UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA
United States Department of Justice
Antitrust Division
450 Fifth Street, N.W., Suite 8700
Washington, D.C. 20530

Plaintiff,

v.

CONAGRA FOODS, INC.
One ConAgra Drive
Omaha, Nebraska 68102,

HORIZON MILLING, LLC
15407 McGinty Road West
Wayzata, Minnesota 55391,

CARGILL, INCORPORATED
15407 McGinty Road West
Wayzata, Minnesota 55391,

and

CHS INC.
5500 Cenex Drive
Inver Grove Heights, Minnesota 55077,

Defendants.

COMPLAINT

The United States of America ("United States"), acting under the direction of the Attorney General of the United States, brings this civil antitrust action against Defendants ConAgra Foods, Inc. ("ConAgra"), Horizon Milling, LLC ("Horizon"), Cargill, Incorporated

("Cargill"), and CHS Inc. ("CHS") to enjoin the formation of a flour milling joint venture to be known as Ardent Mills ("Ardent Mills" or "the joint venture").

Ardent Mills would be formed by combining the flour milling assets of Horizon (a joint venture between Cargill and CHS) and ConAgra Mills (a subsidiary of ConAgra). Horizon and ConAgra Mills are two of the three largest flour millers in the United States, as measured by capacity. Horizon and ConAgra Mills are significant competitors in the sale of hard and soft wheat flour in Southern California and Northern Texas; they also are significant competitors in the sale of hard wheat flour in Northern California and the Upper Midwest. The formation of Ardent Mills likely would lessen competition in each of these markets in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 1 of the Sherman Act, 15 U.S.C. § 1.

I. JURISDICTION, VENUE, AND COMMERCE

1. The United States brings this action under Section 15 of the Clayton Act, 15 U.S.C. § 25, and Section 4 of the Sherman Act, 15 U.S.C. § 4, to prevent and restrain Defendants from violating Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 1 of the Sherman Act, 15 U.S.C. § 1.

2. Defendants produce and sell flour in the flow of interstate commerce. Defendants' activities in the production and sale of flour substantially affect interstate commerce. This Court has subject matter jurisdiction over this action pursuant to Section 15 of the Clayton Act, 15 U.S.C. § 25; Section 4 of the Sherman Act, 15 U.S.C. § 4; and 28 U.S.C. §§ 1331, 1337(a), and 1345.

3. Defendants have consented to venue and personal jurisdiction in this judicial district.

II. THE DEFENDANTS AND THE TRANSACTION

4. ConAgra is incorporated in Delaware and has its headquarters in Omaha, Nebraska. ConAgra is one of the largest food companies in the United States. Its ConAgra Mills subsidiary makes several types of flour, including hard wheat flour and soft wheat flour. ConAgra Mills operates twenty-one wheat flour mills in the United States. It is one of the three largest wheat flour millers in the country, with a total daily wheat flour capacity of approximately 225,000 hundred weight ("cwt"). In 2012, ConAgra reported revenues of $13.3 billion; ConAgra Mills reported revenues of $1.8 billion.

5. Horizon is a joint venture formed in 2002 by Cargill and CHS that is headquartered in Wayzata, Minnesota. Cargill owns 76 percent of Horizon and CHS owns 24 percent of Horizon. Horizon makes several types of flour, including hard wheat flour and soft wheat flour. It is one of the three largest wheat flour millers in the United States, controlling twenty wheat flour mills with a total daily wheat flour capacity of approximately 270,000 cwt. In 2012, Horizon reported revenues of approximately $2.5 billion.

6. Cargill is a privately held company that is incorporated in Delaware and has its headquarters in Wayzata, Minnesota. Cargill produces agricultural products and food ingredients; it also markets wheat to flour mills. All of Cargill's flour mills were contributed to the Horizon joint venture, which presently includes fifteen of Cargill's former wheat flour mills. In 2012, Cargill reported revenues of $133.8 billion.

7. CHS is incorporated in Minnesota and has its headquarters in Inver Grove Heights, Minnesota. It sells, among other things, grains and grain marketing services, animal feed, foods, and food ingredients; it also markets wheat to flour mills. CHS owns five wheat

flour mills in the United States, all of which are leased to the Horizon joint venture. In 2012, CHS reported revenues of $40.1 billion.

8. Pursuant to a March 4, 2013 Master Agreement, Ardent Mills would combine the flour milling operations of ConAgra Mills and Horizon. The joint venture would be 44 percent owned by ConAgra, 44 percent owned by Cargill, and 12 percent owned by CHS. Ardent Mills would own forty-one wheat flour mills in the United States. It would have annual sales of more than $3 billion, and assets worth more than $2.5 billion.

III. BACKGROUND

9. Wheat flour is an important ingredient in many baked goods. The two primary types of wheat flour – hard wheat flour and soft wheat flour – are distinguished by their gluten content. “Hard” wheat flour has a high gluten content, which makes it well suited for baking bread, rolls, bagels, pizza dough, and similar baked goods. Gluten is a protein that helps trap gasses during the leavening process, permitting baked goods to rise, and giving them a tougher, chewier texture. “Soft” wheat flour has a low gluten content, which makes it well suited for baked goods that are lighter and flakier than bread and rolls, such as cakes, cookies, and crackers, which have a tender, crumbly texture.

10. Wheat flour is produced by grinding wheat into a fine powder. The process starts by feeding wheat kernels into a flour mill’s “breaker rollers,” which crack open the wheat kernels, separating the exterior hull from the interior endosperm of each kernel. The separated exterior hulls are known as wheat middlings, or “midds,” and typically are sold for use in the manufacture of animal feed. The interior endosperm is further ground between rollers to produce flour. Although some flour mills, known as “swing” mills, are set up to produce hard and soft wheat flour, most flour mills are designed to produce only one or the other. Hard and

soft wheat flour generally cannot be produced on the same equipment without a substantial loss of efficiency, which increases the cost of producing flour.

11. Finished wheat flour is sold to industrial bakers, food service companies, distributors, and retail sellers. Larger flour customers typically purchase flour pursuant to a formal request for proposal or a less formal bidding-type solicitation. For such purchases, large flour customers often specify the characteristics of the flour they desire to buy (including protein level, an indicator of gluten content), and they seek to negotiate the lowest price possible for the type of flour they desire. Smaller customers typically purchase standard types of flour at a price based on a miller's daily or weekly price sheet. Smaller customers often compare the delivered price offered by rival millers to determine the best available flour price, and they often can negotiate a discount off of list prices by playing millers against one another.

12. The price of delivered wheat flour has five key components: (i) the price of wheat, which is usually determined by the price on an organized wheat market; (ii) the "basis," which accounts for the difference between the organized wheat market price and the local price for a miller; (iii) the "millfeed credit," which is based on the price at which a miller can sell wheat middlings; (iv) transportation costs, *i.e.*, the cost of delivering flour from the mill to the customer; and (v) the "block," which covers the cost of converting wheat into flour.

13. The first four components largely are determined by a mill's location or market forces that are beyond a miller's control, and account for the overwhelming majority of the price of delivered flour. Although competing millers seek to minimize each of these components to keep the delivered price of flour low, the block – which is a relatively small portion of the total delivered price of flour – is the primary component on which millers compete.

14. Although transportation costs also are a relatively small portion of the cost of delivered flour, they often determine whether a flour miller can supply a customer cost effectively. Customers frequently find that the most cost competitive flour millers are those with nearby mills, whose flour transportation costs are low relative to those of more distant flour mills. Although flour can travel long distances by rail, the added cost of doing so may prevent distant mills from making substantial sales to local customers. Thus, competition for flour sales to a customer takes place largely among millers located within approximately 150 to 200 miles of a customer. Within that area, competition among millers largely takes place over the size of the block offered to the customer, all else equal.

IV. RELEVANT MARKETS

A. <u>Relevant Product Markets</u>

15. Hard wheat flour is a relevant product market and a line of commerce under Section 7 of the Clayton Act, and Section 1 of the Sherman Act. Hard wheat flour has specific applications for which other types of flour cannot be used. A baker of crusty, chewy baked goods, such as bread, bagels, or pizza dough, cannot use soft wheat flour because the finished product will not "rise" or have the texture that consumers expect. As a result, a flour customer who requires hard wheat flour would not substitute other products in response to a small but significant and nontransitory increase in the price of hard wheat flour.

16. Soft wheat flour is a relevant product market and line of commerce under Section 7 of the Clayton Act, and Section 1 of the Sherman Act. Soft wheat flour has specific applications for which other types of flour cannot be used. A baker of lighter, flakier baked goods, such as cakes, cookies, crackers, or pastries, cannot use hard wheat flour in place of soft wheat flour because the finished product will not remain flat – as is desirable for crackers or

pastries – or have the texture that consumers expect. As a result, a flour customer who requires soft wheat flour would not substitute other products in response to a small but significant and nontransitory increase in the price of soft wheat flour.

B. Relevant Geographic Markets

17. Flour millers can price differently to customers in different locations. Hard and soft wheat flour sales typically are negotiated by a miller and an individual customer. Flour millers take into account rivals' mills that can economically supply a customer when determining the price at which to sell to that customer. Thus, a miller will charge a higher price to a customer in an area with few supply options relative to a customer in an area with many supply options.

18. Flour customers are unlikely to arbitrage in response to such differential pricing. The ability of customers to arbitrage by securing flour from customers in other areas is limited by transportation costs, which limit the distance that flour can economically be shipped. Moreover, arbitrage by securing flour from customers in other areas entails increased food safety and quality risks. As a result, most customers would not find it desirable or cost effective to buy flour from customers in other areas.

19. Because flour millers can price differentially and customers are unlikely to arbitrage, flour millers can price discriminate. In the presence of price discrimination, relevant geographic markets may be defined by reference to the location of customers. In particular, the relevant geographic markets for hard and soft wheat flour are those areas of the country encompassing the locations of customers who could be similarly targeted for a price increase.

20. A hypothetical monopolist flour miller could impose on customers a small but significant nontransitory price increase in each of the following areas (which encompass certain metropolitan statistical areas): Northern California (encompassing Santa Rosa-Petaluma, Napa,

Sacramento-Arden-Arcade-Roseville, Stockton, Vallejo-Fairfield, San Francisco-Oakland-Fremont, Santa Cruz-Watsonville, San Jose-Sunnyvale-Santa Clara, Merced, and Modesto), Southern California (encompassing Los Angeles-Long Beach-Santa Ana, Riverside-San Bernardino-Ontario, and San Diego-Carlsbad-San Marcos), Northern Texas (encompassing Dallas-Fort Worth-Arlington), and the Upper Midwest (encompassing Minneapolis-St. Paul-Bloomington, Eau Claire, Madison, La Crosse, and Rochester). Therefore, each area is a relevant geographic market under Section 7 of the Clayton Act, and Section 1 of the Sherman Act.

V. MARKET SHARES AND CONCENTRATION

21. Ardent Mills would own a substantial share of flour milling capacity serving each relevant market. Because transportation costs limit the ability of distant millers to compete with local millers for customers, competition for flour sales largely takes place among millers with milling capacity located within 150 to 200 miles of a customer. Thus, milling capacity within 200 miles of key cities within each geographic area is a useful basis on which to estimate market shares and concentration, and it approximates sales shares in each geographic market. Each 200-mile area around a city encompasses those flour millers most likely to compete for sales in each geographic market, and shares based on capacity within 200 miles of each city are indicative of the likely competitive effects for customers in the broader relevant markets.

22. In Northern California, Ardent Mills would own approximately 70 percent of hard wheat flour milling capacity within 200 miles of San Francisco. In Southern California, it would own more than 40 percent of hard wheat flour milling capacity, and approximately 70 percent of soft wheat flour milling capacity, within 200 miles of Los Angeles. In Northern Texas, it would own more than 75 percent of hard wheat flour milling capacity, and 100 percent of the soft wheat

flour milling capacity, within 200 miles of Dallas/Ft. Worth. In the Upper Midwest, it would own more than 60 percent of hard wheat flour milling capacity within 200 miles of Minneapolis. Given that transportation costs limit the ability of more distant mills to compete in these areas, Ardent Mills's large capacity shares would result in Ardent Mills having a large share of sales in these areas.

23. Based on capacity within 200 miles of key cities in each market, formation of Ardent Mills would increase the Herfindahl-Hirschman Index ("HHI"),[1] a standard measure of market concentration, by more than 200 points to more than 2,500 points in the relevant markets. For San Francisco, formation of the joint venture would increase the HHI for hard wheat flour to more than 5,000. For Los Angeles, the joint venture would increase the HHI for hard wheat flour to more than 2,500; and the HHI for soft wheat flour to more than 5,500. For Dallas/Ft. Worth, the HHI for the hard wheat flour would increase to more than 6,000; and the HHI for soft wheat flour would increase to 10,000. For Minneapolis, the HHI for hard wheat flour would increase to more than 4,500. As a result, the joint venture should be presumed likely to enhance market power in each of the relevant markets.

[1] *See* U.S. Dep't of Justice and Federal Trade Commission, Horizontal Merger Guidelines § 5.3 (2010), *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.html. The HHI is calculated by squaring the market share of each firm competing in the market, then summing the resulting numbers. The HHI takes into account the relative size distribution of the firms in a market; it increases both as the number of firms in the market decreases and as the disparity in size between those firms increases. The HHI approaches zero in markets with a large number of participants of relatively equal size and reaches a maximum of 10,000 points in markets controlled by a single firm.

VI. ANTICOMPETITIVE EFFECTS OF THE JOINT VENTURE

A. Formation of Ardent Mills Would Eliminate Head-to-Head Competition between Horizon and ConAgra

24. The formation of Ardent Mills would eliminate head-to-head competition between ConAgra Mills and Horizon in the relevant markets. ConAgra Mills and Horizon routinely compete by offering lower prices to their customers, and customers have secured lower prices by playing ConAgra Mills and Horizon against one another. The formation of Ardent Mills would eliminate that competition, resulting in higher hard wheat flour prices for customers in Northern California, Southern California, Northern Texas, and the Upper Midwest, and higher soft wheat flour prices for customers in Southern California and Northern Texas.

25. Horizon and ConAgra Mills operate mills that are close to one another in the relevant geographic markets, and that are among those closest to many customers in those markets. Because their mills are the closest mills to many customers, Horizon's and ConAgra's delivered flour costs tend to be lower than those of their rivals' more distant mills. Moreover, because their mills are located close to one another, Horizon's and ConAgra's flour transportation costs tend to be similar. As a result of the proximity of their mills to one another – and to one another's customers – Horizon and ConAgra frequently are among the lowest-cost flour suppliers for customers in the relevant areas, and they compete aggressively against one another to make sales in those areas. That competition would be lost with the formation of Ardent Mills.

B. Formation of Ardent Mills Would Increase the Likelihood of Anticompetitive Capacity Closures

26. Relative to stand-alone Horizon and ConAgra Mills, the joint venture would increase the incentive and ability of Ardent Mills to close hard and soft wheat flour milling

capacity serving the relevant markets. With a larger base of mills to benefit from increased flour prices, the joint venture would have an increased incentive to shut down capacity. The joint venture also would have mills with a wider array of operating costs from which to choose capacity to shut down, increasing the ability of the joint venture to profitably shut down capacity or entire mills. By creating a larger portfolio of flour mills with differing costs, formation of the joint venture would make it more likely that Ardent Mills would find it profitable to close a higher-cost mill to raise hard or soft wheat flour prices. Thus, the joint venture would increase the likelihood of capacity closure, which would tighten supply relative to demand, inducing Ardent Mills and rival millers to compete less aggressively for flour sales, ultimately increasing flour prices to customers in the relevant geographic markets.

C. Formation of Ardent Mills Would Increase the Likelihood of Anticompetitive Coordination

27. The formation of Ardent Mills would increase the likelihood of anticompetitive coordination among flour millers. Several features of hard and soft wheat flour markets render them susceptible to anticompetitive coordination. First, the markets are transparent, which gives millers insight into their rivals' costs, prices, output, and capacity utilization levels. Second, hard wheat flour and soft wheat flour are relatively homogeneous products that are purchased frequently. Third, the demand for hard and soft wheat flour is relatively inelastic. Finally, larger flour millers compete against one another to supply hard and soft flour in multiple geographic markets.

28. The relevant markets already are highly concentrated, and the formation of the joint venture would significantly increase that concentration by reducing the number of substantial millers in each of the relevant markets. As a result, the formation of Ardent Mills would allow it and its few remaining rivals to more easily identify and account for the

competitive strategies of one another, making it easier for them to coordinate on capacity, price, or other competitive strategies in the relevant markets, which already are susceptible to coordination. This, in turn, will make coordination more likely and more durable, increasing the likelihood that hard and soft wheat flour prices would increase in the relevant markets.

29. The formation of Ardent Mills also would permit information exchanges between CHS, Cargill, and the joint venture that would facilitate coordination in the relevant markets. CHS and Cargill propose entering into side agreements to supply Ardent Mills with wheat. These agreements include terms that, in principle, would permit CHS, and Cargill to provide Ardent Mills with detailed information about rival millers' wheat purchases, giving the joint venture greater insight into its rivals' costs. As a result, the side agreements would make it easier for Ardent Mills to understand the competitive strategies of its rivals, which would make coordination more likely and durable, increasing the likelihood that hard and soft wheat flour prices would increase in the relevant markets.

VII. ENTRY

30. Entry would not be likely, timely, or sufficient to offset the anticompetitive effects of the formation of Ardent Mills. Flour is a mature industry with stable demand and margins, which means that the incentive to enter the relevant markets with a new mill, or with substantial new capacity at an existing mill, is small. It also is unlikely that entry by more distant mills delivering flour by rail will be timely, likely, or sufficient due to rail delivery's additional cost and inconvenience, which renders it an unacceptable option for many customers.

VIII. VIOLATIONS ALLEGED

A. Violation of Section 7 of the Clayton Act

31. The proposed joint venture likely would substantially lessen competition in the relevant markets, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

32. Unless enjoined, the joint venture likely would have the following anticompetitive effects, among others:

a. competition between ConAgra and Horizon in the relevant markets would be eliminated;

b. competition in the relevant markets likely would be substantially lessened;

c. reductions in milling capacity would be more likely;

d. coordination in the relevant markets would be easier and more likely; and, as a result,

e. hard wheat flour prices would increase for customers in Northern California, Southern California, Northern Texas, and the Upper Midwest; and soft wheat flour prices would increase for customers in Southern California and Northern Texas.

B. Violation of Section 1 of the Sherman Act

33. ConAgra and Horizon's agreement to combine their flour-milling assets and operations through the Ardent Mills joint venture, to eliminate competition between them, and not to compete against each other unreasonably restrains trade, and likely would continue to unreasonably restrain trade, in the relevant markets in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

IX. REQUESTED RELIEF

34. The United States requests that this Court:

a. adjudge and decree that the Ardent Mills joint venture would be unlawful and violate Section 7 of the Clayton Act, 15 U.S.C. § 18;

b. adjudge and decree that the Ardent Mills joint venture would be unlawful and violate Section 1 of the Sherman Act, 15 U.S.C. § 1;

c. preliminarily and permanently enjoin and restrain Defendants and all persons acting on their behalf from effectuating the Ardent Mills joint venture, or from entering into or carrying out any other contract, agreement, plan, or understanding, the effect of which would be to create such a joint venture;

d. award the United States its costs for this action; and

e. award the United States such other and further relief as the Court deems just and proper.

Dated: May 20, 2014

Respectfully submitted,

FOR PLAINTIFF UNITED STATES OF AMERICA:

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