

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,)	
)	
<i>Plaintiff,</i>)	
)	CIVIL CASE NO.: 04-CV-5829
v.)	JUDGE: Thomas N. O'Neill, Jr.
)	
EASTERN MUSHROOM MARKETING)	
COOPERATIVE, INC.)	
)	
<i>Defendant.</i>)	
)	

**UNITED STATES' MOTION, WITH SUPPORTING MEMORANDUM,
FOR ENTRY OF FINAL JUDGMENT**

Pursuant to Section 2(b) of the Antitrust Procedures and penalties Act ("APPA"), 15 U.S.C. §§ 16 (b)-(h), the Plaintiff, United States of America ("United States"), moves for entry of the attached proposed Final Judgment in this civil antitrust proceeding. The 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 December 16, 2004, explains why entry of the proposed Final Judgment would be in the public interest. The United States is filing simultaneously with this Motion a Certificate of Compliance 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 December 16, 2004, the United States filed a civil antitrust Complaint alleging that the Defendant, the Eastern Mushroom Marketing Cooperative, Inc. (“EMMC”), had violated Section 1 of the Sherman Act, 15 U.S.C. § 1. The EMMC is made up of entities that grow, buy, package, and ship mushrooms to retail and food service outlets across the United States. EMMC began operations in January 2001 and, at the time of the filing of the Complaint, had approximately 15 members. EMMC sets the minimum prices at which its members sell their mushrooms to customers in various geographic regions throughout the United States and publishes those prices regularly.

The Complaint alleges that, in order to support its price increases, the EMMC collectively purchased or entered lease options on mushroom farms and thereafter shut them down, adding deed restrictions that permanently removed significant production capacity from the market. With the Complaint, the United States and the EMMC filed an agreed-upon proposed Final Judgment that requires the EMMC to eliminate the deed restrictions from all the properties it shut down.

Under the proposed Final Judgment, the EMMC is required to file nullifying documents in each jurisdiction where it has filed any “Mushroom Deed Restrictions,” as defined in the Final Judgment. The EMMC is also prohibited from creating, filing, or enforcing any Mushroom Deed Restrictions with respect to any real property in which the cooperative has an ownership or leasehold interest of any kind.

The United States and the EMMC agreed that the proposed Final Judgment could be entered after compliance with the APPA. Entry of the Final Judgment would terminate the action, except that the Court would retain jurisdiction to construe, modify,

or enforce the Final Judgment's provisions and to punish violations thereof.

II. Compliance with the APPA.

The APPA requires a sixty-day period for the submission of public comments on the proposed Final Judgment. 15 U.S.C. § 16 (b). In compliance with the APPA, the United States filed a CIS on December 16, 2004. The United States published the proposed Final Judgment and the CIS in the *Federal Register* on February 10, 2005; in *The Washington Post* during the period February 5, 2005, through February 11, 2005; and in *The Philadelphia Inquirer* during the period February 28, 2005, through March 6, 2005. The comment period expired on May 5, 2005. The United States received one anonymous comment from the public. The United States filed its Response to Public Comment and the public comment with this Court on June 29, 2005, and published the Response and the public comment in the *Federal Register* on July 7, 2005. The Certificate of Compliance filed simultaneously with this Motion recites that all the requirements of the APPA have now been satisfied. It is therefore appropriate for the Court to make the public interest determination required by 15 U.S.C. § 16 (e) and to enter the Final Judgment.

III. Standard of Judicial Review.

The APPA requires that proposed consent judgments in antitrust cases brought by the United States be subject to a 60-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, the Court shall 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) and (B). As the United States Court of Appeals for the District of Columbia Circuit has held, the APPA 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 Corp., 56 F.3d 1448, 1458-62 (D.C. Cir. 1995).

"Nothing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. § 16(e)(2). Thus, in conducting this inquiry, "[t]he 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." 119 *Cong. Rec.* 24,598 (1973) (statement of Senator Tunney).¹ Rather:

¹ *See United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975) (recognizing it was not the court's duty to settle; rather, the court must only answer "whether the settlement achieved [was] within the reaches of the public interest"). A "public interest" determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed by the Department of Justice 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. No. 93-1463*,

[a]bsent 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. (CCH) ¶ 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) (citing *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)); see also *Microsoft*, 56 F.3d at 1460-62.

Courts have held that:

[t]he 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 decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).²

The proposed Final Judgment, therefore, should not be reviewed under a standard

93rd Cong., 2d Sess. 8-9 (1974), *reprinted* in 1974 U.S.C.C.A.N. 6535, 6538.

² Cf. *BNS*, 858 F.2d at 464 (holding that the court's "ultimate authority under the [APPA] is limited to approving or disapproving the consent decree"); *Gillette*, 406 F. Supp. at 716 (noting that, in this way, the court is constrained to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass"). See generally *Microsoft*, 56 F.3d at 1461 (discussing 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'").

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.'" *United States v. AT&T*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *Gillette*, 406 F. Supp. at 716), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); *see also United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy).

Moreover, the Court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint; the APPA does not authorize the Court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459. Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Id.* at 1459-60.

IV. Conclusion.

For the reasons set forth in this Motion and in the CIS, the United States respectfully requests that the Court find that the proposed Final Judgment is in the public interest and enter the proposed Final Judgment without further hearings.

Dated this 24th day of August, 2005.

Respectfully submitted,

/s/

C. Alexander Hewes
Tracey D. Chambers
David McDowell
Trial Attorneys
U.S. Department of Justice
Antitrust Division
Transportation, Energy & Agriculture Section
325 7th Street, NW; Suite 500
Washington, D.C. 20530
Telephone: (202) 305-8519

/s/

Laura Heiser
Anne Spiegelman
Trial Attorneys
Antitrust Division, Philadelphia Field Office

CERTIFICATE PURSUANT TO LOCAL RULE 7.1 (b)

The foregoing Motion, with Supporting Memorandum, for Entry of Final Judgment is uncontested.

/s/
Laura Heiser