IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. PLAYMOBIL USA, INC., Defendant.	CASE NUMBER 1:95CV00214 JUDGE: James Robertson DECK TYPE: Antitrust DATE STAMP: 01/31/95

COMPETITIVE IMPACT STATEMENT

The United States of America, pursuant to Section 2 of the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. § 16(b), submits this Competitive Impact Statement in connection with the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I.

NATURE AND PURPOSE OF THE PROCEEDING

On January 30, 1995, the United States filed a civil antitrust complaint under Section 4 of the Sherman Act, as amended, 15 U.S.C. § 4, alleging that the defendant Playmobil USA, Inc. ("Playmobil") engaged in a combination and conspiracy, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, to fix the retail prices of Playmobil children's toys throughout the

United States. The complaint alleges that, in furtherance of this conspiracy, Playmobil from February 1990 through August of 1994:

(a) established and communicated to dealers minimum resale prices for Playmobil toys;

(b) threatened to terminate dealers for selling or advertising Playmobil toys at prices below those minimum resale prices;

(c) through the threats of termination, secured dealers' adherence to those minimum resale prices and limited the duration of promotional sales by dealers;

(d) enforced adherence to minimum resale prices at the behest of dealers in order to stop price wars among them; and

(e) agreed with dealers on the retail prices the dealers would charge for Playmobil toys.

The complaint also alleges that as a result of the combination and conspiracy, prices of children's toys have been fixed and maintained, and competition in the sales of children's toys has been restrained.

The complaint alleges that the combination and conspiracy is illegal, and accordingly requests that this Court prohibit Playmobil from continuing or renewing such activity or similar activities.

The United States and Playmobil have stipulated that the proposed Final Judgment may be entered after compliance with the

APPA, unless the United States withdraws its consent.

The Court's entry of the proposed Final Judgment will terminate the action, except that the Court will retain jurisdiction over the matter for possible further proceedings to construe, modify or enforce the Judgment, or to punish violations of any of its provisions.

II.

DESCRIPTION OF PRACTICES GIVING RISE TO THE ALLEGED VIOLATION OF THE ANTITRUST LAWS

Playmobil, a New Jersey corporation, is a prominent seller of specialty toys for children in the United States, with annual sales at wholesale in excess of $18 million. Playmobil imports its toys from Germany, where its parent company makes them. From New Jersey it distributes to retail toy stores in every state, and these stores in turn sell Playmobil toys to consumers.

Over the past several years, Playmobil regularly published what it termed "Suggested Retail Price Ranges" for all of its products. It also annually issued letters to all of its dealers setting forth a "Retailer Discount Policy." The Playmobil letters facially expressed a well-defined, unilateral, dealer-termination policy under United States v. Colgate & Co., 250 U.S. 300 (1919) that even included some safeguards to ensure that Playmobil and its dealers would not enter into resale price agreements. The stated policy said, in effect, that Playmobil would, entirely on its own, monitor its retailers and

automatically, without discussion, refuse to sell to any dealer it determined was discounting beyond the prescribed limits (emphasis supplied). In the letters, Playmobil also committed not to further discuss the policy or anything related to it.

In practice, however, Playmobil ignored these restrictions: Playmobil personnel repeatedly contacted and pressured dealers in over a dozen states who reportedly were discounting below the policy's "suggested" minimum levels. Playmobil secured from a number of its dealers express agreements to follow Playmobil's published retail prices. Playmobil often expressly threatened a dealer with termination in order to obtain its agreement.

Frequently the impetus for Playmobil's actions was pressure from other dealers that did not want to face price competition in the retail sales of Playmobil toys. Playmobil determined whether an accused dealer was in fact discounting beyond the "suggested" limits, and if it was, Playmobil forcefully "discussed" its resale pricing policy with the offending dealer.

If, after such discussions, the dealer did not agree to raise its prices, Playmobil responded with various threats -- additional stores in the immediate area might begin carrying Playmobil toys, Playmobil might improperly process orders, a variety of shipping problems could occur. In some instances, Playmobil refused to sell additional toys to a dealer until after that dealer agreed to adhere to Playmobil's price ranges.

The volume of commerce affected by Playmobil's illegal conduct is difficult to estimate. Playmobil's illegal conduct

was concentrated in the more than one dozen states where, at the urging of retail dealers that wanted to prevent price competition, it obtained illegal resale pricing agreements with potential discounters. Thus while it is difficult to estimate the total volume of commerce affected by Playmobil's violations, it clearly was substantial although significantly less than the entire $35 million in annual, nationwide, retail sales of Playmobil toys.

Playmobil, by using the devices described, was usually successful in inducing dealers to raise their prices. Indeed, the power of these actions was such that Playmobil never had to permanently sever its relationship with a dealer because of that dealer's continued discounting. Thus, the result of Playmobil's activities was to fix, raise and stabilize the prices at which toy retailers sold Playmobil products. The courts have routinely found conduct such as Playmobil's here to be a per se violation of the prohibition on agreements in restraint of trade under Section 1 of the Sherman Act.

III.

EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The parties have stipulated that the Court may enter the proposed Final Judgment at any time after compliance with the APPA. The proposed Final Judgment states that it shall not constitute an admission by either party with respect to any issue of fact or law.

The proposed Final Judgment enjoins any continuation or renewal, directly or indirectly, of the type of combination or conspiracy alleged in the Complaint. Specifically, Section IV A prohibits Playmobil from entering into any agreement or understanding with any dealer to fix, stabilize or maintain any dealer's prices for Playmobil products in the United States.

The law permits a manufacturer unilaterally to announce and unilaterally to implement a policy of terminating discounters. Colgate, supra. The manufacturer may not, however, secure a dealer's agreement on retail price levels. United States v. Parke, Davis & Co., 362 U.S. 29 (1960). If a dealer discounts, the manufacturer must choose either to continue to supply that dealer, knowing of its discounting practices, or to forego that retail outlet for its products in the future.

In this case, the Complaint alleges that Playmobil reached illegal agreements with its dealers in the course of discussions about discount pricing. Although discussions between a manufacturer and a dealer about resale pricing do not always result in an agreement about those prices, see Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984), the evidence in this case showed, and the Complaint alleges, that Playmobil's discussions clearly led to, and in fact included, illegal agreements. Isaksen v. Vermont Castings, 825 F.2d 1158, 1164 (7th Cir. 1987), cert. denied, 486 U.S. 1005 (1988). To avoid a repetition of such episodes, Section IV B bars Playmobil from discussing, explaining, or encouraging dealers to adhere to

suggested prices, threatening to terminate a dealer for discounting, or discussing a dealer's termination with another dealer. This prohibition addresses the central offense in this case and extends for the entire ten-year life of the decree.

The proposed Final Judgment not only bars Playmobil's unlawful practices, but also contains additional provisions that are remedial in nature, intended to restore competitive conditions in retail toy markets and in dealer relationships, both of which have been distorted by Playmobil's conduct from 1990 through August of 1994, as set forth in the Complaint. These provisions bar some activities that are not, in and of themselves, illegal, but which could nevertheless serve the same purpose as Playmobil's outright agreements to fix resale prices -- preventing Playmobil dealers from selling or advertising at discount prices.

To establish a new pricing regime to replace the former illegally enforced regime, and to encourage retailers of Playmobil toys that previously could not offer Playmobil products at discount prices, because of Playmobil's illegal conduct, to exercise their ability to discount if they so wish, Sections IV C and D of the Final Judgment prohibit Playmobil for the first five years of the decree from reestablishing its resale price policy in any form, even forms that would be legal if Playmobil had never engaged in the illegal conduct alleged in the Complaint. Thus, Section IV C bars Playmobil from announcing policies to (1) sell only to non-discounting dealers, (2) terminate or hinder

dealers for discounting, or (3) control the duration or frequency of a dealer's discounting. Section IV D 3 further ensures that regardless of its stated policies, Playmobil will not terminate or otherwise take actions against any dealer because of discounting. Under the decree, the only thing Playmobil may continue to do is to publish truly suggested retail prices, together with the clear statement that dealers are free to ignore the suggestions.

When it is clear that a manufacturer's suggested retail prices are informational only and strictly optional, they can serve useful market functions without adversely affecting competition. In such an environment, dealers become fully aware of and accustomed to exercising their pricing rights.

Since the problem with Playmobil's policy lay in the implementation of the policy rather than in the policy itself, the prohibition on adopting such a policy extends only for five years. Similarly, since Playmobil never improperly terminated any dealers, the prohibition on terminations also extends only for five years. Playmobil will thereafter regain its Colgate right unilaterally to announce a resale pricing policy and unilaterally to terminate non-complying dealers. Throughout the period, Playmobil will be able to disseminate its suggested retail prices, but it must make clear that actual retail sales prices will be set entirely at its dealers' discretion.

Subsections 1 and 2 of Section IV D of the Final Judgment also prohibit Playmobil from accepting dealer complaints about

other dealers' pricing. In some cases, Playmobil was acting in response to dealers' complaints when it pressured other dealers to agree to charge higher retail prices. The complaints about discounting were the proximate cause of much of the illegal conduct alleged in the Complaint. Although a manufacturer's merely listening to a dealer's complaint about another's pricing does not necessarily violate the law, Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717 (1988), the evidence here showed that the dealer complaints led directly to Playmobil's violations. Accordingly, in order to establish a period of time during which Playmobil's and its dealers' conduct can become clearly legal, Playmobil has agreed not even to accept such communications from its dealers for five years.

Section IV E of the Final Judgment prohibits Playmobil from establishing a cooperative advertising program that conditions rebates in any way upon a dealer's adherence to certain advertised price levels. Playmobil did not have a cooperative advertising program, but its illegal price agreements with dealers were often triggered by advertising. In order to avoid any discussions at all with dealers on the sensitive issue of retail pricing, Playmobil has also agreed not to undertake a cooperative advertising program during the first five years of the decree. This will provide a period of time during which market conditions can become more competitive, and Playmobil and its dealers can become more accustomed to remaining within legal parameters.

Section V of the proposed Final Judgment is designed to ensure that Playmobil's dealers are aware of the limitations the Final Judgment imposes on Playmobil. Section V requires Playmobil to send notices and copies of the Judgment to each dealer who purchased Playmobil products from the defendant in 1993 or 1994. In addition, Playmobil must send notices and copies of the Judgment to every other dealer to which it sells Playmobil products within ten years of the date of the Judgment's entry.

Sections VI and VII require Playmobil to set up an antitrust compliance program and designate an antitrust compliance officer. Under the program, Playmobil is required to furnish a copy of the Judgment and a less formal written explanation of it to each of its officers and directors and each of its non-clerical employees, representatives, or agents responsible for the sale or advertising of Playmobil products in the United States.

In addition, the proposed Final Judgment provides methods for determining and securing Playmobil's compliance with its terms. Section VIII provides that, upon request of the Department of Justice, Playmobil shall submit written reports, under oath, with respect to any of the matters contained in the Judgment. Additionally, the Department of Justice is permitted to inspect and copy all books and records, and to interview officers, directors, employees and agents, of Playmobil.

Section IX makes the Judgment effective for ten years from the date of its entry.

Section XI of the proposed Final Judgment states that entry of the Judgment is in the public interest. The APPA conditions entry of the proposed Final Judgment upon a determination by the Court that the proposed Final Judgment is in the public interest.

The Government believes that the proposed Final Judgment is fully adequate to prevent the continuation or recurrence of the violation of Section 1 of the Sherman Act alleged in the Complaint, and that disposition of this proceeding without further litigation is appropriate and in the public interest.

IV.

REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorney fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against the defendant.

V.

PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and the defendant have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent.

The APPA provides a period of at least 60 days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wants to comment should do so within 60 days of the date of publication of this Competitive Impact Statement in the Federal Register. The United States will evaluate the comments, determine whether it should withdraw its consent, and respond to the comments. The comments and the response of the United States will be filed with the Court and published in the Federal Register.

Written comments should be submitted to:

Rebecca P. Dick
Chief, Civil Task Force I
U.S. Department of Justice
Antitrust Division
1401 H Street, N.W., Room 3700
Washington, D.C. 20530

Under Section X of the proposed Judgment, the Court will retain jurisdiction over this matter for the purpose of enabling either of the parties to apply to the Court for such further orders or

directions as may be necessary or appropriate for the construction, implementation, modification, or enforcement of the Judgment, or for the punishment of any violations of the Judgment.

VI.

ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The only alternative to the proposed Final Judgment considered by the Government was a full trial on the merits and on relief. Such litigation would involve substantial cost to the United States and is not warranted, because the proposed Final Judgment provides appropriate relief against the violations alleged in the Complaint.

VII.

DETERMINATIVE MATERIALS AND DOCUMENTS

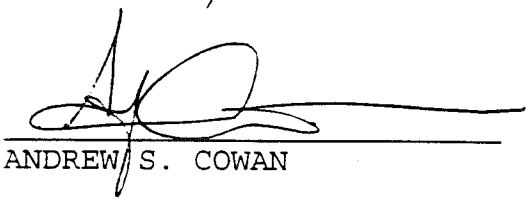
No particular materials or documents were determinative in formulating the proposed Final Judgment. Consequently, the

Government has not attached any such materials or documents to the proposed Final Judgment.

Dated:

Respectfully submitted,

BRUCE K. YAMANAGA



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