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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA,)	
)	Civil No. 74-560-PHX-CAM
Plaintiff,)	
)	<u>COMPLAINT</u>
v.)	
)	(15 U.S.C. §§ 4 and
BORDEN, INC.;)	15a)
CARNATION COMPANY;)	(31 U.S.C. §§ 231-233
FOREMOST-McKESSON, INC.; and)	
SHAMROCK FOODS COMPANY,)	Antitrust Injunction
)	and Money Damages
Defendants.)	
)	
)	Filed: Aug. 16, 1974

The United States of America, plaintiff herein, by its attorneys, brings this action against the defendants named herein in three counts. As a first claim, the United States of America brings this suit under Section 4 of the Sherman Act (15 U.S.C. § 4), in order to prevent and restrain the continuing violation by the defendants, as hereinafter alleged, of Section 1 of said Act (15 U.S.C. § 1) (Count One). As a second claim the United States of America in its capacity as purchaser of dairy products for use by Federal agencies, brings this suit under Section 4A of the Clayton Act (15 U.S.C. § 15A) to recover its actual damages (Count Two). As a third claim, alternatively, the United States of America brings this suit under the False Claims Act (31 U.S.C. §§ 231-233) for double the amount of damages sustained, plus forfeitures (Count Three).

COUNT ONE

I

JURISDICTION AND VENUE

1. As a first claim, the United States of America brings this suit under Section 4 of the Act of Congress of July 2, 1890 (15 U.S.C. § 4), as amended, commonly known as the Sherman Act, in order to prevent and restrain the continuing violation by the defendants, as hereinafter alleged, of Section 1 of the Sherman Act (15 U.S.C. § 1).

2. Each of the defendants maintains an office, transacts business and is found within the District of Arizona.

II

THE DEFENDANTS

3. Each of the corporations named below is hereby made a defendant herein. Each is organized and exists under the laws of the state indicated below, and has its principal place of business in the city indicated below.

<u>Name of Corporation</u>	<u>State of Incorporation</u>	<u>Principal Place Of Business</u>
Borden, Inc.	New Jersey	Columbus, Ohio
Carnation Company	Delaware	Los Angeles, California
Foremost-McKesson, Inc.	Maryland	San Francisco, California
Shamrock Foods Company	Arizona	Phoenix, Arizona

4. Within the period of time covered by this complaint, each of the defendant corporations was engaged in the business of processing and selling dairy products in Arizona. Defendant Borden, Inc. changed its name from The Borden Co. to its present name in 1968. The present name of defendant Foremost-McKesson, Inc. was adopted in 1967 upon the merger of Foremost Dairies, Inc. with McKesson & Robbins, Inc. Defendant Shamrock Foods Company was incorporated in 1967, as a successor to Shamrock Dairy, Inc.

III

CO-CONSPIRATORS

5. Various other individuals and companies, including dairies operating in the State of Arizona, not made defendants herein, participated as co-conspirators in the violation hereinafter alleged, and have performed acts and made statements in furtherance thereof.

IV

DEFINITIONS

6. As used herein:

(a) "Raw milk" means unprocessed cows' milk sold or delivered to dairies for processing into dairy products;

(b) "Dairy products" means end products which have been processed from raw milk, and related products not processed from raw milk but which are usually marketed by dairies, including, but not limited to: pasteurized and homogenized milk; two-percent milk; skim milk; buttermilk; whipping and table cream; half and half; sour cream; cottage cheese; chocolate and orange drinks; ice cream and ice milk; sherbets; popsicles and other novelties;

(c) "Dairy" means any corporation, firm, or individual which processes raw milk into dairy products and/or sells and distributes dairy products to customers such as grocery stores, restaurants, hotels, schools, hospitals, military installations, other government agencies and home delivery purchasers;

(d) "Ingredients" means flavoring, skim milk, solids, corn sugar, sweeteners, milk stabilizers, popsicle units and other products (other than raw milk) used in the processing of dairy products;

(e) "Packaging" means cartons, bottles, wrappers, sticks and other materials used to contain or package dairy products.

TRADE AND COMMERCE

7. The defendant corporations are the principal dairies in the State of Arizona. Their total 1973 sales in Arizona were approximately \$80,000,000. They account for approximately 90 percent of the total sales of dairy products by dairies in Arizona.

8. During the period of time covered by this complaint, defendant and co-conspirator dairies purchased and received substantial quantities of raw milk from sources located in states other than Arizona. Said raw milk was utilized by defendant and co-conspirator dairies in the processing of dairy products sold by them within Arizona and elsewhere. There was a continuous and substantial flow of raw milk in interstate commerce from sources located outside the State of Arizona to the processing plants of defendant and co-conspirator dairies located in Arizona and through them, in the form of dairy products, to customers located in Arizona and elsewhere.

9. During the period of time covered by this complaint, defendant and co-conspirator dairies purchased and received from sources located outside the State of Arizona substantial quantities of packaging and ingredients. There was a continuous and substantial flow of said packaging and ingredients in interstate commerce to defendant and co-conspirator dairies in Arizona which were used by said dairies in the processing and packaging of dairy products, and a continuous and substantial flow of said dairy products to their customers in Arizona and elsewhere.

10. During the period of time covered by this complaint, defendant and co-conspirator dairies purchased and received substantial quantities of finished dairy products from sources outside the State of Arizona for sale within Arizona. There was a continuous and substantial flow of said dairy products in interstate commerce from outside Arizona to defendant and

co-conspirator dairies and through them to their customers located in Arizona and elsewhere.

VI

VIOLATION ALLEGED

11. Beginning sometime prior to 1966, the exact date being to the plaintiff unknown, and continuing thereafter up to and including the date of this complaint, the defendants and co-conspirators engaged in a combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce in violation of Section 1 of the Act of Congress of July 2, 1890, as amended (15 U.S.C. § 1), commonly known as the Sherman Act. Said combination and conspiracy may continue unless the relief hereinafter prayed for is granted.

12. The aforesaid combination and conspiracy consisted of a continuing agreement, understanding, and concert of action among the defendants and co-conspirators, the substantial terms of which were:

(a) to fix, raise, stabilize and maintain the prices of dairy products sold to their wholesale customers;

(b) to reduce, fix and stabilize discounts for the sale of dairy products offered to certain customers;

(c) to submit collusive and rigged bids for the sale of dairy products to customers seeking bids such as schools, hospitals, military installations and other government agencies; and

(d) to allocate among themselves customers for the sale of dairy products.

13. For the purpose of forming and effectuating the aforesaid combination and conspiracy the defendants and co-conspirators have done those things which they combined and conspired to do.

VII
EFFECTS

14. The aforesaid combination and conspiracy has had the following effects, among others:

(a) competition between and among the defendants and co-conspirators has been restricted, suppressed and restrained;

(b) purchasers of dairy products have been deprived of free and open competition in the sale of dairy products; and

(c) wholesale prices of dairy products in Arizona have been raised, fixed and maintained at artificial and noncompetitive levels.

PRAYER

15. WHEREFORE, plaintiff prays:

(a) That the Court adjudge and decree that the defendants, and each of them, have engaged in a combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce in violation of Section 1 of the Sherman Act.

(b) That each of the defendants, its successors, assignees, subsidiaries and transferees, and the respective officers, directors, agents, and employees thereof, and all other persons acting or claiming to act on behalf thereof, be perpetually enjoined and restrained from, in any manner, directly or indirectly:

(i) continuing, maintaining, or renewing the aforesaid combination and conspiracy and from engaging in any other combination, conspiracy, agreement, understanding, or concert of action having a similar purpose or effect and from adopting

or following any practice, plan, program, or device having a similar purpose or effect.

- (ii) entering into any agreement, arrangement, concerted activity, or understanding with another dairy or seller of dairy products, or with any association of said dairies or sellers in relation to said products to:
 - (1) fix or adopt prices, terms, or conditions of sale;
 - (2) maintain or stabilize prices;
 - (3) submit noncompetitive, collusive, complementary or rigged bids or quotations to any customer.

(c) That the Court order each defendant for a period of five (5) years to certify in writing through one of its officers, at the time of every succeeding change in published prices, terms, or conditions of sale of dairy products, that said change was independently arrived at by said defendant and was not the result of any agreement or understanding with any competitor; and further that each defendant retain in its files the aforesaid certifications which shall be made available to plaintiff for inspection upon reasonable written demand.

(d) That the Court order each defendant to annex to every sealed bid or quotation on dairy products, for a period of five (5) years from the date of entry of a final judgment herein, a written certification by an officer of said defendant, or by the official of said defendant having

authority to determine the bid or quotation involved, that said bid or quotation was not the result of any agreement, understanding or communication between the defendant and any of its competitors.

(e) That plaintiff have such other, further and different relief as the Court may deem just and proper in the premises.

(f) That plaintiff recover the costs of this suit.

COUNT TWO

16. As an alternative to the claim alleged in Count Three, the United States of America, in its aforesaid capacity as purchaser of dairy products by Federal agencies, brings this suit against the defendants under Section 4A of the Act of Congress of October 15, 1914, as amended (15 U.S.C. § 15A), commonly known as the Clayton Act, to recover damages which it has sustained due to the violation by defendants of Section 1 of the Sherman Act (15 U.S.C. § 1).

17. The allegations contained in paragraphs 2 through 14 of this complaint are here realleged with the same force and effect as though set forth in full.

18. Plaintiff had no knowledge of the said combination and conspiracy, or of any facts which might have led to the discovery thereof, until March 1, 1973, and it first became fully aware of the scope of the unlawful conspiracy during the course of the grand jury proceedings which culminated in the return of an indictment in this District against the defendants in August 1974. It could not have uncovered the conspiracy at an earlier date by the exercise of due diligence, inasmuch as the unlawful conspiracy had been fraudulently concealed by defendants.

19. As a result of the illegal combination and conspiracy and the defendants' acts in furtherance thereof, plaintiff has

been compelled to pay substantially higher prices for dairy products than would have been the case but for the illegal conduct complained of herein, and has been financially damaged by defendants, the amount of which is presently undetermined.

PRAYER

20. WHEREFORE, the United States of America:

- (a) Prays that the herein alleged combination and conspiracy among defendants be adjudged and decreed to be in unreasonable restraint of interstate trade and commerce and in violation of Section 1 of the Sherman Act.
- (b) Demands judgment against defendants for the damages suffered by it due to defendants' violation of the antitrust laws, as provided for in Section 4A of the Clayton Act (15 U.S.C. § 15A), or some lesser amount to the extent that it has recovery under Count Three hereof together with such interest thereon as is permitted by law and the costs of this suit.
- (c) Prays that it recover such other amounts as the Court shall deem just.

COUNT THREE

21. As an alternative to the claim alleged in Count Two, the United States of America, in its capacity as purchaser of dairy products for Federal agencies, brings this suit under Sections 3490, 3491, 3492, and 5438 of the Revised Statutes (31 U.S.C. §§ 231-233), commonly known as the False Claims Act.

22. The allegations contained in paragraphs 2 through 14 are here realleged with the same force and effect as though set forth in full.

23. Inasmuch as all defendants are corporations, no defendant is in the military or naval forces of the United States, or in the

militia called into or actually employed in the service of the United States.

24. Pursuant to said combination and conspiracy, and as a result of the acts done in furtherance thereof, defendants have made sales and have received payments for dairy products on the basis of bids and quotations which they submitted and which they falsely or fraudulently represented to be bona fide, independent, competitive, and not the product of any collusion or agreement between the bidders, and the prices of which bids they further falsely or fraudulently represented to be normal, reasonable and competitive whereas, in fact known to the defendants but unknown to plaintiff, the said bids were sham and collusive and not the result of open competition, and prices therefor were unreasonable, arbitrary, and noncompetitive.

25. With respect to each such contract awarded for the supply of dairy products during the aforesaid period of the conspiracy, the defendant to which such contract was awarded, presented and/or caused to be presented to plaintiff for payment or approval by its numerous claims, knowing such claims to be false, fictitious, or fraudulent in that such claims were based on a contract which had been false or fraudulently procured by reason of the aforesaid bidding practices.


26. As a result of the presentment to it of the aforesaid false or fraudulent claims, and without knowledge thereof, plaintiff has paid the false or fraudulent claims to defendants.

27. As a result of the illegal combination and conspiracy and the defendants' acts in furtherance thereof, plaintiff has been compelled to pay substantially higher prices for dairy products than would have been the case but for the illegal conduct complained of herein, and has been financially damaged by defendants, the amount of which is presently undetermined.

PRAYER

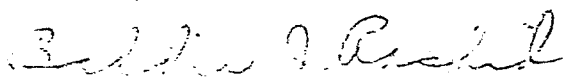
29. WHEREFORE, the United States of America:

- (a) Demands judgment against defendants for Two Thousand Dollars (\$2,000) for each claim submitted pursuant to the said conspiracy, for double the amount of the damages it has sustained, and for such other forfeitures as are allowable by law, as provided in Sections 3490, 3491, 3492 and 5438 of the Revised Statutes (31 U.S.C. §§ 231-233) together with interest thereon and the costs of this suit;
- (b) Prays that it recover such other amounts and have such other and further relief as the Court shall deem just.



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