

settlement through the consent decree process.”<sup>2</sup> Rather, absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should \* \* \* carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances. *United States v. Mid-America Dairymen, Inc.*, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977).

Accordingly, with respect to the adequacy of the relief secured by the decree, a court may not “engage in an unrestricted evaluation of what relief would best serve the public.” *United States v. BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (quoting *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir.), cert. denied, 454 U.S. 1083 (1981)); see also *Microsoft*, 56 F.3d 1448 (D.C. Cir. 1995). Precedent requires that the balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court’s role in protecting the public interest is one of insuring that the government has not breached its duty to the 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.<sup>3</sup>

The proposed Final Judgment, therefore should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice or whether it mandates certainty of free competition

<sup>2</sup> 119 Cong. Rec. 24598 (1973). See *United States v. Gillette Co.*, 406 F. Supp. 713, 715 (D. Mass. 1975). A “public interest” determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed pursuant to the APPA. Although the APPA authorizes the use of additional procedures, 15 U.S.C. § 16(f), those procedures are discretionary. A court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues. See H.R. 93-1463, 93rd Cong. 2d Sess. 8-9, reprinted in (1974) U.S. Code Cong. & Ad. News 6535, 6538.

<sup>3</sup> *United States v. Bechtel Corp.*, 648 F.2d at 666 (citations omitted) (emphasis added); see *United States v. BNS, Inc.*, 858 F.2d at 463; *United States v. National Broadcasting Co.*, 449 F. Supp. 1127, 1143 (C.D. Cal. 1978); *United States v. Gillette Co.*, 406 F. Supp. at 746; see also *United States v. American Cyanamid Co.*, 719 F.2d 558, 565 (2d Cir. 1983), cert. denied. 465 U.S. 1101 (1984).

in the future. Court approval of a final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. “[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is ‘within the reaches of public interest.’”<sup>4</sup>

Moreover, the court’s role under the Tunney Act 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. Since “[t]he 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 might have but did not pursue. *Id.*

#### VIII. Determinative Documents

There are not determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: June 22, 2000.

Respectfully submitted,  
David R. Bickel,  
DC Bar #393409, U.S. Department of Justice,  
Antitrust Division, Litigation II Section,  
1401 H Street, NW, Suite 3000,  
Washington, DC 20530, (202) 307-0924.

#### Certificate of Service

I hereby certify that a copy of the foregoing has been served upon Allied Waste Industries, Inc. and Superior Services, Inc. by placing a copy of this Competitive Impact Statement in the U.S. mail, postage prepaid directed to each of the above-named parties at the addresses given below, this 22nd day of June, 2000.

*Counsel for Defendant Allied Waste Industries, Inc.*

Tom D. Smith,  
*Jones Day Reavis & Pogue, 51 Louisiana Avenue, NW, Washington, DC 20001-2113.*

*Counsel for Defendant Superior Services, Inc.*  
James T. McKeown,

<sup>4</sup> *United States v. American Tel. and Tel. Co.*, 552 F. Supp. 131, 150 (D.D.C. 1982) (citations omitted), quoting *United States v. Gillette Co.*, supra, 406 F. Supp. at 716 aff’d sub nom. *Maryland v. United States*, 460 U.S. 1001 (1983); *United States v. Alcan Aluminum, Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985).

*Foley & Lardner, 777 East Wisconsin Avenue, Milwaukee, WI 53202-5367.*

and

Joseph D. Edmondson, Jr.,  
*Foley & Lardner, Washington Harbour, 3000 K Street, NW, Washington, DC 20007.*

**David R. Bickel,**

*DC Bar #393409, U.S. Department of Justice, Antitrust Division, Suite 3000, 1401 H Street, NW, Washington, DC 20530.*

[FR Doc. 00-18157 Filed 7-18-00; 8:45 am]

BILLING CODE 4410-11-M

## DEPARTMENT OF JUSTICE

### Antitrust Division

#### **United States v. Dairy Farmers of America, 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. Section 16(b) through (h), that a proposed Final Judgment, Stipulation and Competitive Impact Statement have been filed with the United States District Court for the Eastern District of Pennsylvania in *United States of America v. Dairy Farmers of America, et al.*, Civil Action No. 00-1663. On March 31, 2000, the United States filed a Complaint alleging that the proposed acquisition by Dairy Farmers of America, Inc. (“DFA”) of substantially all the assets of SODIAAL North America Corporation (“SODIAAL”), would violate section 7 of the Clayton Act, 15 U.S.C. 18. The proposed Final Judgment, filed on May 18, 2000, allows DFA to complete the proposed acquisition of SODIAAL but prohibits it from entering into any federation with Land O’ Lakes, Inc. with respect to the marketing, promotion, sale, or distribution of branded butter. Copies of the Complaint, proposed Final Judgment and Competitive Impact Statement are available for inspection at the Department of Justice in Washington, DC in Room 200, 325 Seventh Street, NW, and at the Office of the Clerk of the United States District Court for the Eastern District of Pennsylvania.

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 J. Robert Kramer

II, Chief, Litigation II Section, Antitrust Division, Department of Justice, 1401 H St. NW, Suite 3000, Washington, DC 20530 (telephone: (202) 307-0924).

**Constance K. Robinson,**

*Director of Operations and Merger Enforcement.*

**United States District Court, Eastern District of Pennsylvania**

Civil Action No. 00-1663

United States of America, Plaintiff, vs. Dairy Farmers of America, et al., Defendants.

*Stipulation and Order*

It is stipulated by and between the undersigned parties, by their respective attorneys, as follows:

(1) The Court has jurisdiction over the subject matter of this action and over each of the parties hereto, and venue of this action is proper in the Eastern District of Pennsylvania.

(2) The parties stipulate that a Final Judgment in the form hereto attached may be filed and entered by the Court, upon the motion of any party or upon the Court's own motion, at any time after compliance with the requirements of the Antitrust Procedures and Penalties Act (15 U.S.C. 16), and without further notice to any party or other proceedings, provided that the Plaintiff has not withdrawn its consent, which it may do at any time before the entry of the proposed Final Judgment by serving notice thereof on Defendants and by filing that notice with the Court.

(3) Defendants shall (a) act in accordance with, abide by and comply with the provisions of the proposed Final Judgment pending entry of the Final Judgment, (b) from the date of the filing of this Stipulation, comply with all the terms and provisions of the proposed Final Judgment as though the same were in full force and effect as an order of the Court, and (c) continue to comply with those terms and provisions until superseded by an Order of this Court.

(4) This Stipulation shall apply with equal force and effect to any amended proposed Final Judgment agreed upon in writing by the parties and submitted to the Court.

(5) Defendants waive any claim that the Capper-Volstead Act, 7 U.S.C. 291, constitutes a defense to any breach or

violation of this Stipulation and Order or to any violation of any provision of the Final Judgment once entered by the Court.

(6) In the event the Plaintiff withdraws its consent, as provided in Paragraph 2 above, or if the proposed Final Judgment is not entered pursuant to this Stipulation, or the time has expired for all appeals of any court ruling declining entry of the proposed Final Judgment, this Stipulation shall have no binding effect on Plaintiff whatsoever, and the making of this Stipulation shall be without prejudice to Plaintiff in this or any other proceeding. Regardless of whether Plaintiff withdraws its consent, Defendants shall continue to abide by this Stipulation and Order until such time as it is superseded by Order of the Court.

(7) Defendants represent that the conduct ordered in the proposed Final Judgment can and will be performed, and that Defendants will raise no claim of hardship or difficulty as grounds for asking the Court to modify any of the provisions contained therein.

(8) Upon entry of this Stipulation as an Order of the Court, and consistent with this Stipulation, insofar as the Defendants were enjoined by Orders of the Court on March 31, 2000, April 4, 2000, and April 17, 2000, from consummation of their proposed transaction and from bringing their operations under common ownership and control, this Stipulation and Order, and the incorporated terms of the proposed Final Judgment shall supersede any inconsistent provisions of those earlier orders.

(9) Unless otherwise indicated, from the date of filing of this proposed Stipulation and Orders of the Court and until consummation of the transaction, Societe De Diffusion Internationale Agro-Alimentaire and SODIAAL North America Corporation shall:

a. Preserve, maintain, and operate the SODIAAL North America Corporation butter assets as an independent competitor with management, production, sales and operations held entirely separate, distinct and apart from those of Dairy Farmers of America ("DFA");

b. Take all steps reasonably necessary to ensure that the SODIAAL North

America Corporation butter assets will be maintained and operated as an independent, ongoing, economically viable and active competitor in the markets alleged in the Complaint; that the management of SODIAAL North America Corporation will not be influenced by DFA, and that the books, records, competitively sensitive sales, marketing and pricing information, and decision-making associated with the SODIAAL North America Corporation butter assets will be kept separate and apart from the operations of DFA;

c. Use all reasonable efforts to maintain the operations of the SODIAAL North America Corporation butter assets, and maintain at current or previously approved levels, whichever are higher, internal funding, promotional, advertising, sales, technical assistance marketing and merchandising support for the SODIAAL North America Corporation butter assets;

d. Provide and maintain sufficient working capital to maintain the SODIAAL North America Corporation butter assets as an economically viable, ongoing business;

e. Provide and maintain sufficient lines and sources of credit to maintain the SODIAAL North America Corporation butter assets as an economically viable, ongoing business;

f. Take all steps reasonably necessary to ensure that the SODIAAL North America Corporation butter assets are fully maintained in operable condition at no lower than their current rated capacity levels, and to maintain and adhere to normal repair and maintenance schedules of the SODIAAL North America Corporation butter assets; and,

g. Cause the management of the SODIAAL North America Corporation butter assets to maintain, in accordance with sound accounting principles, separate, true, accurate and complete financial ledgers, books and records that report, on a periodic basis, such as the last business day of every month, consistent with past practices, the assets, liabilities, expenses, revenues, income, profit and loss of the SODIAAL North America Corporation butter assets.

Respectfully submitted,

Mark J. Botti

Michael H. Knight

*U.S. Department of Justice, Antitrust Division,  
1401 H Street, N.W., room 400, Washington,  
D.C. 20530, Telephone: (202) 514-9109,  
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637-9384, Counsel for United States of  
America, Inc.*

Frederick A. Tecce, Esq.

*McShea & Tecce Mellon Bank Ctr., 26th floor,  
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599-0800, Counsel for Dairy Farmers of  
America, Inc.*

Facsimile: (202) 307-5802

Burton Z. Alter, Esq.

Christopher Rooney, Esq.

*Carmody & Torrance LLP 18th Floor, 195  
Church Street, New Haven, CT 06509-1950,  
Counsel for Societe De Diffusion,  
Internationale Agro-Alimentaire and  
SODIAAL North America Corporation.*

So ordered:

This 19th day of May, 2000.

**United States District Court Eastern district  
of Pennsylvania**

Civil Action No. 00-1663

United States of America Plaintiff, vs. Dairy  
Farmers of America, et al., Defendants.

*Final Judgment*

Whereas Plaintiff, the United States of America (hereinafter "United States"), having filed its Complaint on March 31, 2000, this Court having issued a temporary restraining order on the same date, and Plaintiff and Defendants, by their respective attorneys, having 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, Defendant Societe de Diffusion Internationale Agro-Alimentaire, while not agreeing that it does business in the United States generally, has agreed to be bound by the provisions of this Final Judgment;

And whereas, Defendants SODIAAL North America Corporation and Dairy Farmers of America, Inc. have agreed to be bound by the provisions of this Final Judgment;

Now, therefore, before the taking of any testimony, and without trial or final adjudication of any issue of fact or law herein, and upon consent of the

parties hereto, it is hereby *ordered, adjudged, and decreed:*

*I. Jurisdiction*

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

*II. Definitions*

As used in this Final Judgment:

A. "Butter LLC" means the limited liability company formed pursuant to Section IV of this Final Judgment and includes each of its successors, divisions, subsidiaries, and affiliates, each other person directly or indirectly, wholly or in part, owned or controlled by its, and each partnership or joint venture to which any of them is a party, and all of their directors, officers, and employees, and each and any successor to its interest in the Keller's, Hotel Bar, or Breakstone's brands.

B. "Dairy Farmers of America, Inc." or "DFA", means Defendant Dairy Farmers of America, Inc., a Kansas corporation with its headquarters in Kansas City, Missouri, and includes each of its successors, divisions, parents, subsidiaries, and majority-owned affiliates, and each other person, directly or indirectly, majority-owned by it, including, but not limited to, Mid-Am Capital LLC and Butter LLC, and each majority-owned partnership or joint venture to which any of them is a party, and all of their directors, officers, managers, agents and employees.

C. "DFA butter assets" means (a) assets currently employed by DFA to produce and process butter at DFA's Winnsboro, Texas facility and (b) DFA's interest in the Breakstone's brand (the transfer of which is subject to the consent of Kraft Foods, Inc.), which shall include, but not be limited to, all customer lists, inventory, contracts, and promotional materials.

D. "Federation" means:

(1) An agency in common, federation, pooling arrangement, merger or other combination or collaboration, including, but not limited to, any agreement on price or output, involving DFA's and/or Land O'Lakes' Branded Butter operations; or

(2) An agreement, directly or indirectly, between DFA and Land O'Lakes with regard to the price, quantity, sale or supply of cream, milk, or butter to Butter LLC pursuant to which DFA, Land O'Lakes, or both would charge Butter LLC more for cream, milk or butter than either one or both charge other customers. However,

nothing in this paragraph shall prohibit price differentials that are reasonably based on differences in purchase volume, freight or shipping costs, federal regulation or product quality.

E. "Land O'Lakes" means Land O'Lakes, Inc., each of its successors, divisions, parents, subsidiaries, and affiliates, each other person directly or indirectly, wholly or in part, owned or controlled by it, and each partnership or joint venture to which any of them is a party, and all of their directors, officers, managers, agents and employees.

F. "Societe de Diffusion Internationale Agro-Alimentaire" means Defendant Societe de Diffusion Internationale Agro-Alimentaire, each of its successors, divisions, parents, subsidiaries, and affiliates, each other person directly or indirectly, wholly or in part, owned or controlled by it, and each partnership or joint venture to which any of them is a party, and all of their directors, officers, managers, agents, and employees.

G. "SODIAAL North America Corporation" means Defendant SODIAAL North America Corporation and includes each of its successors, divisions, parents, subsidiaries, and affiliates, each other person directly or indirectly, wholly or in part, owned or controlled by it, and each partnership or joint venture to which any of them is a party, and all of their directors, officers, managers, agents and employees.

H. "SODIAAL North America Corporation butter assets" means the real property, equipment, vehicles, inventories, accounts receivables, information and records, intellectual property, and other assets used to produce, process or market butter including, but not limited to, the Keller's and Hotel Bar brands, and which assets are to be acquired by DFA pursuant to the Transaction, defined in Paragraph II.I., herein.

I. "Transaction" means the proposed acquisition of certain assets of SODIAAL North America Corporation by DFA, described in the December 15, 1999, letter agreement between DFA and Societe De Diffusion Internationale Agro-Alimentaire, and includes all related agreements among Defendants.

J. "Agricultural Cooperative" means an entity eligible for classification as an "agricultural cooperative" under the terms of the Capper Volstead Act, 7 U.S.C. 291, as "[p]ersons engaged in the production of agricultural products such as farmers, planters, ranchmen, dairymen, nut or fruit growers," acting individually or "together in associations, corporate or otherwise," as such terms are used in the Capper-Volstead Act.

K. "Branded Butter" means butter, as currently defined by the Food and Drug Administration at 7 CFR 58.305(a), sold in a retail grocery channel under a brand owned or licensed by the butter manufacturer.

L. "Majority-owned" means either (a) holding more than 50 percent of the voting interests in a corporation, partnership, or limited liability company, or (b) having the right to designate more than 50 percent of the board of directors or similar body.

M. "Competitively Sensitive Information" means information that is not public and could be used by a competitor or supplier to make production, pricing, or marketing decisions including, but not limited to, information relating to costs, capacity, distribution, marketing, supply, market territories, customer relationships, the terms of dealing with any particular customer (including the identity of individual customers and the quantity sold to any particular customer), and current and future prices, including discounts, slotting allowances, bids, or price lists. "Competitively Sensitive Information" does not include information that must be disclosed to implement a supply arrangement in the ordinary course of business.

### III. Applicability

A. The provisions of this Final Judgment apply to:

(1) Defendant Dairy Farmers of America, Inc., as defined above, so long as DFA or Butter LLC (i) controls, (ii) receives royalty or other licensing payments from, or (iii) has any right or obligation to direct the pricing, production, sales, promotion, or marketing of Branded Butter sold under, the Keller's or Hotel Bar brands;

(2) Defendants Societe de Diffusion Internationale Agro-Alimentaire and SODIAAL North America Corporation, as defined above, so long as either of them (i) controls, (ii) receives royalty or other licensing payments from, or (iii) has any right or obligation to direct the pricing, production, sales, promotion, or marketing of Branded Butter sold under, the Keller's or Hotel Bar brands;

(3) Butter LLC, as defined above, so long as DFA or Butter LLC (i) controls, (ii) receives royalty or other licensing payments from, or (iii) has any right or obligation to direct the pricing, production, sales, promotion, or marketing of Branded Butter sold under, the Keller's or Hotel Bar brands;

(4) Any person under Paragraph III.B. of this Final Judgment; and

(5) All other persons in active concert or participation with anyone named in Paragraphs III.A.(1), III.A.(2), III.A.(3), or

III.A.(4) above, who receive actual notice of this Final Judgment by Personal service or otherwise.

B. DFA and/or Butter LLC shall require as a condition of the sale or other disposition of either the Keller's or Hotel Bar brands (or both) to an Agricultural Cooperative or to an entity in which DFA has a non-majority ownership interest that such person or persons agree to be bound by the provisions of this Final Judgment. However, except as provided in Paragraph III.A.(2) or III.A.(5) above, this Final Judgment shall not apply to transferees of either the Keller's or Hotel Bar brands (or both) who are neither an Agricultural Cooperative nor an entity in which DFA has an ownership interest.

### IV. Formation of Limited Liability Company and Contribution of Assets

A. Within 30 days after the consummation of the Transaction, DFA shall cause to be formed "Butter LLC," a limited liability company to be partially owned by persons other than DFA which will cause Butter LLC to be ineligible for classification as an Agricultural Cooperative. Butter LLC shall, within 15 days of its formation, stipulate in writing to be bound by this Final Judgment and subject to the jurisdiction of this Court and shall serve a copy of its stipulation on Plaintiff and file that stipulation with the Court within those 15 days.

B. Within 30 days after the consummation of the Transaction, DFA and/or Societe de Diffusion Internationale Agro-Alimentaire shall contribute to Butter LLC (a) the DFA butter assets including, subject to the consent of Kraft Foods, Inc., DFA's interest in the Breakstone's brand; and (b) the SODIAAL North America Corporation butter assets. Prior to that contribution, DFA shall take no steps to reduce eliminate, or otherwise divest those assets.

C. Without prior written approval of Plaintiff, Butter LLC shall not sell, transfer, divest, license, or in any way grant, direct or indirect, control over the pricing, production, sales, promotion, or marketing of any or all of Keller's, Hotel Bar, or Breakstone's brands to Land O'Lakes.

D. Without prior written approval of Plaintiff, Butter LLC shall not obtain, receive, or in any way acquire, direct or indirect, control over the pricing, production, sales, promotion, or marketing of any or all Branded Butter from Land O'Lakes.

E. Without 30 days prior notice to Plaintiff, Butter LLC shall not sell, transfer, or divest either the Keller's or

Hotel Bar brands, or both, to any entity in which DFA has an ownership interest. This Final Judgment shall apply to any such entity pursuant to Paragraph III.B.

F. Without 30 days prior notice to Plaintiff, Butter LLC shall not sell, transfer, or divest either the Keller's or Hotel Bar brands, or both, to any entity in which neither DFA nor Land O'Lakes has an ownership interest. Notice provided under this Paragraph shall include the production to the Plaintiff of copies of any and all supply contracts then existing or contemplated between Butter LLC and the transferee.

### V. Injunctive Provisions

A. DFA and Butter LLC are hereby enjoined, individually and/or collectively, from entering into a Federation with Land O'Lakes, provided, however that, except as set forth in Paragraphs IV.C. and IV.D., nothing contained herein shall prohibit either DFA or Butter LLC from entering into a supply arrangement with Land O'Lakes whereby one party processes and packages (but does not market, promote, sell, or distribute) Branded Butter on the other's behalf.

B. DFA and Butter LLC are further enjoined, individually and/or collectively, from disclosing to Land O'Lakes, directly or indirectly, any Competitively Sensitive Information regarding Branded Butter.

### VI. Compliance Program

DFA and Butter LLC shall maintain a judgment compliance program that shall include:

A. Distributing, within 60 days from the entry of this Final Judgment, a copy of the Final Judgment and Competitive Impact Statement to all directors, officers and Branded Butter sales and marketing personnel;

B. Distributing, in a timely manner, a copy of this Final Judgment and Competitive Impact Statement to any person who succeeds to a position described in Paragraph VI.A;

C. Distributing, within 60 days from the entry of this Final Judgment, a copy of this Final Judgment and Competitive Impact Statement to Land O'Lakes;

D. Briefing, annually, in writing or orally, those persons designated in Paragraphs VI.A. and VI.B. on the meaning and requirements of this Final Judgment and the antitrust laws, including penalties for violation thereof;

E. Obtaining from those persons designated in Paragraphs VI.A. and VI.B. annual written certifications that they (1) have read, understand, and agree to abide by this Final Judgment, (2) understand that their noncompliance

with this Final Judgment may result in conviction for criminal contempt of court and imprisonment and/or fine, and (3) have reported violations, if any, of this Final Judgment of which they are aware to counsel for the respective Defendant; and

F. Designating a specific individual for each company who shall be responsible for maintaining for inspection by Plaintiff a record of recipients to whom this Final Judgment and Competitive Impact Statement have been distributed and from whom annual written certifications regarding this Final Judgment have been received.

#### VII. Certification and Notification

A. Within 75 days after entry of this Final Judgment, DFA and Butter LLC each shall certify to Plaintiff that it has made the distribution of the Final Judgment and Competitive Impact Statement as required by Paragraph VI.A.

B. For each year after the entry of this Final Judgment, on or before its anniversary date, DFA and Butter LLC each shall certify to Plaintiff its compliance with any provisions of Sections IV, V, and VI then applicable to it; and

C. Butter LLC shall notify the Plaintiff at least 30 days prior to, as applicable, any proposed (1) dissolution, (2) sale or assignment of claims or assets resulting in a successor person, or (3) change in company structure that may affect compliance with this Final Judgment.

D. All certifications, notices and communications required to be made to Plaintiff pursuant to this Final Judgment shall be in writing and shall be deemed to be delivered when (1) hand delivered; or (2) when deposited in the United States mail, postage prepaid, registered or certified U.S. mail, return receipt requested, and addressed, in each such case, to the address set forth in this Paragraph, or the address as changed pursuant to the requirements of this Paragraph.

United States Department of Justice—Antitrust Division, Director of Operations and Merger Enforcement, 601 D Street, N.W., Room 10103, Washington, DC 20530.

With a copy to:

United States Department of Justice—Antitrust Division, Chief, Litigation II

Section, 1401 H Street, N.W., Washington, DC 20530.

Plaintiff may change the address for notices to be sent to it by written notice delivered to the Defendants by one of the methods described above in this Paragraph.

#### VIII. Compliance Inspection

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

(1) Assess during office hours to inspect and copy, or at Plaintiff's option, demand Defendants or Butter LLC to provide copies of, all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of Defendants or Butter LLC, who may have counsel present, relating to any matters contained in this Final Judgment; and

(2) Subject to the reasonable convenience of Defendants or Butter LLC and without restraint or interference from them to interview, either informally or on the record, directors, officers, employees, and agents of Defendants or Butter LLC, who may have their individual counsel present, regarding any such matters.

B. Upon the written request of the Assistant Attorney General in charge of the Antitrust Division, Defendants and Butter LLC shall submit such written reports, under oath if requested, relating to any of the matters contained in this Final Judgment as may be requested.

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 or Butter LLC to the United States, Defendants or Butter LLC 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)(7) of the Federal Rules of Civil Procedure, and Defendants or Butter LLC mark each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure," then the United States shall give Defendants or Butter LLC ten (10) calendar days notice prior to divulging such material in any legal proceeding (other than a grand jury proceeding).

#### IX. Retention of Jurisdiction

This Court retains jurisdiction for the purpose of enabling any party to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction, implementation, or modification of any of the Provisions of this Final Judgment, for the enforcement of compliance herewith, and for the punishment of any violations hereof.

#### X. Termination of Final Judgment

This Final Judgment will continue in force until terminated pursuant to an order of this Court.

#### XI. Public Interest Determination

Entry of this Final Judgment is in the public interest.

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

#### UNITED STATES DISTRICT COURT EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 00-1663  
UNITED STATES OF AMERICA, Plaintiff, v.  
DAIRY FARMERS OF AMERICA, et al.  
Defendants.

#### Certificate of Service

I, Michael H. Knight, hereby certify that on May 17, 2000, I caused copies of the foregoing proposed Final Judgment and the United States' Explanation of Consent Decree

Procedures to be served by telecopier and by mail upon the following:

Todd Miller, Esq.,

*Baker & Miller, PLLC, Counsel for Dairy Farmers of America, suite 1000, 915 15th Street, NW., Washington, DC 20005-2302.*

Burton Z. Alter, Esq.,

Christopher Rooney, Esq.

*Carmody & Torrance LLP, Counsel for SODIAAL North America Corporation and for Societe de Diffusion Internationale Agro-Alimentaire, 18th Floor, 195 Church Street, New Haven, CT 06509-1950.*

Michael H. Knight,

*Attorney, U.S. Department of Justice, Antitrust Division, 1401 H Street, NW., Room 4000, Washington, DC 20530, Phone: 202-514-9109 Fax: 202-514-9033.*

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF PENNSYLVANIA**

Civil Action No. 00-1663

UNITED STATES OF AMERICA, *Plaintiff*, vs.  
DIARY FARMERS OF AMERICA, *et al.*,  
*Defendants*.

**Competitive Impact Statement**

The United States, pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA"), 16(b), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

**1. Nature and Purpose of the Proceeding**

On March 31, 2000, the United States filed a civil antitrust suit alleging that the proposed acquisition by Dairy Farmers of America, Inc. ("DFA") of SODIAAL North America Corporation ("SODIAAL") would violate Section 7 of the Clayton Act, 15 U.S.C. 18. The Complaint alleges that the combination of DFA and SODIAAL would substantially lessen competition in the markets for the sale of branded whipped and branded stick butter in the Philadelphia and New York City metropolitan areas. The United States District Court for the Eastern District of Pennsylvania entered a Temporary Restraining Order on March 31, 2000, prohibiting the parties from consummating their proposed transaction and setting the government's Motion for Preliminary Injunction for hearing.

According to the Compliant, the proposed acquisition would create a duopoly in the markets for branded stick and branded whipped butter in Philadelphia and New York metropolitan areas. Land O' Lakes is the chief competitor to the SODIAAL brands in these regions. Combined, DFA

(including the SODIAAL brands) and Land O' Lakes would control more than 90 percent of the sales of branded stick and branded whipped butter in these markets.

Moreover, because both DFA and Land O' Lakes are agricultural cooperatives they are entitled to federate their branded butter businesses under the Capper-Volstead Act, 7 U.S.C. 291, which exempts from antitrust scrutiny collective marketing by or on behalf of agricultural production cooperatives. SODIAAL, however, does not have the benefit of the Capper-Volstead exemption. Thus, DFA's acquisition of the SODIAAL assets would bring the important SODIAAL brands under the control of an exempt cooperative. As a result, prices for branded stick and branded whipped butter sold to retailers and consumers in the Philadelphia and New York metropolitan areas likely would increase.

The prayer for relief in the Compliant seeks: (1) A judgment that the proposed acquisition would violate Section 7 of the Clayton Act and (2) temporary and permanent injunctive relief that would prevent DFA from acquiring control of, or otherwise combining its assets with SODIAAL.

On May 18, 2000, the United States filed a proposed Stipulation and Order and proposed Final Judgment that would permit DFA to complete its acquisition of SODIAAL but prohibit it from federating with Land O' Lakes, Inc. with respect to the marketing and sale of branded butter.

The proposed Final Judgment requires DFA to form "Butter LLC," a limited liability company to be majority-owned by DFA and minority-owned by persons other than DFA (*i.e.*, former SODIAAL managers).<sup>1</sup> DFA and/or SODIAAL must contribute to Butter LLC assets necessary to produce and market the brands of butter DFA and SODIAAL have sold in New York and Philadelphia. Butter LLC will not be an agricultural cooperative and thus will not be entitled to Capper-Volstead immunity.

The proposed Final Judgment also enjoins DFA and Butter LLC, individually and collectively, from entering into any federation with Land O' Lakes with respect to the marketing, promotion, sale, or distribution of branded butter. DFA and Butter LLC are further prohibited from disclosing to Land O' Lakes any competitively sensitive information regarding branded butter.

<sup>1</sup> Butter LLC will do business under the name *Keller's Creamery, L.L.C.*

The Stipulation and Order, which was entered by the Court on May 19, 2000, permits the defendants to close their transaction but requires that they act in accordance with, abide by, and comply with, the terms of the proposed Final Judgment pending its entry by the Court. The parties have agreed that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

**II. Description of the Events Giving Rise to the Violations Alleged in the Complaint**

**A. The Defendants and the Proposed Transaction**

DFA is an agricultural cooperative based in Kansas City, Missouri. It owns and operates dairy processing plants throughout the United States, including butter-producing plants in Winnsboro, Texas, and Goshen, Indiana. DFA produces, processes, markets, advertises, and sells Breakstone's branded butter (under license from Kraft Food, Inc.) throughout the eastern United States, including the greater Philadelphia and New York metropolitan areas. The Breakstone's brand was founded in 1882. In 1998, the company recorded net sales of approximately \$7.3 billion.

SODIAAL, headquartered in Harleysville, Pennsylvania, is a privately held subsidiary of a French cooperative, Societe de Diffusion Internationale Agro-Alimentaire. It owns and operates one butter-producing plant, Mayfair Creamery, in Somerset, Pennsylvania. SODIAAL produces, markets, advertises, and sells Keller's and Hotel Bar branded butter in the northeastern United States, including the greater Philadelphia and New York metropolitan areas. The Keller's brand was founded in 1906; the Hotel Bar brand was founded in 1885. In 1998, SODIAAL had net sales of approximately \$238 million.

On or about December 15, 1999, DFA entered into a letter agreement with Societe de Diffusion Internationale Agro-Alimentaire, to purchase, for about \$36 million, substantially all of the assets of SODIAAL. This transaction, which would eliminate the sole remaining, significant, privately held (*i.e.*, non-cooperative) branded butter producer in the Philadelphia and New York markets, precipitated the government's suit.

### B. The Competitive Effects of the Transaction

#### 1. The Relevant Product Markets for Branded Stick and Branded Whipped Butter

Butter is sold to consumers at retail in a variety of forms (e.g., quarter-pound butter sticks, whipped butter, lightly salted butter, and unsalted butter) and package sizes (e.g., one-pound packages comprising four quarter-pound sticks, one-half pound packages comprising two quarter-pound sticks, and eight-ounce tubs of whipped butter). In the greater Philadelphia and New York metropolitan areas combined, approximately 84 percent of butter sold at retail is in stick form. An additional 14 percent is whipped and is typically sold in half-pound (eight-ounce) tubs.

The unique characteristics of butter differentiate it from potential substitutes such as margarine. While spreads such as margarine compete in a limited way with butter, because of butter's unique qualities and characteristics, if the price of butter were increased by a small but significant amount, a sufficient number of purchasers would not switch to other products to make such a price increase unprofitable.

Most butter is sold to consumers through retail outlets, such as grocery stores and mass merchandisers. Consumers purchase two distinct categories of butter—branded butter (such as Keller's, Hotel Bar, Breakstone's, and Land O' Lakes) and private label butter (i.e., butter marketed under a label owned or controlled by the retailer)—and two distinct forms of butter—stick and whipped.<sup>2</sup>

The sale of branded whipped butter through retail outlets is a relevant product market for antitrust purposes. Retail consumers of branded whipped butter consider it to be a distinct product from private label whipped butter, stick butter, and other products. With respect to private label whipped butter, consumers perceive branded whipped butter to possess different quality characteristics. These perceptions have been reinforced by years of promotions and brand advertising. In addition, branded whipped butter has different principal users and is manufactured and packaged differently from stick butter (branded and private label) and other products. Accordingly, a small but significant increase in the price of branded whipped butter will not cause a

sufficient number of consumers of branded whipped butter to substitute other products (including private label whipped butter and stick butter) to dissuade a hypothetical monopolist from such a price increase.

The sale of branded stick butter through retail outlets is also a relevant product market for antitrust purposes. Retail consumers of branded stick butter consider it to be a distinct product from private label stick butter, whipped butter, and other products. As with branded whipped butter, consumers perceive quality differences between branded stick butter and private label stick butter. In addition, branded stick butter has different principal users and is manufactured and packaged differently from whipped butter and other products. A small but significant increase in the price of branded stick butter will not cause a sufficient number of consumers of branded stick butter to substitute other products (including private label stick butter and whipped butter) to dissuade a hypothetical monopolist from such a price increase.

Although branded products do not always comprise relevant markets, there is no principle of law or economics that implies that relevant markets cannot be limited to such products. Whether the market is properly limited to branded products is determined by an application of the general market delineation principles articulated in the Horizontal Merger Guidelines. In Section 1.0, the Guidelines state:

A market is defined as a product or group of products and a geographic area in which a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future producer or seller of those products in that area likely would impose at least a "small but significant and nontransitory" increase in price, assuming the terms of sale of all other products are held constant. A relevant market is a group of products and a geographic area that is no bigger than necessary to satisfy this test.

Stated differently, relevant product markets are delineated by determining the likely buyer response to a "small but significant and nontransitory" price increase (typically in the range of 5–10%) imposed by a hypothetical monopolist. If, in response to a price increase, buyers would switch to products outside the candidate market in sufficient numbers so that the hypothetical monopolist would not find it profit maximizing to increase price at least a "small but significant and nontransitory" amount, the candidate market is drawn too small.

A critical factor in applying the Merger Guidelines' market definition principles is "elasticity of demand,"

which measures the responsiveness of the quantity demanded for a product to changes in its price. Elasticity of demand is generally defined as the ratio of the percentage change in quantity demanded of a product to the percentage change in price that induced the quantity change. A high elasticity of demand for a product or group of products implies that good substitutes exist (and thus that the product or group of products is not likely to comprise a relevant market for antitrust purposes), while a low elasticity implies that substitutes are poor (and thus that the product or products may comprise a relevant market).

When the requisite data are available, the Merger Guidelines' market definition principles are applied empirically. Using data supplied by the parties to determine product margins, the United States can employ standard economic analysis to determine the "critical elasticity of demand" (i.e., the demand elasticity value below which a hypothetical monopolist would impose at least the requisite "small but significant nontransitory price increase"), and compare it to the estimated elasticity of demand for candidate market.<sup>3</sup> An essentially equivalent approach identifies a critical sales loss corresponding to a designated threshold for a significant price increase. The latter approach has been used by several courts. *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045, 1050–51, 1053–54 (8th Cir. 1999); *California v. Sutter Health System*, 84 F. Supp. 2d 1057, 1076–80 (N.D. Cal. 2000), *aff'd mem.* \_\_\_F.3d\_\_\_, 2000 WL531847 (9th Cir. 2000). The results of a critical elasticity analysis performed using data provided by the merging firms and Land O'Lakes during the course of the government's investigation of the proposed merger support the alleged relevant product markets for branded stick and branded whipped butter.

#### 2. The Relevant Geographic Markets of Philadelphia and New York Metropolitan Areas.

Both DFA's and SODIAAL's brands of butter are sold and compete directly in the greater Philadelphia and New York metropolitan areas. DFA sells its Breakstone's brand in both the Philadelphia and New York metropolitan areas, while SODIAAL sells its Keller's brand primarily in the Philadelphia metropolitan area and its Hotel Bar brand primarily in the New

<sup>2</sup> A small percentage of butter sold at retail (approximately 2% in Philadelphia and New York) is purchased in "specialty" forms such as shaped holiday molds.

<sup>3</sup> For a more detailed discussion of the use of critical demand elasticities in delineating antitrust markets, see Gregory J. Werden, *Demand Elasticities in Antitrust Analysis*, 66 Antitrust L.J. 363, 384–96 (1998).

York metropolitan area. Due to local consumer preferences for specific brands, retailers and other consumers would not readily substitute brands of butter that had not been promoted and sold in the greater Philadelphia and New York metropolitan areas, and are likely to pay higher prices as a result of the proposed acquisition.

Differing consumer preferences in different geographic areas cause DFA and SODIAAL to charge different net prices for the same product sold in different geographic areas. The variations in price do not simply reflect differences in costs, but rather reflect local differences in brand strength, competition, and competitive strategy. Price variations often take the form of advertising allowances, local promotions, and couponing campaigns. DFA and SODIAAL develop distinct marketing plans for the Philadelphia metropolitan area and for the New York metropolitan area.

It would not be practical for retailers located in a higher-priced area to purchase branded stick or branded whipped butter from retailers in a lower-priced area. Such arbitrage, also known as "diversion," is not practical for retailers because of the control producers maintain over the distribution and sale of their products. Producers, like the defendants, structure locally targeted price concessions to prevent arbitrage and often require proof of local advertising, coupon limitations, and other promotional restrictions.

Accordingly, for the purposes of antitrust analysis, the greater Philadelphia and New York metropolitan areas each constitute a relevant geographic market.

### 3. The Effects of the Transaction on Competition in the Markets for Branded Stick and Branded Whipped Butter in Philadelphia and New York

According to the Complaint, the proposed acquisition will reduce competition substantially for the sale of branded stick and branded whipped butter in the Philadelphia and New York metropolitan areas.

The Complaint alleges harm resulting from post-acquisition anticompetitive coordination between DFA and Land O' Lakes, Inc. DFA and SODIAAL are two of only three significant suppliers of branded butter in the greater Philadelphia and New York metropolitan areas. The third is Land O' Lakes, a cooperative with approximately \$6 billion in annual sales, and the largest butter manufacturer in the United States. Post-transaction, more than 90 percent of the branded stick and branded whipped butter sold in the

greater Philadelphia and New York metropolitan markets will be supplied by either DFA or Land O' Lakes. Economic analysis predicts that DFA and Land O' Lakes would find anticompetitive coordination to be profit-maximizing, particularly because both firms (unlike SODIAAL) are agricultural cooperatives between whom explicit collusion would be legal and could not be challenged under the antitrust laws. As a result, in the absence of relief, post-transaction prices would likely increase.

The Complaint also alleges that entry into the sale of branded stick and branded whipped butter in the greater Philadelphia and New York metropolitan areas is difficult. Such entry requires substantial, sunk promotional, and advertising expenditures. Establishing a branded butter product takes years of effort and would not be timely, likely, or sufficient to deter any exercise of market power by branded butter suppliers in the relevant markets following the acquisition by DFA of SODIAAL.

In order to prevent the consummation of the proposed acquisition, the Complaint had to be prepared on the basis of a preliminary analysis. That analysis suggested that the acquisition likely would also give rise to a unilateral anticompetitive effect resulting directly from the loss of competition between DFA and SODIAAL. Consequently, the Complaint also alleged this sort of anticompetitive effect. However, extensive post-Complaint analysis of the competitive interaction between DFA's Breakstone's brand and SODIAAL's Keller's and Hotel Bar brands has indicated that the proposed acquisition would not likely give rise to significant unilateral anticompetitive effects.

### III. Explanation of the Proposed Final Judgment

The relief described in the proposed Final Judgment is designed to eliminate the anticompetitive effects of the acquisition in the markets for the sale of branded butter in the Philadelphia and New York metropolitan areas.

#### A. The Formation of Butter LLC as a Non-Cooperative Entity

The proposed Final Judgment requires DFA to form Butter LLC and ensures the transfer to Butter LLC of all assets necessary to manufacture and market the Breakstone's, Keller's, and Hotel Bar brands. Butter LLC will be owned in part by persons other than DFA (*i.e.*, members of the premerger SODIAAL management team) and thus, unlike DFA, it will not qualify as an

agricultural cooperative entitled to engage in collective marketing under the Capper-Volstead Act. In addition, both DFA and Butter LLC would be bound by the injunctive provisions of the Final Judgment described below.

Neither DFA nor Butter LLC may dispose of either the Keller's or Hotel Bar brands (or both) to an "Agricultural Cooperative" (as defined in the proposed Final Judgment) unless the transferee agrees to be bound by the provisions of the Final Judgment. Similarly, disposition of these brands to any entity in which DFA holds a minority ownership interest, but which is not included within the definition of DFA in the Final Judgment, requires that the transferee agree to be bound by the Final Judgment. Disposition of the brands to any other entity (except Land O' Lakes) cannot be made without 30 days prior notice to the Department of Justice. Such notice shall include the provision of all supply contracts then existing or contemplated between the transferor and transferee. Finally, any transfer of control over the brands to Land O' Lakes would require the Department's prior written approval, as would receipt by Butter LLC (or DFA) of control over any Land O' Lakes brand.

#### B. The Injunctive Provisions

The proposed Final Judgment also enjoins DFA and Butter LLC from entering into any Federation with Land O'Lakes with respect to branded butter. "Federation" is defined in the proposed Final Judgment as:

- (1) An agency in common, federation, pooling arrangement, merger or other combination or collaboration, including, but not limited to, any agreement on price or output, involving DFA's and/or Land O'Lakes' Branded Butter operations; or
- (2) An agreement, directly or indirectly, between DFA and Land O'Lakes with regard to the price, quantity, sale or supply of cream, milk, or butter to Butter LLC pursuant to which DFA, Land O'Lakes, or both would charge Butter LLC more for cream, milk or butter than either one or both charge other customers. However, nothing in this paragraph shall prohibit price differentials that are reasonably based on differences in purchase volume, freight or shipping costs, federal regulation or product quality.

For purposes of illustration, the defendants have acknowledged that a federation between DFA and Land O'Lakes "involving (their ) Branded Butter operations," prohibited by paragraph (1) above, would include an agreement on non-Branded Butter that has the purpose and effect of tying up substantial capacity otherwise available (and used) to produce Branded Butter. Similarly, an "indirect" agreement between DFA and Land O'Lakes of the



type prohibited by paragraph (2) above would exist if a non-majority-owned affiliate of DFA forms an agreement with Land O'Lakes with regard to the price, quantity, sale, or supply of cream, milk, or butter to Butter LLC and the non-majority-owned affiliate forms a related agreement with DFA with regard to the price, quantity, sale or supply of cream, milk, or butter to Butter LLC.

DFA and Butter LLC are also enjoined from disclosing to Land O'Lakes, directly or indirectly, competitively sensitive information regarding branded butter. "Competitively Sensitive Information" is defined as:

information that is not public and could be used by a competitor or supplier to make production, pricing, or marketing decisions including, but not limited to, information relating to costs, capacity, distribution, marketing, supply, market territories, customer relationships, the terms of dealing with any particular customer (including the identity of individual customers and the quantity sold to any particular customer), and current and future prices, including discounts, slotting allowances, bids, or price lists. "Competitively Sensitive Information" does not include information that must be disclosed to implement a supply arrangement in the ordinary course of business.

### C. Compliance Provisions

DFA and Butter LLC are required under the proposed Final Judgment to distribute copies of the proposed Final Judgment and this Competitive Impact Statement to: (1) All current and future directors, officers and Branded Butter sales and marketing personnel; and (2) Land O'Lakes, Inc. In addition, DFA and Butter LLC must brief, annually, those directors, officers, and employees receiving copies of the Final Judgment and Competitive Impact Statement, on the meaning and requirements of the Final Judgment and the antitrust laws, including penalties for violation thereof. DFA and Butter LLC must also obtain written certifications from these individuals that they: (1) Have read, understand, and agree to abide by the Final Judgment; (2) understand that noncompliance with the Final Judgment may result in a conviction for criminal contempt of court; and (3) have reported violations, if any, of the Final Judgment of which they are aware to counsel for the respective company. Finally, both DFA and Butter LLC must designate a specific individual for each company to be responsible for ensuring that the compliance provisions are satisfied.

### 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 defendant.

### V. Procedures Available for Modification of the Proposed Final Judgment

The parties 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 of the decree upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) 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 (60) days of the date of publication of this Competitive Impact Statement in the **Federal Register**. The United States will evaluate and respond to the comments. All comments will be given due consideration by the Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to entry. 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: J. Robert Kramer II, Chief, Litigation II Section, Antitrust Division, United States Department of Justice, 1401 H Street, NW, Suited 3000, Washington, D.C. 20530.

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

### VI. 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 DFA, SODIAAL and Societe de Diffusion International Agro-Alimentaire. The United States could have continued the litigation to seek

preliminary and permanent injunctions against DFA's acquisition of SODIAAL. The United States is satisfied, however, that the requirements and prohibitions contained in the proposed Final Judgment will establish, preserved and ensure viable competitors in each of the relevant markets identified by the government. To this end, the United States expects that the proposed relief, once implemented by the Court, will likely prevent DFA's acquisition of SODIAAL from having significant adverse competitive effects.

### VII. Standard or Review Under the APPA for Proposed Final Judgment

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

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

(2) The impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. 16(e). As the Court of Appeals for the District of Columbia Circuit has held, the APPA permits a court to consider, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. See *United States v. Microsoft*, 56, F.3d 1448 (D.C. Cir. 1995).

In conducting this inquiry, "the 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"<sup>4</sup> Rather,

<sup>4</sup> 119 Cong. Rec. 24598 (1973). See *United States v. Gillette Co.*, 406 F. Supp. 713, 715 (D.C. Mass. 1975). A "public interest" determined can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed pursuant to the APPA. Although the APPA authorizes the use of additional procedures. 15 U.S.C. 16(f), those procedures are discretionary. A court need not invoke any of them unless it believes

absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should \* \* \* carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.

*United States v. Mid-America Dairymen, Inc.*, 1977-1 CCH Trade Cas. ¶ 61,508, at 71,980 (W.D. Mo. 1977).

Accordingly, with respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States v. BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (quoting *United States v. Bethel Corp.*, 648 F.2d 660, 666 (9th Cir.), cert denied, 454 U.S. 1083 (1981)); see also *Microsoft*, 56 F.3d 1448 (D.C. Cir. 1995). Precedent requires that:

the balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the 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.<sup>5</sup>

The proposed Final Judgment, therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice or whether it mandates certainty of free competition in the future. Court approval of a final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is within the range of public interest."<sup>6</sup>

that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues. See H.R. 93-1463, 93rd Cong. 2d Sess. 8-9 reprinted in (1974) U.S. Code Cong. & Ad. News 6535, 6538.

<sup>5</sup> *United States v. Bechtel*, 648 F.2d at 666 (citations omitted) (emphasis added); see *United States v. BNS, Inc.* 858 F.2d at 463; *United States v. National Broadcasting Co.*, 449 F. Supp. 1127, 1143 (C.D. Cal. 1978); *United States v. Gillette Co.*, 406 F. Supp. at 716. See also *United v. American Cyanamid Co.*, 719 F.2d at 565.

<sup>6</sup> *United States v. American Tel. and Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (quoting *United States v. Gillette Co.*, supra, 406 F. Supp. at 716) (citations omitted), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); *United States v. Alcan Aluminum, Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985).

### 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: June 29, 2000.

Respectfully submitted,

Mark J. Botti

Michael H. Knight

U.S. Department of Justice, Antitrust Division, Litigation II Section, 1401 H Street, NW, Suite 3000, Washington, DC 20530, (202) 307-0827.

### Certificate of Service

I hereby certify under penalty of perjury that on this 29th day of June, 2000, I caused a true and correct copy of the foregoing Competitive Impact Statement to be served by telecopier and by mail to:

W. Todd Miller, Esq.

*Baker & Miller, PLLC, Suite 1000, 915 15th Street, N.W., Washington, D.C. 20005-2302, Counsel for Dairy Farmers of America, Inc.*

Burton Z. Alter, Esq.

Christopher Rooney, Esq.  
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Michael H. Knight

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## DEPARTMENT OF JUSTICE

### Antitrust Division

#### **United States v. JDS Uniphase Corporation and E-TEK Dynamics, Inc. Civil Action No. C 00-2227 TEH (N.D. Cal); Proposal 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 Northern District of California in *United States v. JDS Uniphase Corp. and E-TEK Dynamics, Inc.*, Civil Action No. C00-2227 TEH. On June 22, 2000, the United States filed a Complaint which alleged that JDS Uniphase Corp.'s proposed merger with E-TEK Dynamics, Inc. would violate section 7 of the Clayton Act, 15 U.S.C. 18, by substantially lessening competition in the production and sale of dense wavelength division multiplexer and demultiplexer modules

of 16 or fewer channels ("DWDMs"). The proposed Final Judgment, filed the same time as the Complaint, requires the newly merged firm to divest certain contractual rights in supply agreements the merged entity holds with several thin film filter suppliers. Copies of the Complaint, proposed Final Judgment and Competitive Impact Statement are available for inspection in Room 215 of the Antitrust Division, United States Department of Justice, 325 Seventh Street, NW., Washington, DC 20530 (telephone: (202) 514-2481) and at the Office of the Clerk of the United States District Court for the Northern District of California, 450 Golden Gate Avenue, San Francisco, California 94102.

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 Christopher S. Crook, Chief, San Francisco Field Office, Antitrust Division, United States Department of Justice, 450 Golden Gate Ave., Box 36046, Room 10-0101, San Francisco, California 94102 (telephone: (415) 436-6660).

#### **Constance K. Robinson,**

*Director of Operations & Merger Enforcement, Antitrust Division.*

### Stipulation and Order

It is hereby STIPULATED by and between the undersigned parties, by their respective attorneys, as follows:

1. The Court has jurisdiction over the subject matter of this action and over each of the parties hereto, and venue of this action is proper in the United States District Court for the Northern District of California.

2. The parties stipulate that a Final Judgment in the form hereto attached may be filed and entered by the Court, upon the motion of any party or upon the Court's own motion, at any time after compliance with the requirements of the Antitrust Procedures and Penalties Act (15 U.S.C. § 16), and without further notice to any party or other proceedings, provided that the plaintiff has not withdrawn its consent, which it may do at any time before the entry of the proposed Final Judgment by serving notice thereof on defendants and by filing that notice with the Court.

3. Defendants shall abide by and comply with the provisions of the proposed Final Judgment pending entry of the Final Judgment by the Court, or until expiration of the time for all appeals of any Court ruling declining entry of the proposed Final Judgment, and shall, from the date of the entry of this Stipulation and Order, comply with all the terms and provisions of the