DEPARTMENT OF JUSTICE

Antitrust Division

United States v. The Earthgrains Company, Specialty Foods Corporation, and Metz Holdings, Inc.; Proposed Final Judgment and Competitive Impact Statement

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), that a proposed Final Judgment, Hold Separate Stipulation and Order, and Competitive Impact Statement have been filed with the United States District Court for the Northern District of Illinois, Chicago, IL, in *United States* v. *The Earthgrains Company, Specialty Foods Corporation, and Metz Holdings, Inc.,* Civ. No. 00 CV 1687 (J. Bucklo).

On March 20, 2000, the United States filed a Complaint, which sought to enjoin Earthgrains from acquiring Metz or from entering into or carrying any agreement or understanding the effect of which would be to combine the businesses or assets of Earthgrains and Metz. The Complaint alleged that Earthgrains's acquisition of Metz would lessen competition substantially in the sale of white pan bread though retail outlets in violation of section 7 of the Clayton Act, 15 U.S.C. 18, in many markets in the Midwest, including Kansas City, MO; Omaha, NE; Des Moines, IA; and many smaller communities in Illinois, Iowa, Kansas, Missouri, and Nebraska.

The proposed Final Judgment, also filed on March 20, 2000, requires Earthgrains and Metz to divest two popular brands of white pan bread, Colonial and Taystee, and such other assets (*e.g.,* Earthgrains's Des Moines bakery, bread routes, customer lists, thrift stores, depots, warehouses, and trucks) as the government determines is necessary in order to create an effective and viable competitor in the sale of white pan bread in the geographic areas in which the acquisition would adversely affect competition. A Hold Separate Stipulation and Order requires the defendants to maintain, prior to divestiture, the competitive independence of many of the operations that must be sold under the Judgment.

Public comment is invited within the statutory 60-day comment period. 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, U.S. Department of Justice, 1401 H Street, NW, Suite 3000, Washington, D.C. 20530 [telephone: (202) 307–0924].

Constance K. Robinson,

Director of Operations & Merger Enforcement.

[Civil No: 00C 1687]

Judge Bucklo,

Magistrate Judge Nolan.

Hold Separate Stipulation and Order

It is hereby stipulated and agreed by and between the undersigned parties, subject to approval and entry by the Court, that:

I. Definitions

As used in this Hold Separate Stipulation and Order:

A. ''Earthgrains'' means defendant The Earthgrains Company, a Delaware corporation with its headquarters in St. Louis, Missouri, and includes its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

B. ''Specialty Foods'' means defendant Specialty Foods Corporation, a Delaware corporation with its headquarters in Deerfield, Illinois, and includes its successors and assigns, and its subsidiaries (including defendant Metz Holdings, Inc. or ''Metz''), divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

C. ''Acquirer'' means the entity or entities to whom defendants divest the Relevant Baking Assets.

D. ''Relevant Banking Assets'' means:

1. A perpetual, royalty-free, freely assignable and transferable, and exclusive license to make, have made, use or sell white pan bread in the Relevant Territory under each of the Relevant Labels; and

2. Each of the Additional Baking Assets.

E. ''Additional Baking Assets'' means:

1. Earthgrains' Des Moines, IA bakery;

2. A perpetual, royalty-free, freely assignable and transferable, and exclusive license to make, have made, use or sell under each of the Relevant Labels any bread, bun or roll other than white pan bread in the Relevant Territory;

3. All trucks and other vehicles, depots and warehouses, and thrift stores used by defendants in the sale and distribution of bread, buns and rolls under each of the Relevant Labels in the Relevant Territory; and

4. All route books, customer lists, contracts and accounts used by defendants in the sale and distribution of bread, buns and rolls under each of the Relevant Labels in the Relevant Territory.

F. ''Label'' means all legal rights associated with a brand's trademarks, trade names, copyrights, service names, service marks, intellectual property, designs, and trade dress; the brand's trade secrets; the brand's technical information and production know-how, including, but not limited to, recipes and formulas used to produce bread currently sold under the brand, and any improvements to, or line extensions thereof; and packaging, marketing and distribution know-how and documentation, such as customer lists and route maps, associated with the brand.

G. ''Relevant Labels'' means:

(1) Earthgrain's Colonial label; and

(2) Metz's Taystee label (a license to which label may be divested to an Acquirer without prior approval of the licensor, Interstate Brands West Corporation, see the letter hereto attached as an appendix to the proposed Final Judgment, Exhibit A).

H. ''Relevant Territory'' means:

(1) Every county in the state of Iowa;

(2) The following counties in the state of Nebraska: Burt, Butler, Cass, Colfax, Cuming, Dodge, Douglas, Gage, Jefferson, Johnson, Lancaster, Nemaha, Otoe, Pawnee, Platte, Richardson, Saline, Sarpy, Saunders, Stanton, Seward, and Washington;

(3) The following counties in the state of Kansas: Atchison, Brown, Clay, Dickinson, Doniphan, Douglas, Franklin, Geary, Jackson, Jefferson, Johnson, Leavenworth, Lyon, Marshall, Miami, Morris, Nemaha, Osage, Pottawatomie, Riley, Shawnee, Washington, Waubaunsee, and Wyandotte;

(4) The following counties in the state of Illinois: Carroll, Henry, Mercer, Rock Island, and Whiteside; and

(5) The following counties in the state of Missouri: Andrew, Atchison, Buchanan, Caldwell, Carroll, Cass, Clay, Clinton, Daviess, De Kalb, Gentry, Grundy, Harrison, Holt, Jackson, Lafayette, Livingston, Mercer, Nodaway, Pettis, Platte, Ray, Saline, and Worth.

I. ''Earthgrain's Des Moines, IA bakery'' means the bakery located at 1225–1303 2nd Avenue, Des Moines, IA 50314, and all of Earthgrain's rights, titles and interests in any tangible assets (*e.g.*, land, buildings, other real property and improvements, fixtures, machinery, tooling, fixed assets, personal property, inventory, office furniture, material, supplies and equipment) relating thereto, including all fee and leasehold and renewal rights in such assets or any options to purchase any adjoining property.

J. ''White Pan Bread'' means white bread baked in a pan, but shall not include hamburger and hot dog buns, or variety breads such as French bread and Italian bread.

II. Objectives

The Final Judgment filed in this case is meant to ensure defendants' prompt divestitures of the Relevant Baking Assets for the purpose of establishing one or more viable competitors in the production and sale of white pan bread in the Relevant Territory in order to remedy the effects that the United States alleges would otherwise result from Earthgrain's acquisition of Metz. This Hold Separate Stipulation and Order ensures, prior to such divestitures, that the Relevant Baking Assets remain independent, economically viable, and ongoing business concerns that will remain independent and uninfluenced by Earthgrains, and that competition is maintained during the pendency of the ordered divestitures.

III. Jurisdiction and Venue

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 for the Northern District of Illinois, Eastern Division.

IV. Compliance with and entry of Final Judgment

A. The parties stipulate that a Final Judgment in the form attached hereto as Exhibit A may be filed with 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 United States 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.

B. Defendants shall abide by and comply with the provisions of the proposed Final Judgment, pending the Judgment's entry by the Court, or until expiration of time from all appeals of any Court ruling declining entry of the proposed Final Judgment, and shall, from the date of the signing of this Stipulation by the parties, 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.

C. Defendants shall not consummate the transaction sought to be enjoined by the Complaint herein before the Court has signed this Hold Separate Stipulation and Order.

D. 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.

E. In the event (1) the United States has withdrawn its consent, as provided in Section IV(A) above, or (2) the proposed Final Judgment is not entered pursuant to this Stipulation, the time has expired for all appeals of any Court ruling declining entry of the proposed Final Judgment, and the Court has not otherwise ordered continued compliance with the terms and provisions of the proposed Final Judgment, then the parties are released from all further obligations under this Stipulation, and the making of this Stipulation shall be without prejudice to any party in this or any other proceeding.

F. Defendants represents that the divestitures ordered in the proposed Final Judgment can and will be made, and that defendants will later raise no claim of mistake, hardship or difficulty of compliance as grounds for asking the Court to modify any of the provisions contained therein.

V. Hold Separate Provisions

Until the divestitures required by the Final Judgment have been accomplished:

A. Defendants shall preserve, maintain, and continue to operate the Relevant Baking Assets as independent competitive businesses, with management, sales and operations of such assets held entirely separate, distinct and apart from those of Earthgrains's other operations. Earthgrains shall not coordinate its production, marketing, or terms of sale of any products with those produced by or sold under any of the Relevant Baking Assets. Within twenty (20) days after the entry of the Hold Separate Stipulation and Order, defendants will inform the United States of the steps defendants have taken to comply with this Hold Separate Stipulation and Order.

B. Earthgrains shall take all steps necessary to ensure that (1) the Relevant Baking Assets will be maintained and operated as independent, ongoing, economically viable and active competitors in the production and sale of bread; (2) management of the Relevant Baking Assets will not be influenced by Earthgrains (or Metz); and (3) the books, records, competitively sensitive sales, marketing and pricing information, and decision-making concerning production, distribution or sales of products by or under any of the Relevant Baking Assets will be kept separate and apart from Earthgrains's other operations. Earthgrains influence over the production and sale of products utilizing the Relevant Baking Assets shall be limited to that necessary to carry out its obligations under this Hold Separate Stipulation and Order and the proposed Final Judgment. Earthgrains may, however, receive historical aggregate financial information (excluding capacity utilization or pricing information relating to the Relevant Baking Assets to the extent necessary to allow Earthgrains to prepare financial reports, tax returns, and other legally required reports).

C. Defendants shall use all reasonable efforts to maintain and increase the sales and revenues of the products produced by or sold under Relevant Baking Assets, and shall maintain at 1999 or previously approved levels for 2000, whichever are higher, all promotional, advertising, sales, technical assistance, marketing and merchandising support for the Relevant Baking Assets and otherwise maintain the Relevant Baking Assets as active competitors in the Relevant Territory.

D. Earthgrains shall take all steps necessary to ensure that its Des Moines, IA bakery will be maintained and operated as an independent, ongoing, economically viable business concern.

E. Earthgrains shall provide sufficient working capital and lines and sources of credit to continue to maintain the Relevant Baking Assets as economically viable and competitive, ongoing businesses, consistent with the requirements of Section V (A) and (B).

F. Earthgrains shall take all steps necessary to ensure that its Des Moines, IA bakery is fully maintained in operable condition at no less than its current capacity and sales, and shall maintain and adhere to normal repair and maintenance schedules for the Relevant Baking Assets.

G. Defendants shall not, except as part of a divestiture approved by the United States in accordance with the terms of the proposed Final Judgment, remove, sell, lease, assign, transfer, pledge or otherwise dispose of any of the Relevant Baking Assets.

H. Defendants shall maintain, in accordance with sound accounting principles, separate, 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 and income of products produced, distributed or sold utilizing the Relevant Baking Assets.

I. Except in the ordinary course of business or as otherwise consistent with this Hold Separate Stipulation and Order, defendants shall not hire, transfer, terminate, or otherwise alter the salary or employment agreements for any Earthgrains, Metz, or Specialty Foods employee who, on the date of defendants' signing of this Hold Separate Stipulation and Order, either: (1) Works in Earthgrains's Des Moines, IA bakery or in the production, distribution or sale of bread, buns or rolls under a Relevant Baking assets or (2) is a member of management referenced in Section V(J) of this Hold Separate Stipulation and Order.

J. Until such time as the Relevant Baking Assets are divested pursuant to the terms of the Final Judgment, the Relevant Baking Assets shall be managed by Mr. Paul Johnson, Vice President for Earthgrains's Iowa/Nebraska Zone. Mr. Johnson shall have complete managerial responsibility for the Relevant Baking Assets, subject to the provisions of this Order and the proposed Final Judgment. In the event that Mr. Johnson is unable to perform his duties, defendants shall appoint, subject to the approval of the United States, a replacement within ten (10) working days. Should defendants fail to appoint a replacement acceptable to the United States within ten (10) working days, the United States shall appoint a replacement.

K. Defendants shall take no action that would interfere with the ability of any trustee appointed pursuant to the Final Judgment to complete the divestitures pursuant to the Final Judgment to a Acquirer or Acquirers acceptable to the United States.

L. This Hold Separate Stipulation and Order shall remain in effect until consummation of the divestitures required by the proposed Final Judgment or until further order of the Court.

Dated: March 17, 2000.

For Plaintiff, United States of America:

Anthony E. Harris,

Esquire, IL Bar #1133713, U.S. Department of Justice, Antitrust Division, Litigation II Section, 1401 H Street, NW, Suite 3000, Washington, DC 20005, (202) 307–6583.

Respectfully submitted,

For Defendant, The Earthgrains Company:

Roxanne E. Henry;

Esquire, DC Bar #351569, Howrey Simon Arnold & White, 1299 Pennsylvania Avenue, NW, Washington, DC 20005, (202) 383–6503.

For Defendants, Specialty Foods Inc. and Metz Holdings, Inc:

Roxanne E. Henry;

Esquire, DC Bar #351569, Howrey Simon Arnold & White, 1299 Pennsylvania Avenue, NW, Washington, DC 20005, (202) 383–6503.

Order

It is so ordered by the Court, this 20th day of March 2000.

United States District Judge

Final Judgment

Whereas, plaintiff, the United States of America, having filed its Compliant in this action on March 20, 2000 and plaintiff and defendants, The Earthgrains Company, Specialty Foods Corporation, and Metz Holdings, Inc., by their respective attorneys, having consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein, and without this Final Judgment constituting any evidence against or an admission by any party with respect to any issue of law or fact herein;

And whereas, defendants have agreed to be bound by the provisions of this Final Judgment pending its approval by the Court;

And whereas, the essence of this Final Judgment is the prompt and certain divestiture by defendants of the Relevant Baking Assets and, if necessary, the Additional Relevant Baking Assets to assure that competition is not substantially lessened;

And whereas, the United States requires defendants to make certain divestitures for the purpose of remedying the loss of competition alleged in the Compliant;

Exhibit A

And whereas, defendants have represented to the United States that the divestitures ordered herein can and will be made and that they will later raise no claims of hardship, mistake or difficulty as grounds for asking the Court to modify any of the injunctive provisions contained below;

Now, therefore, before the taking of any testimony, and without trial or adjudication of any issue of fact or law herein, and upon consent of the parties hereto, it is hereby ordered, adjudged, and decreed as follows:

I. Jurisdiction

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

II. Definition

As used in this Final Judgment:

A. ''Earthgrains'' means defendant The Earthgrains Company, a Delaware corporation with its headquarters in St. Louis, Missouri, and includes its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

B. ''Specialty Foods'' means defendant Specialty Foods Corporation, a Delaware corporation with its headquarters in Deerfield, Illinois, and includes its successors and assigns, and its subsidiaries (including defendant Metz Holdings, Inc. or ''Metz''), divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

C. ''Acquirer''means the entity or entities to whom defendants divest the Relevant Baking Assets.

D. ''Relevant Baking Assets'' means:

1. A perpetual, royalty-free, freely assignable and transferrable, and exclusive license to make, have made, use or sell white pan bread in the Relevant Territory under each of the Relevant Labels; and

2. Such Additional Baking assets as the United States, in its sole discretion, determines may be reasonably necessary for an Acquirer or Acquirers to complete effectively and viably in the sale of white pan bread under each of the Relevant Labels in the Relevant Territory.

E. ''Additional Baking Assets'' means:

1. Earthgrains's Des Moines, IA bakery;

2. A perpetual, royalty-free, freely assignable and transferrable, and exclusive license to make, have made, use or sell under each of the Relevant Labels any bread, buns or rolls other than white pan bread in the Relevant Territory.

3. All trucks and other vehicles, depots and warehouses, and thrift stores used by defendants in the sale and distribution of bread, buns or rolls under each of the Relevant Labels in the Relevant Territory; and

4. All route books, customer lists, contracts and accounts used in defendants' distribution and sale of bread, buns or rolls under each of the Relevant Labels in the Relevant Territory.

F. ''Label'' means all legal rights associated with a brand's trademarks, trade names, service names, service marks, intellectual property, copyrights, designs, and trade dress; the brand's trade secrets; the brand's technical information and production know-how, including, but not limited to, recipes and formulas used to produce bread currently sold under the brand, and any improvements to, or line extensions thereof; and packaging, marketing and distribution know-how and documentation, such as customer lists and route maps, associated with the brand.

G. ''Relevant Labels'' means:

(1) Earthgrains's Colonial label; and

(2) Metz's Taystee label (a license to which label may be divested to an Acquirer without prior approval of the licensor, Interstate Brands West Corporation, *see* the letter attached hereto as Appendix A).

H. ''Relevant Territory'' means:

(1) Every county in the state of Iowa;

(2) The following counties in the state of Nebraska: Burt, Butler, Cass, Colfax, Cuming, Dodge, Douglas, Gage, Jefferson, Johnson, Lancaster, Nemaha, Otoe, Pawnee, Platte, Richardson, Saline, Sarpy, Saunders, Stanton, Seward, and Washington;

(3) The following counties in the state of Kansas: Atchison, Brown, Clay, Dickinson, Doniphan, Douglas, Franklin, Geary, Jackson, Jefferson, Johnson, Leavenworth, Lyon, Marshall, Miami, Morris, Nemaha, Osage, Pottawatomie, Riley, Shawnee, Washington, Waubaunsee, and Wyandotte;

(4) The following counties in the state of Illinois: Carroll, Henry, Mercer, Rock Island, and Whiteside; and

(5) The following counties in the state of Missouri: Andrew, Atchison, Buchanan, Caldwell, Carroll, Cass, Clay, Clinton, Daviess, De Kalb, Gentry, Grundy, Harrison, Holt, Jackson, Johnson, Lafayette, Livingston, Mercer, Nodaway, Pettis, Platte, Ray, Saline, and Worth.

I. ''Earthgrains's Des Moines, IA bakery'' means the bakery located at 1225–1303 2nd Avenue, Des Moines, IA 50314, and all of Earthgrains's rights, titles and interests in any tangible assets (*e.g.,* land, buildings, other real property and improvements, fixtures, machinery, tooling, fixed assets, personal property, inventory, office furniture, material, supplies and equipment) relating thereto, including all fee and leasehold and renewal rights in such assets or any options to purchase any adjoining property.

J. ''White Pan Bread'' means white bread baked in a pan but shall not include hamburger and hot dog buns, or variety breads such as French bread and Italian bread.

III. Applicability

A. The provisions of this Final Judgment apply to defendants, their successors and assigns, subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees, and all other persons in active concert or participation with any of them who shall have received actual notice of this Final Judgment by personal service or otherwise.

B. Defendants shall require, as a condition of the sale or other disposition of all or substantially all of their assets, or of a lesser business unit that includes the Relevant Baking Assets, that the acquiring party or parties agree to be bound by the provisions of this Final Judgment.

IV. Divestitures

A. Defendants are hereby ordered and directed, in accordance with the terms of this Final Judgment, within ninety (90) calendar days after the filing of the Complaint in this matter, or five (5) days after notice of the entry of this Final Judgment by the Court, whichever is later, to divest all Relevant Baking Assets as viable, ongoing businesses to a Acquirer or Acquirers acceptable to the United States, in its sole discretion.

B. Defendants shall use their best efforts to accomplish the divestitures ordered by this Final Judgment as expeditiously and timely as possible. The United States, in its sole discretion, may extend the time period for any divestiture two additional periods of time, not to exceed thirty (30) calendar days each.

C. In accomplishing the divestitures ordered by this Final Judgment, defendants promptly shall make known, by usual and customary means, the availability of the Relevant Baking Assets. Defendants shall inform any person making an inquiry regarding a possible purchase of the Relevant Banking Assets that the sale is being made pursuant to this Final Judgment and provide such person with a copy of this Final Judgment. Defendants shall also offer a furnish to any prospective Acquirer, subject to customary confidentiality assurances, all information and documents relating to the Relevant Baking Assets customarily provided in a due diligence process except such information or documents subject to attorney-client privilege or attorney work-product privilege. Defendants shall make available such information to the United States at the same time that such information is made available to any other person.

D. Defendants shall provide the Acquirer and the United States information relating to the personnel involved in the production, development, and sale of the divestiture assets to enable the Acquirer to make offers of employment. Defendants shall not interfere with any negotiations by any Acquirer to employ any Earthgrains (or former Specialty Foods or Metz) employee who works at, or whose primary responsibility concerns, any bakery business that is part of the Relevant Banking Assets.

E. Defendants shall permit prospective Acquirers of the Relevant Baking Assets to have access to personnel and to any and all environmental, zoning, and other permit documents and information, and to make inspection of the Relevant Baking Assets, and have access to any and all financial, operational, business, strategic or other documents and information customarily provided as part of a due diligence process.

F. Defendants shall warrant to any Acquirer of Earthgrains's Des Moines, IA bakery that the bakery will be fully operational on the date of sale.

G. Defendants shall not take any action, direct or indirect, that will impede in any way the operation, sale, or divestiture of the Relevant Baking Assets.

H. Unless the United States otherwise consents in writing, the divestitures pursuant to Section IV or by trustee appointed pursuant to Section V of this Final Judgment shall include all Relevant Baking Assets and be accomplished by selling or otherwise conveying each asset to an Acquirer in such a way as to satisfy the United States, in its sole discretion, that the Relevant Baking Assets can and will be used by the Acquirer as part of a viable, ongoing business or businesses engaged in sale of white pan bread in the Relevant Territory. The divestitures, whether pursuant to Section IV or Section V of this Final Judgment, shall be made to an Acquirer (or Acquirers) for whom it is demonstrated to the United States's sole satisfaction that: (1) The Acquirer(s) has the capability and intent of competing effectively in the sale of white pan bread in each area in the Relevant Territory; (2) the Acquirer(s) has the managerial, operational, and financial capability to compete effectively in the sale of white pan bread in each area of the Relevant Territory; and (3) none of the terms of any agreement between an Acquirer and defendants give any defendant the ability unreasonably to raise the Acquirer's costs, lower the Acquirer's efficiency, or otherwise interfere in the ability of the Acquirer to compete effectively in the Relevant Territory.

V. Appointment of Trustee

A. In the event that defendants have not divested the Relevant Baking Assets within the time specified in Section IV(A) of this Final Judgment, defendants shall notify the United States of that fact in writing. Upon application of the United States, the Court shall appoint a trustee to be selected by the United States, at its sole discretion, to effect the divestiture of the Relevant Baking Assets. Defendants shall not object to the selection of the trustee on any grounds other than irremediable conflict of interest. Defendants must make any such objection within five (5) business days after the United States notifies defendants of the trustee's selection.

B. After the appointment of the trustee becomes effective, only the trustee shall have the right to divest the unsold Relevant Baking Assets. The trustee shall have the power and authority to accomplish any and all divestitures to an Acquirer(s) acceptable to the United States at such price and on such terms as are then obtainable upon reasonable efforts of the trustee, subject to the provisions of Sections IV and VI of this Final Judgment, and shall have such other powers as the Court shall deem appropriate. The trustee shall divest the unsold Relevant Baking Assets in the manner that is most conducive to remedying the loss of competition alleged in the Complaint. Subject to Section V(C) of this Final Judgment, the trustee shall have the power and authority to hire at the cost and expense of defendants any investment bankers, attorneys, or other agents reasonably necessary in the judgment of the trustee to assist in the divestitures, and such professionals and agents shall be accountable solely to the trustee. The trustee shall have the power and authority to accomplish the divesitures at the earliest possible time to an Acquier or Acquirers acceptable to the United States, and shall have such other powers as this Court shall deem appropriate.

C. The trustee shall serve at the cost and expense of defendants, on such terms and conditions as the United States approves, and shall account for all monies derived from the sale of each asset sold by the trustee and all costs and expenses so incurred. After approval by the Court of the trustee's accounting, including fees for its services and those of any professionals and agents retained by the trustee, all remaining money shall be paid to defendants and the trust shall then be terminated. The compensation of such trustee and of any professionals and agents retained by the trustee shall be reasonable in light of the value of the divested assets and based on a fee arrangement providing the trustee with an incentive based on the price and terms of the disvestiture and the speed with which it is accomplished.

D. Defendants shall use their best efforts to assist the trustee in accomplishing the required divestitures and shall take no action to interfere with or impede the trustee's accomplishment of the divestiture of the Relevant Baking Assets. The trustee and any consultants, accountants, attorneys, and other persons retained by the trustee shall have full and complete access to the personnel, books, records, and facilities for the Relevant Baking Assets, and to defendants' overall businesses as is reasonably necessary to effectuate the divestiture. Defendants shall provide financial or other information relevant to the Relevant Baking Assets customarily provided in a due diligence process as the trustee may reasonably request, subject to reasonable protection for trade secrets or other confidential research, development or commercial information. Subject to customary confidentiality assurances, defendants shall permit prospective Acquirers of any Relevant Baking Assets to have reasonable access to the information provided to the trustee and to management personnel for the Relevant Baking Assets, and to make inspection of any physical facilities for the Relevant Baking Assets.

E. After the trustee's appointment, the trustee shall file biweekly reports with the parties and the Court setting forth the trustee's efforts to accomplish the divestitures ordered under this Final Judgment; provided, however, that to the extent such reports contain information that the trustee deems confidential, such reports shall not be filed in the public docket of the Court. Such reports shall include the name, address and telephone number of each person who, during the preceding period, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the Relevant Baking Assets, and shall describe in detail each contact with any such person during the period. The trustee shall maintain full records of all efforts to divest the Relevant Baking Assets.

F. The United States may object to a proposed divestiture by the trustee in the manner prescribed in Section VI of this Final Judgment. Defendants shall not object to a divestiture by the trustee on any grounds other than the trustee's malfeasance. Any such objections by defendants must be conveyed in writing to the United States and the trustee within ten (10) calendar days after the trustee has provided the notice required under Section VI of this Final Judgment.

G. If the trustee has not accomplished such divestitures within one hundred and twenty (120) days after its appointment, the trustee thereupon shall file promptly with the Court a report setting forth (1) The trustee's efforts to accomplish the required divestitures, (2) the reasons, in the trustee's judgment, why the required divestitures have not been accomplished, and (3) the trustee's recommendations for completing the required divestiture; provided, however, that to the extent such report contains information that the trustee deems confidential, it shall not be filed in the public docket of the Court. The trustee shall at the same time furnish a copy of such reports to the parties, who shall have the right to be heard and to make additional recommendations consistent with the purpose of the trust. The Court shall thereafter enter such orders as it shall deem appropriate in order to carry out the purpose of the Final Judgment, which may, if necessary, include extending the trust and the term of the trustee's appointment by a period requested by the United States.

VI. Notice of Proposed Divestitures

A. Within two (2) business days following execution of a definitive agreement, contingent upon compliance with the terms of this Final Judgment, to effect, in whole or in part, any proposed divestiture pursuant to Sections IV or V of this Final Judgment, defendants or the trustee, whichever is then responsible for effecting the divestiture, shall notify the United States of the proposed divestiture. If the trustee is responsible, it shall similarly notify defendants. The notice shall set forth the details of the proposed transaction and list the name, address, and telephone number of each person not previously identified who offered to, or expressed an interest in or a desire to, acquire any ownership interest in the Relevant Baking Assets that is the subject of the definitive agreement, together with full details of same.

B. Within fifteen (15) calendar days of receipt by the United States of such notice, the United States, in its sole discretion, may request from defendants, the proposed Acquirer(s), any other third party, or the trustee additional information concerning the proposed divestiture, the proposed Acquirer, or any other potential Acquirer. Defendants and the trustee shall furnish any additional information requested from them within fifteen (15) calendar days of the receipt of the request, unless the parties shall otherwise agree.

C. Within thirty (30) calendar days after receipt of the notice, or within twenty (20) calendar days after the United States has been provided the additional information requested from defendants, the proposed Acquirer, any third party, and the trustee, whichever is later; the United States shall provide written notice to defendants and the trustee, if there is one, stating whether or not it objects to the proposed divestiture. If the United States provides written notice to defendants (and the trustee, if applicable) that it does not object, then the divestiture may be consummated, subject only to defendants' limited right to object to the sale under Section V(F) of this Final Judgment. Absent written notice that the United States does not object to the proposed Acquirer, or upon objection by the United States, a divestiture proposed under Section IV or Section V of this Final Judgment shall not be consummated. Upon objection by defendants under the provision in Section V(F), a divestiture proposed under Section V shall not be consummated unless approved by the Court.

VII. Affidavits

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

B. Within twenty (20) calendar days of the filing of the Complaint in this matter, defendants shall deliver to the United States an affidavit which describes in reasonable detail all actions defendants have taken and all steps defendants have implemented on an ongoing basis to comply with Section VIII of this Final Judgment and the Hold Separate Stipulation and Order entered by the Court. The affidavit also shall describe, but not be limited to, defendants' efforts to maintain and operate each Relevant Baking Asset as a viable active competitor; to maintain separate management, staffing, sales, marketing and pricing of each asset; and to maintain each asset in operable condition at current capacity configurations. Defendants shall deliver to the United States an affidavit describing any changes to the efforts and actions outlined in defendants' earlier affidavit(s) filed pursuant to this Section within fifteen (15) calendar days after any such change has been implemented.

C. For a one-year period following the completion of each divestiture, defendants shall preserve all records of any and all efforts made to preserve and divest the Relevant Baking Assets.

VIII. Hold Separate Order

Until the divestitures required by the Final Judgment have been accomplished, defendants shall take all steps necessary to comply with the Hold Separate Stipulation and Order entered by this Court. Defendants shall take no action that would jeopardize the sale of any Relevant Baking Asset.

IX. Financing

Defendants are ordered and directed not to finance all or any part of any acquisition by any person made pursuant to Sections IV or V of this Final Judgment.

X. Compliance Inspection

For purposes of determining or securing compliance with the Final Judgment, or of determining whether the Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time:

A. Duly authorized representatives of the United States Department of Justice, upon written request of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to defendants, shall be permitted:

1. Access during office hours of defendants to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of defendants, who may have counsel present, relating to any matters contained in this Final Judgment and the Hold Separate Stipulation and Order; and

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

B. Upon the written request of the Assistant Attorney General in charge of the Antitrust Division, defendants shall submit such written reports, under oath if requested with respect to any matter contained in the Final Judgment and the Hold Separate Stipulation and Order.

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

D. If at the time information or documents are furnished by defendants to the United States, defendants represent and identify in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(7) of the Federal Rules of Civil Procedure, and defendants mark each pertinent page of such material, "Subject" to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure," then the United States shall give defendants ten (10) calendar days notice prior to divulging such material in any legal proceeding (other than a grand jury proceeding).

XI. Retention of Jurisdiction

Jurisdiction is retained by this Court for the purpose of enabling any of the parties 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 or carrying out of this Final Judgment, for the modification of any of the provisions hereof, for the enforcement of compliance herewith, and for the punishment of any violations hereof.

XII. Termination

Unless this Court grants an extension, this Final Judgment will expire upon the tenth anniversary of the date of its entry.

XIII. Public Interest

Entry of this Final Judgment is in the public interest.

Dated , 2000.

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

United States District Judge

Interstate Brands Corporation,
East Armour Blvd., 64111/P.O. Box 419627, Kansas City, MO 64141–5627, (816) 502–4000

Legal Department

March 17, 2000.

Mr. David E. Groce,
The Earthgrains Company, 8400 Maryland Avenue, St. Louis, MO 63105.

Dear David: I understand that The Earthgrains Company has agreed to acquire Metz Baking Company (''Metz''), and that both firms have agreed to resolve certain competitive concerns raised by the U.S. Department of Justice (''DOJ'') in connection with this merger by entering into a consent decree. I have been advised that the consent decree would require Earthgrains and Metz to divest, to a purchaser approved by DOJ, Metz's license rights under the TAYSTEE® trademark for certain geographic areas in the Midwest. Interstate Brands West Corporation, will, upon the request of Metz and in accordance with the provisions of the License Agreement dated July 27, 1987, between American Bakeries Licensing Co. (our predecessor in interest) and Heileman Baking Company (Metz's predecessor in interest) (except for provisions of Articles 5(G) and 9 requiring prior written approval of sublicensees), consent to a transfer and sublicense of the TAYSTEE® trademark to any third party approved by DOJ under the proposed consent decree. Any final decision concerning whether the sublicensing of the TAYSTEE® trademark to such third party satisfies the conditions of the consent decree shall be in the sole discretion of the United States.

Sincerely,

Kim B. Murphy,
Sr. Staff Attorney.

Appendix A

Competitive Impact Statement

The United States, pursuant to Section 2(b) of the Antitrust Procedure and Penalties Act (''APPA''), 15 U.S.C. 16(b)–(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. Nature and Purpose of the Proceeding

On March 20, 2000, the United States field a civil antitrust suit the alleges that an acquisition by The Earthgrains Company (''Earthgrains'') of Metz Holdings, Inc. (''Metz'') would violate Section 7 of the Clayton Act, 15 U.S.C. 18. The complaint alleges that in many markets in the Midwest, Earthgrains and Metz are two of only a few significant competitors in the production and sale of white pan bread, and that their combination would substantially lessen competition in these already highly concentrated markets, including Kansas City, Missouri,; Omaha, Nebraska; Des Moines, Iowa; and many smaller communities in Illinois, Iowa, Kansas, Missouri, and Nebraska. According to the Complaint, the loss of competition would likely result in retailers and consumers paying higher prices for white pan bread in these areas. The prayer for relief in the Complaint seeks: (1) A judgment that the proposed acquisition would violate Section 7 of the Clayton Act; and (2) a permanent injunction that would prevent Earthgrains from acquiring control of Metz or otherwise combining Metz's assets with its own business.

At the same time the Complaint was filed, the United States also filed a proposed settlement that would permit Earthgrains to complete its acquisition of Metz, yet preserve competition in the markets in which the transaction would otherwise raise significant competitive concerns. The settlement consists of a proposed Final Judgment and a Hold Separate Stipulation and Order. In essence, the Hold Separate Stipulation and Order would require Earthgrains to maintain certain bread brands, and associated production and distribution assets, as economically viable, ongoing concerns, operated independently of Earthgrains' other businesses until the divestitures mandated by the Final Judgment have been accomplished.

The proposed Final Judgment orders defendants to divest to one or more acquirers the Colonial and Taystee labels of white pan bread for use in each of the affected markets, including all of the cities and counties identified in the proposed Final Judgment. See Final Judgment, § II (H). Because an acquirer may require other assets in order to compete effectively and viably in the sale of white pan bread in the affected areas, under the Final Judgment the United States may, in its sole discretion, require the divestiture of additional assets, including (a) Earthgrains' Des Moines, IA bakery; (b) a license to produce buns, rolls and any other bread under the Colonial and Taystee labels; (c) Earthgrains' and Metz's bread routes, trucks, and customer lists; and (d) other ancillary assets currently used by Eathgrains and Metz in the production, distribution and sale of white pan bread under the Colonial or Taystee labels. Defendants must complete these divestitures within 90 days after filing of the Complaint,[1] or five days after entry of the Final Judgment, whichever is later. If they do not complete the divestitures within the prescribed time, the Court may appoint a trustee to see the assets.

The United States and defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

II. Description of the Events Giving Rise to the Alleged Violation

A. The Defendants and the Proposed Transaction

1. Earthgrains. Earthgrains, based in St. Louis, Missouri, is the nation's second largest wholesale commercial baker. It operates a total of 43 commercial bakeries throughout the United States, though its bread production and sales are concentrated primarily in the South and Midwest. In 1999, Earthgrains reported sales of $1.93 billion.[2]

2. Specialty Foods and Metz. Specialty Foods Corporation is a privately held concern that owns several baking operations, including Metz. Metz, based in Deerfield, Illinois, is one of the largest regional wholesale commercial bakers. It produces and sells white pan bread throughout the Midwest, primarily in Colorado, Illinois, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, Utah, and Wisconsin. In 1999, Metz's total revenue exceeded $600 million.

3. The proposed transaction. On November 15, 1999, Earthgrains agreed to acquire Metz from Specialty Foods for about $625 million. This proposed

[1] The Complaitn was filed on march 20, 2000.

[2] The Complaint inaccurately alleges that Earthgrains operates 28 commercial bakeries and reported sales of $1.6 billion in 1999. It, in fact, operated 43 commercial bakeries and reported $1.93 million in annual sales.

transaction, which would combine Earhtgrains and Metz and substantially lessen competition in the sale of white pan bread in many areas of the Midwest, precipitated the government's antitrust suit.

B. The Bread Industry and the Competitive Effects of the Transaction

1. White pan bread. White pan bread describes the ubiquitous, white, sliced, soft loaf known to most consumers as ''plain old white bread.'' An American household staple, typically used for sandwiches, white pan bread is sold in the commercial bread aisle of every grocery store, as well as many other retail stores. White pan bread differs significantly from other types of bread, such as variety bread (*e.g.,* wheat, rye or French) and freshly baked in-store breads, in taste, texture, uses, perceived nutritional value, keeping qualities, and appeal to various groups of consumers. Families with young children, for instance, strongly prefer to purchase white pan bread because children prefer this bread.

Because of its unique appeal and distinguishing attributes, a small but significant increase in the price of white pan bread by all producers would not cause a significant number of current purchasers to substitute any other type of breads, or for that matter, any other product. The sale of white pan bread to consumers through retailers is, therefore, a relevant product market in which to assess the competitive effects of the acquisition.

White pan bread is mass produced on high-speed production lines by wholesale commercial bakers, who package and sell it to retailers under either their own brand or a private label (*i.e.,* a brand controlled by a grocery chain or buying cooperative). Though physically similar to private label brand, branded white pan bread is perceived by consumers as higher quality bread; consequently, consumers often pay a premium of twice as much or more for branded white pan bread.

The Complaint alleges that the provision of white pan bread through retail outlets takes place in highly localized geographic markets. The high transportation costs, short shelf life, and extensive bakery control over the sale of their branded white bread products all make it very expensive and difficult for retail stores and consumers to purchase white pan bread from bakers that are not local market incumbents.

2. Competition between Earthgrains and Metz in the sale of white pan bread. Earthgrains and Metz compete directly in producing, promoting, and selling both private label and branded white pan bread to grocery retailers, who in turn sell it to consumers. In the relevant areas alleged in the Complaint, Earthgrains sells two brands of white pan bread, either IronKids and Colonial or IronKids and Rainbo, and Metz sells two brands of white pan bread, either Pillsbury and Old Home or Pillsbury and Taystee.

Earthgrains and Metz recognize the keen rivalry between their bread products in the relevant geographic markets. To avoid losing sales to the other, each has engaged in extensive promotional and couponing campaigns that reduce the prices charged for their branded white pan breads to the benefit of retailers and consumers. Each also competed against the other in pricing and in improving the quality and services offered in connection with both branded and private label white pan bread. Through these activities, Earthgrains and Metz have each operated as a significant competitive constraint on the other's prices for branded and private label white pan bread.

3. Anticompetitive consequences of the acquisition. The Complaint alleges that Earthgrains's acquisition of Metz would remove the competitive constraint each has had on the other, and create (or facilitate Earthgrains's exercise of) market power (*i.e.,* the ability to increase prices to consumers) in a number of relevant geographic markets throughout the Midwest, including Kansas City, Missouri; Omaha, Nebraska; and Des Moines, Iowa metropolitan areas; and in many smaller communities in Illinois, Iowa, Kansas, Missouri and Nebraska.

Specifically, the Complaint alleges that in each of the markets, Earthgrains and Metz are two of only a few significant competitors. The acquisition would increase concentration significantly in these already highly concentrated, difficult-to-enter markets.[3] Post-acquisition, Earthgrains would dominate each market, accounting for at least 58 percent of all sales of white pan bread in the Omaha market, at least 52 percent in the Kansas City market, about 56 percent in the Des Moines market, and likely half or more of all sales of white pan bread in many smaller communities in Iowa, western Illinois, northeastern Kansas, northwestern Missouri, and eastern Nebraska. Moreover, after the merger, Earthgrains and only one or two other competitors would control more than 90 percent of annual sales revenues of white pan bread in these areas.

The Complaint alleges that Earthgrains's acquisition of Metz in each of these markets would cause a substantial reduction in competition either from an increased likelihood of coordinated pricing that would result from the elimination of a significant competitor, Metz, or from the likelihood that Earthgrains will acquire the power to unilaterally increase prices to consumers for branded white pan bread after the merger. In both instances, the merger is likely to lead to higher prices to consumers who purchase white pan bread through retail outlets in the relevant areas.

The Complaint alleges that entry by other wholesale commercial bakers into the sale of white pan bread in any of the adversely affected geographic markets is time-consuming, expensive and difficult, and hence, unlikely to soon counteract these anticompetitive effects.

III. Explanation of the Proposed Final Judgment

The proposed Final Judgment would preserve competition in the sale of white pan bread in each of the relevant geographic markets. Within 90 days after March 20th, the date the Complaint was filed, or five days after entry of the Final Judgment, whichever is later, defendants must divest two of their popular white pan bread brands, the Colonial and Taystee labels, [4] and such other production and distribution assets that the United States determines may be necessary to create an economically viable competitor in the sale of white pan bread in each geographic market.[5] It may well be that the sale to an

[3] The Herfindahl-Hirschman Index (''HHI'') is a widely-used measure of market concentration. Following the acquisition, the approximate post-merger HHIs, calculated from 1999 dollar sales, would be about 3800 with a change of 875 points for the Omaha area; 3400 with a change of 1378 points for the Kansas City area; and 3500 with a change of 1530 points for the Des Moines area. Under the Merger Guidelines, an acquisition that increases the HHI by 50 points or more in a market in which the post-merger HHI will exceed 1800 points may raise serious competitive concerns.

[4] As defined in the Final Judgment, a ''label'' ''means all legal rights associated with a brand's trademarks, trade names, service names, service marks, intellectual property, copyrights, designs, and trade dress; the brand's trade secrets; the brand's technical information and production known-how, including, but not limited to, recipes and formulas used to produce bread currently sold under the brand, and any improvements to, or line extensions thereof; and packaging, marketing and distribution know-how and documentation, such as customer lists and route maps, associated with the brand.'' Final Judgment, § II(F). Divesting a label would require defendants to grant, at a minimum, ''[a] perpetual, royal-free, freely assignable and transferrable, and executive license to make, have made, use or sell white pan bread in the Relevant Territory under each of the Relevant Labels.'' *Id.,* § II(D)(1).

[5] These assets are defined in the Final Judgment as the ''Additional Baking Assets.'' See Final Judgment, § II(E).

existing wholesale baker of exclusive rights to make and sell white pan bread under either the Colonial and Taystee labels is all that is required to accomplish this goal. Depending on the acquirer's requirements, however, effective divestiture may require the sale other assets such as Earthgrain's Des Moines, IA bakery, which currently services the relevant areas; a license to sell buns, rolls, or other bread under the Colonial and Taystee labels; and the bread routes, trucks, thrift stores, depots, warehouses, customers contracts and lists used by Earthgrains and Metz in production, distribution, and sale of white pan bread under the Colonial and Taystee labels. Defendants must use their best efforts to accomplish the divestitures as expeditiously as possible. The proposed Final Judgment provides that the assets must be divested in such a way as to satisfy the United States, in its sole discretion, that the assets can and will be used by the acquirer as part of a viable, ongoing business or businesses engaged in the sale of white pan bread in the geographic areas covered by the Final Judgment.[6]

If defendants do not accomplish the ordered divestitures within the prescribed time period, the proposed Final Judgment provides that the Court will appoint a trustee to complete the divestitures. If a trustee is appointed, the proposed Final Judgment provides that defendants must pay all costs and expenses of the trustee. The trustee's commission will be structured so as to provide an incentive for the trustee based on the price obtained and the speed with which divestiture is accomplished. After his or her appointment becomes effective, the trustee will file periodic, biweekly reports with the parties and the Court, setting forth the trustee's efforts to accomplish the required divestiture. At the end of six months, if the divestiture has not been accomplished, then the trustee and the parties will make recommendations to the Court, which shall enter such orders as appropriate.

The relief in the Final Judgment has been tailored to ensure that the ordered divestitures maintain competition that would have been eliminated as a result of the merger and prevent the exercise of market power after the merger in each of the various markets alleged in the Complaint.

[6] These areas, listed in the ''Relevant Territory'' definition of the Final Judgment, § II(H), include a number of cities and counties in Illinois, Iowa, Kansas, Missouri and Nebraska.

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 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 comments 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 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, Suite 3000, Washington, DC 20530.

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

VI. Alternatives to The Proposed Final Judgment,

The United States considered, as an alternative to the proposed Final Judgment a full trial on the merits against defendants Earthgrains, Specialty Foods and Metz. The United States could have continued the litigation to seek preliminary and permanent injunctions against Earthgrains's acquisition of Metz. The United States is satisfied, however, that defendants' divestiture of the assets described in the proposed Final Judgment will establish, preserve and ensure a viable competitor in each of the relevant markets identified by the United States. To this end, the United States is convinced that the proposed relief, once implemented by the Court, will prevent Earthgrains's acquisition of Metz from having adverse competitive effects.

VII. Standard of Review Under the APPA for Proposed Final Judgment

The APPA requires the proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the court shall determine whether entry of the proposed Final Judgment ''is in the public interest.'' 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) (emphasis added). 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 Corp.,* 56 F.3d 1448, 1458–62 (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.'' [7] 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.[8]

The proposed Final Judgment, therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice or whether it mandates certainty of free competition in the future. Court approval of a final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. ''[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest' (citations omitted).'' [9]

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 is a single determinative document within the meaning of the APPA that was considered by the United States in formulating the proposed Final Judgment. That document, a letter dated March 17, 2000 from Kim Murphy, an attorney at Interstate Brands Corporation (''IBC''), to David Groce, General Counsel of Earthgrains, is attached to the Final Judgment as Appendix A. (A copy of this letter is reproduced in the attached Appendix). Although defendants proposed licensing the Taystee label as a step toward alleviating the competitive harm, Metz's license rights to that label were subject to the approval of the original licensee, IBC. Defendants subsequently secured assurances from IBC that it would permit the Taystee label to be licensed to an acquirer acceptable to the United States under the terms of the Final Judgment. Divestiture of the Taystee label became acceptable to the United States only after it had received that written assurance.

Dated: April 7, 2000.

Respectfully submitted,

Anthony E. Harris, Illinois Bar #1133713.

U.S. Department of Justice, 1401 H Street, NW, Suite 3000, Washington, DC 20530, (202) 307–6583.

Certificate of Service

I hereby certify that on April 7, 2000, I caused a copy of the foregoing Competitive Impact Statement to be served by causing the pleading to be mailed first-class, postage prepaid, to a duly authorized legal representative of each of the defendants, as follows:

The Earthgrains Company

Roxann E. Henry, Esquire, Howrey Simon Arnold & White, 1299 Pennsylvania Avenue, NW, Washington, DC 20004

Specialty Foods Corporation and Metz Holdings, Inc.

David E. Schreibman, Esquire, Vice President, Secretary and General Counsel, Specialty Foods Corporation, 520 Lake Cook Road, Deerfield, IL 60015.

Anthony E. Harris, (IL Bar #1133713).

[FR Doc. 00–9747 Filed 4–18–00; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

Antitrust Division

Joint Motion To Modify Final Judgment and United States' Memorandum in Support of Motion To Modify; United States v. Baroid Corp., et al.

Notice is hereby given that the United States and Diamond Products International (''DPI'') have filed a joint motion to modify the final judgment filed in a civil antitrust case, *United States* v. *Baroid Corpation., et al.* Civil Action No. 93–2621, in the United States District Court for the District of Columbia. The Department has consented to modification of the Judgment but has reserved the right to withdraw its consent if it determines that, based upon comments filed or other information received, consent to the modification is not in the public interest.

This case was filed on December 23, 1993, and alleged that the merger of Dresser Industries, Inc. (''Dresser'') and Baroid Corporation (''Baroid'') might substantially lessen competition in the United States in the manufacture and sale of two oil field service products, diamond drill bits and drilling fluids, in violation of section 7 of the Clayton Act. The Final Judgment was entered on April 12, 1994.

[7] 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.C.C. A.N. 6535, 6538.

[8] *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 716. See also *United States* v. *American Cyanamid Co.,* 719 F.2d 558, 565 (2d Cir. 1983), cert. denied, 465 U.S. 1101 (1984).

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