

Mr. William J. Baer
Assistant Attorney General
Antitrust Division
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530

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BY ELECTRONIC MAIL AND POST: antitrust.atr@usdoj.gov

Dear Mr. Baer:

The non-profit consumer advocacy organization Food & Water Watch respectfully requests that the U.S. Department of Justice oppose the early termination of the antitrust examination and undertake a second review of the proposed merger between Cargill/Horizon Milling, CHS and ConAgra Mills to create Ardent Mills (Ardent). The Department of Justice must engage in a lengthy investigation of the proposed merger to address the negative impact on farmers and consumers. The proposed merger creates a significantly more concentrated national flour market warranting the request for additional information needed for a more thorough and comprehensive analysis.¹

The creation of Ardent would be the largest flour-milling merger in history.² Ardent would joint 21 Horizon Milling (a joint venture between Cargill and the CHS cooperative wheat flour mills) with 23 ConAgra Mills operations, three bakery mix plants and a specialty bakery facility with combined sales of \$4.3 billion.³ Cargill/Horizon is already the nation's largest flour milling company and its economic size generates significant competitive advantages over smaller rivals.⁴

The Clayton Antitrust Act bars mergers and joint ventures that could substantially reduce competition in any business line in any part of the country.⁵ The proposed merger threatens to reduce competition in the wheat flour industry, both by increasing Ardent's market power when buying wheat from farmers (monopsony power) and by increasing its market power selling flour to bread and baked goods manufacturers (monopoly power). The proposed merger would likely create or enhance buyer and seller market power and establish conditions where the merged company could exercise this market power to the detriment of farmers, baked goods manufacturers and consumers.

The impact is considerably worse in many areas of the country where the number of buyers of wheat or sellers of flour would decline substantially, allowing the proposed Ardent to pay less for wheat and charge more for flour than a perfectly competitive market would allow. Mergers that increase local or regional market power by reducing competition can facilitate price increases to

¹ U.S. Department of Justice and the Federal Trade Commission. "Horizontal Merger Guidelines." August 19, 2010 at 19.

² Schroeder, Eric. "ConAgra, Cargill, CHS combining milling business." *FoodBusinessNews*. March 5, 2013.

³ Gillam, Carey. "Flour power: ConAgra, Cargill, CHS to create mega-miller." *Reuters*. March 5, 2013; Karnowski, Steve.

"Conagra, CHS, Cargill form huge milling venture." *Associated Press*. March 6, 2013.

⁴ Rademacher, Sondra et al. "The Grain Milling and Oilseed Processing Industry Cluster Report for State of Minnesota Regions 9 & 10." January 22, 2008 at 11.

⁵ 15 U.S.C. §18.

consumers or reduce prices paid to suppliers because there are few other geographically practical options.⁶ Further, the proposed merger increases vertical integration because it combines Cargill's grain marketing business with ConAgra's substantial bakery and food manufacturing businesses.

The proposed merger covers goods for which there is no practical substitute product—flour mills require wheat and bakery companies and other food manufacturers require flour.⁷ The merger significantly increases regional concentration in many areas where there often are few practical alternative competitors by eliminating a significant rivalry in the flour industry. The proposed Ardent could in many cases impose slight but significant price increases to flour buyers that lacked adequate alternative sources and as well force wheat sellers to accept slight but significant price concessions because they lacked adequate alternate markets for wheat. The potential to unilaterally impose these price increases or concessions could harm wheat farmers, food manufacturers and ultimately individual consumers.

Agribusinesses pursue consolidation to increase efficiency, attain larger economies of scale, expand to new geographic markets and increase revenues.⁸ ConAgra's spokesperson observed that the merger will “enhance competition and customer and consumer choice.”⁹ Some food industry analysts contend that the increased efficiency from concentration and consolidation exceeds any costs associated with increased market power and diminished market competition.¹⁰ Theoretically, increased competitive pressures should reduce prices to manufacturing customers and consumers, as sellers increase efficiencies and offer better prices to capture consumers.

But the efficiencies of the proposed merger are primarily expected to be fixed cost savings, like transportation and supply chain management.¹¹ These factors have driven mergers and joint ventures in the flour milling industry over the past decades—efforts to reduce transportation and labor costs to increase benefits and profits to the merging parties.¹² However, mergers that generate fixed cost savings, especially transportation cost savings, are generally not passed on to consumers but are captured by the merged firms.¹³

Farmers, consumers and federal regulators have become increasingly concerned by the rapid consolidation in the food and agriculture sectors. In 2010, the U.S. Department of Agriculture and the U.S. Department of Justice held a series of workshops that explored the impact of food and agriculture consolidation. The 2012 Department of Justice report on these workshops “stressed the importance of vigorous antitrust enforcement and detailed the ways that anticompetitive mergers

⁶ Baye, Michael R. and Graeme Hunter. NERA Economic Consulting. “Going beyond the conventional wisdom on whether merger-related cost savings will benefit consumers.” *Antitrust Insights*. Spring 2010 at 7

⁷ “Horizontal Merger Guidelines” at 9.

⁸ Democratic Staff Report. U.S. Senate Committee on Agriculture Nutrition, Forestry. “Economic Concentration and Structural Change in the Food and Agriculture Sector: Trends, Consequences and Policy Options.” October 29, 2004 at 3.

⁹ Karnowski, Steve. “The biggest U.S. flour miller is getting bigger.” *St. Louis Post-Dispatch*. March 6, 2013.

¹⁰ Sexton, Richard J. Department of Agricultural and Resource Economics, University of California Davis. “Industrialization and Consolidation in the U.S. Food Sector: Implications for Competition and Welfare.” Waugh Lecture, Agricultural & Applied Economics Association Annual Meeting, Tampa, Florida. August 2, 2000 at 25.

¹¹ Hughlett, Mike. “Cargill, CHS, ConAgra flex new power in flour business.” *Minneapolis Star Tribune*. March 6, 2013.

¹² Rademacher, Sondra et al. “The Grain Milling and Oilseed Processing Industry Cluster Report for State of Minnesota Regions 9 & 10.” January 22, 2008 at 9.

¹³ Baye and Hunter at 3 and 7.

and conduct can harm producers, consumers, and others.”¹⁴ The pace of agribusiness and food mergers appears to be accelerating in 2013. The Justice Department must increase the scrutiny of proposed mega-mergers like the proposed creation of Ardent.

Historic consolidation accelerated and worsened by proposed Ardent merger

Although the Ardent merging companies have asserted that flour “is a very competitive market,”¹⁵ the proposed merger would significantly increase the concentration levels of an increasingly concentrated subsector. Consolidation has been one of the most consistent trends in the flour milling industry.¹⁶ The growing consolidation in regionally dispersed markets has created increased market power for the largest wheat milling firms. According to USDA economists, the growing consolidation in flour milling “Significantly increased market power in a geographically divided regional market, however, when accompanied by entry barriers, could enhance both prices and firm profits beyond that which would occur under a perfectly competitive market.”¹⁷

Historically, wheat flour mills were located near wheat production areas, because the costs of shipping wheat and flour were comparable, but changes to railroad shipping techniques (both grain hopper cars and unit-trains with entire trains carrying the same commodity freight) encouraged flour mills to shift to metropolitan areas.¹⁸ Today, wheat flour mills operate predominantly in three areas: the wheat production areas, around transportation and export hubs and in metropolitan areas where many of the wheat flour bakery and food manufacturers are located.

The agriculture and food sector is unusually concentrated. The four-firm concentration for most sectors of the economy has hovered between 40 and 45 percent; many economists maintain that four-firm concentration ratios above this level can start to erode competitiveness.¹⁹ Today, the top-four wheat flour milling firms already control more than half (58 percent) of the market and the proposed merger significantly increases national concentration levels.²⁰

The market share if the four largest flour mill firms rose by one-fifth in fifteen years from 48.4 percent in 1997 to 58.1 percent in 2013.²¹ The number of flour milling firms dropped by more than half (57 percent) from 382 in 1997 to 169 in 2010.²² USDA has attributed the rise of multi-plant

¹⁴ U.S. Department of Justice. “Competition and Agriculture: Voices from the Workshops on Agriculture and Antitrust Enforcement in our 21st Century Economy.” May 2012 at 2.

¹⁵ Fletcher, Owen and Ben Fox Rubin. “ConAgra, Cargill, CHS set flour milling venture.” *Wall Street Journal*. March 5, 2013.

¹⁶ Rademacher et al. at 9.

¹⁷ Kim, C.S. et al. USDA Economic Research Service (ERS). “Economic analysis of the changing structure of the U.S. flour milling industry.” *Agribusiness*. Vol. 17, no. 1. 2001 at 162.

¹⁸ *Ibid.* at 161.

¹⁹ Democratic Senate Agriculture Committee Staff Report (2004) at 4-5.

²⁰ The material for the concentration ratios and market shares for this entire section and Table 1 come from: Gillem; Karnowski. *Associated Press*. (includes the 1.6 million hundredweight total U.S. flour milling capacity); Sosland, John. “Bay State adds specialty unit at Winona mill.” *FoodBusiness News*. August 8, 2011; Cereal Food Processors. “About Cereal Food Processors.” Available at www.cerealfood.com/about-us.html. Accessed March 2013.

²¹ Martinez, Steve W. USDA ERS. “The U.S. Food Marketing System: Recent Developments, 1997-2006.” Economic Research Report No. 42. May 2007 at 23; James, Harvey S. Jr., Mary K. Hendrickson and Philip H. Howard. University of Missouri, Department of Agricultural and Applied Economics Working Paper. February 2012 at 32.

²² Martinez at 23; Miller, John C. North American Millers’ Association. “American Flour Millers: Issues and Perspectives.” Congress of European Flour Millers 2010, Bled, Slovenia. June 17, 2010 at 7.

flour milling companies, like Cargill, to the growing concentration in the wheat flour milling sector.²³ The current market has three competitors with close market shares (Cargill/Horizon and ADM have about 18 percent of the market and ConAgra has 16 percent of the market), but the next largest competitor is only about a third the size of the largest players (Cereal Food Products is currently the fourth largest flour mill firms with about 6 percent of the market).

Pre-Merger	Number of Mills	Daily Flour Milling Capacity (CWT)	Market Share	Post Merger	Number of Mills	Daily Flour Milling Capacity (CWT)	Market Share	Merger Increase in Concentration	
Cargill/Horizon	21	290,500	18.2%	Ardent	44	545,600	34.1%		
ADM	23	281,100	17.6%	ADM	23	281,100	17.6%		
ConAgra	23	255,100	16.0%	Cereal Food Processors	10	101,760	6.4%		
Cereal Food Processors	10	101,760	6.4%	Bay State Milling	7	83,600	5.2%	Absolute	Relative
Pre-Merger CR-4			58.1%	Post-Merger CR-4			63.3%	5.2%	9.0%
Pre-Merger HHI			935	Post-Merger HHI			1,539	606	65.0%

The proposed Ardent merger would substantially increase concentration in the flour milling industry and would represent a significant one time increase in concentration (*see* Table 1). Post-Ardent, the top four firms would mill nearly two-thirds (63.3 percent) of all flour. This instantaneous 9.0 percent increase in four firm concentration is larger than the 7.4 percent increase in four-firm concentration over the 1997-2007 decade. Moreover, the proposed merger significantly widens the gap between competitors, which suggests the merger would significantly erode the competitiveness of the market because the remaining rivals would be significantly smaller.²⁴ After the merger, Ardent would have nearly twice the market share of the second largest firm, five times the market share of the third largest firm and six times the fourth place firm.

The merger would result in a moderately concentrated market of 1,539 measured by the Herfindahl-Hirshman Index (HHI),²⁵ but the merger would increase HHI by more than 600. The Horizontal Merger Guidelines suggest a merger that increases concentration levels this rapidly deserves close examination: “Mergers resulting in moderately concentrated markets [HHI between 1,500 and 2,500] that involve an increase in HHI of more than 100 points potentially raise significant competitive concerns that warrant scrutiny.”²⁶

²³ Martinez at 225.

²⁴ “Horizontal Merger Guidelines” at 18.

²⁵ Horizontal concentration is most typically described by either a four-firm concentration ratio or the Herfindahl-Hirschman Index (HHI). HHI is the sum of the squares of the market shares of the companies in any sector. The four-firm concentration ratio is the sum of the market shares of the four largest firms and weights each market share equally, while the HHI gives greater weight to the larger competitors.

²⁶ “Horizontal Merger Guidelines” at 19.

Extremely concentrated markets create barriers to entry for new competitors, allow economies of scale to drive out innovation, and allow oligopolies to raise prices on captive consumers. Mergers between rivals can distort markets sufficiently to deter new market entrants from restoring competition.²⁷ The proposed Ardent merger significantly increases national concentration levels, at levels sufficient for the Justice Department to extend the investigation and make a second request from the merging parties. But the anticompetitive effects of increased concentration can be considerably higher in regional markets where Ardent would buy wheat and sell flour.

Proposed Ardent merger increases anti-competitive monopsony market power over wheat producers and elevator suppliers

The proposed Ardent could leverage its market power to lower the prices farmers receive for wheat.²⁸ It would create or enhance the ability of Ardent mills to exercise monopsony buyer power over wheat marketers, elevators and farmers. In many parts of the country, ConAgra and Cargill/Horizon compete head-to-head to buy wheat and the merger would give farmers fewer marketing options to sell their crops.

Mergers can increase market power in regional markets where the merged firm can extract even minor price concessions that sellers cannot avoid.²⁹ In many cases, the cost of shipping wheat could exceed the higher prices that might be paid at more distant flour mills. Local or regional markets can be based on historical customs, such as the flour mills near wheat producing regions, or based on transportation costs or convenience, such as the regional delivery of wheat to flour mills by rail or truck.³⁰ In markets where the merger joins two firms where the nearby competitors are too small or too few, the merger could award the companies with near unilateral power to extract price concessions from suppliers.³¹ The proposed Ardent merger creates the sufficient monopsony buyer power to facilitate all of these potential market-distorting, anti-competitive effects.

Although buyer power is similar to seller power, buyers can extract greater leverage over suppliers with lower market shares than are typically necessary to capitalize on monopoly seller power. Sellers may need to control more than half of the consumer market to exercise single-firm monopoly power, but buyers can potentially exert dominance over suppliers with less than ten percent of the purchasing market share.³² Buyer power is often exerted over agricultural sellers using much more complex strategies and techniques.³³ The market pressure that encourages competitors to undercut price-gouging monopolist sellers to capture consumer markets does not

²⁷ Ross, Douglas. "Antitrust enforcement and agriculture." Address before the American Farm Bureau Policy Development Meeting. Kansas City, Missouri. August 20, 2002 at 16.

²⁸ Gillam.

²⁹ *United States v. Cargill, Incorporated, and Continental Grain Company*. United States District Court for the District of Columbia. Civil Action No. 99-1875 (GK). "United States Response to Public Comments." February 11, 2000 at 19.

³⁰ "Horizontal Merger Guidelines" at 13.

³¹ *United States v. Cargill* at 20.

³² Foer, Albert A. American Antitrust Institute. "Mr. Magoo Visits Wal-Mart: Finding the Right Lens for Antitrust." Working Paper No. 06-07. November 30, 2006 at 5.

³³ Taylor, C. Robert. Auburn University. "The Many Faces of Power in the Food System." Presentation at the DoJ/FTC Workshop on Merger Enforcement. February 17, 2004 at 1.

work as well on the buyer side. Because all buyers benefit when purchase prices are low, there is little incentive in a concentrated market for competitors to bid up input prices.³⁴

Many flourmills are still located in proximity to the wheat growing regions and they compete for wheat supplies with other nearby wheat mills in regional markets. Only 7 of ConAgra's 23 mills are in states where Cargill/Horizon does not operate.³⁵ In the Cargill-Continental merger, the Department of Justice only excluded from scrutiny the Continental elevators that were located far enough from the nearest Cargill elevator that it was "inconceivable" that they could both draw from the same farmers.³⁶ Since flour mills draw wheat from a greater distance than grain elevators, even some ConAgra mills that are across state lines can have overlapping draws with Cargill/Horizon mills. Nebraska and Kansas wheat farmers both likely sell to Cargill's Kansas plant and ConAgra's Nebraska plants.

In some areas, like Minnesota, ConAgra and Cargill/Horizon mills have overlapping draws where the competing mills are of comparable shipping costs and distance to their rivals. The proposed merger not only would reduce the number of buyers, but would also leave only a few alternative flour mills where farmers (through elevators) could sell their flour.



Flour mills near wheat cultivating areas are a primary market for wheat elevators. South Dakota grain elevators sell most of the state's wheat (54.7 percent) into the Minneapolis market for sale to processors and other buyers in 2005-2006.³⁷ Half (46 percent) of Kansas wheat elevators were located within 60 miles of a wheat processing mill and the average distance from a wheat elevator to a wheat processing mill was 72 miles in 2008.³⁸ A 2012 survey of grain elevators in Kansas, Nebraska, Minnesota, North Dakota and South Dakota found that Eastern domestic processing markets are the most common destination for wheat but a considerable portion of wheat (22 percent of rail shipments and 33 percent of truck shipments) went to in-state processors.³⁹

³⁴ Carstensen, Peter C. University of Wisconsin Law School. Statement Prepared for the Workshop on Merger Enforcement. February 17, 2004 at 3.

³⁵ Fletcher and Rubin.

³⁶ United States v. Cargill at note 8 at 27.

³⁷ Qasmi, Bashir, Yonas Hamda and Scott Fausti. Department of Economics, South Dakota State University. "The 2005/06 South Dakota Grain Marketing Patterns Study: A Grain Elevator Survey Report." Research Report 2010-1. February 2010 at 17 and 26-7.

³⁸ O'Brien, Daniel M. Department of Agricultural Economics at Kansas State University. "The Effects of the Micro-Market Structure for Kansas Grain Elevators on Spatial Grain Price Differentials." Paper presented at NCCC-134 Conference on Applied Commodity Price Analysis, Forecasting and Market Risk Management. St. Louis, Missouri. April 20-21, 2009 at 7.

³⁹ Vachal, Kimberly and the Upper Great Plains Transportation Institute. North Dakota State University. "Regional Elevator Transportation: Market Decisions and Rail Service." November 2012 at 18.

Throughout the wheat-growing region (from Montana to Minnesota to Kansas and Colorado as well as the Pacific Northwest) the proposed Ardent merger would effectively create a nearly captive draw area where the Ardent facilities would be the dominant buyer with few, often smaller alternative flour mills where farmers can sell wheat.⁴⁰ (See Maps Distribution of Flour Mills in Wheat Growing Region, Maps 1 and 2.)⁴¹

For growers in the Dakotas who primarily ship through Minnesota, the number of flour mill competitors drops from five firms (North Dakota Mills in Grand Forks, Bay State Milling in Winona, MN, four Cargill/Horizon mills, two ConAgra Mills facilities and two ADM mills in Minneapolis) to four firms after the proposed Ardent merger, but with six of 10 mills operated by Ardent. In Northern California and Oregon, the merger would reduce the number of firms from four to three and join the Cargill/Horizon plant in Stockton, California with the ConAgra flour mill in Oakland, California. Cereal Food Processors (number three after the merger) operates a mill in Portland and another firm operates a mill in Pendleton, Oregon.



The combination would also leave growers in Idaho, Utah and Wyoming with fewer options as three of the six mills in Colorado, Idaho and Utah would be Ardent facilities. In Western Kansas and Nebraska, there would be reduced competition as Cargill/Horizon’s Newton, Kansas facility would join two ConAgra plants in Omaha and two in the Denver area, leaving only three other players: three ADM plants in Kansas and Nebraska, two Cereal Food Processor plants in Kansas and a Bay State Milling plant in Platteville, Colorado.

The decline in the number of flour milling rivals would likely decrease the premium closely-located wheat elevators receive, since fewer buyers would compete to keep prices high. This can have the effect of potentially imposing a cost (or price reduction) on the wheat suppliers for flour mills. For example, Kansas elevators within 60 miles of a wheat processing plant received 4.5¢ per bushel more for their wheat in 2008, amounting to a \$56,000 premium to average sized Kansas elevators.⁴² This is nearly a 1 percent premium based on the average Kansas wheat price of \$7.15 per bushel in 2008.⁴³ The proposed Ardent merger could effectively reduce competition in many

⁴⁰ United States v. Cargill at 28.

⁴¹ Food & Water Watch geospatial analysis of wheat flour mills based on the wheat mill facilities of the North American Milling Association member mill locations (available at <http://www.namamillers.org/about-us/u-s-member-mill-locations/> and accessed March 2013) and individual corporate information of the NAMA flour milling member companies including ADM, America Italian Pasta Co., Bartlett Milling, Cargill/Horizon, Cereal Food Processors, C.H. Guenther & Son, ConAgra Mills, FM Brown’s Sons, Hopkinsville Milling, Italgiani USA, JIFFY Mixes, Keynes Bros., King Milling, Knappen Milling, Mennell Milling, Miller Milling, Milner Milling/Southeastern Mills, Minot Milling, North Dakota Mill & Elevator, Shawnee Milling, Siemer Milling, Snavely’s Mills, Star of the West Milling, Wilkins Rogers Mills and Southeastern Mills as well as non-NAMA member Bay State Milling.

⁴² O’Brien at 6 and 11.

⁴³ USDA. National Agricultural Statistical Service. “Agricultural Prices 2008 Summary.” August 2009 at 44.

markets where farmers and elevators deliver wheat and give Ardent the ability to impose price concessions on wheat suppliers that would not occur in more competitive markets.

Proposed merger creates vertically integrated wheat/flour/bakery operation that could impose differential prices and cost structures on smaller rivals

Mergers can allow firms to exercise market power by coordinating commercial relationships between competitors.⁴⁴ The proposed Ardent flour mill merger would align two pieces of the production chain: Cargill's grain distribution network that supplies wheat and ConAgra's food manufacturing plants that use flour as a key ingredient. These linkages could facilitate Ardent's ability to charge differential or discriminatory prices contrary to federal antitrust laws.⁴⁵

The increased vertical integration created by the proposed merger increases the risk of price discrimination against competitors both in sourcing wheat and in sourcing flour. The Horizontal Merger Guidelines require the Department of Justice to consider whether the merger would facilitate adverse anti-competitive effects by creating differential pricing for different customers.⁴⁶

Cargill already is one of the largest grain merchandizing firms in the country. It currently operates 143 grain elevators,⁴⁷ more than it operated a decade ago.⁴⁸ A 2009 study found that elevators with business affiliations are less likely to compete on price for buying grain.⁴⁹ The proposed merger may heighten the potential for differential pricing for wheat. Ardent would likely source as much wheat as possible from Cargill grain elevators probably at preferential prices. Currently, ConAgra flour mills that buy from Cargill elevators likely pay the price that Cargill charges to all other competitors. By merging the firms, the Ardent merger would further distort the market for wheat and facilitate differential pricing that could disadvantage other, smaller competitors. ADM, the second largest flour miller, also operates elevators and likely sources some of its wheat from its affiliated distribution systems. But smaller flour mill competitors may not have the preferential elevator affiliations, which would leave them subject to anti-competitive differential pricing in a more consolidated market.

The opposite effect happens with the ConAgra manufacturers. The proposed Ardent flour mills would likely offer preferential prices to ConAgra manufacturing operations than to the competitors of ConAgra. This would strengthen both the milling operations monopoly market power and potentially increase ConAgra's market power in flour-based manufactured foods (see monopoly section below). ConAgra's merger with Ralcorp included significant wheat flour based manufacturing assets and product lines, including dry cereal, hot cereal, cookies, crackers, frozen breakfast foods (waffles, pancakes and French toast), frozen breads and dough, dry pasta, pretzels and frozen pasta meals.⁵⁰ ConAgra now sells between 55 and 70 percent of private label dry,

⁴⁴ United States v. Cargill at 19.

⁴⁵ 15 U.S.C. §13(a)(d-f).

⁴⁶ "Horizontal Merger Guidelines" at 6.

⁴⁷ See <http://www.cargillag.com/Marketing/LocalBids/local-bids-center>, accessed April 2013.

⁴⁸ MacDonald, James. USDA ERS. "Cargill's acquisition of Continental Grain: Anatomy of a merger." *Agricultural Outlook*. September 1999.

⁴⁹ O'Brien at 7.

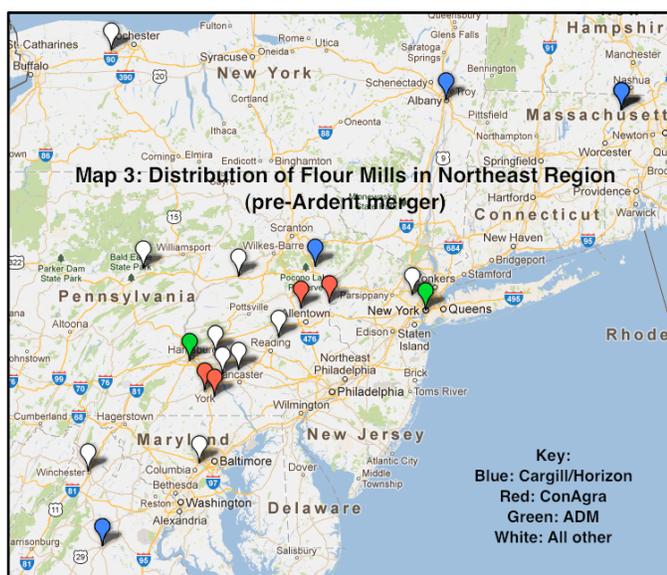
⁵⁰ Ralcorp Holdings, Inc. U.S. Securities and Exchange Commission 10-K filing. November 29, 2012 at 2.

ready-to-eat cereal and \$1.1 billion in frozen bakery goods.⁵¹ The proposed Ardent would have sufficient market power to offer flour at higher prices to ConAgra's competitors, especially smaller manufacturers without the affiliations with flour and other input suppliers.

Proposed Ardent merger creates monopoly selling power over food manufacturing customers and consumers

Monopoly power allows sellers to keep prices higher than they would be under more competitive situations.⁵² In many areas, Cargill/Horizon and ConAgra are head-to-head competitors selling flour to food manufacturers and the merger would reduce this competition. The few remaining rivals are not sufficient to maintain competitive markets, leaving buyers subject to potentially adverse unilateral effects.

Many wheat flour mills are now located near metropolitan population centers in closer proximity to the bakery and food manufacturers. Most wheat flour is sold not to individual consumers but to bakery wholesale manufacturers.⁵³ A 2008 survey of Minnesota wheat flour mills found that 5 percent of flour sales were to local buyers, between 15 and 75 percent of sales were to regional buyers and 20 to 70 percent of sales were to national buyers.⁵⁴ Unlike the Cargill-Continental merger, where the distribution of grain entered a national market,⁵⁵ a considerable portion of wheat flour enters a local or regional market.



The bakery industry is concentrated around population centers — a quarter (24.7 percent) of bread manufacturing is in New York, Pennsylvania and New Jersey and 15 percent is in California.⁵⁶ Moreover, unlike the wheat flour mill industry, the bread and bakery goods manufacturing sector contains over 10,000 manufacturers,⁵⁷ meaning that the market power of a few, consolidating flour mills wield considerable market power over the many manufacturers that need to purchase flour.

The proposed merger will enable or facilitate the ability of Ardent to increase the price of flour to

⁵¹ Fusaro, Dave. "Ralcorp hitches its star to private label." *Prepared Foods*. March 1, 1996; Porter, Mark S. *Mergers & Acquisitions Report*. "Ralcorp may sell Chex Cereals to Post." July 29, 1996; Stamborski, Al. "Ralcorp buys seller of private label nuts." *St. Louis Post-Dispatch*. April 14, 1998; Ralcorp Holdings, Inc. U.S. Securities and Exchange Commission 10-K filing. November 29, 2012 at 78.

⁵² *United States v. Cargill* at 18.

⁵³ Karnowski. *St. Louis Post-Dispatch*. March 6, 2013.

⁵⁴ Rademacher et al. at 10.

⁵⁵ *United States v. Cargill* at 25.

⁵⁶ Everett, Natalie. IBISWorld. "Bread Production in the U.S." Report 31181. February 2013.

⁵⁷ U.S. Census Bureau. Economic Census. Geographic Distribution-Bread and Bakery Product Manufacturing. 2007. Mid-Atlantic includes all states between Virginia and New York and New England includes all states from Connecticut to Maine.

bakery, bread, flour mix, pasta and other manufacturers. This is especially true in some regions of the country where the merger will reduce the number of significant flour suppliers to these manufacturers and leave them largely dependent on the prices offered by Ardent. This may be compounded by the tendency for smaller flour mills to increase their costs to match or follow the largest wheat mills.⁵⁸

In Northern California, the merger would join the only flour manufacturers, the ConAgra plant in Oakland and the Cargill/Horizon plant in Stockton. In the Northeast, the merger would reduce the competition for flour sales and enable Ardent to impose unilateral price hikes on manufacturers (see Distribution of Flour Mills in the Northeast, Maps 3 and 4). In the high population Northern New Jersey/New York City to Boston region the proposed merger significantly reduces the number of options for manufacturers to buy flour. The merger would reduce the number of firms from four to three (there is a Bay State Milling plant in New Jersey and an ADM plant in Hudson, NY), but five of the seven mills between Allentown through Scranton, Pennsylvania to Albany, NY to Massachusetts would be Ardent mills.



In the Baltimore-Washington metropolitan area, the merger would reduce the number of firms from six to five, with Ardent operating three of the nine mills between Central Pennsylvania and Northern Virginia. In Pennsylvania, the number of firms drops from five to four, but Ardent would operate five of 12 mills and much smaller firms run six of the remaining mills.

This market power will disadvantage bread and baked goods manufacturers. In 2003, the U.S. International Trade Commission estimated that flour made up 15 to 20 percent of the cost of bread production,⁵⁹ but wheat prices were considerably lower in the early 2000s. As wheat prices spiked in the late 2000s, bread bakers were forced to increase their prices. USDA found that the retail price of bread incorporated about 19 percent of changes in the cost of flour.⁶⁰ During 2008, some smaller bakeries were forced to pass through almost half the increased cost of flour to consumers (a 15¢ per pound increase in wholesale flour costs could yield an 8¢ increase in the price of a loaf of bread).⁶¹ The rising price for flour was higher for smaller bakeries and foodservice establishments than for the larger commercial bakeries.⁶²

⁵⁸ Kim at 170.

⁵⁹ U.S. International Trade Commission. "Industry & Trade Summary: Bakery Products." USITC Publication 3635. September 2003 at 19.

⁶⁰ Roeger, Edward and Ephraim Leibtag. USDA ERS. "How Retail Beef and Bread Prices Respond to Changes in Ingredient and Input Costs." ERR No. 112. February 2011 at iii.

⁶¹ McKinney, Matt. "Bakers need dough." *Minneapolis Star Tribune*. March 3, 2008.

⁶² Richardson, Leslie, Jim Dino and Jim Haggerty. "Rising cost of flour felt by area bakeries, pizzerias." *Pottsville (Pennsylvania) Republic & Herald*. June 27, 2011.

Ultimately, some of these potential price hikes will harm consumers. Household purchases of flour declined in the 1970s but were replaced by increased consumption of baked goods and prepared mixes that continued to increase the total consumption of flour at the end of the 20th century.⁶³ The per capita consumption of flour peaked at 147 pounds in 1997 and dropped to 134 pounds by 2005.⁶⁴ USDA estimated that per capita flour consumption was 132.5 pounds in 2011.⁶⁵ Even with this decline, Americans consume about 41 billion pounds of flour annually. Even if Ardent's market power enabled it to increase the final consumer price of baked goods and flour-based products by 1¢ per pound, it's sales of higher priced flour would still amount to a \$140 million surcharge on consumers.

* * *

The proposed merger significantly increases concentration in flour milling and raises several relevant questions for the Department of Justice:

- 1) Has the Justice Department adequately assessed the market for wheat to flour mills and the potential for the merger to harm farmers and push down prices? The proposed merger will likely harm farmers by giving Ardent sufficient market power to reduce the price it pays for wheat. The Department must examine the marketing and sales channels that deliver wheat to flour mills, survey wheat elevators in the wheat belt and Pacific Northwest and ensure that the proposed merger does not distort the market for wheat.
- 2) Will the merger affect the market for specialty wheat or flour? The Ardent companies have stressed their capacity to deliver value-added wheat (non-gluten) and specialty wheats (organic, whole wheat, etc.). Cargill's corporate vice president stated that the proposed Ardent would not shed any of its 44 combined mills in order to maintain customers for "specialized types of wheat and specialty types of flour solutions."⁶⁶ The proposed merger would strengthen the market power of Ardent over niche flour products like whole wheat and gluten-free flours.⁶⁷ The Justice Department must assess the impact of the proposed merger on specialty wheat and flour.
- 3) Has the Department investigated the total vertical integration of the wheat-to-waffle supply chain created by a joint venture between one of the world's largest grain distributors and largest food manufacturers, especially of wheat-based foods?
- 4) Has the Department considered the potentially differential prices competitors of Ardent would face buying wheat, flour or manufactured goods after the proposed merger and the ability of Ardent to exercise undue market power throughout the supply chain?

⁶³ Rademacher et al. at 8.

⁶⁴ Martinez at 25; Wells, Hodan Farah and Jean C. Buzby. USDA ERS. "Dietary Assessment of Major Trends in U.S. Food Consumption, 1970-2005." Economic Information Bulletin No. 33. March 2008 at 6.

⁶⁵ See <http://www.ers.usda.gov/topics/crops/wheat/background.aspx#.UV8qTkQyGSM>. Accessed April 2013.

⁶⁶ Gillam.

⁶⁷ Hughlett, Mike. "Cargill, CHS, ConAgra flex new power in flour business." *Minneapolis Star Tribune*. March 6, 2013.

- 5) Has the Department considered the potentially deleterious impact on manufacturers from the consolidated flour milling? Are the potentially negative impacts that are likely to occur in higher-population areas even worse in areas with fewer flour mills where Ardent may be the only supplier?
- 6) Does the proposed merger facilitate the increased market power that allows the new Ardent to effect, alter or establish standards in the flour milling industry? The combination of dominant firms in flour milling increases the possibility that certain types of premium wheat (e.g. durum) will be blended with wheat of lower quality as a means of suppressing prices of premium wheat below competitive prices. This issue was addressed in *National Macaroni Manufacturers Association, et al, v. Federal Trade Commission*.⁶⁸ The court ruled that “where all or the dominant firms in a market combine to fix the composition of their product with the design and result of depressing the price of an essential raw material, they violate the rule against price-fixing agreements as it has been laid down by the Supreme Court.” In the present case, ConAgra is both a dominant user of flour, especially in light of the Ralcorp takeover, and potentially an even more dominant miller of flour, especially as the merger most significantly affects mills in proximity to durum wheat cultivation.

The agricultural processing sector is already excessively concentrated. Food & Water Watch believes the proposed Ardent merger would reduce competition and harm consumers and farmers. We request that no early termination of the antitrust evaluation be granted and that the investigation be extended.⁶⁹ The Department of Justice must extend the merger waiting period and make a second request to solicit further information from the parties and give the agencies more time to review the complexities of the proposed merger.⁷⁰ Food & Water Watch would appreciate the opportunity to study these issues more closely and share our findings with the appropriate federal regulators.

Sincerely,



Wenonah Hauter
Executive Director

cc. Mr. William H. Stallings, Chief, Transportation, Energy, and Agriculture Section, U.S.
Department of Justice
Mr. Mark Tobey, Special Counsel for State Relations and Agriculture, U.S. Department of Justice

⁶⁸ *Nat'l Macaroni Mfrs. Ass'n v. FTC*, 345 F.2d 421, (7th Cir. 1965).

⁶⁹ 15USC§18(b)(1).

⁷⁰ 15USC§18(e)(1).