

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,
c/o Department of Justice
Antitrust Division
Washington, D.C. 20530,

Plaintiff,

v.

Foodmaker, Inc.
9330 Balboa Avenue
San Diego, California 92123,

Defendant.

Civil Action No. 1:96CV0187

Filed: August 13, 1996

COMPLAINT FOR CIVIL PENALTIES
FOR VIOLATION OF PREMERGER REPORTING
REQUIREMENTS OF THE HART-SCOTT-RODINO ACT

The United States of America, Plaintiff, by its attorneys, acting under the direction of the Attorney General of the United States and at the request of the Federal Trade Commission, brings this civil action to obtain monetary relief in the form of a civil penalty against the Defendant named herein, and alleges as follows:

JURISDICTION AND VENUE

1. This Complaint is filed and these proceedings are instituted under Section 7A of the Clayton Act, 15 U.S.C. § 18a, also known as Title II of the Hart-Scott-Rodino Antitrust

Improvements Act of 1976 ("HSR Act" or "Act") to recover a civil penalty for violation of the HSR Act.

2. This Court has jurisdiction over the defendant and over the subject matter of this action pursuant to Section 7A(g) of the Act, 15 U.S.C. § 18a(g), and 28 U.S.C. §§ 1331, 1337(a), 1345, and 1355.

3. Venue in this District is proper by virtue of 28 U.S.C. §§ 1391 and 1395, and by virtue of the Defendant's consent in the Stipulation relating hereto, to the maintenance of this action and entry of the Final Judgment in this District.

THE HART-SCOTT-RODINO ACT AND RULES

4. The HSR Act requires certain acquiring persons and certain persons whose voting securities or assets are to be acquired ("acquired persons") to file notifications with the Department of Justice and the Federal Trade Commission ("antitrust agencies") and to observe a waiting period before consummating certain acquisitions of voting securities or assets. 15 U.S.C. § 18a(a) and (b). The notification and waiting period are intended to give the antitrust agencies prior notice of, and information about, the proposed transactions. The waiting period is also designed to provide the antitrust agencies an opportunity to investigate proposed transactions and determine whether to

seek an injunction to prevent transactions that may violate the antitrust laws.

5. The notification and waiting period requirements of the Act apply to direct or indirect acquisitions when the Act's jurisdictional criteria -- "size-of-person," "size-of-transaction," and "commerce" tests -- are met. The size-of-person test is satisfied if one party to the transaction has annual net sales or total assets in excess of \$100 million and the other party to the transaction has annual net sales or total assets in excess of \$10 million. The size-of-transaction test is met if, as a result of an acquisition, an acquiring person would either hold voting securities or assets of an acquired entity that are valued at greater than \$15 million or hold 50 percent or more of the outstanding voting securities of an acquired entity that had annual net sales or total assets of \$25 million or more. 15 U.S.C. § 18a(a)(3); 16 C.F.R. § 802.20(b).

6. Where an acquisition is subject to the Act, Rule 801.1(a)(1) of the Premerger Notification Rules ("HSR Rules"), 16 C.F.R. § 801.1(a)(1), defines the "person" subject to the Act as the "ultimate parent entity" of the entity contemplating the acquisition and all entities which it controls directly or indirectly. Rule 801.1(b) of the HSR Rules defines an entity as

controlled if the ultimate parent entity holds 50% or more of the entity's outstanding voting securities.

7. Rule 803.2(a) states that the notification required by the Act shall be filed by either the ultimate parent entity or by any entity authorized by the ultimate parent entity to file notification on its behalf.

DEFENDANT

8. Defendant Foodmaker, Inc., ("Foodmaker") is incorporated in the state of Delaware with its principal place of business at 9330 Balboa Avenue, San Diego, California 92123. Foodmaker owns, operates, and franchises Jack In The Box, a chain of fast food restaurants located principally in the western and southwestern United States. At all times pertinent to this complaint, Foodmaker had total assets or annual net sales valued in excess of \$100 million. Defendant Foodmaker at all times pertinent to this proceeding was engaged in commerce, or in activities affecting commerce, within the meaning of Section 1 of the Clayton Act, 15 U.S.C. § 12, and Section 7A(a)(1) of the Clayton Act, 15 U.S.C. § 18a(a)(1).

9. Foodmaker is subject to a revolving credit agreement that is conditioned on Foodmaker's not incurring litigation-related liabilities in excess of a designated amount.

10. Chi-Chi's, Inc., ("Chi-Chi's") is a chain of full-service Mexican restaurants. When Chi-Chi's acquired Consul Restaurant Corporation ("Consul"), Chi-Chi's was a wholly-owned subsidiary of Foodmaker.

CONSUL RESTAURANT CORPORATION

11. When Chi-Chi's acquired Consul, Consul was headquartered in Bloomington, Minnesota, and operated twenty-six full-service Chi-Chi's restaurants under franchises granted by Chi-Chi's. At all times pertinent to this complaint, Consul had total assets or annual net sales valued in excess of \$25 million.

THE ACQUISITION

12. On September 9, 1991, Consul initiated bankruptcy proceedings in bankruptcy court in Minnesota.

13. Pursuant to the bankruptcy proceedings, Consul's then-management proposed a plan of reorganization and submitted it to the bankruptcy court for approval.

14. In response to the plan of reorganization submitted by Consul's then-management, Chi-Chi's submitted a competing plan of reorganization in March of 1992, proposing to acquire all of the assets of Consul. In May of 1992, Chi-Chi's revised its plan, proposing to acquire all of Consul's voting securities rather than its assets.

15. The bankruptcy court approved Chi-Chi's revised plan in early October, 1992, and the district court affirmed the bankruptcy court's decision on October 6, 1992.

16. Pursuant to that approved plan, Chi-Chi's acquired 100% of the outstanding voting securities of Consul for \$8.7 million and the assumption of approximately \$4 million in liabilities on October 23, 1992. The acquisition was consummated without notifying the Department of Justice or the Federal Trade Commission pursuant to the HSR Act.

VIOLATION ALLEGED

17. The acquisition of Consul met the Act's jurisdictional criteria and thus was subject to the notification and waiting period requirements of the HSR Act.

18. Chi-Chi's was aware that the Consul acquisition was subject to the notification and waiting period requirements of the HSR Act; Chi-Chi's decided to make the acquisition without making the required notification.

19. At the time of the acquisition of Consul, Foodmaker was the ultimate parent entity of Chi-Chi's, and Chi-Chi's was an entity which Foodmaker controlled.

20. Foodmaker, as parent of Chi-Chi's, approved the acquisition and authorized the expenditure for the acquisition.

21. The HSR Act and the HSR Rules required that defendant Foodmaker, as ultimate parent entity of Chi-Chi's, file premerger notification and observe a waiting period before Chi-Chi's acquired the outstanding voting securities of Consul.

22. Defendant Foodmaker did not comply with the notification and waiting period requirements of the Hart-Scott-Rodino Act with respect to the acquisition of Consul prior to consummation of the acquisition.

23. Section 7A(g)(1) of the Clayton Act, 15 U.S.C. § 18a(g)(1), provides that any person, or any officer, director, or partner thereof, who fails to comply with the Act's provisions shall be liable to the United States for a civil penalty of not more than \$10,000 for each day during which such person is in violation of the Act.

24. In response to an inquiry from the Federal Trade Commission's Premerger Notification Office, defendant Foodmaker filed notification with respect to the acquisition of Consul on January 26, 1994, on its own behalf and on behalf of Consul. The applicable waiting period with respect to the notification expired on February 5, 1994, pursuant to 15 U.S.C. § 363(b), which at that time provided a ten-day waiting period for

acquisitions subject to the HSR Act that are also subject to the Bankruptcy Code.

25. Defendant Foodmaker was in continuous violation of the HSR Act from October 23, 1992, until February 5, 1994.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that this Court:

1. Adjudge and decree that defendant's purchase of the voting securities of Consul on October 23, 1992, was in violation of the Hart-Scott-Rodino Act, 15 U.S.C. § 18a, and that defendant was in violation of the HSR Act each day during the period from October 23, 1992, through February 5, 1994;

2. Order defendant Foodmaker to pay to the United States an appropriate civil penalty as provided by Section 7A(g)(1) of the Act, 15 U.S.C. § 18a(g)(1);

3. Grant such other, further relief as the Court shall deem just, necessary, or appropriate; and

4. Award plaintiff its costs of this suit.

DATED: _____

FOR THE PLAINTIFF UNITED STATES OF AMERICA

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