UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,
1401 H Street, N.W.
Suite 4000
Washington, D.C. 20530,

Plaintiff,

v.

DAIRY FARMERS OF AMERICA, INC.
Northpoint Tower, Suite 100
10220 North Executive Hills Blvd.
P.O. Box 909700
Kansas City, MO 64190-9700, and

SOCIETE DE DIFFUSION
INTERNATIONALE AGRO-ALIMENTAIRE
Direction Financiere
170 bis bd du Montparnasse
75014 Paris, France, and

SODIAAL NORTH AMERICA
CORPORATION,
832 Harleysville Pike
Harleysville, PA 19438-1039,

Defendants.

Civil Action No. CN00-CV-1663

Judge Clarence Newcomer

Filed: 3/31/00

VERIFIED COMPLAINT

The United States of America, acting under the direction of the Attorney General of the United States, brings this civil action preliminarily and permanently to enjoin the proposed acquisition by the Dairy Farmers of America, Inc. ("DFA"), a cooperative, of SODIAAL North America Corporation ("SODIAAL"), a private company, and alleges as follows:

1. DFA and SODIAAL compete against each other in the sale of branded butter in the greater Philadelphia and New York metropolitan areas. Direct and aggressive competition among producers of branded butter has resulted in lower prices, higher promotional allowances and other benefits to retailers and other consumers of branded butter in these geographic areas.

2. Defendants are two of only three significant producers supplying branded butter in the greater Philadelphia and New York metropolitan areas. The proposed acquisition will eliminate substantial head-to-head competition between DFA and SODIAAL which has benefited consumers. In addition, DFA's acquisition of SODIAAL substantially increases the likelihood that the two remaining significant competitors will be able to coordinate to raise prices, harming consumers. The risk of coordinated pricing is especially high in this case because the elimination of SODIAAL as a competitor will enable the merged firm to fix prices legally with the only other significant branded butter supplier, Land O' Lakes, Inc. ("LOL"), also a cooperative, under the Capper-Volstead Act, 7 U.S.C. § 291. This transaction will result, effectively, in a monopoly in the relevant markets.

3. Unless the proposed acquisition is enjoined, DFA's acquisition of SODIAAL will substantially lessen competition in the sale of branded butter, including branded stick butter and branded whipped butter, to retail purchasers and other consumers in the greater Philadelphia and New York metropolitan areas in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

I. JURISDICTION AND VENUE

4. This Complaint is filed under Section 15 of the Clayton Act, as amended, 15 U.S.C. § 25, to prevent and restrain defendants from violating Section 7 of the Clayton Act, as

amended, 15 U.S.C. § 18.

5. DFA and SODIAAL sell branded butter in the flow of interstate commerce. Defendants' activities in producing, processing, marketing, advertising and selling branded butter also substantially affect interstate commerce. Butter sold in the Commonwealth of Pennsylvania by DFA is produced outside of Pennsylvania and transported to retailers in Pennsylvania and other states. SODIAAL produces butter within the Commonwealth of Pennsylvania for shipment to retailers and other consumers located outside of Pennsylvania. Defendants purchase substantial quantities of materials, equipment, supplies and services for use in their respective businesses from sources located outside of the Commonwealth of Pennsylvania. This Court has jurisdiction over the subject matter of this action and the parties pursuant to Section 12 of the Clayton Act, 15 U.S.C. § 22, and 28 U.S.C. §§ 1331, 1337(a) and 1345.

6. DFA is a Kansas corporation that transacts business, maintains offices and is found in the Eastern District of Pennsylvania. Venue is proper in this judicial district pursuant to 15 U.S.C. § 22 and 28 U.S.C. § 1391.

7. SODIAAL is a Delaware corporation that has its principal place of business in Harleysville, Pennsylvania and transacts business, maintains offices and is found in the Eastern District of Pennsylvania. Venue is proper in this judicial district pursuant to 15 U.S.C. § 22 and 28 U.S.C. § 1391.

II. DEFENDANTS

8. DFA is the largest dairy cooperative in the United States. An agricultural cooperative is an association of producers performing traditional farming activities such as tilling

the soil and tending to animals. DFA produces, processes, markets, advertises and sells *Breakstone's* branded butter (under license from Kraft Foods, Inc.) throughout the eastern United States, including the greater Philadelphia and New York metropolitan areas. *Breakstone's* has been an established brand since 1882. In 1998, DFA reported sales of approximately $7.3 billion.

9. SODIAAL North America Corporation ("SODIAAL"), headquartered in Harleysville, Pennsylvania, is a private corporation, not a cooperative, and is wholly owned by Societe de Diffusion Internationale Agro-Alimentaire. SODIAAL produces, markets, advertises and sells *Keller's* and *Hotel Bar* branded butter in the northeastern United States, including the greater Philadelphia and New York metropolitan areas. The *Keller's* brand was founded in 1906; the *Hotel Bar* brand was founded in 1885. In 1998, SODIAAL had sales of approximately $ 238 million.

10. Societe de Diffusion Internationale Agro-Alimentaire ("Societe") is a French agricultural cooperative with international business operations. Societe markets dairy products including milk, yogurt, butter and cheese. In 1997, Societe had sales of about $3 billion in sales.

III. THE PROPOSED TRANSACTION

11. On or about December 15, 1999, DFA entered into a letter agreement with Societe to purchase, for about $36 million, substantially all of the assets of SODIAAL ("Purchase Agreement").

IV. TRADE AND COMMERCE

A. Relevant Product Market

12. Butter is a food product, which is made from cream and milk, with or without salt, and contains at least 80 percent milkfat by weight. Butter is made by churning cream and milk.

13. A staple of the American diet, butter is widely used on bread and vegetables and is essential to holiday baking. Because of butter's importance to consumers, it is used by retailers as an advertised special to attract customers to the store. Butter is sold to consumers at retail in a variety of forms (e.g., quarter-pound butter sticks, whipped butter, lightly salted butter, unsalted butter) and package sizes (e.g., one-pound packages comprising four quarter-pound sticks, one-half pound packages comprising two quarter-pound sticks, eight ounce tubs of whipped butter). In the greater Philadelphia and New York metropolitan areas, approximately 80 percent of butter sold at retail is in stick form. Nearly all the remaining 20 percent of butter is whipped and is typically sold in half-pound (eight ounce) tubs.

14. Butter is a unique product with specific characteristics (e.g., flavor, texture, certain cooking attributes, and blending abilities), unmatched by other products. The unique characteristics of butter differentiate it from potential substitutes such as margarine. While butter competes in a limited way with spreads such as margarine, those products are not in the same relevant antitrust market. Because of butter's unique qualities and characteristics, if the price of butter were increased by a small but significant amount, a sufficient number of purchasers would not switch to other products to make such a price increase unprofitable.

15. Most butter is sold to consumers through retail outlets, such as grocery stores and mass merchandisers. Consumers purchase two distinct categories of butter -- branded butter (such as *Keller's*, *Hotel Bar*, *Breakstone's*, and *Land O' Lakes*), and private label butter, *i.e.*, butter marketed under a label owned or controlled by the retailer.

16. Retail consumers of branded butter consider it to be a product better than private label butter. These perceptions, reinforced by years of promotions and brand advertising, mean that a small but significant increase in the price of branded butter will not cause a sufficient number of consumers of branded butter to substitute private label butter or other products to make such a price increase unprofitable.

17. Retail consumers of branded stick butter consider it to be a distinct product from private label stick butter. Branded stick butter has different principal users and is manufactured and packaged differently from whipped butter. A small but significant increase in the price of branded stick butter will not cause a sufficient number of consumers of branded stick butter to substitute branded whipped butter or other products to make such a price increase unprofitable.

18. The sale of branded stick butter through retail outlets is a line of commerce or relevant product market within the meaning of Section 7 of the Clayton Act.

19. Retail consumers of branded whipped butter consider it to be a distinct product from private label whipped butter. Branded whipped butter has different principal users and is manufactured and packaged differently from stick butter. A small but significant increase in the price of branded whipped butter will not cause a sufficient number of consumers of branded whipped butter to substitute branded stick butter or other products to make such a price increase

unprofitable.

20. The sale of branded whipped butter through retail outlets is a line of commerce or relevant product market within the meaning of Section 7 of the Clayton Act.

Relevant Geographic Market

21. DFA's and SODIAAL's branded butter are both sold and compete directly in the greater Philadelphia and New York metropolitan areas which are defined in detail in Appendix A. DFA sells its *Breakstone's* brand in both the Philadelphia and New York metropolitan areas, while SODIAAL sells its *Keller's* brand primarily in the Philadelphia metropolitan area and its *Hotel Bar* brand primarily in the New York metropolitan area. Due to local consumer preferences for specific brands, retailers and other consumers would not substitute brands of butter promoted and sold outside the greater Philadelphia and New York metropolitan areas, and are likely to pay higher prices as a result of the proposed acquisition.

22. Differing consumer preferences in different geographic areas allow DFA and SODIAAL to charge different net prices for the same product sold in different geographic areas. The variations in price do not simply reflect differences in costs, but rather reflect local differences in brand strength, competition or competitive strategy. Price variations often take the form of advertising allowances, local promotions and couponing campaigns. DFA and SODIAAL develop distinct marketing plans for the Philadelphia metropolitan area and for the New York metropolitan area.

23. It would be not be practical for retailers in a higher-priced area to purchase branded butter from retailers in a lower-priced area and transport it to a higher-priced area. Such

arbitrage, also known as "diversion," is not practical for retailers because of the control producers maintain over the distribution and sale of their products. Producers, like the defendants, structure locally targeted price concessions to prevent arbitrage and often require proof of local advertising, coupon limitations and other promotional restrictions.

24. Accordingly, the greater Philadelphia and New York metropolitan areas each constitute a section of the country or relevant geographic market within the meaning of Section 7 of the Clayton Act.

B. Anticompetitive Effects

25. DFA and SODIAAL are two of only three significant suppliers of branded butter, including branded stick butter and branded whipped butter, in the greater Philadelphia and New York metropolitan areas. Branded butter producers compete directly and aggressively against each other for retail sales, and to have retailers purchase and promote their branded butter for retail sale. For example, branded stick and branded whipped butter producers compete aggressively by lowering prices and providing promotional allowances (including increased frequency and degree of promotions and advertising contributions) to encourage retailers like supermarkets to promote exclusively their branded stick butter and branded whipped butter, especially during the Thanksgiving, Passover, Easter, and Christmas holidays. This direct and aggressive competition between DFA and SODIAAL benefits consumers through lower prices, and more frequent and better promotions. If the combination of DFA and SODIAAL is permitted, the substantial competition between them will be eliminated.

26. The only other significant supplier of branded butter, including branded stick

butter and branded whipped butter, in the greater Philadelphia and New York metropolitan areas is Land O' Lakes, Inc. ("LOL"), a cooperative with approximately $6 billion in annual sales, and the largest butter manufacturer in the United States. DFA and SODIAAL compete directly and aggressively against LOL on the basis of price, promotional allowances, service, brand support, product improvements and other facets of competition in the sale of branded butter in the greater Philadelphia and New York metropolitan areas.

27. The proposed acquisition will reduce competition substantially in the sale of branded stick butter in the Philadelphia metropolitan area. In this highly concentrated market, DFA has a share of about 1.3 percent and SODIAAL has a share of about 43.6 percent. The proposed acquisition would result in a virtual duopoly in the Philadelphia market, where the merged firm would control about 45 percent of branded stick butter sales and the merged firm and LOL would control over 96 percent of sales. Using a standard measure of market concentration employed by economists, called the Herfindahl-Hirschman Index ("HHI"), defined and explained in Appendix B, DFA's acquisition of SODIAAL would increase the already high concentration in the greater Philadelphia branded stick butter market. Following the acquisition, the HHI would increase by about 116 points from 4628 to 4744, well in excess of that which would raise significant antitrust concerns.

28. The proposed acquisition will reduce competition substantially in the sale of branded whipped butter in the Philadelphia metropolitan area. In this highly concentrated market, DFA has a share of about 23.8 percent and SODIAAL has a share of about 26.5 percent. The proposed acquisition would result in a virtual duopoly in the Philadelphia market, where the

merged firm would control about 50 percent of branded whipped butter sales and the merged firm and LOL would control over 93 percent of sales. DFA's acquisition of SODIAAL would increase substantially the already high concentration in the greater Philadelphia branded whipped butter market. Following the acquisition, the HHI would increase by about 1263 points from 3165 to 4428, well in excess of that which would raise significant antitrust concerns.

29. The proposed acquisition will reduce competition substantially in the sale of branded stick butter in the New York metropolitan area. In this highly concentrated market, DFA has a share of about 11.7 percent and SODIAAL has a share of about 27.8 percent. The proposed acquisition would result in a virtual duopoly in the New York market, where the combined firm would control about 40 percent of branded stick butter sales and the combined firm and LOL would control over 96 percent of sales. DFA's acquisition of SODIAAL would substantially increase the already high concentration in the New York branded stick butter market. Following the acquisition, the HHI would increase by about 649 points from 4203 to 4851, well in excess of that which would raise significant antitrust concerns.

30. The proposed acquisition will reduce competition substantially in the sale of branded whipped butter in the New York metropolitan area. In this highly concentrated market, DFA has a share of about 47.1 percent and SODIAAL has a share of about 14.6 percent. The proposed acquisition would result in a virtual duopoly in the New York market, where the combined firm would control about 62 percent of branded whipped butter sales and the combined firm and LOL would control over 99 percent of sales. DFA's acquisition of SODIAAL would substantially increase the already high concentration in the New York branded whipped butter

market. Following the acquisition, the HHI would increase by about 1375 points from 3863 to 5238, well in excess of that which would raise significant antitrust concerns.

31. For almost a century SODIAAL's *Keller's* and *Hotel Bar* brands have enjoyed strong, established reputations in the Philadelphia and New York metropolitan areas. These brands allow SODIAAL to act as a significant pricing constraint. The proposed acquisition, if not enjoined, would allow DFA to unilaterally raise prices substantially. Additionally, unless the proposed acquisition is enjoined, almost 100 percent of the branded butter sold in the greater Philadelphia and New York markets will be supplied by two firms, giving rise to a substantial risk that these remaining two firms will coordinate their pricing decisions anticompetitively. Economic analysis predicts that both firms would find such coordination to be profit-maximizing. That general concern for coordinated pricing in a duopoly market is significantly greater where, as here, the two firms are agricultural cooperatives, between whom explicit price fixing is legal and could not be challenged by the United States.

D. Entry

32. Entry into the sale of branded butter in the greater Philadelphia and New York metropolitan areas is difficult. Such entry requires substantial, sunk promotional and advertising expenditures. Establishing a branded butter products takes years of effort and would not be timely, likely or sufficient to deter any exercise of market power by branded butter suppliers in the relevant markets following the acquisition by DFA of SODIAAL.

V. VIOLATIONS ALLEGED

33. The transaction will likely have the following effects, among others:

a. Competition generally in the sale of branded butter, including branded stick butter and branded whipped butter, to retailers and other consumers in the greater Philadelphia and New York metropolitan areas would be substantially lessened;

b. Actual and potential competition between DFA and SODIAAL in the sale of branded stick butter and branded whipped butter to retailers and other consumers in the greater Philadelphia and New York metropolitan areas would be eliminated;

c. Prices for branded stick butter and branded whipped butter sold to retailers and other consumers would likely increase in the greater Philadelphia and New York metropolitan areas.

34. Defendants have informed plaintiff that they will close the proposed transaction at 6:00 PM on March 31, 2000, or as soon thereafter as possible, absent an order from a federal district court.

35. Unless enjoined, the proposed acquisition will violate Section 7 of the Clayton Act, 15 U.S.C. § 18.

VI. REQUESTED RELIEF

1. Plaintiff requests that the Court issue a temporary restraining order pending a hearing and decision on the United States' Motion for a Preliminary Injunction:

a. That preserves the *status quo*;

b. That prohibits DFA, SODIAAL and Societe from closing or otherwise

moving forward with the proposed acquisition of SODIAAL's assets, including the *Keller's* and *Hotel Bar* brand names;

c. That prohibits DFA from exercising any control over the *Keller's* and *Hotel Bar* brand names;

d. That requires SODIAAL and Societe to continue to operate its butter business in the United States in a manner that will fully maintain the value and viability of the *Keller's* and *Hotel Bar* brand names; and

e. That will contain such other relief as the Court deems reasonable and necessary.

2. Plaintiff requests a preliminary injunction and final judgment:

a. That the proposed acquisition of the assets of SODIAAL by DFA and the common ownership of the *Breakstone's*, *Keller's* and *Hotel Bar* butter brands be adjudged and decreed to be unlawful and in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18;

b. That defendants and all persons acting on their behalf be preliminarily and permanently enjoined and restrained from implementing the Purchase Agreement or any other agreement, understanding or plan, the effect of which would be to combine the businesses or assets of the defendants;

c. That plaintiff be granted such other and further relief as the Court may deem proper; and

d. That plaintiff recover the costs of this action.

Respectfully submitted,

For Plaintiff United States of America:

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Dated: March 30, 2000

APPENDIX A

The greater Philadelphia metropolitan area includes:

Pennsylvania	New Jersey	Delaware
City of Philadelphia	Mercer County	New Castle County
Bucks County	Burlington County	
Montgomery County	Camden County	Maryland
Chester County	Gloucester County	Cecil County
Delaware County	Salem County	
	Cumberland County	

The greater New York metropolitan area is comprised of:

New York	New Jersey	Connecticut
New York City	Hudson County	Fairfield County
Putnam County	Bergen County	
Westchester County	Essex County	
Rockland County	Union County	
Suffolk County	Middlesex County	
Nassau County	Monmouth County	
Queens County	Passaic County	
Kings County	Morris County	
Richmond County	Somerset County	
	Ocean County	

APPENDIX B

"HHI" means the Herfindahl-Hirschman Index, a commonly accepted measure of market concentration calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. For example, a market consisting of four firms with market shares of 30, 30, 20, and 20 percent, has an HHI of 2,600 (30 squared + 30 squared + 20 squared + 20 squared = 2,600). The HHI, which takes into account the number and size distribution of the firms in the market, ranges from virtually zero to 10,000. The index approaches zero when a market consists of a large number of firms of relatively equal size. The index increases as the number of firms in the market decreases and may also increase as the disparity in size between the leading firms and the remaining firms increases. Thus, a market of two firms with shares of 60 and 40 percent would have an HHI of 5200 (60 squared + 40 squared = 3600 + 1600 = 5200).

The Department of Justice and the Federal Trade Commission 1992 Horizontal Merger Guidelines consider the markets in which the HHI is between 1000 and 1800 are moderately concentrated and those in which the HHI is in excess of 1800 points are concentrated. Transactions that increase the HHI by more than 100 points in moderately concentrated and concentrated markets presumptively raise antitrust concerns under the Merger Guidelines. Merger Guidelines § 1.51; FTC v. PPG Industries, Inc., 798 F.2d 1500, 1503 (D.C. Cir. 1986); United States v. Rockford Mem'l Corp., 717 F. Supp. 1251, 1279 (N.D. Ill. 1989), aff'd, 898 F.2d 1278 (7th Cir.), cert. denied, 498 U.S. 921 (1990).

UNITED STATES DISTRICT COURT
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SOCIETE DE DIFFUSION
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832 Harleysville Pike
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Defendants.

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Filed: __/__/00

VERIFICATION OF COMPLAINT

I, Michael H. Knight, declare:

1. I am an attorney with the United States Department of Justice, Antitrust Division.

2. The foregoing complaint for and on behalf of the United States of America was duly prepared under the direction of the Attorney General of the United States. The facts stated therein have been assembled by authorized employees and counsel for the United States of

America. The allegations therein are true and correct to the best of my knowledge, information, and belief.

I declare under penalty of perjury that the above is true and correct.

Executed on: March 30, 2000

Michael H. Knight
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