

Natural Resources Division, Department of Justice, Washington, DC 20530, and should refer to *United States v. Morton Int'l, Inc.*, Civil Action No. 05-3088 (DMC), D.J. Ref. 90-5-2-1-07513.

The proposed consent decree may be examined at the Office of the United States Attorney, District of New Jersey, 970 Broad Street, Newark, New Jersey 07102. During the public comment period, the proposed consent decree may also be examined on the following Department of Justice Web site, <http://www.usdoj.gov/enrd/open.html>. A copy of the proposed consent decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044-7611 or by faxing or e-mailing a request to Tonia Fleetwood (tonia.fleetwood@usdoj.gov), fax no. (202) 514-0097, phone confirmation number (202) 514-1547. If requesting a copy of the proposed consent decree, please so note and enclose a check in the amount of \$5.75 (25 cents per page reproduction cost) payable to the U.S. Treasury.

Ronald Gluck,

Assistant Chief, Environmental Enforcement Section, Environmental and Natural Resources Division.

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DEPARTMENT OF JUSTICE

Antitrust Division

[Civil No.: 04-CV-5829]

Public Comment and Response on Proposed Final Judgment United States v. Eastern Mushroom Marketing Cooperative, Inc.

Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)-(h), the United States of America hereby publishes below the comment received on the proposed Final Judgment in *United States v. Eastern Mushroom Marketing Cooperative, Inc.*, Civil Action No.: 04-CV-5829 (TNO), which was filed in the United States District Court for the Eastern District of Pennsylvania, together with the United States's response to the comment.

Copies of the comment and response are available for inspection at the U.S. Department of Justice, Antitrust Division, 325 7th Street, NW., Room 200, Washington, DC 20530, (telephone: (202) 514-2481), and at the Office of the Clerk of the United States District Court for the Eastern District of Pennsylvania, 601 Market Street, Room 2609, Philadelphia, Pennsylvania 19106-

1797. Copies of any of these materials may be obtained upon request and payment of a copying fee.

Dorothy B. Fountain,

Deputy Director of Operations, Antitrust Division.

1/5/05

Roger W. Fones,

Chief, Transportation, Energy & Agriculture Section, U.S. Department of Justice, Antitrust Division, 325 7th Street, NW., Suite 500, Washington DC 20530

Dear Mr. Fones: This letter is in response to the investigation of the Eastern Mushroom Marketing Cooperative (EMMC). These grower packers have pulled the wool over the eyes of the customers, consumers, and the Department of Justice. This group has forced many members to be in the EMMC or they would not do business with them. In the community each company would sell fresh mushrooms to each other to fill daily needs. If you were not a member a great deal of pressure was put on these people. From not selling to overcharging and even trying to limit the picking containers they could pick in. Any one that tried to start to sell fresh mushrooms in the new period of the EMMC were shut down in other means within the industry. This has not been an ethical business plan.

As far as the growing houses (Farms) what the U.S. Government has come up with is a token. These growing houses have been pillaged stripped to no value to any one new that wants to purchase as a growing facility. The grower farmers are very smart and only will give information to the government that it wants them to know. No fault of the government which would have no way of knowing anything about the growing facilities.

First this group purchased the growing farms. Threatened anyone that competed for the facilities. The Group would go into the marketing area and give out low quotes on fresh mushrooms even when they were raising the pricing in the home markets.

Second when they acquired these growing farms they would go in and strip the houses of anything useful to grow mushrooms and just leave the walls. This was a guarantee no one would start these back up. This is the insurance police on top of the restriction. Growing of mushrooms is a specialized process. Not just planting in field. Must be air conditioned and very sanitary. Compost facilities with specialized equipment. Not something that is easy. This is why pulling the restrictions mean absolutely nothing. The damage is done when they take all the special equipment out.

Currently this group is trying to purchase the Money's farms that are shutting down but waiting for them to close. The plan is to purchase these farms and pillage so they will never be able to grow mushrooms again. This is a way to get what they want and insult the U.S. Government. Think about it. Many businesses have suffered and many consumers have overpaid for mushrooms. They have created a false market. If this was not true how can people purchase for millions and sit on them if they are not

taking an unfair advantage of the market place.

JUST SIT BACK AND ASK THE QUESTION OF HOW AND WHY THESE PEOPLE ARE DOING THIS. PURE GREED
Judge: Thomas N. O'Neill, Jr.

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"), the United States of America hereby files comments received from a member of the public concerning the proposed Final Judgment in this civil antitrust action and the Response of the United States to those comments. The United States continues to believe that the proposed Final Judgment will provide an effective and appropriate remedy for the antitrust violations alleged in the Complaint. The United States will move the Court for entry of the proposed Final Judgment after the public comment and Response have been published in the **Federal Register**, pursuant to 15 U.S.C. 16(d).

I. Factual Background

A. The Defendant, the Eastern Mushroom Marketing Cooperative ("EMMC").

The EMMC was incorporated in the Commonwealth of Pennsylvania on December 21, 2000, and began operations in January 2001. At the time the Complaint was filed in this case, the EMMC had 15 members with a single staff person, an executive director. The EMMC is made up of entities that grow, buy, package, and ship Agaricus and specialty mushrooms to retail and food service outlets across the United States. The EMMC members each grow some of their own product, but they also buy mushrooms from each other and from nonmembers. Shortly after it began operations, the EMMC adopted minimum prices at which its members could sell their mushrooms to customers in various geographic regions throughout the United States. The minimum prices, with periodic adjustments, were published regularly among members.

According to the United States Department of Agriculture, 844 million pounds of mushrooms were produced nationwide during the 2001-2002 growing season with an approximate value of \$908 million. The EMMC members' estimated collective share of that national market was 60%, with their share estimated to be higher in the East region.

B. The EMMC's Real Estate Transactions

Shortly after instituting minimum price increases in all regions, the EMMC began acquiring mushroom farms. Between May of 2001 and March of 2002, the EMMC acquired one mushroom farm in Hillsboro, Texas, one farm in Dublin, Georgia, and three in Pennsylvania. These five farms had the capacity to grow fresh mushrooms in competition with EMMC members' farms even though none of the farms was in operation at the time of its respective purchase. Except for the Texas farm, the EMMC sold these properties almost immediately after purchasing them and filed deed restrictions at the time of resale which effectively prohibited in perpetuity the conduct of any business related to the mushroom industry.

In addition to the aforesaid purchases and resales, the EMMC entered into lease option agreements for two more mushroom farms, one in Ohio and the other in Pennsylvania, in 2002. The EMMC never actually entered into leases for these properties, but the agreements gave it the right to file deed restrictions prohibiting the production of mushrooms on the properties for ten years, and the EMMC exercised that right.

The combined production capacity of the seven farms that were purchased/lease-optioned by the EMMC totaled approximately 42–44 million pounds of mushrooms annually.

The United States investigated the likelihood that the several land acquisitions and related transactions by the EMMC were entered into with the sole intent of removing productive capacity from the market to avoid competition from nonmembers in violation of Section 1 of the Sherman Act (15 U.S.C. 1) as part of a conspiracy to restrain trade in the East mushroom market. Upon the completion of the investigation, the United States concluded that the EMMC had violated Section 1 of the Sherman Act.

In or about November 2004, and before the filing of the Complaint in this case, the United States and the EMMC reached an agreement whereby the EMMC agreed to consent to the proposed Final Judgment filed with the Complaint in this case. Pursuant to that Final Judgment, the EMMC agreed to file all papers necessary to eliminate all deed restrictions previously filed on the properties in which it held an ownership or leasehold interest and agreed that, in the future, it would neither file nor seek to enforce any similar deed restrictions on any other

properties in which it held an ownership or leasehold interest.

C. Complaint

On December 16, 2004, the United States filed a Complaint alleging that the real estate transactions entered into by the EMMC were intended to restrict, forestall and exclude competition from nonmember farmers in violation of Section 1 of the Sherman Act. The Complaint further alleged that the acreage and facilities available to produce mushrooms for American consumers were artificially reduced and consumers were deprived of the benefits of competition.

D. The Proposed Settlement

At the time the United States filed its Complaint, it also filed a proposed Final Judgment, a Competitive Impact Statement ("CIS"), and a Stipulation signed by counsel for the parties. The proposed Final Judgment is designed to eliminate the anticompetitive effects of the EMMC's real estate transactions by removing the existing deed restrictions on properties in which the EMMC has an ownership or leasehold interest and preventing the filing of any similar deed restrictions in the future.

E. Compliance with the Tunney Act

To date, the United States and the EMMC have complied with the provisions of the Tunney Act as follows:

1. The Complaint, proposed Final Judgment, CIS and Stipulation were all filed on December 16, 2004.

2. The EMMC filed the statement required by 15 U.S.C. 16(g) on May 11, 2005.

3. 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 February 5, 2005 through February 11, 2005.

4. A summary of the terms of the proposed Final Judgment and CIS was published in the Philadelphia Inquirer, a newspaper of general circulation in the region surrounding Philadelphia, Pennsylvania, for seven days during the period February 27, 2005 through March 5, 2005.

5. The Complaint, CIS, and proposed Final Judgment were published in the **Federal Register** on February 10, 2005, 70 FR 7120 (2005). The United States also posted the Complaint, proposed Final Judgment and the CIS on its Web site, <http://www.usdoj.gov/atr/cases/f206900/206919>.

6. The sixty-day comment period specified in 15 U.S.C. 16(b) expired on May 5, 2005.

7. The United States received one comment from an anonymous member of the public which is attached hereto as Appendix A. The United States 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 comment and the Response are published in the **Federal Register**.

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

Upon the publication of the public comment and this Response, the United States will have fully complied with the Tunney Act and will move for entry of the proposed Final Judgment as being "in the public interest." 15 U.S.C. 16(e), as amended. In making the "public interest" determination, the Court should 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)).

It is not proper during a Tunney Act review to "reach beyond the complaint to evaluate claims that the government did not make and to inquire as to why they were not made." *Microsoft* 56 F.3d at 1459; see also *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6–7 (D.D.C. 2003) (rejecting argument that court should consider effects in markets other than those raised in the complaint); *United States v. Pearson PLC* 55 F. Supp. 2d 43, 45 (D.D.C. 1999) (noting that a court should not "base its public interest determination on antitrust concerns in markets other than those alleged in the government's complaint"). Because "[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 the United States might have but did not pursue. *Microsoft*, 56 F.3d at 1459–60; see also *United States v. W. Elec. Co.*, 993 F.2d 1572, 1577 (D.C. Cir. 1993) (noting that a Tunney Act proceeding does not permit "de novo determination of facts and issues" because "[t]he balancing of competing social and political interests affected by a proposed antitrust decree must be left, in the first instance, to the discretion of

the Attorney General” (citations omitted)).

Moreover, the United States is entitled to “due respect” concerning its “prediction as to the effect of proposed remedies, its perception of the market structure, and its view of the nature of the case.” Archer-Daniels-Midland Co., 272 F. Supp. 2d at 6 (citing Microsoft, 56 F.3d at 1461).

III. Summary of Public Comment

Although it is unclear whether the author intended it as a comment in this proceeding, the United States received one anonymous letter related to this case during the relevant 30-day time period. The letter made a number of allegations about the conduct of Defendant EMMC and various unidentified mushroom grower/packers. These allegations are not comments on the proposed Final Judgment and therefore are not relevant here. In any event, the United States investigated each of these or similar allegations and concluded that they were unsubstantiated or did not constitute violations of the Federal antitrust laws.

The letter also commented on the relief contained in the proposed Final Judgment, claiming that the EMMC had sold or removed specialized equipment from the farms, and questioned the value of removing the deed restrictions the EMMC had placed on the properties.

IV. The Response of the United States to the Comment

In filing this case, the United States was concerned that the EMMC had collectively removed 8 percent of the mushroom production capacity in the East region of the United States. This was done primarily by placing deed restriction on former farms, restrictions that erected an absolute barrier to new entry on these farms. By removing these restrictions, the proposed Final Judgment assures that new entry can occur wherever economically justified.

There are a number of factors in addition to the presence of specialized equipment that make a farm attractive to potential mushroom entrants, including suitable buildings, an available trained labor force in the area, and existing zoning approvals. Specialized equipment, though potentially valuable, is not unique and can be replaced. Accordingly, the United States determined that the crucial element of relief was the removal of the deed restrictions. The proposed final Judgment accomplishes this.

V. Conclusion

The Competitive Impact Statement and this Response to Comments

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

Respectfully submitted,

C. Alexander Hewes, Tracey D. Chambers, David McDowell,

Trial Attorneys, United States Department of Justice, Antitrust Division, Transportation, Energy & Agriculture Section, 325 7th Street, NW., Suite 500, Washington, DC 20530, Telephone: (202) 305-8519, Facsimile: (202) 616-2441.

Laura Heiser, Anne Spiegelman,

Trial Attorneys, Antitrust Division, Philadelphia Field Office.

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DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Microcontaminant Reduction Venture

Notice is hereby given that, on June 8, 2005, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (“the Act”), Microcontaminant Reduction Venture (“MRV”) has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its project status. The notifications were filed for the purpose of extending the Act’s provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. The change in its project status is: The parties to MRV, KMG—Bernuth, Inc., Houston, TX and Vulcan Materials Company, Birmingham, AL, have extended the term of the venture from four to five years.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and MRV intends to file additional written notification disclosing all changes in membership.

On June 13, 2001, MRV filed its original notification pursuant to Section 69(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on July 19, 2001 (66 FR 37709).

The last notification was filed with the Department on June 15, 2004. A notice was published in the **Federal Register** pursuant to section 69(b) of the Act on July 14, 2004 (69 FR 42212).

Dorothy B. Fountain,

Deputy Director of Operations, Antitrust Division.

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DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Mobile Enterprise Alliance, Inc.

Notice is hereby given that, on June 13, 2005, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (“the Act”), Mobile Enterprise Alliance, Inc. has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act’s provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Apear Networks, Stockholm, Sweden has been added as a party to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and Mobile Enterprise Alliance, Inc. intends to file additional written notification disclosing all changes in membership.

On June 24, 2004, Mobile Enterprise Alliance, Inc. filed its original notification pursuant to section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to section 6(b) of the Act on July 23, 2004 (69 FR 44062).

The last notification was filed with the Department on March 17, 2005. A notice was published in the **Federal Register** pursuant to section 6(b) of the Act on April 1, 2005 (70 FR 16944).

Dorothy B. Fountain,

Deputy Director of Operations, Antitrust Division.

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