IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, **Plaintiff,** **v.** **AMERICAN SKIING COMPANY, and** **S-K-I LIMITED,** **Defendants.**	**Civil Action No.:** **96-01308TPJ** **Filed:**

COMPETITIVE IMPACT STATEMENT

The United States, pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. § 16(b)-(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I.

NATURE AND PURPOSE OF THE PROCEEDING

The United States filed a civil antitrust Complaint on June 11, 1996, alleging that American Skiing Company's ("ASC") proposed acquisition of the ski resorts of S-K-I Limited ("S-K-I") would violate Section 7 of the Clayton Act, 15 U.S.C. § 18. The Complaint alleges that ASC and S-K-I are the two largest owner/operators of ski resorts in New England, and that this transaction would combine eight of the largest ski resorts in this region. In particular, this acquisition would increase

substantially the concentration among ski resorts to which eastern New England residents (i.e., those in Maine, eastern Massachusetts and Connecticut, and Rhode Island) practicably can go for weekend ski trips, and to which Maine residents practicably can go for day ski trips. As a result, this acquisition threatens to raise the price of, or reduce discounts for, weekend and day skiing to consumers living in these areas in violation of Section 7 of the Clayton Act. The prayer for relief in the Complaint seeks: (1) a judgment that the proposed acquisition would violate Section 7 of the Clayton Act, 15 U.S.C. § 18; and (2) a permanent injunction preventing ASC from acquiring control of S-K-I's ski resorts, or otherwise combining such businesses with ASC's own business in the United States.

At the same time the Complaint was filed, the United States also filed a proposed settlement that would permit ASC to complete its acquisition of S-K-I's ski resorts, but require certain divestitures that would preserve competition for skiers in eastern New England and Maine. This settlement consists of a Stipulation and a proposed Final Judgment.

The proposed Final Judgment orders the parties to sell all of S-K-I's rights, titles, and interests in the Waterville Valley resort in Campton, New Hampshire, and all of ASC's rights, titles, and interests in the Mt. Cranmore resort in North Conway, New Hampshire, to one or more purchasers who have the capability to compete effectively in the provision of skiing for skiers in eastern New England and Maine at Waterville Valley and Mt.

Cranmore. The parties must complete the divestiture of these ski resorts and related assets within one hundred and eighty (180) calendar days after the filing of the proposed Final Judgment in accordance with the procedures specified therein.

The Stipulation and proposed Final Judgment also impose a hold separate agreement that requires defendants to ensure that, until the divestiture mandated by the Final Judgment has been accomplished, S-K-I's Waterville Valley and ASC's Mt. Cranmore operations will be held separate and apart from, and operated independently of, defendants' other assets and businesses. Defendants must preserve and maintain the ski resorts to be divested as saleable and economically viable, ongoing concerns, with competitively sensitive business information and decision-making divorced from that of defendants' ski resorts. Defendants will appoint a person or persons to monitor and ensure their compliance with these requirements of the proposed Final Judgment.

The United States, ASC, and S-K-I have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

II.

DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. The Parties and the Proposed Transaction

ASC, a Maine corporation headquartered in Newry, Maine, owns four ski resorts: Sunday River in Maine, Attitash/Bear Peak and Mt. Cranmore in New Hampshire, and Sugarbush in Vermont. During the 1994-95 ski season, ASC resorts accounted for 1.1 million skier days. ASC had revenues of over $58 million in 1995.

S-K-I, a Delaware corporation headquartered in West Lebanon, New Hampshire, also owns four ski resorts: Killington and Mt. Snow/Haystack in Vermont, Waterville Valley in New Hampshire, and a 51 percent interest in Sugarloaf in Maine. During the 1994-95 ski season, S-K-I resorts accounted for 1.8 million skier days. S-K-I had revenues of more than $109 million in 1995.

On February 13, 1996, ASC agreed to acquire all the common stock of S-K-I for approximately $137 million, which includes the assumption of certain liabilities. Pursuant to the purchase agreement, ASC would acquire all of the ski resort services and operations of S-K-I and its subsidiaries as well as its 51 percent interest in Sugarloaf. This proposed transaction combining the two largest owner/operators of ski resorts in New England precipitated the government's suit.

B. The Skiing Market

The Complaint alleges that the provision of weekend and day skiing constitutes a line of commerce, or relevant product

market, for antitrust purposes, and that eastern New England and Maine constitute relevant geographic markets. Within eastern New England and Maine, the Complaint alleges the effect of ACS's acquisition would be to lessen competition substantially in the provision of skiing.

The business of skiing comprises all services related to providing access to downhill skiing and snowboarding, including, but not limited to, providing lifts, ski patrol, snowmaking, design, building, and grooming of trails, skiing lessons, and ancillary services such as food service, entertainment, and lodging.

Most skiers must travel some distance from their homes to ski. Consequently, depending on, among other things, the duration of a given ski trip, the number of resorts practicably available to a skier will vary according to the time and expense required to travel to, and the qualitative aspects of, the possible alternatives.

The duration of a ski trip and the distance traveled by the skier can be identified easily by ski resorts. As a consequence, ski resorts can and do offer different prices to skiers depending on where they come from and how long they plan to stay at the resort. For example, consecutive-day passes can be offered at a discount off the single day ticket to attract weekend skiers. Discounts can be given to a skier who presents a drivers license from a more distant state without the same discounts being offered to local residents, who may have fewer choices. Also,

coupons can be put in local papers or sent out by direct mail, targeted to skiers in particular geographic areas. Promotions can be targeted to skiers in defined locations without significant risk that skiers in other locations will be able to learn about and take advantage of the lower price being offered to others. In addition, ski resorts routinely offer discounts on lift ticket prices when tickets are packaged with lodging, either by offering such "ski and stay" packages directly to skiers or by selling discounted lift tickets to the owner of a hotel or inn, who in turn sells a package to skiers. As a result, ski resorts can and do routinely charge different prices for skiing depending on the length of stay and the residence of the skier. Downhill skiing differs from other winter recreational activities, such as cross-country skiing, ice skating, snow-mobiling, sleigh rides, tobogganing, ice fishing, and taking cruises to places with hot climates. A small but significant and nontransitory increase in prices for skiing would not cause a significant number of downhill skiers to substitute other winter recreational activities for skiing.

Moreover, geographic markets for skiing are regional. Skiers are not willing to travel an unlimited distance to ski. Traveling to distant ski resorts imposes a burden on the skier, either in the form of excessive driving time or of a large additional expense for airfare. However, the longer the ski trip, the greater a skier’s willingness to travel. Thus, distance a skier will travel to a ski resort depends in part on

the length of time that skier will stay at the resort and on the qualitative characteristics of the resort.

C. Competition Between ASC and S-K-I

ASC and S-K-I compete directly to provide skiing to both eastern New England weekend skiers and Maine day skiers.

Eastern New England Weekend Skiers

ASC and S-K-I both provide skiing to eastern New England weekend skiers at each of their ski resorts. Eastern New England residents can practicably turn only to a limited number of resorts with adequate services (e.g., accommodations, number and variety of trails, and other amenities) in Maine, New Hampshire, and Vermont for weekend skiing trips. These are the resorts that have the necessary qualities and are within a reasonable traveling distance for eastern New England weekend skiers.

Smaller ski resorts and resorts located farther away cannot and after this transaction would not constrain prices charged to weekend skiers living in eastern New England. Although eastern New England skiers occasionally choose to ski at such smaller or more distant resorts, skiing at such resorts is not a practical or economic alternative for most eastern New England weekend skiers most of the time.

Ski resorts in Maine, New Hampshire, and Vermont that have the necessary qualities and services to attract weekend skiers from eastern New England can charge different prices to these skiers than they charge to others. Eastern New England weekend skiers can be identified easily by the ski resorts that are

reasonable alternatives for these consumers. These ski resorts can charge eastern New England weekend skiers prices that differ from prices charged to day skiing customers, to customers coming from other parts of the country, or to customers who stay longer than a weekend. Ski resorts can offer coupons for discounted lift tickets packaged with lodging and/or airfare, either through direct mail or through advertising in local papers, in, for example, the New York, Washington D.C., or Atlanta metropolitan areas, and not offer such coupons in eastern New England. A single firm controlling all the resorts in Maine, New Hampshire, and Vermont with adequate services for weekend skiing would be able to raise prices a small but significant amount to eastern New England weekend skiers without losing so much business as to make the price increase unprofitable.

Thus, the provision of weekend skiing to eastern New England residents is a relevant market (i.e., a line of commerce and a section of the country) within the meaning of Section 7 of the Clayton Act, and ASC and S-K-I compete directly in this market.

Maine Day Skiers

ASC provides skiing to Maine day skiers primarily at its Sunday River, Attitash/Bear Peak, and Mt. Cranmore ski resorts. S-K-I provides skiing to Maine day skiers primarily at its Sugarloaf and Waterville Valley ski resorts. Maine residents can practicably turn only to resorts in Maine and eastern New Hampshire for day skiing trips. These are the resorts that are within a reasonable traveling distance for Maine day skiers.

Ski resorts located farther from Maine cannot and after this transaction would not constrain prices charged to day skiers living in Maine. Although Maine skiers occasionally choose to ski at such more distant resorts, skiing at such resorts is not a practical or economic alternative for most Maine day skiers most of the time.

Ski resorts in Maine and eastern New Hampshire can charge prices to Maine day skiers different from prices they charge to other skiers. Maine day skiers can be identified easily by the ski resorts that are reasonable alternatives for these consumers. These ski resorts can charge Maine day skiers prices that differ from prices charged to out-of-state skiers or to Maine skiers who stay multiple days. A single firm controlling all the ski resorts in Maine and eastern New Hampshire would be able to raise prices a small but significant amount to Maine day skiers without losing so much business as to make the price increase unprofitable.

Thus, the provision of day skiing to Maine residents is a relevant market (i.e., a line of commerce and a section of the country) within the meaning of Section 7 of the Clayton Act, and ASC and S-K-I compete directly in this market.

D. Anticompetitive Consequences of the Acquisition

The Complaint alleges that the acquisition of S-K-I by ASC would substantially lessen competition. The transaction would have the following effects, among others:

1. competition generally in providing skiing to eastern New England weekend skiers would be lessened substantially;

2. actual competition between ASC and S-K-I in providing skiing to eastern New England weekend skiers would be eliminated;

3. discounting to eastern New England weekend skiers by ASC and S-K-I resorts would likely be reduced or eliminated;

4. prices for skiing to eastern New England weekend skiers would be likely to increase;

5. competition generally in providing skiing to Maine day skiers would be lessened substantially;

6. actual competition between ASC and S-K-I in providing skiing to Maine day skiers would be eliminated;

7. discounting to Maine day skiers by ASC and S-K-I resorts would likely be reduced or eliminated; and,

8. prices for skiing to Maine day skiers would be likely to increase.

Moreover, the Complaint alleges that the combination of ASC and S-K-I would substantially increase concentration in the eastern New England weekend skier market and Maine day skier market using the Herfindahl-Hirschman Index ("HHI") (explained in Appendix A to the Complaint) as a measure of market concentration. The approximate post-merger HHI for eastern New England weekend skiing, based on the 1994-95 total skier days of ski resorts located in Maine, New Hampshire, and Vermont capable of attracting and accommodating weekend skiers, would be approximately 2100 with a change in HHI of about 900 points. The

approximate post-merger HHI for Maine day skiing, based on the 1994-95 total skier days of ski resorts located in Maine and eastern New Hampshire, would be over 2900 with a change in HHI of over 1200 points.

Finally, the Complaint alleges that successful entry or expansion in the skiing business would be difficult, time consuming, and costly, as well as extremely unlikely. Entry or expansion therefore would not be timely, likely, or sufficient to prevent any harm to competition.

III.

EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment would preserve competition for skiers in the operation of ski resorts in eastern New England and Maine. Within one hundred and eighty (180) calendar days after filing the proposed Final Judgment, defendants must sell all of S-K-I's rights, titles, and interests in the Waterville Valley resort in Campton, New Hampshire, and all of ASC's rights, titles, and interests in the Mt. Cranmore resort in North Conway, New Hampshire, to one or more purchasers. The assets and interests will be sold to one or more purchasers who demonstrate to the sole satisfaction of the United States that they will be an economically viable and effective competitor, capable of maintaining or surpassing ASC's and S-K-I's pre-acquisition market performance in the operation of ski resorts in the New England region.

The divestitures ordered in the proposed Final Judgment will resolve the anticompetitive problems raised by the proposed transaction. With these divestitures, the post-merger HHI for the eastern New England weekend skiing market will be below 1800, and the parties' post-merger share of that market will be less than 40 percent. The post-merger HHI for the Maine day skiing market will be slightly over 1900 with these divestitures, and the parties' post-merger share of that market will be less than 35 percent. Given these post-divestiture HHI levels, the combined firm's post-divestiture market shares, and the number and size of independent ski resorts remaining in the affected markets, the proposed transaction is not likely to lead to a unilateral anticompetitive effect or to a higher probability of coordinative behavior, provided the divestitures are made.

Until the ordered divestitures take place, defendants must take all reasonable steps necessary to accomplish the divestitures, and cooperate with any prospective purchaser. If defendants do not accomplish the ordered divestitures within the specified one hundred and eighty (180) calendar day time period, which may be extended up to ninety (90) calendar days by the United States, the proposed Final Judgment provides for procedures by which the Court shall appoint a trustee to complete the divestitures. In that case defendants must cooperate fully with the trustee.

If a trustee is appointed, the proposed Final Judgment provides that defendants will pay all costs and expenses of the

trustee. The trustee's compensation will be structured so as to provide an incentive for the trustee to obtain the highest price for the assets to be divested, and to accomplish the divestiture as quickly as possible. After the effective date of his or her appointment, the trustee shall serve under such other conditions as the Court may prescribe. After his or her appointment becomes effective, the trustee will file monthly reports with the parties and the Court, setting forth the trustee's efforts to accomplish the divestiture. At the end of six (6) months, if the divestiture has not been accomplished, the trustee shall file promptly with the Court a report that sets forth: (1) the trustee's efforts to accomplish the divestiture, (2) the reasons, in the trustee’s judgment, why the divestiture has not been accomplished, and (3) the trustee’s recommendations. The trustee's report will be furnished to the parties and shall be filed in the public docket, except to the extent the report contains information the trustee deems confidential. The parties each will have the right to make additional recommendations to the Court. The Court shall enter such orders as it deems appropriate to carry out the purpose of the trust.

The proposed Final Judgment also imposes a hold separate agreement that requires defendants to ensure that, until the divestiture mandated by the Final Judgment has been accomplished, S-K-I’s Waterville Valley and ASC’s Mt. Cranmore operations will be held separate and apart from, and operated independently of, defendants’ other assets and businesses.

IV.

REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorney's fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against ASC or S-K-I.

V.

PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and the defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the Federal Register. The United States will evaluate and respond to

the comments. All comments will be given due consideration by the Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to entry. The comments and the response of the United States will be filed with the Court and published in the Federal Register.

Written comments should be submitted to:

Craig W. Conrath
Chief, Merger Task Force
Antitrust Division
United States Department of Justice
1401 H Street, N.W., Suite 4000
Washington, D.C. 20530.

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI.

ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits of its Complaint against ASC and against S-K-I. The United States is satisfied, however, that the divestiture of the assets and other relief contained in the proposed Final Judgment will preserve viable competition in the operation of ski resorts that otherwise would be affected adversely by the acquisition. Thus, the proposed Final Judgment would achieve the relief the government would have obtained through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits of the government's Complaint.

VII.

STANDARD OF REVIEW UNDER THE APPA FOR PROPOSED FINAL JUDGMENT

The APPA requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty (60) day comment period, after which the court shall determine whether entry of the proposed Final Judgment "is in the public interest." In making that determination, the court may consider --

> (1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;
>
> (2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e) (emphasis added). As the United States Court of Appeals for the D.C. Circuit recently held, this statute permits a court to consider, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. See United States v. Microsoft, 56 F.3d 1448, 1461-62 (D.C. Cir. 1995).

In conducting this inquiry, "the Court is nowhere compelled to go to trial or to engage in extended proceedings which might

have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process."[1] Rather,

> absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.

United States v. Mid-America Dairymen, Inc., 1977-1 Trade Cas. ¶ 61,508, at 71,980 (W.D. Mo. 1977).

Accordingly, with respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." United States v. BNS, Inc., 858 F.2d 456, 462 (9th Cir. 1988) quoting United States v. Bechtel Corp., 648 F.2d 660, 666 (9th Cir.), cert. denied, 454 U.S. 1083 (1981); see also Microsoft, 56 F.3d at 1460-62. Precedent requires that

> the balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine

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[1] 119 Cong. Rec. 24598 (1973). See United States v. Gillette Co., 406 F. Supp. 713, 715 (D. Mass. 1975). A "public interest" determination can be made properly on the basis of the Competitiveve Impact Statement and Response to Comments filed pursuant to the APPA. Although the APPA authorizes the use of additional procedures, 15 U.S.C. § 16(f), those procedures are discretionary. A court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues. See H.R. Rep. 93-1463, 93rd Cong. 2d Sess. 8-9, reprinted in (1974) U.S. Code Cong. & Ad. News 6535, 6538.

> not whether a particular decree is the one that will best serve society, but whether the settlement is "within the reaches of the public interest." More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.[2]

The proposed Final Judgment, therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice or whether it mandates certainty of free competition in the future. Court approval of a final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.' (citations omitted)."[3]

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[2] United States v. Bechtel, 648 F.2d at 666 (citations omitted)(emphasis added); see United States v. BNS, Inc., 858 F.2d at 463; United States v. National Broadcasting Co., 449 F. Supp. 1127, 1143 (C.D. Cal. 1978); United States v. Gillette Co., 406 F. Supp. at 716. See also Microsoft, 56 F.3d at 1461 (whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest.'") (citations omitted).

[3] United States v. American Tel. and Tel Co., 552 F. Supp. 131, 150 (D.D.C. 1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983), quoting United States v. Gillette Co., supra, 406 F. Supp. at 716; United States v. Alcan Aluminum, Ltd., 605 F. Supp. 619, 622 (W.D. Ky. 1985).

VIII.

DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Respectfully submitted,

June ____, 1996

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