UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. INTERSTATE BAKERIES CORPORATION, and CONTINENTAL BAKING COMPANY, Defendants.	Civil Action No.: 95C 4194 Filed: 7/20/95 Judge Manning

COMPLAINT

The United States of America, acting under the direction of the Attorney General of the United States, brings this civil action to obtain equitable and other relief against the defendants named and alleges as follows:

1. The United States brings this antitrust case to prevent the proposed acquisition by Interstate Bakeries Corporation of Continental Baking Company. Interstate is the third largest baker of bread and sweet goods in the United States. Continental is the largest baker of bread and sweet goods in the United States. Combined, they would be more than twice the size of the second largest baker.

2. In Los Angeles, San Diego, Chicago, Milwaukee and central Illinois, Interstate and Continental are either the two largest or two of the three largest sellers of white pan bread, with a combined market share (measured in revenues) ranging from 33 percent to 64 percent. They compete vigorously to sell

branded white pan bread to retailers for resale to consumers, to supply private label white pan bread to retailers for resale to consumers, to provide the best quality product and service, and to develop new bread products. If the combination of these two bakers were permitted, this competition would be substantially reduced or eliminated.

3. The impact of the acquisition on prices to consumers is particularly important. Interstate and Continental's brands of white pan bread are close substitutes for each other. Interstate's acquisition of Continental would likely cause Interstate to raise its prices for white pan bread sold under its brands and the brands it is acquiring from Continental. Moreover, other bakers would likely follow Interstate's lead and also raise prices. As a result of the acquisition, consumers would likely pay significantly higher prices for white pan bread.

I. JURISDICTION AND VENUE

4. This action is filed under Section 15 of the Clayton Act, 15 U.S.C. § 25, to prevent and restrain the violation by the defendants, as hereinafter alleged, of Section 7 of the Clayton Act, 15 U.S.C. § 18.

5. Interstate and Continental sell bread and other products in interstate commerce. The Court has jurisdiction over this action and over the parties pursuant to 15 U.S.C § 22, and 28 U.S.C. §§ 1331 and 1337.

6. Both Interstate and Continental transact business in this District. Venue is proper in this District under 15 U.S.C.

§ 1391(c).

II. THE DEFENDANTS

7. Interstate is a Delaware corporation with headquarters in Kansas City, Missouri. It is the third largest baker in the United States. It operates about 31 bakeries, mostly in the south, mid-west and west. In 1994, Interstate reported total sales of $1.1 billion, of which about 70 percent came from bread sales and 30 percent from sweet baked goods. Interstate sells white pan bread under various brand names including Butternut, Merita, Weber's, Sunbeam, Holsum, Mrs. Karl's, Sweetheart and Eddy's.

8. Continental is a Delaware corporation with headquarters in St. Louis, Missouri. It is the largest baker in the United States. It operates about 35 plants throughout most of the country, except the southeast. In 1994, Continental reported total sales of $1.9 billion, of which 54 percent came from bread sales and 46 percent from sweet baked goods. Continental sells white pan bread primarily under the Wonder brand name.

III. TRADE AND COMMERCE

A. The Relevant Product Market

9. White pan bread baked by wholesale and captive bakeries and sold through retail food stores is a relevant product market for purposes of analyzing this acquisition under the Clayton Act. There are no reasonably interchangeable substitutes for such white pan bread to which a significant number of white pan bread consumers would switch in response to a small but significant,

nontransitory increase in price imposed by all producers of white pan bread that would make such a price increase unprofitable.

10. White pan bread is made from white flour and baked in a deep-walled pan. It is supplied by wholesale bakeries, such as defendants, and by captive bakeries owned and operated by retail grocery stores. It has a bland taste and a soft, consistent texture. White pan bread is typically sold sliced in 16, 20, or 24 ounce loaves and is used primarily for sandwiches or toast. It typically stays fresh for seven to ten days.

11. White pan bread is sold under brand names owned and promoted by the wholesale baker or under private labels owned by a retail grocery store. Some small grocery stores that do not own a private label sell bread under secondary labels owned by a wholesale baker that also supplies them with branded bread. More white pan bread is sold than any other type of bread. Over 35 percent of all bread product sales by Continental and Interstate are of white pan bread.

12. In addition to white pan bread, wholesale and captive bakers produce variety breads, which are not a part of the relevant market. Variety breads include wheat, rye, raisin, pumpernickel, sourdough, French, Italian, and other specialty breads. Variety breads have significantly different product attributes from white pan bread. For example, they have more pronounced tastes, and denser, grainier textures as compared with white pan bread. They are often served as part of a meal. Variety breads are generally perceived as higher in nutritional

value than white pan bread. Variety breads are usually eaten by higher income, health-conscious adults.

13. Similarly, the small amounts of freshly baked white pan bread produced by retail or in-store bakeries may be excluded. This freshly baked white pan bread has a different taste and texture than white pan bread produced by wholesale and captive bakeries. Freshly baked white pan bread is baked on the premises to provide a fresher product than that found on the commercial bread rack. Since preservatives generally are not used by retail or in-store bakers, freshly baked bread has a shelf life of only one to two days. Customers usually purchase freshly baked bread for immediate consumption.

B. <u>The Relevant Geographic Markets</u>

14. The relevant geographic markets for purposes of analyzing this transaction are: the Los Angeles area, the San Diego area, the Chicago area, the Milwaukee area and central Illinois. These are areas where consumers are likely to pay higher prices as a result of the acquisition, and would not be able to substitute products sold by more distant sellers. Moreover, other buyers likely would not purchase the relevant product and resell it to the targeted buyers, thus defeating any price increase by arbitrage or diversion.

15. White pan bread can be priced differently in different geographic areas, or zones, served by a bakery. For example, Interstate and Continental's Chicago bakeries each have five different price zones in northern Illinois and eastern Wisconsin.

The variations in price do not simply reflect differences in costs. They reflect differences in competition that exist in each zone.

16. It is not profitable for retail stores in a higher-priced zone to purchase bread from customers in a lower-priced zone and transport it to the higher-priced zone. Such diversion, or arbitrage, is not practical because of the short shelf life of white pan bread, the high cost of transporting white pan bread and the control that the bakers maintain over the product.

IV. COMPETITION AND ENTRY

17. Using a measure of market concentration called the HHI, defined and explained in Appendix A, a combination of Interstate and Continental would substantially increase concentration in markets that are already highly concentrated. The approximate post-merger HHIs for the relevant markets based on 1994 dollar sales are over: 2250 with a change of 766 for Chicago; 1800 with a change of 548 for Milwaukee; 4000 with a change of 974 for central Illinois; 4200 with a change of 2035 for Los Angeles; and 2900 with a change of 1265 for San Diego.

18. After the acquisition, Interstate would have the incentive to raise the price of each of its brands of white pan bread, including brands acquired from Continental, because some of the customers who would switch away from each brand would buy another brand controlled by Interstate.

19. The primary brands used by Interstate and Continental for branded white pan bread in Los Angeles and San Diego are

Weber's and Wonder, respectively. These brands are close substitutes for each other. No other baker sells a significant amount of branded white pan bread in Los Angeles and San Diego. Therefore, if Interstate controlled both Weber's and Wonder, it would likely increase the price of those brands.

20. The primary brands used by Interstate and Continental for branded white pan bread in Chicago are Butternut and Wonder, respectively. These brands are close substitutes for each other. Only one other baker, Metz Baking, sells a substantial amount of branded white pan bread in Chicago. Therefore, if Interstate controlled both Butternut and Wonder, it would likely increase the price of those brands.

21. The primary brands used by Interstate and Continental for branded white pan bread in Milwaukee are Mrs. Karl's and Wonder, respectively. These brands are close substitutes for each other. Only one other baker, Metz Baking, sells a substantial amount of branded white pan bread in Milwaukee. Therefore, if Interstate controlled both Mrs. Karl's and Wonder, it would likely increase the price of those brands.

22. The primary brands used by Interstate and Continental for branded white pan bread in central Illinois are Sunbeam and Butternut, and Wonder, respectively. These brands are close substitutes for each other. No other baker sells a significant amount of branded white pan bread in central Illinois. Therefore, if Interstate controlled Sunbeam, Butternut and Wonder it would likely increase the price of those brands.

23. In response to Interstate's price increases on its branded white pan bread, consumers would not switch to other brands or private label white pan bread in sufficient numbers to render Interstate's price increases unprofitable.

24. In response to Interstate's price increases, other competing bakers are likely to increase their prices of white pan bread.

25. Establishing a new successful brand of white pan bread in any market is difficult, time-consuming and costly. It is unlikely that timely and sufficient entry of a branded white pan bread would prevent any harm to competition caused by Interstate's acquisition of Continental.

V. VIOLATIONS ALLEGED

26. Pursuant to an Agreement dated April 12, 1995, Interstate agreed to acquire all of the outstanding stock of Continental.

27. The effects of the proposed transaction may be to substantially lessen competition and tend to create a monopoly in interstate trade and commerce in violation of Section 7 of the Clayton Act.

28. The transaction would have the following effects, among others:

a. actual and potential competition between Interstate and Continental in the market for branded and private label white pan bread will be eliminated in Los Angeles, San Diego, Chicago, Milwaukee and central

Illinois;

b. competition generally in the above-described markets will be substantially lessened;

c. prices consumers pay for white pan bread in the above-described geographic markets are likely to increase.

VI. REQUESTED RELIEF

The United States requests:

1. That the proposed acquisition of Continental by Interstate be adjudged to be in violation of Section 7 of the Clayton Act;

2. That the defendants be permanently enjoined from carrying out their Agreement dated April 12, 1995, or from entering into or carrying out any agreement, understanding or plan, the effect of which would be to combine the businesses or assets of Interstate and Continental;

3. That the United States be awarded the costs of this action; and

4. That the United States have such other relief as the Court may deem just and proper.

Dated:

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APPENDIX A

<u>DEFINITION OF HHI</u>

"HHI" means the Herfindahl-Hirschman Index, a commonly accepted measure of market concentration. It is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. For example, for a market consisting of four firms with shares of thirty, thirty, twenty, and twenty percent, the HHI is 2600 ($30^2 + 30^2 + 20^2 + 20^2 = 2600$). The HHI takes into account the relative size and distribution of the firms in a market and approaches zero when a market consists of a large number of firms of relatively equal size. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases.

Markets in which the HHI is between 1000 and 1800 are considered to be moderately concentrated and those in which the HHI is in excess of 1800 points are considered to be concentrated. Transactions that increase the HHI by more than 100 points in moderately concentrated and concentrated markets presumptively raise antitrust concerns under the Department of Justice and Federal Trade Commission 1992 Horizontal Merger Guidelines.