

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA

Plaintiff,

v.

DANONE S.A.

and

THE WHITEWAVE FOODS COMPANY,

Defendants.

CASE NO.: 1:17-cv-0592 (KBJ)

JUDGE: Ketanji Brown Jackson

**MOTION AND MEMORANDUM OF THE
UNITED STATES IN SUPPORT OF ENTRY OF FINAL JUDGMENT**

Pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) (“APPA”), Plaintiff, the United States of America (“United States”), moves for entry of the proposed Final Judgment filed in this civil antitrust proceeding on April 3, 2017, a copy of which is attached hereto as Exhibit A. The proposed Final Judgment may be entered at this time without further hearing if the Court determines that entry is in the public interest. The Competitive Impact Statement (“CIS”) filed in this matter on April 13, 2017, explains why entry of the proposed Final Judgment is in the public interest. The United States is also filing a Certificate of Compliance, attached hereto as Exhibit B, setting forth the steps taken by the

parties to comply with all applicable provisions of the APPA and certifying that the statutory waiting period has expired.

I. BACKGROUND

On April 3, 2017, the United States filed a civil antitrust Complaint alleging that the proposed acquisition by defendant Danone S.A. (“Danone”) of defendant The WhiteWave Foods Company (“WhiteWave”), likely would substantially lessen competition in the purchase of raw organic milk in the northeast United States and the manufacture and sale of fluid organic milk in the United States, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

At the same time the Complaint was filed, the United States also filed a Hold Separate Stipulation and Order (“Hold Separate Order”) and proposed Final Judgment. A CIS, filed by the United States on April 13, 2017, describes how the proposed Final Judgment is designed to remedy the likely anticompetitive effects of the proposed acquisition. The Hold Separate Order, which was signed and entered on April 5, 2017, provides that the proposed Final Judgment may be entered by the Court after the completion of the procedures of 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 Final Judgment and to punish violations thereof.

II. COMPLIANCE WITH THE APPA

The APPA requires a sixty-day period for the submission of public comments on a proposed Final Judgment. *See* 15 U.S.C. § 16(b). In compliance with the APPA, the United States filed the CIS on April 13, 2017; published the proposed Final Judgment and CIS in the

Federal Register on April 19, 2017 (*see* 82 Fed. Reg. 18468-18469); and ensured that a summary of the terms of the proposed Final Judgment, together with directions for the submission of written comments relating to the proposed Final Judgment, was published in *The Washington Post* for seven days beginning on April 10, 2017, and ending on April 18, 2017. The sixty-day public comment period terminated on June 19, 2017, and the United States received no public comments.

Simultaneously with this Motion and Memorandum, the United States is filing a Certificate of Compliance that states all the requirements of the APPA have been satisfied. It is now appropriate for the Court to make the public interest determination required by 15 U.S.C. § 16(e) and to enter the proposed Final Judgment.

III. STANDARD OF JUDICIAL REVIEW

The Clayton Act, as amended by 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.” 15 U.S.C. § 16(e)(1). In making that determination in accordance with the statute, the court is required to consider:

- (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of 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), (B). In its CIS, the United States explained the meaning and proper application of the public interest standard under the APPA and now incorporates those portions of the CIS by reference.

IV. ENTRY OF THE PROPOSED FINAL JUDGMENT IS IN THE PUBLIC INTEREST

The United States alleged in its Complaint that the acquisition of WhiteWave by Danone likely would substantially lessen competition in the purchase of raw organic milk in the northeast United States and the manufacture and sale of fluid organic milk in the United States resulting in less favorable contract terms for northeast farmers for raw organic milk, and higher prices for fluid organic milk customers. As explained in the CIS, the remedy in the proposed Final Judgment is designed to eliminate the likely anticompetitive effects of this acquisition by requiring defendants to divest Stonyfield Farm, Inc. to a buyer approved by the United States.

The public, including affected competitors and customers, has had the opportunity to comment on the proposed Final Judgment as required by law, and no comments have been submitted. There has been no showing that the proposed settlement constitutes an abuse of the United States' discretion or that it is not within the zone of settlements consistent with the public interest.

IV. CONCLUSION

For the reasons set forth in this Motion and Memorandum and in the CIS, the Court should find that the proposed Final Judgment is in the public interest and should enter the Final Judgment without further hearings. The United States respectfully requests that the Final Judgment, attached hereto as Exhibit A, be entered as soon as possible.

Dated: July 12, 2017

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Suzanne Morris", is written over a horizontal line.

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