DEPARTMENT OF JUSTICE

Antitrust Division

United States v. Grupo Bimbo, S.A.B. de C.V., et al.; Public Comment and Response on Proposed Final Judgment

Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), the United States hereby publishes below the comment received on the proposed Final Judgment in *United States* v. *Grupo Bimbo, S.A.B. de C. V., et al.,* Civil Action No. 1:11–cv–01857, which was filed in the United States District Court for the District of Columbia on January 23, 2012, together with the response of the United States to the comment.

Copies of the comment and the response are available for inspection at the U.S. Department of Justice, Antitrust Division, Antitrust Documents Group, 450 Fifth Street NW., Suite 1010, Washington, DC 20530 (telephone: (202) 514–2481); on the Department of Justice's Web site at *http://www.usdoj.gov/atr;* and at the Office of the Clerk of the United States District Court for the District of Columbia. Copies of any of these materials may be obtained upon request and payment of a copying fee.

Patricia A. Brink,

Director of Civil Enforcement.

United States District Court for the District Of Columbia

United States of America, Plaintiff, v. *Grupo Bimbo, S.A.B. de C.V., et al.* Defendants.

CASE NO.: 1:11–cv–01857 (EGS) FILED: January 23, 2012

Response of Plaintiff United States to Public Comment on the Proposed Final Judgment

Pursuant to the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)–(h) (''APPA'' or ''Tunney Act''), plaintiff, the United States of America (''United States'') hereby files the public comment concerning the proposed Final Judgment in this case and the United States' response to that comment. After careful consideration of the comment submitted, the United States continues to believe that the proposed Final Judgment will provide an effective and appropriate remedy for the antitrust violations alleged in the Complaint. The United States will move the Court for entry of the proposed Final Judgment after the public comment and this response have been published in the **Federal Register**, pursuant to 15 U.S.C. § 16(d).

I. Procedural History

On October 21, 2011, the United States filed a civil antitrust lawsuit against Defendants Grupo Bimbo S.A.B. de C.V., BBU, Inc., and Sara Lee Corporation to enjoin Grupo Bimbo and BBU's proposed acquisition of Sara Lee's North American Fresh Bakery business. The Complaint alleged that the acquisition would substantially lessen competition in the market for sliced bread in eight geographic markets in the United States in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, and result in higher prices for consumers in these markets.

Simultaneously with the filing of the Complaint, the United States filed a proposed Final Judgment and Stipulation signed by the United States, Grupo Bimbo, BBU, and Sara Lee consenting to entry of the proposed Final Judgment after compliance with the requirements of the APPA, 15 U.S.C. § 16. The United States filed an Amended Stipulation signed by the United States, Grupo Bimbo, BBU, and Sara Lee on November 17, 2011.[1] Pursuant to the requirements of the APPA, the United States (1) filed its Competitive Impact Statement (''CIS'') with the Court on October 21, 2011; (2) published the proposed Final Judgment and CIS in the **Federal Register** on October 31, 2011 (see 76 Fed. Reg. 67209); and (3) had summaries of the terms of the proposed Final Judgment and CIS, together with directions for the submission of written comments relating to the proposed Final Judgment, published in The Washington Post on October 28, 2011, and for six days beginning on October 31, 2011, and ending on November 5, 2011. The Defendants filed the statement required by 15 U.S.C. § 16(g) on October 31, 2011. The sixty-day public comment period ended on January 4, 2012. One comment was received, as described below and attached hereto.

II. The Investigation and Proposed Resolution

On November 9, 2010, Grupo Bimbo and BBU (collectively ''BBU'') agreed to acquire the North American Fresh Bakery business of Sara Lee. The United States Department of Justice (the ''Department'') conducted an extensive, detailed investigation into the competitive effects of the proposed transaction. As part of this investigation, the Department obtained and considered more than 30,000 documents. The Department deposed officials of BBU and Sara Lee and interviewed retail store customers, sliced bread manufacturers, and other individuals with knowledge of the sliced bread industry.

After conducting a detailed analysis of the acquisition, the Department concluded that the combination of BBU and Sara Lee likely would substantially lessen competition for the sale of sliced bread in the metropolitan and surrounding areas of San Francisco, San Diego, Sacramento, and Los Angeles, California; Harrisburg/Scranton, Pennsylvania; Kansas City, Kansas; Omaha, Nebraska; and Oklahoma City, Oklahoma.

As more fully explained in the CIS, the Amended Stipulation and proposed Final Judgment in this case are designed to preserve competition in the sale of sliced bread in the eight geographic areas set forth in the Complaint by requiring BBU to divest the following assets (''Divestiture Assets''). In Los Angeles, San Diego, San Francisco, and Sacramento, California, BBU is required to divest the Sara Lee family of brands of sliced bread (which includes Sara Lee, Sara Lee Classic, Sara Lee Soft & Smooth, Sara Lee Hearty & Delicious, and Sara Lee Delightful) and the EarthGrains brand of sliced bread. In Harrisburg/Scranton, Pennsylvania, BBU is required to divest the Holsum and Milano brands of sliced bread. In Kansas City, Kansas, BBU is required to divest the EarthGrains and Mrs Baird's brands of sliced bread. In Omaha, Nebraska, BBU is required to divest the EarthGrains and Healthy Choice brands of sliced bread. In Oklahoma City, Oklahoma, BBU is required to divest the EarthGrains brand of sliced bread. See Sections II.E, H, and K of the Proposed Final Judgment.

In addition to a perpetual, royalty-free, assignable, transferable, exclusive license to use the particular brands of sliced bread, the proposed Final Judgment requires with respect to each relevant geographic market the divestiture of related tangible assets, including records, customer information, and other assets related to the divested brands. Id. at II.D, G, and J. It also requires the divestiture of related intangible assets, including the rights to trade dress, trademarks, trade secrets, and other intellectual property used in the research, development,

[1] On November 17, 2011, the United States filed a Notice of Amended Hold Separate Stipulation and Order to correct an inadvertent clerical error relating to the definition of ''Central Pennsylvania Area'' in the Hold Separate Stipulation and Order originally filed on October 21, 2011. The Court entered the Amended Hold Separate Stipulation and Order on November 30, 2011.

production, marketing, servicing, distribution, or sale of the brands being divested. Id. The proposed Final Judgment additionally requires the divestiture of brand-related plants and plant-related assets, but it also provides that BBU need not divest those assets in the event that (1) the acquirer does not want those assets, and (2) the United States determines in its sole discretion that a divestiture of some or all of such assets is not reasonably necessary to enable the acquirer to replace the competition that otherwise would have been lost pursuant to BBU's acquisition of Sara Lee's fresh bakery business. Id.

In the Department's judgment, the divestiture of the Divestiture Assets, along with the other requirements contained in the Amended Stipulation and proposed Final Judgment, are sufficient to remedy the anticompetitive effects identified in the Complaint.

III. Standard of Judicial Review

The Tunney Act 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, the court, in accordance with the statute as amended in 2004, 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 considering these statutory factors, the court's inquiry is necessarily a limited one as the United States is entitled to ''broad discretion to settle with the defendant within the reaches of the public interest.'' United States v. Microsoft Corp., 56 F.3d 1448, 1461 (DC Cir. 1995). See also United States v. SBC Commc'ns, Inc., 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public interest standard under the Tunney Act); United States v. InBev N.V./S.A., 2009–2 Trade Cas. (CCH)

76,736, 2009 U.S. Dist. LEXIS 84787, No. 08–1965 (JR), at *3, (D.D.C. Aug. 11, 2009) (noting that the court's review of a consent judgment is limited and only inquires ''into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanism to enforce the final judgment are clear and manageable.'').

As the United States Court of Appeals for the District of Columbia Circuit has held, a court considers under the APPA, among other things, the relationship between the remedy secured and the specific allegations set forth in the United States' complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. See Microsoft, 56 F.3d at 1458–62. 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; *United States* v. *Alcoa, Inc.,* 152 F. Supp. 2d 37, 40 (D.D.C. 2001); InBev, 2009 U.S. Dist. LEXIS 84787, at *3. 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] In determining whether a proposed settlement is in the public interest, a district court ''must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations.'' SBC Commc'ns, 489 F. Supp. 2d at 17; see also Microsoft, 56 F.3d at 1461 (noting the need for courts to be ''deferential to the government's predictions as to the effect of the proposed remedies''); *United States* v. *Archer-Daniels-Midland Co.,* 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States' ''prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case'').

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. ''[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. *Am. Tel & Tel. Co.,* 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States* v. *Gillette Co.,* 406 F. Supp. 713, 716 (D. Mass. 1975)), aff'd sub nom. *Maryland* v. *United States,* 460 U.S. 1001 (1983); see also *United States* v. *Akan 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). To meet this standard, the United States ''need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms.'' *United States* v. *Abitibi-Consolidated, Inc.,* 584 F. Supp. 2d 162, 165 (D.D.C. 2008) (citing SBC Commc'ns, 489 F. Supp. 2d at 17).

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, and 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; see also InBev, 2009 U.S. Dist. LEXIS 84787, at *20 (''the 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged''). 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,''

[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''); *United States* v. *Gillette Co.,* 406 F. Supp. 713, 716 (D. Mass. 1975) (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'').

and not to ''effectively redraft the complaint'' to inquire into other matters that the United States did not pursue. Microsoft, 56 F.3d at 1459–60. As this court recently confirmed in SBC Communications, courts cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power.'' SBC Commc'ns, 489 F. Supp. 2d at 15.

In its 2004 amendments,[3] Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, stating that ''[n]othing 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). This clause reflects what Congress intended when it enacted the Tunney Act in 1974. As Senator Tunney explained: ''[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). Rather, the procedure for the public-interest determination is left to the discretion of the court, with the recognition that the court's ''scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings.'' SBC Commc'ns, 489 F. Supp. 2d at 11.

IV. Summary of Public Comment and the United States' Response

During the 60-day comment period, the United States received one public comment, from Donald Steinhauer, a current BBU, and former Sara Lee, employee in Central California.[4]

A. Summary of Comment

Mr. Steinhauer argues that requiring the divestiture of the Sara Lee and EarthGrains brands of sliced bread in Central California will result in job losses, and that concern for lost jobs should outweigh any concerns the Department has about the anticompetitive effects of BBU's acquisition of Sara Lee's fresh bakery business.

B. The United States' Response

This action was brought in order to prevent a potential violation of Section 7 of the Clayton Act, which protects consumers from the economic consequences of anticompetitive mergers and acquisitions. The Clayton Act seeks to prevent the higher prices, lower quality, or reduced innovation that may result from such transactions.

The Tunney Act, as amended in 2004, requires the Court to evaluate the effect of the proposed Final Judgment ''upon competition'' as alleged in the Complaint. The purpose of this Tunney Act proceeding is to determine whether the proposed divestiture of the brands of sliced bread and related assets resolves the violation identified in the Complaint in a manner that is within the reaches of the public interest. In his comment, Mr. Steinhauer does not criticize the efficacy of the relief contained in the proposed Final Judgment to remedy the competitive harm alleged in the Complaint. Accordingly, Mr. Steinhauer's letter does not provide an appropriate rationale for rejecting the proposed Final Judgment.

V. Conclusion

After careful consideration of the public comment, the United States concludes that entry of the proposed Final Judgment will provide an effective and appropriate remedy for the antitrust violations alleged in the Complaint and is therefore in the public interest. Accordingly, after the comment and this Response are published, the United States will move this Court to enter the proposed Final Judgment.

Dated: January 23, 2012.

Respectfully submitted,
United States of America
/s/Michelle R. Seltzer
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Certificate of Service

I, Michelle R. Seltzer, hereby certify that on January 23, 2012, I electronically filed the Response of Plaintiff United States to Public Comment on the Proposed Final Judgment and the attached Public Comment with the Clerk of the Court using the CM/ECF system, which will send a notice of electronic filing to the following counsel:

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November 16, 2011

To Whom It May Concern:

On your ruling over the Grupo Bimbo buyout of Sara Lee, I was stunned at this ruling that requires Bimbo to divest the Sara Lee and Earthgrains products in our area, Central California Do you realize the job loss that will occur from this ruling over what you call ''higher prices'' that people will pay for bread in the stores? If the consumer feels that specific bread is too high they will buy another brand and would still have other choices.

Knowing that this letter by no means will change the outcome of this ruling, I thought that jobs were the focal point of a lot decisions that are being made in this administration. I hope for my family's well-being that I won't be one that loses out after being employed with Sara Lee for 20+ years. In respect for what the Department of Justice does to stop immorality in American businesses and individuals, in this case, job loss that will occur outweighs the concerns that you have about Bimbo monopolizing. I hope in the coming months I could write you another letter apologizing to you about this letter.

Respectfully, *Donald Steinhauer.*

Redacted.

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BILLING CODE 4410–11–M

[3] The 2004 amendments substituted ''shall'' for ''may'' in directing relevant factors for the court to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. Compare 15 U.S.C. § 16(e) (2004), with 15 U.S.C. § 16(e)(1) (2006); see also SBC Commc'ns, 489 F. Supp. 2d at 11 (concluding that the 2004 amendments ''effected minimal changes'' to Tunney Act review).

[4] Pursuant to a specific request, the Department has redacted Mr. Steinhauer's mailing address from his comment.