UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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H. Stuart Cunningham, Clerk
United States District Court

UNITED STATES OF AMERICA, Plaintiff, v. INTERSTATE BAKERIES CORPORATION and CONTINENTAL BAKING COMPANY, Defendants.	Civil Action No. 95C 4194 Judge Manning Filed:

COMPETITIVE IMPACT STATEMENT

The United States, 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

The United States filed a civil antitrust Complaint on July 20, 1995, alleging that the proposed acquisition of Continental Baking Company ("Continental") by Interstate Bakeries Corporation ("Interstate") would violate Section 7 of the Clayton Act, 15 U.S.C. § 18. Continental and Interstate are the nation's first and third largest producers of white pan bread.

The Complaint alleges that the combination of these major competitors would substantially lessen competition in the

production and sale of white pan bread in five geographic markets: the Chicago area; the Milwaukee area; central Illinois (i.e., Peoria, Springfield, Champaign/Urbana); the Los Angeles area and the San Diego area. The prayer for relief seeks: (1) a judgment that the proposed acquisition would violate Section 7 of the Clayton Act; and (2) a permanent injunction preventing Interstate from acquiring control of Continental's assets or otherwise combining them with its own business in these five geographic markets.

At the same time that the suit was filed, a proposed settlement was filed that would permit Interstate to complete its acquisition of Continental's assets in other parts of the country, yet preserve competition in the markets in which the transaction would raise significant competitive concerns. Also filed were a Hold Separate Stipulation and Order, a Stipulation, and a proposed Final Judgment.

The Hold Separate Stipulation and Order would, in essence, require Interstate to ensure that, until the divestitures mandated by the Final Judgment have been accomplished, Continental's bread production and distribution facilities and ancillary assets located in the affected markets will be held separate and apart from, and operated independently of, other Interstate assets and businesses. Moreover, because the Final Judgment may require Interstate to divest either its or Continental's plants and ancillary assets in these geographic markets, until the divestitures are accomplished, Interstate must

preserve and maintain both sets of assets as saleable and economically viable, ongoing concerns.

The proposed Final Judgment orders defendants to divest to one or more purchasers certain white pan bread labels in each market. Additional assets to be divested may include bread production and distribution facilities and ancillary assets currently used by Interstate or Continental in each market, as may be required by the purchaser to be able to sell branded white pan bread at levels substantially equivalent to the levels existing before the acquisition. Defendants must complete these divestitures within nine months after entry of the Final Judgment. If they do not, the Court may appoint a trustee to sell the assets.

The United States, Interstate, and Continental have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

II. DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. The Defendants and the Proposed Transaction

Interstate, based in Kansas City, Missouri, is the third largest wholesale baker in the United States. In 1994, it reported total sales of $1.1 billion. Interstate has 14,000 employees, operates 31 commercial bakeries, and transacts

business in 39 states.

Continental, a subsidiary of St. Louis-based Ralston Purina Company, is the nation's largest wholesale baker. In 1994, Continental reported total sales of $1.95 billion. It employs 22,000, and operates 35 commercial bakeries that service 80% of the nation's population.

On January 8, 1995, Interstate and Continental announced an agreement by which Interstate would acquire Continental from its parent, Ralston Purina Corporation, for cash and stock. This $450 million transaction, which would combine Interstate and Continental, precipitated the government's suit.

B. The White Pan Bread Industry

White pan bread describes the ubiquitous, white, sliced, soft loaf known to most consumers as "plain old white bread." An American household staple, white pan bread is sold in the commercial bread aisle of every grocery store, convenience store, and mass merchandiser. White pan bread differs significantly in product attributes from other types of bread, such as variety bread (e.g., wheat, rye or French) and freshly baked in-store breads, in taste, texture, uses, perceived nutritional value, keeping qualities, and appeal to various groups of consumers. These differing attributes give rise to distinct consumer preferences for each type of bread. Many children, for instance, strongly prefer to eat white pan bread, and hence, a primary use of this bread is for sandwiches in school lunches.

Because of its unique appeal and its distinguishing

attributes, a small but significant increase in the price of white pan bread by all producers would not be rendered unprofitable by consumers substituting other breads. White pan bread is, therefore, an appropriate product market in which to assess the competitive effects of the acquisition.

White pan bread is mass produced on high speed production lines by wholesale commercial bakers,[1] who package and sell it to retailers under either their own brand or a private label (i.e., a brand controlled by a grocery chain or buying cooperative). Though physically similar to private label, branded white pan bread is perceived by consumers as fresher, better tasting, and higher quality bread; consequently, consumers often pay a premium of twice as much or more for branded white pan bread. Competition in the white pan bread market takes place on two levels, between different brands of white breads and between branded and private label white bread.

C. Competition Between Interstate and Continental

Interstate and Continental compete directly in producing, promoting, and selling both private label and branded white pan bread to grocery retailers, who in turn sell it to consumers. Interstate's popular Butternut, Sunbeam, Mrs. Karl's and Weber's regional brands and Continental's powerhouse national Wonder brand are regarded by consumers as particularly close

[1]The bread is also made by so-called "captive" bakers, i.e., wholesale commercial bakers which are owned by, and bake bread exclusively for, a grocery chain or wholesale grocery buying cooperative.

substitutes, for they are very comparable in appearance, price, taste, perceived quality and freshness.

Interstate and Continental recognize the rivalry between their products in the relevant geographic markets. To avoid losing sales to the other, each has engaged in extensive promotional, couponing, and advertising campaigns that reduce the prices charged for their branded white pan breads to the benefit of consumers. Through these activities, Interstate and Continental have each operated as a significant competitive constraint on the other's prices for white pan bread.

D. Anticompetitive Consequences of the Acquisition

The Complaint alleges that Interstate's acquisition of Continental would remove that competitive constraint and create (or facilitate Interstate's exercise of) market power (i.e., the ability to increase prices to consumers) in five relevant geographic markets: the Chicago area; the Milwaukee area; central Illinois (i.e., Peoria, Springfield, Champaign/Urbana); the Los Angeles area and the San Diego area.

Specifically, the Complaint alleges that the acquisition would increase concentration significantly in these already highly concentrated, difficult-to-enter markets.[2] Post-

[2] The Herfindahl-Hirschman Index ("HHI") is a widely-used measure of market concentration. Following the acquisition, the approximate post-merger HHIs, calculated from 1994 dollar sales, would be over: 2250 with a change of 766 for Chicago; 1800 with a change of 548 for Milwaukee; 4000 with a change of 974 for central Illinois; 4200 with a change of 2035 for Los Angeles; and 2900 with a change of 1265 for San Diego. Under the Merger Guidelines, the Antitrust Division is likely to challenge any

acquisition, Interstate would dominate each market. It would control 41% of all sales of white pan bread in the Chicago market; 33% in the Milwaukee market; 62% in the central Illinois market; 64% in the Los Angeles market; and 50% in the San Diego market.

The Complaint alleges that Interstate's acquisition of Continental would likely lead to an increase in prices charged to consumers for white pan bread. Following the acquisition, Interstate likely would unilaterally raise the price of its own brands, Continental's Wonder, or both. Because Interstate and Continental's brands are perceived by consumers as close substitutes, Interstate could pursue such a pricing strategy without losing so much in sales to competing white pan bread brands or to private labels that the price increase would be unprofitable. Interstate could, for instance, profitably impose a significant increase in the price of the Wonder white pan bread, since a substantial portion of any sales lost for that product would be recaptured by increased sales of Interstate's other brands. Similarly, Interstate could increase the prices of any one of its other popular brands of white pan bread, such as Butternut, and much of the sales lost by that brand would be picked up by Interstate's Wonder white bread brand.

Since many consumers consider Interstate and Continental brands to be closer substitutes than most other branded or

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acquisition that increases the HHI by 50 points or more in a market in which the post-merger HHI will exceed 1800 points.

private label white breads, the competitive discipline provided by rivals after the acquisition would be insufficient to prevent Interstate from significantly increasing the prices now being charged for Interstate and Continental branded white pan bread. Moreover, in response to Interstate's price increases, competing bakers would likely increase their prices of white pan bread.

The Complaint alleges that new entry by other wholesale commercial bakers, or brand repositioning by existing competitors, in any of the five adversely affected geographic markets is unlikely to counteract these anticompetitive effects.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment would preserve competition in the sale of white pan bread in each of the five relevant geographic markets. Within nine months after entry of the Final Judgment, defendants will divest certain white pan bread labels, and other assets if necessary, to make an economically viable competitor in the sale of white pan bread in each geographic market. It may well be that all that is required to accomplish this goal is the sale to an existing wholesale baker of the exclusive rights to make and sell white pan bread under either Continental or Interstate's most popular brand. Depending on the purchasers' requirements, however, effective divestiture could also require a sale of Interstate or Continental's production and distribution facilities. Defendants must take all reasonable steps necessary to accomplish the divestitures, and shall cooperate with the prospective purchaser or with the trustee. If

defendants do not accomplish the ordered divestitures within that nine-month time period, the Final Judgment provides that the Court will appoint a trustee to complete the divestitures.

If a trustee is appointed, the proposed Final Judgment provides that Interstate will pay all costs and expenses of the trustee. The trustee's commission will be structured so as to provide an incentive for the trustee based on the price obtained and the speed with which divestiture is accomplished. After her appointment becomes effective, the trustee will file monthly reports with the parties and the Court, setting forth the trustee's efforts to accomplish divestiture. At the end of six months, if the divestiture has not been accomplished, the trustee and the parties will make recommendations to the Court, which shall enter such orders as appropriate.

The relief sought in the various markets alleged in the Complaint has been tailored to ensure that consumers of white pan bread will not experience unreasonably high prices as a consequence of the acquisition.

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 the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section

5(a) of the Clayton Act (15 U.S.C. § 16(a)), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against defendants.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and the defendants 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 (60) 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 sixty (60) days of the date of publication of this Competitive Impact Statement in the Federal Register. The United States will evaluate and respond to the comments. All comments will be given due consideration by the Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to entry. 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:

Anthony V. Nanni
Chief, Litigation I Section
Antitrust Division
United States Department of Justice
1401 H Street, N.W., Suite 4000
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 of its Complaint against defendants Interstate and Continental. The United States is satisfied, however, that the divestiture of the assets and other relief contained in the Final Judgment will establish viable white pan bread competitors in the geographic markets that would otherwise be adversely affected by the acquisition. Thus, the Final Judgment would achieve the relief the government would have obtained through litigation, but avoids the time, expense and uncertainty of a full trial on the merits of the government's Complaint.

VII. STANDARD OF REVIEW UNDER THE APPA FOR PROPOSED FINAL JUDGMENT

The APPA requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the court shall determine

whether entry of the proposed Final Judgment "is in the public interest." In making that determination,

> the court may consider--
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> > (1) 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, and any other considerations bearing upon the adequacy of such judgment;
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> > (2) the impact of entry of such judgment 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) (emphasis added). As the D.C. Circuit recently held, this statute 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, 1995-1 Trade Cas. (CCH) P 71,027, at __ (Slip op. 26) (D.C. Cir. June 16, 1995).

In conducting this inquiry, "the 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."[3] Rather,

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[3]119 Cong. Rec. 24598 (1973). See United States v. Gillette Co., 406 F. Supp. 713, 715 (D. Mass. 1975). A "public interest" determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed

> absent 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. ¶ 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) quoting United States v. Bechtel Corp., 648 F.2d 660, 666 (9th Cir.), cert. denied, 454 U.S. 1083 (1981); see also Microsoft, 1995-1 Trade Cas. at __ (Slip. op. 22). Precedent requires that

> the 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

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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. 93-1463, 93rd Cong. 2d Sess. 8-9, reprinted in (1974) U.S. Code Cong. & Ad. News 6535, 6538.

decree.[4]

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.' (citations omitted)."[5]

VIII. DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the

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[4]United States v. Bechtel, 648 F.2d at 666 (citations omitted)(emphasis added); see United States v. BNS, Inc., 858 F.2d at 463; United States v. National Broadcasting Co., 449 F. Supp. 1127, 1143 (C.D. Cal. 1978); United States v. Gillette Co., 406 F. Supp. at 716. See also Microsoft, 1995-1 Trade Cas. at __ (Slip op. 23) (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.'") (citations omitted).

[5]United States v. American Tel. and Tel Co., 552 F. Supp. 131, 150 (D.D.C. 1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983) quoting United States v. Gillette Co., supra, 406 F. Supp. at 716; United States v. Alcan Aluminum, Ltd., 605 F. Supp. 619, 622 (W.D. Ky 1985).

meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: July 21, 1995

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 21, 1995, I caused a copy of the Competitive Impact Statement filed in U.S. v. Interstate Bakeries Corporation and Continental Baking Company, Civil No. 95 C 4194, to be served, by first class mail, postage prepaid on counsel for defendants Interstate Bakeries Corporation and Continental Baking Company, respectively: Terry Grimm, Winston & Strawn, 35 West Wacker Drive, Chicago, IL 60604; and Donald Hibner, Sheppard, Mullin, Richter & Hampton, 48th Floor, 333 South Hope Street, Los Angeles, CA 90071-1448.

Dated: July 21, 1995.

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