UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES of AMERICA, U.S. Department of Justice Antitrust Division 325 7th Avenue, NW Suite 500 Washington, DC 20530, Plaintiff, v. CONNORS BROS. INCOME FUND, 669 Main Street Blacks Harbour, New Brunswick, Canada E5h 1K1, and BUMBLE BEE SEAFOODS, LLC, 9655 Granite Ridge Drive San Diego, CA 92123-2674, Defendants.	Case No. 1:04CV01494 Judge: JDB Deck Type: Antitrust

RESPONSE OF THE UNITED STATES TO
PUBLIC COMMENTS ON THE PROPOSED FINAL JUDGMENT

Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b) ("Tunney Act"), Plaintiff, the United States of America, acting under the direction of the Attorney General, hereby files comments received from members of the public concerning the proposed Final Judgment in this civil antitrust suit, and the Response of the United States to those comments.

I. FACTUAL BACKGROUND

A. The Parties to the Transaction

Connors Bros. Income Fund ("Connors") is an income trust fund organized under Canadian law. In 2003, it marketed the first, second and fourth best selling brands of sardine snacks in the United States (Brunswick, Beach Cliff and Port Clyde, respectively). At that time, Connors brands accounted for approximately 63% of the sardine snack sales in the United States; and it earned revenues of about $43 million from the sale of these products.

Bumble Bee Seafoods, LLC ("Bumble Bee") is a Delaware limited liability corporation with its headquarters in San Diego, California. It marketed the third largest selling brand of sardine snacks in the United States before it was acquired by Connors. In 2003, the Bumble Bee brand accounted for approximately 13% of U.S. sardine snack sales; and Bumble Bee earned revenues of about $9 million from the sale of these products.

B. The Transaction

Connors entered into a Transaction Agreement, dated February 10, 2004, in which it proposed to acquire Bumble Bee from Centre Capital Investors III, L.P. (the "Transaction"). Connors partially financed its acquisition through a subscription agreement. The proceeds of that subscription were held in escrow pending final consummation of the Transaction. Under Canadian law, those funds had to be withdrawn to finance the acquisition before the escrow agreement expired on April 30, 2004 (otherwise, the funds had to be returned to the subscribers).

The United States' preliminary investigation into the likely competitive effects of the Transaction indicated that it was likely that combining the two companies selling the four largest selling brands of sardine snacks (with a combined U.S. market share of over 75%) would lessen competition in violation of Section 7 of the Clayton Act (15 U.S.C. § 18). The Defendants

proposed a settlement by which they would divest one or more Connors or Bumble Bee brands and related assets in order to restore the competition that otherwise would be lost by the combination of Connors and Bumble Bee.

On April 30, 2004, the United States and Defendants finalized an agreement by which: the United States agreed not to file suit at that time to enjoin the Transaction; the Defendants signed a Hold Separate Stipulation and Order and a proposed Final Judgment, which included remedies designed to restore the competition that the United States' preliminary analysis indicated would be lost through the Connors/Bumble Bee combination; and the United States agreed to defer filing the executed Hold Separate Stipulation and Order and proposed Final Judgment until it completed a thorough investigation into the likely competitive effects of the Transaction. At the completion of this investigation, the United States confirmed that it was likely that the Transaction, as originally proposed, would harm competition for the sale of sardine snacks in the United States, but decided to narrow the scope of the original Final Judgment to eliminate certain remedies that were not needed to restore competition in the relevant antitrust market.

C. The Complaint

On August 31, 2004, the United States filed a Complaint alleging that the likely effect of the Transaction, as originally proposed, would be to lessen competition substantially for the sale of sardine snacks throughout the United States in violation of Section 7 of the Clayton Act. The Complaint further alleged that this loss of competition would result in U.S. consumers paying higher prices for sardine snacks.

D. The Proposed Settlement

When the United States filed its Complaint, it also filed a Hold Separate Stipulation and Order and a proposed Final Judgment. The proposed Final Judgment includes a divestiture package that is designed to eliminate the anticompetitive effects of the Transaction.

The proposed Final Judgment provides that Connors must transfer its Port Clyde, Commander, Bulldog, Possum, Admiral and Neptune labels of sardine snacks to an acquirer that is acceptable to the United States (the "Divestiture Assets"). In addition, the Divestiture Assets include a processing plant (if the acquirer wants it), inventories, and the other tangible and intangible assets that an acquirer might need to produce, distribute and sell sardine snacks under the divested labels in the United States. Moreover, the proposed Final Judgment provides that the acquirer may sell other canned seafood products under its brand names (as do Connors, Bumble Bee and other sellers of sardine snacks) – as Connors is required to transfer all of its rights to produce, distribute and sell seafood products under the divested brands (with the limited exception of clam products, which Connors may continue to sell under the Neptune brand).

E. Compliance With The Tunney Act

To date, the United States and the parties to this transaction have complied with the provisions of the Tunney Act as follows:

(1) The Complaint, Hold Separate Stipulation and Order, and proposed Final Judgment were filed on August 31, 2004.

(2) The Competitive Impact Statement ("CIS") was filed on October 19, 2004.

(3) Defendants have filed the statements required by 15 U.S.C. § 16(g).

(4) A summary of the terms of the proposed Final Judgment and CIS was published

in the *Washington Post*, a newspaper of general circulation in the District of Columbia, for seven days during the period November 6, 2004 through November 12, 2004.

(5) The Complaint, proposed Final Judgment and CIS were published in the *Federal Register* on November 9, 2004, 69 Fed. Reg. 64969 (2004).[1]

(6) The sixty-day public comment period specified in 15 U.S.C. § 16(b) commenced on November 9, 2004.

(7) About November 15, 2004, the Defendants advised the United States of their intention to transfer the Divestiture Assets to Ocean Beauty Seafoods, Inc. ("Ocean Beauty"), in conjunction with a supply agreement of unlimited duration.

(8) On December 15, 2004, the United States filed an amended proposed Final Judgment with the Court, which includes a new Section IV.K to resolve the United States' concerns that Ocean Beauty might not establish an independent supply of fish for its sardine snacks if it had a supply agreement of unlimited duration with the Defendants.

(9) The Defendants consummated their transfer of the Divestiture Assets to Ocean Beauty on December 15, 2004 (after the amended proposed Final Judgment had been filed).

(10) The 60 day comment period expired on January 10, 2005.

(11) The United States received one comment from a member of the public (attached as Appendix A) and hereby files this Response pursuant to 15 U.S.C. § 16(b).

The United States will move this Court for entry of the proposed Final Judgment after the

[1] The United States also posted the Complaint, proposed Final Judgment and the CIS on its Website, http://www.usdoj.gov/atr/cases/205200/205283, 206800/206840 and 205900/205900.htm.

comments and the Response are published in the Federal Register. The proposed Final Judgment cannot be entered before that publication. 15 U.S.C. § 16(d).

II. LEGAL STANDARD GOVERNING THE COURT'S PUBLIC INTEREST DETERMINATION

Upon the publication of the public comments and this Response, the United States will have fully complied with the Tunney Act. After receiving the United States' motion for entry of the proposed Final Judgment, the Court must determine whether it "is in the public interest." 15 U.S.C. § 16(e), as amended. In doing so, the Court must apply a deferential standard and should withhold its approval only under very limited conditions. *See, e.g.*, *Mass. Sch. of Law at Andover, Inc. v. United States*, 118 F.3d 776, 783 (D.C. Cir. 1997). Specifically, the Court should review the proposed Final Judgment in light of the violations charged in the complaint. *Id*. (quoting *United States v. Microsoft Corp.,* 56 F.3d 1448, 1462 (D.C. Cir. 1995), hereinafter "*Microsoft"*).

Comments challenging the validity of the United States' case, or alleging that it should not have been brought, are challenges to the initial exercise of the United States' prosecutorial discretion, which are outside the scope of the Tunney Act. The purpose of the Court's public interest inquiry is not to evaluate the merits of the United States' case, or to conduct a de novo determination of facts and issues, because "[t]he balancing of competing social and political interests affected by a proposed antitrust decree must be left, in the first instance, to the discretion of the Attorney General." *United States v. Western Elec. Co.*, 993 F.2d 1572, 1577 (D.C. Cir. 1993) (citations omitted). Courts consistently have refused to consider "contentions going to the merits of the underlying claims and defenses." *United States v. Bechtel*, 648 F.2d

660, 666 (9th Cir. 1981).

With this standard in mind, the Court should consider the comment and the United States' Response. As this Response makes clear, entry of the proposed Final Judgment is in the public interest.

III. SUMMARY OF PUBLIC COMMENT

The United States received one comment – from Citizens for Voluntary Trade ("CVT"), which describes itself as "a nonprofit, nonpartisan educational organization that applies free market principles and rational ethics to contemporary antitrust issues . . ." CVT Comment at 1. CVT opposes any remedies to ameliorate the competitive harm that the United States alleges would otherwise occur as a result of Connors' acquisition of Bumble Bee, and urges the Court to reject the proposed Final Judgment as inconsistent with the public interest.

It appears that CVT is philosophically opposed to the antitrust laws. CVT Comment at 1. Beyond that, CVT argues that the United States raised spurious arguments to support the Complaint's allegation that: (1) sardine snacks is a relevant product market; (2) the sardine snack market is concentrated; (3) it is likely that the transaction would give Connors sufficient market power to increase the price of canned sardine snacks; and (4) entry into the sardine snack market would not be timely, likely or sufficient to deter the exercise of market power by the combined Connors/Bumble Bee entity. CVT Comment at 2.

All of CVT's arguments are directed toward the United States' decision to file the Complaint, and to accept the Defendants' offer to avoid the need to litigate this matter by divesting Port Clyde and the other Connors' sardine snack brands. None of CVT's arguments

are directed toward relevant Tunney Act issues, *i.e.,* whether, *in light of the violations charged in the complaint,* the terms of the proposed Final Judgment are inconsistent with the public interest. *Microsoft* at 1462 (emphasis added).

IV. The Department's Response To Specific Comments

The Court should ignore CVT's comment. It second guesses the United States' decision to file the Complaint without raising any relevant arguments about the adequacy of the relief in light of the violations charged in the Complaint. Nevertheless, the United States will briefly respond to the issues CVT raises in its comment. Copies of this Response are being mailed to CVT.

Contrary to CVT's assertion, sardine snacks are a relevant product market within the meaning of the antitrust laws. CVT appears to misunderstand the concept of a relevant product market. Certainly consumers could switch to premium or ethnic sardines if the combined Connors/Bumble Bee firm raised the prices of sardine snacks – they could even switch to canned tuna, salmon or sausages. The relevant issue, however, is whether sufficient numbers of sardine snack consumers would switch to other food products to make it unprofitable for a hypothetical monopolist of sardine snacks to raise prices.[2]

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[2] *See,* the Department of Justice/Federal Trade Commission's *Horizontal Merger Guidelines* (1992, revised 1997) (the *"Guidelines"*) at §1.11. The courts have recognized that the *Guidelines* provide a useful analytical tool for predicting the likely competitive consequences of mergers. *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 716 n. 9 (D.C. Cir. 2001) (*"Heinz"*); *FTC v. Cardinal Health, Inc.,* 12 F.Supp. 2d 34, 53 (D.D.C. 1998) (*"Cardinal Health"*). Recent cases in which courts declined to add purported substitutes to the relevant product market include: *Consolidated Gas Co. Of Fla. v. City Gas Co. of Fla.*, 665 F. Supp. 1493, 1504, 1517 (S.D. Fla. 1987) (consumers would not shift to liquid petroleum-based gas in response to a 5% increase in natural gas prices); aff'd 880 F.2d 297 (11th Cir 1989); reh'g granted and opinion vacated (on non-antitrust grounds) 499 U.S. 915 (1991); and *United States v. Archer-Daniels-Midland Co.*,

The United States' delineation of the relevant market is based on the specific facts of this case, which were developed in a thorough investigation that included numerous interviews of executives from retail outlets that buy sardine snacks, as well as other sellers of sardine products. In their business judgment, if the sellers of sardines raised their prices by a small but significant amount, insufficient numbers of sardine snack buyers would switch to premium or ethnic sardines in order to make that price increase unprofitable. Moreover, these executives' business judgment is consistent with the United States' independent quantitative analysis of the substitutability of sardine snacks, premium sardines and ethnic sardines.

Contrary to CVT's second assertion, the sardine snack industry is highly concentrated. Even CVT recognizes that the Herfindahl-Hirschman Index ("HHI") indicates that the Transaction would significantly raise concentration in an already concentrated market.[3] And, as the courts recognize, the HHI test is a useful analytical tool for measuring market concentration. *Heinz,* 246 F.3d at 716 ("Sufficiently large HHI figures establish the FTC's prima facie case that a merger is anti-competitive"); *United States v. Baker Hughes, Inc.* 908 F.2d 981, 982-83 (D.C. Cir. 1990); *Cardinal Health*, 12 F.Supp 2d at 53 ("Accordingly, the courts turn to the Guidelines for assistance and over the years have come to accept the HHI as the most prominent and accurate method of measuring market concentration").

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866 F.2d 242 (8th Cir. 1988) (consumers of high fructose sugar would not switch to natural sugar costing 10% to 30% more).

[3] The Transaction, as originally proposed, would raise the HHI by over 1600 points to 5800 (approximately 4000 points over the 1800 point indication of highly concentrated markets).

Contrary to CVT's third assertion, it is likely that the Transaction would create market power for the combined Connors/Bumble Bee firm. In fact, the combined market share of over 75% is so high that the combined firm would likely acquire unilateral market power, *i.e.,* they could profitably raise prices even if the remaining small sellers of sardine snacks kept prices at the original level in order to increase their market share.[4]

Finally, contrary to CVT's last assertion, it is not likely that entry into the sardine snack market would be timely, likely or sufficient enough to deter the exercise of market power by the combined Connors/Bumble Bee firm. Our investigation determined that brand recognition is an important factor in the marketing and sale of sardine snacks in the United States, and consumers of these products generally restrict their purchases to brands they know and trust. New entry would require years of effort and the investment of substantial sunk costs, including promotion expenditures and slotting allowances (in many grocery chains), to create brand awareness among consumers.

In short, none of CVT's comments are relevant to the issues before this court, because they are challenges to the Complaint itself, rather than challenges to the proposed Final Judgment in light of the violations charged in the Complaint. Moreover, its irrelevant criticism of the United States' decision to file the Complaint misconstrues the law and the facts of this case.

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[4] As noted in the *Guidelines*, "A merger between firms in a market for differentiated products may diminish competition by enabling the merged firm to profit by unilaterally raising the price of one or both products above the premerger level. Some of the sales loss due to the price rise merely will be diverted to the product of the merger partner and, depending on relative margins, capturing such sales loss through the merger may make the price increase profitable even though it would not have been profitable premerger." *Guidelines* at § 2.21.

V. CONCLUSION

The Competitive Impact Statement and this Response to Comments demonstrate that the proposed Final Judgment serves the public interest. Accordingly, after publication of the Response in the Federal Register pursuant to 15 U.S.C. § 16(b), the United States will move this Court to enter the Final Judgment.

Dated this 22nd day of February, 2005.

Respectfully submitted,

"/s/"

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of February, 2005, I have caused a copy of the foregoing Response of the United States to Public Comments on the Proposed Final Judgment and the attached Appendix to be served by first class mail, postage prepaid, and by facsimile on counsel for Defendants in this matter:

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