UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States of America	)	
Plaintiff,	)	**Civil Action No. 99-1875 (GK)**
v.	)	
Cargill, Incorporated, and Continental Grain Company,	)	
Defendants.	)	

UNITED STATES RESPONSE TO PUBLIC COMMENTS

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February 11, 2000

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UNITED STATES RESPONSE TO PUBLIC COMMENTS

Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b) ("AAPA"), 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

O. The Parties to the Transaction

Cargill, Incorporated ("Cargill") and Continental Grain Company ("Continental") are grain traders. They employ grain distribution networks -- primarily composed of country elevators, rail terminals, river elevators, and port elevators -- to buy grain from farmers and other suppliers, store it, and move it to their domestic and foreign customers. In

addition, both firms
are engaged in related businesses such as grain processing and cattle feeding.

P. The Proposed Acquisition

On October 9, 1998, Cargill entered into an agreement with Continental to acquire its grain trading business (conducted by Continental's Commodity Marketing Group). Cargill is not acquiring Continental's processing or finance divisions, which Continental will continue to operate as independent businesses after Cargill's acquisition of its grain trading business.

Q. The Complaint

On July 8, 1999, the United States Department of Justice (the Department) filed a Complaint with this Court alleging that Cargill's acquisition of Continental's Commodity Marketing Group would substantially lessen competition for grain purchasing services in nine relevant markets, in violation of Section 7 of the Clayton Act (15 U.S.C. § 18). In those markets, Cargill would have gained the power to artificially depress the prices paid to U.S. farmers and other suppliers for their grain and oilseed crops -- including corn, soybeans, and wheat (collectively referred to as "grain").

The Complaint also alleged that the transaction would have resulted in Cargill and one other grain company

controlling approximately eighty percent of the capacity at the Chicago and Illinois River elevators that are authorized by Chicago Board of Trade (CBOT) to accept delivery for the settlement of corn and soybeans futures contracts.[1] That concentration would have increased the risk of manipulation of futures prices.

Finally, the Complaint alleged that a non-compete provision of the Cargill/Continental agreement was a division of markets in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Because the Cargill/Continental acquisition agreement prohibited Continental from re-entering the grain distribution business for five years, the Complaint charged that it gave Cargill more time than would be reasonably necessary to gain the loyalty of former Continental suppliers and customers, and therefore, the agreement constituted an unlawful division of markets.

R. <u>The Proposed Settlement</u>

The Department, Cargill, and Continental filed a joint stipulation for entry of a proposed Final Judgment settling this action on July 8, 1999. In each of the nine markets where the Department has determined that the consolidation of

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[1] For corn futures contracts, CBOT-authorized delivery points are located in Chicago and on the Illinois River as far south as Peoria; for soybean contracts, these facilities are in Chicago and along the entire length of the Illinois River.

competing Cargill and Continental grain elevators would give grain companies the power to artificially depress the price of grain that they pay farmers and other suppliers, the Final Judgment requires the divesture of either the Cargill grain elevator or the Continental grain elevator serving that market. The Final Judgment also requires divestitures of elevators on the Illinois River to ensure that concentration among firms controlling CBOT-authorized delivery points does not provide opportunities for manipulation of CBOT corn and soybean futures contracts.

Continental's divestitures to preserve competition for the purchase of grain from farmers and other suppliers include:

- its river elevator at Lockport, Illinois;
- its river elevator at Caruthersville (Cottonwood Point), Missouri;
- its rail elevator at Salina, Kansas;
- its rail elevator at Troy, Ohio;
- its port elevator at Stockton, California; and
- its port elevator at Beaumont, Texas.

Prior to entering into the proposed Final Judgment, Continental also terminated its minority interest in a river elevator at Birds Point, Missouri. Accordingly, no divestitures were required to protect competition in this market.

In order to protect against manipulation of CBOT futures markets, Continental was required to divest its Chicago port elevator.[2]

Cargill's divestitures to preserve competition for the purchase of grain from farmers and other suppliers were:

- its river elevator at East Dubuque, Iowa;
- its river elevator at Morris, Illinois; and
- its port elevator at Seattle, Washington (with the option to retain its port elevator at Seattle if it does not acquire the Continental port elevator at Tacoma).

In addition, the Final Judgment requires Cargill to enter into a throughput agreement making one-third of the daily loading capacity at its Havana, Illinois river elevator available to an independent grain company to avoid undue concentration among firms controlling CBOT delivery points.[3]

The proposed Final Judgment also prohibits Cargill from acquiring any interest in the facilities to be divested by Continental pursuant to the proposed Final Judgment or the

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[2] Continental's divestiture of its Lockport river elevator is a remedy for concentration among authorized CBOT delivery stations, as well as a remedy for concentration among grain buyers in that area.

[3] Cargill's divestiture of its Morris facility serves to protect against CBOT concentration problems, as well as concentration among buyers of grain in that market.

river elevator at Birds Point, Missouri in which Continental formerly held a minority interest.

Finally, the proposed Final Judgment prohibits the non-compete provision of the Cargill/Continental agreement from remaining in force for more than three years.

E. Compliance with Antitrust Procedures and Penalties Act

To date, the parties have complied with the provisions of the Antitrust Procedures and Penalties Act as follows:

(1) The Complaint and proposed Final Judgment were filed on July 8, 1999;

(2) Defendants filed statements pursuant to 15 U.S.C. § 16(g) on July 19, 1999.

(3) the Competitive Impact Statement ("CIS") was filed on July 23, 1999;

(4) The proposed Final Judgment and CIS were published in the Federal Register on August 12, 1999, 64 Fed. Reg. 44,046 (1999);

(5) 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 August 10, 1999 through

August 16, 1999;

(6) The sixty-day period specified in 15 U.S.C. § 16(b) commenced on August 12, 1999 and terminated on October 12, 1999;

(7) The United States hereby files the comments of members of the public and the Nebraska Attorney General's amicus brief (bound separately as Appendix A) together with the Response of the United States to the comments and brief, pursuant to 15 U.S.C. § 16(b); and

(8) The United States will move this Court for entry of the Final Judgment after the comments and the Response are published in the Federal Register. The 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 APPA. 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. As Judge Greene observed in the AT&T case:

> If courts acting under the Tunney Act disapproved proposed consent decrees merely because they did not

> contain the exact relief which the court would have imposed after a finding of liability, defendants would have no incentive to consent to judgment and this element of compromise would be destroyed. The consent decree would thus as a practical matter be eliminated as an antitrust enforcement tool, despite Congress' directive that it be preserved.

United States v. American Tel. & Tel. Co., 552 F. Supp. 131, 151 (D.D.C. 1982), aff'd mem. sub nom. Maryland v. United States, 460 U.S. 1001 (1983).

The United States Court of Appeals for the District of Columbia has noted that "constitutional questions . . . would be raised if courts were to subject the government's exercise of its prosecutorial discretion to non-deferential review." Massachusetts Sch. of Law at Andover, Inc. v. United States, 118 F.3d 776, 783 (D.C. Cir. 1997) (citing United States v. Microsoft Corp., 56 F.3d 1448, 1457-59 (D.C. Cir. 1995). Rather, the district 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. at 783 (quoting Microsoft at 1462).

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

Sixty-seven individuals, eight public officials, and nineteen organizations expressed their views on the proposed Final Judgment. These comments and questions are summarized below.

Sixty-five individual farmers filed comments. Some are disappointed because they believe the transaction does nothing to raise the prices they receive when they sell their grain. Others are concerned that the markets in which they sell their grain have become so concentrated that the grain companies will be able to depress prices paid to farmers for their grain. Still others are concerned that Cargill will be able to monopolize "specialty or niche" markets or lessen competition in grain futures markets. Finally, some of the commenting farmers believe there should be a complete ban on mergers and acquisitions in the agribusiness sector.

Congresswoman Jo Ann Emerson, Missouri Attorney General Jeremiah Nixon, and several farm organizations, including the Missouri Farm Bureau Federation, Missouri Soybean Association, and Permiscot County Farm Bureau, addressed their comments to Section IV(D) of the proposed Final Judgment, which directs Continental to divest its river elevator at Cottonwood Point,

Missouri, near Caruthersville. After noting that Bunge Corp. is one of the major grain purchasers in the vicinity of Cottonwood Point, these commentators urge the Department of Justice not to permit divestiture of the Cottonwood Point facility to Bunge.

New Mexico Attorney General Patricia Madrid has no opposition to the proposed Final Judgment, although she is concerned about there being one less significant competitor in the national grain trading market after the transaction. Attorney General Madrid, therefore, urges the Department to actively advocate administrative and legislative actions that will invigorate competition in the agricultural sector of our economy.

Minnesota Attorney General Mike Hatch believes the proposed Final Judgment does not go quite far enough to ameliorate antitrust concerns raised by the transaction. He is concerned that grain markets are already too highly concentrated and that agriculture industries, in general, are experiencing high rates of vertical consolidation. Under the circumstances, Attorney General Hatch recommends that the proposed Final Judgment be modified to prohibit Cargill from acquiring any other of its competitors in grain export, transport, and storage markets.

Nebraska and South Dakota Attorneys General Don Stenberg

and Mike Barnett take issue with the relevant geographic markets as defined in the Complaint. They believe the Department of Justice should not have focused on overlapping draw areas for country, rail, river or port areas, but rather suggest the relevant market should be enlarged to include the entire United States or even the rest of the world. Given that Cargill and Continental are two of our nation's largest grain trading companies, these Attorneys General are of the view that the two firms should not be permitted to merge under any circumstances. In addition, Attorney General Stenberg's comments in his amicus brief mirror many of the concerns expressed by the Organization for Competitive Markets, discussed infra.

North Dakota Attorney General Heidi Heitkamp filed a comment expressing her appreciation for the ways in which this law suit has preserved competition for farmers at the local level in North Dakota. She, nevertheless, remains concerned about powerful concentrations of agribusiness firms that North Dakota farmers must face. Based on that concern, she suggests that the Department should reconsider the adequacy of divestitures required by the proposed Final Judgment and instead, seek to enjoin the transaction in its entirety. In particular, Attorney General Heitkamp thinks the time has come to rethink antitrust analysis in the farm sector to give

greater consideration to non-economic concerns.

John W. Helmuth, an agricultural economist, filed a comment that set forth his suggested analytical framework for the Department's use in analyzing the transaction. In his view, it is essential for the Department to assess market concentration, the extent of information available to grain traders and farmers in the market, and the potential adverse competitive effects on grain futures markets and other agribusinesses beyond grain trading, such as livestock markets. Mr. Helmuth asks if we have made these assessments.

A.V. Krebs believes the Department's analysis is deficient because it fails to consider whether the transaction will permit Cargill to force its own standards, practices, marketing arrangements, and prices on farmers, processors, and merchandisers in grain markets throughout the United States.

Professor C. Robert Taylor of Auburn University is concerned that the Department did not adequately consider the extent of vertical integration in the agricultural sector. Minnesota and Nebraska Attorneys General Mike Hatch and Don Stenberg and Catholic Charities of Sioux City, Iowa voice the same concern in their comments.

Jon Lauck, writing on behalf of the Organization for Competitive Markets (“OCM”), filed a comment that was critical of the Department's analysis in several respects. OCM states

that the Department's analysis failed to consider: (1) the impact of concentration in agriculture markets other than grain buying; (2) the continuing potential for anticompetitive behavior in the post-merger market; (3) whether the divested facilities will continue to be competitive forces in the hands of new owners, particularly if the new owners do not have a "network" of elevators that buy grain; (4) the impact on potential entry into grain buying markets; (5) the ramifications of competition in overseas grain markets; (6) the implications of economic disorganization of farmers which can be exploited by powerful buyers; (7) information disparities in agriculture markets; (8) the lack of benefits of the merger; (9) a range of statutes that Congress intended courts to consider when making decisions about agriculture markets; and (10) that the consent decree risks leaving farmers without an effective outlet for legal redress. OCM's conclusion is that the proposed Final Judgment is not an adequate remedy and that the transaction should be prohibited in its entirety.

Several farm, rural-life, and religious groups voice concerns about general levels of market concentration in agriculture industries. These groups include the American Agriculture Movement, Animal Welfare Institute, Clean Water Action Alliance, Farmland Co-op Inc., Institute for

Agriculture and Trade Policy (“IATP”), Kansas Cattlemen's Association, Minnesota Catholic Conference, National Catholic Rural Life Conference, and the Office of Hispanic Ministry. In the main, they believe the Department's analysis does not adequately consider concentration in agriculture markets beyond grain buying. In their view, these non-grain markets are already too concentrated, and so Cargill ought not be permitted to acquire Continental under any circumstances.

The Kansas chapter of the National Farmers Organization (NFO) expressed concern about declining grain “basis levels.” Thus, they are concerned that Kansas farmers will receive lower prices for their grain after the transaction. The Kansas NFO did not address the adequacy of the proposed Final Judgment.

National Farmers Union (“NFU”) filed comments opposing the transaction because the transaction does not increase competition in grain markets. NFU also believes the proposed Final Judgment is deficient because it does not ensure that divested facilities will remain competitive. NFU also believes the proposed Final Judgment fails to address the roles played by Cargill and Continental in export markets.

Rural Life Office of Dorchester, Iowa expressed concern that the transaction may facilitate Cargill's exercise of market power in “organic and specialty” markets.

Women Involved in Farm Economics ("WIFE") is concerned that the transaction as proposed, by unifying the second and third largest grain traders in Nebraska, might depress grain prices to Nebraska farmers and permit Cargill to control their export market. WIFE did not object to the proposed Final Judgment.

IV. The Department's Analysis of the Transaction

We begin our response to public comments with an overview of the legal standards for analyzing mergers and acquisitions, our investigation of Cargill's proposed acquisition of Continental's commodity marketing business, and our analysis of the relevant competitive issues in this case. Thereafter, we respond to specific points raised by commentators.

A. The Relevant Merger Law

Section 7 of the Clayton Act, 15 U.S.C. § 18, prohibits mergers and acquisitions whose effect may be substantially to lessen competition "in any line of commerce . . . in any section of the country." The purpose of Section 7 is to prevent acquisitions or mergers before they create harm. "'The intent here *** [is] to cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act

proceeding.'" Brown Shoe Co. v. United States, 370 U.S. 294, 318 n. 32 (1962) (quoting S.Rep. No. 81-1775 at 4-5).

The antitrust laws apply to the exercise of market power over sellers (monopsony power), just as they do to the exercise of market power over buyers (monopoly power).[4] See Mandeville Island Farms v. American Crystal Sugar Co. 334 U.S. 219, 235-44 (1948)(a case arising under Sections 1 and 2 of the Sherman Act). Section 7, in particular, applies to monopsony power gained via acquisitions or mergers. See United States v. Rice Growers Ass'n of California, 1986 WL 12562 (E.D. Cal. 1986) (acquisition by one miller of another found to lessen competition in purchase of California paddy rice); United States v. Pennzoil Company, 252 F. Supp. 962, 981-985 (W.D. Pa. 1965)(merger found to lessen competition in purchase of Penn Grade crude oil).

To predict whether an acquisition may substantially lessen competition or tend to create a monopoly, the reviewing court must determine: (a) the "line of commerce" or product

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[4] As noted in the U.S. Department of Justice/Federal Trade Commission's Horizontal Merger Guidelines § 0.1 (issued 1992, revised 1997): "The unifying theme of the Guidelines is that mergers should not be permitted to create or enhance market power or to facilitate its exercise. Market power to a seller is the ability profitably to maintain prices above competitive levels for a significant period of time. . . Market power also encompasses the ability of a single buyer (a 'monopsonist'), a coordinating group of buyers, or a single buyer, not a monopsonist, to depress the price paid for a product to a level that is below the competitive price . . ."

market in which to assess the transaction, (b) the "section of the country" or geographic market in which to assess the transaction, and (c) the acquisition's probable effect on competition in the product and geographic markets. The probable effect often can be assessed by determining the level of concentration based on the market shares of the parties to the proposed transaction and their competitors in the product and geographic markets. See United States v. Philadelphia National Bank, 374 U.S. 321, 362-63 (1963).

B. Framework for the Department's Competitive Analysis

As the case law suggests, the core issue in competition analysis is whether the proposed transaction likely would create or enhance market power or facilitate its exercise. This investigation focused on both monopoly and monopsony issues (that is, whether Cargill would likely gain market power through its acquisition of Continental's grain trading business in its roles as a seller or as a buyer of grain).

1. Monopoly Analysis

The Horizontal Merger Guidelines, which outline the Department's enforcement policy for horizontal acquisitions and mergers subject to Section 7 of the Clayton Act, define market power in monopoly situations as the ability of a seller profitably to maintain prices above competitive levels (or to

reduce quality or service below competitive levels) for a significant period of time. Horizontal Merger Guidelines at § 0.1. An acquisition can facilitate the exercise of market power by increasing the likelihood of coordinated interaction among competing firms or by creating a market structure in which firms find it profitable to unilaterally raise prices or reduce output. See id. at § 2.

To determine whether the proposed acquisition would create, enhance or facilitate the exercise of market power, Department staff first had to define the markets within which Cargill and Continental compete. Under the Horizontal Merger Guidelines, a market is defined as a set of products or services within a geographic area such that a hypothetical monopolist could profitably impose a "small but significant and nontransitory" price increase or decrease. Id. at § 1.O.

If the evidence shows that a hypothetical monopolist of any given product or service profitably could impose such a price increase, that product or service is defined as the relevant product market. Id. at 1.11 If, on the other hand, the evidence shows that a sufficient number of customers would substitute other products or services to make such a price increase unprofitable, those products or services are also included in the product market. Id. This process continues until a group of products or services is identified for which

a small but significant and nontransitory price increase would be profitable. Id.

Similarly, if the evidence shows that a hypothetical monopolist of the relevant product or service could impose such a price increase in any given region, that region is defined as the relevant geographic market. Id. at 1.21. If, on the other hand, the evidence shows that a sufficient number of customers would switch to products or services provided at locations outside the region to make such a price increase unprofitable, those locations are also included in the geographic market. Id. This process continues until a group of locations is identified for which a small but significant and nontransitory price increase would be profitable. Id.

Once the relevant product and geographic markets are defined, Department staff must evaluate the competitive impact of the proposed acquisition. A merger is likely to be problematic if the merged firms are two of a relatively small number of sellers in the market. Under these circumstances, the merged firm may gain unilateral power to raise prices, or the existence of only a few other firms in the market may facilitate tacit collusion.

2. Monopsony Analysis

As a general proposition, the analysis of competitive issues in monopsony cases is the mirror image of the more

common analysis of competitive issues in monopoly cases.[5] For example, instead of determining whether the merging firms are two of a small number of sellers in the relevant product and geographic market, and whether the merged firm would gain sufficient market power to raise prices to consumers, monopsony analysis focuses on whether the merging firms are two of a small number of buyers in the relevant product and geographic market, and whether the merged firm would gain sufficient market power to depress prices paid to its suppliers. Likewise, instead of determining whether the buyers could defeat an attempt by a monopolist to increase prices by a small but significant and non-transitory amount by switching to alternative products or alternative suppliers, the issue in a monopsony investigation is whether the sellers could defeat an attempt by a monopsonist to depress prices by producing other products or by selling their products to more distant buyers.

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[5] As noted in Section 0.1 of the Horizontal Guidelines: "The exercise of market power by buyers ('monopsony power') has adverse effects comparable to those associated with the exercise of market power by sellers. In order to assess potential monopsony concerns, the Agency will apply an analytical framework analogous to the framework of these Guidelines."

C. Overview of the Department's Analysis of Competitive Issues in this Transaction

1. Background

Cargill and Continental are international grain traders, and so the Department's investigation encompassed grain markets throughout the world. In the course of this investigation, conducted by a team of approximately twenty lawyers, paralegals, and economists, the Department's staff: reviewed over 400 boxes of documents furnished by Cargill and Continental pursuant to our second request discovery procedures; deposed Cargill and Continental executives; reviewed relevant legal and economic literature; consulted with officials of the Department of Agriculture, the Commodity Futures Trading Commission, and state attorney general offices; and interviewed over one hundred farmers, farm organization officials, agricultural economists, grain company executives, and other individuals with knowledge of the industry and competitive conditions.

The Department's staff found that grain typically moves from farms to country elevators, from which it moves to river elevators and rail terminals, and then to domestic purchasers or to port elevators for export to the rest of the world. We found that Cargill and Continental often compete with each other at various stages of their grain distribution networks

as they buy, store, distribute, and sell agricultural commodities. Accordingly, the investigation encompassed all aspects of their worldwide grain businesses in order to identify any portions of their respective grain distribution networks where they compete with each other.

In our investigation, we focused on the use of these grain distribution networks to facilitate four different aspects of the grain business:

1. selling standard grades of grain (primarily, corn, wheat and soybeans);
2. selling less widely-traded grain products (super commodities, special commodities, and other niche products);
3. buying grain; and
4. providing elevator services at delivery facilities that are designated by the CBOT for the settlement of corn and soybean futures contracts.

As to the first two categories, the investigation indicated that the transaction would not create market power in the sale of these products; and very few of the public comments dealt with these aspects of the grain business. Most of the comments concerned the Department's conclusions on the third and fourth aspects of the Cargill and Continental grain businesses.

2. Analysis of Cargill as a Seller of Standard-Grade Grain Products

Cargill and Continental compete in a national (or international) market in their role as sellers of standard agricultural commodities. Although they are big grain companies in absolute terms, they have relatively small shares of the output markets in which they compete. One way to assess concentration among grain traders is grain storage capacity.[6] By this measure of concentration, collectively they had less than eight percent of total U.S. off-farm grain storage capacity -- before the divestitures required by the Final Judgment.[7]

Food processors, cattle feeders, and other buyers of agricultural commodities rely upon competition among a fairly large number of big grain companies with nationwide grain distribution networks and nearby regional grain companies to ensure competitive prices. Commodity prices tend to be fairly consistent in grain companies' output markets throughout the country when adjusted for transportation costs. With these

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[6] Market share data is difficult to obtain and not entirely reliable in this industry. One limitation of this measure of concentration is the "double counting" problem that occurs when a firm handles the same bushel of grain several times -- for example, when it buys wheat at a country elevator, transfers it to its rail terminal and subsequently its flour mill, and sells it to a baker.

[7] See section V(B) of this Response.

competitive conditions, it was not surprising that the officials from cereal companies, bakers, and other buyers of wheat, corn, and soybeans whom we interviewed consistently indicated that they thought the transaction would not give Cargill the power to raise prices for standard commodities.

In summary, our investigation determined that the relevant geographic market for grain companies' sale of grain is at least as broad as the national market. With a combined Cargill/Continental share of less than eight percent of that market, it is highly unlikely that this transaction could create or enhance market power for sellers of these commodities to any appreciable degree.

3. Analysis of Cargill as a Seller of Speciality Products

Although we concluded that this transaction would not give Cargill or other grain companies market power as a seller of standard grade grain products, we considered the possibility that Cargill and Continental might be two of a relatively small number of sellers of less widely-traded commodities and that the consolidation of these business might give Cargill market power as a seller of these products. Niche grain products include super commodities (crops with specific characteristics, such as high oil content corn), special commodities (crops that are not widely traded, such as

white corn), and organic crops.

Our investigation determined, however, that there are no niche product markets in which Cargill and Continental are two of a relatively small number of competitors. Consequently, we concluded that the transaction will not create opportunities for Cargill to gain sufficient market power to raise the prices on any of the niche products that it sells.

4. Analysis of Cargill as a Buyer of Grain

Although Cargill and Continental compete for the sale of grain in national and international markets, our investigation revealed that they compete for the purchase of grain in relatively small local or regional markets. Shipping grain by truck is relatively costly and time-consuming. Farmers, therefore, tend to truck their grain within limited geographic areas surrounding their farms -- usually to buyers who operate nearby country elevators or to buyers who operate river, rail or port elevators if their farms are fairly close to those facilities. Operators of river elevators and rail terminals may transport grain farther distances to buyers who operate port elevators and domestic processing plants -- reflecting the relatively low cost of transporting bulk commodities long distances by rail or barge as compared with truck

transportation. The draw area of one grain company's country, river, rail or port elevator overlaps the “draw area” of a competing elevator if their facilities are close enough to each other so that the costs of shipping grain to the two elevators are not significantly different.

During the course of our investigation, the Department reviewed every local or regional market in which Continental competed with Cargill for the purchase of grain before the transaction. Department staff began this process by identifying every geographic market in which Cargill and Continental operate facilities with overlapping draw areas.[8] We then determined how many grain companies other than Cargill and Continental operated grain elevators in each of those markets and conducted detailed and specific analyses of all of the approximately three dozen local or regional markets that are served by less than twelve grain company elevators. The analysis for each of these geographic markets included interviews of farmers, officials of farm organizations, independent elevator operators, and other people with knowledge of these local and regional markets, determinations of local or regional grain transportation costs, and other

[8] At this stage of the process, we eliminated only the Continental elevators that are located so far away from the nearest Cargill elevator that it is inconceivable that the Continental elevator and nearest Cargill elevator might be drawing an appreciable amount of grain from the same farmers.

relevant information about competitive conditions in these markets. We concluded that sufficient numbers of competitive grain buyers would remain after the consolidation of the Cargill and Continental elevators in most of those local or regional markets to make it highly unlikely that grain companies could gain the power to depress the prices they pay for grain.

In nine local or regional markets, however, farmers located within the overlapping Cargill/Continental draw areas depend on competition among Cargill, Continental, and only a few other grain companies to obtain a competitive price for their grain. Cargill's acquisition of Continental's elevators in these markets, therefore, could create sufficient market power to enable the few grain companies competing in those markets to depress grain prices.

Sections VI and VII of the Complaint refer to these overlapping Cargill/Continental draw areas as "captive draw areas." This term identifies highly concentrated markets in which Cargill and Continental are two of a relatively small number of grain buyers and in which the transaction is likely to create or enhance monopsony market power for: operators of port elevators in the Pacific Northwest port range; operators of port elevators in the central California port range; operators of port elevators in the Texas Gulf port range;

operators of river elevators along the Illinois and Mississippi rivers; and operators of rail terminals in the vicinities of Salina, Kansas and Troy, Ohio.

In order to prevent the loss of competition for the purchase of grain that would result from Continental's exit from these markets, the Department insisted that Cargill divest either its elevator or Continental's elevator in the markets to a new entrant who would operate the facility as a grain elevator and compete for the purchase of grain from farmers in the facility's draw area. Cargill and Continental have divested, or are in the process of divesting, the following facilities:

Continental Facilities	Acquirer
Lockport, IL river elevator	Louis Dreyfus Corporation
Caruthersville, MO river elevator	Louis Dreyfus Corporation
Salina, KN rail elevator	declined to renew its lease
Troy, OH rail elevator	Mennel Milling Company
Beaumont, TX port elevator	Louis Dreyfus Corporation
Stockton, CA port elevator	Penny Newman Grain Co.

Birds Point, MO river elevator[9]	terminated minority interest

Cargill Facilities	Acquirer
East Dubuque, IL river elevator	Consolidated Grain & Barge
Morris, IL river elevator	Louis Dreyfus Corporation
Seattle, WA port elevator	Louis Dreyfus Corporation

5. Analysis of Cargill as an Operator of River Elevators Designated by CBOT for Settlement of Futures Contracts

Our investigation indicated that the acquisition would give Cargill and one other firm approximately 80% of the authorized delivery capacity for settlement of CBOT corn and soybeans futures contracts. In the light of these market shares and other market information, we determined that Cargill's acquisition of Continental would make it easier for Cargill unilaterally, or in coordination with the few remaining firms in the corn and soybean futures markets, to manipulate corn and soybean futures contracts in violation of Section 7 of the Clayton Act.

The divestitures of Continental's Lockport river elevator and Cargill's Morris river elevator are needed to prevent the

[9] The proposed Final judgment does not require a divestiture of the Birds Points facility since Continental terminated its minority interest in that facility before the execution of that settlement agreement.

loss of competitors that otherwise would have occurred as a result of consolidation among operators of delivery facilities authorized for the settlement of CBOT corn and soybean futures contracts. Further divestitures required by the Final Judgment to remedy these concerns include Continental's Chicago port elevator and one-third of the capacity of Cargill's river elevator at Havana, Illinois.

6. Summary of the Department's Competitive Analysis

In summary, the Department found that Cargill's acquisition of Continental's Commodity Grain Marketing Group, as originally structured, would violate the antitrust laws. Cargill's acquisition of grain elevators in nine local or regional markets in which there are relatively small numbers of elevators operated by other grain companies would have created or enhanced the ability of grain companies to exercise monopsony powers in those geographic markets. Cargill's acquisition of Continental's CBOT-authorized delivery points would have resulted in undue concentration of these facilities and increased opportunities for manipulations of CBOT futures markets. And, the non-compete provision of the Cargill/Continental agreement would have harmed competition by unduly restricting Continental's right to re-enter the grain trading business in the future.

The Department has concluded that the restructuring of

the transaction as required by the proposed Final Judgment resolves these competitive concerns. The divestitures required by the Final Judgment should preserve the competitive conditions that existed before the acquisition and ensure that farmers in the affected markets will continue to have effective alternatives to Cargill when selling their crops. The entry of new operators of CBOT-authorized delivery stations should prevent manipulation of CBOT corn and soybean futures markets. And, the requirement that the non-compete provision of the Cargill/Continental agreement remain in force for no more than three years should ensure that Cargill does not preclude Continental's re-entry into the grain distribution business for longer than is required to give Cargill a fair opportunity to gain the loyalty of former Continental suppliers and customers.

V. The Department's Responses 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 appendix are being mailed to all who filed comments.

A. Remedy

Several commentators questioned whether the acquirers of

the divested facilities would be competitive.[10] The proposed Final Judgment sets forth procedures designed to ensure that the firms that acquire the divested facilities will vigorously compete to buy grain from farmers in their geographic markets.

Pursuant to the proposed Final Judgment, Cargill and Continental provided widespread notice of the availability of the facilities that they were required to divest in newspapers of general circulation, provided appropriate information concerning these facilities to prospective acquirers, and submitted reports to the Department concerning these inquiries and subsequent negotiations. They received over one hundred written expressions of interest in the facilities to be divested,[11] and now have entered into definitive agreements to divest all of the facilities that they were required to transfer to new entrants under the terms of the Final Judgment.

To ensure that the new entrants have the capability to compete with Cargill and other incumbent grain companies in

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[10] Minnesota Attorney General Mike Hatch, South Dakota Attorney General Mark Barnett, National Farmers Union, and Western Organization of Resource Councils.

[11] As a further indication of widespread interest in the divested facilities, the number of potential acquirers who obtained detailed information pursuant to confidentiality agreements ranged from thirteen (for the Seattle port elevator) to twenty-one (for the Morris and Caruthersville river elevators).

their markets, the United States reviewed the proposed divestiture agreements, obtained further information from the proposed acquirers, and conducted an independent investigation into the background and capabilities of the proposed acquirers. Under the Final Judgment, the United States has the sole right to disapprove any prospective acquirer if it concludes that the proposed acquirer might not operate the divested facility as part of a viable, ongoing business. The Department's investigation indicated that each of the proposed acquirers has the financial capability, expertise, and incentive to become a vigorous, independent competitor in the relevant market. Louis Dreyfus and Consolidated Grain & Barge are major grain companies who will use these acquisitions to expand into markets that they do not presently serve. Mennel and Penny Newman are smaller, but they are experienced grain traders who presented sound business plans for assimilating the Troy rail elevator and Stockton port elevator in their respective grain distribution businesses.

In summary, the divested facilities will be controlled by new entrants with the background, expertise, and incentive to compete effectively for the purchase of grain produced in these markets. With these divestitures, therefore, it is not likely that this transaction will create or enhance the exercise of market power by Cargill or other grain companies

enabling them to depress prices paid to farmers for their crops in any market.[12]

For the divestitures required to forestall undue concentration among firms who control river elevators designated for the settlement of CBOT corn and futures contracts, the Department insisted on additional criteria. We required that the proposed acquirers (Louis Dreyfus at Morris and Lockport, NIDERA at Chicago, and Prairie Central at Havana) demonstrate that they satisfy all requirements for obtaining CBOT designation as an authorized delivery point (including CBOT's financial standards) in addition to the criteria established for the other divestitures.

Turning to one specific local market, Congresswoman Jo Ann Emerson, several farm groups, and one individual farmer in

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[12] Antitrust relief should "'cure the ill effects of the illegal conduct, . . . assure the public freedom from its continuance,' . . . and it necessarily must 'fit the exigencies of the particular case.'" See Ford Motor Company v. United States, 405 U.S. 562, 575 (1972) (quoting United States v. United States Gypsum, 340 U.S. 76, 88 (1950)) and International Salt Co. v. United States, 332 U.S. 392, 401 (1947)). The proposed Final Judgment meets these criteria by preserving competition in domestic grain markets, as it existed prior to the transaction. In the absence of any evidence to indicate that the transaction raises antitrust concerns elsewhere, there is no basis for prohibiting Cargill "from acquiring any other direct competitors in grain export, transport, and storage markets," as suggested by Minnesota Attorney General Mike Hatch. If Cargill were to attempt to acquire competitors in additional markets, the Department will have the opportunity to investigate those acquisitions and to seek remedies for any transactions that violate the antitrust laws.

southeastern Missouri cautioned against allowing Bunge Corp. to acquire the Continental river elevator at Caruthersville (Cottonwood Point), Missouri because Bunge is already one of the major grain buyers in that local market.[13] The United States agrees with their analysis. Bunge will not acquire that facility; instead it will be acquired by Louis Dreyfus.

B. Market Definition

Several commentators argue that the United States failed to recognize that Cargill and Continental operate on a national scale and to realize that this transaction would concentrate the national grain market for the purchase and sale of grain.[14] We believe that we used the correct market definitions in our competitive analysis.

Under standard antitrust analysis (as applied to monopsony cases), we determine the boundaries of relevant geographic markets by determining whether it would be profitable for the only buyer of grain in the geographic market to depress the price that farmers receive for their grain by a small, but significant, and non-transitory amount.

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[13] Missouri Farm Bureau Federation, Missouri Soybean Association, Pemiscot County Farm Bureau, and Clyde Southern.

[14] Nebraska Attorney General Don Stenberg, South Dakota Attorney General Mark Barnett, National Farmers Union, WIFE, and Reena Kazmann.

In this case, the farmer's alternatives when he looks for buyers of his crops include the closest grain buyer and other buyers located relatively near the closest buyer.[15] In most markets, we found that the additional trucking costs would preclude farmers from shipping their crops more than about twenty to thirty miles beyond the nearest grain elevator to get a small, but significant, increase in the price paid for his grain.

In this case, therefore, it was appropriate to focus our monopsony analysis on local or regional markets consisting of areas in which: (a) Cargill and Continental had elevators that were close enough to each other to compete for the purchase of grain originating in their overlapping draw areas; and (b) there were a relatively small number of competitors near enough to the Cargill and Continental facilities to be reasonable outlets for farmers located in the overlapping Cargill/Continental draw areas. These are the markets in which the transaction could create market power if too few competitors remained after Cargill acquired nearby Continental grain elevators.

Our investigation began with an examination of all local

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[15] The cost of shipping grain from farm to grain elevator is more relevant than the distance from farm to grain elevator, but cost and distance are roughly proportionate to each other in most cases.

or regional markets in which Cargill and Continental operated grain elevators that were close enough together to compete for the purchase of grain from the same farmers. After eliminating the local or regional markets served by relatively large numbers of other grain company elevators, we found that Cargill and Continental were two of a relatively small number of grain companies who competed for the purchase of grain in nine local or regional markets and concluded that the transaction would have created monopsony market power in those markets.

Not one of the comments that we received indicated that we overlooked a specific local or regional market in which the transaction was likely to create competitive problems. Instead, the commentators who said that we overlooked a relevant geographic market directed our attention to national, international or export markets.

If the relevant geographic market were nationwide, we would have been forced to conclude that the transaction is not likely to lessen competition among grain buyers. Using total U.S. off-farm grain elevator capacity as a measure of market share in the grain distribution industry, Cargill had about a 5.7% share of the market and Continental about 2.1% before the transaction (and before the combined capacity was reduced by

the divestitures required under the Final Judgment).[16] The combined share of less than eight percent of the market is far below any appropriate threshold for suggesting that this transaction is likely to significantly lessen competition among grain buyers. Thus, the combined Cargill/Continental share of the national grain market masks the anticompetitive effects of this transaction, as originally structured, at the local or regional level.

Other commentators suggest that the U.S. grain export market may be a relevant market.[17] Cargill and Continental are two of the United States' largest agricultural exporters (with combined export market shares of about 40% for corn, 30% for soybeans, and 25% for wheat); but, U.S. export market shares are not meaningful indications of concentration in any relevant grain output market. The customers for Cargill and Continental U.S. grain exports (i.e., grain buyers in foreign countries) rely on competition among relatively large numbers of U.S. and foreign grain sellers. These sellers include

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[16] The 1999 Grain & Milling Annual estimates total U.S. off-farm grain storage capacity to be 7,938,190,000 bushels. Id. at 7. Cargill had total capacity of 452,399,560 bushels; Continental 169,346,000 bushels. Id. at 21, 22. The combined Cargill/Continental capacity is 7.83% of total U.S. off-farm grain storage capacity.

[17] Nebraska Attorney General Don Stenberg, South Dakota Attorney General Mark Barnett, National Farmers Union, and WIFE.

Cargill, Continental, other big international grain traders, such as Bunge, Louis Dreyfus, Peavey (a division of ConAgra), and ADM, smaller regional grain traders, and (in most cases) their own domestic producers. With such large numbers of competing sellers in these markets, it is not likely that the this transaction will create or enhance monopoly market power.

Cargill and Continental port elevators were a major focus of our investigation, but not because of their impact on buyers in foreign markets. We devoted substantial efforts to the investigation of this level of the Cargill and Continental grain distribution networks because: (a) in several port ranges, they compete with each other for the purchase of grain from farmers and other suppliers in their port elevators' overlapping draw areas; and (b) there are relatively small numbers of other grain companies in some of those port ranges. In fact, we found competitive problems requiring the divestiture of four of Continental's six port elevators.

C. Cargill's Power over Price

Many of the those who filed comments are concerned that Cargill may have the power to depress grain prices paid to farmers after it acquires Continental.[18] We too had that

[18] Nebraska Attorney General Don Stenberg, South Dakota Attorney General Mark Barnett, Animal Welfare Institute, National Catholic Rural Life Conference, and Office of

concern, and as explained in section IV of this memorandum, we concluded that the acquisition as originally proposed would have adversely affected farmers in local or regional markets who had no reasonable choice but to sell their grain to Cargill, Continental, and only a few other grain companies. As explained in section V(A) of this memorandum, the divestitures required by the proposed Final Judgment protect those farmers. Only if the Court were not to require the divestitures set forth in the proposed Final Judgment would grain companies gain the power to depress prices paid to farmers and other suppliers in these markets.[19]

Hispanic Ministry, Greta Anderson, Vivian Anderson, Kay Barnes, Isabelle Barth, Mary Beckrich, Amanda Bray, Loris von Brethorst, Marilyn Borchardt, Mike Callicrate, G. M. Carlson, Mary Casserand, Laurie Chancellor, Donald B. Clark, Roger and Shari Cummings, Peggy B. Daugherty, Lyman and Darline Denzer, Steve Dewell, C.K. Dresae, Llewellyn and Karen Engelhart, Dan and Judy Gotto, Bob Gregory, Mary Hargrafen, Minnesota AG Mike Hatch, Veron E. Heim, John W. Helmuth, Barbara Hook, Jeff Horejsi, Robin Kleven, Riley Lewis, Todd Lewis, Lawrence Marvin, Margot Ford McMillen, Darlene Milbradt, Winton Nelson, Jennifer Poole, Rae Powell, Lois Shank, Lyle D. Spencer, Ellen Stebbins, Elenor Steburg, Daniel J. Swartz, and Professor C. Robert Taylor.

[19] A.V. Krebs posed the question whether farmers and others who deal with Cargill will be forced to conform to Cargill's standards for marketing grain after the acquisition. The answer is no. The proposed Final Judgment ensures that the transaction will not create or enhance the ability of Cargill to exercise market power in domestic grain markets. Absent market power, Cargill cannot impose its will on the firms with whom it does business.

Several individual farmers and the National Farmers Union

D. Futures Markets

Several comments stated that the United States failed to consider the impact of the transaction on futures markets.[20] In fact, we devoted considerable attention to that issue. Our analysis of the futures issue included reviews of all agricultural futures markets and economic literature on the subject, interviews of farmers, farm organization officials, grain company executives, and other people who rely on futures markets, and extensive consultations with officials from the Commodity Futures Trading Commission (CFTC).

We concluded that the transaction, as originally structured, would have given Cargill and Archer Daniels Midland Co. (ADM) approximately eighty percent of the delivery capacity for the settlement of CBOT corn and soybean futures contracts, thereby increasing opportunities for manipulation of those futures markets. Under the transaction, as originally structured, Cargill would have acquired eight Continental elevators that were authorized to accept

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oppose the acquisition because it will not have the effect of increasing prices or competition in grain markets. The goal of antitrust is to prevent transactions that would reduce existing competition. The antitrust laws provide no legal basis for using the power to challenge proposed mergers to increase competition in any market.

[20] Minnesota Attorney General Mike Hatch, John W. Helmuth, and Keith Mudd.

deliveries for the settlement of CBOT corn and soybean futures contracts. The proposed Final Judgment requires the divestiture of three CBOT-authorized delivery stations on the northern portion of the Illinois river -- Continental's port elevator at Chicago, Continental's river elevator at Lockport, and Cargill's river elevator at Morris. In addition, Cargill is required to make one-third of its loading capacity at a fourth facility -- its Havana river elevator --available to an independent grain company under a throughput agreement in order to gain an additional facility on the southern portion of the Illinois River for the settlement of soybean futures contracts.

During our review of the divestitures proposed by Cargill and Continental, we reviewed the prospective acquirers' backgrounds to ensure that they had the requisite financial and operational capabilities and incentives to become vigorous independent competitors. In cooperation with officials from the CFTC, we also obtained credible assurances that the acquirers could obtain CBOT authorization to accept deliveries in settlement of corn and soybean futures contracts. The Department concluded that the divestitures will leave sufficient CBOT-authorized delivery capacity in the control of firms other than Cargill and ADM to protect against manipulation of CBOT corn and soybean futures markets.

E. Specialty Markets

Several commentators indicated that the United States failed to consider whether the transaction would enable Cargill to monopolize speciality or niche commodity markets.[21] As noted in section IV(B)(3) of this Response, we did study this issue, but our investigation produced information showing that the transaction would not create or enhance market power in any markets for the purchase or sale of niche products (including super commodities, special commodities, and organic grain products).

In summary, our investigation uncovered no niche product market in which Cargill and Continental were two of a relatively small number of buyers or sellers. Our investigation, which encompassed all niche products handled by either Cargill or Continental, revealed that either: (a) they did not compete with each other before the transaction or (b) there were sufficient numbers of other grain companies in the market to deny Cargill the opportunity to gain monopoly or monopsony market power.

F. Nebraska Grain Markets

Several members of the WIFE organization in Nebraska

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[21] Minnesota Attorney General Mike Hatch, Rural Life Office, Office of Hispanic Ministry, and Roger and Shari Cummings.

expressed concern about the ability of Cargill to depress prices paid to Nebraska farmers. As mentioned previously, the main focus of our competitive analysis was to determine whether the transaction was likely to create sufficient market power for Cargill to depress prices paid to farmers in any local or regional market. Since our preliminary investigation identified several markets in Nebraska in which Cargill and Continental competed for the purchase of grain, we devoted considerable attention to local markets within that state. After conducting numerous interviews with farmers and farm organizations in those areas, calculating local grain transportation costs, and considering other relevant competitive data, however, we concluded that there were no local markets in Nebraska in which Cargill and Continental were two of a relatively small number of competitors for the purchase of grain. In each Nebraska market where Cargill and Continental compete with each other for the purchase of grain, we found that there were sufficient numbers of alternative nearby buyers remaining after the Cargill/Continental consolidation to defeat any attempt by grain companies to depress prices paid to farmers in those areas. Accordingly, we did not seek divestitures of any grain elevators in Nebraska.

G. Concentration in Other Agriculture Markets

Some comments express concern over concentration in markets other than grain -- for example, markets pertaining to beef and pork packing, cattle feedlots, broiler and turkey production, animal feed plants, flour and corn milling, soybean crushing, and ethanol production.[22] The comments suggest that the Department's analysis of the Cargill transaction may be deficient because it fails to give due consideration to these and other agriculture markets.

The Department disagrees. No facts have arisen that lead us to believe that Cargill's acquisition of Continental will harm competition in markets other than those identified in the Complaint.

The Department filed the Complaint and entered into the proposed Final Judgment after an extensive investigation. During this investigation, we examined competition and the likely effects of the transaction in every market where both Cargill and Continental provide competing products or services. We focused on the grain and grain futures markets alleged in the Complaint because these are the markets in which Cargill and Continental compete with each other and the markets in which competition could diminish after this

[22] Nebraska Attorney General Don Stenberg, AAM Inc., Clean Water Action Alliance, IATP, Kansas Cattlemen's Association, and Minnesota Catholic Conference, Marilyn Borchardt, John W. Helmuth, and Richard and Margene Eiguren.

transaction.

We are aware of other agribusiness industries in which one or both firms operate -- including beef and pork packing, broiler and turkey production, flour and corn milling, soybean crushing, cattle feedlots, animal feed plants, and ethanol -- but none of these industries is affected by the transaction since Continental is not selling its processing division to Cargill. Having carefully reviewed the facts, the Department has found no reason to believe that the transaction would have an adverse impact on competition in markets other than the grain markets alleged in the Complaint.

H. Ban on all Agribusiness Mergers

Some commentators suggest that current concentration levels in agriculture markets justify an absolute ban on mergers and acquisitions in the agriculture sector.[23] The antitrust laws provide no legal basis for such a ban, and the Department has no power to prevent the consummation of any transaction except to prevent or cure specific violations of the antitrust laws. Section 7 of the Clayton Act is the principal federal statutory provision dealing with mergers and acquisitions and, as explained above, it prohibits transactions that may harm competition in specific markets.

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[23] Mary Beckrich, Dick Lundebreck, David Olson, and Professor C. Robert Taylor.

Concentration levels are an important part of the analysis, but the ultimate test under Section 7 is whether the acquisition may tend to substantially lessen competition and that is the showing we must be prepared to prove in court, based on the facts in any given case.

I. Vertical Integration

Several commentators express concern about a trend toward vertical integration in agricultural industries, and they ask if the Department gave due consideration to that trend.[24] The Department is aware that some agricultural sectors are experiencing an increase in vertical integration. While a trend toward integration can be anticompetitive in certain circumstances, we did not find that such concerns are presented by the Cargill-Continental transaction.

Vertical integration occurs when several stages of production, processing, distribution, and marketing are brought together in one firm. In broilers, for example, many of the big firms are involved in breeding, hatching, growing, processing, and packaging activities. Vertical integration also appears to be increasing in other agricultural sectors.

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[24] South Dakota Attorney General Mark Barnett, AAM Inc., Animal Welfare Institute, Catholic Charities, Clean Water Action Alliance, Jan Lundebrek, David Olson, and Professor C. Robert Taylor.

In many circumstances, vertical integration is actually procompetitive, allowing firms to reduce their costs. See Herbert Hovenkamp, Federal Antitrust Policy, The Law of Competition and Its Practice, 332-36 (1994). However, there may be circumstances in which vertical mergers raise antitrust concerns, usually by either increasing barriers to entry, facilitating collusion or circumventing regulation. Id. at 346-48.

Since the Cargill-Continental transaction is a horizontal, rather than vertical, acquisition, it does not raise significant vertical issues. The Department did not uncover evidence suggesting that the transaction, as restructured, would have anticompetitive effects at any level in the production chain or result in an increase in vertical integration that would be competitively problematic. In short, the Department was aware of, and did consider, trends toward vertical integration in various agricultural sectors, but concluded that such trends did not provide a basis for seeking broader relief with respect to this transaction.

J. Non-economic Concerns

North Dakota Attorney General Heitkamp urges the Department to go beyond antitrust analysis and give greater consideration to unspecified "non-economic concerns." While she does not say so directly, Attorney General Heitkamp may be

suggesting that the antitrust laws be used to preserve family farms.

Our prosecution of this matter protects the interests of all farmers, large and small. The proposed Final Judgment is designed to eliminate the risk that Cargill's acquisition of Continental will lessen competition anywhere in the United States. Department staff first identified all markets in which Cargill and Continental are competitors, and then, in every one of these markets, assessed the extent to which the acquisition raises concerns about a loss of competition that would cause competitive problems. Ultimately, we identified nine relevant markets in which farmers were likely to be adversely affected by the creation of monopsony market power that would enable Cargill and other grain companies to depress grain prices. Through divestitures, the proposed Final Judgment resolves those concerns. In addition, the Final Judgment protects against the exercise of market power to manipulate corn and soybean futures prices and limits a non-compete clause that otherwise would have prevented Continental from re-entering the grain distribution business.

As far as our investigation was able to determine, there are no other potential adverse competitive effects likely to arise from the acquisition. The proposed Final Judgment therefore protects sellers of grain throughout the United

States from the price depressing effects that otherwise could have been caused by the acquisition. This outcome is beneficial to farmers of every size, including small family farmers.

K. Administrative and Legislative Actions

New Mexico Attorney General Madrid has no opposition to the proposed Final Judgment. Rather, her comment urges the Department to advocate administrative and legislative actions that will invigorate competition in agriculture markets.

The Antitrust Division of the Department of Justice testifies before Congress on antitrust matters and prepares written reports stating the views of the Department on pending or proposed legislation pertaining to antitrust. Division attorneys also participate in administrative proceedings that require consideration of the antitrust laws or competition policies. In these situations, the Division often is the government's principal advocate of competition. Therefore, Attorney General Madrid can be sure that whenever the opportunities present themselves -- in legislation, administrative proceedings or elsewhere -- the Department will continue to promote competition in agriculture markets.

L. The OCM Comments

OCM's comments indicate that it is dissatisfied with the action taken by the Department of Justice. Apparently, OCM

thinks the complaint and proposed Final Judgment are too modest to deal with Cargill's dominance, as perceived by OCM, in numerous agriculture markets throughout the world. OCM's comments thus "reach beyond the complaint, to evaluate claims that the government did *not* make and to inquire as to why they were not made." See United States v. Microsoft Corp., 56 F.3d at 1459. By doing so, OCM invites the Court improperly to intrude on the government's prosecutorial role. See id.

On the merits, many of OCM's comments in opposition to the Department's analysis are answered by the CIS itself, the rationale of which OCM has not addressed. Rather than repeat the CIS here, we briefly deal with OCM's principal objections with appropriate references to relevant explanations in the CIS or elsewhere in this Response.[25]

1. DOJ Failed to Consider the Wider Concentration in Agricultural Markets Beyond Grain Buying

In addition to its grain trading operations, Cargill has significant presence in beef packing, cattle feedlots, pork packing, broiler and turkey production, animal feed plants, flour and corn milling, soybean crushing, and ethanol production. OCM believes that Cargill transfers resources

[25] In a separate filing, Nebraska Attorney General Don Stenburg shares OCM's concerns as they are set out in points 4, 5, 6, 8, and 9 of this section.

between these markets according to prevailing economic conditions.[26] In OCM's view, these transfers are bound to increase after the transaction and, in some manner, enhance Cargill's power regardless of its economic performance.

The appropriate question for antitrust purposes, however, is whether, by transferring its own assets across industry lines as it sees fit in response to changing economic conditions, Cargill's ability artificially to depress prices will increase. OCM does not explain how such transfers could actually injure competition, and the Department is not aware of any plausible theories.

2. DOJ Failed to Consider the Continuing Potential for Anticompetitive Behavior in the Post-Merger Market

OCM is concerned that the proposed Final Judgment may not preserve competition in the relevant markets. We address this concern in the CIS at pages 9-17 and in section V(A) of this memorandum.

3. DOJ Failed to Show That the Divested Remnants of Continental Will be a Competitive Force Absent a Large Network of Elevators that Buy Grain

OCM questions whether the divested grain elevators will be operated by effective competitors if the acquirers do not

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[26] OCM refers to these transfers of resources between markets as "cross-subsidization," and claims that they make diversified firms "even more capable of . . . anti-competitive behavior." OCM at 2-3.

operate a large-scale network of facilities. This comment also goes to the issue of relief, which we address in section V(A) of this memorandum.

In addition to the points discussed in that section, we note that operators of river elevators and rail terminals who do not have extensive distribution networks in their facilities' draw areas do not have to buy their grain from Cargill or other national grain companies -- they can buy from farmers and local or regional operators of country elevators in those markets. Likewise, operators of port elevators who do not have extensive inland distribution networks can buy grain from independent operators of river elevators and grain terminals in their facilities' draw areas. On the basis of these facts and other information that we learned about the acquirers and competitive conditions in the markets where the divested facilities are located, we concluded that all of the acquirers of the divested facilities are likely to be viable and effective competitors as a result of the elevators that they are acquiring.

4. DOJ Failed to Consider the Impact on Potential Entry Into Grain Buying Markets

OCM suggests that Continental should be held together because it is one of the few firms that has the potential to challenge Cargill in markets that Cargill now dominates, citing United States v. Penn-Olin Chemical Co., 378 U.S. 158

(1964), for that proposition. The teachings of Penn-Olin do not apply to the facts in this case.

In Penn-Olin, the Supreme Court considered the legality of a joint venture between two chemical companies to build a sodium chlorate plant. Although the joint venture would have added a sodium chlorate producer to the market, the Court remanded the case with instructions that the district court consider "the reasonable probability that either one of the corporations would have entered the market by building a plant, while the other would have remained a significant potential competitor." Id. at 175-76. The Court's rationale was that "[t]he existence of an aggressive, well equipped, and well financed corporation engaged in the same or related lines of commerce waiting anxiously to enter an oligopolistic market would be a substantial incentive to competition which cannot be underestimated." Id. at 174.

Penn Olin thus concerns the protection of the present competitive force of a likely potential entrant -- a firm perceived as a likely entrant by those in the market. That is not our concern in this case because Continental is presently in the market. We are concerned with the protection of *actual competition* in grain markets throughout the United States. As explained at pages 9-17 of the CIS and in section V(A) of this memorandum, the proposed Final Judgment fully addresses this

concern by divesting Continental's assets to new, independent competitors in the markets, who can ensure that farmers receive a competitive price for their grain after the transaction.

5. DOJ Failed to Consider the Nature of Grain Selling Markets

It is true, as OCM suggests, that a lessening of competition in world grain markets could have an adverse effect on competition within the United States. Therefore, contrary to OCM's assertion, we did assess Cargill's acquisition of Continental in the light of market conditions throughout the world.

Our investigation revealed that numerous firms sell to buyers in foreign countries -- including big international grain traders (such as Cargill, Bunge, ADM, Peavey, and Louis Dreyfus), smaller regional grain traders, and domestic producers in most foreign countries. These numbers suggest that overseas markets will remain unconcentrated, even after Cargill acquires Continental. Acquisitions in unconcentrated markets rarely have adverse competitive effects, and OCM provides no evidence to the contrary.[27]

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[27] As noted in section IV(B)(4) of this Response, our investigation did indicate competitive problems at U.S. export facilities because Cargill and Continental were two of a relatively small numbers of grain buyers in the relevant port ranges, not because Cargill and Continental were two of a relatively small number of grain sellers in any overseas

6. DOJ Failed to Consider the Economic Disorganization of Farmers Which can be Exploited by Powerful Buyers

Many thousands of farmers produce corn, wheat, and soybeans in the United States. As grain leaves their farms, however, the number of firms that buy grain from the farmers becomes much smaller. OCM says this disparity "creates a rationale for scrutinizing the power of buyers relative to sellers." We agree with OCM on this point; its assertion that we ignored buyer power in our analysis is simply incorrect.

If there is one theme that unifies our analysis, it is that Cargill's acquisition of Continental should not be permitted to create or enhance market power or to facilitate its exercise. CIS at 4-9; see also section IV(B) of this memorandum. Market power in this case means the ability of Cargill, as a *buyer*, to depress the price it pays for grain. See section IV(B)(4) of this memorandum. During the course of our investigation, we located every grain market in the United States in which it appeared likely that Cargill could depress prices as a result of the acquisition -- and we obtained appropriate relief to address that concern. See id. at

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market.

section V(A).[28]

In short, the Department has not ignored the “power of buyers” that concerns OCM. Rather, we now recommend entry of the proposed Final Judgment, which will ensure that this transaction does not give Cargill the opportunity to exercise monopsony power over farmers anywhere in the United States.

7. DOJ Failed to Consider Informational Disparities in Agricultural Markets

OCM does not explain how Cargill's acquisition of Continental will exacerbate informational disparities that may exist in agriculture markets. To the extent that Cargill or other grain merchants have the benefit of information that may be in some sense superior, there is no evidence that such information will improve after the transaction so as to lessen competition. Assuming information disparities could be the predicate for a Section 7 violation, they are not exacerbated by the transaction.

8. DOJ Failed to Explain the Benefits of the Merger

OCM's argument that we should explain the efficiencies in order to justify our “approval of the merger,” OCM comment at 8, suggests that it misunderstands the role of the Department

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[28] As noted in section V(B) of this Response, no commentator suggested that we failed to require divestitures in any specific local or regional market in which Cargill and Continental are two of a relatively small number of grain buyers.

of Justice in reviewing mergers subject to the antitrust laws. The Department does not approve mergers. Rather, the Department reviews the particular facts and circumstances of each proposed merger in order to determine whether the merger is likely to substantially lessen competition. If the Department determines that a proposed merger is likely to lessen competition in violation of the antitrust laws, we seek an injunction from the court to prohibit the transaction.

As the Complaint and CIS make clear, the Department challenged this merger in its original form as being in violation of Section 7 of the Clayton Act. The Department did not rely upon any asserted "efficiencies" as a defense to allow Cargill to acquire Continental facilities in any relevant market in which we concluded that the transaction would otherwise tend substantially to lessen competition. The Department agreed to settle only after Cargill and Continental agreed to be bound by the terms of the proposed Final Judgment, which has the effect of substantially altering the terms of the merger to ensure that the transaction will not give grain companies market power to depress grain prices in any relevant market in the United States.

9. DOJ Failed to Consider a Range of Statutes that Congress Intended Courts to Consider When Making Decisions about Agriculture Markets

OCM refers at some length to the Packers and Stockyards

Act, the Capper-Volstead Act, and the Agricultural Fair Practices Act. OCM then concludes that "mergers or other activities that enhance the power of buyers" require careful review under the antitrust laws, especially when farmers are involved. See OCM comment at 12. The United States carefully investigates *all* mergers that may create substantial competitive harm affecting any group, including farmers. As the CIS and this Response make clear, the Department's concern for Cargill's power as a buyer of grain from farmers has been central to our analysis, prosecution, and proposed remedy in this case.

10. DOJ Failed to Consider That the Consent Decree Risks Leaving Farmers Without an Effective Outlet for Legal Redress

OCM believes that the Court of Appeals for the District of Columbia Circuit has "severely restricted" the ability of the district court to determine whether the proposed Final Judgment is in the public interest as required by the APPA. See OCM comment at 13. For that reason, OCM is concerned that the interests of midwestern farmers may not be fully considered in this federal circuit.

There is no reason to believe that the District Court for the District of Columbia cannot make the public interest determination that is required by law in this case.

M. A Hearing is Unnecessary in This Case

Nebraska Attorney General Stenberg urges the Court to appoint a special master "to hear evidence and to make a recommendation to the court as to the efficacy" of the proposed Final Judgment prior to its entry. See Brief of the Attorney General of Nebraska as Amicus Curiae at 13-14. The APPA provides that the Court must make a determination that entry of the proposed consent judgment is in the public interest before entering that judgment. The statute provides that in making such a public interest determination, the Court "may", inter alia, appoint a special master, conduct proceedings involving the taking of testimony and documentary evidence, and "take such other action in the public interest as the court may deem appropriate." 15 U.S.C. § 16(f)(5). The statute does not require the Court to hold hearings, but directs the court to take such action as it deems appropriate.

As noted in section II of this memorandum, Congress, in passing the APPA, intended that consent decrees remain a viable antitrust enforcement option. They could not remain viable if it were necessary for a reviewing court to conduct a trial for a de novo determination of factual issues relevant to the adequacy of a proposed decree. The legislative history is clear that the court need not conduct the equivalent of a trial on the merits, or even conduct a hearing or take

evidence, S.Rep. No. 298-93 at 6 (1973):

> The Committee recognizes that the court must have broad discretion to accommodate a balancing of interests. On the one hand, the court must obtain the necessary information to make its determination that the proposed consent decree is in the public interest. On the other hand, it must preserve the consent decree as a viable settlement option. It is not the intent of the Committee to compel a hearing or trial on the public interest issue. It is anticipated that the trial judge will adduce the necessary information through the least complicated and least time-consuming means possible. Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, this is the approach that should be utilized. Only where it is imperative that the court should resort to calling witnesses for the purpose or eliciting additional facts should it do so.[29]

The expeditious procedures to determine the public interest that Congress envisioned are not possible without reliance upon the Department's good faith execution of its prosecutorial discretion. Evidentiary hearings, therefore, should be used only in extreme cases. See United States v. G. Heileman Brewing Co., 563 F. Supp. 642, 652 (D. Del. 1983) ("This preference for the comment procedure over more burdensome forms of third-party participation . . . is clearly shown by the legislative history of the APPA.").

In the instant case, an evidentiary hearing would be

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[29] This passage is quoted in United States v. Associated Milk Producers, Inc., 394 F. Supp. 29, 45 (W.D. Mo. 1975), aff'd, 534 F.2d 113 (8th Cir. 1976), cert. denied sub nom. National Farmers Org., Inc. v. United States, 429 U.S. 940 (1976) (hereafter "AMPI").

inordinately time consuming and would not in any way further the Court's understanding of facts relevant to the determination it must make. There has been no claim of bad faith or malfeasance on the part of the United States in settling this case. See AMPI, 394 F. Supp. at 41, and cases cited. Nor has Attorney General Stenberg explained why he has not been able to fully apprise the Court of his concerns in the comments he has already filed with respect to the proposed Final Judgment. See Heileman Brewing Co., 563 F. Supp. at 653.

The Court need only consider the proposed Final Judgment as explained by the CIS, the comments thereon, and this Response thereto. Such consideration will amply demonstrate that the proposed Final Judgment satisfies the public interest standard of the APPA as interpreted by the courts.

N. The 60-Day Comment Period Should not be Extended

Several commentators request that the time period for filing public comments be extended.[30] There is no need for such extension.

The 60-day public comment period specified in 15 U.S.C. § 16(b) commenced on August 12, 1999 and terminated on October

[30] Animal Welfare Institute, NFO Kansas, OCM, Isabelle Barth, Mary Casserand, Steve Dewell, Grant and Mabel Dobbs, Barbara Hook, Jay Godley, Todd Lewis, Glenn Oshiro, N. Ramsey, Ellen Stebbins, Giles Stockton, Dr. Frankie M. Summers, Dennis and Janice Urie.

12, 1999; but we have considered and responded to every comment that we received before or after the deadline. Those who request more time for the filing of comments do not suggest the existence of relevant facts that the Department has failed to consider in negotiating and consenting to the proposed Final Judgment. Nor do they explain why more time would be desirable to assist the Court in making the public interest determination that is required by the APPA. Under the circumstances, an extension of the 60-day public comment period is unnecessary and inappropriate in this action.

CONCLUSION

The Competitive Impact Statement and this Response to comments demonstrate that the proposed Final Judgment serves the public interest. Accordingly, after publication of this 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 11th day February, 2000.

Respectfully submitted,

"/s/"
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