going to happen now is that outside counsel will make it a matter of practice to call these documents to their clients’ attention early in the process. This should benefit everyone.

Just for background, on the Nestlé/Ralston Purina transaction, we ended up divesting the Meow Mix brand and one other small brand of dry cat food to an institutional investor. We signed that deal in January 2001, and closed in December 2001.¹³ Compared to the General Mills/Pillsbury deal, this seems very quick, but to my client, it did not seem quick. In that case the Meow Mix business was not a stand-alone business. There were no dedicated manufacturing facilities and no dedicated sales force. However, the assets divested did all come from the Ralston Purina side of the deal.

The Nestlé/Dreyer’s divestiture was much more of mix-and-match because it involved Dreyer’s brands and Nestlé’s distribution assets.¹⁴ Unlike Ralston Purina, it involved key assets from both parties to the underlying merger. This divestiture involved a strategic buyer as opposed to an institutional buyer.

When I visualize the issues in a transaction of this type, I think of it as three points of a triangle. At each point you have someone with differing interests. In order to get the deal done, you need to find that common point in the triangle where everyone is willing to live. It’s a struggle to find the point that works for everyone. It’s very frustrating from the in-house perspective because one’s client wants a lot more certainty than is possible in such a transaction. I think that no matter what improvements happen in the process, there will never be as much certainty at the beginning of a transaction as clients are going to want.

From the in-house perspective, it often feels like we’re hanging on to the reports from our outside counsel as to what the FTC staff said at a certain meeting, or didn’t say, and what it means that they did or did not say something. It’s like reading tea leaves. At the same time, the company continues paying outside counsel significant fees and producing volumes of documents while trying to get the transaction done. Meanwhile management is questioning why it’s taking so long.

¹³ *Nestlé/Ralston Purina*, *supra* note 2.

¹⁴ *Nestlé/Dreyer’s*, *supra* note 2.

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—KRISTIN ADRIAN

I think all of this points to the fact that having a good relationship between the inside counsel and the outside counsel is critical. I've spent a significant amount of time over the last two-and-a-half years talking with my outside antitrust counsel. It's very important that the relationship be a good one. It's also important that the outside counsel have good communication skills so that when he or she is dealing with the staff, no time is wasted on misunderstandings along the way. And, finally, when there's a merger remedy required, usually three sets of antitrust counsel are involved—the primary buyer, the primary seller, and the divestiture buyer. The communication among that group of counsel is also critical.

Once it's clear that a divestiture is going to be required, it's helpful to engage investment bankers, to prepare an offering memo, and to market the proposed package to both institutional and strategic buyers, and not just the most likely buyer. The fact that the divestiture seller, the company that was in the position Nestlé was in, has multiple options and not just one viable divestiture buyer should help to keep the buyer a little bit more honest and less likely to take complete advantage of the situation.

I also think going through a more formal process of trying to sell and market the business will help. Management is going to find the purchase price shockingly low. In order to really believe that it wasn't possible to get a higher price in this do-or-die type of sale, it helps that you've gone through what would be a normal process in any other situation. In the end, having marketed the business being divested should help in dealing with the FTC. As you go through that process of locating a buyer and negotiating the terms of the divestiture package, keep in mind that you will likely need to review the process with the FTC staff.

It's wise to adjust management's expectation as to the time that it will take to negotiate the divestiture and the terms of the decision and order. Divestitures in this context really bear little resemblance to a standard M&A deal. There are many more people involved. In a typical transaction, you have transactional lawyers for the buyer and the seller, and in-house counsel involved—and that's about it. In one of these transactions, the divestiture buyer and the divestiture seller will each have antitrust and transaction counsel, the other party in the primary transaction will have its counsel involved, and the FTC staff will be involved. The amount of time to communicate with all these additional parties obviously adds a significant degree of complexity even if the policies of the government are clear from the outset. Even when the staff is ready to proceed to approve a transaction subject to a divestiture, there remains a question of whether or not the FTC Commissioners themselves will agree with the position of staff. In our Meow Mix divestiture, we got to the 11th hour and there was a surprise condition thrown in by one of the Commissioners. So, it's never done until it's done.

You may want to negotiate the divestiture agreements to a fairly final stage with multiple buyers assuming more than one party is interested. Once you've gone through negotiations with more than one buyer, you are likely to be in a better position to analyze which overall package is the best package to put forward to the staff.

One variable to consider is how closely you want to work with the staff during the negotiations with the buyers, or whether you want to keep your options fairly close to your vest. Perhaps the government would prefer buyer A, but you may not be sure that you can reach a deal that is acceptable with buyer A. Maybe, ultimately, buyer B is a better fit. So, my inclination would be to try to get the transaction fairly close to the position where you're ready to sign it before you present it to the FTC staff, while recognizing that changes may still be required.

Finally, clients need to be informed as they negotiate the primary merger agreement and the best-efforts clause in that contract, how likely it is that there will be an antitrust issue. At the time

the parties are negotiating the primary deal, there will be so many other pressing issues to be negotiated and resolved that the parties may be inclined to dismiss the likelihood of antitrust issues. From the standpoint of valuing the deal, our clients need to have an understanding of the full consequences of the likely antitrust issues—especially, the potential worst scenario consequences.

In closing, I'd like to suggest that outside counsel develop an overall strategy to deal with the antitrust issues early on and review that strategy so that the client has a clear understanding of what might be needed to complete its deal. The strategy is probably going to need to change, maybe many times. Still, this will help to educate clients who are not familiar with the FTC's processes.

I would be very interested in hearing from Frank as a divestiture buyer because my sense from having talked to him previously is that it's much more fun to be in the buyer's position in one of these transactions.

FRANK BONVINO: I'm going to try to give a little bit of our experience as a divestiture buyer in this kind of a situation. I don't specialize in antitrust. Basically, the closest I ever came to the FTC staff before this deal was to ask a staff person for an early termination on a Hart-Scott-Rodino Act notification. When we went into this transaction, it was an eye-opening experience.

Let me start with giving you some background about International Multifoods Corporation. I'll take you back to calendar year 2000. This was just prior to the Multifoods acquisition of the Pillsbury desserts and specialty products business.¹⁵ Multifoods was then and still is a public company listed on the NYSE. At that time, it had revenues of about \$2.5 billion. Its business portfolio consisted of, in the United States, a \$250 million food-service manufacturing business, which included an assortment of fresh and frozen baked goods for in-store bakeries, chains, and other industrial-type users. In addition to this manufacturing business, Multifoods also operated in the United States a nationwide food-service distribution business, which included the sale and distribution of third-party branded and non-branded foods and other products to customers such as limited-menu restaurants, food chains, and vending machine operators. This distribution business accounted for about \$1.8 billion of sales revenue.

In Canada, Multifoods' Canadian subsidiary, Robin Hood, operated a consumer package retail business with sales in U.S. dollars of a little more than \$200 million, with mostly number one and number two positions in the categories in which Robin Hood competed. It also operated a commercial business with sales of flour and other grain-based products to commercial bakeries and distributors and similar type customers.

¹⁵ A majority of Commissioners did not vote to authorize a complaint challenging the underlying merger or to authorize a consent order covering the divestiture of the Pillsbury business to Multifoods. Some of the background concerning the General Mills/Pillsbury merger and the divestiture is set forth in statements of individual commissioners. See *General Mills/Pillsbury*, *supra* note 3. As to the underlying competitive concerns raised by the merger, according to one of the Commissioner statements, the merger would have significantly increased concentration in eight already highly-concentrated product markets: cake mixes, ready-to-spread frosting, family flour, cookie mixes, brownie mixes, quick bread mixes, pancake mixes, and potato mixes. General Mills/Pillsbury, FTC File No. 001-0213 (Oct. 23, 2001) (Statement of Commissioner Mozelle W. Thompson), available at <http://www.ftc.gov/os/2001/10/gmstmthomp.htm>. Some of these overlaps would arise from the combination of products sold under General Mills' Betty Crocker trademark with those sold under Pillsbury's Doughboy trademark. General Mills/Pillsbury, FTC File No. 001-0213 (Oct. 23, 2001) (Statement of Commissioner Sheila F. Anthony) ("Products bearing these symbols command leading shares in virtually every product category in which the two companies compete."), available at <http://www.ftc.gov/os/2001/10/gmstmtant.htm>.

In calendar year 2000—this is important, too, because the staff took some exception to this—Robin Hood was the exclusive licensee of Duncan Hines cake mixes and related products. As many of you know, Duncan Hines is a national player in these products. Robin Hood actually manufactured, marketed, and sold these products in Canada along with its own cake mix products sold under the Robin Hood label. This gave Robin Hood an overall number three position in Canada in this category. This arrangement raised some concern with staff members, although after many hours of discussion, I think we finally convinced the staff that the aggregate sales revenue and earnings from this Canadian cake mix business were immaterial. This relationship has ended in June of this year.

Multifoods and its predecessor companies have been in business for 110 years. The company, formerly known as International Milling, was in the 1960s the largest flour milling company in the world. In the 1960s, 70s and 80s, the company was also in consumer package goods—mostly regional brands. The company, in the mid-80s, decided to change strategic focus and sold its consumer package brands to focus on food-service manufacturing and food-service distribution. So, in calendar year 2000, just prior to our involvement with the FTC, Multifoods did not have a consumer package infrastructure in the United States. It had one in Canada. But, what Multifoods did have was a heritage, as I mentioned, in grain-based products. We had a CEO who came to us from Kellogg's, after five years at Kellogg's, who had a deep knowledge and real passion for consumer brands, and also senior management that was very partial to manufacturing and not particularly fond of the low margin food-service distribution business. When the opportunity to purchase the Pillsbury desserts specialty products business came to us, we were very interested.

General Mills and Diageo, PLC, the parent company of Pillsbury, announced in July 2000 that General Mills would acquire Pillsbury. Both parties were quick to acknowledge the overlap of the Pillsbury dessert and specialty products sold and marketed under the Pillsbury Barrelhead and the Doughboy trademarks, and the General Mills desserts and specialty products sold and marketed under the Betty Crocker trademark. The FTC staff took the position that General Mills and Diageo had to find and produce an up-front buyer as a condition to the staff's willingness to recommend approval of the transaction to the Commission. So General Mills and Pillsbury went out and sought buyers and Multifoods was ultimately selected.

Given Multifoods grain-based heritage, its consumer experience in the past and in Canada, its desire to re-enter the United States, its ability to obtain the necessary financing to do the deal, and the absence of an overlap with the desserts and specialty products business being divested, each of the parties—General Mills, Diageo, and Multifoods—had good reason to believe that the staff would determine that Multifoods was an acceptable buyer. To make a long story short, Multifoods and General Mills signed a sale and purchase agreement in early February 2001.

We had our first meeting with staff in January 2001—about two-and-a-half weeks before the agreement was signed. This meeting gave Multifoods' senior management an opportunity to introduce the company to the staff, and, quite frankly, sell the staff on Multifoods as an acceptable buyer. As an aside, Billy Vidgor will remember this, that first meeting started in the mid-afternoon and we assumed that the meeting would last until about 5:30. It lasted until 9:30 that evening. That meeting was particularly instructive for us. The staff did not pull any punches in expressing their concerns about the mix-and-match nature of the transaction and made it very clear to us that the parties had better come up with a plan to resolve these concerns.

The staff expressed three main concerns at that meeting. They were manufacturing, split trademark, and viability of Multifoods—principally because of infrastructure issues. Let me discuss the

manufacturing issue first. Pillsbury cake mix and ready-to-spread frosting products were made at Pillsbury's plant in Murfreesboro, Tennessee. This is the same plant in which refrigerated and frozen dough products were made. That plant was primarily built for the manufacture of frozen and refrigerated products, so it didn't make any commercial sense to the parties to include the Murfreesboro plant in the divestiture package. General Mills manufactured Betty Crocker cake mix in its plant located in Toledo, Ohio. The parties proposed to flip-flop the manufacturing locations, which meant that General Mills' Toledo plant would have to be converted from a Betty Crocker cake mix manufacturing facility to a Pillsbury cake mix and ready-to-spread frosting facility. This is significant because the manufacture of the ready-to-spread frosting product is far more difficult than the manufacture of cake mix products.

During the conversion process it would be necessary for General Mills to co-pack (or contract pack) Pillsbury products for Multifoods at the Murfreesboro, Tennessee plant until such time that the Toledo plant was converted and able to make the Pillsbury products. General Mills had the obligation, and was charged with completing the conversion of the Toledo plant. The parties had agreed that all of the Pillsbury products to be manufactured in the Toledo plant would have to be manufactured at a cost and quality level at least equal to, or better than, those products that were manufactured by Pillsbury at the Murfreesboro plant. And General Mills agreed that the converted Toledo plant would have a manufacturing capacity of at least equal to or better than the Murfreesboro plant with respect to these products.

The engineers on both sides spent a lot of time on this and estimated that it would take at least a year to complete the conversion of the plant for Multifoods. In fact, it took several months longer.

The split trademark was another big issue. Most of you probably know something about that because it received a lot of publicity during the investigation. The use of the Pillsbury Barrelhead and the Pillsbury Doughboy trademarks needed to be shared by General Mills and Multifoods. Essentially this would allow use of the trademark by Multifoods in the interior of the traditional supermarket, and by General Mills around the outside for its frozen and refrigerated products. This presented a real issue for the staff to deal with—that is, one competitor licensing another competitor with respect to similar product categories in the same trade channel.

The infrastructure was another issue very high on the list of concerns expressed by the staff. Other than the core group of about nineteen people dedicated by Pillsbury to the dessert and specialty products business, the services necessary to support this business were furnished by a central corporate group and other business groups scattered throughout the Pillsbury organization. Multifoods was required to come up with an infrastructure in order to be viable. It had to create a supply chain, a management information system, distribution, sales, marketing, research and development, and other administrative functions to support the business. The parties estimated that it would take about a year to transition the most difficult of these functions, particularly the management information system. In all, the parties would have to transition about fifty separate administrative and operational functions from General Mills to Multifoods.

As you can see, for good reason, there was concern expressed by the staff about the length of time of the transition functions and whether or not the parties could pull this off. We had some real concerns to overcome to get the staff comfortable with recommending the deal. In essence, the staff wanted to make sure that the whole of the business was being divested so that the business being divested would have most of the assets, properties, rights, and flexibilities that it had when it was part of Pillsbury.

Here's how that worked out. With respect to the Toledo plant, General Mills decided to move its cake mix and cereal operations (it had its cereal operations in that facility as well) to other loca-

tions and to sell Multifoods the entire facility to avoid a shared facility—something the staff expressed concern about. Also, instead of moving all of the machinery and equipment related to the divested business from Pillsbury's Murfreesboro plant to the Toledo plant to be purchased by Multifoods, General Mills agreed to install new machinery in Toledo. This avoided the complexities of moving the machinery—another concern expressed by the staff.

Multifoods and General Mills worked out several transition-services agreements, most notably a co-pack agreement under which General Mills would manufacture the products Multifoods needed for its business on a guaranteed cost basis until such time as the Toledo plant was converted and made ready to manufacture the same products. We also worked out a conversion agreement under which General Mills would convert the Toledo plant. Each of these agreements contained confidentiality obligations and adequate firewall protections. In addition, the staff had recommended and the parties agreed that a monitoring trustee be appointed to oversee and in effect control the co-pack and conversion operations to assure compliance.

Kristin mentioned the timing issues. Well, the staff spent a lot of time, perhaps more than any of the parties expected or wanted, to understand these mix-and-match issues. In a perverse way, the time taken by the staff was enormously helpful. The extra time gave us an opportunity to fully vet the proposed acquisition and line up the new business infrastructure. I have to add, as more time went by the deal got a lot better for us. The extra time certainly was a huge factor in our ability to successfully transition the business.

On the negative side of the timing issue, we had to extend a bank underwriting commitment for eleven months. This is an extremely long time for an underwriting commitment and posed a significant additional cost to us. This is something we didn't expect that we would have to do. However, on the other side of it, we got lucky because during the time delay interest rates dropped ten or eleven times.

We also had to contend with anxious investors and prospective employees wondering if we'd ever get this thing done. The time delay had a negative effect on the operating performance of the divested business because it just didn't get the attention it would have otherwise gotten had it been turned over to us sooner.

With respect to the manufacturing issue, we were confident that the plan that both parties' engineers proposed would work, simply because General Mills had world-class engineering talent and resources to complete the Toledo plant conversion. Unfortunately, our confidence—that is, the parties'—wasn't exactly shared by all the staff members.

With respect to the trademark, the staff expressed a lot of concern with the split trademark. In particular, the staff expressed concern that somehow General Mills would use the Pillsbury Barrelhead and the Doughboy in a way that could be detrimental to Multifoods' use of the same trademarks in connection with the products exclusively licensed to it. So far we have not seen any evidence of this kind of activity from General Mills.

The parties negotiated a trademark agreement that is very unusual. Multifoods was granted a royalty-free trademark license automatically renewable every twenty years, with exclusivity in certain product categories. This license provided flexibility that is not commonly seen in trademark license agreements. Again, the staff deserves a lot of credit for its input into this subject because it was the staff's view all along that Multifoods should have as much flexibility in its use of licensed trademarks as Pillsbury had while the desserts and specialty products business was part of the Pillsbury company.

With respect to transitional services, Multifoods and General Mills negotiated several agreements relating to transitional services, complete with confidentiality and firewall provisions that

would enable Multifoods to bring the business in and establish the infrastructure, while at the same time keeping the parties separate with respect to proprietary information. Also the parties agreed to a hold-separate agreement with respect to a portion of the Murfreesboro plant until certification by the monitoring trustee.

BILLY VIDGOR: I appreciate the positive view on which you spin the FTC staff's objections. Mike, you said that a lot of times it takes longer to review a mix-and-match than a stand-alone business. But, when you get down to it, what criteria are you using to build your confidence that a mix-and-match would work?

We look at the elements of the business that supplies the overlapping product or service. Is the management there? Do you have a credible management team with experience in this particular area?

—MIKE COWIE

MIKE COWIE: We look at the elements of the business that supplies the overlapping product or service. Is the management there? Do you have a credible management team with experience in this particular area? In Nestlé/Dreyer's, that was an important factor weighing in favor of accepting the remedy because the divestiture buyer had significant, credible management experience in the industry.¹⁶ So, management expertise is an element.

Manufacturing may be an important element depending on the market of concern. That was obviously a source of some contention in General Mills/Pillsbury. In Nestlé/Dreyer's the divestiture buyer had significant manufacturing capabilities as well as management experience.¹⁷ Management, manufacturing, and distribution capabilities may be important in evaluating a divestiture buyer. In other industries, especially pharmaceuticals, intellectual property may become important as well. There's no secret formula for evaluating divestiture buyers—it requires looking at the elements of the business in the area of concern, keeping in mind what the underlying theory of anticompetitive harm is.

BILLY VIDGOR: Kristin, without going into the specifics, what do you recommend the merging parties look for when they're looking for a divestiture candidate?

KRISTIN ADRIAN: First and foremost is somebody who's going to be acceptable to the FTC. In addition, assuming they're acceptable to the FTC, you want to make certain that they're not going to have any other conditions that would give them a right to walk from the deal, such as a financing condition or some other out. Certainty that the deal will close is very important. In addition, you're looking at how quickly the parties can sever the ties and how quickly the buyer can become truly independent.

MIKE COWIE: Kristin reminded me of the issue of financial condition. That can be a key element as well. Does the divestiture buyer have the financial condition sufficient to replace one of the merging parties going forward? Frank, I think that was an issue in General Mills/Pillsbury. One of the

¹⁶ Nestlé/Dreyer's, FTC Docket No. C-4082 (June 25, 2003) (Concurring Statement of Commissioner Sheila F. Anthony) ("CoolBrands is a qualified buyer whose management team has significant experience in the ice cream business."), available at <http://www.ftc.gov/os/2003/06/dreyeranthonystatement.htm>.

¹⁷ *Id.* ("CoolBrands has existing manufacturing capacity and expertise . . .").

Commissioners referred to Diageo providing credit or a line of credit in order to mitigate that concern.¹⁸

FRANK BONVINO: When we went out to finance the deal, we got an underwriting commitment in a very short period of time, which is unusual. But as part of that underwriting commitment, there was a high-yield piece of the debt. And in those days, the interest rates were fairly significant. The market was very tight all around with respect to financing. The seller on the underlying merger, Diageo, agreed to guarantee the high-yield piece so that we could trade off of Diageo's balance sheet, which reduced the interest rates enormously. And that was very helpful to us. We could have certainly done the deal otherwise, and I think we've produced enough information during our many meetings on this subject to support that.

BILLY VIDGOR: Mike when you're vetting the divestiture buyer, what are some of the tools you use, and what are some of the things you think people should bring to you?

MIKE COWIE: As I mentioned earlier, the underlying problem with the mix-and-match is that we're trying to substitute for the market place in evaluating whether the assets constitute a stand-alone business—so we do try to get as close to the market place as we can. One way we do that is by asking significant customers how they would interface with this business; we do talk to customers and others in the industry to help us understand whether this is likely to work.

BILLY VIDGOR: Kristin, what did you use to persuade the staff that the divestiture buyer should be accepted in Nestlé/Dreyer's?

KRISTIN ADRIAN: Obviously, in part it's up to the buyer to do some of that convincing. One thing we did was to work very closely with economists who were very helpful in providing some of the necessary information.

MIKE COWIE: I have a follow up on Kristin's comment about the use of economists, which is an important one. We at the FTC have tried to improve our accounting and financial analysis capability, and we do have a somewhat growing staff of accountants, as well as economists. This enhances communication with the management of the divestiture buyer and others.

FRANK BONVINO: On the General Mills/Pillsbury matter, face-to-face meetings with the senior management and staff was critical because Multifoods had to establish credibility. Mike, you've mentioned in your comments that one of the concerns you have is a credible management. We did bring in a number of engineers and investment bankers, to cover every issue that was thrown at us. We prepared white papers for the staff to study what we were proposing.

¹⁸ See *General Mills/Pillsbury*, FTC File No. 001-0213 (Oct. 23, 2001) (Statement of Commissioners Orson Swindle and Thomas B. Leary) ("In order to further enhance the financial strength of Multifoods, Pillsbury's parent company, Diageo, will guarantee up to \$200 million long-term debt of Multifoods to finance the purchase, with a commitment that Diageo will not directly or indirectly influence Multifoods's business decisions. Further, General Mills and Diageo will put \$10 million in escrow that could be used to finance a direct sales force"), available at <http://www.ftc.gov/os/2001/10/gmstmtswinleary.htm>.

We wanted to, first of all, establish that the company had manufacturing ability, even though we didn't have the infrastructure in the United States. We had an infrastructure in Canada, and could duplicate it here without any problem. We believed the company would reinvigorate these Pillsbury deserts and specialty products that we felt had been somewhat neglected, that we would be a formidable competitor, and that we had the financial resources and the flexibility to do this. So, those are the kinds of things that we time and time again, in the many meetings and visits that we had with the staff, tried to get across.

BILLY VIDGOR: I wasn't in on the Dreyer's deal, but I would ask—just how much risk was the FTC willing to take on a mix-and-match? Have they thought about it? Is there a standard?

MIKE COWIE: I am certainly unable to quantify but, in general, the risk tolerance is relatively low. You have seen in the last few years the Commission has brought some consummated merger cases, but obviously those are much more complicated in dealing with remedies. So in evaluating a premerger deal, there's a general recognition that now is the time to remedy the anticompetitive problem.

BILLY VIDGOR: Frank, how is your business working now that some time has passed?

*The more complex the
mix-and-match,
the longer the
investigation is going
to take . . .*

—FRANK BONVINO

FRANK BONVINO: The matter went to the Commission in October 2001, about sixteen months after General Mills and Diageo announced their deal. The Commission voted 2–2, so the deal went forward, and it went forward in October 2001 without a consent decree. Chairman Muris had recused himself. So now, twenty months later, I'm pleased to say that this divestiture has worked extremely well for us. During the first twelve months following the closing, we sold the food-service distribution business. So the company now is exclusively focused on its manufacturing business. The Toledo plant was converted. It did take a little longer than we had expected, but it was converted, and it's fully operating and functioning very well.

We started our management information system on time, without any glitches, and within budget. So I'm happy to report that. The marketing, the sales, the distribution, the supply chain, the research and development—all of those organizations were put in place and are fully functioning. In the first year we introduced forty new or improved products in this category. Just as a comparison, in the year prior to the divestiture, Pillsbury had introduced less than five. In the second year, this year, we will introduce (and this is public) fifty new or improved products. Our sales distribution—what I mean by that is the consumer-packaged products that are on the shelf of the supermarket—has increased 12 percent nationally since we acquired the business. That's, I'm told, very significant. And our consumer take-away, as measured by Nielsen, has been extremely good, probably better than we expected.

We reduced our debt by \$255 million from the sale proceeds of the distribution business and from cash flow generated from the business. So our financial position has improved dramatically.

If I can take a minute, I'd like to talk about some of the conclusions to draw from our experience. As Kristin said in her opening comments, if your client has a mix-and-match issue then the client's expectations need to be set realistically. The more complex the mix-and-match, the longer the investigation is going to take—Mike has said that as well. So, your client needs to assess at the outset whether the prize is worth the time and effort. In our case, we felt that the prize was worth the effort. We had negotiated a very favorable purchase price, and we made a commitment to see the matter through to the end.

Despite the mix-and-match challenges that I described, everybody in this deal worked very

hard, including the staff, to come up with answers and remedies to the issues presented by the staff. The staff's input was critical to us because we received an asset package that allows us to be a strong competitor. In our case the parties had a plan, and had the talent and the resources to execute and complete the remedy. The staff didn't entirely agree with that, but we knew we could do this. And, based on the results twenty months later, we believe that the divestiture not only restored competition, but actually enhanced competition in these product categories. The bakery aisle has been reinvigorated as a result of more innovation by us and by our competitors. In the end, the consumers win because they get more product choice and competitive prices.

MIKE COWIE: I'm glad to hear that this has been a success for your company. I was wondering if you could comment on the extent to which your client has replaced Pillsbury as a pricing force, in terms of providing pricing pressure on General Mills or engaging in trade promotions directed at General Mills.

FRANK BONVINO: I can't speak to where they're directed. We have other competitors. We're a very strong force. In this kind of business, trade spending—that is money spent at the trade level—is really how you promote these products, not by consumer advertising and consumer pull-through. So, I believe that we have increased trade spending from the levels that Pillsbury was trade spending before we bought the business.

LISTENER QUESTION: Mike, this is a question directed to you. If you have a mix-and-match situation, would it influence the Commission's decision positively if the divesting party brings multiple potential buyers or bidders for the assets?

MIKE COWIE: So you're saying you would present to the staff or the Commission a menu of potential divestiture buyers?

QUESTIONER: Right, does it give you confidence when you have that much interest? If we're trying to figure out what does the market think about this mix-and-match group, does it give you more confidence that you've got a lot of people interested?

MIKE COWIE: Having more ready and willing buyers improves the likelihood that the staff will find a buyer with the characteristics that we think are needed. It could inject some delay just in evaluating multiple buyers.

BILLY VIDGOR: There's a part of the investigation that focuses on competitive effects and then there's a part focusing on remedy. How do you turn from one to the other, or do you try to do this in parallel?

KRISTIN ADRIAN: If you know for certain that a remedy is going to be needed and that it's clear from the outset, that's one thing. If there is real hope that one won't be needed, I don't think that you would begin to discuss a remedy while you were still discussing the merits. It seems to me if you start to discuss the remedy, you've conceded the fact that one is needed.

MIKE COWIE: The government obviously differs from the private plaintiff—we're less likely to compromise just for the sake of compromise. It's obviously important for us, in meeting our statutory

obligations to enforce the antitrust laws in a principled way, to reach an institutional judgment that there is an underlying antitrust problem. So, we really have to get consensus here on the nature of the underlying antitrust problem before getting too far ahead on the remedy. And that might mean that we're unwilling to accept the remedy because we're uncertain that there's an underlying problem. It also may mean we need to understand whether the remedy is commensurate with the problem. So, the one thought I would add is, from our perspective, we really have to reach some understanding of the problem before getting too far along on remedy.

KRISTIN ADRIAN: So, in other words, it's probably not practical to hope that you can dual-track the two big tasks that need to be done and shorten the time frame.

MIKE COWIE: It may be difficult. There are some markets where the Commission has expertise from looking at them in the past. It may be that we can reach a principled judgment on the underlying problem relatively quickly based on experience. But, in the absence of that condition, we do have to spend the needed time to understand whether there's a problem. The staff is not going to recommend a remedy without showing our management and the Commission first that there's a problem.

BILLY VIDGOR: Any recommendations on how to narrow the issues? Frank, you had effectively every issue on the table. Are there ways of actually getting things resolved or identifying the ones that aren't issues so that you can focus on the ones that are hot?

FRANK BONVINO: The most productive way that we found was to deal with them on a rolling basis, in other words, take them one at a time and work them through to a conclusion. Because if you don't do that, then you've got bouncing balls all over the place and you never get anywhere. Psychologically, it's a lot better for the parties to do it that way because then you can feel that you're making real progress. I don't know how else to do it.

KRISTIN ADRIAN: Now I know why it took sixteen months. But I think Frank makes a very valid point that affects client counseling and expectations. If you have something tangible—say one down, ten to go, two down, nine to go—it looks like you are making progress. However, my experience has been more that you're juggling balls all along the way.

BILLY VIDGOR: How do you present these issues to a judge—whether you are advocating a settlement or opposing it?

KRISTIN ADRIAN: If you think that you have proposed a very viable fix, and you have been through all of the analyses and have all the supporting data, then depending upon various external factors, you might want to roll the dice and you might feel confident going into court. And I suspect the FTC would feel equally confident, because you wouldn't have reached that point unless you were both convinced that your position was correct.

MIKE COWIE: I would just add one dynamic. In a mix-and-match situation, in contemplating litigation, you're always going to have someone like Frank, or someone like CoolBrands on the ice cream merger, in court under oath saying, "We can compete. Here's our business plan, and we have the expertise to do it." That puts the government in a position of appearing to second-guess

business people in the trenches. That's a litigation concern. How is the court going to perceive that dynamic when you have a divestiture buyer saying, "I can do it, believe me. I've been in the industry for twenty years?"

KRISTIN ADRIAN: If they're very convincing in their presentation, then that has to be a serious issue that the FTC has to consider.

MIKE COWIE: In the *Libbey* case the FTC was able to show that the divestiture buyer was going to be dependent on a necessary input from Colombia, which had been essentially undergoing civil war at the time—at a higher price than the incumbents.¹⁹ In other words, the FTC could show empirically that the divestiture buyer was at a measurable disadvantage in obtaining an essential input. So that was a relatively clean way of showing that the divestiture buyer was inadequate and the FTC did not appear to be second-guessing the management capabilities or the sales capabilities of the divestiture buyer. So, there are ways the FTC can litigate that issue effectively. ●

¹⁹ FTC v. Libbey, Inc., 211 F. Supp. 2d 34 (D.D.C. 2002), available at <http://www.ftc.gov/os/2002/04/ftclibbey.htm>.