UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *Plaintiff,* v. GRUPO BIMBO, S.A.B. de C.V., et al. *Defendants.*	Civil Action No. 11-01857 (EGS)

MEMORANDUM OF PLAINTIFF UNITED STATES IN SUPPORT OF UNOPPOSED MOTION TO MODIFY FINAL JUDGMENT

The United States and Defendants Grupo Bimbo S.A.B. de C.V. and BBU, Inc. (collectively, "BBU") have jointly moved the Court to modify the Final Judgment in this matter to permit the Divestiture Trustee to sell certain of the California Assets without their being operational. This memorandum summarizes the Complaint and the Final Judgment, describes the proposed minor modification, explains why the United States supports the modification, and discusses the legal standards and precedents for modifying consent decrees.

I. Background

On October 21, 2011, the United States filed a Complaint alleging that the acquisition by BBU of the North American Fresh Bakery business of Defendant Sara Lee Corporation ("Sara Lee") would substantially lessen competition in the market for sliced bread in eight relevant geographic markets in the United States. The Complaint sought adjudication that the acquisition of Sara Lee's North American Fresh Bakery business by BBU would violate Section 7 of the Clayton Act, 15 U.S.C. § 18, and further sought permanent injunctive relief.

At the same time the United States filed the Complaint, the United States also filed a

Hold Separate Stipulation and Order[1] and proposed Final Judgment. The Final Judgment requires BBU, among other things, to divest certain brands of sliced bread and related assets in the eight geographic markets where anticompetitive effects are likely. The objective of the Final Judgment is the divestiture of the Divestiture Assets to assure that competition in the manufacture, distribution, marketing, promotion, advertisement, and sale of fresh bread in the relevant geographic markets is preserved. The Court entered the Final Judgment on February 16, 2012.

BBU was unable to complete the divestiture of the California Assets within the time permitted by the Final Judgment. On February 29, 2012, the Court appointed James A. Fishkin as Divestiture Trustee to effect the divestiture of the California Assets.[2] In a Minute Order entered on August 27, 2012, the Court extended Mr. Fishkin's initial six-month term as Divestiture Trustee by sixty days with respect to the California Assets.[3]

II. The California Assets

The Final Judgment calls for the California Assets to be divested in a manner consistent with the Final Judgment to an acquirer or acquirers acceptable to the United States in its sole discretion. Final Judgment, Section IV(A). The California Assets include plants, equipment,

[1] On November 17, 2011, the United States filed a Notice of Amended Hold Separate Stipulation and Order to correct an inadvertent clerical error relating to the definition of "Central Pennsylvania Area" in the Hold Separate Stipulation and Order originally filed on October 21, 2011. The Court entered the Amended Hold Separate Stipulation and Order on November 30, 2011.

[2] BBU also was unable to complete the divestiture of the portions of the Central Region Assets used in the Oklahoma City and Kansas City Areas, respectively, within the time permitted by the Final Judgment or extensions granted by the United States. The Court's February 29, 2012, appointment of Mr. Fishkin as Divestiture Trustee extended to the portion of the Central Region Assets used in the Oklahoma City Area. On March 7, 2012, the United States notified the Court that the Divestiture Trustee additionally had the power and authority to effect the divestiture of the portion of the Central Region Assets used in the Kansas City Area. The United States and BBU do not seek to modify the Final Judgment with respect to the Central Region Assets that remain subject to divestiture.

[3] The Court also extended the Divestiture Trustee's term by 60 days with respect to the portion of the Central Region Assets used in the Oklahoma City Area and 180 days for the portion of the Central Region Assets used in the Kansas City Area.

and other assets used to manufacture, distribute, and sell Fresh Bread. Final Judgment, Section II(D).

Since his appointment by the Court, the Divestiture Trustee has worked diligently with BBU and the independent investment firm Atlas Advisors to market and sell the California Assets. The Divestiture Trustee's efforts, however, have not yet resulted in the signing of a purchase agreement. The United States, upon consultation with the Divestiture Trustee, has determined that the Divestiture Trustee is significantly more likely to divest the California Assets to a viable acquirer if BBU is allowed to sell the Stockton Bakery as a closed facility. An acquirer may find acquiring a closed plant significantly more attractive because that will facilitate the acquirer's upgrading, retrofitting, or otherwise significantly modifying the plant to be more efficient and/or productive.

But the Final Judgment currently requires Defendants to maintain the California Assets as operational and warrant to an acquirer that they are operational. Specifically, Paragraph IV.E of the Final Judgment provides that BBU "shall warrant to the Acquirer(s) that the Divestiture Assets"—which include the California Assets—"be operational on the date of sale." Paragraph IV.F of the Final Judgment provides that BBU "shall not take any action that will impede in any way the licensing, permitting, operation, or divestiture of the Divestiture Assets." Section VIII of the Final Judgment requires BBU to "take all steps necessary to comply with the Amended Hold Separate Stipulation and Order," which requires BBU to "take all steps necessary to ensure that the California Assets are fully maintained in operable condition at no less than their current capacity and sales," and "maintain and adhere to normal repair and maintenance schedules for the California Assets." *See* Amended Hold Separate Stipulation and Order at V.E.

The United States and BBU seek to modify the Final Judgment to authorize the United States to approve a divestiture of the California Assets that includes non-operational assets. This modification will make it significantly more likely that an acquirer with the "intent and capability (including the necessary managerial, operational, technical, and financial capability) of competing effectively in the sale of Fresh Bread" will execute a definitive divestiture agreement for the California Assets with the Divestiture Trustee. *See* Final Judgment Paragraph IV.H(1).

This modification also will allow the Divestiture Trustee to present, and the United States to consider, a divestiture of the California Assets to an acquirer who offers to purchase some assets in non-operational condition. The modification will not allow BBU unilaterally to stop operating any assets and will not restrict a potential acquirer's ability to purchase California Assets that it desires in operational condition. Rather, the proposed modification would allow BBU to close the Stockton Bakery only after the United States notified the Divestiture Trustee that the United States did not object to a divestiture including the sale of non-operational assets.

III. The Proposed Modification Serves the Public Interest and Should Be Approved

A. Applicable Legal Standard

Finding that entry of the proposed Final Judgment in this matter was in the public interest, the Court entered it on February 16, 2012. This Court has jurisdiction to modify or terminate the Final Judgment pursuant to Section XIII of the Final Judgment,[4] Fed. R. Civ. P. 60(b)(5), and "principles inherent in the jurisdiction of the chancery." *United States v. Swift &*

[4] Section XIII states that the Court "retains jurisdiction to enable any party to this Final Judgment to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions."

Co., 286 U.S. 106, 114 (1932); *see also In re Grand Jury Proceedings*, 827 F.2d 868, 873 (2d Cir. 1987).

Where, as here, the parties have consented to a proposed modification of an antitrust judgment, the issue before the Court is whether modification is in the public interest. *See United States v. Western Elec. Co*., 900 F.2d 283, 307 (D.C. Cir. 1990) ("*Western Elec. I*") (noting that court should "approve an uncontested modification so long as the resulting array of rights and obligations is within the zone of settlements consonant with the public interest today"); *see also United States v. Western Elec. Co*., 993 F.2d 1572, 1576 (D.C. Cir. 1993) ("*Western Elec. II*") (quoting *Western Elec. I*); *United States v. SBC Commc'ns, Inc*., 339 F. Supp. 2d. 116, 117 (D.D.C. 2004) ("*SBC I*") (same). "[T]he district court may reject an uncontested modification only if it has exceptional confidence that adverse antitrust consequences will result – perhaps akin to the confidence that would justify a court in overturning the predictive judgments of an administrative agency." *Western Elec. II*, 993 F.2d at 1577.

The public interest standard to be applied by the district court is the same one used in reviewing an initial proposed consent judgment in a government antitrust case. *See Western Elec. I*, 900 F.2d at 295; *United States v. American Telephone & Telegraph Co.*, 552 F. Supp. 131,147 n.67 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 406 U.S. 1001 (1983). It has long been recognized that the United States has broad discretion in settling antitrust litigation on terms that will best serve the public interest in competition. *See United States v. Microsoft Corp*., 56 F.3d 1448, 1461 (D.C. Cir. 1995) (stating that government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest"). *See generally United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1, 11 (D.D.C. 2007) ("*SBC II*") (explaining the public interest standard under the Tunney Act).

The Court's role in determining whether the initial entry of a consent decree is in the public interest is not to determine what decree would best serve society, but only to determine whether entering the proposed decree would be in the public interest. It should so determine and enter the proposed decree unless it cannot find that the government's explanation of why the proposed decree would be in the public interest is reasonable, or finds that the government has abused its discretion or failed to discharge its duty to the public. *See Microsoft*, 56 F.3d at 1460-62; *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981); *see SBC II*, 489 F. Supp. 2d at 15-16 (D.D.C. 2007), ("[T]he relevant inquiry is whether there is a factual foundation for the government's decisions such that its conclusions regarding the proposed settlements are reasonable."). The Court's role is to "insur[e] that the government has not breached its duty to the public in consenting to the decree." *Bechtel*, 648 F.2d at 666; *see also Microsoft*, 56 F.3d at 1461 (examining whether "the remedies [obtained in the Final Judgment] were not so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'"); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States's prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case). As the public interest standard for reviewing a modification to a consent decree is the same as for deciding whether initially to enter the decree, the Court should conclude that modifying the decree is in the public interest if the United States has offered a reasonable explanation of why the modification vindicates the public interest in competitive markets, and there is no showing of abuse of discretion affecting the United States's recommendation.

B. The Proposed Modification Is Within the Zone of Settlement Which Will Advance the Public Interest

With respect to the divestiture of the California Assets, the objective of the Final Judgment is to preserve competition in the manufacture, distribution, and sale of fresh bread in California. The efforts of BBU and the Divestiture Trustee to divest the California Assets as required by the Final Judgment have been unsuccessful. The Divestiture Trustee has informed the United States that he is significantly more likely to be able to negotiate a definitive divestiture agreement for the California Assets that includes non-operational assets. Therefore, the United States and BBU propose to modify the Final Judgment by adding new paragraph IV.K to the Final Judgment, which states:

> (K) Notwithstanding any contrary requirements of this Modified Final Judgment, including without limitation paragraphs IV.E or IV.F or section VIII, the United States may approve a divestiture that includes the sale of the Stockton Bakery on a non-operational (closed) basis if, in the United States's sole discretion, it is consistent with the purposes of this Modified Final Judgment. If the United States has notified Grupo Bimbo, BBU, and the Divestiture Trustee pursuant to paragraph VI(C) that the United States does not object to the divestiture agreement, (1) Grupo Bimbo and BBU may stop operating such assets that the agreement contemplates being sold as non-operational assets; (2) Grupo Bimbo and BBU shall not be required to warrant to the Acquirer(s) that the specified assets will be operational on the date of sale; and (3) the Amended Hold Separate shall cease to apply to the assets that the agreement specifies will be sold as non-operational, and to any trucks, other vehicles, depots, warehouses, and routes that Grupo Bimbo, BBU, or their agents use to distribute or sell Fresh Bread manufactured by or using the specified assets.

IV. A Public Comment Period is Unnecessary

The APPA does not expressly apply to the modification of entered final judgments.[5] The proposed modification is minor and will not materially affect BBU's obligations under the

[5] The procedures mandated by the APPA govern federal district courts' consideration of "[a]ny proposal for a consent judgment submitted by the United States," 15 U.S.C. § 16(b), and are designed to facilitate a public interest determination "[b]efore entering any consent judgment proposed by the United States," 15 U.S.C. § 16(e).

decree.[6] The proposed modification neither expands nor contracts the assets included in the California Assets. Rather, it allows some of those assets to be sold as non-operational assets if the United States does not object. Moreover, the Final Judgment already grants the United States the discretion to agree to a divestiture that includes less than all of the identified plants and equipment used to manufacture Fresh Bread under the California Brands for sale in the California Area. *See* Final Judgment II.D.2. Thus, the proposed modification is minor, and no notice or public comment period is necessary for a determination that the proposed modification is in the public interest.[7]

V. Conclusion

For the foregoing reasons, the United States and BBU respectfully request that the Court enter the proposed Order on Unopposed Motion to Modify Final Judgment and the proposed Modified Final Judgment submitted with this motion.

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[6] Few courts have addressed the issue of the applicability of the APPA to judgment modifications. This Court and other courts in this district have made non-material modifications of final judgments without requiring notice to the public and opportunity for comments. *See United States et al. v. Verizon Communications, Inc., et al.,* Civil Action No. 1:08-cv-01878 (D.D.C. April 8, 2011, Judge Emmet Sullivan) (extending the term of transition services agreements); *United States v. Cemex, S.A.B. de C.V. and Rinker Group Ltd,* Civil Action No. 1:07-cv-00640 (D.D.C. November 28, 2007, Judge Royce Lamberth) (substituting a 40-year lease of real property for a sale of that property); *United States v. Halliburton and Dresser Industries*, Civil Action No. 98-2340 (D.D.C. March 13, 2000, Judge Thomas Penfield Jackson) (substituting access to one test well for access to a different test well). Two courts outside of this district have further held that the APPA is not applicable to judgment termination proceedings, suggesting that those courts would not view the APPA as applicable to minor judgment modifications. *United States v. American Cyanamid Co.*, 719 F.2d, 558, 565 n.7 (2d Cir. 1983); *United States v. General Motors Corp.*, 1983-2 Trade Cas. ¶ 65,614 at 69,093 (N.D. Ill. 1983). *But see United States v. Motor Vehicle Mfrs. Ass'n*, 1981-2 Trade Cas. ¶ 64,370 (C.D. Cal. 1981).

[7] The United States and the courts have concluded that notice to the public and an opportunity for comment are appropriate where significant decree modifications are proposed. *See United States v. AT&T*, 552 F. Supp. 131, 144-45 (D.D.C. 1982), *aff'd. sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); *see also United States v. Cemex S.A.B. de C.V. and Rinker Group Ltd.*, 2009 WL 922436 (D.D.C. March 5, 2009) (following a new notice and comment period jointly requested by the United States and Cemex, the court entered a second modified final judgment allowing Cemex to reacquire a plant that it had been required to divest).

Dated: October 1, 2012

Respectfully submitted,

FOR PLAINTIFF
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CERTIFICATE OF SERVICE

I hereby certify that on October 1, 2012, I electronically filed this Memorandum of Plaintiff United States in Support of Unopposed Motion to Modify Final Judgment with the Clerk of the Court using the CM/ECF system, which will send a notice of electronic filing to the following counsel:

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