

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, :

Plaintiff, :

v. : 82 Civ. 3696 (EW)

DANILOW PASTRY CO., INC., :

DAN-SAN PASTRY SHOP, INC., :

d/b/a BROADWAY PASTRY SHOP, :

KREMO BAKING CO., INC., :

R.K. BAKING CORP., :

ACME CAKE CO., INC., :

WENS CAKE DISTRIBUTING CORP., :

MRS. MAC'S BAKING CO., INC., :

TEMTEE DONUTS, INC., :

Defendants. :

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The United States of America, pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b), files this Competitive Impact Statement in connection with the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I

NATURE AND PURPOSE OF THE PROCEEDING

On June 4, 1982, the United States filed a civil antitrust complaint under Section 4 of the Sherman Act, 15 U.S.C. § 4, alleging that the above-named defendants and unnamed co-conspirators had from at least as early as the mid-1960s until at least March 1981 combined and conspired to raise and fix prices of pastry in the New York metropolitan

area in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. The complaint also alleged that, as a result of the combination and conspiracy, price competition among the defendants was restrained and their customers were deprived of the benefits of free and open competition.

The complaint sought an adjudication that the alleged combination and conspiracy was illegal and an injunction prohibiting the defendants from continuing, maintaining or renewing the combination or conspiracy, or from engaging in any other combination or conspiracy having a similar purpose or effect.

On the same day the United States filed its complaint in this proceeding, a federal grand jury in Manhattan returned an indictment charging six of the above-named defendants and six individuals with a criminal violation of the Sherman Act arising out of the same conspiracy alleged in the complaint. All of the defendants in the criminal action (82 Cr. 415) entered pleas of nolo contendere on November 29, 1982. On January 31, 1983, Judge David N. Edelstein sentenced the corporate defendants to pay fines that totalled \$220,000 and to make restitution valued at \$174,200. He sentenced the individual defendants to pay fines that totalled \$41,000, imposed suspended jail sentences that ranged from 30 to 120 days, and, for five of the six individuals, required them to perform between 200 and 1000 hours of community service during the next two years, as a condition of probation.

The Court's entry of the proposed Final Judgment will terminate this action, except that the Court will retain jurisdiction over the matter for the next ten years for possible further proceedings to construe, modify or enforce the judgment, or to punish violation of any of its provisions.

II

DESCRIPTION OF PRACTICES GIVING RISE TO THE ALLEGED VIOLATION

The defendants are the major wholesale bakeries, or their affiliated distributors, of pastry for customers such as restaurants, luncheonettes, hospitals, schools, office cafeterias and institutional caterers in the New York metropolitan area. They also sell pastry to independent middlemen known as jobbers. The defendants' total sales of pastry from 1977 through 1980 were more than \$100 million.

At trial, the United States would have been prepared to prove that owners and executives of each of the defendants regularly met to discuss price increases and that they repeatedly agreed to raise prices by approximately the same amounts and at approximately the same times, and also to limit discounts, to limit promotional devices, not to solicit each other's customers for a period of time and to refuse new orders from each other's customers for a period of time. Within the past five years, the defendants implemented their agreements by increasing wholesale prices for pastry in February and March 1978, December 1978, November 1979,

September 1980, November 1980, and February and March 1981 and by following the other terms of their conspiracy. A summary of the government's evidence, in the form of statements by each of its six anticipated trial witnesses, was made part of the record of the criminal proceeding before Judge Edelstein.

III

EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The parties have stipulated that the proposed Final Judgment, in the form they negotiated, may be entered by the Court at any time after compliance with the Antitrust Procedures and Penalties Act. The judgment provides that it shall not constitute an admission by any party with respect to any issue of fact or law.

The proposed Final Judgment enjoins each defendant from directly or indirectly entering into, participating in or maintaining any contract, agreement, understanding, plan, program, combination or conspiracy with any other defendant, or any other wholesale bakery or any jobber or any union to fix, establish, raise, lower or maintain prices, discounts or other terms or conditions for the sale of pastry.

It also enjoins each defendant from communicating to, requesting from or exchanging with any other defendant or any other wholesale bakery or any jobber any information concerning actual or proposed prices, discounts, terms or

conditions of sale, or actual or proposed pricing policies, or any consideration or contemplation of changes therein, for the sale of pastry.

The proposed Final Judgment contains several provisions relating to defendants' compliance with its terms. It prescribes the manner in which each defendant must notify certain of its officers and employees of their obligations under the judgment. It also requires that each defendant secure from any party who acquires all or substantially all of the assets used by the defendant in its pastry business an agreement to be bound by the provisions of the judgment.

The proposed Final Judgment specifies that it will be effective for ten years from the date of its entry.

The last provision states that entry of the Final Judgment is in the public interest. Under the provisions of the Antitrust Procedures and Penalties Act, entry of the proposed Final Judgment is conditioned upon a determination by the Court that it is in the public interest.

The government believes that the proposed Final Judgment is fully adequate to prevent the continuation or recurrence of the violation of Section 1 of the Sherman Act alleged in the complaint, and that disposition of this proceeding without further litigation is appropriate and in the public interest.

IV

REMEDIES AVAILABLE TO POTENTIAL PRIVATE PLAINTIFFS

After entry of the proposed Final Judgment, any potential private plaintiff that might have been damaged by the alleged violation will retain the same right to sue for monetary damages and any other legal or equitable relief that it may have had if the Final Judgment had not been entered. The Final Judgment may not be used, however, as prima facie evidence in private litigation, pursuant to Section 5(a) of the Clayton Act, as amended, 15 U.S.C. § 16(a).

V

PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

As provided by the Antitrust Procedures and Penalties Act, any person believing that the proposed Final Judgment should be modified may submit written comments within the 60-day period provided by the Act to Ralph T. Giordano, Chief, New York Office, Antitrust Division, United States Department of Justice, Room 3630, 26 Federal Plaza, New York, New York 10278 (Telephone: 212-264-0390). These comments and the Department's responses to them will be filed with the Court and published in the Federal Register.

All comments will be given due consideration by the Department of Justice. The Department remains free to withdraw its consent to the proposed Final Judgment at any time prior to its entry if it should determine that some modification is necessary. Additionally, the proposed Final Judgment provides that the Court retains jurisdiction over this action, and that the parties may apply to the Court at any time during the life of the Final Judgment for interpretation, modification, or enforcement of its provisions.

VI

ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The alternative to the proposed Final Judgment considered by the government was a full trial on the merits and on relief. The government considers the proposed Judgment to be of sufficient scope and effectiveness to make a trial unnecessary, since it provides appropriate relief against the violations alleged in the complaint.

VII

DETERMINATIVE MATERIALS AND DOCUMENTS

No materials or documents were considered determinative by the government in formulating the proposed Final Judgment. Consequently, none is being filed pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b).

Dated: April 5, 1983
New York, New York

Respectfully submitted,

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