

**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)
Judge Emmet G. Sullivan

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION
OF THE UNITED STATES TO APPOINT DIVESTITURE TRUSTEE**

This Memorandum is filed in support of the Motion of the United States to Appoint Divestiture Trustee in the above-captioned case. This case arises from a civil antitrust Complaint filed by the United States on October 21, 2011. The Court entered the Final Judgment on February 16, 2012 (Doc. 18).

The success of the Final Judgment in remedying the competitive problems identified in the Complaint depends upon the timely divestiture of the California Assets, Central Pennsylvania Assets, and Central Region Assets as defined in Sections II (D), (G), and (J) of the Final Judgment. Defendants Grupo Bimbo S.A.B. de C.V. and BBU, Inc. (collectively, "BBU") have not been able to successfully divest the Divestiture Assets in the time permitted and extensions granted under the Final Judgment. Accordingly, Court appointment of a Divestiture Trustee, pursuant to Section V of the Final Judgment, is warranted. The United States has informed defendants that it is filing this motion, which, pursuant to the terms of the Final Judgment, defendants may not oppose.

The United States has selected James A. Fishkin, a partner at the law firm of Dechert LLP, as the candidate Divestiture Trustee. Mr. Fishkin possesses the expertise, experience, and organization necessary to accomplish the successful divestiture of the Divestiture Assets.

I. INTRODUCTION

The Complaint alleges that the acquisition of the North American Fresh Bakery business of Defendant Sara Lee Corporation (“Sara Lee”) by BBU 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.

A. Final Judgment

The Final Judgment entered by this Court on February 16, 2012, memorializes the parties’ agreement to settle the case through the divestiture of certain brands of sliced bread and related assets in the eight geographic markets where anticompetitive effects are likely. The essence of the Final Judgment is the prompt and certain 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. To accomplish this objective, Section IV(A) of the Final Judgment requires defendants to “use their best efforts to divest the Divestiture Assets as expeditiously as possible” to “an Acquirer or Acquirers acceptable to the United States in its sole discretion.”

B. BBU's Failure to Divest The Divestiture Assets

Section IV(A) of the Final Judgment gave BBU ninety (90) calendar days after the filing of the Complaint or five (5) calendar days after notice of entry of the Final Judgment by the Court, whichever was later, to divest the Divestiture Assets. It further provided that the United States, "in its sole discretion, may agree to up to two thirty (30) day extensions" of this time period. The United States agreed to a thirty-day extension for the divestiture of all of the Divestiture Assets which expired on Tuesday, February 21.¹ The United States granted no further extensions of the divestiture period with respect to the California Assets and the Central Region Assets relevant to the Oklahoma City Area. The Court entered the Final Judgment on February 16, 2012, and notice was provided electronically the same day. Accordingly, BBU had until February 21, 2012, to divest the California Assets and the Central Region Assets relevant to the Oklahoma City Area.

It is now appropriate, pursuant to Section V(A) of the Final Judgment, to appoint a Divestiture Trustee selected by the United States to effect the required divestiture of the California Assets and the Central Region Assets relevant to Oklahoma City. With respect to the California Assets, the United States has determined that a Divestiture Trustee is required because a divestiture of those assets raises unique issues not presented in other geographic areas due to their size and complexity. With respect to the Central Region Assets relevant to Oklahoma City, the United States has determined that a Divestiture Trustee is required because BBU has not made progress acceptable to the United States in

¹ The United States extended the divestiture period for all of the Divestiture Assets thirty days to February 18, 2012. Because February 18 was a Saturday, and Monday, February 20, was a federal holiday, the divestiture period expired on Tuesday, February 21, 2012, in accordance with Fed. R. Civ. P. 6(a)(1)(C).

divesting those assets as a standalone divestiture. Additionally, the United States requests that the Court transfer responsibility for the sale of the Central Pennsylvania Assets and the Central Region Assets relevant to the Omaha Area and the Kansas City Area to the Divestiture Trustee if the United States notifies the Court that BBU was unable to sell those assets prior to the expiration of the extensions that the United States has granted pursuant to paragraph IV(A) of the Final Judgment.²

II. DIVESTITURE TRUSTEE PROPOSED BY THE UNITED STATES

The United States moves this Court to appoint James A. Fishkin, a partner at Dechert LLP, as Divestiture Trustee. Mr. Fishkin is an attorney with 25 years of experience in antitrust law. Prior to entering private practice, Mr. Fishkin served for 15 years at the Federal Trade Commission. In his tenure at the Federal Trade Commission and in private practice, Mr. Fishkin has had experience with antitrust consent decrees and the sale of divestiture assets, including in matters involving food product manufacturers. Mr. Fishkin's professional biography is attached as Exhibit 2 to the Declaration of Michelle R. Seltzer. Mr. Fishkin also can call upon substantial legal resources at his firm, Dechert LLP, and other professionals as required to assist him in the performance of his duties. Mr. Fishkin is well-suited to assume the responsibilities of Divestiture Trustee under the Final Judgment.

III. CONCLUSION

For all of the foregoing reasons, the United States respectfully requests this Court to appoint James A. Fishkin as Divestiture Trustee pursuant to Section V of the Final

² On February 23, 2012, the United States granted BBU an additional extension of the divestiture period with respect to the Central Pennsylvania Assets and the Central Region Assets relevant to the Omaha Area and the Kansas City Area to allow BBU additional time to negotiate with proposed buyers of those assets. *See* Doc. 19.

Judgment.

Dated: February 28, 2012

Respectfully submitted,

/s/

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