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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON DIVISION

UNITED STATES OF AMERICA, et al. Plaintiffs, v. DAIRY FARMERS OF AMERICA, INC., et al. Defendants.	)	Civil Action No.: 6:03-206-KSF

COMPETITIVE IMPACT STATEMENT

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

I.

NATURE AND PURPOSE OF THIS PROCEEDING

The United States and the Commonwealth of Kentucky (collectively, the "government") filed a civil antitrust Complaint under Section 15 of the Clayton Act, 15 U.S.C. § 25, on April 24, 2003, alleging that the acquisition by Dairy Farmers of America, Inc. ("DFA") of its interest

in Southern Belle Dairy Co., LLC ("Southern Belle") violated Section 7 of the Clayton Act ("Section 7"), 15 U.S.C. § 18.[1] An Amended Complaint was filed on May 6, 2004.

The Amended Complaint alleged that the acquisition may substantially lessen competition for the sale of milk sold to schools in one hundred school districts in eastern Kentucky and Tennessee. On August 31, 2004, the District Court granted summary judgment to DFA and Southern Belle. The government appealed, and on October 25, 2005, the Court of Appeals reversed the grant of summary judgment as to DFA and remanded the case for trial. The Court of Appeals affirmed the dismissal of Southern Belle, leaving DFA as the only defendant. *See United States v. Dairy Farmers of America*, 426 F.3d 850 (6th Cir. 2005).

On October 2, 2006, the United States filed a proposed Final Judgment that requires DFA to divest its interest in Southern Belle and use its best efforts to require its partner, the Allen Family Limited Partnership ("AFLP"), to also divest its interest in Southern Belle. DFA has proposed divesting its interest and AFLP's interest in Southern Belle to Prairie Farms Dairy, Inc. ("Prairie Farms"), and the government has approved Prairie Farms as a suitable buyer of DFA's and AFLP's interests in Southern Belle. The proposed Final Judgment is designed to eliminate the anticompetitive effects of the acquisition alleged in the Amended Complaint.

The government and DFA 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.

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[1] The Commonwealth of Kentucky joined this lawsuit under 15 U.S.C. § 26, and also sought relief pursuant to the provisions of K.R.S. § 367.110, *et seq.*

II.

THE ALLEGED VIOLATIONS

A. The Defendants

Dairy Farmers of America ("DFA") is a Kansas milk marketing cooperative with its headquarters and principal place of business in Kansas City, Missouri. DFA is the largest dairy cooperative in the world. DFA sells raw milk in interstate commerce. In 2005, DFA had 20,000 members in 49 states, marketed 59.7 billion pounds of raw milk in the United States, and had over $8.9 billion in revenues.

Southern Belle Dairy Co., LLC ("Southern Belle") owns the Southern Belle dairy processing plant. Southern Belle is a Delaware limited liability company with its headquarters and principal place of business in Somerset, Kentucky. Southern Belle processed approximately 25 million gallons of raw milk in 2001 and had annual revenues of approximately $65 million that year. Southern Belle sells fluid milk in interstate commerce, including milk to school districts in Kentucky and Tennessee.

B. The Acquisition

Southern Belle was formed by DFA on February 20, 2002. It acquired the assets of the Southern Belle dairy plant on February 25, 2002. On February 26, 2002, DFA's joint venture partner AFLP acquired 50 percent of Southern Belle. The purchase price of the Southern Belle dairy plant was approximately $18.7 million: $2 million in common equity; $4 million in preferred equity; and the rest paid through of a line of credit. DFA and AFLP each contributed $1 million in exchange for each receiving 50 percent of the common interests in Southern Belle.

A subsidiary of DFA contributed $4 million in exchange for preferred equity interests and extended to Southern Belle the line of credit used to finance the remaining $12.7 million of the purchase price.

C. Anticompetitive Effects of the Acquisition

The Amended Complaint alleged that the manufacture, distribution, and sale of school milk constitutes a relevant product market. Milk is a product that has special nutritional characteristics and no practical substitutes. Dairies sell milk to schools with special services, including storage coolers, daily or every-other-day delivery to each school, constant rotation of old milk, and replacement of expired milk. Moreover, school districts must provide milk in order to receive substantial funds under federal school meal subsidy programs. There are no other products that school districts would substitute for school milk in the event of a small but significant price increase.

The Amended Complaint alleged that the relevant geographic markets in which to assess the competitive effects of the acquisition are the school districts in eastern Kentucky and Tennessee identified in Attachments A and B of the Amended Complaint, either as individual districts or, where applicable, as groups of districts that solicit school milk bids together.[2] As a practical matter, these school districts are unable to turn to additional school milk suppliers, who would not bid for their school milk contracts even if the price of school milk were to increase by a small but significant amount.

[2] These groups of school districts require bidders to charge the same price to the entire group, require successful bidders to serve all of group's districts at the same price, and require the group's members to accept the group bid.

The Amended Complaint alleged that DFA's acquisition of its interest in Southern Belle would lessen competition substantially in the sale of school milk in each of the school districts identified in the Amended Complaint. These districts receive school milk bids from Southern Belle and dairies operated by National Dairy Holdings, LP ("NDH"), a dairy holding company also 50 percent-owned by DFA. Some affected districts and groups of districts also receive bids from a third supplier. One of the NDH-operated dairies that serves the affected school districts is the Flav-O-Rich dairy, located in London, Kentucky, only 30 miles from the Southern Belle plant in Somerset, Kentucky. The transaction lessened competition for school districts receiving milk contract bids from both Southern Belle and NDH because, as a result of the transaction, both Southern Belle and NDH were 50 percent-owned by DFA. Since any contracts won by Southern Belle from NDH, or vice versa, through aggressive bidding would likely reduce DFA's profits, reduced competition between Southern Belle and NDH is in DFA's interest.

In 45 of the school districts listed in the Amended Complaint, the effect of the acquisition has been to establish a monopoly, with only Southern Belle and Flav-O-Rich (or another NDH dairy) as possible milk suppliers. In these districts, the acquisition would give DFA the incentive and ability to encourage, facilitate, or enforce cooperation between Southern Belle and NDH to raise prices or decrease the level or quality of service provided to these school districts. In 55 school districts listed in the Amended Complaint, the acquisition has reduced the number of independent competitors from three to two, making it likely that the remaining bidders will bid less aggressively against each other.

The Amended Complaint also alleged that entry into the affected markets by other dairies or distributors would not be timely, likely, or sufficient to deter the anticompetitive effects

caused by the acquisition. Dairies or distributors not currently competing in the affected markets would be unlikely to start bidding as a result of a small but significant increase in school milk prices. This is supported by the lack of new entry into these markets when competition between Southern Belle and Flav-O-Rich has been reduced. First, in the 1980s, these two dairies rigged bids for school milk contracts for many of the school districts affected by the acquisition. Despite an increase in school milk prices, new entry did not occur in these markets to undermine the bid-rigging conspiracy, which lasted for over ten years. Second, competition between Southern Belle and Flav-O-Rich was eliminated in some districts when Southern Belle was suspended from bidding on certain school milk contracts from 1998 to 2000 by the U.S. Department of Agriculture for violating provisions of an antitrust compliance program. Again, for those districts affected by the loss of Southern Belle as a bidder for school milk contracts, relative prices for school milk rose and new entry did not occur to return prices to a competitive level.

For all of these reasons, the government concluded that the transaction would substantially lessen competition in the sale of school milk in the school districts in Kentucky and Tennessee identified in the Amended Complaint, by increasing prices and/or reducing quality, all in violation of Section 7 of the Clayton Act. Indeed, the government found evidence that, after the transaction, bids to districts where Southern Belle and Flav-O-Rich were the only bidders were higher than bids received by other districts with only two bidders, though this was not true before the transaction.

III.

EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The divestiture requirement of the proposed Final Judgment will eliminate the anticompetitive effects identified in the Amended Complaint by requiring DFA to divest its interest in Southern Belle. In addition, the proposed Final Judgment requires DFA to use commercially reasonable efforts to cause AFLP to divest its interest in Southern Belle. The proposed Final Judgment requires the United States, in consultation with the Commonwealth of Kentucky, to approve any buyer of DFA's and AFLP's interests in Southern Belle. The divestitures must be accomplished in such a way as to satisfy the United States, in its sole discretion, after consultation with the Commonwealth of Kentucky, that Southern Belle will be a viable, ongoing dairy business capable of competing effectively in the sale of school and fluid milk in Kentucky and Tennessee. The effect of these divestitures would be to restore competition between Southern Belle and NDH, with the divestiture of AFLP's interest allowing a buyer of Southern Belle to acquire the entire dairy as a going concern, rather than as a 50 percent owner in conjunction with AFLP. During the divestiture process, DFA is prohibited from taking any steps to degrade the operations of Southern Belle, and the entire Southern Belle dairy business is to be sold through the divestiture, instead of piecemeal, so it can and will be operated by the purchaser as a viable, ongoing business that can compete effectively in the relevant markets. In addition, DFA is not permitted to finance any part of a purchaser's acquisition of the Southern Belle dairy and is prohibited from requiring the purchaser to enter into a raw milk supply contract with DFA as a condition of the divestiture.

The government and DFA reached agreement on the terms of the proposed Final Judgment and signed the Stipulation on May 15, 2006. That same day, DFA and AFLP executed an option agreement giving DFA the ability to purchase AFLP's ownership interest in Southern Belle. This option agreement allows DFA to sell the dairy in its entirety rather than just DFA's partial ownership interest in the dairy. Not only would a complete transfer of Southern Belle to a new owner eliminate the government's concerns about DFA's ownership interests in both Southern Belle and Flav-O-Rich, the divestitures also eliminate the possibility of anticompetitive effects as a result of DFA's ability to influence AFLP, its long-time business partner.

In exchange for DFA's agreement to divest its interest in Southern Belle and use its best efforts to have AFLP do the same, and so that DFA could find a buyer for the dairy, the government agreed in a letter agreement with DFA dated May 15, 2006, not to file the Stipulation and proposed Final Judgment until the earlier of 120 days after signing the Stipulation, or DFA gave notice that it executed an agreement with a buyer. A copy of this letter agreement is provided as Exhibit A to this Competitive Impact Statement. If DFA was not able to find a buyer for Southern Belle after 120 days had elapsed, DFA agreed that the government could file the Stipulation and proposed Final Judgment.

If a buyer for Southern Belle were not found by five days after DFA receives notice of the entry of the proposed Final Judgment, the Final Judgment provides that the Court will appoint a trustee selected by the United States to effect the divestiture. The proposed Final Judgment allows the United States to delay the appointment of the trustee for thirty days. If a trustee is appointed, the proposed Final Judgment provides that DFA 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 six months, 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.

The divestitures required by the proposed Final Judgment eliminate the harm to competition identified in the Amended Complaint by making Southern Belle completely independent from DFA and NDH, including the Flav-O-Rich dairy. Prairie Farms' purchase of Southern Belle accomplishes this goal of the proposed Final Judgment. Prairie Farms will be purchasing Southern Belle as a complete going concern, including the plant in Somerset, Kentucky, distribution facilities, equipment, and trademarks. The government believes that Prairie Farms can capably operate and manage Southern Belle, as it already owns and operates several dairy processing plants. The government believes that Southern Belle will continue to bid on school milk contracts under Prairie Farms' ownership, including against Flav-O-Rich and other NDH dairies. The divestiture of DFA's and AFLP's interests in Southern Belle to Prairie Farms has allowed the government to secure relief more quickly than if the matter had gone to trial. In addition, this relief is equal to, and probably exceeds, the relief that the government could have obtained after a victory at trial.

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 DFA or Southern Belle.

V.

PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The parties 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 (60) 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 (60) days of the date of publication of this Competitive Impact Statement is published in the Federal Register, or the last date of publication in a newspaper of the summary

of this Competitive Impact Statement, whichever is later. 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:

Mark J. Botti
Chief, Litigation I Section
Antitrust Division
U.S. Department of Justice
1401 H St. NW, Suite 4000
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 government considered, as an alternative to the proposed Final Judgment, a full trial on the merits of the Amended Complaint against DFA, continuing the litigation and seeking the divestiture of DFA's interest in Southern Belle and other injunctive relief requested in the Amended Complaint. The government is satisfied, however, that the divestitures and other relief contained in the proposed Final Judgment will preserve competition in the relevant markets alleged in the Amended Complaint. The government believes that by requiring DFA to divest its

interest in Southern Belle, as well as using its best efforts to have AFLP simultaneously divest its interest in the remaining 50 percent of the dairy, the relief obtained in the proposed Final Judgment has allowed the government to secure relief more quickly than if the matter had gone to trial. In addition, this relief is equal to, and probably exceeds, the relief that the government could have obtained after a victory at trial.

VII.

STANDARD OF REVIEW UNDER THE APPA FOR PROPOSED FINAL JUDGMENT

The APPA requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty (60)-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 of 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).[3] As the United States Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, 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).

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.

[3] In 2004, Congress amended the APPA to ensure that courts take into account the above-quoted list of relevant factors when making a public interest determination. *Compare* 15 U.S.C. § 16(e) (2004) *with* 15 U.S.C. § 16(e)(1) (2006) (substituting "shall" for "may" in directing relevant factors for court to consider and amending list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms). On the points discussed herein, the 2004 amendments did not alter the substance of the Tunney Act, and the pre-2004 precedents cited below remain applicable.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[4] In making its public interest determination, a district court must accord due respect to the government's prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case. *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003).

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. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975)), *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 Amended 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

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[4] *Cf. BNS*, 858 F.2d at 464 (holding that the court's "ultimate authority under the [APPA] is limited to approving or disapproving the consent decree"); *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975) (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'").

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

In its 2004 amendments to the Tunney Act, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction "[n]othing 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). This language codified the intent of the original 1974 statute, expressed by Senator Tunney in the legislative history: "[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). 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).

VIII.

DETERMINATIVE DOCUMENTS

In formulating the proposed Final Judgment, the United States considered DFA's agreement with AFLP, dated May 15, 2006, giving DFA the option to purchase AFLP's interest in Southern Belle. This agreement, a determinative document as described in Section 2(b) of the APPA, 15 U.S.C. § 16(b), is available for public inspection at the office of the Department of Justice in Washington, D.C., Room 200, 325 Seventh Street, N.W. and at the office of the Clerk of the United States District Court for the Eastern District of Kentucky, London, Kentucky, as Exhibit B to this Competitive Impact Statement.

Dated: October 2, 2006

Respectfully Submitted,

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CERTIFICATE OF SERVICE

This certifies that I caused a true and correct copy of the foregoing Competitive Impact Statement to be served on October 2, 2006, in the manner indicated:

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