



STATEMENT OF POINTS AND AUTHORITIES

The Complaint in this action alleges that Defendant Sara Lee, in acquiring assets of Reckitt & Colman plc ("Reckitt & Colman"), violated Section (a) of Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("Hart-Scott-Rodino Act" or "Act"), 15 U.S.C. § 18a, which requires certain acquiring persons and certain persons whose voting securities or assets are acquired to file notification with the Department of Justice and the Federal Trade Commission and to observe a waiting period before consummating certain acquisitions of voting securities or assets. The Complaint alleges that Defendant Sara Lee was continuously in violation of the Hart-Scott-Rodino Act during the period from October 4, 1991, through January 18, 1995, with respect to the acquisition of assets of Reckitt & Colman. Section (g)(1) of the Hart-Scott-Rodino Act, 15 U.S.C. § 18a(g)(1), provides that any person who fails to comply with the Act shall be liable to the United States for a civil penalty of not more than \$10,000 for each day during which such person is in violation of the Act. Accordingly, the Complaint seeks "an appropriate civil penalty." As the Stipulation and proposed Final Judgment indicate, Defendant Sara Lee has agreed to pay a

civil penalty of \$3,100,000.00 within 30 days of entry of the Final Judgment.

The United States does not believe that the procedures of the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. § 16 (b)-(h), are required in this action. The APPA requires that any proposal for a "consent judgment" submitted by the United States in a civil case filed "under the antitrust laws" be filed with the court at least 60 days in advance of its effective date, published in the Federal Register and a newspaper for public comment, and reviewed by the court for the purpose of determining whether it is in the public interest. Key features of the APPA are preparation by the United States of a "competitive impact statement" explaining the proceeding and the proposed judgment, and the consideration by the court of the proposed judgment's competitive impact and its impact on the public generally as well as individuals alleging specific injury from the violation set forth in the complaint.

The procedures of the APPA are not required in this action because the Complaint seeks, and the Final Judgment provides for, only the payment of civil penalties. In our view, a consent judgment in a case seeking only monetary penalties is not the type of "consent judgment" Congress had in mind when it passed

the APPA. Civil penalties are intended to penalize the defendant for violating the law, and, unlike injunctive relief, have no "competitive impact," and no effect on other persons or on the public generally, within the context of the APPA. The legislative history of the APPA does not contain any indication that Congress intended to subject settlements of civil penalty actions to its competitive impact review procedures.<sup>1</sup>

Thus, courts to date have not required use of APPA procedures in cases involving only the payment of civil penalties. Indeed, courts in this district have consistently entered consent judgments for civil penalties under the Hart-Scott-Rodino Act without employing APPA procedures.<sup>2</sup> Previously,

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<sup>1</sup> Civil penalties may also be assessed under Section 11(1) of the Clayton Act, 15 U.S.C. § 21(1), for violation of Federal Trade Commission orders.

<sup>2</sup> E.g., United States v. Pennzoil Company, 1994-2 CCH Trade Cases ¶ 70,760 (D.D.C.); United States v. Atlantic Richfield Company, 1992-1 CCH Trade Cases ¶ 69,695 (D.D.C.); United States v. Aero Limited Partnership, 1991-1 CCH Trade Cases ¶ 69,451 (D.D.C.); United States v. Atlantic Richfield Company, 1991-1 CCH Trade Cases ¶ 69,318 (D.D.C.); United States v. Equity Group Holdings, 1991-1 CCH Trade Cases ¶ 69,320 (D.D.C.); United States v. Service Corporation International, 1991-1 CCH Trade Cases ¶ 69,290 (D.D.C.); United States v. Reliance Group Holdings, Inc., 1990-2 CCH Trade Cases ¶ 69,428 (D.D.C.); United States v. Baker Hughes, Inc., 1990-1 CCH Trade Cases ¶ 68,976 (D.D.C.); United States v. Tengelmann-Warenhandels-gesellschaft, 1989-1 CCH Trade Cases ¶ 68,623 (D.D.C.); United States v. Lonrho, PLC,

(continued...)

in United States v. ARA Services, Inc., 1979-2 CCH Trade Cases ¶ 62,861 (E.D. Mo.), a consent judgment calling for both equitable relief and civil penalties was approved by the court on August 14, 1979, after the United States had taken the position in APPA proceedings that the civil penalties component of that judgment was not open to public objection. See 44 Fed. Reg. 41583 (July 17, 1979).

There may be circumstances, of course, in which the procedures of the APPA, while not required, would serve the public interest. Thus, in United States v. Coastal Corp., 1985-1 CCH Trade Case ¶ 66,425 (D.D.C.), the United States noted its view that the APPA was not applicable, but chose to employ the APPA procedures, believing that those procedures would in that particular case -- the first brought under the Hart-Scott-Rodino Act -- help describe to the public the circumstances and events that gave rise to the complaint and final judgment.

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<sup>2</sup>(...continued)

1988-2 CCH Trade Cases, ¶ 68,232 (D.D.C.); United States v. Roscoe Moss Corp., 1988-1 CCH ¶ 68,040 (D.D.C.); United States v. Trump, 1988-1 CCH Trade Cases ¶ 67,968 (D.D.C.); United States v. First City Financial Corp., Ltd., 1988-1 CCH Trade Cases ¶ 67,967 (D.D.C.); United States v. Wickes Companies, Inc., 1988-1 CCH Trade Cases ¶ 67,966 (D.D.C). In each case, the United States noted the issue in a motion for entry of judgment, explaining to the court that it believed the APPA inapplicable.

49 Fed. 36455 (Sept. 17, 1984).<sup>3</sup> There are no circumstances, however, favoring the use of APPA procedures in this case.

For the above reasons, the United States asks the Court to enter the Final Judgment in this case.

Dated: Feb 6, 1996

Respectfully submitted,



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<sup>3</sup> In the only other case involving civil penalties under the Hart-Scott-Rodino Act where APPA procedures were followed, United States v. Bell Resources Ltd., 1986-2 CCH Trade Cases ¶ 67,321 (S.D.N.Y), the complaint sought injunctive relief in addition to civil penalties.

PERSONS TO BE NOTIFIED OF ENTRY OF JUDGMENT

Pursuant to Rule 108(k) of the District of Columbia Federal District Court Rules, the following persons are to be notified of the entry of the attached final judgment:

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