IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

GRUPO BIMBO, S.A.B. de C.V., et al.,

Defendants.

Case No. 1:11-cv-01857-EGS

Filed: February 8, 2013

MEMORANDUM OF POINTS AND AUTHORITIES OF PLAINTIFF UNITED STATES OF AMERICA IN OPPOSITION TO DEFENDANTS' MOTION FOR AN ORDER "TEMPORARILY SUSPENDING DIVESTITURE"

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Plaintiff the United States of America respectfully submits this memorandum in opposition to the motion of defendants Grupo Bimbo S.A.B. de C.V. and BBU, Inc. (together, "Bimbo") for an "order temporarily suspending divestiture until such time as the Court and the parties have an opportunity to complete their review of the changed circumstances presented by Flowers' actions to acquire the national bread business of Hostess" (Doc. 64), and for at least 60 days (Proposed Order, Doc. 64-14). The motion should be denied, and Bimbo and the Divestiture Trustee should proceed promptly with the divestiture of the California Assets to Flowers Foods, Inc., as required by the Modified Final Judgment to which Bimbo has previously consented.

Introduction and Summary of Argument

The predicate of Bimbo's motion for delay is a purportedly changed circumstance – the prospect of Flowers' acquisition of Hostess Brands, Inc.'s bread assets. But Bimbo does not show that this changed circumstance makes *its acquisition of Sara Lee's* bread

business – the antitrust violation the divestiture is meant to remedy – no longer anticompetitive or no longer requiring a remedy.

Delaying divestiture delays that remedy, which should have been implemented a year ago, delays the date on which Flowers can start operating and investing in the California Assets, and threatens to leave the violation in California markets that gave rise to this action unremedied altogether.

While Bimbo claims it "does not seek more drastic or permanent relief at this time," Doc. 64-1 at 19, the only reason to delay the divestiture of the California Assets to Flowers would be if the Court might ultimately order that Bimbo *not* divest those assets to Flowers. But Flowers is the only potential, viable purchaser, as Bimbo's and the Trustee's efforts demonstrate, *see* Hrg. Tr. at 29 (Jan. 30, 2013), so such an order would result in the divestiture not occurring at all. The result would be that the violation alleged in the Complaint – the loss of competition in the California sliced bread markets – would not be remedied.

The potential Flowers-Hostess transaction is beyond the scope of this proceeding, because the Final Judgment in this matter is limited to remedying the violation *alleged in the Complaint*. The Complaint alleged that Bimbo's acquisition of Sara Lee's bread business would likely result in anticompetitive effects in the markets for all sliced bread in California (and elsewhere). This Court has recognized that proceedings under the Tunney Act, 15 U.S.C. § 16(e)(1), are limited to the violations alleged, and are not an occasion to inquire into other ways the merger at issue might lessen competition – much less how some *other* transaction by *other* parties might do so. Flowers' acquisition of

Hostess's bread assets is being investigated by the Antitrust Division, which will take appropriate action – including challenging the acquisition, if appropriate.

Bimbo has not met the standards for modifying a consent judgment. The changed circumstances it relies on might not occur and were at least as foreseeable as circumstances that have led courts to deny delaying other divestitures or decree obligations. Hostess was in financial difficulty and considering bankruptcy when the Complaint was filed and when Bimbo agreed to the consent decree. Flowers was and is a major player in the bread industry, and Bimbo had agreed to split the Sara Lee brand with the acquirer of the California Assets – which was likely to be Flowers.

Even had Bimbo shown changed circumstances, delaying the divestiture would not be in the public interest. Delaying or preventing the divestiture of the California Assets to Flowers would leave the instant violation unremedied, which would be contrary to the public interest, and Bimbo has made no showing that changed circumstances make a remedy for Bimbo's acquisition of Sara Lee unnecessary. The Flowers-Hostess transaction may or may not violate the antitrust laws. Bimbo has not shown that it does – Bimbo merely points to high shares in segments that might or might not be markets.

Bimbo urges, in essence, that Flowers' acquisition of Hostess would reduce Flowers' incentive to participate in nationwide Sara Lee promotions, to the detriment of Bimbo's Sara Lee brand. But Bimbo entered into a consent decree that would split the Sara Lee brand, knowing that Flowers was a likely acquirer and that Flowers was already promoting its own national brand, Nature's Own, in California and elsewhere. Flowers' change in incentives is at most a difference of degree, not of kind, and does not constitute the substantial changed circumstance necessary to modify a consent judgment.

Background

On November 9, 2010, Bimbo agreed to acquire the North American Fresh Bakery business of defendant Sara Lee Corporation. Complaint ¶ 1 (Doc. 1). That acquisition would have combined the two largest sellers of sliced bread in San Diego, Los Angeles, and Sacramento, California, and the largest and third largest sellers of sliced bread in San Francisco, California (the "California markets"), among other overlap markets. *Id.* ¶ 21. The United States investigated the acquisition, and concluded that the acquisition would likely substantially lessen competition in the markets for "sliced bread" in eight geographic markets, including the California markets, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, and therefore brought this action to enjoin that acquisition on October 21, 2011.

That same day, the United States filed a proposed Final Judgment, which the Court entered on February 16, 2012. Doc. 18. The Final Judgment required the divestiture of the Sara Lee family of sliced bread brands and the EarthGrains brand in California, and other assets (collectively the "California Assets," *see id.* ¶ II.D). The United States believed that divestiture of the California Assets to a viable acquirer would "prevent or significantly reduce the increase in concentration that the transaction would otherwise produce." Competitive Impact Statement at 9 (Doc. 2). The Final Judgment required Bimbo to divest the divestiture assets within five calendar days after notice of entry of the judgment (*i.e.*, February 21, 2012). Doc. 18 ¶ IV.A.

Defendants stipulated to the entry of the Final Judgment, Doc. 3 ¶ IV.A, and further stipulated as follows:

> Defendants represent that they can and will make the divestitures ordered in the proposed Final Judgment and that Defendants will later raise no claim of

> mistake, hardship, or difficulty of compliance as grounds for asking the Court to modify any of the provisions contained therein.

Doc. 3 ¶ IV.F. Notwithstanding this representation, Bimbo did *not* divest the California Assets by the February 21, 2012 deadline. Therefore, on unopposed motion of the United States, the Court appointed James A. Fishkin as Divestiture Trustee by Minute Order of February 29, 2012 (*see* Doc. 21).[1] On the United States' motion (Doc. 54), the Court extended the Trustee's term with respect to the California Assets (among others) to and including May 30, 2013. Minute Order of November 2, 2012 (*see* Doc. 54).
The Court had previously extended the Trustee's term regarding the California Assets (among others) for 60 days. Minute Order of August 27, 2012 (*see* Doc. 44).

The Trustee contacted several potential buyers for the California Assets, and only Flowers and one other potential acquirer expressed interest in the California Assets. After conducting due diligence, the other potential acquirer told the Trustee, on August 3, 2012, that it would not seek to acquire the California Assets.[2] The Trustee therefore negotiated a modified proposed purchase agreement, and on October 24, 2012, submitted an executed purchase agreement to the United States, to which the United States said it did not object on October 26, 2012. Bimbo likewise did not object.[3]

Therefore, under the terms of the purchase agreement and the Modified Final Judgment, the Trustee, Flowers and Bimbo should be proceeding to close the divestiture of the California Assets. The California divestiture is scheduled to close February 23, 2013. Doc. 64-1 at 2. By its terms, Flowers can terminate the Asset Purchase Agreement

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[1] The Court has also appointed a Monitoring Trustee. For simplicity, references in this memorandum to "the Trustee" are to the Divestiture Trustee unless otherwise specified.
[2] *See* Divestiture Trustee's Ninth Monthly Report at 80 (Doc. 59) (filed under seal).
[3] Doc. 59 at 82 (under seal). Under the Modified Final Judgment, Bimbo is not permitted to object on any basis other than the Trustee's malfeasance. Doc. 51 ¶ V.C.

if the divestiture does not close by May 30, 2013, the current expiration of the Trustee's term.

On January 29, 2013, Bimbo brought this motion seeking to delay the divestiture of the California Assets on the ground that Flowers was seeking to acquire certain bread assets of Hostess, a debtor in possession, including assets in California. Hostess had emerged from a prior bankruptcy in 2009. Nonetheless Hostess had been in financial difficulty, and reentered bankruptcy in January 2012. In November 2012, Hostess ceased operations, Doc. 64-1 at 8, and Hostess's brands, including Wonder, are not currently being sold in stores, *id*. On January 11, 2013, Flowers entered into a "stalking horse" agreement to purchase certain of Hostess's bread assets, but those assets are subject to an auction to be conducted by the Bankruptcy Court on February 28, after which the Bankruptcy Court will approve a purchaser on March 5.[4] The Antitrust Division is currently investigating Flowers' potential acquisition of Hostess's (shut down) bread assets.

Argument

I. THE CALIFORNIA DIVESTITURE SHOULD PROCEED PROMPTLY.

The "essence of this Modified Final Judgment is the prompt and certain divestiture of certain rights and assets" by Bimbo. Doc. 51 at 1. Bimbo agreed to use its "best efforts to divest the Divestiture Assets as expeditiously as possible." Doc. 51 ¶ IV.A. But the indefinite delay Bimbo seeks jeopardizes the divestiture of the California

[4] Doc. 64-1 at 9. Flowers has committed to buying the Sara Lee California Assets in this divestiture, and specifically reserved the right to *not* buy Hostess assets if an acquisition of Hostess assets conflicted with its acquisition of divestiture assets. Asset Purchase Agreement Among Hostess Brands, Inc., Interstate Brands Corporation, IBC sales Corporation, Flowers Foods, Inc., and FBC Georgia, LLC ¶ 8(d)(i) (attached as Exh. 1).

Assets because Flowers is the only viable buyer of these assets. Both Bimbo and the Trustee searched for other buyers, but Flowers was the only viable buyer, and the Trustee and the United States approved Flowers.[5] If closing on the divestiture does not occur by May 30, 2013, Flowers can terminate the purchase agreement, and no other suitable buyer is likely to be found for the California Assets.

Failure to divest the California Assets would be contrary to the purpose of the judgment, and would deny the United States a remedy for the violation alleged in the Complaint. As the preamble of the Modified Final Judgment states, "the United States requires Defendants to make certain divestitures for the purpose of remedying the loss of competition *alleged in the Complaint*." Doc. 51 at 1 (emphasis added). The Complaint alleges that Bimbo's "proposed acquisition of Sara Lee would likely substantially lessen competition in interstate trade and commerce" because "actual and potential competition in the relevant markets between [Bimbo] and Sara Lee for sales of sliced bread would be eliminated" and "competition generally in the relevant markets for sliced bread would be substantially lessened." Complaint ¶ 33.

Even a shorter delay would not be in the public interest. Each day of delay leaves the California Assets in limbo longer, depriving consumers of the benefit that increased competition would provide if the California Assets were operated by an owner with incentives to invest in and grow those assets under a long-term plan. The delay also imposes costs on Flowers (*see* Hrg. Tr. 26(Jan. 30, 2013)) (Flowers would be spending

[5] Under the decree, it is up to "the United States, in its sole discretion," to approve an acquirer in a Trustee divestiture – not to the Defendants or, respectfully, the Court. Doc. 51 ¶ IV.I (quoted Doc. 64-1 at 6).

$500,000 per week with no revenue). The Hold Separate Stipulation and Order is not, and was not intended as, a permanent or long-term solution.

II. THE FLOWERS-HOSTESS TRANSACTION IS NOT BEFORE THIS COURT.

The crux of Bimbo's argument is that Flowers' potential acquisition of *Hostess* assets, in addition to Flowers' acquisition of the California Assets, might be anticompetitive and might harm Bimbo. Bimbo does not contend that Flowers' acquisition of the California Assets would itself be anticompetitive or contrary to the public interest.[6]

But the potential Flowers-Hostess transaction is not properly before this Court. This proceeding is a Tunney Act proceeding to enter and supervise an antitrust consent decree to resolve the United States' challenge to Bimbo's acquisition of Sara Lee's bread business. The Complaint alleged likely anticompetitive effects in the market for "sliced bread" (not in any narrower market) in, among others, four geographic areas in California. The Complaint did not allege that Flowers' acquisition of Hostess assets would be anticompetitive, or that any transaction would be anticompetitive in a "traditional white bread" or "traditional bread" market.

As this Court has recognized, a Tunney Act proceeding is not an avenue for the court to examine violations *not* alleged by the Government:

> [T]he D.C. Circuit held in *Microsoft* that a district court should not inquire beyond the complaint unless the complaint makes a mockery of judicial power. Apart from that rare case, a district court is not permitted to "reach beyond the

[6] See Jan. 30, 2013, Hrg. Tr. 7 ("Flowers was a very appropriate purchaser at that time for that California piece of the Sara Lee assets"); Doc. 64-11 ¶ 8. Bimbo notes that "Flowers had no sales in Northern California and was a recent entrant into Southern California." Doc. 64-1 at 7.

> complaint to evaluate claims that the government did *not* make and to inquire as to why they were not made."

U.S. v. SBC Communs., Inc., 489 F. Supp. 2d 1, 14 (D.D.C. 2007) (Sullivan, J.), *quoting U.S. v. Microsoft Corp.*, 56 F.3d 1448, 1459 (D.C. Cir. 1995). This Court found that the 2004 Tunney Act amendments did not change the law in this regard. 489 F. Supp. 2d at 14.

The question before the Court in entering the consent judgment in *this* case was whether requiring divestiture of the California Assets (and others) to remedy the Bimbo-Sara Lee transaction was in the public interest. Even if a Flowers-Hostess transaction had been pending at that time, the Court would *not* have considered whether that transaction also required a remedy. Consequently, the Court's review *now* should likewise be limited to whether divestiture of the California Assets remains "within the reaches of the public interest," *id.* at 15, remedying the violation alleged in the Complaint in *this* action – not whether a potential Flowers-Hostess transaction also requires a remedy. Bimbo cites no case (and the Government is aware of no case, other than the District Court's decision in *Microsoft* itself, which was reversed) in which a court refused to enter, or modified, a consent decree because some other, un-alleged conduct or transaction was said to be anticompetitive.

The Antitrust Division is currently investigating the potential Flowers-Hostess transaction, and is not waiting for the Bankruptcy Court to award Hostess's bread assets to Flowers. The United States can challenge – and has challenged – the sale of assets in bankruptcy by bringing a Clayton Act Section 7 claim in District Court. *U.S. v. Sungard Data Systs.*, 172 F. Supp. 2d 172, 178-79 (D.D.C. 2001). Indeed, Congress specifically contemplated antitrust investigations of, and challenges to, bankruptcy sales by making

those sales subject to the Hart-Scott-Rodino Act, 15 U.S.C. § 18a, subject to special timing provisions, 11 U.S.C. § 363(b)(2)(B).

Bimbo has its own remedies. It can bring its own Section 7 action, if it can demonstrate antitrust injury and prove the case it asserts. *AlliedSignal, Inc. v. B.F. Goodrich Co.*, 183 F.3d 568 (7th Cir. 1999) (enjoining merger in action brought by customer and component makers). It can object in Bankruptcy Court. And it can of course present its views to the Antitrust Division.

III. BIMBO HAS NOT DEMONSTRATED THAT IT IS ENTITLED TO A MODIFICATION OF THE JUDGMENT TO WHICH IT CONSENTED.

A. Bimbo Must Show Entitlement to the "Extraordinary Remedy" of Decree Modification.

As Bimbo recognizes, its motion to delay divestiture is a motion to modify the Modified Final Judgment in this case. Doc. 64-1 at 13. Delaying divestiture would relieve defendants of their obligation to "use their best efforts to assist the Divestiture Trustee in accomplishing the required divestiture," and "take no action to interfere with or to impede the Divestiture Trustee's accomplishment of the divestiture." Doc. 51 ¶ V.E. Allowing Bimbo to retain the California Assets would relieve Bimbo and the Trustee of the obligation to divest those assets, *id.* ¶¶ IV.A, V.B, and frustrate the primary purpose of the judgment. *Id.* at 1 ("the essence of this Modified Final Judgment is the *prompt and certain* divestiture of certain rights and assets by Defendants to assure that competition is not substantially lessened") (emphasis added).

Therefore, the Court should decide this motion under the standards for contested modifications of judgments under Fed. R. Civ. P. 60(b)(5) ("the court may relieve a party

. . . from a final judgment [when] . . . applying it prospectively is no longer equitable").[7] Relieving a defendant of its obligations under a *consent* decree "is an extraordinary remedy, as would be any device which allows a party . . . to escape commitments voluntarily made and solemnized by a court decree." *NLRB v. Harris Teeter Supermarkets*, 215 F.3d 32, 34-35 (D.C. Cir. 2000). The Court of Appeals there described the standard for modifying a consent decree as follows:

> "[A] party seeking modification of a consent decree *must establish* that a significant change in facts or law warrants revision of the decree *and* that the proposed modification is suitably tailored to the changed circumstances." *Rufo [v. Inmates of Suffolk County Jail*, 502 U.S. 367,] 377, 393 [(1992)]. According to the Court, modification "may be warranted when changed factual conditions make compliance with the decree substantially more onerous"; "when a decree proves to be unworkable because of unforeseen obstacles"; "or when enforcement would be detrimental to the public interest." *Id.* at 384.

Harris Teeter, 215 F.3d at 35 (emphasis added). In *Harris Teeter*, as here, a party asserting a "purely private interest in wanting to be free of the decree" must show "'*significant* change'" and that "'*genuine* changes requir[ing] modifications' exist." 215 F.3d at 36, *quoting Rufo* (emphasis added by Court of Appeals).[8] It is not enough to show that "it is no longer convenient to live with the terms of the decree." *Rufo*, 502 U.S.

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[7] Bimbo quotes, but does not discuss, Rule 60(b)(6), which allows modification of a judgment for "any other reason that justifies relief." Doc. 64-1 at 13. The Court of Appeals "has emphasized that Rule 60(b)(6) should be only sparingly used and may not be employed simply to rescue a litigant from strategic choices that later turn out to be improvident." *Salazar v. District of Columbia*, 633 F.3d 1110, 1120 (D.C. Cir. 2011) (internal quotations and citations omitted). "[A] more compelling showing of inequity or hardship is necessary to warrant relief under subsection (6) than under subsection (5); otherwise, the ready availability of subsection (6) would make meaningless the limitation of subsection (5) to judgments with prospective application." *Id.* at 1120-21, *quoting Twelve John Does v. District of Columbia*, 841 F.2d 1133, 1140 (D.C. Cir. 1988).

[8] As the *Harris Teeter* Court noted, *Rufo* was an institutional reform case and, "as a general proposition, 'it should generally be easier to modify an injunction in an institutional reform case than in other kinds of cases." *Id., quoting U.S. v. Western Elec. Co.*, 46 F.3d 1198, 1203 (D.C. Cir. 1995).

at 383. "Requests to modify consent decrees are to be approached with caution." *U.S. v. Caterpillar, Inc.*, 227 F. Supp. 2d 73, 80 (D.D.C. 2002).

Moreover, "in most cases, the antitrust defendant should be prepared to demonstrate that the basic purposes of the consent decree[] . . . have been achieved. . . . [A]n antitrust defendant should not be relieved of the restrictions that it voluntarily accepted until the purpose of the decree has been substantially effectuated, or when time and experience demonstrate that the decree is not properly adapted to accomplishing its purposes." *U.S. v. Eastman Kodak Co.*, 63 F.3d 95, 101-02 (2d Cir. 1995) (internal quotation omitted). Although Bimbo relies on *Kodak*,[9] it does not claim – nor could it – that Flowers' potential acquisition of Hostess's bread assets somehow remedies the anticompetitive effect of *Bimbo's acquisition of Sara Lee*.

B. Bimbo Has Not Demonstrated a Significant *Unanticipated* Change in Circumstances.

"[I]n this circuit, a movant who wants relief from a final judgment must show that the changed circumstances were not taken into account during the formulation of the consent final judgment." *U.S. v. Signature Flight Support Corp.*, 607 F. Supp. 2d 56, 59 (D.D.C. 2009), *citing Harris Teeter*, 215 F.3d at 34-36.[10]

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[9] Doc. 64-1 at 14. *Kodak* involved conduct prohibitions in decrees that were, at the time of the decision, 74 and 41 years old. The court found that Kodak no longer had market power over film and photofinishing, and therefore that the decree was no longer necessary to remedy the violations alleged – indeed, that "termination of the consent decrees would benefit consumers." 63 F.3d at 102. Likewise, in *U.S. v. Agri-Mark, Inc.*, 156 F.R.D. 87, 88 (D. Vt. 1994) (cited Doc. 64-1 at 14), the court found that the change in circumstance eliminated "the threat to competition" that led to the underlying merger challenge.

[10] Bimbo relies on *U.S. v. Western Elec. Co.*, 46 F.3d 1198 (D.C. Cir. 1995) (*see* Doc. 64-1 at 18-19). There the unanticipated change in fact (Bell company acquisitions of "A" block cellular systems, unanticipated by the parties and the court, *id.* at 1204) had the unanticipated *result* that AT&T was prohibited from acquiring those cellular systems and

Bimbo claims that Flowers' proposed acquisition of Hostess assets was "unforeseen" – that "*Bimbo* was not aware while finalizing the Flowers APA, that Hostess was planning for the liquidation of its assets, let alone that a substantial sale to Flowers was a possibility." Doc. 64-1 at 18.[11] But it was well known *at the time of the Complaint*, in October 2011, when Bimbo agreed to divest the California Assets, that Hostess was struggling: It had already been in bankruptcy once, Doc. 64-1 at 18, and it was continuing to struggle.[12] It was certainly foreseeable that Hostess would fail again, and that Flowers, the nation's second largest bread baker – after Bimbo – would be interested in Hostess's assets.[13]

In *Signature Flight Support,* a situation strikingly similar to this case, Judge Roberts of this Court recently refused to modify an antitrust consent decree *to extend a deadline for a divestiture* that defendant had agreed to in order to be allowed to consummate a merger. Defendant claimed that the 2008 "global financial crisis" had reduced the value of the divestiture asset, making the divestiture more onerous in that the

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participating in the cellular market. The court had rejected such a prohibition in initially formulating the decree because it "would artificially and unfairly restrict competition – an action antithetical to the purposes of the antitrust laws." *Id.* at 1206. In other words, the unanticipated factual development led to an unanticipated *prohibition* that was contrary to the public interest and to the intent of the parties and the court. Flowers' proposed acquisition of Hostess assets does not impose new, anticompetitive decree obligations on Bimbo.

[11] What Bimbo was (or should have been) aware of "while finalizing the Flowers APA" is irrelevant, since Bimbo's objection to a sale by the Trustee is limited to instances of trustee malfeasance, which Bimbo did not (and does not) assert. Doc. 51 ¶ VI.C.

[12] *See, e.g.,* "Hostess Again Hires Advisers – Two Years Out of Bankruptcy Protection, Wonder Bread, Twinkies Maker Struggling with High Costs," *Wall Street Journal*, Sept. 2, 2011, p. B6 (attached as Exh. 2); "WSJ: Hostess hires advisers," *BakingBusiness.com*, Sept. 2, 2011 (attached as Exh. 3).

[13] As discussed at pp. 18-20 below, Bimbo also agreed to split the Sara Lee brand, and contemplated that Flowers would acquire the California Assets, Doc. 64-1 at 7, giving Flowers the incentive Bimbo asserts to favor its own brands (*e.g.*, Nature's Own) in promotions rather than Sara Lee, to Bimbo's disadvantage.

divestiture's proceeds would be less. But "the final judgment was negotiated in the midst of troubling economic news," whether or not the defendant specifically and subjectively anticipated a downturn in the market for assets in its industry. 607 F. Supp. 2d at 58-59. Therefore – and, because the defendant had agreed in the consent decree "to raise no claim of hardship," *id.* at 59 – the Court denied the modification.[14]

The same result is proper here. There, as here, Defendants agreed that they would "later raise no claim of hardship." Doc. 3 ¶ IV.E (Hold Separate Stipulation and Order, October 21, 2011). There, as here, the purportedly unexpected change of facts was foreseeable. Indeed, Hostess's difficulties (and the prospect that it might not survive) was specifically foreseen in the financial and industry press (*see* note 12 above) – much more specific warning than the "troubling economic news" the Court relied on in *Signature* for the inference that the defendant should have contemplated "that Signature would have difficulty selling" the divestiture asset. 607 F. Supp. 2d at 59.

C. Bimbo Has Not Demonstrated that Modification Is in the Public Interest.

The equities plainly favor leaving the judgment in place and requiring the California divestiture to proceed without delay. The violations in California alleged in the Complaint have not been remedied, and until the divestitures are completed, the judgment's purpose will not be accomplished. A court may modify its judgment when "enforcement of the decree would be 'detrimental to the public interest,'" *Caterpillar*, 227 F. Supp. 2d at 80, but Bimbo makes no attempt to show that remedying *its* acquisition of Sara Lee is now detrimental to the public interest.

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[14] *Accord, e.g., Caterpillar*, 227 F. Supp. 2d at 83 (inclusion in consent decree of provision that "neither technical nor financial difficulties would constitute a 'force majeure' excusing defendants from complying with the decree . . . clearly indicates that the parties contemplated cost increases").

Instead, Bimbo argues that *Flowers'* acquisition of the Hostess assets *as well as* the California Assets "raises the distinct prospect of substantial anticompetitive effects," Doc. 64-1 at 16, and urges the Court to delay – and thereby jeopardize – the divestiture of the California Assets "to ensure that the procompetitive objectives of the MFJ are realized," *id.* at 18.

Bimbo's fundamental error is its characterization of the purpose of this Court's judgment – it is not "to assure that 'competition is not substantially lessened'" (*id*. at 15) in the abstract or even in the bread industry overall, but to "remedy[] the loss of competition *alleged in the Complaint*" (Doc. 51 at 1) (emphasis added) – the loss of competition in the sliced bread markets in California caused by Bimbo's acquisition of Sara Lee's bread business. Delaying divestiture of the California Assets delays remedying the alleged violation, and allowing Bimbo to retain those assets – the ultimate consequence of not divesting to Flowers, since there are no other purchasers – would leave the alleged violation without a remedy in California.

Bimbo claims that Flowers' acquisition of both the California Assets and the Hostess assets would result in Flowers "dominat[ing] traditional bread sales," "traditional family bread," "traditional white bread" and "traditional wheat bread" in California markets. Doc. 64-1 at 9-10.[15] While Bimbo and its economist are careful not to call traditional bread, traditional white, traditional wheat or traditional branded bread *markets*, they present "shares" – which they treat as *market* shares – in these categories.

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[15] According to Bimbo, "traditional family bread is the familiar soft, sliced bread, white or wheat, sold in stores across the country," as contrasted with "wide-pan" or "premium" bread. Doc. 64-1 at 3. Bimbo's economist also discusses "traditional branded sliced bread" shares. Doc. 64-11 ¶ 5 & n.3. The Complaint included both branded and private label sliced bread in the market. Complaint ¶ 13.

Doc. 64-1 at 10; Doc. 64-11 at 4-9. It is customary to define a market before relying on market shares.[16]

The Complaint – based on an extensive investigation (Doc. 64-1 at 4) – does not allege a *traditional* bread market (white, wheat or both). It alleges a market "no broader than all sliced bread."[17] The Complaint explained that "there is substantial variety and differentiation among sliced bread products," which "vary in price, brand, flavor, texture, nutritional content, ingredients," and shape (*i.e.*, traditional or wide pan), and include both branded and private-label products. *Id.* ¶¶ 11-13. Because "consumers vary in their preferences for sliced bread products, and . . . consider many factors when choosing sliced bread products, . . . BBU and Sara Lee each make and sell a wide variety of sliced bread products, under a portfolio of brands that have been developed over many years, to meet this diverse consumer demand." *Id.* ¶ 23; *see* Gitlin Dec. ¶ 3 (attaching Bimbo submission regarding market definition) (attached as Exh. 5) (under seal). The Division determined that a narrower product market was *not* appropriate in the Bimbo-Sara Lee case before the Court.

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[16] "In any merger enforcement action, the Agency will normally identify one or more relevant markets in which the merger may substantially lessen competition. Second, market definition *allows the Agencies to identify market participants and measure market shares* and market concentration." U.S. Dept. of Justice & Federal Trade Comm'n, *Horizontal Merger Guidelines* § 4, at 7 (2010) (emphasis added) (attached as Exhibit 4). Bimbo's economist nowhere opines that the "traditional" segments constitute properly defined markets, and acknowledges that "I have not conducted an analysis of market definition at this point," Doc. 64-11 at 5 n.7, nor "had an opportunity to conduct a rigorous analysis of the potential impact of the divestiture on competition in California or nationwide." *Id.* ¶ 25.

[17] The Complaint alleges that "sliced bread" consists of "fresh sliced and bagged loaf bread sold by supermarkets, mass merchandisers (such as Wal-Mart), club stores (such as Costco), other grocery stores, and convenience stores," but not "breakfast breads (such as raisin bread or cinnamon swirl), buns and rolls, bagels or English muffins, or products sold by in-store bakeries." Complaint ¶ 10.

The United States is well aware of the segment "shares" Bimbo presents. Notably, in the market the United States actually alleged – all sliced bread – the combination of Bimbo and Sara Lee results in far higher shares than are the "shares" of a Flowers-Sara Lee-Hostess combination in that market. As alleged in the Complaint, the combination of Bimbo and Sara Lee would result in a combined share of 63% for sliced bread in San Diego, 58% in Los Angeles, 56% in San Francisco and 59% in Sacramento. Complaint ¶ 21. Those shares did not change appreciably between the filing of the Complaint in October 2011 and Hostess's cessation of operations in November 2012. By comparison, the combination of Flowers, Sara Lee and Hostess would result in a combined share of 29% for sliced bread in San Diego, 30% in Los Angeles, 24% in San Francisco and 28% in Sacramento. *See* Verlinda Dec. ¶ 5 (attached as Exh. 6). If in investigating the Flowers-Hostess transaction the Division believes a narrower market is correct, it will analyze the transaction accordingly.

As this Court recognized in *SBC* and the Court of Appeals held in *Microsoft*, a Tunney Act proceeding is not an occasion to evaluate claims not alleged in the complaint, in markets not alleged in the complaint. *SBC*, 489 F. Supp. 2d at 14 (review limited to "only those markets implicated by the government's complaint"). Nor is a motion to modify a consent decree "a vehicle for relitigating underlying violations or for challenging a ruling." *LaShawn A. v. Fenty*, 701 F. Supp. 2d 84, 95 (D.D.C. 2010), *citing Horne v. Flores*, 557 U.S. 433, 447 (2009) ("Rule 60(b)(5) may not be used to challenge the legal conclusions on which a prior judgment or order rests.").

D. Bimbo Has Not Demonstrated that the (Potential) Change in Circumstances Makes Compliance with the Decree Substantially More Onerous.

Bimbo should not be relieved of its decree obligation to divest the California Assets to Flowers, because Flowers' also acquiring the Hostess bread assets in California would not make Bimbo's compliance with the decree substantially more onerous than when Bimbo agreed to the consent judgment.

Bimbo argues that if Flowers acquires both the California Assets and the Hostess California bread assets, Bimbo will be less able to orchestrate national and regional promotions of Sara Lee bread. Bimbo further suggests that if Bimbo "does not have the ability to offer a true nationwide or regional promotion for Sara Lee – because Flowers declines to participate or prices uncompetitively – Bimbo will be substantially impaired in its ability to compete against Hostess on the national and regional levels." Doc. 64-1 at 12.

Bimbo's entry into a consent decree requiring the divestiture of the Sara Lee and EarthGrains brands in California contemplated that a competitor's ownership of those brands could hamper Bimbo's national or regional promotion efforts. Bimbo knew it would not have the rights to the Sara Lee brand nationally, and the $250 million reduction in the purchase price Bimbo paid Sara Lee reflects as much.[18] And Bimbo knew that Flowers was a likely acquirer of the California Assets.

The potential addition of Hostess's California bread assets to Flowers' brand portfolio is insufficient to warrant a modification. In *Signature Flight Support Corp.*, the

[18] *See, e.g.*, Melissa Lipman, "Divestitures Force Price Cut on Bimbo, Sara Lee Deal," *Law360,* (Oct. 21, 2011) ("U.S. antitrust regulators on Friday ordered Grupo Bimbo SAB de CV and Sara Lee Corp. to shed several sliced bread brands before the Mexican food giant acquires Sara Lee's North American bakery operations, leading the companies to cut $250 million from the purchase price") (attached as Exh. 7).

court denied a motion for modification where "selling . . . to one of the current bidders would bring in a far lower sales price than it had originally hoped for, a problem that does not constitute a changed circumstance necessary to modify a final judgment." 607 F. Supp. 2d at 60; *cf. Tinsley v. Mitchell*, 804 F.2d 1254, 1256 (D.C. Cir. 1986) (denying motion to modify based on claim of increased cost of compliance). Furthermore, Bimbo provides no estimate of the additional cost it claims it will incur as a result of Flowers' acquisition of Hostess's bread assets and potential nonparticipation in Sara Lee promotions.

Bimbo's compliance requirements will not be substantially more onerous if Flowers acquires Hostess's California bread assets than when Bimbo consented to the judgment. Flowers was already expanding sales of its Nature's Own brand in California.[19] When Bimbo agreed to the terms of the judgment, Flowers clearly already had an incentive to opt out of nationwide Sara Lee promotions, opting to promote its "mainstream" offerings instead. That did not prevent Bimbo from agreeing to split the Sara Lee brand as provided in the consent decree, proposing Flowers as a purchaser for the California Assets, or from urging DOJ to agree to split the Sara Lee brand even *within* California. *See* Doc. 64-1 at 5.

Bimbo is at most complaining of hardship not amounting to a material change of circumstances. Like the defendant in *Signature Flight Support*, it "explicitly agreed to raise no claim of hardship or difficulty as grounds for asking the court to release it from

[19] Flowers stated in its 2010 Form 10-K that "[i]n August 2008," it acquired Holsum Holdings, LLC, which "operates two bakeries in the Phoenix, Arizona area and serves customers in Arizona, New Mexico, southern Nevada and southern California with fresh breads and rolls . . . . This merger allowed [Flowers] to expand our *Nature's Own* brand into new geographic markets." Flowers Foods, Inc. Form 10-K for fiscal year ended January 1, 2011, at 4 (excerpt attached as Exh. 8).

its obligation to divest" the California Assets. *Signature Flight Support*, 607 F. Supp. 2d at 59 (D.D.C. 2009) (denying motion to modify consent decree). Bimbo, like the defendant in *Signature Flight Support*, also "did not limit its promise to raise no claim of hardship or difficulty by creating an exception," *id.*, here for a divestiture to a competitor that might not want to participate in national promotions involving the divested brands.

Bimbo does not contend that less participation in national promotions by Flowers would place Bimbo at the risk of insolvency. *Cf. Evans v. Williams*, 206 F.3d 1292, 1298-99 (D.C. Cir. 2000) ("In truth, the consent decree was negotiated with the expectation that the District would be able to pay its bills. Once it could not, circumstances had changed."). All Bimbo claims is that now the divestiture will be more expensive for Bimbo because it will have a reduced ability to coordinate national and regional Sara Lee promotions, but the decree explicitly contemplates financial difficulties, which are therefore no excuse. *See Caterpillar*, 227 F. Supp. 2d at 83.

Conclusion

For the foregoing reasons, the Court should deny Bimbo's motion to delay the divestiture of the California Assets.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 8, 2013, I electronically filed this Memorandum of Points and Authorities of Plaintiff United States of America in Opposition to Defendants' Motion for an Order Temporarily Suspending Divestiture to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send a notice of electronic filing to the following counsel of record:

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