UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *Plaintiff*, v. ARCHER-DANIELS-MIDLAND COMPANY, and MINNESOTA CORN PROCESSORS, LLC, *Defendants*.	CASE NUMBER: 1:02CV01768 JUDGE: John D. Bates DECK TYPE: Antitrust

RESPONSE OF THE UNITED STATES TO PUBLIC COMMENTS ON THE PROPOSED FINAL JUDGMENT

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Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b) ("Tunney Act"), plaintiff, the UNITED STATES OF AMERICA, acting under the direction of the Attorney General, hereby files comments received from members of the public concerning the proposed Final Judgment in this civil antitrust suit and the Response of the United States to those comments.

I. FACTUAL BACKGROUND

A. The Parties To The Transaction

Archer-Daniels-Midland Company ("ADM") and Minnesota Corn Processors, LLC ("MCP") were two of the largest corn wet millers in the United States, competing to manufacture and sell corn syrup, high fructose corn syrup ("HFCS") and other wet-milled products principally to the food and beverage industries in the United States and Canada. In addition, both firms manufactured and sold fuel ethanol, and they also procured, transported, stored,

manufactured, processed, and merchandised a wide variety of other agricultural commodities and products.

B. The Proposed Acquisition

On July 11, 2002, ADM entered into an agreement with MCP to acquire MCP's corn wet milling business, including MCP's two corn wet milling plants in Marshall, Minnesota and Columbus, Nebraska and its network of regional blending, storage, and distribution stations. As a result of the transaction, MCP has become a wholly-owned subsidiary of ADM.

C. The Complaint

On September 6, 2002, the United States Department of Justice (the "Department") filed a Complaint with this Court alleging that ADM's acquisition of MCP substantially would lessen competition in the markets for corn syrup and HFCS in the United States and Canada, in violation of Section 7 of the Clayton Act (15 U.S.C. § 18). The transaction would have eliminated the competition between ADM and MCP, making anticompetitive coordination among the few remaining corn wet millers more likely in those markets.

D. The Proposed Settlement

The Department, ADM, and MCP filed a joint stipulation for entry of a proposed Final Judgment settling this action on September 6, 2002. The proposed Final Judgment contains three principal provisions for relief. First, it requires ADM and MCP to have dissolved CornProductsMCP Sweeteners LLC ("CPMCP") on or prior to December 31, 2002. CPMCP was the marketing and sales joint venture that MCP had formed with Corn Products International ("CPI") to serve as the exclusive sales and distribution outlet in the United States, Canada, and Mexico for most corn syrup and HFCS products made by CPI and MCP in the United States.

Second, prior to or simultaneously with the closing of ADM's acquisition of MCP, the proposed Final Judgment requires the defendants to have provided CPI written notice of their election to dissolve CPMCP. Upon written notice of their election to dissolve CPMCP, the defendants additionally were required to have provided CPI with written notice that CPI is permitted to conduct independent operations in competition with the defendants and CPMCP. Third, the proposed Final Judgment requires the defendants to compete independently of CPMCP and CPI. The proposed Final Judgment does not affect or alter any obligations of ADM and MCP to facilitate or ensure that CPMCP completes the performance of any existing contracts or commitments to its customers.

E. Compliance With The Tunney Act

To date, the parties have complied with the provisions of the Tunney Act as follows:

(1) The Complaint and proposed Final Judgment were filed on September 6, 2002;

(2) the Competitive Impact Statement ("CIS") was filed on September 13, 2002;

(3) Defendants filed statements pursuant to 15 U.S.C. § 16(g) on September 17 and 18, and October 2, 2002;

(4) A summary of the terms of the proposed Final Judgment and CIS was published in the *Washington Post*, a newspaper of general circulation in the District of Columbia, for seven days during the period September 23, 2002 through September 29, 2002;

(5) The Complaint, proposed Final Judgment, and CIS were published in the *Federal Register* on November 7, 2002, 67 Fed. Reg. 67,864 (2002);[1]

[1] The Department also posted the Complaint, proposed Final Judgment and the CIS on its Website, http://www.usdoj.gov/atr/cases/indx358.htm.

(6) The sixty-day public comment period specified in 15 U.S.C. § 16(b) commenced on November 7, 2002, and terminated on January 7, 2003; and

(7) The United States hereby files the comments of members of the public (attached as Appendix A) together with this Response of the United States to the comments, pursuant to 15 U.S.C. § 16(b).

The United States will move this Court for entry of the proposed Final Judgment after the comments and the Response are published in the Federal Register. The proposed Final Judgment cannot be entered before that publication. 15 U.S.C. § 16(d).

II. Legal Standard Governing The Court's Public Interest Determination

Upon the publication of the public comments and this Response, the United States will have fully complied with the Tunney Act. After receiving the United States' motion for entry of the proposed Final Judgment, the Court must determine whether it "is in the public interest." 15 U.S.C. § 16(e). In doing so, the Court must apply a deferential standard and should withhold its approval only under very limited conditions. *See, e.g.*, *Mass. Sch. of Law at Andover, Inc. v. United States*, 118 F.3d 776, 783 (D.C. Cir. 1997). Specifically, the Court should review the proposed Final Judgment "in light of the violations charged in the complaint and . . . withhold approval only [a] if any of the terms appear ambiguous, [b] if the enforcement mechanism is inadequate, [c] if third parties will be positively injured, or [d] if the decree otherwise makes 'a mockery of judicial power.'" *Id*. (quoting *United States v. Microsoft Corp.,* 56 F.3d 1448, 1462 (D.C. Cir. 1995)).

With this standard in mind, the Court should review the comments of members of the public concerning the proposed Final Judgment and the United States' Response to those

comments. As this Response makes clear, entry of the proposed Final Judgment is in the public interest.

III. Summary Of Public Comments

In a total of three comments, nine individuals and three organizations expressed their views on the proposed Final Judgment. Their comments are summarized below.

Peter C. Carstensen, Professor of Law at the University of Wisconsin Law School, writing on behalf of himself, the National Farmers Union, the Organization for Competitive Markets, and Professors Paul Brietzke, John Connor, Thomas Greaney, Neil E. Harl, Delbert Robertson, Stephen Ross, and Kyle Stiegert, filed a comment that is critical of the Department's CIS in several respects. Professor Carstensen states that the Department's CIS failed to disclose or discuss: (1) MCP's and CPI's separate market shares in the corn syrup and HFCS markets identified in the complaint; (2) ADM's direct and indirect ownership interests in Tate & Lyle PLC ("Tate & Lyle"), the corporate parent of A.E. Staley Manufacturing Company ("Staley"); (3) a recent decision by the United States Court of Appeals for the Seventh Circuit, in the HFCS antitrust litigation; (4) additional relief that would go beyond the competitive harm from the merger; and (5) the impact of ADM's acquisition of MCP in the market for ethanol. Professor Carstensen concludes that the Department should file a revised CIS, one that provides additional factual and other information he requests.

The American Antitrust Institute ("AAI"), an independent education, research, and advocacy organization, filed a comment endorsing the comment filed by Professor Carstensen.

C. LeRoy Deichman, a former farmer-member of MCP and certified professional

agronomist, complains that MCP may have manipulated the shareholder vote on ADM's proposal to acquire MCP. Mr. Deichman also is disappointed that the acquisition eliminates MCP as a positive role model for other farmer-cooperative organizations, and he is concerned that the transaction might lead to lower prices for farmers and higher prices to consumers of corn sweeteners and ethanol.

IV. The Department's Response To Specific Comments

We now turn to the comments that raise questions about our analysis or that suggest relief different or supplemental to that contained in the proposed Final Judgment. Copies of this Response, without the Appendix, are being mailed to those who filed comments.

A. Professor Carstensen's Comment

Congress enacted the Tunney Act, among other reasons, "to encourage additional comment and response by providing more adequate notice [concerning a proposed consent judgment] to the public," S. Rep. No. 93-298, at 5 (1973); H.R. Rep. No. 93-1463, at 7 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6535, 6538. The CIS is the primary means by which Congress sought to provide more adequate notice to the public. The Tunney Act requires that the CIS recite:

(1) the nature and purpose of the proceeding;

(2) a description of the practices or events giving rise to the alleged violation of the antitrust laws;

(3) an explanation of the proposal for a consent judgment, including an explanation of any unusual circumstances giving rise to such proposal or any provision contained therein, relief to be obtained thereby, and the anticipated effects on

competition of such relief;

(4) the remedies available to potential private plaintiffs damaged by the alleged violation in the event that such proposal for the consent judgment is entered in such proceeding;

(5) a description of the procedures available for modification of such proposal; and

(6) a description and evaluation of alternatives to such proposal actually considered by the United States.

15 U.S.C. § 16(b). In this case, the Department has satisfied all of these requirements. *See* CIS at 1-3 (explaining the nature and purpose of the proceeding), 3-6 (describing events that gave rise to the alleged violation of the antitrust laws), 6-7 (explaining the proposed Final Judgment), 7 (explaining remedies available to potential private plaintiffs), 7-8 (explaining procedures available for modifying the proposed Final Judgment), and 8 (describing and evaluating alternatives to the proposed Final Judgment).

Professor Carstensen's comments purport to challenge the content of the CIS but are in fact criticisms of the Department's enforcement decisions, specifically the scope of the Complaint and the substance of the proposed Final Judgment. As explained below, these criticisms are without merit.

1. The Department Is Not Required To Disclose In The Complaint Or The CIS MCP's And CPI's Separate Market Shares In The Corn Syrup And HFCS Markets

The Complaint, at ¶¶ 19-20, sets out market concentration data, including individual capacity shares for ADM and CPMCP (the joint venture of MCP and CPI), in the relevant corn syrup and HFCS markets in the United States and Canada, alleging that these markets are highly

concentrated and that the concentration levels will substantially increase after the transaction.[2] This is a sufficient allegation of market concentration in a Section 7 case. *See, e.g., United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 363-64 (1963)(noting that acquisition by a firm that would control 30% of the market after the acquisition threatens undue concentration and is presumptively unlawful). Professor Carstensen contends that the CIS should set forth separate market shares attributable to each of the CPMCP partners, MCP and CPI, so that the post-remedy change in the Herfindahl-Hirschman Index ("HHI") can be calculated. *See* Professor Carstensen's Comment at 5.[3]

But such precise calculations are neither required by law nor very informative in assessing the effectiveness of the remedy in this case.[4] As the Complaint alleges and the CIS explains, the harm from ADM's acquisition of MCP was an increased likelihood of successful anticompetitive coordination among the remaining firms. The goal of the proposed Final Judgment, therefore, is to preserve the number of effective independent competitors. An independent competitor is effective if it has enough productive capacity to increase its output

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[2] CPI and MCP were selling all of their corn syrup and HFCS products in the United States through the CPMCP joint venture, and so they effectively were competing as one firm.

[3] The Department uses the HHI to measure market concentration, and it is calculated by summing the squares of the individual shares of all firms in the market. *See* U.S. Department of Justice/Federal Trade Commission's *Horizontal Merger Guidelines* § 1.5 issued 1992, revised 1997, *reprinted in* 4 Trade Reg. Rep. (CCH) at ¶ 13,104, *available at* http://www.atrnet.gov/policies/mergers. A market is broadly characterized as being highly concentrated if its HHI is above 1800. *See id*.

[4] HHI statistics provide a useful framework, but they are only the starting point for merger analysis. *See Horizontal Merger Guidelines at § 1.51(c)*. For the Court's information, however, the net effect of the acquisition and proposed relief is to decrease the relevant HHI in corn syrup by about 50 points, to increase the relevant HHI in HFCS 42 by about 300 points, and to increase the relevant HHI in HFCS 55 by about 100 points.

significantly in response to anticompetitive price increases. The proposed Final Judgment accomplishes this goal by requiring that ADM and MCP dissolve CPMCP by December 31, 2002, thus preserving the number of effective independent competitors, including CPI.

Professor Carstensen suggests without explanation that ADM and CPI may not compete after the acquisition. S*ee* Professor Carstensen's Comment at 7. Based on the Department's investigation, both ADM and CPI will have the ability and incentive to compete to increase their sales at their rivals' expense. There is excess capacity throughout the corn wet milling industry, a condition that gives ADM, CPI, and their competitors the incentive to respond aggressively to any increase in price.

In summary, the Department found that ADM's acquisition of MCP, as originally structured, would have enhanced the prospects for coordination among the four remaining corn wet millers, likely raising domestic prices for corn syrup and HFCS above competitive levels. The Department has concluded that the restructuring of the acquisition as required by the proposed Final Judgment resolves these competitive concerns by preserving the pre-acquisition number of effective, competitive sellers of corn syrup and HFCS.

2. ADM's Ownership Interest In Tate & Lyle Does Not Threaten Competition

Professor Carstensen contends that ADM "directly and indirectly" has a 25% stake in Tate & Lyle, the corporate parent of Staley, which is one of the five corn wet milling operations in the United States. In Professor Carstensen's view, this stake in Staley threatens competition, and so it should have been discussed in the CIS. *See* Professor Carstensen's Comment at 5-7.

The Complaint and CIS appropriately focus on the potential anticompetitive effects of the

acquisition being challenged, not pre-existing or prior transactions, such as ADM's acquisition of Tate & Lyle stock. The relevance of the ADM-Staley cross ownership to this case is limited to whether ADM's acquisition of MCP should be analyzed as reducing the number of competitors from five to four or from four to three. The Department's investigation revealed that ADM and Staley should be treated as independent competitors.

Professor Carstensen overstates ADM's equity interest in Tate & Lyle. His own citations reveal that ADM has a 41.5% interest in Compagnie Industrielle et Finianciere des Produits Amylaces ("CIP"), a European firm with a 10% interest in Tate & Lyle.[5] ADM also has a direct 5.76% interest in Tate & Lyle. *See* Tate & Lyle, 2002 Annual Report 63 (2002). Thus, even assuming for purposes of analysis that ADM's 41.5% ownership of CIP gives ADM control of CIP's 10% interest in Tate & Lyle (and Staley), ADM's interest in Tate & Lyle is less than 16%, and its share of Staley's profits is not quite 10% ((10% x 41.5%) + 5.76% = 9.91%).

Based on its investigation, the Department concluded that ADM's 16% stake in Tate & Lyle does not give ADM control or influence over Staley's business decisions, give ADM access to competitively sensitive information at Staley, or materially affect competition in more subtle ways; *e.g.*, by realigning incentives so that ADM is less inclined to compete aggressively against Staley because of its share of Staley's profits. Department staff thus determined that ADM's ownership interest in Tate & Lyle (and Staley) does not support treating ADM's acquisition of MCP as a four to three rather than a five to four situation, and so there was no reason to mention

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[5] *See* Archer-Daniels-Midland Co., 1998 Annual Report 5 (1998), http://www.sec.gov/Archives/edgar/data/7084/0000007084-98-000029.txt; Tate & Lyle, 2002 Annual Report 63 (2002), http://www.tateandlyle.com/IR/financials/annual_reports/documents/2002_TL_AR_Full.pdf.

that interest in the CIS.

3. The Seventh Circuit's Decision in the *High Fructose Corn Syrup Litigation* is Consistent With the Department's Complaint

Professor Carstensen contends that the Department's CIS should have discussed the Seventh Circuit's decision in *In re High Fructose Corn Syrup Litig.,* 295 F.3d 651, 653-54 (7th Cir. 2002), *cert. denied*, 71 U.S.L.W. 3352 (U.S. Feb. 24, 2003)(No. 02-692), 71 U.S.L.W. 3353 (U.S. Feb. 24, 2003)(No. 02-705), 71 U.S.L.W. 3367 (U.S. Feb. 24, 2003)(No. 02-736). *See, e.g*., Professor Carstensen's Comment at 2. Professor Carstensen believes the decision is particularly relevant because it suggests to him that ADM should not be permitted to acquire MCP "without any other change in the structure" of the HFCS industry. *See id*. at 6-8.

Beyond what is said about how to decide summary judgment motions in antitrust cases, the *HFCS* decision suggests that the manufacturers of corn syrup and HFCS operate in concentrated markets under conditions that are conducive to coordinated interaction. The Department reached a similar conclusion and thus brought this case. That said, the Department had no reason, and certainly no obligation, to discuss the *HFCS* litigation in the CIS.

4. The Department Has Considered All Appropriate Forms Of Relief

Professor Carstensen contends that the Department did not consider alternative remedies, including a remedy he proposes to dissolve the CPMCP joint venture, to divest ADM's interest in Tate & Lyle and to bar ADM's acquisition of MCP. Professor Carstensen would have the Department "increase[ ]the number of separate firms from 5 to 6," *see* Professor Carstensen's Comment at 8, thereby increasing rather than preserving the existing competition. This remedy is inappropriate – the purpose of an antitrust remedy is to restore or protect competition, but not

to enhance it. *See, e.g.*, *Ford Motor Co. v. United States*, 405 U.S. 562, 573 (1972). Professor Carstensen's remedy is also inappropriate because it reaches beyond the Complaint. *See United States v. Microsoft Corp*., 56 F.3d 1448, 1459 (D.C. Cir. 1995). By proposing this remedy, Professor Carstensen improperly invites the Court to restructure an industry without legal basis and to intrude on the Department's prosecutorial role. *See id*.

The Department did consider the only appropriate relief raised by Professor Carstensen, barring the acquisition. *See* CIS at 8. However, that relief would have required a full trial on the merits against the defendants. The Department concluded that the proposed Final Judgment would preserve the existence of five independent competitors, while avoiding the time, expense, and uncertainty of trial. *Id*.

5. The Department Considered The Impact Of The Acquisition In The Ethanol Market

Professor Carstensen also has asserted that "this merger *may* create significant competitive issues" and that there is "a *plausible* basis for concern" in the ethanol market. *See* Professor Carstensen's Comment at 10-11 (emphasis added). He goes on to construct his own hypothetical case, and now demands that the Court evaluate the proposed Final Judgment against that case. *Id*. at 8-15. Under the principles of *Microsoft Corp*., however, this demand is improper, for it too reaches far beyond the Complaint. *See* 56 F.3d at 1459. In any event, Department staff, in the course of its investigation, carefully considered the competitive implications of ADM's acquisition of MCP in the market for ethanol and found no evidence to support any credible theory of antitrust violation.

B. <u>AAI's Comment</u>

AAI's comment voices many of the same concerns expressed by Professor Carstensen, all

of which were addressed *supra*.

C. C. LeRoy Deichman's Comment

C. LeRoy Deichman's principal concern appears to be that MCP manipulated the shareholder vote on ADM's acquisition of MCP. That concern, and Mr. Deichman's concern that MCP is being eliminated as a role model for other farmer cooperatives that might be interested in building their own ethanol producing facilities, do not raise antitrust issues, and it is inappropriate for the Department to respond to them in this memorandum. Mr. Deichman's concerns that the acquisition may lead to higher prices in ethanol and sweetener markets raise antitrust issues that we have already addressed. In short, consumers would be forced to pay ethanol and sweetener prices above competitive levels only if the acquisition enabled makers of these products to behave in a noncompetitive manner, and it is highly unlikely that the acquisition will have that effect. *See* Sections IV.A.1. and 5. Finally, Mr. Deichman's concern about farm prices (which we take to mean corn prices) is unwarranted. Having carefully reviewed the facts, the Department found no reason to believe that the acquisition would have an adverse impact on competition in markets other than the corn syrup and HFCS markets alleged in the Complaint. Indeed, in addition to the five corn wet millers preserved as a result of the proposed Final Judgment, there exist many other alternative buyers of corn to whom farmers can sell their crops. Therefore, the acquisition is highly unlikely to give corn wet millers monopsony power to depress the prices they pay farmers for corn.

CONCLUSION

The Competitive Impact Statement and this Response to Comments demonstrate that the proposed Final Judgment serves the public interest. Accordingly, after publication of the

Response in the Federal Register pursuant to 15 U.S.C. § 16(b), the United States will move this Court to enter the Final Judgment.

Dated this 1st day of April, 2003.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of April, 2003, I have caused a copy of the foregoing Response of the United States to Public Comments on the Proposed Final Judgment and the attached Appendix to be served by first class mail, postage prepaid, and by facsimile on counsel for defendants in this matter:

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