UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES of AMERICA, U.S. Department of Justice Antitrust Division 325 7th Avenue, NW Suite 500 Washington, DC 20530, Plaintiff, v. CONNORS BROS. INCOME FUND, 669 Main Street Blacks Harbour, New Brunswick, Canada E5h 1K1, and BUMBLE BEE SEAFOODS, LLC, 9655 Granite Ridge Drive San Diego, CA 92123-2674, Defendants.	Case No. 1:04CV01494 Judge: JDB Deck Type: Antitrust

COMPETITIVE IMPACT STATEMENT

Plaintiff United States of America ("United States"), pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA" or "Tunney Act"), 15 U.S.C. § 16(b)-(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding on August 31, 2004.

I. NATURE AND PURPOSE OF THE PROCEEDING

Defendant Connors Bros. Income Fund ("Connors"), an income trust fund organized under Canadian law, entered into a Transaction Agreement, dated February 10, 2004, in which it proposed to acquire Bumble Bee Seafoods, LLC ("Bumble Bee") from Centre Capital Investors III, L.P. (the "Transaction"). Connors partially financed its acquisition through a subscription agreement, and those funds were held in escrow pending final consummation of the Transaction. Under Canadian law, the escrow agreement expired on April 30, 2004; the funds had to be returned to subscribers if Connors had not consummated the Transaction by that date.

On April 30, 2004, the United States and Defendants reached an agreement by which: the United States agreed not to file suit at that time to enjoin the Transaction; the Defendants signed a Hold Separate Stipulation and Order and a proposed Final Judgment, which included remedies that would restore the competition that the United States' preliminary analysis indicated would be lost through the combination of the Connors and Bumble Bee sardine businesses; and the United States agreed to defer filing the executed Hold Separate and proposed Final Judgment until it completed a thorough investigation into the likely competitive effects of the Transaction. At the completion of this investigation, the United States confirmed that it was likely that the Transaction as originally proposed would harm competition for the sale of sardine snacks in the United States, but decided to narrow the scope of the original Final Judgment to eliminate certain remedies that it had subsequently determined were not needed to restore competition in the relevant antitrust market.

Accordingly, on August 31, 2004, the United States filed a Complaint alleging the likely effect of the Transaction, as originally proposed, would be to lessen competition substantially for

the sale of sardine snacks throughout the United States in violation of Section 7 of the Clayton Act. This loss of competition would result in U.S. consumers paying higher prices for sardine snacks. At the same time, the United States also filed the Hold Separate Stipulation and Order and a proposed Final Judgment, which are designed to eliminate the anticompetitive effects of the acquisition.

The proposed Final Judgment, which is explained more fully below, requires Connors to divest its Port Clyde brand, several smaller brands (Commander, Possum, Bulldog, Admiral and Neptune), and related assets that an acquirer of those brands might need in order to become a viable and active competitor in the sale of sardine snacks throughout the United States. Under the terms of the Hold Separate Stipulation and Order, Connors must maintain the commercial value of the Port Clyde brand until it is divested to an acquirer acceptable to the United States.

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

II. DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. The Defendants and the Proposed Transaction

Connors marketed the first, second and fourth largest selling brands of sardine snacks in the United States (Brunswick, Beach Cliff, and Port Clyde, respectively) before this Transaction. In 2003, Connors brands accounted for approximately 63% of the sardine snack sales in the United States; and it earned revenues of about $43 million from the sale of these products.

Bumble Bee, a Delaware limited liability corporation with its headquarters in San Diego,

California, marketed the third largest selling brand of sardine snacks in the United States before the Transaction. In 2003, its Bumble Bee brand accounted for approximately 13% of U.S. sardine snack sales; and it earned about $9 million from the sale of these products.

The Transaction, as initially proposed by Defendants, would lessen competition substantially as a result of Connors' acquisition of Bumble Bee's sardine snack business. This acquisition is the subject of the Complaint and proposed Final Judgment filed by the United States on August 31, 2004.

B. The Competitive Effects of the Transaction on Consumers of Sardine Snacks

The Complaint alleges that the relevant product market is sardine snacks, which is an "overlap" product, because Connors and Bumble Bee sell competing sardine snack products in the United States. Several characteristics distinguish sardine snacks (also called "mainstream" sardines in the industry) from other sardine products. Typically, sardine snacks are made from herring and other varieties of small fish, which are caught off the coasts of the United States (primarily Maine), Canada, Poland, Morocco, South America and Thailand, processed in those countries, and sold in the United States. Sardine snacks, as the name implies, are sold primarily as snacks; and they are packed in snack-size cans (primarily 3.75 ounce "dingley" cans or 4.4 ounce "club" cans). In the United States, the average retail price of sardine snacks is about $.21 per ounce.

Evidence gathered in the course of the United States' investigation indicated that a sardine product called "premium" sardines in the industry is not in the same product market as sardine snacks. Premium sardines typically consist of the brisling species of fish, which are caught off the coasts of Norway and Scotland, processed in those countries, and imported into

the United States (and other countries). In the United States, the average retail price of premium sardines is about $.52 per ounce.

The evidence also showed that a sardine product called "ethnic" sardines in the industry is not in the same product market as sardine snacks. Typically, these sardines are marketed to specific ethnic groups, consumed as main courses rather than as snacks, and packed in meal-size cans (primarily 15 ounce "oval" cans). They typically consist of larger herring and other species that are perceived to be of a lower quality than the herring used for sardine snacks, and sell for an average of about $.08 per ounce (or about 40% of the price of sardine snacks). In addition, grocery stores often display these sardines exclusively in the ethnic section of their stores, rather than the canned seafood section (*e.g.,* Perla Pacifica might be displayed next to other Hispanic food products, several aisles away from Connors and Bumble Bee sardine snacks).

Connors and Bumble Bee sell sardine snacks throughout the United States. A small, but significant, increase in the price of sardine snacks would not cause a sufficient number of purchasers to switch to sardine snack brands not presently marketed in the United States to make the increase unprofitable. The United States, therefore, concluded that the appropriate geographic market for the purpose of analyzing the competitive effects of the Transaction is no larger than the United States, and that the United States is the relevant geographic market within the meaning of Section 7 of the Clayton Act.

Even before Connors acquired Bumble Bee, the U.S. sardine snack market was highly concentrated. Connors brands accounted for approximately 63% of the sales in this market, while Bumble Bee's sardine brand held about a 13% share. The remaining share is accounted for by brands with small individual market shares that can be described as "fringe" players.

Using a measure of concentration called the Herfindahl-Hirschman Index ("HHI"), which is defined and explained in Exhibit A to the Complaint, the pre-transaction HHI was about 4200 – well in excess of the 1800 point level for characterizing markets as highly concentrated.

The Transaction resulted in Connors' main rival exiting the sardine snack market and a substantial increase in concentration in an already concentrated market. Post-transaction, the combined Connors/Bumble Bee firm would account for over 75% of the market; and none of its remaining competitors would have as much as a 5% share of the remaining sales. The Transaction would increase the HHI by about 1600 points – well in excess of levels that raise significant antitrust concerns.

In fact, as the Complaint alleges, it is likely that the elimination of Bumble Bee as an independent competitor would give the combined Connors/Bumble Bee firm unilateral power to profitably raise prices, whether or not the remaining fringe players responded by raising their prices. For example, the combined firm could raise the price of the Bumble Bee brand of sardine snacks with little concern that it would lose sufficient sales to make the Bumble Bee price increase unprofitable.

The evidence gathered during the investigation also indicated that entry into the sale of sardine snacks in the United States would not be timely, likely, or sufficient to deter any exercise of market power by the combined Connors/Bumble Bee entity. Brand recognition is an important factor in the marketing and sale of sardine snacks in the United States, and consumers of sardine snacks generally restrict their purchases to brands they know and trust. New entry would require years of effort and the investment of substantial sunk costs, including promotion expenditures and slotting allowances (in many grocery chains), to create brand awareness among

consumers. Likewise, the investigation showed that these same barriers would make it difficult for existing fringe players or regional sellers of sardine snacks to expand to the level required to make up for the loss of a competitor of Bumble Bee's significance.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The divestiture required by the proposed Final Judgment will eliminate the anticompetitive effects of the acquisition in sardine snack products by establishing a new, independent, and economically viable competitor with several recognized brand names in the sardine snack market. The purchaser will acquire several sardine snack brands. Moreover, the acquirer may sell other canned seafood products under its brand names (as do Connors, Bumble Bee and other sellers of sardine snacks) – as Connors will transfer all of its rights to produce, distribute and sell seafood products under the divested brands (with the limited exception of clam products, which Connors may continue to sell under the Neptune brand). For example, the acquirer will obtain the right to sell kippered herring snacks, which a firm with a sardine snack processing plant can easily produce at its plant, in addition to sardine snacks. The divestiture also includes a packing plant, inventories, and the other tangible and intangible assets that an acquirer might need to produce, distribute and sell sardine snacks under the divested brand names in the United States.

Port Clyde is the fourth largest brand of sardine snacks, and Commander is in the top ten. The remaining brands to be divested (Possum, Bulldog, Admiral and Neptune) have relatively small national market shares, but each is a significant seller in one or more regions. In the aggregate, the divested Connors brands accounted for approximately 14% of U.S. sardine snack sales in the United States in 2003, as compared to about a 13% market share for the Bumble Bee

brand.

The proposed divestiture, therefore, will re-establish the competitive constraint that the Transaction would have removed from the U.S. sardine snack market. Within one hundred and twenty calendar days after the filing of the Complaint, or five days after notice of the entry of the Final Judgment by the Court, whichever is later, Connors must transfer the divested brands, and related assets, in a way that satisfies the United States, in its sole discretion, that the operations can and will be operated by the purchaser as a viable, ongoing and competitive business. In exercising its discretion, the United States will ensure that the assets are transferred to an acquirer who has the incentive and opportunity to compete as effectively in the sardine snack business as did Bumble Bee.

Defendants must take all reasonable steps necessary to accomplish the divestiture quickly and shall cooperate with prospective purchasers. In the event that Defendants do not accomplish the divestiture within the periods prescribed in the proposed Final Judgment, the Final Judgment provides that the Court will appoint a trustee selected by the United States to effect the divestiture, and the defendants will pay all costs and expenses of the trustee. The trustee's commission will be structured so as to provide an incentive for the trustee based on the price obtained and the speed with which the divestiture is accomplished. After his or her appointment becomes effective, the trustee will file monthly reports with the Court and the United States setting forth his or her efforts to accomplish the divestiture.

At the end of three months after the trustee's appointment, if the divestiture has not been accomplished, the trustee and the United States will make recommendations to the Court, which shall enter such orders as appropriate, in order to carry out the purpose of the trust, including

extending the trust or the term of the trustee's appointment.

IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

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

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

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

The APPA provides a period of at least sixty days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty days of the date of publication of this Competitive Impact Statement in the Federal Register. All comments received during this period will be considered by the Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to the Court's entry of judgment. The comments and the response of the United States will be filed with the Court and published in the Federal Register.

Written comments should be submitted to:

Roger W. Fones
Chief, Transportation, Energy, & Agriculture Section
Antitrust Division
United States Department of Justice
325 7th Street, NW; Suite 500
Washington, DC 20530

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

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against the Defendants. The United States could have entered into litigation and sought an injunction against the combination of Connors and Bumble Bee's sardine snack business. The United States is satisfied, however, that the divestiture of assets described in the proposed Final Judgment will preserve competition for the provision of sardine snacks in the United States.

The United States also considered requiring the Defendants to grant a long-term, but finite, license allowing an acquirer to use the Bumble Bee brand name for sardine snacks while it transitioned the product to its own brand name, but rejected this in favor of a clean structural remedy.

VII. STANDARD OF REVIEW UNDER THE APPA FOR THE PROPOSED FINAL JUDGMENT

The APPA requires that proposed consent judgments in antitrust cases brought by the

United States be subject to a sixty-day comment period, after which the Court shall determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. § 16(e)(1). In making that determination, the Court shall consider:

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
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> (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e)(1)(A) & (B). As the United States Court of Appeals for the District of Columbia Circuit has held, the APPA permits a court to consider, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See United States v. Microsoft Corp.*, 56 F.3d 1448, 1458-62 (D.C. Cir. 1995).

"Nothing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. § 16(e)(2). Thus, in conducting this inquiry, "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of

Senator Tunney).[1] Rather:

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

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

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

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "*within the reaches of the public interest*." More elaborate
> requirements might undermine the effectiveness of antitrust enforcement by consent decree.

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[1] *See United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975) (recognizing it was not the court's duty to settle; rather, the court must only answer "whether the settlement achieved [was] within the reaches of the public interest"). A "public interest" determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed by the Department of Justice pursuant to the APPA. Although the APPA authorizes the use of additional procedures, 15 U.S.C. § 16(f), those procedures are discretionary. A court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues. *See* H.R. Rep. No. 93-1463, 93rd Cong., 2d Sess. 8-9 (1974), *reprinted* in 1974 U.S.C.C.A.N. 6535, 6538.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[2]

The proposed Final Judgment, therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice or whether it mandates certainty of free competition in the future. Court approval of a final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'" *United States v. AT&T*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *Gillette*, 406 F. Supp. at 716), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001

(1983); *see also United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy).

Moreover, the Court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the Court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459. Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not

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[2] *Cf. BNS*, 858 F.2d at 463 (holding that the court's "ultimate authority under the [APPA] is limited to approving or disapproving the consent decree"); *Gillette*, 406 F. Supp. at 716 (noting that, in this way, the court is constrained to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass"). *See generally Microsoft*, 56 F.3d at 1461 (discussing whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'").

to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Id*. at 1459-60.

VIII. DETERMINATIVE DOCUMENTS

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

Dated: October 19, 2004

Respectfully submitted,

/s/

Robert L. McGeorge
D.C. Bar # 91900

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CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2004, I have caused a copy of the foregoing Competitive Impact Statement to be served on counsel for defendants by electronic mail and first class mail, postage prepaid:

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