

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

COMMISSIONERS: **Joseph J. Simons, Chairman**
 Noah Joshua Phillips
 Rohit Chopra
 Rebecca Kelly Slaughter
 Christine S. Wilson

In the Matter of

Post Holdings, Inc.
a corporation,

and

TreeHouse Foods, Inc.
a corporation.

Docket No. 9388

REDACTED PUBLIC VERSION

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act (FTC Act), and by the virtue of the authority vested in it by the FTC Act, the Federal Trade Commission (Commission), having reason to believe that Respondents Post Holdings, Inc. (Post) and TreeHouse Foods, Inc. (TreeHouse)

III.

RESPONDENTS

9. Respondent Post, headquartered in St. Louis, Missouri, is a publicly traded corporation organized under the laws of Missouri. Post has offerings of the store, foodservice, food ingredient, refrigerated, active nutrition, and private brand food categories. Through its Post Consumer Brands unit, Post manufactures, markets, and sells a broad portfolio of well known national RTE cereal brands, including Honey Bunches of Oats, Pebbles, and Grape-Nuts as well as a variety of private label RTE cereal products. Post produces approximately 28 formulations of private label RTE cereal and offers retailers natural, clean label private label RTE cereal products. In fiscal year 2018, Post Consumer Brands retail sales of private label RTE cereal were approximately [REDACTED].

10. Respondent TreeHouse, headquartered in Oak Brook, Illinois, is a publicly traded corporation organized under the laws of Delaware. TreeHouse is a leading manufacturer of private label food and beverage products across multiple categories, with total annual revenue of approximately \$5.8 billion in fiscal year 2018. TreeHouse is the largest manufacturer of private label RTE cereal in the United States through its TreeHouse Private Brands, Inc. subsidiary. In fiscal year 2018, TreeHouse sales of private label RTE cereal were [REDACTED].

IV.

THE PROPOSED ACQUISITION

11. On May 1, 2019, Post and TreeHouse signed an Asset Sale Agreement pursuant to which Post will acquire TreeHouse's private label RTE cereal business, including TreeHouse's RTE cereal product formulations and manufacturing plants. Post eventually plans to integrate TreeHouse's private label RTE cereal business into Post's existing private label business. The total consideration for the Acquisition is approximately [REDACTED].

V.

RELEVANT MARKETS

12. The relevant market in which to evaluate the effects of the Proposed Acquisition is not broader than the sale of private label RTE cereal to retailers in the United States.

A. Relevant Product Market

13. The sale of private label RTE cereal to retailers is the relevant product market.

14. Post and TreeHouse each manufacture and sell RTE cereal. RTE cereal (or cold cereal) is food made from processed grains like wheat, rice, and oats that requires no preparation or heating before consumption. RTE cereal is dry and sold in a variety of packages (

21. The relevant market does not include private label and organic RTE cereal formulations. Retailers and end consumers do not view natural and organic cereals as substitutes for conventional cereals. Retailers typically source conventional (non-natural/organic) cereals through separate processes, and many of the suppliers of natural and organic cereals are different than the suppliers for conventional RTE cereals. Natural and organic cereals tend to have healthier and more expensive inputs and are consequently priced significantly higher than their conventional counterparts. Thus, retailers could not effectively defeat a SSNIP on conventional private label RTE cereals by switching their purchases to natural and organic RTE cereals.

B. Relevant Geographic Market

22. The relevant geographic market in which to assess the competitive effects of the Proposed Acquisition is no broader than the United States. Customers based in the United States cannot arbitrage or substitute based on different prices offered to customers outside the United States.

23. Competition among private label RTE cereal suppliers occurs at the national level. Many large retailers have locations in multiple regions across the United States, generally select a single supplier for all locations, and sell the same nationally private label RTE cereal products across their entire retail footprint. Post and TreeHouse have national distribution networks to transport their private label RTE cereal throughout the United States. Post and TreeHouse each produce most of the private label RTE cereal they sell to U.S. retailers within the United States.

VI.

MARKET STRUCTURE AND THE PROPOSED ACQUISITION'S PRESUMPTIVE ILLEGALITY

24. Post and TreeHouse are the two largest suppliers of private label RTE cereal to retailers in the United States.

25. There is only one other meaningful private label RTE cereal supplier, Mary Lee. Other private label RTE cereal suppliers are significantly smaller than Respondents are and have limited competitive significance. For example, the most prominent foreign manufacturer, Brügglen, accounts for less than one percent of private label RTE cereal sales in the United States.

26. Combined, Post and TreeHouse would account for [REDACTED] of the market for the sale of private label RTE cereal to retailers in the United States. Post's ordinary course documents, in 2018, TreeHouse [REDACTED] share of the private label RTE cereal market, followed by Post with [REDACTED] and, Gilster Mary Lee with [REDACTED]. The remainder is a mix of all other suppliers, accounting for [REDACTED].

35. The following are just a few of the examples of direct price competition between TreeHouse and Post for retail customers:

- a. In March 2018, [redacted] and TreeHouse had a ~~contract~~ private label RTE cereal that extended until October 2018. [redacted] inquired if Post could [come] to the table with an aggressive box proposal with the inducement of switching its business from TreeHouse to Post. Post noted that this would be an opportunity to take volume from [redacted]. In an initial round of negotiations, Post offered to lower prices by [redacted].

VIII.

LACK OF COUNTERVAILING FACTORS

42. Neither entry by new market participants or expansion by current market participants would be timely, likely, and sufficient to deter or offset the anticompetitive effects of the Proposed Acquisition.

43. Entry by a branded RTE cereal manufacturer private label is unlikely; thus, branded manufacturers will not offset the lost competition between Respondents and [REDACTED].

[REDACTED] Thus it is highly unlikely that branded RTE cereal manufacturers will begin producing private label RTE cereal.

44. Successful and timely entry or expansion by international suppliers is also unlikely. Retailers have a strong preference for sourcing private label RTE cereal products domestically and international suppliers lack meaningful name recognition with U.S. RTE cereal companies, including manufacturers and ingredient suppliers, are also unlikely to replace successfully the competition lost due to the Proposed Acquisition. Manufacturers produce limited RTE cereal products on behalf of national brands and do not market directly to retailers.

45. Retailers are also unlikely to manufacture their own private label RTE cereals due to the significant costs and capital investment required to own and operate RTE cereal production facilities.

46. Respondents cannot demonstrate cognizable specific efficiencies that rebut the strong presumption and evidence that the Proposed Acquisition likely would substantially lessen competition in the relevant market.

47. Respondents also cannot establish that the FreeHouse's private label RTE cereal business will fail and its assets will exit the market absent the Proposed Acquisition.

IX.

VIOLATION

COUNT I ILLEGAL AGREEMENT

48. The allegations of Paragraphs 1 through 47 above are incorporated by reference as though fully set forth.

49. The Proposed Acquisition constitutes an unfair method of competition in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

COUNT II ILLEGAL ACQUISITION

50. The allegations of Paragraphs 1 through 47 above are incorporated by reference as though fully set forth.

51. The Proposed Acquisition, if consummated, may substantially lessen competition in the relevant market in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and is an unfair method of competition in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

NOTICE

Notice is hereby given to the Respondents that the hearing of May, 2020, at 10:00 a.m., is hereby fixed as the time, and the Federal Trade Commission offices at 600 Pennsylvania Avenue, N.W., Room 532, Washington, DC, 20580, as the place, when and where an evidentiary hearing will be had before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under the Federal Trade Commission Act and the Clayton Act to appear and show why an order should not be entered requiring you to desist from the violations of law charged in the complaint.

You are notified that this administrative proceeding shall be conducted as though the Commission, in an ancillary proceeding, has also filed a complaint in a United States District Court, seeking relief pursuant to Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. 53(b), as provided by Commission Rule 3.11(b)(4), 16 CFR 3.11(b)(4). You are also notified that the opportunity is afforded you to file with the Commission an answer to this complaint or before the fourteenth (14th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific, admitted explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted. If

provide a record basis on which the Commission shall issue a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings and conclusions under Rule 3.46 of the Commission's Rules of Practice for Adjudicative Proceedings.

Failure to file an answer within the time above provided shall be deemed to constitute a waiver of your right to appear and to contest the allegations of the complaint and shall authorize the Commission, without further notice to you, to find the facts to be as alleged in the complaint and to enter a final decision containing appropriate findings and conclusions, and a final order disposing of the proceeding.

The Administrative Law Judge shall hold a prehearing scheduling conference not later than ten (10) days after the Respondents file their answers. Unless otherwise directed by the Administrative Law Judge, the scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580. Rule 21(a) requires a meeting of the parties' counsel as early as practicable before the prehearing scheduling conference (but in any event no later than five (5) days after the Respondents file their answers). Rule 3.3(b) obligates counsel for each party, within five (5) days of receiving the Respondents' answers, to make certain initial disclosures without awaiting a discovery request.

NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that the Proposed Acquisition challenged in this proceeding violates Section 5 of the Federal Trade Commission Act, as amended, and/or Section 7 of the Clayton Act, as amended, the Commission may order such relief against Respondents as is supported by the record and is necessary and appropriate, including, but not limited to:

1. If the Proposed Acquisition i

5. Any other relief appropriate to correct or remedy the anticompetitive effects of the transaction or to restore ~~Steel~~ as viable, independent competitor in the relevant market.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this complaint to be signed by its Secretary and its official seal to be ~~by~~ hereto aff