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Department of Justice
Antitrust Division

UNITED STATES v. GRUPO BIMBO S.A.B. de C.V., et al.

Proposed Final Judgment and Competitive Impact Statement

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. §16(b)-(h), that a proposed Final Judgment, Stipulation and Competitive Impact Statement have been filed with the United States District Court for the District of Columbia in United States of America v. Grupo Bimbo S.A.B. de C.V., et al., Civil Action No. 1:11-cv-01857. On October 21, 2011, the United States filed a Complaint alleging that the proposed acquisition by Grupo Bimbo S.A.B. de C.V. ("Grupo Bimbo") and BBU, Inc. (collectively "BBU") of the North American Fresh Bakery business of Sara Lee Corporation ("Sara Lee") would violate Section 7 of the Clayton Act, 15 U.S.C. §18. The proposed Final Judgment, filed the same time as the Complaint, requires BBU to divest certain brands of sliced bread and related assets to one or more acquirers approved by the United States.

Copies of the Complaint, proposed Final Judgment and Competitive Impact Statement are available for inspection at the 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 website 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 these materials may be obtained from the Antitrust Division upon request and payment of the copying fee set by Department of Justice regulations.

Public comment is invited within 60 days of the date of this notice. Such comments, and responses thereto, will be published in the *Federal Register* and filed with the Court. Comments

should be directed to Joshua H. Soven, Chief, Litigation I Section, Antitrust Division, Department of Justice, Washington, DC 20530, (telephone: 202-307-0827).

_____/s/_____
Patricia A. Brink
Director of Civil Enforcement

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

United States Department of Justice

Antitrust Division, Litigation I Section

450 Fifth Street, N.W.

Suite 4100

Washington, DC 20530,

Plaintiff,

v.

GRUPO BIMBO, S.A.B. de C.V.

Prolongacion Paseo de la Reforma No. 1000

Col. Pena Blanca Santa Fe

Delegacon Alvaro Obregon

Mexico D.F., 01210 Mexico,

BBU, INC.

225 Business Center Drive

Horsham, Pennsylvania 19044,

and

SARA LEE CORPORATION

3500 Lacey Road,

Downers Grove, Illinois 60515,

Defendants.

CASE: 1:11-cv-01857

Assigned To: Sullivan, Emmet G.

Assign Date: 10/21/2011

Description: Antitrust

COMPLAINT

The United States of America ("United States"), acting under the direction of the Attorney General of the United States, brings this civil action to enjoin the proposed acquisition of the North American Fresh Bakery business of Defendant Sara Lee Corporation ("Sara Lee") by Defendants Grupo Bimbo S.A.B. de C.V. ("Grupo Bimbo") and BBU, Inc. (collectively "BBU"), and to obtain other equitable relief. The acquisition would likely substantially lessen competition in the market for sliced bread in eight relevant 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 of sliced bread in these markets. The United States alleges as follows:

I. NATURE OF THE ACTION

1. On November 9, 2010, BBU agreed to acquire the North American Fresh Bakery business of Sara Lee (by acquiring all of the shares of Sara Lee Bakery Group, Inc. and Sara Lee Vernon LLC).

2. BBU and Sara Lee compete in the sale of sliced bread, which they sell under a variety of well-known brands. They are among the four largest sellers of sliced bread in the eight relevant geographic markets alleged below; in four of the relevant geographic markets, they are the two largest.

3. BBU and Sara Lee compete aggressively with each other in the relevant markets. The head-to-head competition between the companies results in lower prices for consumers and improved service to retailers.

4. As alleged in greater detail below, the proposed acquisition would substantially increase concentration among sellers of sliced bread in each of the relevant geographic markets and eliminate the substantial head-to-head competition between BBU and Sara Lee, likely leading to higher prices and reduced service, and substantially lessening competition in the sale of sliced bread in the relevant markets. Therefore, the proposed acquisition violates Section 7 of the Clayton Act.

II. JURISDICTION, VENUE, AND INTERSTATE COMMERCE

5. The United States brings this action pursuant to Section 15 of the Clayton Act, as amended, 15 U.S.C. § 25, to prevent and restrain Defendants from violating Section 7 of the Clayton Act, 15 U.S.C. § 18. The Court has subject-matter jurisdiction over this action pursuant to Section 15 of the Clayton Act, 15 U.S.C. § 25, and 28 U.S.C. §§ 1331, 1337(a), and 1345.

6. BBU and Sara Lee manufacture, market, and sell sliced bread and other consumer products in the flow of interstate commerce, and their production and sale of these products substantially affect interstate commerce. BBU and Sara Lee transact business and are found in the District of Columbia, through, among other things, the sale of consumer products to grocery stores in this District. Venue is proper in this District for Sara Lee and BBU, Inc. under Section

12 of the Clayton Act, 15 U.S.C. § 22. Venue is proper in this District for Grupo Bimbo, a Mexican corporation, under 28 U.S.C. § 1391(d).

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

III. THE DEFENDANTS

8. Grupo Bimbo is a corporation organized under the laws of Mexico, with headquarters in Mexico City. It controls BBU, Inc., a Delaware corporation headquartered in Horsham, Pennsylvania, through which Grupo Bimbo carries out its baking business in the United States, including but not limited to sliced bread. Grupo Bimbo had more than $8 billion in worldwide sales in 2009. In the same year, BBU's sales in the United States totaled approximately $3.9 billion. BBU sells sliced bread under a variety of national and regional brand names, including Bimbo, Arnold, Brownberry, Oroweat, Roman Meal, Freihofer's, Maier's, Mrs Baird's, Stroehmann, and Weber's. BBU also makes and sells Thomas' English muffins and Entenmann's sweet baked goods.

9. Sara Lee is a corporation organized under the laws of Maryland, with headquarters in Downers Grove, Illinois. Sara Lee had more than $10 billion in worldwide revenues in fiscal 2010. That year, Sara Lee's North American Fresh Bakery division had approximately $2.1 billion in sales. Sara Lee sells sliced bread under a variety of brand names, including the "Sara Lee" brand family (including Sara Lee, Sara Lee Classic, Sara Lee Soft & Smooth, Sara Lee Hearty & Delicious, and Sara Lee Delightful), EarthGrains, and regional brands such as Milton's, Mother's, Grandma Sycamore's, Rainbo, San Luis Sourdough, Old Home, and Holsum.

IV. RELEVANT MARKETS

A. Relevant Product Market—Sliced Bread

10. The relevant product market is no broader than sliced bread. "Sliced bread," as the term is used in the industry and in this Complaint, is fresh sliced and bagged loaf bread sold by supermarkets, mass merchandisers (such as Wal-Mart), club stores (such as Costco), other grocery stores, and convenience stores. For purposes of this Complaint, "sliced bread" does not include breakfast breads (such as raisin bread or cinnamon swirl), buns and rolls, bagels or English muffins, or products sold by in-store bakeries.

11. There is substantial variety and differentiation among sliced-bread products. Sliced breads vary in price, brand, flavor, texture, nutritional content, ingredients (*e.g.*, the inclusion or exclusion of sweeteners or artificial ingredients), and other factors. Sliced breads range from traditional white bread to a wide variety of wheat and whole grain breads, rye, sourdough, and other varieties.

12. Sliced breads also vary in shape. "Traditional" breads are baked in longer, narrower loaf pans and are often used as sandwich bread; "wide pan" breads are shorter and wider (and typically denser) than traditional breads. Traditional breads are often targeted to families with younger children. Wide pan breads are marketed as having greater nutritional value, and are typically sold at higher prices than traditional breads.

13. Sliced breads include both branded products, which bear a brand owned by or licensed to the baker (such as BBU's Arnold or Sara Lee's EarthGrains), and private-label products, which bear a brand owned by the retailer (such as Wal-Mart's Great Value). Large baking companies, including BBU and Sara Lee, make and sell both branded and private-label bread.

14. Industry participants consider sliced breads to be a distinct set of products from other bakery products. Sliced bread sellers monitor the prices of competing sliced-bread products and set the prices of their sliced-bread products accordingly, and do not typically set sliced-bread prices based on prices of consumer products other than sliced bread.

15. There are no adequate substitutes for sliced bread for most consumers. Most consumers purchase sliced bread to make sandwiches or toast, among other uses. Consumers are unlikely to substitute other bakery or food products for sliced bread for these and other uses. Therefore, a hypothetical monopolist producer of sliced bread would find it profitable to increase its prices by a small but significant and non-transitory amount. Accordingly, sliced bread is a relevant product market and a line of commerce within the meaning of Section 7 of the Clayton Act.

B. Relevant Geographic Markets

16. The metropolitan and surrounding areas of San Diego, Los Angeles, San Francisco and Sacramento, California; Kansas City, Kansas; Omaha, Nebraska; Oklahoma City, Oklahoma; and Harrisburg/Scranton, Pennsylvania, each are relevant geographic markets.

17. The relevant geographic markets for analyzing the effects of this acquisition on competition are best defined by reference to the locations of the retailers that purchase sliced bread for sale to consumers, rather than by the location of bakeries. This approach to defining the relevant geographic markets is appropriate because bakers can price discriminate to their retailer customers based on location—i.e., price differently to retailers in different locations based on local competitive conditions—and the retailers cannot defeat these price differences through arbitrage.

18. Where sellers can successfully price discriminate based on customer location, the goal of geographic market definition is to identify the area encompassing the locations of potentially targeted customers. The relevant geographic markets identified above encompass the locations of retailers that could likely be targeted for price increases for sliced bread as a result of this transaction. For each of these geographic markets, the participants in each market are those sellers who currently sell sliced bread into that area, regardless of the location of the sellers' production facilities.

19. Arbitrage across each of these geographic areas is unlikely to occur. Arbitrage would occur if a retailer in a higher-priced area were supplied with goods that had been sold to a retailer in a lower-priced area. Arbitrage of sliced bread between metropolitan areas is prohibitively costly because the retailer would incur substantial transportation costs to ship bread from another retailer to its store locations. In addition, arbitrage would be costly because it would require retailers to forego the "direct store delivery" ("DSD") services provided by the bakery, which include delivering bread up to five times a week, stocking their shelves and displays, and removing stale or dated loaves.

20. Accordingly, a hypothetical monopolist seller of sliced bread to retailers in each of the eight geographic areas identified in Paragraph 16 would find it profitable to increase its prices by a small but significant and non-transitory amount. Therefore, the geographic areas identified in Paragraph 16 are relevant geographic markets and "sections of the country" within the meaning of Section 7 of the Clayton Act.

V. LIKELY ANTICOMPETITIVE EFFECTS

21. Each of the relevant markets for sliced bread would be highly concentrated, and concentration would increase substantially in each of the relevant markets, as a result of the acquisition. Specifically,

a. In San Diego, Defendants are the two largest sellers of sliced bread, with a combined market share of approximately 63 percent (in dollars).

b. In Los Angeles, Defendants are the two largest sellers of sliced bread, with a combined market share of approximately 58 percent.

c. In San Francisco, BBU is the largest seller of sliced bread, and Sara Lee is the third largest, with a combined market share of approximately 56 percent.

d. In Sacramento, Defendants are the two largest sellers of sliced bread, with a combined market share of approximately 59 percent.

e. In Kansas City, Sara Lee is the largest seller of sliced bread, and BBU is the third largest, with a combined market share of approximately 52 percent.

f. In Omaha, Sara Lee is the largest seller of sliced bread, and BBU is the third largest, with a combined market share of approximately 52 percent.

g. In Oklahoma City, Sara Lee is the largest seller of sliced bread, and BBU is the fourth largest, with a combined market share of approximately 53 percent.

h. In Harrisburg and Scranton, Defendants are the two largest sellers of sliced bread, with a combined market share of approximately 56 percent.

22. BBU and Sara Lee compete vigorously in the sale of sliced bread in the relevant geographic markets on price, promotions, variety, flavor, texture, shape, nutrition, and ingredients. They compete for retailers' business and for shelf and display space in retailers'

stores by, among other things, offering lower wholesale prices and larger promotional discounts, which lower the prices paid by consumers of sliced bread.

23. Consumers vary in their preferences for particular sliced bread products, and bakers and retailers offer a wide variety of sliced bread products to meet consumer preferences. Consumers consider many factors when choosing sliced-bread products, including brand, flavor, texture, nutritional content, shape, ingredients, and price. BBU and Sara Lee each make and sell a wide variety of sliced-bread products, under a portfolio of brands that have been developed over many years, to meet this diverse consumer demand.

24. Bread brands convey information to consumers regarding quality, value, nutrition, and other attributes, and are an important factor in many consumers' buying decisions. Branded sliced breads typically sell at significantly higher prices than similar private-label sliced breads, indicating that many consumers value the qualities they associate with branded sliced breads.

25. BBU's wide-pan variety breads, sold under the Oroweat and Arnold brands in the relevant markets, are similar in shape, flavor, texture, image, and price to Sara Lee's wide-pan variety breads sold under the Sara Lee Hearty & Delicious and EarthGrains brands in the relevant markets. Similarly, Sara Lee sells traditional soft white and wheat bread in the relevant markets under the Sara Lee Soft & Smooth brand and other brands, which are similar in shape, flavor, texture, image, and price to traditional soft white bread sold by BBU under the Bimbo, Mrs Baird's, Stroehmann, Freihofer's, Weber's, and other brands in the relevant markets.

26. BBU and Sara Lee recognize that many of their sliced-bread products are close substitutes for each other's products, and a significant number of consumers in the relevant markets regard BBU and Sara Lee branded sliced-bread products as their first and second choices in sliced-bread products.

27. The acquisition would eliminate the substantial head-to-head competition between BBU and Sara Lee for sliced-bread sales to retailers and consumers, and allow BBU profitably to raise price and decrease the services that it provides to retailers in the relevant markets.

28. A price increase by BBU in a relevant market likely would result in the loss of substantial sales to Sara Lee, because, as previously alleged, a substantial number of consumers view BBU and Sara Lee breads as close substitutes. Prior to the acquisition, BBU would have lost the profits on the sales it loses to Sara Lee (and others) as a result of such a price increase. Following the acquisition, BBU would own the Sara Lee products, and would retain the profits that it would otherwise lose when consumers switch to Sara Lee products, in addition to earning higher profits on the sale of BBU products, which it would retain. Because those sales of Sara Lee products are likely profitable, a price increase by BBU would be profitable after the acquisition. The same profit motive would apply to an increase in the prices of Sara Lee bread, recaptured through sales of BBU bread. Therefore, BBU likely would unilaterally raise prices as a result of the acquisition.

29. The significant increase in market concentration that the proposed acquisition would produce in the relevant markets, combined with the loss of head-to-head competition between BBU and Sara Lee, is likely to substantially lessen competition in violation of Section 7 of the Clayton Act, resulting in higher prices for retailers and consumers of sliced bread.

VI. ABSENCE OF COUNTERVAILING FACTORS

A. Entry

30. Responses from competitors and new entry are unlikely to prevent the acquisition's likely anticompetitive effects. Barriers to entering these markets include: (i) the

substantial time and expense required to build a brand reputation to overcome existing consumer preferences; (ii) the substantial sunk costs for promotional and advertising activity needed to secure the distribution and placement of a new entrant's sliced-bread products in retail outlets; (iii) the difficulty of securing shelf-space in retail outlets; (iv) the time and cost of building new bakeries and other facilities; and (v) the time and cost of developing delivery routes.

B. Efficiencies

31. The proposed acquisition is unlikely to generate verifiable, merger-specific, cognizable efficiencies sufficient to reverse the likely competitive harm of the acquisition.

VII. VIOLATION ALLEGED

32. The United States hereby repeats and realleges the allegations of paragraphs 1 through 31 as if fully set forth herein.

33. BBU's proposed acquisition of Sara Lee would likely substantially lessen competition in interstate trade and commerce, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, and would likely have the following effects, among others:

a) actual and potential competition in the relevant markets between BBU and Sara Lee for sales of sliced bread would be eliminated; and

b) competition generally in the relevant markets for sliced bread would be substantially lessened.

VIII. REQUEST FOR RELIEF

The United States requests:

a) That the Court adjudge the proposed acquisition to violate Section 7 of the Clayton Act, 15 U.S.C. § 18;

b) That the Court permanently enjoin and restrain the Defendants from carrying out the proposed acquisition or from entering into or carrying out any other agreement, understanding, or plan by which Sara Lee would be acquired by, acquire, or merge with BBU;

c) That the Court award the United States the costs of this action; and

d) That the Court award such other relief to the United States as the Court may deem just and proper.

Dated: October 21, 2011 Respectfully submitted,

FOR PLAINTIFF UNITED STATES:

/s/ Sharis A. Pozen

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Acting Assistant Attorney General for

Antitrust

/s/ Patricia A. Brink PATRICIA A. BRINK

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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: 1:11-cv-01857

Assigned To: Sullivan, Emmet G.

Assign Date: 10/21/2011

Description: Antitrust

COMPETITIVE IMPACT STATEMENT

Plaintiff United States of America ("United States"), pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA" or "Tunney Act"), 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 October 21, 2011, seeking to enjoin the proposed acquisition of the North American Fresh Bakery business of Defendant Sara Lee Corporation ("Sara Lee") by Defendants Grupo Bimbo S.A.B. de C.V. ("Grupo Bimbo") and BBU, Inc. (collectively "BBU"), alleging that the acquisition likely would substantially lessen competition in the market for sliced bread in eight relevant geographic markets in the United States, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. The loss of competition caused by the acquisition likely would result in higher prices for consumers of sliced bread in those markets.

At the same time the Complaint was filed, the United States filed a Hold Separate Stipulation and Order ("Hold Separate") and proposed Final Judgment, which will substantially eliminate the anticompetitive effects that would result from the acquisition. Under the proposed Final Judgment, which is explained more fully below, BBU is required to divest certain brands of sliced bread and related assets to one or more acquirers approved by the United States, in the markets where anticompetitive effects are likely. Under the Hold Separate, BBU and Sara Lee must take certain steps to ensure that the assets being divested continue to be operated in a competitively and economically viable manner and that competition for the products being divested is maintained during the pendency of the divestiture.

The United States and the Defendants have stipulated that the proposed Final Judgment may be entered by the Court 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 punish violations thereof.

II. EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. The Defendants and the Proposed Acquisition

Defendant BBU is the largest sliced-bread baker and seller in the United States, operating 33 bakeries, 21 transportation depots, and more than 7,000 sales routes.[1] In 2009, BBU's sales in the United States totaled approximately $3.9 billion. BBU owns many of the major brand names in the sliced-bread industry, including Bimbo, Arnold, Brownberry, Oroweat, Mrs Baird's, Stroehmann, Freihofer, and Weber's.

Defendant Sara Lee's North American Fresh Bakery division is the third largest sliced-bread producer in the United States. Sara Lee operates 41 bakeries and approximately 4,800 sales routes in the United States. In fiscal year 2010, Sara Lee's North American Fresh Bakery division had $2.1 billion in sales. The majority of Sara Lee's bread sales are made under brands in the "Sara Lee" brand family, but Sara Lee also has substantial sales under its EarthGrains brand and various regional brands, including Milton's, Mother's, Grandma Sycamore's, Rainbo, San Luis Sourdough, Old Home, and Holsum.

On or about November 9, 2010, BBU entered into an agreement to acquire Sara Lee's North American bread-baking business by acquiring all of the shares of Sara Lee Bakery Group, Inc. and Sara Lee Vernon LLC (the "Acquisition").

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[1] Defendant Grupo Bimbo, a Mexican corporation headquartered in Mexico City, operates in the United States through its subsidiary BBU, Inc.

B. Relevant Markets

1. The Relevant Product Market Is No Broader than Sliced Bread

The Complaint alleges that the relevant product market is no broader than sliced bread. Sliced bread is fresh sliced and bagged loaf bread sold by supermarkets, mass merchandisers (such as Wal-Mart), club stores (such as Costco), other grocery stores, and convenience stores. There is substantial variety and differentiation among sliced-bread products. Sliced breads vary in price, brand, flavor, texture, nutritional content, ingredients (*e.g.*, the inclusion or exclusion of sweeteners or artificial ingredients), and other factors. Sliced breads range from traditional white bread to a wide variety of wheat and whole grain breads, rye, sourdough, and other varieties.

Sliced breads also vary in shape. "Traditional" breads are baked in longer, narrower loaf pans and often used as sandwich bread. "Wide pan" breads are shorter and wider (and typically denser) than traditional breads. Traditional breads are often targeted to families with younger children. Wide-pan breads are marketed as having greater nutritional value, and are typically sold at higher prices than traditional breads.

Sliced breads include branded products, which bear a brand owned by or licensed to the baker (such as BBU's Arnold or Sara Lee's EarthGrains), and private-label products, which bear a brand owned by the retailer (such as Wal-Mart's Great Value). Most large baking companies, including BBU and Sara Lee, make and sell branded and private-label bread.

There are no adequate substitutes for sliced bread for most consumers. Most consumers purchase sliced bread to make sandwiches or toast, among other uses, and are unlikely to substitute other bakery or food products for sliced bread for these and other uses. Therefore, a hypothetical monopolist producer of sliced bread would find it profitable to increase its prices by

a small but significant and non-transitory amount. Accordingly, sliced bread is a relevant product market and a line of commerce within the meaning of Section 7 of the Clayton Act.

2. The Relevant Geographic Markets are Local

The Complaint alleges that the San Francisco, San Diego, Sacramento, Los Angeles, Harrisburg/Scranton, Kansas City, Kansas, Omaha, and Oklahoma City metropolitan and surrounding areas each constitute relevant geographic markets for the sale of sliced bread. Each geographic market is defined with respect to the location of customers (e.g., grocery stores), rather than the location of manufacturers (i.e., bakeries), because, as the Complaint alleges, sliced-bread suppliers can price discriminate across local geographic markets.

The appropriateness of defining the geographic market as a price-discrimination market based on the location of the customers is explained in the 2010 Horizontal Merger Guidelines issued by the U.S. Department of Justice and the Federal Trade Commission. Under the Guidelines analysis, "[f]or price discrimination to be feasible, two conditions typically must be met: differential pricing and limited arbitrage." U.S. Dept. of Justice & FTC, Horizontal Merger Guidelines § 3 (2010) (hereinafter "Horizontal Merger Guidelines"). If these conditions are met, "a hypothetical profit-maximizing firm that was the only present or future seller of the relevant product(s) to customers in the region would impose at least a [small price increase] on some customers in the specified region." Horizontal Merger Guidelines § 4.2.2. So long as this price increase would not be defeated by arbitrage, the targeted region constitutes a relevant geographic market. *Id*.

Sliced-bread suppliers can charge different prices for the same product (net of transportation costs) in different metropolitan areas. Sliced-bread suppliers compete for retailers' business and for shelf and display space in retailers' stores by, among other things,

offering lower wholesale list prices and larger promotional discounts, which lower the prices paid by consumers of sliced bread. List prices and promotional activity are regularly determined after a consideration of the competitive conditions in a particular geographic area. Even with larger retailers that have a national or regional footprint, there are different pricing and promotional strategies that are influenced by the degree of competition in a particular area.

Geographic price discrimination by sliced-bread suppliers is possible because the cost of arbitrage is prohibitively expensive. Arbitrage would occur if a retailer in a higher-priced area were supplied with goods previously sold to a retailer in a lower-priced area. Arbitrage of sliced bread between metropolitan areas is very costly because the retailer would incur substantial transportation costs to ship bread from another retailer to its store locations. In addition, arbitrage would require retailers to forego the "direct store delivery" ("DSD") services provided by the bread manufacturer, which include delivering bread to their stores up to five times a week, stocking their shelves and displays, and removing stale or dated loaves. Accordingly, arbitrage of sliced bread is unlikely to occur or to eliminate disparities in wholesale prices between metropolitan areas. Therefore, a hypothetical monopolist seller of sliced bread to retailers in each of the geographic areas identified above would find it profitable to increase its prices by a small but significant and non-transitory amount. Therefore, the eight geographic areas identified in the Complaint are relevant geographic markets and "sections of the country" within the meaning of Section 7 of the Clayton Act.

C. The Acquisition is Likely To Substantially Lessen Competition in the Sale of Sliced Bread in Each of the Relevant Geographic Markets

The Complaint alleges that the Acquisition is likely to substantially lessen competition in the sale of sliced bread in the relevant geographic markets. The Acquisition would result in the relevant markets being highly concentrated, giving BBU a dominant share of the sliced bread market. In San Diego, BBU would have 63 percent of the sliced bread market; in Sacramento 59 percent; in Los Angeles 58 percent; in San Francisco 56 percent; in Omaha 52 percent; in Oklahoma City 53 percent; in Kansas City 52 percent; and in Harrisburg/Scranton 56 percent.[2]

In addition, BBU and Sara Lee are among each other's most important competitors in the relevant markets, and in some relevant markets are particularly close competitors within certain market segments, such as wide-pan and traditional sliced bread. The Defendants regularly set prices and offer promotions in response to competition from each other, or to win market share from each other. Consumers benefit from this competition in the form of lower prices, innovative and healthier products, and a greater variety of choices of sliced-bread products. As discussed below, new entry is unlikely to eliminate the Acquisition's anticompetitive effects.

[2] All of the market shares in the following paragraphs are rounded off to the nearest percentage point. As a consequence, the post-Acquisition market share of BBU need not be exactly equal to the sum of the pre-Acquisition shares of the BBU brands and the Sara Lee brands minus the pre-Acquisition share attributable to the divested brands.

1. The Loss of Competition Between the Defendants in the Relevant Geographic Markets is Likely to Lead to Post-Acquisition Price Increases.

For a substantial number of consumers in the relevant markets, BBU and Sara Lee branded sliced-bread products are close substitutes. BBU's wide-pan variety breads, sold under the Oroweat and Arnold brands in the relevant markets, are similar in shape, flavor, texture, image, and price to Sara Lee's wide-pan variety breads sold under the Sara Lee Hearty & Delicious and EarthGrains brands in the relevant geographic markets. Similarly, Sara Lee sells traditional soft white and wheat bread in the relevant markets under the Sara Lee Soft & Smooth brand and other brands, which are similar in shape, flavor, texture, image, and price to traditional soft white bread sold by BBU under the Bimbo, Mrs Baird's, Stroehmann, Freihofer's, Weber's, and other brands in the relevant geographic markets. BBU and Sara Lee recognize that many of their sliced-bread products are close substitutes for each other's products, and they engage in substantial head-to-head competition for sales of these substitute products.

The loss of the head-to-head competition between the Defendants is likely to produce unilateral anticompetitive effects. *See* Horizontal Merger Guidelines § 6.0. Because a substantial number of consumers view BBU and Sara Lee breads as closest substitutes, BBU is likely to increase prices post-transaction. Prior to the Acquisition, a price increase by BBU in a relevant market likely would result in the loss of substantial sales to Sara Lee. BBU would have lost the profits on the sales it loses to Sara Lee (and others) as a result of the price increase. Following the Acquisition, however, BBU would own the Sara Lee products, and would retain the profits that it would otherwise lose when consumers switch to Sara Lee products, in addition to earning higher profits on the sale of BBU products, which it would retain. Because those sales

of Sara Lee products likely are profitable, a price increase by BBU likely would be profitable after the Acquisition. The same profit motive would apply to an increase in the prices of Sara Lee bread, recaptured through sales of BBU bread. Therefore, BBU likely would raise prices unilaterally as a result of the Acquisition.

For a unilateral price increase to be profitable, the brands at issue need not be the *closest* substitutes for all consumers. A merger "may produce significant unilateral effects for a given product even though many more sales are diverted to products sold by non-merging firms than to products previously sold by the merger partner." Horizontal Merger Guidelines § 6.1. All that is required is that a significant proportion of customers regard the breads as their first and second choices. *Id*. The Complaint alleges that this condition is met in each of the relevant geographic markets with respect to the BBU and Sara Lee brands.

2. Entry is Unlikely to Prevent the Acquisition's Anticompetitive Effects.

The Complaint alleges that entry by new firms is not likely to prevent the Acquisition's anticompetitive effects. Entry by new firms will not prevent an acquisition's anticompetitive effects unless that entry is likely to occur in a timely manner and is sufficient to deter those anticompetitive effects. Horizontal Merger Guidelines § 9.

Entry into the sliced-bread business is unlikely to prevent anticompetitive effects because there are substantial barriers to entry in a timely manner. First, a well-established brand is crucial to the sale of sliced bread, and developing that brand equity is difficult and time-consuming. Consumers are reluctant to try new brands unless they are heavily promoted through advertising and especially aggressive pricing. In addition, constructing a new bakery is time-consuming. From the time a decision to build a new bakery is made, it can take six months to acquire the land; construction can then take 12 to 18 months.

Nor is it likely that any existing competitors in the relevant markets would expand their output or reposition their products to constrain a price increase by the leading firms. The other competitors either lack sufficient brand equity, or their production capacity serving the relevant markets is too small to constrain a post-merger price increase.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment requires significant divestitures that will preserve competition in the market for sliced bread. Within 90 calendar days after filing of the Complaint (subject to up to two 30-day extensions) or five calendar days after entry of a Final Judgment by the Court, whichever is later, the Defendants are required to divest a perpetual, royalty-free, assignable, transferable, exclusive license to use the following brands and associated assets to an acquirer or acquirers that has or have the intent and capability (including the necessary managerial, operational, technical, and financial capability) to compete effectively in the manufacture and sale of sliced bread in each geographic market. To prevent the splitting of a divested brand between BBU and the acquirer within a relevant market, in most instances the proposed Final Judgment provides that for each brand of sliced bread required to be divested, the divestiture will include additional fresh bread products sold under that brand, *i.e.*, buns, rolls, sandwich thins, thin buns, etc.

In Los Angeles, San Diego, San Francisco, and Sacramento, California, the Defendants are required to divest the Sara Lee family of brands (which includes Sara Lee, Sara Lee Classic, Sara Lee Soft & Smooth, Sara Lee Hearty & Delicious, and Sara Lee Delightful) and the EarthGrains brand. In Harrisburg/Scranton, Pennsylvania, the Defendants are required to divest the Holsum and Milano brands. In Kansas City, Kansas, the Defendants are required to divest the EarthGrains and Mrs Baird's brands. In Omaha, Nebraska, the Defendants are required to divest the EarthGrains and

Healthy Choice brands. In Oklahoma City, Oklahoma, the Defendants are required to divest the EarthGrains brand. These divestitures target the loss of competition between BBU and Sara Lee in each particular market and will prevent or significantly reduce the increase in concentration that the transaction would otherwise produce in the relevant markets.

- In Los Angeles, BBU brands currently account for 41 percent of the sliced bread market and Sara Lee brands currently account for 18 percent. The divestiture in Los Angeles of EarthGrains and the Sara Lee family brands, which together account for 17 percent of the sliced-bread market, will reduce the merged firm's post-Acquisition market share to 41 percent.
- In San Diego, BBU brands currently account for 46 percent of the sliced-bread market and Sara Lee brands currently account for 17 percent. The divestiture in San Diego of EarthGrains and the Sara Lee family of brands, which together account for 15 percent of the sliced-bread market, will reduce the merged firm's post-Acquisition market share to 48 percent.
- In San Francisco, BBU brands currently account for 44 percent of the sliced-bread market and Sara Lee brands currently account for 12 percent. The divestiture in San Francisco of EarthGrains and the Sara Lee family of brands, which together account for 8 percent of the sliced-bread market, will reduce the merged firm's post-Acquisition market share to 47 percent.
- In Sacramento, BBU brands currently account for 34 percent of the sliced-bread market and Sara Lee brands currently account for 25 percent. The divestiture in Sacramento of EarthGrains and the Sara Lee family of brands, which together

account for 15 percent of the sliced-bread market, will reduce the merged firm's post-Acquisition market share to 44 percent.

- In Kansas City, BBU brands currently account for 17 percent of the sliced-bread market and Sara Lee brands currently account for 35 percent. The divestiture in Kansas City of EarthGrains and Mrs Baird's, which together account for 9 percent of the sliced-bread market, will reduce the merged firm's post-Acquisition market share to 43 percent.
- In Omaha, BBU brands currently account for 14 percent of the sliced-bread market and Sara Lee brands currently account for 38 percent. The divestiture in Omaha of EarthGrains and Healthy Choice, which together account for 5 percent of the sliced-bread market, will reduce the merged firm's post-Acquisition market share to 47 percent.
- In Oklahoma City, BBU brands currently account for 7 percent of the sliced-bread market and Sara Lee brands currently account for 46 percent. The divestiture in Oklahoma City of EarthGrains, which accounts for 6 percent of the sliced-bread market, will reduce the merged firm's post-Acquisition market share to 47 percent.
- In Harrisburg/Scranton, BBU brands currently account for 44 percent of the sliced-bread market and Sara Lee brands currently account for 12 percent. The divestiture in Harrisburg/Scranton of Holsum and Milano, which together account for 8 percent of the sliced-bread market, will reduce the merged firm's post-Acquisition market share to 49 percent.

The United States' analysis of the proposed Acquisition indicates that the acquisition of all of the Sara Lee brands of sliced bread in each of these eight geographic areas would have created an incentive for BBU to raise prices on BBU and Sara Lee brands of sliced bread because, in the event of a price increase, a significant portion of the lost sales from either the BBU or the Sara Lee portfolio of brands would be diverted to the other. In each geographic area, the divestiture, by separating the ownership of several closely competing brands, prevents the Acquisition from creating any significant incentive for the merged firm to raise the price of sliced bread.

In addition, as stated above, without the required divestitures, the Acquisition would have created substantial increases in the merged firm's sliced-bread market share in multiple geographic markets. The divestitures reduce those increases to no more than 4 percentage points in all but three markets: Sacramento (10 points), Omaha (9 points), and Kansas City (9 points). These incremental share gains in these three geographic markets do not pose substantial competitive concerns because they will result from the combination of brands that are largely in different segments of the sliced-bread market—i.e., combining traditional breads and wide pan breads. Combining ownership of brands that consumers consider to be relatively distant substitutes for each other is less likely to raise competitive concerns than combining closer substitutes. The required divestitures mandate the sale of the Defendants' brands that most closely and directly compete in order to preserve competition in the segments of the market where they are very close substitutes for each other.

In Sacramento, the Sara Lee brands required to be divested are those that compete strongly with BBU brands. The Sara Lee brands that BBU will retain, in particular Rainbo, San Luis Sourdough, and Old Home, do not compete as directly with BBU brands, and thus present

BBU with little incentive to increase prices post-Acquisition. In Omaha, BBU and Sara Lee primarily compete in the sale of wide-pan bread. BBU is not a significant competitor in Omaha in the traditional bread segment. Although wide-pan bread is a small part of the overall sliced-bread market, the divestiture of the EarthGrains and Healthy Choice brands protects the competition in this segment that the Acquisition would otherwise have reduced. The increased market share that BBU will retain in Omaha after the divestiture largely comes from BBU's acquisition of Sara Lee's traditional bread products, which is unlikely to reduce competition because BBU has not been a significant competitor in the sale of traditional bread in the Omaha metropolitan area.

In Kansas City, BBU and Sara Lee compete in both the traditional and wide-pan segments. The required divesture of BBU's traditional Mrs Baird's brand and Sara Lee's wide-pan EarthGrains brand targets competition in each of these segments. The small increase in market share of sliced bread that BBU likely will retain after the divestitures in Kansas City largely comes from combining BBU's wide-pan bread brands with Sara Lee's traditional bread brands, which is unlikely to create a significant competitive concern.

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. 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, production, marketing, servicing, distribution, or sale of the brands being divested.

In addition, effective divestitures probably will require the sale of manufacturing plants

and equipment used primarily to manufacture the divested brands, as well as distribution facilities, routes, route assets, and other tangible assets used in connection with those manufacturing plants. Accordingly, the proposed Final Judgment requires the divestiture of brand-related plants and plant-related assets, but it also provides that the Defendants 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 the Acquisition.

The proposed Final Judgment provides that there will be a single acquirer of all brands and brand-related assets required to be divested in California, and that there may be different acquirers in different relevant markets outside of California. As stated above, to prevent the splitting of a divested brand between BBU and the acquirer within a relevant market, in most instances the proposed Final Judgment provides that for each brand of sliced bread required to be divested, the divestiture will include additional fresh-bread products sold under that brand, i.e., buns, rolls, sandwich thins, thin buns, etc.

The proposed Final Judgment provides that the assets must be divested in such a way as to satisfy the United States, in its sole discretion, that an acquirer or acquirers can and will use the assets as part of a viable, ongoing business engaged in the sale of sliced bread in the metropolitan and surrounding areas of Los Angeles, San Diego, San Francisco, Sacramento, Harrisburg, Scranton, Kansas City, Kansas, Omaha, and Oklahoma City.

Section V of the proposed Final Judgment provides that if Defendants do not accomplish the ordered divestitures within the prescribed time period, the Court will appoint a trustee, selected by the United States, to complete the divestitures. If a trustee is appointed, the proposed Final

Judgment provides that Defendants must cooperate fully with the trustee and pay all of the trustee's costs and expenses. The trustee's compensation will be structured to provide an incentive for the trustee to maximize the price and terms of the divestitures and the speed with which they are accomplished. After the trustee's appointment becomes effective, the trustee will file monthly reports with the United States and the Court setting forth the trustee's efforts to accomplish the required divestitures.

The proposed Final Judgment provides that if a trustee is appointed, the trustee may make the ordered divestitures in California to different acquirers, so long as the United States is satisfied that the California divestiture assets will remain viable and the divestiture of such assets will remedy the competitive harm alleged in the Complaint.

At the end of six months, if the divestitures have not been accomplished, the trustee and the United States will make recommendations to the Court, which shall enter such orders as appropriate to carry out the purpose of the Final Judgment, including extending the trust or the term of the trustee's appointment.

The proposed Final Judgment also provides that the United States may appoint a monitoring trustee to **ensure that Defendants expeditiously comply with all of their obligations and perform all of their responsibilities under the Final Judgment and the Hold Separate and to ensure that the** divestiture assets remain economically viable, competitive, and ongoing assets, and that competition in the sale of sliced bread in the relevant markets is maintained until the required divestitures have been accomplished. The monitoring trustee shall serve at the cost and expense of Defendants, on customary and reasonable terms and conditions agreed to by the monitoring trustee and the United States.

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 Defendants.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States, BBU, and Sara Lee 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 a period of at least sixty days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty days of the date of publication of this Competitive Impact Statement in the Federal Register, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the United States Department of Justice, which remains free to withdraw its consent to the proposed

Final Judgment at any time before the Court's entry of judgment. The comments and the response of the United States will be filed with the Court and published in the Federal Register.

Written comments should be submitted to:

Joshua H. Soven

Chief, Litigation I Section

Antitrust Division

United States Department of Justice

450 Fifth Street, NW, Suite 4100

Washington, DC 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. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against Defendants. The United States could have continued the litigation and sought a judicial order enjoining BBU's acquisition of Sara Lee's North American Fresh Bakery business. The United States is satisfied, however, that divestiture of the assets described in the proposed Final Judgment will preserve competition for the sale of sliced bread in the relevant geographic markets. Thus, the proposed Final Judgment would achieve all or substantially all of the relief the United States would have obtained through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits.

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

The Clayton Act, as amended by **t**he APPA, 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 government 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 (D.C. Cir. 1995); *see generally 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 mechanisms to enforce the final judgment are clear and manageable.").[3]

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; *InBev*, 2009 U.S. Dist. LEXIS 84787, at *3; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001). Instead:

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[3] The 2004 amendments substituted "shall" for "may" in directing relevant factors for courts 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).

> [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).[4] 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

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[4] *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'").

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. 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). 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." *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," 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 the United States District Court for the District of Columbia 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, Congress made clear its intent to preserve the practical benefits of using consent decrees in antitrust enforcement, adding the unambiguous instruction 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 language effectuates 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.[5]

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[5] *See United States v. Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the "Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone"); *United States v. Mid-Am. Dairymen, Inc.*, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977) ("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

VIII. DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: October 21, 2011

Respectfully submitted,

/s/ Michelle Seltzer

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explanations are reasonable under the circumstances."); S. Rep. No. 93-298 at 6 (1973) ("Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.").

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.:

JUDGE:

[PROPOSED] FINAL JUDGMENT

WHEREAS, Plaintiff United States of America filed its Complaint on October 21, 2011, and plaintiff and defendants Grupo Bimbo S.A.B. de C.V. ("Grupo Bimbo"), BBU, Inc. ("BBU") and Sara Lee Corporation ("Sara Lee") (collectively "Defendants"), by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law, and without this Final Judgment constituting any evidence against or admission by any party regarding any issue of fact or law;

AND WHEREAS, Defendants have agreed to be bound by the provisions of this Final Judgment pending its approval by the Court;

AND WHEREAS, the essence of this Final Judgment is the prompt and certain divestiture of certain rights and assets by Defendants to assure that competition is not substantially lessened;

AND WHEREAS, the United States requires Defendants to make certain divestitures for the purpose of remedying the loss of competition alleged in the Complaint;

AND WHEREAS, Defendants have represented to the United States that the divestitures required below can and will be made and that Defendants will later raise no claim of hardship or difficulty as grounds for asking the Court to modify any of the divestiture provisions contained below;

NOW THEREFORE, before any testimony is taken, without trial or adjudication of any issue of fact or law, and upon consent of the parties, it is ORDERED, ADJUDGED, AND DECREED:

I. Jurisdiction

This Court has jurisdiction over the subject matter of and each of the parties to this action. The Complaint states a claim upon which relief may be granted against Defendants under Section 7 of the Clayton Act, as amended (15 U.S.C. § 18).

II. Definitions

As used in this Final Judgment:

(A) "Acquirer" means the person or persons to whom Defendants divest all or any portion of the Divestiture Assets.

(B) "BBU" means Defendant BBU, Inc., a Delaware corporation with its headquarters in Horsham, Pennsylvania, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

(C) "California Area" means the state of California.

(D) "California Assets" means:

(1) a perpetual, royalty-free, assignable, transferable, exclusive license (or, in the case of rights licensed from third parties or Sara Lee, a sublicense or assignment thereof) to use, manufacture (or have manufactured for the Acquirer), distribute, market, promote, advertise, and sell Fresh Bread under the California Brands in the California Area, including the right to manufacture Fresh Bread under the California Brands outside of the California Area for sale exclusively in the California Area, subject to any preexisting limitations on Sara Lee's authority to engage in such actions in the California Area;

(2) all plants and equipment used by Sara Lee to manufacture Fresh Bread under the California Brands for sale in the California Area (at the locations identified herein), and all trucks and other vehicles, depots, and warehouses utilized by Sara Lee or its agents in the distribution and sale of Fresh Bread under the California Brands in the California Area, provided, however, that the United States may approve a package of fewer of the assets identified in this subparagraph (2) based on a determination, in its sole discretion, that such a smaller package is sufficient to maintain current levels of competition for the manufacturing, distribution, and sale of Fresh Bread in the California Area;

(3) all route books, customer lists, and other records used in the Defendants' sale of Fresh Bread under the California Brands in the California Area, provided that copies may be provided if such assets cannot be separated from what Defendants require for the retained business;

(4) all Other Assets used in the research, development, manufacturing,

production, distribution, marketing, promotion, advertising, or sale of Fresh Bread under the California Brands in the California Area; and

(5) the Sara Lee Fresh Bread production facilities located at (a) 160 L Street, Fresno, California, 93721; (b) 955 Kennedy Street, Oakland, California, 94606; (c) 3211 6th Avenue, Sacramento, California, 95817; and (d) 2651 South Airport Way, Stockton, California, 95206. The California Assets specifically exclude the Sara Lee Fresh Bread production facility located at 5200 South Alameda, Vernon, California, 90058.

(E) "California Brands" means the EarthGrains, Sara Lee, Sara Lee Classic, Sara Lee Soft & Smooth, Sara Lee Hearty & Delicious, and Sara Lee Delightful brands for Fresh Bread in the California Area and any other related Trade Dress used in connection with the sale of Fresh Bread in the California Area.

(F) "Central Pennsylvania Area" means Adams, Berks, Carbon, Columbia, Cumberland, Dauphin, Franklin, Fulton, Huntingdon, Juniata, Lackawanna, Lancaster, Lebanon, Lehigh, Luzerne, Mifflin, Monroe, Montour, Northampton, Northumberland, Perry, Pike, Schuylkill, Snyder, Sullivan, Susquehanna, Union, Wayne, Wyoming, and York Counties in the commonwealth of Pennsylvania.

(G) "Central Pennsylvania Assets" means:

(1) a perpetual, royalty-free, assignable, transferable, exclusive license (or, in the case of rights licensed from third parties or Sara Lee, a sublicense or assignment thereof) to use, manufacture (or have manufactured for the Acquirer), distribute, market, promote, advertise, and sell Fresh Bread under the Central Pennsylvania Brands in the Central Pennsylvania Area, including the right to manufacture Fresh Bread under the Central Pennsylvania Brands outside of the Central Pennsylvania Area for sale

exclusively in the Central Pennsylvania Area, subject to any preexisting limitations on Sara Lee's authority to engage in such actions in the Central Pennsylvania Area;

(2) all plants and equipment used by Sara Lee to manufacture Fresh Bread under the Central Pennsylvania Brands for sale in the Central Pennsylvania Area (at the locations identified herein), and all trucks and other vehicles, depots, and warehouses utilized by Sara Lee or its agents in the distribution and sale of Fresh Bread under the Central Pennsylvania Brands in the Central Pennsylvania Area, provided, however, that the United States may approve a package of fewer of the assets identified in this subparagraph (2) based on a determination, in its sole discretion, that such a smaller package is sufficient to maintain current levels of competition for the manufacturing, distribution, and sale of Fresh Bread in the Central Pennsylvania Area;

(3) all route books, customer lists, and other records used in the Defendants' sale of Fresh Bread under the Central Pennsylvania Brands in the Central Pennsylvania Area, provided that copies may be provided if such assets cannot be separated from what Defendants require for the retained business;

(4) all Other Assets used in the research, development, manufacturing, production, distribution, marketing, promotion, advertising, or sale of Fresh Bread under the Central Pennsylvania Brands in the Central Pennsylvania Area; and

(5) the Sara Lee Fresh Bread production facilities located at (a) 500 Hanover Street, Northumberland, Pennsylvania, 17857; and (b) 249 North 11th Street, Sunbury, Pennsylvania, 17801.

(H) "Central Pennsylvania Brands" means the Holsum and Milano brands for Fresh Bread in the Central Pennsylvania Area, and any other related Trade Dress used in connection

with the sale of Fresh Bread in the Central Pennsylvania Area.

(I) "Central Region Area" means the Kansas City Area, the Omaha Area, and the Oklahoma City Area.

(J) "Central Region Assets" means:

(1) a perpetual, royalty-free, assignable, transferable, exclusive license (or, in the case of rights licensed from third parties or Sara Lee, a sublicense or assignment thereof) to use, manufacture (or have manufactured for the Acquirer), distribute, market, promote, advertise, and sell Fresh Bread under the Central Region Brands in the Central Region Area, including the right to manufacture Fresh Bread under the Central Region Brands outside of the Central Region Area for sale exclusively in the Central Region Area, subject to any preexisting limitations on Defendants' authority to engage in such actions in the Central Region Area;

(2) all plants and equipment used by Sara Lee to manufacture Fresh Bread under the Central Region Brands for sale in the Central Region Area (at the locations identified herein), and all trucks and other vehicles, depots, and warehouses utilized by Sara Lee or its agents in the distribution and sale of Fresh Bread under the Central Region Brands in the Central Region Area, provided, however, that the United States may approve a package of fewer of the assets identified in this subparagraph (2) based on a determination, in its sole discretion, that such a smaller package is sufficient to maintain current levels of competition for the manufacturing, distribution, and sale of Fresh Bread in the Central Region Area;

(3) all route books, customer lists, and other records used in the Defendants' sale of Fresh Bread under the Central Region Brands in the Central Region Area,

provided that copies may be provided if such assets cannot be separated from what Defendants require for the retained business;

(4) all Other Assets used in the research, development, manufacturing, production, distribution, marketing, promotion, advertising, or sale of Fresh Bread under the Central Region Brands in the Central Region Area; and

(5) the Sara Lee Fresh Bread production facilities located at (a) 317 South Elm Street, Hastings, Nebraska, 68901; (b) 221 North Chapel Hill Road, Sioux Falls, South Dakota, 57103; (c) 2630 Southeast Drive, Wichita, Kansas, 67216; and (d) 1916 North Broadway, Oklahoma City, Oklahoma, 73103. The Central Region Assets specifically exclude the Sara Lee bread production facilities located at (i) 415 South Mill Street, Fergus Falls, Minnesota, 56537; (ii) 3723 South Dakota Avenue, South Sioux City, Nebraska, 68776; and (iii) 1500 North US Highway 75, Sioux City, Iowa, 51102.

(K) "Central Region Brands" means:

(1) the EarthGrains and Mrs Baird's brands for Fresh Bread in the Kansas City Area, and any other related Trade Dress used in connection with the sale of Fresh Bread in the Kansas City Area;

(2) the EarthGrains and, as licensed by Defendants, Healthy Choice brands for Fresh Bread in the Omaha Area, and any other related Trade Dress used in connection with the sale of Fresh Bread in the Omaha Area; and

(3) the EarthGrains brand for Fresh Bread in the Oklahoma City Area, and any other related Trade Dress used in connection with the sale of Fresh Bread in the Oklahoma City Area.

(L) "Divestiture Assets" means the California Assets, the Central Pennsylvania

Assets, and the Central Region Assets.

(M) "Divestiture Trustee" means the trustee selected by the United States and appointed by the Court pursuant to Section V of this Final Judgment.

(N) "Formulas" mean all of Defendants' formulas, recipes, and specifications used by a Defendant in connection with the production and packaging associated with the goods manufactured, distributed, marketed, and sold under a brand name, including, without limitation, ingredients, manufacturing processes, equipment and material specifications, trade and manufacturing secrets, know-how, and scientific and technical information.

(O) "Fresh Bread," for purposes of this Final Judgment, means for the Central Pennsylvania Brands and the Central Region Brands, fresh, bagged, sliced bread, and items sold as bagged buns, rolls, sandwich thins, thin buns, bagels, English muffins, flat bread sold as traditional pita bread, and other fresh bread products sold under each Relevant Brand in the Central Pennsylvania Area and the Central Region Area. For the purposes of this Final Judgment, "Fresh Bread" for the California Area means fresh, bagged, sliced bread, and items sold as bagged buns, rolls, sandwich thins, thin buns, and other fresh bread products sold under the California Brands in the California Area, and excludes English muffins, bagels, and flat bread sold as traditional pita bread.

(P) "Grupo Bimbo" means Defendant Grupo Bimbo S.A.B. de C.V., a corporation organized under the laws of Mexico, with its headquarters in Mexico City, Mexico, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

(Q) "Kansas City Area" means Johnson, Leavenworth, Miami, and Wyandotte Counties in the state of Kansas, and Cass, Clay, Jackson, Lafayette, Platte, and Ray Counties in

the state of Missouri.

(R) "Licensed Trademarks" means all trademarks or service marks belonging or licensed to Defendants (whether registered or unregistered, or whether the subject of a pending application) that consist of, or incorporate, a Relevant Brand.

(S) "Monitoring Trustee" means any monitor appointed by the United States pursuant to Section IX of this Final Judgment.

(T) "Oklahoma City Area" means Canadian, Cleveland, Logan, McClain, Oklahoma, and Pottawatomie Counties in the state of Oklahoma.

(U) "Omaha Area" means Pottawattamie County in the state of Iowa, and Cass, Douglas, Lancaster, Sarpy, Saunders, and Washington Counties in the state of Nebraska.

(V) "Other Assets" means, with respect to each Relevant Brand:

(1) All tangible assets (other than plants and equipment) primarily used in the research, development, manufacturing, production, distribution, marketing, promotion, advertising, or sale of any Fresh Bread product sold under a Relevant Brand in its Relevant Area, including but not limited to copies of customer lists and route maps; copies of accounts, credit records and related customer information; product inventory; packaging and copies of artwork relating to such packaging; and copies of all performance records and all other records, provided, however, that Defendants may retain the portions of such tangible assets that relate to products other than any Fresh Bread product sold under a Relevant Brand in its Relevant Area where such assets reasonably can be divided, or may provide copies of such assets where it is reasonable to do so; and

(2) All of the following intangible assets:

(a) all licenses, permits, or authorizations issued by any governmental

organization, contracts (including route contracts), teaming arrangements, agreements, leases, commitments, certifications, and understandings, including agreements with suppliers, distributors, independent operators, wholesalers, retailers, marketers, unions, employees, or advertisers used primarily in the research, development, manufacturing, production, distribution, marketing, promotion, advertising, or sale of any Fresh Bread product sold under a Relevant Brand in its Relevant Area;

(b) A non-exclusive, transferable, royalty-free license or sublicense to all not-previously-identified intellectual property used in the research, development, manufacturing, production, distribution, marketing, promotion, advertising, servicing, or sale of any Fresh Bread product under a Relevant Brand in its Relevant Area, including but not limited to any patents, licenses and sublicenses, copyrights, Licensed Trademarks (excluding trademarks other than the Licensed Trademarks), and trade secrets; and

(c) all technical information, computer software, route configurations, and related documentation, know-how, and Formulas, including information relating to plans for, improvement to, or line extensions of, Fresh Bread products sold or distributed primarily under a Relevant Brand in its Relevant Area; all research, packaging, distribution, marketing, advertising, and sales know-how and documentation, including marketing and sales data, packaging designs, quality assurance and control procedures; all associated manuals and technical information that Defendants provide to their own employees, customers, suppliers, agents or licensees; and all research data concerning historic and

current research and development efforts, including, but not limited to, designs or experiments primarily related to the Relevant Brands in the Relevant Areas, and the results of successful and unsuccessful designs and experiments,

provided that with respect to any intangible assets identified in subparagraphs (a), (b), and (c) herein that, prior to the merger, were being used in the research, development, production, distribution, marketing, promotion, advertising, servicing, or sale of any Fresh Bread product distributed or sold under a Relevant Brand in a Relevant Area and any product or other asset not being divested, Defendants may utilize and retain the portions of such intangible assets that relate solely to products other than any Fresh Bread product distributed or sold under a Relevant Brand in a Relevant Area where such assets reasonably can be divided, and may provide copies of such intangible assets that relate to both any Fresh Bread sold or distributed under a Relevant Brand in a Relevant Area and any other product or asset not being divested if such assets cannot be separated from what Defendants require for the retained business.

(W) "Relevant Areas" means the California, Central Pennsylvania, and Central Region Areas.

(X) "Relevant Brands" means the California Brands, the Central Pennsylvania Brands, and the Central Region Brands.

(Y) "Sara Lee" means Defendant Sara Lee Corporation, a Maryland corporation with its headquarters in Downers Grove, Illinois, its successors and assigns (other than Grupo Bimbo and BBU), and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

(Z) "Trade Dress" means the print, style, color, labels, and other elements of trade dress currently used by Defendants and/or their subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures in association with the goods manufactured, distributed, marketed, and sold under a brand name.

III. Applicability

(A) This Final Judgment applies to each Defendant and all persons in active concert or participation with any Defendant who receives actual notice of this Final Judgment by personal service or otherwise.

(B) If, prior to complying with Section IV or V of this Final Judgment, Defendants sell, license, or otherwise dispose of all or substantially all of their assets or of lesser business units that include the Divestiture Assets, Defendants shall require the purchaser(s) to be bound by the provisions of this Final Judgment. Defendants need not obtain such an agreement from the Acquirer(s) of the assets divested pursuant to this Final Judgment.

IV. Divestitures

(A) Grupo Bimbo and BBU are ordered and directed, within ninety (90) calendar days after the filing of the Complaint in this matter or five (5) calendar days after notice of entry of this Final Judgment by the Court, whichever is later, to divest the Divestiture Assets in a manner consistent with this Final Judgment to an Acquirer or Acquirers acceptable to the United States in its sole discretion. The United States, in its sole discretion, may agree to up to two thirty (30) day extensions of this time period, and shall notify the Court in such circumstances. Defendants agree to use their best efforts to divest the Divestiture Assets as expeditiously as possible.

(B) In accomplishing the divestiture ordered by this Final Judgment, Defendants

promptly shall make known, by usual and customary means, the availability of the Divestiture Assets. Defendants shall inform any person who inquires about a possible purchase of the Divestiture Assets that they are being divested pursuant to this Final Judgment and provide that person with a copy of this Final Judgment. Defendants shall offer to furnish to all prospective Acquirers, subject to customary confidentiality assurances, all information and documents relating to the Divestiture Assets customarily provided in a due diligence process except such information or documents subject to the attorney-client privilege or work-product doctrine. Defendants shall make available such information to the United States no later than five (5) business days after such information is made available to any prospective Acquirer.

(C) Subject to the execution of customary confidentiality agreements, Defendants shall provide prospective Acquirers and the United States with information relating to the personnel (including independent operators) directly involved in the operation and sale activities relating to the Divestiture Assets to enable the Acquirer(s) to make offers of employment. Defendants will not interfere with any negotiations by the Acquirer(s) to employ or contract with any Defendant's employee or independent operator whose responsibility relates to the Divestiture Assets.

(D) Subject to the execution of customary confidentiality agreements, Defendants shall permit prospective Acquirers of the Divestiture Assets to (1) have reasonable access to personnel; (2) make inspections of the physical facilities; (3) have access to any and all environmental, zoning, and other permit documents and information; and (4) have access to any and all financial, operational, or other documents and information customarily provided as part of a due diligence process.

(E) Grupo Bimbo and BBU shall warrant to the Acquirer(s) that the Divestiture Assets will be operational on the date of sale.

(F) Defendants shall not take any action that will impede in any way the licensing, permitting, operation, or divestiture of the Divestiture Assets.

(G) Grupo Bimbo and BBU shall warrant to the Acquirer(s) that there are no material defects in the environmental, zoning, or other permits pertaining to the operation of each asset, and that following the sale of the Divestiture Assets, Defendants will not undertake, directly or indirectly, any challenges to the environmental, zoning, or other permits relating to the operation of the Divestiture Assets.

(H) In connection with the divestiture of the Divestiture Assets pursuant to Section IV, or by Divestiture Trustee appointed pursuant to Section V, of this Final Judgment, at the option of the Acquirer(s), Grupo Bimbo and BBU shall enter into transitional supply and transportation agreements, up to six (6) months in length, for the supply and transportation of Fresh Bread under the Relevant Brands in the Relevant Areas. At the request of the Acquirer, the United States, in its sole discretion, may agree to one or more extensions of this time period, not to exceed twelve (12) months in total. The terms and conditions of such transitional supply and transportation agreements must be acceptable to the United States in its sole discretion. All such agreements shall be deemed incorporated into this Final Judgment, and a failure by Grupo Bimbo or BBU to comply with any terms of such an agreement shall constitute a failure to comply with this Final Judgment. Upon the expiration or termination of such agreements, Grupo Bimbo and BBU shall not enter into or have any supply or transportation agreements with the Acquirer(s) relating to the sale of Fresh Bread under the Relevant Brands in the Relevant Areas

for a period of three (3) years thereafter.

(I) Unless the United States otherwise consents in writing, the divestiture pursuant to Section IV, or by the Divestiture Trustee appointed pursuant to Section V, of this Final Judgment shall include the entire Divestiture Assets, and shall be accomplished in such a way as to satisfy the United States, in its sole discretion, that the divestiture will achieve the purposes of this Final Judgment and that the Relevant Brands can and will be used by the Acquirer(s) as part of viable, ongoing businesses engaged in the sale of Fresh Bread. Divestiture of the California Assets by Defendants pursuant to Section IV of the Final Judgment shall be made to a single Acquirer. Divestiture of the Central Region Assets and Central Pennsylvania Assets pursuant to Section IV (by Defendants) or Section V (by the Divestiture Trustee) of the Final Judgment, and divestiture of the California Assets by the Divestiture Trustee pursuant to Section V of the Final Judgment, may be made to one or more Acquirers, provided that in each instance it is demonstrated to the sole satisfaction of the United States that the Divestiture Assets will remain viable and the divestiture of such assets will remedy the competitive harm alleged in the Complaint. The divestitures, whether pursuant to Section IV or Section V of this Final Judgment:

(1) shall be made to an Acquirer or Acquirers that, in the United States' sole judgment, has or have the intent and capability (including the necessary managerial, operational, technical, and financial capability) of competing effectively in the sale of Fresh Bread; and

(2) shall be accomplished so as to satisfy the United States, in its sole discretion, that none of the terms of any agreement between an Acquirer and Defendants give Defendants the ability unreasonably to raise the Acquirer's costs, to lower the

Acquirer's efficiency, or otherwise to interfere in the ability of the Acquirer to compete effectively.

(J) During the term of this Final Judgment, Defendants shall not sell or introduce for sale any Fresh Bread under a Relevant Brand in its Relevant Area, and Defendants shall not use the Sara Lee trade name for co-branding of any Fresh Bread product sold in the California Area.

V. Appointment of Divestiture Trustee

(A) If BBU and Grupo Bimbo have not divested the California Assets, the Central Pennsylvania Assets, and the Central Region Assets within the time period specified in paragraph IV(A), Grupo Bimbo and BBU shall notify the United States of that fact in writing. Upon application of the United States, the Court shall appoint a Divestiture Trustee selected by the United States and approved by the Court to effect the divestiture of the not-yet-divested Divestiture Assets (the "remaining Divestiture Assets").

(B) After the appointment of a Divestiture Trustee becomes effective, only the Divestiture Trustee shall have the right to sell the remaining Divestiture Assets. The Divestiture Trustee shall have the power and authority to accomplish the divestiture to an Acquirer acceptable to the United States at such price and on such terms as are then obtainable upon reasonable effort by the Divestiture Trustee, subject to the provisions of Sections IV, V, and VI of this Final Judgment, and shall have such other powers as this Court deems appropriate. Subject to paragraph V(D) of this Final Judgment, the Divestiture Trustee may hire at the cost and expense of Grupo Bimbo and BBU any investment bankers, attorneys, or other agents, who shall be solely accountable to the Divestiture Trustee and who shall be required to execute customary confidentiality agreements, reasonably necessary in the Divestiture Trustee's

judgment to assist in the divestiture.

(C) Defendants shall not object to a sale by the Divestiture Trustee on any ground other than the Divestiture Trustee's malfeasance. Any such objections by Defendants must be conveyed in writing to the United States and the Divestiture Trustee within ten (10) calendar days after the Divestiture Trustee has provided the notice required under Section VI.

(D) The Divestiture Trustee shall serve at the cost and expense of Grupo Bimbo and BBU, on such terms and conditions as the United States approves, and shall account for all monies derived from the sale of the assets sold by the Divestiture Trustee and all costs and expenses so incurred. After approval by the Court of the Divestiture Trustee's accounting, including fees for its services and those of any professionals and agents retained by the Divestiture Trustee, all remaining money shall be paid to Grupo Bimbo or BBU and the trust shall then be terminated. The compensation of the Divestiture Trustee and any professionals and agents retained by the Divestiture Trustee shall be reasonable in light of the value of the remaining Divestiture Assets and based on a fee arrangement providing the Divestiture Trustee with an incentive based on the price and terms of the divestiture and the speed with which it is accomplished, but timeliness is paramount.

(E) Defendants shall use their best efforts to assist the Divestiture Trustee in accomplishing the required divestiture. The Divestiture Trustee and any consultants, accountants, attorneys, and other persons retained by the Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities of the remaining Divestiture Assets, and Defendants shall develop financial and other information relevant to the remaining Divestiture Assets as the Divestiture Trustee may reasonably request, subject to reasonable

protection for trade secrets or other confidential research, development, or commercial information. Defendants shall take no action to interfere with or to impede the Divestiture Trustee's accomplishment of the divestiture.

(F) After its appointment, the Divestiture Trustee shall file monthly reports with the United States and the Court setting forth the Divestiture Trustee's efforts to accomplish the divestiture ordered under this Final Judgment. To the extent such reports contain information that the Divestiture Trustee deems confidential, such reports shall not be filed in the public docket of the Court. Such reports shall include the name, address, and telephone number of each person who, during the preceding month, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the remaining Divestiture Assets, and shall describe in detail each contact with any such person. The Divestiture Trustee shall maintain full records of all efforts made to divest the remaining Divestiture Assets.

(G) If the Divestiture Trustee has not accomplished the divestiture ordered under this Final Judgment within six (6) months after its appointment, the Divestiture Trustee shall promptly file with the Court a report setting forth (1) the Divestiture Trustee's efforts to accomplish the required divestiture, (2) the reasons, in the Divestiture Trustee's judgment, why the required divestiture has not been accomplished, and (3) the Divestiture Trustee's recommendations. To the extent the report contains information that the Divestiture Trustee deems confidential, the report shall not be filed in the public docket of the Court. The Divestiture Trustee shall at the same time furnish such report to the United States, which shall have the right to make additional recommendations consistent with the purpose of the trust. The

Court thereafter shall enter such orders as it shall deem appropriate to carry out the purpose of this Final Judgment, which may, if necessary, include extending the trust and the term of the Divestiture Trustee's appointment by a period requested by the United States.

VI. Notice of Proposed Divestiture

(A) Within two (2) business days following execution of a definitive divestiture agreement, Grupo Bimbo and BBU or the Divestiture Trustee, whichever is then responsible for effecting the divestiture required herein, shall notify the United States of any proposed divestiture required by Section IV or V of this Final Judgment. If the Divestiture Trustee is responsible, it shall similarly notify Grupo Bimbo and BBU. The notice shall set forth the details of the proposed divestiture and list the name, address, and telephone number of each person not previously identified who offered or expressed an interest in or desire to acquire any ownership interest in the Divestiture Assets, together with full details of the same.

(B) Within fifteen (15) calendar days of receipt by the United States of such notice, the United States may request from Defendants, the proposed Acquirer(s), any other third party, or the Divestiture Trustee, if applicable, additional information concerning the proposed divestiture, the proposed Acquirer(s), and any other potential Acquirer. Defendants and the Divestiture Trustee shall furnish to the United States any additional information requested within fifteen (15) calendar days of the receipt of the request, unless the parties shall otherwise agree.

(C) Within thirty (30) calendar days after receipt of the notice or within twenty (20) calendar days after the United States has been provided the additional information requested from Defendants, the proposed Acquirer(s), any third party, and the Divestiture Trustee, whichever is later, the United States shall provide written notice to Defendants and the

Divestiture Trustee, if there is one, stating whether or not it objects to the proposed divestiture. If the United States provides written notice that it does not object, the divestiture may be consummated, subject only to Defendants' limited right to object to the sale under paragraph V(C) of this Final Judgment. Absent written notice that the United States does not object to the proposed Acquirer(s) or upon objection by the United States, a divestiture proposed under Section IV or Section V shall not be consummated. Upon objection by Defendants under paragraph V(C), a divestiture proposed under Section V shall not be consummated unless approved by the Court.

VII. Financing

Defendants shall not finance all or any part of any purchase made pursuant to Section IV or V of this Final Judgment.

VIII. Hold Separate

Until the divestiture required by this Final Judgment has been accomplished, Defendants shall take all steps necessary to comply with the Hold Separate Stipulation and Order (the "Hold Separate") entered by this Court. Defendants shall take no action that would jeopardize the divestiture ordered by this Court.

IX. Appointment of Monitoring Trustee

(A) Upon the filing of this Final Judgment, the United States may, in its sole discretion, appoint a Monitoring Trustee, subject to approval by the Court.

(B) The Monitoring Trustee shall have the power and authority to monitor Defendants' compliance with the terms of this Final Judgment and the Hold Separate entered by this Court and shall have such powers as this Court deems appropriate. Subject to Paragraph IX(D) of this Final Judgment, the Monitoring Trustee may hire any consultants, accountants, attorneys, or other persons, who shall be solely accountable to the Monitoring Trustee, reasonably necessary in the Monitoring Trustee's judgment.

(C) Defendants shall not object to actions taken by the Monitoring Trustee in fulfillment of the Monitoring Trustee's responsibilities under any Order of this Court on any ground other than the Monitoring Trustee's malfeasance. Any such objections by Defendants must be conveyed in writing to the United States and the Monitoring Trustee within ten (10) calendar days after the action taken by the Monitoring Trustee giving rise to the Defendants' objection.

(D) The Monitoring Trustee and any consultants, accountants, attorneys, and other persons retained by the Monitoring Trustee shall serve, without bond or other security, at the cost and expense of Defendants, on such terms and conditions as the United States approves, including the execution of customary confidentiality agreements. The compensation of the Monitoring Trustee and any consultants, accountants, attorneys, and other persons retained by the Monitoring Trustee shall be on reasonable and customary terms commensurate with the individuals' experience and responsibilities.

(E) The Monitoring Trustee shall have no responsibility or obligation for the operation of Defendants' businesses.

(F) Defendants shall assist the Monitoring Trustee in monitoring Defendants' compliance with their individual obligations under this Final Judgment and under the Hold

Separate. The Monitoring Trustee and any consultants, accountants, attorneys, and other persons retained by the Monitoring Trustee shall have full and complete access to the personnel, books, records, and facilities relating to the Divestiture Assets, subject to reasonable protection for trade secret or other confidential research, development, or commercial information or any applicable privileges. Defendants shall take no action to interfere with or to impede the Monitoring Trustee's accomplishment of its responsibilities.

(G) After its appointment, the Monitoring Trustee shall file monthly reports with the United States and the Court setting forth the Defendants' efforts to comply with their individual obligations under this Final Judgment and under the Hold Separate. To the extent such reports contain information that the Monitoring Trustee deems confidential, such reports shall not be filed in the public docket of the Court.

(H) The Monitoring Trustee shall serve until the divestiture of all of the Divestiture Assets is finalized pursuant to either Section IV or Section V of this Final Judgment and any agreement(s) for transitional supply and transportation services described in Paragraph IV(H) of this Final Judgment have expired.

(I) If the United States determines that the Monitoring Trustee has ceased to act or failed to act diligently, the United States may appoint a substitute Monitoring Trustee in the same manner as provided in this Section.

(J) The Monitoring Trustee appointed pursuant to this Final Judgment may be the same person or entity appointed as a Divestiture Trustee pursuant to Section V of this Final Judgment.

X. Affidavits

(A) Within twenty (20) calendar days of the filing of the Complaint in this matter, and every thirty (30) calendar days thereafter until the divestiture has been completed under Section IV or V, Defendants shall deliver to the United States an affidavit as to the fact and manner of their compliance with Section IV or V of this Final Judgment. Each such affidavit shall include the name, address, and telephone number of each person who, during the preceding thirty (30) calendar days, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the Divestiture Assets, and shall describe in detail each contact with any such person during that period. Each such affidavit shall also include a description of the efforts Defendants have taken to solicit buyers for the Divestiture Assets and to provide required information to prospective Acquirers, including the limitations, if any, on such information. Provided that the information set forth in the affidavit is true and complete, any objection by the United States to information provided by Defendants, including any limitation on information, shall be made within fourteen (14) calendar days of receipt of such affidavit.

(B) Within twenty (20) calendar days of the filing of the Complaint in this matter, Defendants shall deliver to the United States an affidavit that describes in reasonable detail all actions Defendants have taken and all steps Defendants have implemented on an ongoing basis to comply with Section VIII of this Final Judgment. Defendants shall deliver to the United States an affidavit describing any changes to the efforts and actions outlined in Defendants' earlier affidavits filed pursuant to this section within fifteen (15) calendar days after the change is implemented.

(C) Defendants shall keep all records of all efforts made to preserve and divest the

Divestiture Assets until one (1) year after such divestiture has been completed.

(D) Sara Lee's obligations under paragraphs A and B of this Section shall cease upon completion of its sale to Grupo Bimbo and BBU of the Sara Lee business that includes the Divestiture Assets.

XI. Compliance Inspection

(A) For the purposes of determining or securing compliance with this Final Judgment, or of determining whether the Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time authorized representatives of the United States, including consultants and other persons retained by the United States, shall, upon written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to Defendants, be permitted:

(1) access during Defendants' office hours to inspect and copy, or at the option of the United States, to require Defendants to provide hard copy or electronic copies of, all books, ledgers, accounts, records, data, and documents in the possession, custody, or control of Defendants, relating to any matters contained in this Final Judgment; and

(2) to interview, either informally or on the record, Defendants' officers, employees, or agents, who may have their individual counsel present, regarding such matters. The interviews shall be subject to the reasonable convenience of the interviewee and without restraint or interference by Defendants.

(B) Upon the written request of an authorized representative of the Assistant Attorney

General in charge of the Antitrust Division, Defendants shall submit written reports or responses to written interrogatories, under oath if requested, relating to any of the matters contained in this Final Judgment as may be requested, including, but not limited to, any transitional supply and/or transportation agreements entered into between the Acquirer(s) and the Defendants pursuant to paragraph IV(H) of this Final Judgment.

(C) No information or documents obtained by the means provided in this Section shall be divulged by the United States to any person other than an authorized representative of the executive branch of the United States, except in the course of legal proceedings to which the United States is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

(D) If at the time information or documents are furnished by Defendants to the United States, Defendants represent and identify in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure, and Defendants mark each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure," then the United States shall give Defendants ten (10) calendar days' notice prior to divulging such material in any legal proceeding (other than a grand jury proceeding).

XII. No Reacquisition

Defendants shall not reacquire any part of the Divestiture Assets during the term of this Final Judgment.

XIII. Retention of Jurisdiction

This Court retains jurisdiction to enable any party to this Final Judgment to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

XIV. Expiration of Final Judgment

Unless this Court grants an extension, this Final Judgment shall expire ten (10) years from the date of its entry.

XV. Public Interest Determination

The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16, including making copies available to the public of this Final Judgment, the Competitive Impact Statement, and any comments thereon and the United States's responses to those comments. Based upon the record before the Court, which includes the Competitive Impact Statement and any comments and responses to comments filed with the Court, entry of this Final Judgment is in the public interest.

Date: _____

Court approval subject to procedures
of Antitrust Procedures and Penalties Act,
15 U.S.C. § 16.

_____

United States District Judge

[FR Doc. 2011-28037 Filed 10/28/2011 at 8:45 am; Publication Date: 10/31/2011]