

for Defendant Archer-Daniels-Midland Company.

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Appendix A

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December 27, 2002.

Roger W. Fones,
Chief, Transportation, Energy & Agriculture
Section Antitrust Division, United States
Department of Justice, 325 Seventh
Street, NW., Suite 500, Washington, DC
20530.

Re: Proposed Settlement of *United States v.*
Archer-Daniels-Midland Co and
Minnesota Corn Processors, LLC.

Dear Mr. Fones: Enclosed is a Tunney Act comment on the proposed settlement of the suit challenging ADM's acquisition of Minnesota Corn Processors. The goals motivating this comment are to contribute to the improvement of antitrust analysis and enforcement. My work was entirely pro bono and uncompensated.

I am honored that seven distinguished scholars of antitrust and economics have agreed to support this statement. Their names are listed therein. In addition, two major organizations, the National Farmers Union and the Organization for Competitive Markets also support this statement.

If you or any of your staff have any questions about this comment, please feel free to contact me at the above address or by phone (608/263-7416). I can also be reached by email at pccarste@facstaff.wisc.edu.

Yours truly

Peter C. Carstensen,
Young-Bascom Professor of Law.

Tunney Act Comments on the Proposed Settlement of *United States v. Archer-Daniels-Midland Co and Minnesota Corn Processors, LLC*, Federal District Court, District of Columbia, Civil Case No. 02-1768

Submitted by Professor Peter C. Carstensen on behalf of himself and The National Farmers Union, The Organization for Competitive Markets, Professor Paul Brietzke, Professor John Connor, Professor Thomas Greaney, Professor Neil E. Hari,

Professor Delbert Robertson, Professor Stephen Ross, Professor Kyle Stiegert

At a time when the U.S. government and the American public are demanding that private enterprises provide full and complete disclosure of essential information to avoid repetition of the scandals that have destroyed Enron, Worldcom, and Arthur Anderson, it is incumbent on the Department of Justice to make the same kind of full and complete disclosure of information and analysis in connection with its obligations under the Tunney Act. Only then, can the court and the public in fact judge the appropriateness of the proposed settlement of this or any other major antitrust case. The court should not grant approval to this proposed consent decree until the requirements of the Tunney Act are fully satisfied.

I am joined in these comments by two important organizations, the National Farmers Union and the Organization for Competitive Markets, concerned with competition policy and its impact on the markets for agricultural products as well as a group of seven scholars in the fields of economics and antitrust law. Appendix A provides additional background information about both the organizations and individuals supporting these comments.

The government is proposing to settle its challenge to Archer-Daniels-Midland's (ADM) acquisition of Minnesota Corn Processors (MCP) by allowing the acquisition on condition that MCP withdraw from a joint marketing arrangement with Corn Products International (Corn Products) concerning high fructose corn syrup (HFCS). As demonstrated below, the disclosure contained in the Competitive Impact Statement filed in connection with the proposed settlement of the government's does not satisfy the basic requirements of the Tunney Act.

The Competitive Impact Statement fails to disclose essential facts about the impact of this acquisition on the directly affected markets and ADM's status and role in those markets. Further it does not explain how the proposed decree, in light of those facts and an apparent failure to consider relevant relief options as well as the Antitrust Division's own Merger Guidelines, can successfully protect the identified markets from increased risks of anticompetitive conduct. Finally, the Competitive Impact Statement omits entirely any discussion of the impact of allowing this combination in the related ethanol markets in which ADM is by many orders of magnitude the largest firm and MCP is the second largest.

It is our position that the government must file a revised Competitive Impact Statement that discloses all relevant information and analysis relating to the competitive implications of this settlement. Without such disclosure, the record will not disclose "the competitive impact of such judgment" nor its "impact . . . upon the public generally. . . ." Clayton Act, Section 5(e)(1) and (2); 15 USC sec. 16(e)(1) and (2).; As result, the District Court can not perform its obligation to "determine that the entry of such judgment is in the public interest." Section 5(e); 15 USC sec. 16(e).

Summary

In order to determine whether the proposed settlement of this merger case will serve the public interest in preserving competition in all the markets in which the combining enterprises both compete, it is essential that all relevant facts be fully disclosed. This acquisition will cause a substantial change in the market structure of the corn syrup, HFCS and ethanol markets. In all of these markets the effect of this transaction will or may be to increase concentration.

The initial focus of concern should be the analysis of the corn syrup and HFCS markets. Yet, the Competitive Impact Statement fails to disclose certain essential facts about those markets, ADM's position in them, and the government's basis for believing that the remedy proposed would eliminate the anticompetitive risks posed by the disclosed as well as undisclosed facts about those markets. First, there is no disclosure of MCP's separate market share in corn syrup or either of the two HFCS markets that the complaint and Competitive Impact Statement focus on. Hence, it is not possible to tell what impact this acquisition will have on concentration in these already concentrated markets where entry of new competitors is unlikely. Second, the Competitive Impact Statement does not disclose or discuss ADM's ownership directly and indirectly of 25% of the stock of the corporate parent of one of its major, putative competitors in these markets. Third, the Competitive Impact Statement does not report the decision of the 7th Circuit that examined the risks of anticompetitive, interdependent conduct in the HFCS markets and found them to be real and substantial. Fourth, the Competitive Impact Statement discussion of alternative remedies implies that the government did not consider obvious additional relief that would have both allowed this merger and reduced the ownership linkages among ostensible competitors within both the HFCS and ethanol markets. Finally, and most seriously, the Competitive Impact Statement does not explain why, in light of the foregoing facts, the proposed remedy, separating MCP from Corn Products but allowing its combination with ADM, is likely to achieve the goal of preserving and enhancing competition in these markets. Because of these omissions of facts and explanations of essential analysis, it is not possible for a court, under even the most lax version of the government's self-serving standard for review, to approve this proposed decree.

In respect to the markets involving ethanol, the Competitive Impact Statement is totally silent. The facts are that ADM is the largest producer of ethanol with a very large market share, and MCP is the second largest producer. In addition, ADM is one of an apparently limited number of firms that have the resources to market and distribute ethanol to end users. Thus, this combination will substantially increase ADM's share of the ethanol production market and may further entrench its position in the marketing of ethanol. It is possible that there are good reasons why, despite these prima facie anticompetitive implications of this acquisition, it is unlikely to have such