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white breads and between branded and private label white bread.

## *C. Competition Between Interstate and Continental*

Interstate and Continental 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. Interstate's popular Butternut, Sunbeam, Mrs. Karl's and Weber's regional brands and Continental's powerhouse national Wonder brand are regarded by consumers as particularly close substitutes, for they are very comparable in appearance, price, taste, perceived quality and freshness.

Interstate and Continental recognize the rivalry between their products in the relevant geographic markets. To avoid losing sales to the other, each has engaged in extensive promotional, couponing, and advertising campaigns that reduce the prices charged for their branded white pan breads to the benefit of consumers. Through these activities, Interstate and Continental have each operated as a significant competitive constraint on the other's prices for white pan bread.

## D. Anticompetitive Consequences of the Acquisition

The Complaint alleges that Interstate's acquisition of Continental would remove the competitive constraint and create (or facilitate Interstate's exercise of) market power (i.e., the ability to increase process to consumers) in five relevant geographic markets: the Chicago area; the Milwaukee area; central Illinois (i.e., Peoria, Springfield, Champaign/Urbana); the Los Angeles area and the San Diego area.

Specifically, the Complaint alleges that the acquisition would increase concentration significantly in these already highly concentrated, difficult-toenter markets.<sup>2</sup> Post-acquisition, Interstate would dominate each market. It would control 41% of all sales of white pan bread in the Chicago market; 33% in the Milwaukee market; 62% in the central Illinois market; 64% in the Los Angeles market; and 50% in the San Diego market.

The Complaint alleges that Interstate's acquisition of Continental would likely lead to an increase in prices charged to consumers for white pan bread. Following the acquisition, Interstate likely would unilaterally raise the price of its own brands, Continental's Wonder, or both. Because Interstate and Continental's brands are perceived by consumers as close substitutes, Interstate could pursue such a pricing strategy without losing so much in sales to competing white pan bread brands or to private labels that the price increase would be unprofitable. Interstate could, for instance, profitably impose a significant increase in the price of the Wonder white pan bread, since a substantial portion of any sales lost for that product would be recaptured by increased sales of Interstate's other brands. Similarly, Interstate could increase the prices of any one of its other popular brands of white pan bread, such as Butternut, and much of the sales lost by that brand would be picked up by Interstate's Wonder white bread brand.

Since many consumers consider Interstate and Continental brands to be closer substitutes than most other branded or private label white breads, the competitive discipline provided by rivals after the acquisition would be insufficient to prevent Interstate from significantly increasing the prices now being charged for Interstate and Continental branded white pan bread. Moreover, in response to Interstate's price increases, competing bakers would likely increase their prices of white pan bread.

The Complaint alleges that new entry by other wholesale commercial bakers, or brand repositioning by existing competitors, in any of the five adversely affected geographic markets is unlikely to 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 five relevant geographic markets. Within nine months after entry of the Final Judgment, defendants will divest certain white pan bread labels, and other assets if necessary, to make an economically viable competitor in the sale of white pan bread in each geographic market. It may well be that all that is required to accomplish this goal is the sale to an existing wholesale baker of the exclusive rights to make and sell white pan bread under either Continental or Interstate's most popular brand. Depending on the purchasers' requirements, however, effective divestiture could also require a sale of Interstate or Continental's production and distribution facilities. Defendants must take all reasonable steps necessary to accomplish the divestitures, and shall cooperate with the prospective purchaser or with the trustee. If defendants do not accomplish the ordered divestitures within that ninemonth time period, the 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 Interstate will 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 her appointment becomes effective, the trustee will file monthly reports with the parties and the Court, setting forth the trustee's efforts to accomplish divestiture. At the end of six months, if the divestiture has not been accomplished, the trustee and the parties will make recommendations to the Court, which shall enter such orders as appropriate.

The relief sought in the various markets alleged in the Complaint has been tailored to ensure that consumers of white pan bread will not experience unreasonably high prices as a consequence of the acquisition.

#### 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 defendants.

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

The United States and the defendants 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.

<sup>&</sup>lt;sup>2</sup> The Hirfindahl-Hirschman Index ("HHI") is a widely-used measure of market concentration. Following the acquisition, the approximate post-merger HHIs, calculated from 1994 dollar sales, would be over: 2250 with a change of 766 for Chicago; 1800 with a change of 548 for Milwaukee; 4000 with a change of 974 for central Illinois; 4200 with a change of 2035 for Los Angeles; and 2900 with a change of 1265 for San Diego. Under the *Merger Guidelines*, the Antitrust Division is likely to challenge any acquisition that increases the HHI by 50 points or more in a market in which the postmerger HHI will exceed 1800 points.