4. Inv. No. 731–TA–125 (Second Review) (Potassium Permanganate from China)—briefing and vote. (The Commission is currently scheduled to transmit its determination and Commissioners' opinions to the Secretary of Commerce on or before April 27, 2005.)
5. Inv. Nos. 701–TA–439 and 731–TA–1077, 1078, and 1080 (Final) (Polyethylene Terephthalate (PET) Resin from India, Indonesia, and Thailand)—briefing and vote. (The Commission is currently scheduled to transmit its determination and Commissioners' opinions to the Secretary of Commerce on or before April 26, 2005.)
6. Outstanding action jackets: none.

In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

By order of the Commission:

Issued: March 24, 2005.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 05–6284 Filed 3–25–05; 12:47 pm]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[USITC SE–05–011]

Government in the Sunshine Act Meeting Notice

AGENCY HOLDING THE MEETING: United States International Trade Commission.

TIME AND DATE: April 14, 2005 at 11 a.m.

PLACE: Room 101, 500 E Street, SW., Washington, DC 20436, telephone: (202) 205–2000.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED:

1. Agenda for future meetings: none.
2. Minutes.
3. Ratification List.
4. Inv. Nos. 701–TA–384 and 731–TA–806–808 (Review) (Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Brazil, Japan, and Russia)—briefing and vote. (The Commission is currently scheduled to transmit its determination and Commissioners' opinions to the Secretary of Commerce on or before April 28, 2005.)
5. Outstanding action jackets: none.

In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

By order of the Commission.

Issued: March 24, 2005.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 05–6285 Filed 3–25–05; 12:47 pm]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[USITC SE–05–012]

Government in the Sunshine Act Meeting Notice

AGENCY HOLDING THE MEETING: United States International Trade Commission.

TIME AND DATE: April 15, 2005, at 11 a.m.

PLACE: Room 101, 500 E Street, SW., Washington, DC 20436, telephone: (202) 205–2000.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED:

1. Agenda for future meetings: none.
2. Minutes.
3. Ratification List.
4. Inv. No. 731–TA–1090 (Preliminary) (Superalloy Degassed Chromium from Japan)—briefing and vote. (The Commission is currently scheduled to transmit its determination to the Secretary of Commerce on or before April 18, 2005; Commissioners' opinions are currently scheduled to be transmitted to the Secretary of Commerce on or before April 25, 2005.)
5. Outstanding action jackets: none.

In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

By order of the Commission.

Issued: March 24, 2005.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 05–6286 Filed 3–25–05; 12:48 pm]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Antitrust Division

[Civil No. 1:04–CV–01494]

Public Comments and Response on Proposed Final Judgment *United States* v. *Connors Bros. Income Fund and Bumble Bee Seafoods, LLC*

Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)–(h), the United States of America hereby publishes below the comments received on the proposed Final Judgment in *United States* v. *Connors Bros. Income Fund,* et al., Civil Action No. 1:04–CV–01494 (JDB), filed in the United States District Court for the District of Columbia, together with the United States' response to the comments.

Copies of the comments and response are available for inspection in Room 215 of the U.S. Department of Justice, Antitrust Division, 325 7th Street, NW., Washington, DC 20530, telephone: (202) 514–2481, and at the office of the Clerk of the United States District Court for the District of Columbia, United States Courthouse, Third Street and Constitution Avenue, NW., Washington, DC 20001. Copies of any of these materials may be obtained upon request and payment of a copying fee.

J. Robert Kramer II,

Director of Operations, Antitrust Division.

United States District Court, District of Columbia

Civil Action No.: 1:04CV01494.
Before: Judge John D. Bates.
Filed: January 7, 2005.
United States of America, Plaintiff, v. *Connors Bros. Income Fund, and Bumble Bee Seafoods, LLC, Defendants.*

Comments of Citizens for Voluntary Trade in Opposition to the Proposed Final Judgment, Statement of Interest

Citizens for Voluntary Trade (CVT) is a nonprofit, nonpartisan educational organization that applies free market principles and rational ethics to contemporary antitrust issues through filings with federal courts and agencies, policy papers, public commentaries, and a Web site.[1] Since its establishment in 2002, CVT has filed dozens of public comments and briefs in response to government antitrust cases.

CVT and its supporters have an interest in the consistent enforcement of the principles of the Deceleration of Independence as applied by the United States Constitution. Expansion of the federal antitrust laws—including Section 7 of the Clayton Act—to authorize the government's violation of private property rights creates a substantial threat to the rights of all citizens of the United States.

Here, CVT presents a philosophical framework for analyzing and rejecting the Proposed Final Judgment. CVT seeks to prompt a philosophically informed analysis of the key facts and arguments of the case according to the principles set forth in the Constitution, as well as the concurrent ideas of free-market

[1] *http://www.voluntarytrade.org.*

economics and rational ethics. The United States has not engaged in such rigorous and philosophically consistent thinking. CVT's comments explore the tenuous arguments offered by the United States and the insubstantial ethical premises which underlie its arguments.

Accordingly, CVT files the following comments in opposition to the Proposed Final Judgment in this matter.[2]

Introduction

On April 30, 2004, Connors Bros. Income Fund (Connors) acquired Bumble Bee Seafoods, LLC (Bumble Bee). Both companies market canned sardines within the United States. Prior to the transactions, Connors held the first, second, and fourth largest selling brands of sardine snacks in the United States (Brunswick, Beach Cliff, and Port Clyde, respectively) earning revenues of $43 million. Bumble Bee, which held the third largest sardine brand, accounted for 13% of sales, earning $9 million in revenue.[3]

The United States filed a complaint alleging that the proposed combination of Connors and Bumble Bee would create a ''near monopoly'' in the market for ''sardine snacks.'' The merger would, according to the government, significantly lessen competition for the sale of sardine snacks in the United States, in violation of Section 7 of the Clayton Act, 15 U.S.C. 18. The government further claimed that the concomitant decrease in competition following the acquisition of Bumble Bee would result in higher consumer prices for sardine snacks.

The Proposed Final Judgment permits the merger to proceed, but requires Connors to divest its Port Clyde brand, five smaller brands—Commander, Possum, Bulldog, Admiral, and Neptune—along with ''related assets that an acquirer of those brands might need in order to become a viable and active competitor in the sale of sardine snacks throughout the United States.''

Comments

The government's case rests on four spurious arguments: (1) That ''canned sardine snacks'' are a distinct product market, distinguishable from the rest of the sardine industry; (2) that the pre- and post-merger market for canned sardine snacks are too highly concentrated, as measured by the Herfindahl-Hirschman Indices; (3) that the price of sardine snacks will increase once Connors ''monopolizes'' the market; and (4) that entry into the market for sardine snacks ''would not be timely, likely, or sufficient'' to deter any exercise of market power by the combined Connors/Bumble Bee entity. All of these arguments rest upon a tenuous definition of ''monopoly power'' and a profound ignorance of free-market principles.

I

With its quiver full of feeble intellectual arrows, the United States first opposes Connors' acquisition of Bumble Bee by defining ''canned sardine snacks'' as a distinct product market. This definition purposely narrows the scope of the market in order to create artificial ''monopolies.'' Here, the government has constructed an artificial typology that purports to distinguish between various types of sardine products available in the United States. Unbeknownst to the consumer, the United States has legally defined three sardine categories: The sardine snack, the premium sardine and the ethnic sardine.

The United States contends that the sardine snack is distinguished from premium and ethnic sardines because it consists of herring and other small fish caught and processed in the U.S., Canada, Poland, Morocco, South America, and Thailand, then sold in small snack-size containers. Sardine snacks cost U.S. consumers approximately $0.21/oz. The premium sardine usually consists of brisling species of fish that originates in Norway or Scotland and sold at retail in the U.S. for approximately $0.52/oz. Ethnic sardines, the United States claims, are not in the same product market as sardine snacks because the former are marketed primarily to ethnic groups, consumed as meals rather than snacks, and packaged in larger cans. The government further claims that ethnic sardines consist of larger herring and other species that are believed to be of a lesser quality than the herring used in sardine snacks. In addition, ethnic sardines cost less than sardine snacks, retailing for approximately $0.08/oz. Most importantly, according to the United States, grocery stores do not display ethnic sardines beside other sardine products, but rather in the separate ''ethnic'' food sections.

The government's claim that sardine snacks, premium sardines, and ethnic sardines constitute three distinct product markets is patently absurd. To illustrate the absurdity, consider how the government's reasoning could be applied to the market for tuna. Most grocery stores in the U.S. offer customers a variety of tuna products: Tuna packed in oil, tuna packed in water, tuna packed without liquid, white tuna, tuna that is caught without causing harm to dolphins, etc. Prices vary among different tuna varieties, but tuna in water is not a distinct product market from tuna in oil. Consumers express their preferences through selecting a particular variety of product and, within that variety, a particular brand.

Classifying sardines as three separate markets is nothing more than a pretext for the Department of Justice to expand regulation of each ''market'' under the antitrust laws. As distinct product markets within the sardine industry become more narrowly defined, obviously the number of competitors will decrease, and this in turn opens the door for the government to complain that, for example, once Connors acquires Bumble Bee, they'll have ''cornered'' the market for sardine snacks. Ultimately, however, sardines are sardines and consumers respond according to market conditions and individual preferences rather than bureaucratic models of consumer behavior.

II

After narrowly constraining the sardine market to include only ''sardine snacks,'' the United States next asserts that competition will be illegally lessened based on the Herfindahl-Hirschman Indices (HHI). The HHI purports to measure market concentration by adding the squares of the market shares of the existing competitors. For example, if a market has four competitors with market shares of 30%, 30%, 20%, and 20%, the HHI is ($900^{+}900^{+}400^{+}400$) or 2,600. The United States would consider this hypothetical market to be ''highly concentrated,'' because the HHI exceeds 1,800. If two of the four competitors—say the two firms with 30% shares—were to merge, the United States would likely object because this would increase the index number from 1,800 to 4,400. Any post-merger increase in the index of more than 100 in a ''highly concentrated'' market is deemed suspect because the merger is considered ''likely to create or enhance market power or facilitate its exercise.'' [4]

Here, the government's complaint alleges that the unconditional merger of Connors and Bumble Bee would raise the HHI from 4,200 to 5,800, ''well in excess of levels that raise significant

[2] CVT thanks Douglas Messenger for his assistance in preparing these comments.

[3] Revenue figures are for 2003.

[4] U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines § 1.5 (available at *http:www.usdoj.gov/atr/public/guideline/horiz—book/15.html*).

antitrust concerns.'' But assuming, *arguendo,* that the HHI figures are valid, this alone does not constitute proof of any ''market power'' or justify the government's intervention. The HHI is nothing more than a predictor of whether the Department of Justice (or the Federal Trade Commission) will pursue legal action. As economics professor Dominick Armentano has explained, the HHI has no objective merit as a tool of economic analysis:

> Although the general public has the impression that there must be some good reason for the antitrust authorities' choice of particular limits in the Herfindahl Index of market concentration, those limits are *completely arbitrary*. No one—and certainly not the antitrust authorities—can ever know whether a merger of firms that creates, say, a 36-percent market share, or one that raises the Herfindahl Index by 150 points, can create sufficient economic power to reduce market output and raise market price. No one knows, or can know, whether monopoly power begins at a 36-percent market share or a 36.74-percent market share. Neither economic theory nor empirical evidence can justify any merger guideline or prohibition.[5]

Property rights have no meaning if they are subject to arbitrary and capricious violation by the state. The United States cannot, consistent with the Constitution and free-market economic principles, condition a combination of privately-held properties based on whether the parties will own ''too much'' property according to an arbitrary statistic. Under such a standard, no property would be safe from government seizure on the grounds that ownership is ''highly concentrated.'' The federal government, for example, could seize private homes by claiming the homeowners possess ''too much'' property according to some index that purports to measure the market concentration of real estate.

Indeed, the government's exclusive reliance on the HHI in merger review cases raises a curious question. If the pre-merger index in this case is 4,200—more than double the threshold for labeling a market ''highly concentrated''—then why couldn't the United States, consistent with its self-imposed mandate, have forced Connors and Bumble Bee to divest assets before their merger? In other words, what is to stop the government from breaking up companies, without the pretext of merger review, to ensure the HHI stays below the ''highly concentrated'' threshold at all times? The practical answer is that were the United States to begin seizing and redistributing private property at-will, the government's antitrust policy would likely lose congressional and popular support. Without the facade of merger review, the government's actions would be seen by the public for what they are—*ad hoc* economic planning by the state.

III

In the context of its artificially constructed sardine snack market, the United States claims that the acquisition of Bumble Bee results in a ''near monopoly.'' Under this line of reasoning, the government presumes that Connors will significantly increase the price of sardine snacks—which would be perfectly legal. Connors ''near monopoly,'' however, will not undermine the sovereignty of the consumer one iota. In response to a price increase, consumers can abstain or purchase premium or ethnic sardines. Markets are not static entities. Even a dominant seller owes its continued existence to the continued support of its customers.

Contrary to the government's monopoly paranoia, the dominance of a single seller is never permanent and continually depends on the seller's ability to satisfy the demands imposed by consumers within the market. Nobel Memorial Prize-winning economist F.A. Hayek said, ''The force which in a competitive society beings about the reduction in price to the lowest cost at which the quantity salable at the cost can be produced is the opportunity for anybody who knows a cheaper method to come into at this own risk and to attract consumers by underbidding the other producers.'' [6] Consumer abstention and underbidding holds the power of a single seller at bay and forces that seller to constantly reassess and readjust to satisfy changing demands. The United States has offered no evidence that the force Hayek describes would cease to exist in a world where Connors holds a ''near monopoly'' in a single sub-category within the sardine market (and indeed the substantially larger market for food).

Furthermore, the argument that the combination of Connors and Bumble Bee would constitute a monopoly, ''near'' or otherwise, is erroneous. The famed English jurist Lord Coke offered the classic—and correct—definition of a monopoly:

> An institution or allowance by the king, by his grant, commission, or otherwise * * * to any persons, bodies politic or corporate, for the sole buying, selling, making, working, or using of anything, whereby any person or persons, bodies politic or corporate, are sought to be restrained of any freedom or liberty that they had before, or hindered in their lawful trade.[7]

Connors and Bumble Bee do not qualify as a monopoly, either under Lord Coke's 17th century explanation or the more contemporary, yet equally accurate, definition offered by economist Murray Rothbard [8]: ''[It is] a grant of special privilege by the State, reserving a certain area of production to one particular individual or group. Entry into the field is prohibited to others and this prohibition is enforced by the gendarmes of the State.'' [9] Here the state has not reserved a certain area of production for Connors and Bumble Bee; rather, it is individual consumers who have rewarded the two companies for their efficiency in marketing sardines. No monopoly could ever exist, for sardines or any other product, unless by state action, as Professor Rothbard explained: ''It is obvious that this type of monopoly can never arise on a free market, unhampered by State interference. In the free economy, then according to this definition, there can be no 'monopoly problem' '' [10]

Finally, the United States claims entrance into the sardine snack market would not be ''timely, likely or sufficient'' to curb the market power of the combined Connors-Bumble Bee sardine operation. The irrationality of this argument is overwhelming. Once again, Professor Rothbard explains how free markets actually work:

> If consumer demand had really justified more competitors or more of the product or a greater variety of products, then entrepreneurs would have seized the opportunity to profit by satisfying this demand. The fact that it is not being done in any given case demonstrates that no such unsatisfied consumer demand exists. But if this is true, then it follows that *no man-made actions can improve the satisfaction of consumer demand more than is being done on the unhampered market.*[11] (Italics added.)

The Proposed Final Judgment is predicated on the government's arrogant belief that it can accurately project market activities indefinitely into the future. Such beliefs are reminiscent of the ''five-year plans'' enacted by the former Soviet Union. Here, the United States is substituting its own judgment for that of consumers through the *ad hoc* industrial planning of antitrust. The United States seeks to forcibly redistribute private property in an effort

[5] Dominic T. Armentano, Antitrust: The Case for Repeal 85–86 (1999).

[6] David Osterfeld, Prosperity Versus Planning: How Government Stifles Economic Growth 28.

[7] Murray N. Rothbard, Man, Economy & State 591 (2001).

[8] Coincidentally, this comment is filed on the tenth anniversary of Professor Rothbard's death.

[9] *Id.* at 591.

[10] *Id.* at 592.

[11] *Id.* at 581.

to satisfy a consumer ''demand'' that may never exist. Ostensibly, the government's argument is that consumers require protection from the consequences of their own market decisions: The state, not producers or consumers, know how many firms and what price levels will produce the ideal amount of ''competition''. More than two centuries of experience, however, tell us that such thinking is a recipe for economic stagnation. No government bureaucrat has ever been able to outperform the free market in fulfilling consumer needs.

And while sound economic principles demonstrate the folly of the government's case against Connors and Bumble Bee, the political principles of individual rights—specifically, property rights—trump even the economic objections discussed above. The United States Constitution was conceived by framers who held property rights sacrosanct: We own ourselves, our time, and those goods that we produce and voluntarily trade for. Yet now the very government that derives its authority from the Constitution is attempting to dictate economic outcomes rather than adhere to the classical American view that government should concern itself exclusively with the protection of life, liberty, and property. As John Locke wrote in his Second Treatise on Government, ''the end of the law is not to abolish or restrain, but to preserve and enlarge freedom.'' [12] The Proposed Final Judgment, with its ''divestiture'' mandate, demonstrates the converse of Locke's position, as it abolishes and restrains the liberties of Connors and Bumble Bee, its shareholders, and ultimately its customers.

The Proposed Final Judgment, therefore, does not represent an action taken in the public interest—under the Constitution, there is no ''public'' interest but the protection of individual rights—but rather it is what Frederick Bastiat would describe as an act of ''legal plunder.'' Bastiat identified legal plunder as ''the law tak[king] from some persons what belongs to them, and giv[ing] it to other persons to whom it does not belong.'' [13] Legal plunder occurs ''when a portion of wealth is transferred from the person who owns it—without his consent and without compensation, and whether by force or by fraud—to anyone who does not own it, then I say that property is violated.'' [14] In a free society purportedly dedicated to limited government and individual rights, the legal plunder of Connors and Bumble Bee's property is neither permissible nor defensible.

Conclusion

The government's case rests on the presumption that consumers have no impact on the actions of producers, and that a free market cannot prevent monopolies from arising. The United States has proposed intervening in the market for ''sardine snacks'' in order to protect consumers, yet there is no evidence or economic reasoning that can support the government's complaint or the Proposed Final Judgment. Instead of making excuses for a meritless intervention, the government should heed the words of economist Ludwig von Mises, who cautioned that the public interest can only be served through the existence of a free market:

> The unhampered market economy is not a system which would seem commendable from the standpoint of selfish group interests of the entrepreneurs and capitalists. It is not the particular interests of a group or of individual persons that require the market economy, but regard for the common welfare. It is not true that the advocates of the free-market economy are defenders of the selfish interests of the rich. The particular interests of the entrepreneurs and capitalists also demand intervention to protect them against the competition of more efficient and active men. The free development of the market economy is to be recommended, not in the interests of the rich, but in the interest of the masses of people.[15]

Accordingly, the government should withdraw the Proposed Final Judgment and voluntarily dismiss the complaint against Connors and Bumble Bee. In the alternative, the District Court should reject the Proposed Final Judgment as inconsistent with the public interest.

Dated: January 7, 2005.

Respectfully Submitted,

S.M. ''Skip'' Oliva,

President.

Melinda A. Haring,

Senior Writer.

Citizens for Voluntary Trade, Post Office Box 100073, Arlington, Virginia 22210, Telephone/Fax: (703) 740–8309, E-mail: *info@voluntarytrade.org.*

Case No. 1:04CV01494. Judge: JDB. Deck type: Antitrust.

United States of America, U.S. Department of Justice, Antitrust Division, 325 7th Avenue, NW., Suite 500, Washington, DC 20530, Plaintiff, v. Connors Bros. Income Fund, 669 Main Street, Blacks Harbour, New Brunswick, Canada, E5h 1K1, and Bumble Bee Seafoods, LLC, 9655 Granite Ridge Drive, San Diego, CA 92123–2674, Defendants.

Response of the United States to Public Comments on the Proposed Final Judgment

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

I. Factual Background

A. The Parties to the Transaction

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

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

B. The Transaction

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

The United States' preliminary investigation into the likely competitive effects of the Transaction indicated that it was likely that combining the two companies selling the four largest selling brands of sardine snacks (with a combined U.S. market share of over 75%) would lessen competition in violation of Section 7 of the Clayton Act (15 U.S.C. 18). The Defendants proposed a settlement by which they would divest one or more Connors or Bumble Bee brands and related assets in order to

[12] John Locke, Two Treaties of Government 306 (Peter Laslett, ed., 1988).

[13] Frederic Bastiat, The Law 17 (1972).

[14] *Id.* at 22.

[15] Ludwig von Mises, Interventionism: An Economic Analysis 79 (Bettina Bien Greaves, ed., 1998).

restore the competition that otherwise would be lost by the combination of Connors and Bumble Bee.

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

C. The Complaint

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

D. The Proposed Settlement

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

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

E. Compliance With the Tunney Act

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

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

(2) The Competitive impact Statement (''CIS'') was filed on October 19, 2004.

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

(4) A summary of the terms of the proposed Final Judgment and CIS was published in the Washington Post, a newspaper of general circulation in the District of Columbia, for seven days during the period November 6, 2004 through November 12, 2004.

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

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

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

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

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

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

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

The United states will move this Court for entry of the proposed Final Judgment after the comments and the Response are published in the **Federal Register**. The proposed Final Judgment cannot be entered before that publication. 15 U.S.C. 16(d).

II. Legal Standard Governing the Court's Public Interest Determination

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

Comments challenging the validity of the United States' case, or alleging that it should not have been brought, are challenges to the initial exercise of the United States' prosecutorial discretion, which are outside the scope of the Tunney Act. The purpose of the Court's public interest inquiry is not to evaluate the merits of the United States' case, or to conduct a de novo determination of facts and issues, because ''[t]he balancing of competing social and political interest affected by a proposed antitrust decree must be left, in the first instance, to the discretion of the Attorney general.'' *United states* v. *Western Elec. Co.*, 993 F.2d 1572, 1577 (D.C. Cir. 1993) (citations omitted). Courts consistently have refused to consider ''contentions going to the merits of the underlying claims and defenses.'' *United States* v. *Bechtel*, 648 F.2d 660, 666 (9th Cir. 1981).

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

III. Summary of Public Comment

The United States received one comment—from Citizens for Voluntary Trade (''CVT''), which describes itself as ''a nonprofit, nonpartisan educational organization that applies free market principles and rational ethics to

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

contemporary antitrust issues * * *'' CVT Comment at 1. CVT opposes any remedies to ameliorate the competitive harm that the United States alleges would otherwise occur as a result of Connors' acquisition of Bumble Bee, and urges the Court to reject the proposed Final Judgment as inconsistent with the public interest.

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

All of CVT's arguments are directed toward the United States' decision to file the Complaint, and to accept the Defendants' offer to avoid the need to litigate this matter by divesting Port Clyde and the other Connors' sardine snack brands. None of CVT's arguments are directed toward relevant Tunney Act issues, *i.e.*, whether, *in light of the violations charged in the complaint*, the terms of the proposed Final Judgment are inconsistent with the public interest. *Microsoft* at 1462 (emphasis added).

IV. The Department's Response To Specific Comments

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

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

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

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

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

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

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

V. Conclusion

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

Dated this 22nd day of February, 2005.

Respectfully submitted,

Robert L. McGeorge, Michelle J. Livingston, Hillary L. Snyder.

Attorneys, U.S. Department of Justice, Antitrust Division, Transportation, Energy & Agriculture Section, 7th Street, NW.; Suite 500, Washington, DC 20530.

Certificate of Service

I hereby certify that on this 22nd day of February, 2005, I have caused a copy

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

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

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

of the foregoing Response of the United States to Public Comments on the Proposed Final Judgment and the attached Appendix to be served by first class mail, postage prepaid, and by facsimile on counsel for Defendants in this matter:

Michelle J. Livingston, Attorney, Antitrust Division, U.S. Department of Justice, 325 Seventh St., NW, Suite 500, Washington, DC 20530, Telephone: (202) 353–7328, Facsimile (202) 307–2784.

David T. Beddow.

O'Melveny & Meyers LLP, 1625 Eye Street, NW., Washington, DC 20006–4001. Counsel for the Defendants.

[FR Doc. 05–5331 Filed 3–28–05; 8:45 am]

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DEPARTMENT OF LABOR

Office of the Secretary

Submission for OMB Emergency Review; Comment Request

March 21, 2005.

The Department of Labor has submitted the following (see below) information collection request (ICR), utilizing emergency review procedures, to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. Chapter 35). OMB approval is requested by April 14, 2005. A copy of this ICR, with applicable supporting documentation, may be obtained by calling the Department of Labor Departmental Clearance Officer, Ira L. Mills (202) 693–4122.

Comments and questions about the ICR listed below should be forwarded to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for the Employment and Training Administration, Room 10235, Washington, DC 20503. The Office of Management and Budget is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarify of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submissions of responses.

Agency: Employment and Training Administration (ETA).

Type of Review: Emergency.

Title: Labor Exchange Reporting System.

OMB Number: 1205–0240.

Affected Public: State, Local, or Tribal Government.

Form/Activity	Total respondents	Frequency	Total responses	Average time per response	Total annual burden hours
ETA 9002 A	54	Quarterly	216	346	74,641
ETA 9002 B	54	Quarterly	216	346	74,641
ETA 9002 C	54	Quarterly	216	346	74,641
ETA 9002 D	54	Quarterly	216	346	74,641
ETA 9002 E	54	Quarterly	216	21	4,536
VETS 200 A	54	Quarterly	216	346	74,641
VETS 200 B	54	Quarterly	216	346	74,641
VETS 200 C	54	Quarterly	216	346	74,641
Totals	54		1,728		527,020

Total Burden Cost (capital/startup): $1,825,200.

Total Burden Cost (operating/maintaining): $17,128,164.

Description: States submit quarterly performance data for the Wagner-Peyser-funded public labor exchange through ETA 9002 reports and for Veteran's Employment and Training Services (VETS)-funded labor exchange through VETS 200 reports. The Employment and Training (ET) Handbook No. 406 contains the report forms and provides instructions for completing these reports. The ET Handbook No. 406 contains a total of eight reports (ETA 9002 A, B, C, D, E; VETS 200 A, B, C). The ETA 9002 and VETS 200 reports collect data on individuals who receive core employment and workforce information services through the public labor exchange and VETS-funded labor exchange of the states' One-Stop delivery systems. The current LERS expires in April 2005.

This is a request to revise the current LERS requirements to include data elements necessary for assessing state progress against common measures of performance beginning July 1, 2005. In 2002, under the President's Management Agenda, OMB and other Federal agencies developed a set of common performance measures to be applied to certain Federally-funded employment and training programs with similar strategic goals. Although the common measures are an integral part of ETA's performance accountability system, these measures provide only part of the information necessary to effectively oversee the workforce investment system. ETA will continue to collect from states and grantees data on program activities, participants, and outcomes that are necessary for program management and to convey full and accurate information on the performance of workforce programs to policymakers and stakeholders.

The value of implementing common measures is the ability to describe in a similar manner the core purposes of the workforce system—how many people found jobs; did people stay employed; and did earnings increase. Multiple sets of performance measures have burdened states and grantees as they are required to report performance outcomes based on varying definitions and methodologies. By minimizing the different reporting and performance requirements, common performance measures can facilitate the integration of service delivery, reduce barriers to cooperation among programs, and enhance the ability to assess the effectiveness and impact of the workforce investment system, including the performance of the system in serving