UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, *Plaintiff*, v. EASTERN MUSHROOM MARKETING COOPERATIVE, INC. *Defendant*.	CIVIL CASE NO.: 04-CV-5829 JUDGE: Thomas N. O'Neill, Jr.

RESPONSE OF THE UNITED STATES TO PUBLIC COMMENTS ON THE PROPOSED FINAL JUDGMENT

Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b) ("Tunney Act"), the United States of America hereby files comments received from a member of the public concerning the proposed Final Judgment in this civil antitrust action and the Response of the United States to those comments. The United states continues to believe that the proposed Final Judgment will provide an effective and appropriate remedy for the antitrust violations alleged in the Complaint. The United States will move the Court for entry of the proposed Final Judgment after the public comment and Response have been published in the Federal Register, pursuant to 15 U.S.C. § 16(d).

I. Factual Background.

A. The Defendant, the Eastern Mushroom Marketing Cooperative ("EMMC").

The EMMC was incorporated in the Commonwealth of Pennsylvania on

December 21, 2000, and began operations in January 2001. At the time the Complaint was filed in this case, the EMMC had 15 members with a single staff person, an executive director. The EMMC is made up of entities that grow, buy, package, and ship Agaricus and specialty mushrooms to retail and food service outlets across the United States. The EMMC members each grow some of their own product, but they also buy mushrooms from each other and from nonmembers. Shortly after it began operations, the EMMC adopted minimum prices at which its members could sell their mushrooms to customers in various geographic regions throughout the United States. The minimum prices, with periodic adjustments, were published regularly among members.

According to the United States Department of Agriculture, 844 million pounds of mushrooms were produced nationwide during the 2001-2002 growing season with an approximate value of $908 million. The EMMC members' estimated collective share of that national market was 60%, with their share estimated to be higher in the East region.

B. The EMMC's Real Estate Transactions.

Shortly after instituting minimum price increases in all regions, the EMMC began acquiring mushroom farms. Between May of 2001 and March of 2002, the EMMC acquired one mushroom farm in Hillsboro, Texas, one farm in Dublin, Georgia, and three in Pennsylvania. These five farms had the capacity to grow fresh mushrooms in competition with EMMC members' farms even though none of the farms was in operation at the time of its respective purchase. Except for the Texas farm, the EMMC sold these properties almost immediately after purchasing them and filed deed restrictions at the time of resale which effectively prohibited in perpetuity the conduct of any business related to the mushroom industry.

In addition to the aforesaid purchases and resales, the EMMC entered into lease option agreements for two more mushroom farms, one in Ohio and the other in Pennsylvania, in 2002. The EMMC never actually entered into leases for these properties, but the agreements gave it the right to file deed restrictions prohibiting the production of mushrooms on the properties for ten years, and the EMMC exercised that right.

The combined production capacity of the seven farms that were purchased/lease-optioned by the EMMC totaled approximately 42-44 million pounds of mushrooms annually.

The United States investigated the likelihood that the several land acquisitions and related transactions by the EMMC were entered into with the sole intent of removing productive capacity from the market to avoid competition from nonmembers in violation of Section 1 of the Sherman Act (15 U.S.C. § 1) as part of a conspiracy to restrain trade in the East mushroom market. Upon the completion of the investigation, the United States concluded that the EMMC had violated Section 1 of the Sherman Act.

In or about November 2004, and before the filing of the Complaint in this case, the United States and the EMMC reached an agreement whereby the EMMC agreed to consent to the proposed Final Judgment filed with the Complaint in this case. Pursuant to that Final Judgment, the EMMC agreed to file all papers necessary to eliminate all deed restrictions previously filed on the properties in which it held an ownership or leasehold interest and agreed that, in the future, it would neither file nor seek to enforce any similar deed restrictions on any other properties in which it held an ownership or leasehold interest.

C. Complaint.

On December 16, 2004, the United States filed a Complaint alleging that the real estate transactions entered into by the EMMC were intended to restrict, forestall and exclude competition from nonmember farmers in violation of Section 1 of the Sherman Act. The Complaint further alleged that the acreage and facilities available to produce mushrooms for American consumers were artificially reduced and consumers were deprived of the benefits of competition.

D. The Proposed Settlement.

At the time the United States filed its Complaint, it also filed a proposed Final Judgment, a Competitive Impact Statement ("CIS"), and a Stipulation signed by counsel for the parties. The proposed Final Judgment is designed to eliminate the anticompetitive effects of the EMMC's real estate transactions by removing the existing deed restrictions on properties in which the EMMC has an ownership or leasehold interest and preventing the filing of any similar deed restrictions in the future.

E. Compliance with the Tunney Act.

To date, the United States and the EMMC have complied with the provisions of the Tunney Act as follows:

1. The Complaint, proposed Final Judgment, CIS and Stipulation were all filed on December 16, 2004.
2. The EMMC filed the statement required by 15 U.S.C. § 16 (g) on May 11, 2005.
3. A summary of the terms of the proposed Final Judgment and CIS was

published in the Washington Post, a newspaper of general circulation in the District of Columbia, for seven days during the period February 5, 2005 through February 11, 2005.

4. A summary of the terms of the proposed Final Judgment and CIS was published in the *Philadelphia Inquirer*, a newspaper of general circulation in the region surrounding Philadelphia, Pennsylvania, for seven days during the period February 27, 2005 through March 5, 2005.

5. The Complaint, CIS, and proposed Final Judgment were published in the Federal Register on February 10, 2005, 70 FR 7120 (2005). The United States also posted the Complaint, proposed Final Judgment and the CIS on its Website, http://www.usdoj.gov/atr/cases/f206900/206919.

6. The sixty-day comment period specified in 15 U.S.C. § 16(b) expired on May 5, 2005.

7. The United States received one comment from an anonymous member of the public which is attached hereto as Appendix A. The United States hereby files this Response pursuant to 15 U.S.C. § 16 (b).

The United States will move this Court for entry of the proposed Final Judgment after the comment and the Response are published in the Federal Register.

II. LEGAL STANDARD GOVERNING THE COURT'S PUBLIC INTEREST DETERMINATION.

Upon the publication of the public comment and this Response, the United States will have fully complied with the Tunney Act and will move for entry of the proposed Final Judgment as being "in the public interest." 15 U.S.C. § 16(e), as amended. In

making the "public interest" determination, the Court should apply a deferential standard and should withhold its approval only under very limited conditions. *See, e.g.*, *Mass. Sch. of Law at Andover, Inc. v. United States*, 118 F.3d 776, 783 (D.C. Cir. 1997). Specifically, the Court should review the proposed Final Judgment in light of the violations charged in the complaint. *Id*. (quoting *United States v. Microsoft Corp.,* 56 F.3d 1448, 1462 (D.C. Cir. 1995)).

It is not proper during a Tunney Act review "to reach beyond the complaint to evaluate claims that the government did *not* make and to inquire as to why they were not made." *Microsoft*, 56 F.3d at 1459; *see also United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6-7 (D.D.C. 2003) (rejecting argument that court should consider effects in markets other than those raised in the complaint); *United States v. Pearson PLC*, 55 F. Supp. 2d 43, 45 (D.D.C. 1999) (noting that a court should not "base its public interest determination on antitrust concerns in markets other than those alleged in the government's complaint"). Because "[t]he 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 to "effectively redraft the complaint" to inquire into other matters the United States might have but did not pursue. *Microsoft*, 56 F.3d at 1459-60; *see also United States v. W. Elec. Co.*, 993 F.2d 1572, 1577 (D.C. Cir. 1993) (noting that a Tunney Act proceeding does not permit "*de novo* determination of facts and issues" because "[t]he balancing of competing social and political interests affected by a proposed antitrust decree must be left, in the first instance, to the discretion of the Attorney General" (citations omitted)).

Moreover, the United States is entitled to "due respect" concerning its "prediction as to the effect of proposed remedies, its perception of the market structure, and its view of the nature of the case." *Archer-Daniels-Midland Co.*, 272 F. Supp. 2d at 6 (citing *Microsoft*, 56 F.3d at 1461).

III. SUMMARY OF PUBLIC COMMENT.

Although it is unclear whether the author intended it as a comment in this proceeding, the United States received one anonymous letter related to this case during the relevant 60-day time period. The letter made a number of allegations about the conduct of Defendant EMMC and various unidentified mushroom grower/packers. These allegations are not comments on the proposed Final Judgment and therefore are not relevant here. In any event, the United States investigated each of these or similar allegations and concluded that they were unsubstantiated or did not constitute violations of the federal antitrust laws.

The letter also commented on the relief contained in the proposed Final Judgment, claiming that the EMMC had sold or removed specialized equipment from the farms, and questioned the value of removing the deed restrictions the EMMC had placed on the properties.

IV. The Response of the United States to the Comment.

In filing this case, the United States was concerned that the EMMC had collectively removed 8 percent of the mushroom production capacity in the East region of the United States. This was done primarily by placing deed restrictions on former farms, restrictions that erected an absolute barrier to new entry on these farms. By

removing these restrictions, the proposed Final Judgment assures that new entry can occur wherever economically justified.

There are a number of factors in addition to the presence of specialized equipment that make a farm attractive to potential mushroom entrants, including suitable buildings, an available trained labor force in the area, and existing zoning approvals. Specialized equipment, though potentially valuable, is not unique and can be replaced. Accordingly, the United States determined that the crucial element of relief was the removal of the deed restrictions. The proposed Final Judgment accomplishes this.

V. CONCLUSION

The Competitive Impact Statement and this Response to Comments demonstrate that the proposed Final Judgment serves the public interest. Accordingly, after publication of this Response in the Federal Register pursuant to 15 U.S.C. § 16(b) and (d), the United States will move this Court to enter the Final Judgment.

Dated this 30th day of June, 2005.

Respectfully submitted,

"/s/"
C. Alexander Hewes
Tracey D. Chambers
David McDowell
Trial Attorneys
United States Department of Justice
Antitrust Division
Transportation, Energy &
Agriculture Section
325 7th Street, N.W., Suite 500
Washington, DC 20530
Telephone: (202) 305-8519
Facsimile: (202) 616-2441

"/s/"
Laura Heiser
Anne Spiegelman
Trial Attorneys
Antitrust Division
Philadelphia Field Office