

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,)	
)	
<i>Plaintiff,</i>)	CIVIL CASE NO.: 2:04-CV-5829
)	JUDGE Thomas N. O’Neill, Jr.
v.)	
)	DATE STAMP: 12/16/2004
EASTERN MUSHROOM MARKETING)	
COOPERATIVE, INC.)	
)	
<i>Defendant.</i>)	

COMPETITIVE IMPACT STATEMENT

The United States of America, pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act, (“APPA”), 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.

I. Nature and Purpose of the Proceeding

On December ____, 2004, the United States filed a civil antitrust Complaint alleging that the Eastern Mushroom Marketing Cooperative, Inc. (“EMMC”) had violated Section 1 of the Sherman Act, 15 U.S.C. § 1. The EMMC is made up of entities that grow, buy, package, and ship mushrooms to retail and food service outlets across the United States. EMMC began operations in January 2001 and presently has 15 members. EMMC sets the minimum prices at which its members sell their mushrooms to customers in various geographic regions throughout the United States and publishes those prices regularly.

The Complaint alleges that, in order to support its price increases, the EMMC

collectively purchased or entered lease options on mushroom farms and thereafter shut them down, adding deed restrictions that permanently removed significant production capacity from the market. With the Complaint, the United States and the EMMC filed an agreed-upon proposed Final Judgment that requires the EMMC to eliminate the deed restrictions from all the properties it shut down.

Under the proposed Final Judgment, the EMMC is required to file nullifying documents in each jurisdiction where it has filed any “Mushroom Deed Restrictions,” as defined in the Final Judgment and discussed below in Section III A. The EMMC is also prohibited from creating, filing, or enforcing any Mushroom Deed Restrictions with respect to any real property in which the cooperative has an ownership or leasehold interest of any kind.

The United States and the EMMC have agreed that the proposed Final Judgment may be entered after compliance with the APPA, provided that the United States has not withdrawn its consent. Entry of the Final Judgment would terminate the action, except that the Court would retain jurisdiction to construe, modify, or enforce the Final Judgment’s provisions and to punish violations thereof.

II. Description of Practices Giving Rise to the Alleged Violations of the Antitrust Laws

A. Description of the Defendant and Its Activities

The EMMC is organized pursuant to the Capper-Volstead Act, 7 U.S.C. §291 *et seq.*, which gives its members a limited immunity under the antitrust laws to act together voluntarily in “collectively processing, preparing for market, handling, and marketing” their products, and allows them to “make the necessary contracts and agreements to effect such purposes.” The

Capper-Volstead Act does not give farmers the right to engage in exclusionary practices, monopolize trade, or suppress competition with the cooperative. The Supreme Court has stated that the legislative history of the Act shows a congressional intent:

. . . to make it possible for farmer-producers to organize together, set association policy, fix prices at which their cooperative will sell their produce It does not suggest a congressional desire to vest cooperatives with unrestricted power to restrain trade or to achieve monopoly by preying on independent producers . . . or dealers intent on carrying on their own businesses in their own legitimate way.¹

The EMMC, headquartered in Kennett Square, Pennsylvania, began operations in January 2001 and now is the largest mushroom cooperative in the United States. With control over combined production of more than 500 million pounds of mushrooms, the EMMC accounted for over 60 percent of agaricus mushroom sales during 2001-2002. EMMC also sets the minimum prices at which its members can sell their mushrooms to customers in various geographic regions and publishes those prices regularly.

B. Effects of the Cooperative's Activities

One of the first acts of EMMC members after forming the cooperative was to agree to increase prices in each of the geographic regions where its members sell mushrooms. The agreed-upon price increases averaged about 8 percent nationwide.

Less than four months after instituting the price increases, the EMMC began acquiring mushroom farms through a "Supply Control" campaign. Through membership dues and a so-called "Supply Control Assessment," the EMMC collected approximately six million dollars from its members between 2001 and 2003. Approximately four million dollars of that money

¹*Maryland and Va. Milk Producers Assn. v. United States*, 362 U.S. 458, 466-467 (1960).

was used in its plan to control the supply of mushrooms grown by nonmembers of the cooperative. Between May 2001 and March 2002, the EMMC acquired one mushroom farm in Dublin, Georgia, and three in Pennsylvania. All four farms had mushroom-growing equipment and together had the capacity to grow approximately 29 million pounds of fresh mushrooms annually in competition with EMMC members' farms. The EMMC sold these properties, all at a loss, almost immediately after purchasing them. The net loss for the four properties combined was more than \$1.2 million. The EMMC placed deed restrictions prohibiting the conduct of any business related to mushroom growing on all the properties at the time of each resale. For example, one of the deed restrictions reads:

This property shall never be used for the cultivation, growing, marketing, sale or distribution of fresh mushrooms, canned and/or processed mushrooms or related endeavors.

In addition to the farm purchases and sales, the EMMC entered into lease option agreements during 2002 for two more mushroom farms, one in Ohio and the other in Pennsylvania, at a total cost of another \$1.2 million. 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 purpose of these real estate transactions was to prevent nonmember mushroom farmers from competing with EMMC and its members.

As a result of the deed restrictions filed by the EMMC upon the resale or lease of these mushroom growing properties in the eastern United States, the EMMC was able to boast to its

members that it had “[a]nnually taken over 50 million pounds out of production from facilities which could have easily been purchased and remained in production.” EMMC’s actions artificially reduced the acreage and facilities available to produce mushrooms for American consumers, and consumers were deprived of the benefits of competition.

III. Explanation of the Proposed Final Judgment

A. Prohibited Conduct

Pursuant to the Final Judgment, EMMC will be enjoined and restrained from creating, filing, or enforcing any Mushroom Deed Restrictions with respect to any real property in which the cooperative has an ownership or leasehold interest of any kind. As defined in the proposed Final Judgment, Mushroom Deed Restrictions means any restriction or limitation contained in any document filed in the land records of any jurisdiction that, with respect to any real property, limits the (1) commercial growing or cultivation of any types, varieties or species of mushrooms, mushroom spawn or other fungi; (2) packaging, processing, freezing, storing, handling, selling, or marketing of any types, varieties or species of mushrooms, mushroom spawn or other fungi; (3) production of Phase I, Phase II or Phase III mushroom compost for on-site or off-site use; or (4) any other activity related to the production, processing or sale of mushrooms, mushroom spawn or other fungi, whether such production, processing or sales shall occur on or off such real property.

B. Effect of the Final Judgment

The EMMC is required, within thirty (30) calendar days after the filing of the Complaint in this matter, or five (5) days after notice of the entry of the Final Judgment by the Court,

whichever is later, to file Nullifying Documents in each jurisdiction where the Defendant has filed any Mushroom Deed Restrictions. Nullifying Documents are defined in the proposed Final Judgment as documents that are necessary to nullify the legal effect of any Mushroom Deed Restrictions filed by the EMMC previously on (1) the properties the Defendant purchased in the name of the EMMC and thereafter resold; or (2) properties in which the EMMC purchased a leasehold interest. The Final Judgment requires the Defendant to use its best efforts to file the required Nullifying Documents as expeditiously as possible. Accordingly, the restrictions on competition caused by the deed restrictions will be eliminated.

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 suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of such actions. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the Final Judgment has no *prima facie* effect in any subsequent lawsuits that may be brought against the Defendant.

V. Procedures Available for Modifications of the Proposed Final Judgment

The United States and the Defendant 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 60 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, D.C. 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 Defendant. The United States could have entered into litigation and sought an injunction forcing the Defendant to void the deed restrictions. The United States is satisfied, however, that the Defendant's agreement to void the restrictions described in the proposed Final Judgment will preserve competition for the growth of agaricus mushrooms in the United States.

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 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 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
- (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) and (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).² 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.

² *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).³

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; the APPA 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 to

³ *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"); *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'").

"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: December 16th, 2004.

Respectfully submitted,

“/s/”

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