

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

v.

THE EARTHGRAINS COMPANY,
SPECIALTY FOODS CORPORATION, and
METZ HOLDINGS, INC.,

Defendants.

Civil No: 00 C 1687

Filed: March 20, 2000

Judge Bucklo
Magistrate Judge Nolan

FINAL JUDGMENT

WHEREAS, plaintiff, the United States of America, having filed its Complaint in this action on March 20, 2000, and plaintiff and defendants, The Earthgrains Company, Specialty Foods Corporation, and Metz Holdings, Inc., by their respective attorneys, having consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein, and without this Final Judgment constituting any evidence against or an admission by any party with respect to any issue of law or fact herein;

AND WHEREAS, defendants have agreed to be bound by the provisions of this Final Judgment pending its approval by the Court;

AND WHEREAS, the essence of this Final Judgment is the prompt and certain divestiture by defendants of the Relevant Baking Assets and, if necessary, the Additional Relevant Baking Assets to assure that competition is not substantially lessened;

AND WHEREAS, the United States requires defendants to make certain divestitures for the purpose of remedying the loss of competition alleged in the Complaint;

AND WHEREAS, defendants have represented to the United States that the divestitures ordered herein can and will be made and that they will later raise no claims of hardship, mistake or difficulty as grounds for asking the Court to modify any of the injunctive provisions contained below;

NOW, THEREFORE, before the taking of any testimony, and without trial or adjudication of any issue of fact or law herein, and upon consent of the parties hereto, it is hereby ORDERED, ADJUDGED, AND DECREED as follows:

I.

JURISDICTION

This Court has jurisdiction over each of the parties hereto and over the subject matter of this action. The Complaint states a claim upon which relief may be granted against defendants under Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

II.

DEFINITIONS

As used in this Final Judgment:

A. “Earthgrains” means defendant The Earthgrains Company, a Delaware corporation with its headquarters in St. Louis, Missouri, and includes its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

B. “Specialty Foods” means defendant Specialty Foods Corporation, a Delaware corporation with its headquarters in Deerfield, Illinois, and includes its successors and assigns, and its subsidiaries (including defendant Metz Holdings, Inc. or “Metz”), divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

C. “Acquirer” means the entity or entities to whom defendants divest the Relevant Baking Assets.

D. “Relevant Baking Assets” means:

1. A perpetual, royalty-free, freely assignable and transferrable, and exclusive license to make, have made, use or sell white pan bread in the Relevant Territory under each of the Relevant Labels; and
2. Such Additional Baking Assets as the United States, in its sole discretion, determines may be reasonably necessary for an Acquirer or Acquirers to compete effectively and viably in the sale of white pan bread under each of the Relevant Labels in the Relevant Territory.

E. “Additional Baking Assets” means:

1. Earthgrains’s Des Moines, IA bakery;
2. A perpetual, royalty-free, freely assignable and transferrable, and exclusive license to make, have made, use or sell under each of the Relevant Labels any bread, buns or rolls other than white pan bread in the Relevant Territory;

3. All trucks and other vehicles, depots and warehouses, and thrift stores used by defendants in the sale and distribution of bread, buns or rolls under each of the Relevant Labels in the Relevant Territory; and
4. All route books, customer lists, contracts and accounts used in defendants' distribution and sale of bread, buns or rolls under each of the Relevant Labels in the Relevant Territory.

F. "Label" means all legal rights associated with a brand's trademarks, trade names, service names, service marks, intellectual property, copyrights, designs, and trade dress; the brand's trade secrets; the brand's technical information and production know-how, including, but not limited to, recipes and formulas used to produce bread currently sold under the brand, and any improvements to, or line extensions thereof; and packaging, marketing and distribution know-how and documentation, such as customer lists and route maps, associated with the brand.

G. "Relevant Labels" means:

- (1) Earthgrains's Colonial label; and
- (2) Metz's Taystee label (a license to which label may be divested to an Acquirer without prior approval of the licensor, Interstate Brands West Corporation, *see* the letter attached hereto as Appendix A).

H. "Relevant Territory" means:

- (1) Every county in the state of Iowa;
- (2) The following counties in the state of Nebraska: Burt, Butler, Cass, Colfax, Cuming, Dodge, Douglas, Gage, Jefferson, Johnson, Lancaster, Nemaha,

Otoe, Pawnee, Platte, Richardson, Saline, Sarpy, Saunders, Stanton, Seward, and Washington;

- (3) The following counties in the state of Kansas: Atchison, Brown, Clay, Dickinson, Doniphan, Douglas, Franklin, Geary, Jackson, Jefferson, Johnson, Leavenworth, Lyon, Marshall, Miami, Morris, Nemaha, Osage, Pottawatomie, Riley, Shawnee, Washington, Waubaussee, and Wyandotte;
- (4) The following counties in the state of Illinois: Carroll, Henry, Mercer, Rock Island, and Whiteside; and
- (5) The following counties in the state of Missouri: Andrew, Atchison, Buchanan, Caldwell, Carroll, Cass, Clay, Clinton, Daviess, De Kalb, Gentry, Grundy, Harrison, Holt, Jackson, Johnson, Lafayette, Livingston, Mercer, Nodaway, Pettis, Platte, Ray, Saline, and Worth.

I. "Earthgrains's Des Moines, IA bakery" means the bakery located at 1225-1303 2nd Avenue, Des Moines, IA 50314, and all of Earthgrains's rights, titles and interests in any tangible assets (*e.g.*, land, buildings, other real property and improvements, fixtures, machinery, tooling, fixed assets, personal property, inventory, office furniture, material, supplies and equipment) relating thereto, including all fee and leasehold and renewal rights in such assets or any options to purchase any adjoining property.

J. "White Pan Bread" means white bread baked in a pan but shall not include hamburger and hot dog buns, or variety breads such as French bread and Italian bread.

III.

APPLICABILITY

A. The provisions of this Final Judgment apply to defendants, their successors and assigns, subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees, and all other persons in active concert or participation with any of them who shall have received actual notice of this Final Judgment by personal service or otherwise.

B. Defendants shall require, as a condition of the sale or other disposition of all or substantially all of their assets, or of a lesser business unit that includes the Relevant Baking Assets, that the acquiring party or parties agree to be bound by the provisions of this Final Judgment.

IV.

DIVESTITURES

A. Defendants are hereby ordered and directed, in accordance with the terms of this Final Judgment, within ninety (90) calendar days after the filing of the Complaint in this matter, or five (5) days after notice of the entry of this Final Judgment by the Court, whichever is later, to divest all Relevant Baking Assets as viable, ongoing businesses to a Acquirer or Acquirers acceptable to the United States, in its sole discretion.

B. Defendants shall use their best efforts to accomplish the divestitures ordered by this Final Judgment as expeditiously and timely as possible. The United States, in its sole discretion, may extend the time period for any divestiture two additional periods of time, not to exceed thirty (30) calendar days each.

C. In accomplishing the divestitures ordered by this Final Judgment, defendants promptly shall make known, by usual and customary means, the availability of the Relevant Baking Assets. Defendants shall inform any person making an inquiry regarding a possible purchase of the Relevant Baking Assets that the sale is being made pursuant to this Final Judgment and provide such person with a copy of this Final Judgment. Defendants shall also offer to furnish to any prospective Acquirer, subject to customary confidentiality assurances, all information and documents relating to the Relevant Baking Assets customarily provided in a due diligence process except such information or documents subject to attorney-client privilege or attorney work-product privilege. Defendants shall make available such information to the United States at the same time that such information is made available to any other person.

D. Defendants shall provide the Acquirer and the United States information relating to the personnel involved in the production, development, and sale of the divestiture assets to enable the Acquirer to make offers of employment. Defendants shall not interfere with any negotiations by any Acquirer to employ any Earthgrains (or former Specialty Foods or Metz) employee who works at, or whose primary responsibility concerns, any bakery business that is part of the Relevant Baking Assets.

E. Defendants shall permit prospective Acquirers of the Relevant Baking Assets to have access to personnel and to any and all environmental, zoning, and other permit documents and information, and to make inspection of the Relevant Baking Assets, and have access to any and all financial, operational, business, strategic or other documents and information customarily provided as part of a due diligence process.

F. Defendants shall warrant to any Acquirer of Earthgrains's Des Moines, IA bakery that the bakery will be fully operational on the date of sale.

G. Defendants shall not take any action, direct or indirect, that will impede in any way the operation, sale, or divestiture of the Relevant Baking Assets.

H. Unless the United States otherwise consents in writing, the divestitures pursuant to Section IV or by trustee appointed pursuant to Section V of this Final Judgment shall include all Relevant Baking Assets and be accomplished by selling or otherwise conveying each asset to an Acquirer in such a way as to satisfy the United States, in its sole discretion, that the Relevant Baking Assets can and will be used by the Acquirer as part of a viable, ongoing business or businesses engaged in sale of white pan bread in the Relevant Territory. The divestitures, whether pursuant to Section IV or Section V of this Final Judgment, shall be made to an Acquirer (or Acquirers) for whom it is demonstrated to the United States's sole satisfaction that: (1) the Acquirer(s) has the capability and intent of competing effectively in the sale of white pan bread in each area in the Relevant Territory; (2) the Acquirer(s) has the managerial, operational, and financial capability to compete effectively in the sale of white pan bread in each area of the Relevant Territory; and (3) none of the terms of any agreement between an Acquirer and defendants gives any defendant the ability unreasonably to raise the Acquirer's costs, lower the Acquirer's efficiency, or otherwise interfere in the ability of the Acquirer to compete effectively in the Relevant Territory.

V.

APPOINTMENT OF TRUSTEE

A. In the event that defendants have not divested the Relevant Baking Assets within the time specified in Section IV(A) of this Final Judgment, defendants shall notify the United States of that fact in writing. Upon application of the United States, the Court shall appoint a trustee to be selected by the United States, at its sole discretion, to effect the divestiture of the Relevant Baking Assets. Defendants shall not object to the selection of the trustee on any grounds other than irreparable conflict of interest. Defendants must make any such objection within five (5) business days after the United States notifies defendants of the trustee's selection.

B. After the appointment of the trustee becomes effective, only the trustee shall have the right to divest the unsold Relevant Baking Assets. The trustee shall have the power and authority to accomplish any and all divestitures to an Acquirer(s) acceptable to the United States at such price and on such terms as are then obtainable upon reasonable efforts of the trustee, subject to the provisions of Sections IV and VI of this Final Judgment, and shall have such other powers as the Court shall deem appropriate. The trustee shall divest the unsold Relevant Baking Assets in the manner that is most conducive to remedying the loss of competition alleged in the Complaint. Subject to Section V(C) of this Final Judgment, the trustee shall have the power and authority to hire at the cost and expense of defendants any investment bankers, attorneys, or other agents reasonably necessary in the judgment of the trustee to assist in the divestitures, and such professionals and agents shall be accountable solely to the trustee. The trustee shall have the power and authority to accomplish the divestitures at the earliest

possible time to an Acquirer or Acquirers acceptable to the United States, and shall have such other powers as this Court shall deem appropriate.

C. The trustee shall serve at the cost and expense of defendants, on such terms and conditions as the United States approves, and shall account for all monies derived from the sale of each asset sold by the trustee and all costs and expenses so incurred. After approval by the Court of the trustee's accounting, including fees for its services and those of any professionals and agents retained by the trustee, all remaining money shall be paid to defendants and the trust shall then be terminated. The compensation of such trustee and of any professionals and agents retained by the trustee shall be reasonable in light of the value of the divested assets and based on a fee arrangement providing the trustee with an incentive based on the price and terms of the divestiture and the speed with which it is accomplished.

D. Defendants shall use their best efforts to assist the trustee in accomplishing the required divestitures and shall take no action to interfere with or impede the trustee's accomplishment of the divestiture of the Relevant Baking Assets. The trustee and any consultants, accountants, attorneys, and other persons retained by the trustee shall have full and complete access to the personnel, books, records, and facilities for the Relevant Baking Assets, and to defendants' overall businesses as is reasonably necessary to effectuate the divestiture. Defendants shall provide financial or other information relevant to the Relevant Baking Assets customarily provided in a due diligence process as the trustee may reasonably request, subject to reasonable protection for trade secrets or other confidential research, development or commercial information. Subject to customary confidentiality assurances, defendants shall permit prospective Acquirers of any Relevant Baking Assets to have

reasonable access to the information provided to the trustee and to management personnel for the Relevant Baking Assets, and to make inspection of any physical facilities for the Relevant Baking Assets.

E. After the trustee's appointment, the trustee shall file biweekly reports with the parties and the Court setting forth the trustee's efforts to accomplish the divestitures ordered under this Final Judgment; provided, however, that to the extent such reports contain information that the trustee deems confidential, such reports shall not be filed in the public docket of the Court. Such reports shall include the name, address and telephone number of each person who, during the preceding period, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the Relevant Baking Assets, and shall describe in detail each contact with any such person during that period. The trustee shall maintain full records of all efforts to divest the Relevant Baking Assets.

F. The United States may object to a proposed divestiture by the trustee in the manner prescribed in Section VI of this Final Judgment. Defendants shall not object to a divestiture by the trustee on any grounds other than the trustee's malfeasance. Any such objections by defendants must be conveyed in writing to the United States and the trustee within ten (10) calendar days after the trustee has provided the notice required under Section VI of this Final Judgment.

G. If the trustee has not accomplished such divestitures within one hundred and twenty (120) days after its appointment, the trustee thereupon shall file promptly with the Court a report setting forth (1) the trustee's efforts to accomplish the required divestitures, (2) the reasons, in the trustee's judgment, why the required divestitures have not been accomplished, and (3) the trustee's

recommendations for completing the required divestiture; provided, however, that to the extent such report contains information that the trustee deems confidential, it shall not be filed in the public docket of the Court. The trustee shall at the same time furnish a copy of such report to the parties, who shall have the right to be heard and to make additional recommendations consistent with the purpose of the trust. The Court shall thereafter enter such orders as it shall deem appropriate in order to carry out the purpose of the Final Judgment, which may, if necessary, include extending the trust and the term of the trustee's appointment by a period requested by the United States.

VI.

NOTICE OF PROPOSED DIVESTITURES

A. Within two (2) business days following execution of a definitive agreement, contingent upon compliance with the terms of this Final Judgment, to effect, in whole or in part, any proposed divestiture pursuant to Sections IV or V of this Final Judgment, defendants or the trustee, whichever is then responsible for effecting the divestiture, shall notify the United States of the proposed divestiture. If the trustee is responsible, it shall similarly notify defendants. The notice shall set forth the details of the proposed transaction and list the name, address, and telephone number of each person not previously identified who offered to, or expressed an interest in or a desire to, acquire any ownership interest in the Relevant Baking Assets that is the subject of the definitive agreement, together with full details of same.

B. Within fifteen (15) calendar days of receipt by the United States of such notice, the United States, in its sole discretion, may request from defendants, the proposed Acquirer(s), any other third party, or the trustee additional information concerning the proposed divestiture, the proposed

Acquirer, or any other potential Acquirer. Defendants and the trustee shall furnish any additional information requested from them within fifteen (15) calendar days of the receipt of the request, unless the parties shall otherwise agree.

C. Within thirty (30) calendar days after receipt of the notice, or within twenty (20) calendar days after the United States has been provided the additional information requested from defendants, the proposed Acquirer, any third party, and the trustee, whichever is later, the United States shall provide written notice to defendants and the trustee, if there is one, stating whether or not it objects to the proposed divestiture. If the United States provides written notice to defendants (and the trustee, if applicable) that it does not object, then the divestiture may be consummated, subject only to defendants' limited right to object to the sale under Section V(F) of this Final Judgment. Absent written notice that the United States does not object to the proposed Acquirer, or upon objection by the United States, a divestiture proposed under Section IV or Section V of this Final Judgment shall not be consummated. Upon objection by defendants under the provision in Section V(F), a divestiture proposed under Section V shall not be consummated unless approved by the Court.

VII.

AFFIDAVITS

A. Within twenty (20) calendar days of the filing of the Complaint in this matter and every twenty (20) calendar days thereafter until the divestiture has been completed, whether pursuant to Section IV or Section V of this Final Judgment, defendants shall deliver to the United States an affidavit as to the fact and manner of compliance with Sections IV or V of this Final Judgment. Each such affidavit shall include, *inter alia*, the name, address, and telephone number of each person who, at any

time after the period covered by the last such report, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the Relevant Baking Assets, and shall describe in detail each contact with any such person during that period. Each such affidavit shall also include a description of the efforts that defendants have taken to solicit buyers for any and all Relevant Baking Assets and to provide required information to prospective Acquirers, including the limitations, if any, on such information. Assuming the information set forth in the affidavit is true and complete, any objection by the United States to information provided by defendants, including limitations on information, shall be made within fourteen (14) days of receipt of such affidavit.

B. Within twenty (20) calendar days of the filing of the Complaint in this matter, defendants shall deliver to the United States an affidavit which describes in reasonable detail all actions defendants have taken and all steps defendants have implemented on an ongoing basis to comply with Section VIII of this Final Judgment and the Hold Separate Stipulation and Order entered by the Court. The affidavit also shall describe, but not be limited to, defendants' efforts to maintain and operate each Relevant Baking Asset as a viable active competitor; to maintain separate management, staffing, sales, marketing and pricing of each asset; and to maintain each asset in operable condition at current capacity configurations. Defendants shall deliver to the United States an affidavit describing any changes to the efforts and actions outlined in defendants' earlier affidavit(s) filed pursuant to this Section within fifteen (15) calendar days after any such change has been implemented.

C. For a one-year period following the completion of each divestiture, defendants shall preserve all records of any and all efforts made to preserve and divest the Relevant Baking Assets.

VIII.

HOLD SEPARATE ORDER

Until the divestitures required by the Final Judgment have been accomplished, defendants shall take all steps necessary to comply with the Hold Separate Stipulation and Order entered by this Court. Defendants shall take no action that would jeopardize the sale of any Relevant Baking Asset.

IX.

FINANCING

Defendants are ordered and directed not to finance all or any part of any acquisition by any person made pursuant to Sections IV or V of this Final Judgment.

X.

COMPLIANCE INSPECTION

For purposes of determining or securing compliance with the Final Judgment, or of determining whether the Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time:

A. Duly authorized representatives of the United States Department of Justice, upon written request of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to defendants, shall be permitted:

1. Access during office hours of defendants to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of defendants, who may have

counsel present, relating to any matters contained in this Final Judgment and the Hold Separate Stipulation and Order; and

2. Subject to the reasonable convenience of defendants and without restraint or interference from them, to interview, either informally or on the record, their officers, employees, and agents, who may have counsel present, regarding any such matters.

B. Upon the written request of the Assistant Attorney General in charge of the Antitrust Division, defendants shall submit such written reports, under oath if requested, with respect to any matter contained in the Final Judgment and the Hold Separate Stipulation and Order.

C. No information or documents obtained by the means provided in Sections IV, VI or X of this Final Judgment shall be divulged by the United States to any person other than an authorized representative of the Executive Branch of the United States, except in the course of legal proceedings to which the United States is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If at the time information or documents are furnished by defendants to the United States, defendants represent and identify in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(7) of the Federal Rules of Civil Procedure, and defendants mark each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure," then the United States shall give defendants ten (10) calendar days notice prior to divulging such material in any legal proceeding (other than a grand jury proceeding).

XI.

RETENTION OF JURISDICTION

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification of any of the provisions hereof, for the enforcement of compliance herewith, and for the punishment of any violations hereof.

XII.

TERMINATION

Unless this Court grants an extension, this Final Judgment will expire upon the tenth anniversary of the date of its entry.

XIII.

PUBLIC INTEREST

Entry of this Final Judgment is in the public interest.

Dated _____, 2000.

Court approval subject to procedures of the
Antitrust Procedures and Penalties Act, 15
U.S.C. § 16

United States District Judge