IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

BODEANS CONE COMPANY, L.L.C.; BODEANS WAFER COMPANY, L.L.C.; and BODEANS BAKING HOLDING COMPANY, L.L.C.,	
Plaintiffs,	No. C 09-4014-MWB
vs.	
NORSE DAIRY SYSTEMS, L.L.C.; and INTERBAKE FOODS, L.L.C.,	**GLOSSARY OF ANTITRUST TERMINOLOGY**
Defendants.	

TABLE OF CONTENTS

Anticompetitive acts (anticompetitive actions, anticompetitive conduct, anticompetitive means, anticompetitive practices)—"Anticompetitive acts" are acts, other than competition on the merits, that have the effect of preventing or excluding competition or of frustrating the efforts of other companies to compete for customers within the ***relevant market***. Harm to competition must be distinguished from harm to a single competitor or group of competitors, which does not necessarily constitute harm to competition. In addition, the unlawful acquisition or maintenance of ***monopoly power*** through anticompetitive acts must be distinguished from the lawful acquisition or maintenance of ***monopoly power***, for example, by supplying better products or services, competing on price, or possessing superior business skills.

Acts that might not be of antitrust concern—or that might be viewed as procompetitive—if undertaken by a competitor without ***monopoly power*** may be unlawful when undertaken by a ***monopolist***. Thus, evidence that the party complaining of anticompetitive conduct has engaged in the same conduct or practice, or that the conduct or practice is part of the ordinary business practices typical of those in the same business, is evidence that the conduct is not anticompetitive, unless the firm using the conduct has ***monopoly power***, and the complaining party or other firms using the conduct do not have ***monopoly power***.

The difference between anticompetitive conduct and conduct that has a legitimate business purpose can be difficult to determine. This is so, because all companies have a desire to increase their profits and to increase their market shares.

Whenever one competitor acquires a new customer or provides better products or services, one firm benefits, and another firm loses. These goals are an essential part of a competitive marketplace, and the antitrust laws do not make these goals—or the achievement of these goals—unlawful, as long as a firm does not use anticompetitive means to achieve these goals.

In determining whether a firm's conduct was anticompetitive, and unlawful, or legitimate, and lawful, you should determine whether the conduct is based on a valid business purpose; whether the conduct is consistent with competition on the merits; whether the conduct provides benefits to customers; whether the conduct tends to impair the opportunities of rivals and either does not further competition on the merits or does so in an unnecessarily restrictive way; whether the conduct limited the customer's choice to one source of a product or prevented customers from making free choices between market alternatives; and whether the conduct would make business sense apart from any effect it has on excluding competition or harming competitors.

Barriers to entry—"Barriers to entry" are conditions that make it difficult for new competitors to enter the ***relevant market*** in a meaningful and timely way and for existing competitors to expand. Barriers to entry might include specialized production techniques, the reputation of the firms already participating in the market (or the brand name recognition of their products), the size of the markets, costs faced by potential entrants that were not borne by existing competitors, rules and regulations, controls over necessary inputs, significant investments of money required to compete, particular know-how or skill, or contractual commitments created by a firm already in the market.

Evidence of low or no entry barriers may be evidence that a firm does not have ***monopoly power***, regardless of that firm's ***market share***, because new competitors could enter easily or existing competitors could expand if that firm attempted to raise prices for a substantial period of time. By contrast, evidence of high barriers to entry along with high ***market share*** may support an inference that a firm has ***monopoly power***.

Exclusive dealing and exclusive dealing arrangements—An "exclusive dealing arrangement" is an arrangement in which a seller agrees to sell to a buyer or a buyer agrees to buy from a seller all or substantially all of a buyer's requirements of a product for a period of time. There are several forms of exclusive dealing arrangements. The arrangements may take the form of an agreement forbidding the buyer from purchasing the product or service from the seller's competitors or a "requirements contract" committing the buyer to purchase all or substantially all of its requirements of specific products or services from the seller.

Exclusive dealing is common in many industries and is frequently procompetitive for a number of reasons, including because it creates efficiencies, can facilitate new entry by competitors, results in lower prices for customers, and prevents free-rider problems (one firm benefitting from the actions and efforts of another). Therefore, not all exclusive dealing arrangements are illegal. However, an exclusive dealing arrangement is unlawful when the arrangement substantially harms competition in a substantial share of the ***relevant market*** or ***relevant markets*** affected.

An ***exclusive supply agreement*** is an "exclusive dealing arrangement."

Market entry and exit—"Market entry and exit" refers to competitors entering or leaving a ***relevant market***. Entry of new competitors or expansion of existing competitors in a ***relevant market*** may be evidence that a firm lacks ***monopoly power***, while departures from the market, or the failure of firms to enter the market, particularly if prices and ***profit margins*** are relatively high, may support an inference that a firm has ***monopoly power***.

Market power—"Market power," like ***monopoly power***, is the power to control prices and to exclude competition in the ***relevant market***, although ***monopoly power*** is commonly thought of as "substantial" market power, because a firm with market power has less power to control prices or exclude competition than a firm with ***monopoly power***. Thus, the market power required for a ***tying*** claim is something less than the ***monopoly power*** required for a ***monopolization*** claim.

Like ***monopoly power***, market power requires determination of the ***relevant market***, including both the ***relevant product market*** and the ***relevant geographical market***. Indicators of market power are a high ***market share***, positive ***market share trends***, the ability to force a customer to do something that it would not do in a competitive market, and the presence of unique features or costs associated with the product that effectively prevent others from offering a comparable product. Thus, if you find that customers have no readily available alternative sources for the product in question and, as a practical matter, are forced to obtain that product from one supplier, then you may find that that supplier has market power in the ***relevant market*** for that product. *See also* ***Market share and market power***.

Market share—"Market share" is a firm's share of the ***relevant market*** as a percentage of the total product sales of the product in question in the ***relevant geographical market***.

> **Market share and** ***market power***—high ***market share*** may be an indicator of ***market power***, but whether or not it is such an indicator is a function of numerous market conditions, including the uniqueness of the product, the ability of existing competitors to expand production, ***market share trends***, and the ease (or difficulty) of ***market entry***.
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> **Market share and** ***monopoly power***—A market share above 50 percent may be sufficient to support an inference that a firm has ***monopoly power***, while a market share below 50 percent is ordinarily not sufficient to support a finding that a firm has monopoly power. However, in considering whether a firm has ***monopoly power***, it is also important to consider other aspects of the ***relevant market***, including ***market share trends***. Thus, if you find from other evidence that a firm does, in fact, have ***monopoly power***, despite having a market share below 50 percent, then you may find that the firm does have ***monopoly power***.

Market share trends—"Market share trends" are the tendencies of a firm's ***market share*** of a ***relevant market*** for a particular product to increase, decrease, or stay consistent. An increasing ***market share*** may strengthen an inference that a firm has ***monopoly power***, particularly where that firm has a high ***market share***, while a decreasing ***market share*** might provide an inference that a firm does not have ***monopoly power*** and that there is no dangerous probability that it will acquire ***monopoly power***.

Monopoly—A "monopoly" is the control by one firm of the market for a product or service. A monopoly is only unlawful if the firm has obtained or maintained its monopoly by suppressing competition with ***anticompetitive conduct***, not because its product or service is superior to the products or services of other firms.

> **Monopoly power**—"Monopoly power" is the power to control prices and to exclude competition in a relevant market. More precisely, a firm has monopoly power (and is a **monopolist**) if it can profitably raise or maintain prices substantially above the competitive level for a significant period of time. Factors relevant to the determination of whether a firm has monopoly power include the firm's ***market share***, the firm's ***profit margin and rate of return***, and other aspects of the ***relevant market***, such as existence or lack of ***barriers to entry into the market***, the ***market entry and exit*** of other companies, ***market share trends***, and the ***number and size of competitors***. However, having monopoly power, in and of itself, is not unlawful and may reflect merely that a firm has been successful because of superior products or services, which is encouraged by our free-market system. A monopolist's conduct only becomes unlawful where it involves ***anticompetitive acts*** designed to maintain or abuse monopoly power. *See also* ***Market share and monopoly power***.
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> **Monopolization**—"Monopolization" is obtaining or maintaining an unlawful monopoly.

Number and Size of Competitors—The "number and size of competitors" may indicate whether competitors are capable of effectively competing with an alleged ***monopolist***. The commercial viability, ***market shares***, and number of competitors may act as a check on a firm's ability to price its products. If a firm's competitors are vigorous or have large or increasing ***market shares***, this may be evidence that the firm lacks ***monopoly power***. On the other hand, if a firm's competitors are weak or have small or declining ***market shares***, this may be evidence that the firm has ***monopoly power***.

Profit margin—"Profit margin" is the amount by which revenue from sales exceeds costs, usually expressed as a percentage of costs. The ability to earn high profit margins or a high rate of return does not necessarily mean that a firm has ***monopoly power***. Other factors may enable a company without ***monopoly power*** to sell at higher prices or earn higher profit margins than its competitors, such as the ability to offer superior products or services, the ability to maintain an efficient business operation, or superior advertising or marketing. An ability to sell at higher prices or earn higher profit margins than other companies for similar goods or services over a long period of time, however, may be evidence of ***monopoly power***. By contrast, evidence that a firm would lose a substantial amount of sales if it raised prices substantially, or that the firm's profit margins were low compared to its competitors, might be evidence that the firm does not have ***monopoly power***.

Rate of return—"Rate of return" is the annual return on an investment, generally referred to in terms of a percentage of the investment. *See* ***profit margin*** for an explanation of how rate of return relates to ***monopoly power***.

Relevant market—A relevant market for purposes of the antitrust laws is not necessarily the same as the "market" that salespersons, marketing employees, and management employees in a company might refer to as the "market." A "relevant market" involves two aspects, the "relevant product market" and the "relevant geographical market."

> **Relevant product market**—A relevant product market includes all products that are reasonable substitutes for each other from a buyer's point of view; that is, the products compete with each other. In other words, the relevant product market includes the products that a customer believes are reasonably interchangeable or reasonable substitutes for each other. Products need not be identical or precisely interchangeable as long as they are reasonable substitutes. Interchangeability (also called cross-elasticity of demand) refers to the readiness and ability of customers to turn to reasonable alternatives to the product in question. Products are interchangeable, and hence in the same relevant product market, if a substantial number of customers will shift from one product to another in response to small but significant changes in the relative costs of the products.
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> In determining the relevant product market, you may also consider evidence regarding the following factors: industry or public recognition of the products as a separate economic entity; the product's peculiar characteristics and uses; unique production facilities; distinct customers; distinct prices; sensitivity to price changes; and specialized vendors or distribution channels. The products do not have to be perfectly interchangeable for them to be part of the same relevant market.
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> **Relevant geographic market**—the area in which a firm faces competition from other firms that compete in the relevant product market and

to which customers can reasonably turn for purchases. When analyzing the relevant geographic market, you should consider whether changes in prices or product offerings in one geographic area have substantial effects on prices or sales in another geographic area, which would tend to show that both areas are in the same relevant geographic market. The geographic market may be as large as global or nationwide, or as small as a single town.

In determining whether there is a relevant geographic market for a particular product or service, you may consider several factors, including the following: the geographic area in which the parties sell and in which their customers are located; the geographic area to which customers turn for supply of the product; the geographic area to which customers could practicably turn for supply of the relevant products or where they have seriously considered turning; and the geographic areas that suppliers of the relevant products view as potential sources of competition.

All the firms and products that exert a restraining force on a particular firm's ability to set prices on a particular product are considered to be within the relevant market for that product.

Tying and tying arrangements—A "tying arrangement" is an arrangement in which the seller will sell, lease, or otherwise make available one product (referred to as the ***tying product***) only on the condition that buyers also purchase a different product (referred to as the ***tied product***), or at least agree not to buy the tied product from any other supplier. Not all tying arrangements are unlawful. The essential characteristic of an unlawful tying arrangement is a seller's exploitation of its ***market power*** over the tying product to force buyers to purchase a tied product that buyers either did not want at all or might have preferred to purchase elsewhere.