

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
) Civil No. C 80-1893
 v.)
) Judge Thomas D. Lambros
 FIRST NATIONAL SUPERMARKETS,)
 INC., dba PICK-N-PAY)
 SUPERMARKETS;)
 FISHER FOODS, INC.,)
 dba FAZIO'S; and)
 ASSOCIATION OF STOP-N-SHOP)
 SUPER MARKETS,)
)
 Defendants.)

COMPETITIVE IMPACT STATEMENT

Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h), the United States 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

On October 10, 1980, the United States filed a civil antitrust Complaint alleging that three retail grocery chains--First National Supermarkets, Inc., dba Pick-N-Pay Supermarkets ("First National"); Fisher Foods, Inc., dba Fazio's ("Fisher"); and the Association of Stop-N-Shop Super Markets ("Stop-N-Shop")--conspired to fix prices in violation of Section I of the Sherman Act, 15 U.S.C. § 1.

The Complaint alleges that, beginning at least as early as August 1977 and continuing at least until October 1978, the defendants engaged in a combination and conspiracy to fix, raise, stabilize and maintain the advertised prices and everyday shelf prices of grocery products and the advertised prices of some meat items sold to consumers in Cuyahoga County, Ohio. As used in the Complaint, the term "grocery products" means dry groceries, dairy products, frozen foods, non-alcoholic beverages, pet foods, paper goods, detergents, and other such products commonly sold in a grocery store.

The Complaint seeks a judgment by the Court that the defendants engaged in an unlawful combination and conspiracy in restraint of trade in violation of the Sherman Act. It also asks that the Court enjoin the defendants from such activities in the future.

The defendants in this action have previously pleaded nolo contendere to two criminal felony charges, one of which was the same combination and conspiracy alleged in this action. A fine of \$800,000 was levied against each of the two corporate defendants, First National and Fisher. A fine of \$100,000 was levied against defendant Stop-N-Shop. This civil case has been held in abeyance until the criminal charges were resolved.

II

DESCRIPTION OF THE PRACTICES
GIVING RISE TO THE ALLEGED
VIOLATION OF THE ANTITRUST LAWS

First National is a Massachusetts corporation doing business in Cuyahoga County, Ohio under the name "Pick-N-Pay." Pick-N-Pay, originally an Ohio corporation, was merged into First National on May 25, 1978. At the time the Complaint was filed, First National operated retail grocery stores in Ohio, New York and New England and was one of the fifteen largest food retailers in the United States.

Fisher was incorporated in Ohio in 1908. At the time the Complaint was filed, Fisher operated retail grocery stores in Ohio and Illinois.

Stop-N-Shop is a voluntary association of retail food chains, each of which owns and operates its own stores. The members of Stop-N-Shop advertised together, bought certain products together, and shared certain other services and costs.

During the period covered by the Complaint, First National, Fisher, and Stop-N-Shop were engaged in the retail sale of grocery products, meat and produce in Cuyahoga County, Ohio. During that same period, the defendants were among the leading retail sellers of grocery products, meat and produce in Cuyahoga County. In the period 1977 through 1978, the defendants had total gross sales in Cuyahoga County of approximately \$1.1 billion.

The Complaint alleges that beginning at least as early as August 1977 and continuing at least until October 1978, the defendants engaged in a conspiracy to fix, raise, stabilize and maintain the advertised prices and everyday shelf prices of grocery products and the advertised prices of some meat items sold to consumers in Cuyahoga County.

The Complaint alleges that the combination and conspiracy to fix prices was in restraint of trade and commerce in violation of Section 1 of the Sherman Act, as amended (15 U.S.C. § 1). The conspiracy to fix prices had the following effects:

- a. advertised prices and everyday shelf prices of grocery products and advertised prices of some meat items sold in Cuyahoga County, Ohio were fixed, raised, stabilized, and maintained at artificial and non-competitive levels;
- b. competition in the retail sale of grocery products and some meat items sold in Cuyahoga County, Ohio was restrained; and
- c. consumers were deprived of the benefits of free and open competition in the market for the sale of grocery products and some meat items in Cuyahoga County, Ohio.

III

EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The United States and the defendants have stipulated that the proposed Final Judgment may be entered by the Court at any time after compliance with the Antitrust Procedures and Penalties Act. The proposed Final Judgment states that it constitutes no admission by any party with respect to any issue of fact or law.

The proposed Final Judgment enjoins any direct or indirect renewal of the type of conspiracy alleged in the Complaint. Specifically, Section IV enjoins and restrains the defendants from entering into, adhering to, participating in, maintaining, furthering, enforcing, or claiming, either directly or indirectly, any rights under any contract, agreement, understanding, arrangement, plan, program, combination, or conspiracy with any person engaged in the retail sale in Cuyahoga County, Ohio, of grocery products, meat items, or produce items to determine, establish, fix, raise, maintain, or adhere to advertised retail prices, retail prices, or other terms or conditions for the retail sale of grocery products, meat items, or produce items.

Section V of the proposed Final Judgment enjoins the defendants from communications with each other or with any other retail grocer in Cuyahoga County about the prices or terms of sale of grocery products, meat items, or produce

items. Specifically, the defendants are enjoined and restrained from, directly or indirectly:

(A) Communicating to any person engaged in the retail sale in Cuyahoga County, Ohio, of grocery products, meat items, or produce items, any information concerning the advertised retail prices, retail prices or terms or conditions of sale at which grocery products, meat items, or produce items are or may be advertised or sold in Cuyahoga County, Ohio, or concerning consideration of changes or revisions in any such prices or terms or conditions of sale;

(B) Exchanging with or transmitting to or receiving from any person engaged in the retail sale in Cuyahoga County, Ohio, of grocery products, meat items, or produce items, any information concerning present or future advertised retail prices or retail prices for grocery products, meat items, or produce items sold or to be sold in Cuyahoga County, Ohio;

(C) Requesting from any person engaged in the retail sale in Cuyahoga County, Ohio, of grocery products, meat items, or produce items, any information or documents that said defendant could not communicate or transmit without violating subsections (A) or (B) hereof.

Since the defendants engage in a number of potentially legitimate activities that may involve communications about the prices of grocery products, meat items or produce items, Section VI of the proposed Final Judgment provides that certain activities are excluded from the prohibitions of Sections IV

and V. For example, Fisher has been engaged in wholesaling grocery products to independent grocery stores for several years. In order to compete in the wholesale grocery business, Fisher provides certain marketing services to its wholesale customers which enable its customers to compete with the larger grocery chains. In connection with these services, Fisher receives retail price information from its wholesale customers which it uses for case labeling and individual retail price books which enable the individual customer to keep track of the retail prices of the many items carried in its stores. Consistent with the intent of the proposed Final Judgment to prohibit per se unreasonable conduct but not to prohibit arrangements which may promote competition, Section VI (A) excepts this activity from the prohibitions of the Final Judgment.

Section VI (B), (C), and (D) also excepts from the prohibitions of the Final Judgment bona fide collective bargaining activities, price checking and communications for the purpose of advertising. Price checking is an activity in which an agent or employee of a grocery store physically enters a competitor's retail store and records prices. Not only may price checking be pro-competitive, but any prohibition against price checking would be difficult to enforce.

years at which the persons mentioned above are instructed on their obligations and their company's or Stop-N-Shop's obligations under the Final Judgment. The defendants are required to implement a plan for monitoring compliance of those persons with the Final Judgment.

Section III of the proposed Final Judgment makes the Judgment applicable to each defendant and to the officers, directors, agents, employees, subsidiaries, members, successors and assigns of each defendant, as well as all other persons in active concert or participation with any of them who have received actual notice of the Final Judgment. The Final Judgment does not apply, however, to any person to which any defendant transfers only its wholesale food business or substantially less than all of the assets used in the retail sale of grocery products, meat items, or produce items.

Section IX requires that, if a defendant sells all, or substantially all, of the assets of its retail food business in Cuyahoga County, the purchaser must agree to be bound by the Final Judgment.

Section XII makes the Final Judgment effective for ten years from the date of its entry.

Section XIII of the proposed Final Judgment states that entry of this 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 the proposed Judgment is in the public interest.

Standard provisions similar to those found in other antitrust Final Judgments entered by consent are contained in Section I (jurisdiction of the Court), Section X (investigation and reporting requirements), and Section XI (retention of jurisdiction by the Court).

It is anticipated that the relief provided by the proposed Final Judgment will have a salutary effect on competition in the retail food market in Cuyahoga County. Not only have the defendants been enjoined from future collusive behavior, but they are also required to provide copies of the Final Judgment to each of their officers, directors, and other persons with substantial responsibility for pricing of grocery products, meat items and produce items in Cuyahoga County. In addition, those people must meet annually to be instructed about their responsibilities under the Judgment. It is anticipated that these provisions will make future violations less likely.

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).

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 United States 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).

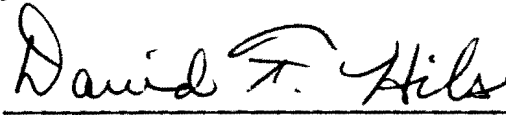
Respectfully submitted,



JOHN A. WEEDON



PAUL L. BINDER



DAVID F. HILS

Attorney, Antitrust Division
Department of Justice
995 Celebrezze Federal Building
Cleveland, Ohio 44199
Telephone: (216) 522-4083

Section VII provides that the Final Judgment does not prohibit any person, other than defendants First National and Fisher, from being a member of defendant Stop-N-Shop. Section VII also provides that the Final Judgment shall not prohibit any member of defendant Stop-N-Shop or any member of any organized group of retail stores from purchasing grocery products, meat items or produce items at wholesale from a defendant or participating in cooperative buying and joint advertising activities. Such activities, of course, remain subject to generally applicable principles of antitrust law.

Section VIII of the proposed Final Judgment orders the defendants to advise their officers and directors and their employees who have any responsibility for the pricing of grocery products, meat items or produce items, and in the case of defendant Stop-N-Shop, the employees of its members who have any responsibilities for the pricing of grocery products, meat items or produce items, of their obligations and their company's obligations under the Final Judgment. Section VIII also orders the defendants to furnish a copy of the Final Judgment to each of those persons; successors of those persons are also to be furnished a copy of the Judgment. Each copy of the Final Judgment so provided will have attached a statement informing the recipient that a violation of the Final Judgment could result in a fine for the company or for Stop-N-Shop and a fine and imprisonment for the recipients. Section VIII requires each defendant to hold a meeting every year for ten

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 John A. Weedon, Chief, Great Lakes Office, Antitrust Division, United States Department of Justice, 995 Celebrezze Federal Building, Cleveland, Ohio 44199 (telephone: 216-522-4070). These comments and the Department's response 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. Further, Section XI of the proposed Judgment provides that the Court retains jurisdiction over this action for the life of the Final Judgment and that the parties may apply to the Court for such orders as may be necessary or appropriate for the modification, interpretation, or enforcement of the Judgment after its entry.

VI

ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The alternative to the proposed Final Judgment considered by the Antitrust Division was a full trial on the merits and on relief. The Division considers the proposed Judgment to be of