

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

Civil Action

No.: 3-97CV2162-P

Filed: September 5, 1997

MID-AMERICA DAIRYMEN, INC.
SOUTHERN FOODS GROUP LP
and MILK PRODUCTS LLC,

Defendants

COMPETITIVE IMPACT STATEMENT

The United States, pursuant to Section 2 (b) of the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. § 16 (b) - (h), 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

The United States filed a civil antitrust Complaint on September 3, 1997, alleging that the proposed acquisition by Mid-America Dairymen, Inc. ("Mid-America") of the voting stock of Borden/Meadow Gold Dairies Holdings, Inc. ("Borden/Meadow Gold") would violate Section 7 of the Clayton Act, 15 U.S.C. § 18, by combining the two main suppliers of milk to schools in Eastern Texas and Louisiana.

The Complaint alleges that the acquisition of Borden/Meadow Gold's fluid milk processing plants in Eastern Texas and Louisiana by Mid-America, owner of a substantial interest in Southern Foods Group LP ("Southern Foods"), would substantially lessen competition in the production, sale and distribution of milk to schools in the area where Borden/Meadow Gold and Southern Foods each has operations and competes for school milk business.

The Complaint also alleges that the parties' proposed remedy -- divestiture of the overlapping facilities formerly held by Borden/Meadow Gold to a newly-formed company called Milk Products LLC that would be financed in large part by a loan to Milk Products from Mid-America affiliate Mid-Am Capital LLC -- would not adequately replace the competition now provided by Borden/Meadow Gold in Eastern Texas and Louisiana.

At the same time the suit was filed, a proposed settlement was filed that would permit Mid-America to complete the acquisition of Borden/Meadow Gold, yet preserve competition in the areas where the transaction would raise significant competitive concerns.

The proposed Final Judgment orders Mid-America to divest the Borden/Meadow Gold assets in Texas, Louisiana and New Mexico to a purchaser acceptable to the United States. The Final Judgment would allow divestiture to Milk Products if the loan to Milk Products by Mid-Am Capital is appropriately conditioned and sold off in its entirety within two years. If Mid-America divests the overlapping assets to Milk Products within 24 hours of its

acquisition of the voting stock of Borden/Meadow Gold in accordance with the Final Judgment, no further approvals would be needed.

If Mid-America does not divest to Milk Products, the assets must be divested to another purchaser within 65 days of the closing of the acquisition of the Borden/Meadow Gold voting stock ("the stock transaction"), which period may be extended by the United States to no more than 90 days. If the divestiture still has not occurred after 90 days, the United States may ask the Court to appoint a trustee who shall assume the responsibility for selling those assets.

The Final Judgment sets out the conditions for reduction of the loan amount advanced to Milk Products by Mid-Am Capital. The loan amount may be reduced in three segments, to reach zero by September 1, 1999. The Final Judgment also imposes other restrictions on Mid-America's ability to affect the competitive performance of Milk Products because of its creditor relationship through Mid-Am Capital.

Finally, the Final Judgment contains provisions that limit communications and other interaction among Mid-America, Southern Foods, and Milk Products, with the purpose of minimizing or eliminating the opportunity or ability of any of them to affect competitive outcomes in school milk bid markets in Eastern Texas and Louisiana.

The United States, Southern Foods and Milk Products have stipulated that the proposed Final Judgment may be entered after

compliance with the APPA. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify or enforce the provisions of the Final Judgment and to prevent violations of it.

II.

DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. The Defendants and The Proposed Transaction

Mid-America is the nation's largest cooperative of dairy farmers, with some 18,000 members in 30 states. In addition to marketing the milk of its members, Mid-America has extensive ownership and other interests in dairy manufacturing and processing operations and in the sale of products and services related to dairying, such as farm equipment and cleaning supplies. Mid-America had revenues of more than \$4 billion in 1996.

Southern Foods is one of Mid-America's joint venture affiliates. It is organized as a partnership whose owners are Mid-America (50%) and, until recently, two individual owners of the remaining 50% share of the partnership. (One of these individuals is Allen A. Meyer, who will sell his interest in Southern Foods to Pete Schenkel, the other 25% owner, as a precondition to the divestiture of the Borden/Meadow Gold assets in Eastern Texas and Louisiana into Milk Products, of which Meyer will be the sole owner.) From its plants in Eastern Texas and Louisiana, Southern Foods sells a variety of dairy products including fluid milk for schools. In 1996, Southern Foods had

revenues of more than \$550 million. Southern Foods operates eight fluid milk processing plants -- five in Eastern Texas and three in Louisiana. Southern Foods sells under a number of brand names including Oak Farms, Golden Royal, Midwest Farms, Sunnydell, Texas Bluebonnet, Schepps, Dairyland, Goodday, Brown's Velvet, Medallion, Foremost, Barbe, and Guth.

Milk Products is a newly-formed limited liability company that will purchase the Borden/Meadow Gold facilities whose marketing areas in Eastern Texas and Louisiana overlap with the marketing area of Southern Foods in these states.

On May 22, 1997, Mid-America and Borden/Meadow Gold entered into an agreement whereby Mid-America would acquire all of the voting stock of Borden/Meadow Gold for \$435 million. Mid-America would thereby acquire 25 processing plants and related facilities in 11 states. On May 28, 1997, Mid-America agreed that it would sell the to-be-acquired assets in Texas, Louisiana and New Mexico to Milk Products for \$65 million and that the purchase would be financed in part by a loan from Mid-Am Capital of at least \$35 million. The loan amount was later increased to \$40 million.

B. Fluid Milk Sold to Schools

Fluid milk is pasteurized milk sold for human consumption in liquid form. In addition to supermarkets and grocery stores, other major buyers of fluid milk are institutional customers such as schools, hospitals, military installations and prisons. Whereas supermarkets and other large grocery stores buy most of their milk packaged in gallon, half gallon and quart size

containers, other customers, particularly schools, purchase most, if not all, of their milk in half pint containers, which is a convenient size for storage and for serving to children in school cafeterias. Virtually all fluid milk processing plants package milk in gallons and half gallons, but not all of them produce half pints. Therefore, school districts that are looking for suppliers have a smaller universe of potential sellers than do most retail outlets, warehouses, and other customers.

Most schools participate in the federally-funded National School Lunch Program and School Breakfast Program. In order to receive reimbursement for meals served at lower than cost to eligible children in these programs, schools must offer eight ounces of milk as part of each meal they serve. It is thus important for many school districts, which often operate on limited budgets, to have a steady and reliable source of milk. There are no substitutes for milk that schools can use and still receive such reimbursement. Therefore, even a substantial rise in the price of milk to schools would not cause a school district to turn to another product.

Schools also have special delivery and service needs that other buyers of fluid milk often do not have. Because their storage space and equipment such as coolers are often limited, many schools require frequent deliveries, sometimes as many as five days a week. Many schools specify that the milk be delivered at particular hours during the day. These factors, plus the seasonal nature of their purchases, generally dictate

the methods to be used by their milk suppliers in servicing them. Most often, school milk is delivered on small (14 feet to 18 feet) route trucks that also carry milk and other dairy products for non-school customers such as small grocery or convenience stores, restaurants, or hospitals.

School districts that require such service can obtain supplies only from a milk processor that has both the ability and the desire to package milk in half pint containers and also has an established small route truck distribution system in or near the school district. As a general rule, only such a processor can economically serve those districts.

School districts purchase their milk on the basis of competitive bids that are requested annually. Contracts are usually awarded for a one-year term. Each bid cycle may produce a new set of bidders for that business in that time period.

C. Competition between Southern Foods and Borden/Meadow Gold

Southern Foods and Borden/Meadow Gold are the primary, and often the only, actual or potential suppliers of fluid milk to schools in Eastern Texas and Louisiana. These firms also compete with other processors for sales to supermarkets and grocery stores. These other processors do not compete for school milk, however, because they lack half-pint packaging equipment, small delivery truck routes, or both. Both Southern Foods and Borden/Meadow Gold also compete with others for the private label milk business of large wholesalers and retailers.

In the school milk markets, however, Southern Foods and

Borden/Meadow Gold are often the only bidders for a particular school district. This is true both in large metropolitan areas such as Dallas/Fort Worth, Waco, and San Antonio and in many other less populated areas of Eastern Texas. In the Houston area, and around Bryan and College Station, Southern Foods and Borden/Meadow Gold sometimes compete with one other milk processor. In most of Louisiana, the only third bidder to school districts is a small dairy processing firm located in Baton Rouge whose ability to serve schools is limited to an area about 50 miles around Baton Rouge.

The Complaint alleges that, were Mid-America to retain the Borden/Meadow Gold assets it will own as a result of the stock transaction, there would be a significant loss of competition for school milk business in Eastern Texas and Louisiana. This is because Mid-America would replace an independent firm (Borden/Meadow Gold) that is the most significant school milk competitor of Southern Foods, a Mid-America affiliate.

The Complaint also alleges that the parties' proposed remedy -- divestiture of the Texas, Louisiana and New Mexico assets to Milk Products with a loan to Milk Products by a Mid-America affiliate, Mid-Am Capital -- is inadequate to cure the anticompetitive effects of the stock transaction. Mid-America has a substantial ownership interest in Southern Foods. The size and terms of the loan as originally proposed, together with Mid-America's financial interest in Southern Foods, could give Mid-America both the incentive and the ability to inhibit competition

between Southern Foods and Milk Products.

The Complaint alleges that school milk markets in many areas of the country have been subject to collusive behavior by dairy firms and that where collusion in these markets has been detected it has been shown to persist for many years. Thus, according to the Complaint, new entry into the provision of milk to schools in Eastern Texas and Louisiana by other processors is unlikely to counteract the anticompetitive effects of the stock transaction, even with the remedy as proposed by the parties.

III.

EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment would preserve competition in the sale of fluid milk to schools in Eastern Texas and Louisiana. The Judgment reflects the intention of Mid-America to sell the Borden/Meadow Gold assets in Texas, Louisiana and New Mexico to Milk Products promptly following the closing of the stock transaction. Should that divestiture not occur, the proposed Final Judgment requires divestiture of these assets within 65 days of the stock transaction or five days after notice of the entry of this Final Judgment by the Court, whichever is later, to a purchaser acceptable to the United States. That period could be extended by the United States to 90 days. Should Mid-America be unable to divest the assets to an acceptable purchaser within the appointed time, the Final Judgment requires that the United States request the Court to appoint a trustee, who will assume the responsibility of selling the assets to a purchaser

acceptable to the United States. Under the terms of the proposed trusteeship, the trustee will have the incentive to quickly conclude a sale of the assets. After the appointment, the trustee will file monthly reports with the parties and the Court regarding the efforts made to sell the assets. If divestiture has not occurred within six months, the trustee and the parties will make recommendations to the Court, which shall enter such orders as are appropriate.

The Final Judgment also places restrictions on the size and terms of the loan that Mid-America or its affiliate, Mid-Am Capital, will make to Milk Products in connection with divestiture of the assets to Milk Products. Financing for the purchase of the assets by Milk Products will come from two sources. One is a secured revolving loan provided by Bank of America. The other is a \$40 million loan provided by Mid-Am Capital that is unsecured and not convertible to equity. The Final Judgment prohibits Mid-America and Mid-Am Capital from requiring that Milk Products obtain their approval before incurring any indebtedness and from interfering in any way in the operation of Milk Products' business because of the creditor relationship.

The proposed Final Judgment also places limits on the length of time that Mid-America or Mid-Am Capital may hold the loan and restricts the amount of the loan that either may hold at any particular time. The Final Judgment requires Mid-America or Mid-Am Capital to terminate its interest in the loan by selling it to

a third party purchaser or purchasers if necessary, by not later than September 1, 1999, and to reduce its interest in the loan before that at least by amounts sufficient to meet two interim goals. The Final Judgment recognizes that sale of the last portion of the loan (not to exceed \$13 million) may be facilitated if Mid-America were to guarantee that part of the loan. Nevertheless, the Judgment prohibits any guarantee that would allow Mid-America to recover from Milk Products any monies paid in its role as guarantor.

The Final Judgment contains additional provisions that are designed to protect against anticompetitive effects that might occur because of Mid-America's relationships with Southern Foods and Milk Products. The Final Judgment prohibits Milk Products, Southern Foods and Mid-America from exchanging competitively sensitive information among themselves and thereby dampening competition between Milk Products and Southern Foods in Eastern Texas and Louisiana.

The Final Judgment also enjoins Southern Foods and Mid-America, in any period while Mid-America has an interest in Southern Foods, from sharing employees, members, officers, or agents with Milk Products. Such intermingling of personnel could easily inhibit vigorous competition between Milk Products and Southern Foods. Because the owner of Milk Products will retain his ownership interest in Land-O-Sun Dairy LLC, a Mid-America joint venture based in Tennessee which does not operate in Texas or Louisiana, the prohibition against sharing officers, employees

or agents does not apply to Land-O-Sun's employees, members, officers or agents.

Finally, the Final Judgment contains provisions that are designed to ensure that Milk Products or any purchaser of the divested assets will have full rights in and use of certain trademarks of Borden, Inc. and BDH Two, Inc. ("Borden"). Borden will grant to Mid-America and/or Southern Foods an exclusive, royalty-free license to use the Borden, Elsie and other trademarks in Texas, Louisiana, and New Mexico and a non-exclusive license to use them in Alabama, Arkansas, Florida, Mississippi, Tennessee, and Mexico. The Final Judgment provides that Southern Foods, in turn, will sublicense the Borden and Elsie marks to Milk Products and that Mid-America and Southern Foods will ensure that Milk Products' (or another purchaser's) rights in the marks will be equal to all the rights and privileges that Southern Foods obtains for itself in its license of the marks from Borden. Mid-America and Southern also are enjoined from asserting or claiming that a sale of an equity interest in Milk Products will affect or diminish Milk Products' rights in the marks.

IV.

REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act (15 U.S.C. § 15) provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs

and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5 (a) of the Clayton Act (15 U.S.C. § 16 (a)), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against the defendants.

V.

**PROCEDURES AVAILABLE FOR MODIFICATION
OF THE PROPOSED FINAL JUDGMENT**

The United States and the defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides that there be a period of at least sixty (60) days prior to the effective date of a proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. All comments will be given due consideration by the United States, which remains free to withdraw its consent to the Final Judgment at any time prior to entry. The United States will respond to the comments and file both the comments and the responses with the Court.

Any person believing that the proposed Final Judgment should

be modified may submit written comments to:

Roger W. Fones, Chief
Transportation, Energy and Agriculture Section
Antitrust Division
United States Department of Justice
Suite 500
325 Seventh Street, N.W.
Washington, D. C. 20530

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI.

ALTERNATIVE TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits of its Complaint in this case. Such litigation would involve all of the issues in this case, including the proposed remedy of the parties. In the view of the Department of Justice, a full trial on the merits is not warranted in this case because divestiture of the assets and loan, under the terms of the Final Judgment, as well as the additional relief relating to possible spillover effects stemming from the relationships of Mid-America, Southern Foods and Milk Products, would preserve the competition adversely affected by the acquisition of the Borden/Meadow Gold voting stock by Mid-America. The proposed Final Judgment is designed to achieve fully adequate relief, while avoiding the expense and

uncertainty of a full trial on the merits.

**VII.
STANDARD OF REVIEW UNDER THE APPA
FOR PROPOSED FINAL JUDGMENT**

The APPA requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty (60) day comment period, after which the court shall determine whether entry of the proposed Final Judgment "is in the public interest." In making that determination, the court may consider --

(1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;

(2) the impact of entry of such judgment 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). As the United States Court of Appeals for the D. C. Circuit has held, this statute 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, 56 F.3d 1448, 1461-62 (D.C. Cir. 1995).

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."¹

Rather,

absent 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. ¶ 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), quoting United States v. Bechtel Corp., 648 F.2d 660, 666 (9th Cir.), cert. denied, 454 U.S. 1083 (1981); see also Microsoft, 56 F.3d at 1460-62. Precedent requires that

the 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

¹ 119 Cong. Rec. 24598 (1973). See United States v. Gillette Co., 406 F. Supp. 713, 715 (D. Mass. 1975). A "public interest" determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed 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. 93-1463, 93rd Cong. 2d Sess. 8-9, reprinted in (1974) U.S. Code Cong. & Ad. News 6535, 6538.

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.^{2/}

The proposed Final Judgment, therefore, should not be reviewed under a standard 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.'" (citations omitted).^{2/}

VII.

DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the

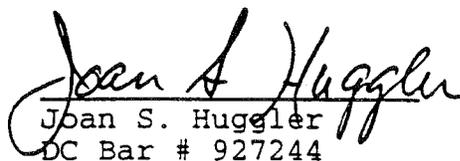
² United States v. Bechtel, 648 F.2d at 666 (citations omitted) (emphasis added); see United States v. BNS, Inc., 858 F.2d at 463; United States v. National Broadcasting Co., 449 F. Supp. 1127, 1143 (C.D. Cal. 1978); United States v. Gillette Co., 406 F. Supp. at 716; see also Microsoft, 56 F.3d at 1461 (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.'" (citations omitted).

³ United States v. American Tel. and Tel. Co., 552 F. Supp. 131, 150 (D.D.C. 1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983), quoting United States v. Gillette Co., supra, 406 F. Supp. at 716; United States v. Alcan Aluminum Ltd., 605 F. Supp. 619, 622 (W.D. Ky. 1985).

meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: September 5, 1997

Respectfully submitted,


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CERTIFICATE OF SERVICE

I hereby certify that I have caused a copy of the foregoing Competitive Impact Statement to be served on counsel for defendants in this matter in the manner set forth below:

By first class mail, postage prepaid:

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Dated: September 5, 1997


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