IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, Department of Justice Antitrust Division 209 South LaSalle Street Suite 600 Chicago, IL 60604 Plaintiff, v. THE EARTHGRAINS COMPANY, 8400 Maryland Avenue St. Louis, MO 63105-3668 SPECIALTY FOODS CORPORATION, 520 Lake Cook Road Deerfield, IL 60015 and METZ HOLDINGS, INC., 520 Lake Cook Road Deerfield, IL 60015 Defendants.	**RECEIVED** **MAR 20 2000** **MICHAEL W. DOBBINS** **CLERK, U.S. DISTRICT COURT** Civil No: **00 C 1687** Filed: **JUDGE BUCKLO** **MAGISTRATE JUDGE NOLAN**

COMPLAINT

The United States of America, acting under the direction of the Attorney General of the United States, brings this civil action to obtain equitable and other relief against defendants and alleges as follows:

1. The United States seeks to prevent the proposed acquisition of defendant Metz

Holdings, Inc. ("Metz") by defendant The Earthgrains Company ("Earthgrains") pursuant to a Stock Purchase Agreement ("Agreement") entered into by defendants Earthgrains; SFC New Holdings, Inc., a subsidiary of Specialty Foods Corporation; and Metz on November 15, 1999.

2. Earthgrains and Metz are two of only a few sellers of white pan bread in many local markets throughout Iowa, Illinois, Kansas, Missouri, and Nebraska. In the metropolitan Kansas City, Missouri and Omaha, Nebraska areas, Earthgrains and Metz are two of the three largest and most significant producers and sellers of white pan bread, and they are two of the four largest and most significant producers and sellers of white pan bread in the metropolitan Des Moines, Iowa area. If the proposed acquisition is permitted, Earthgrains and one other competitor would produce white pan bread that accounts for about 95 percent of annual revenues from the sale of that product to consumers in the Kansas City market, and 98 percent of annual revenues from the sale of white pan bread to consumers in the Omaha market. Earthgrains and two other competitors would account for 95 percent or more of annual revenues from the sale of white pan bread to consumers in the Des Moines market.

3. The acquisition will eliminate substantial head-to-head competition between Earthgrains and Metz which has benefited consumers throughout a large portion of the Midwest. In addition, Earthgrains's acquisition of Metz substantially increases the likelihood that the few remaining significant firms in these Midwestern markets will be able to coordinate and raise prices to consumers, and that Earthgrains will acquire market power that will enable it unilaterally to raise prices to consumers. The elimination of Metz as an independent, significant competitor is likely to result in higher prices for retail customers and consumers in these markets. For these reasons, the proposed acquisition threatens to harm consumers of white pan bread in the approximately $15 million Kansas City market, the

approximately $6 million Omaha market, the approximately $5 million Des Moines market, and in many smaller local markets in Iowa, Illinois, Kansas, Missouri, and Nebraska that collectively account for about $30 million in annual sales of white pan bread.

4. Unless this merger is blocked, Earthgrains's acquisition of Metz will substantially lessen competition in the production, distribution, and sale of white pan bread sold to retail purchasers and to consumers in Iowa and parts of Illinois, Kansas, Missouri, and Nebraska in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

I. JURISDICTION AND VENUE

5. This action is filed by the United States 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.

6. Earthgrains, Specialty Foods Corporation, and Metz sell white pan bread in the flow of interstate commerce. Defendants' activities in producing and selling white pan bread also substantially affect interstate commerce. This Court has subject matter jurisdiction over this action and jurisdiction over 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.

7. Earthgrains is a Delaware corporation that does business within the Eastern Division of the Northern District of Illinois. Venue is proper in this District pursuant to 15 U.S.C. § 22 and 28 U.S.C. §1391(d).

8. Specialty Foods Corporation, which owns 100 percent of Metz, is a Delaware corporation which does business within the Eastern Division of the Northern District of Illinois. Venue is proper in this District pursuant to 15 U.S.C. § 22 and 28 U.S.C. §1391(d).

9. Metz is a Delaware corporation that does business in the Eastern Division of the Northern District of Illinois. Venue is proper in this District pursuant to 15 U.S.C. § 22 and 28 U.S.C. §1391(c).

II. THE DEFENDANTS

10. Earthgrains is a Delaware corporation with its corporate headquarters and principal place of business in St. Louis, Missouri. Earthgrains is the nation's second largest wholesale commercial baker. It operates a total of 28 commercial bakeries throughout the United States, though its bread production and sales are concentrated primarily in the South and Midwest. In 1999, Earthgrains reported sales of $1.6 billion.

11. Specialty Foods Corporation is a Delaware corporation with its corporate headquarters in Deerfield, Illinois. It is a privately held concern that owns several baking operations, among which is Metz.

12. Metz, a wholly owned subsidiary of Specialty Foods, is a Delaware corporation with its corporate headquarters in Sioux City, Iowa. Metz is one of the largest regional wholesale commercial bakers. It produces and sells white pan bread throughout the Midwest, primarily in Illinois, Wisconsin, Michigan, Minnesota, Iowa, Missouri, Kansas, Nebraska, Colorado, and Utah. In 1999, Metz's total revenues exceeded $600 million.

III. THE PROPOSED TRANSACTION

13. On or about November 15, 1999, Earthgrains entered into an agreement pursuant to which it would acquire Metz from Specialty Foods Corporation for about $625 million.

IV. TRADE AND COMMERCE

A. Relevant Product Market

14. White pan bread is an industry term that refers to bread made from enriched white flour dough, baked in flat, deep-walled pans. An American diet staple, white pan bread is a slightly sweet, almost bland bread, with a consistently soft texture and crust. Usually sold prepackaged and pre-sliced in 16, 20 and 24 ounce loaves, white pan bread contains a variety of preservatives that enable it to remain fresh for seven to ten days. White pan bread is an ideal sandwich bread because its taste complements a wide variety of meats and spreads, and a loaf will remain fresh for use throughout a work or school week. Its distinctive flavor, texture, and keeping qualities make white pan bread widely appealing to a broad audience of consumers, and especially to families with children.

15. Wholesale commercial bakeries, such as those operated by defendants, typically produce white pan bread on automated, high-speed production lines. Wholesale commercial bakers produce more white pan bread than any other type of bread. About 50 percent of the bread produced and sold by defendants is white pan bread.

16. Wholesale commercial bakers and other firms also produce "variety breads." Variety breads include wheat, whole grain, potato, rye, raisin, pumpernickel, sourdough, French, Italian, and other types of specialty breads. As a rule, variety breads have denser, grainier textures, harder crusts, and a more pronounced taste, than white pan bread.

17. Small independent bakeries or in-store bakeries of local supermarkets also make small quantities of fresh-baked white bread in small ovens located right on their premises. Fresh-baked white bread is usually sold the day it is made and differs in taste, texture, and keeping characteristics from white pan bread produced by wholesale commercial bakeries. In light of its limited shelf life of one to two days, customers purchase fresh-baked bread for immediate consumption.

18. Because of its unique appeal and distinguishing attributes, a small but significant increase in the price of white pan bread will not cause a significant number of current purchasers of that product to substitute other types of bread or any other products.

19. Most white pan bread is sold to consumers through retail outlets, such as grocery chains and mass merchandisers. White pan bread may be sold to retailers under either a brand name owned (or controlled) by a wholesale baker or a private label owned or controlled by a major retailer. For branded white pan bread sales, the baker usually retains major responsibility for key aspects of sales and service, such as promotions, delivery, product rotation, and removal of stale loaves. For private label bread, a wholesale commercial baker agrees to bake bread for a retailer, package it under the retailer's own private label, and deliver it to retailers' locations. The retailer, however, typically remains fully responsible for promotions, and occasionally for delivery, product rotation, and removal of stale loaves.

20. A small but significant increase in the price of white pan bread sold to retail customers such as supermarkets will not cause a significant number of such purchasers to substitute white pan bread sold to other customers such as institutions (*e.g.*, schools, prisons, and military bases). The costs

of removing the bread from institutional locations, transporting it to retailers' locations, and restocking shelves are significant and would likely substantially exceed any price differential.

21. The sale of white pan bread through retail outlets is a line of commerce and a relevant product market within the meaning of Section 7 of the Clayton Act.

B. Relevant Geographic Markets

22. The relevant geographic markets for purposes of analyzing this transaction are numerous local markets throughout Iowa, Illinois, Kansas, Missouri, and Nebraska, the largest of which are the metropolitan Omaha, NE, Kansas City, MO, and Des Moines, IA areas. In these areas, retailers and consumers would not be able to substitute white pan bread sold by more distant bakers, and are likely to pay higher prices as a result of the acquisition.

23. White pan bread can be priced differently in different geographic areas, or zones, served by a bakery. Earthgrains and Metz charge different prices for the same products sold in different areas covered by this Complaint. The variations in price do not simply reflect differences in costs, but rather reflect local differences in competition or competitive strategy.

24. It would be unprofitable for retail stores in a higher-priced area or zone to purchase bread from customers in a lower-priced area or zone and transport it to a higher-priced zone. Such diversion, or arbitrage, is not practical because of the short shelf life of white pan bread, the high cost of transporting white pan bread and the control that the bakers maintain over branded and private label sales of that product.

25. Customers in the Kansas City, MO metropolitan area are unlikely to shift their purchases to bakers that do not currently produce and sell white pan bread in the Kansas City area in

the event of a small but significant increase in price of white pan bread sold to such customers. Thus, the metropolitan Kansas City, MO area is a relevant geographic market within the meaning of Section 7 of the Clayton Act.

26. Customers in the Omaha, NE metropolitan area are unlikely to shift their purchases to bakers that do not currently produce and sell white pan bread in the Omaha area in the event of a small but significant increase in price of white pan bread sold to such customers. Thus, the metropolitan Omaha, NE area is a relevant geographic market within the meaning of Section 7 of the Clayton Act.

27. Customers in the Des Moines, IA metropolitan area are unlikely to shift their purchases to bakers that do not currently produce and sell white pan bread in the Des Moines area in the event of a small but significant increase in price of white pan bread sold to such customers. Thus, the metropolitan Des Moines, IA area is a relevant geographic market within the meaning of Section 7 of the Clayton Act.

28. Customers in each of many other smaller communities in Iowa, Illinois, Kansas, Missouri, and Nebraska are unlikely to shift their purchases to bakers that do not currently produce and sell white pan bread in their communities in the event of a small but significant increase in price of white pan bread sold to such customers. Thus, each of these smaller communities in Iowa, Illinois, Kansas, Missouri, and Nebraska is a relevant geographic market within the meaning of Section 7 of the Clayton Act.

C. Anticompetitive Effects

29. Earthgrains and Metz directly compete against one another to sell both branded and private label white pan bread, provide high quality and service, and develop improved products to and

for their retail customers. This direct competition between Earthgrains and Metz benefits consumers through lower prices, better service, and improved products. If the combination of Earthgrains and Metz is permitted, this competition would be eliminated. Furthermore, Earthgrains and Metz are two of only three or four suppliers of white pan bread in each of the relevant geographic markets.

1. Reduction in competition in the Omaha, NE market.

30. The proposed acquisition will reduce competition substantially in the sale of white pan bread in the Omaha market. Only three major firms sell white pan bread to retailers in the Omaha market. In this highly concentrated market, Metz has a share of about 49 percent; and Earthgrains has a share of about 8 percent. A combination of Earthgrains and Metz would account for at least 58 percent of retail sales of white pan bread in the Omaha market. Using a measure of market concentration called the Herfindahl-Hirschman Index ("HHI"), defined and explained in Appendix A, combining Earthgrains and Metz would substantially increase the already high concentration in the Omaha white pan bread market. Following the merger, the HHI would increase about 875 points to about 3800, well in excess of that which would raise significant antitrust concerns.

31. The proposed acquisition likely would cause a substantial reduction in competition either from an increased likelihood of coordinated pricing that would result from the elimination of a significant competitor, Metz, or from an increased likelihood that Earthgrains will acquire the power to unilaterally increase prices to consumers for branded white pan bread after the merger, which is likely to lead to higher prices to consumers who purchase white pan bread through retail outlets in Omaha.

2. Reduction in competition in the Kansas City, MO market.

32. The proposed acquisition will reduce competition substantially in the sale of white pan bread in the Kansas City, MO market. Only three major firms sell white pan bread to retailers in the Kansas City market. In this highly concentrated market, Metz has a share of about 27 percent and Earthgrains has a 25 percent market share. A combination of Earthgrains and Metz would account for at least 52 percent of retail sales of white pan bread in the Omaha market. Following the merger, the HHI would increase 1378 points to about 3400, well in excess of that which would raise significant antitrust concerns.

33. The proposed acquisition likely would cause a substantial reduction in competition either from an increased likelihood of coordinated pricing that would result from the elimination of a significant competitor, Metz, or from an increased likelihood that Earthgrains will acquire the power to unilaterally increase prices to consumers for branded white pan bread after the merger, which is likely to lead to higher prices to consumers who purchase white pan bread through retail outlets in Kansas City.

3. Reduction in competition in the Des Moines, IA market.

34. The proposed acquisition will reduce competition substantially in the sale of white pan bread in the Des Moines market. Only four major firms sell white pan bread to retailers in the Des Moines market. In this highly concentrated market, Metz has a share of about 32 percent and Earthgrains has a 24 percent market share. Combining Earthgrains and Metz would substantially increase the already high concentration in this white pan bread market. A combination of Earthgrains and Metz would account for about 56 percent of retail sales of white pan bread in the Des Moines market.

After the merger, the HHI would increase 1530 points to 3500, well in excess of that which would raise significant antitrust concerns.

35. The proposed acquisition likely would cause a substantial reduction in competition either from an increased likelihood of coordinated pricing that would result from the elimination of a significant competitor, Metz, or from an increased likelihood that Earthgrains will acquire the power to unilaterally increase prices to consumers for branded white pan bread after the merger, which is likely to lead to higher prices to consumers who purchase white pan bread through retail outlets in Des Moines.

4. Reduction in competition in other areas.

36. The proposed acquisition will reduce competition substantially in the sale of white pan bread in many other communities in Iowa, Illinois, Kansas, Missouri, and Nebraska. Currently, at best, only three major firms sell white pan bread to retailers in these smaller markets, and Metz and Earthgrains are two of the largest competitors. Combining Earthgrains and Metz would substantially increase the already high concentration in each of these white pan bread markets, and give the combined company a dominant share of each of these markets.

37. The proposed acquisition likely would cause a substantial reduction in competition either from an increased likelihood of coordinated pricing that would result from the elimination of a significant competitor, Metz, or from an increased likelihood that Earthgrains will acquire the power to unilaterally increase prices to consumers for branded white pan bread after the merger, which is likely to lead to higher prices to consumers who purchase white pan bread through retail outlets in each of these markets in Iowa, Illinois, Kansas, Missouri, and Nebraska.

D. ENTRY

38. Entry into the production and sale of white pan bread in Omaha, Kansas City and Des Moines and other markets in Iowa, Kansas, Nebraska, Illinois, and Missouri is difficult. It would not be timely, likely or sufficient to deter any exercise of market power in retail sales of white pan bread resulting from the merger of Earthgrains and Metz.

39. A successful new entrant must not only possess a production facility located close enough to economically supply each of the areas with white pan bread, but also it must have a recognized brand of white pan bread, an established route delivery system, and a reputation for service and reliability, which is often acquired only after several years of providing bread to local retailers. The investment, relative to the size of the Kansas City, Omaha, Des Moines, and other markets, is very large, which makes it highly unlikely that a small but significant post merger increase in prices for white pan bread will elicit significant new entry into any of these markets.

V. VIOLATION ALLEGED

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

a. Competition generally in the sale of white pan bread to retailers and consumers in Omaha, Kansas City, Des Moines and other smaller markets in Iowa, Illinois, Kansas, Missouri, and Nebraska would be substantially lessened;

b. Actual and potential competition between Earthgrains and Metz in the sale of white pan bread to retailers and consumers in the Omaha, Kansas City, Des Moines, and other smaller markets in Iowa, Illinois, Kansas, Missouri, and Nebraska would be eliminated;

c. The prices for white pan bread sold to consumers would likely increase, and the quality, level of service in the delivery, and product improvements of white pan bread would likely decline in Omaha, Kansas City, Des Moines, and other smaller markets in Iowa, Illinois, Kansas, Missouri, and Nebraska;

41. Unless restrained, the proposed acquisition will violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

VI. REQUESTED RELIEF

Plaintiff requests:

1. That Earthgrains's proposed acquisition of Metz be adjudged and decreed to be unlawful and in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18;

2. That defendants and all persons acting on their behalf be permanently enjoined and restrained from carrying out the Agreement or from entering into or carrying out any agreement, understanding, or plan, the effect of which would be to combine the businesses or assets of the defendants;

3. That plaintiff be awarded its costs of this action; and

4. That plaintiff receive such other and further relief as the case requires and the Court deems proper.

Dated: March 20, 2000.

Respectfully submitted,

FOR PLAINTIFF UNITED STATES:

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APPENDIX A

HERFINDAHL-HIRSCHMAN INDEX CALCULATIONS

"HHI" means the Herfindahl-Hirschman Index, a commonly accepted measure of market concentration. It is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. For example, for a market consisting of four firms with shares of thirty, thirty, twenty, and twenty percent, the HHI is 2600 ($30^2 + 30^2 + 20^2 + 20^2 = 2600$). The HHI takes into account the relative size and distribution of the firms in a market and approaches zero when a market consists of a large number of firms of relatively equal size. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases.

Markets in which the HHI is between 1000 and 1800 points are considered to be moderately concentrated, and those in which the HHI is in excess of 1800 points are considered to be concentrated. Transactions that increase the HHI by more than 100 points in concentrated markets presumptively raise antitrust concerns under the Horizontal Merger Guidelines issued by the U.S. Department of Justice and the Federal Trade Commission. *See Merger Guidelines*

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