**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| **UNITED STATES OF AMERICA**,<br><br>Plaintiff,<br><br>v.<br><br>**GENERAL ELECTRIC COMPANY**,<br><br>and<br><br>**INSTRUMENTARIUM OYJ**,<br><br>Defendants. | CASE NUMBER: 1:03CV01923<br>JUDGE: Hon. Royce C. Lamberth<br>DECK TYPE: Antitrust |

**RESPONSE TO PUBLIC COMMENT**

Pursuant to the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) ("Tunney Act"), the United States hereby responds to the public comment received regarding the proposed Final Judgment in this case. After careful consideration of the comment, the United States continues to believe that the proposed Final Judgment will provide an effective and appropriate remedy for the antitrust violation alleged in the Complaint. The United States will move the Court for entry of the proposed Final Judgment after the public comment and this Response have been published in the *Federal Register*, pursuant to 15 U.S.C. § 16(d).

On September 16, 2003, the United States filed the Complaint in this matter alleging that the proposed acquisition of Instrumentarium OYJ ("Instrumentarium") by General Electric Company ("GE") would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

Simultaneously with the filing of the Complaint, the United States filed a proposed Final Judgment and a Stipulation signed by the United States and the defendants consenting to the

entry of the proposed Final Judgment after compliance with the requirements of the Tunney Act. Pursuant to those requirements, the United States filed a Competitive Impact Statement ("CIS") in this Court on October 30, 2003; published the proposed Final Judgment and CIS in the *Federal Register* on November 12, 2003; and published a summary of the terms of the proposed Final Judgment and CIS, together with directions for the submission of written comments relating to the proposed Final Judgment, in the Washington Post for seven days beginning on November 9, 2003 and ending on November 16, 2003. The 60-day period for public comments, during which one comment was received as described below, expired on January 12, 2004.

## I. Background

As explained more fully in the Complaint and CIS, this transaction lessened competition in the sale and development of patient monitors used to take the vital physiologic measurements of patients requiring critical care ("critical care monitors") and of mobile, full-size C-arms used for surgical, orthopedic, pain management, and basic vascular procedures. To restore competition in these markets, the proposed Final Judgment, if entered, would require GE to fully divest two Instrumentarium businesses: Spacelabs, which was its primary critical care monitors business, and Ziehm, the business through which it developed and sold C-arms. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

## II. Legal Standard Governing the Court's Public Interest Determination

Upon the publication of the public comment and this Response, the United States will have fully complied with the Tunney Act and will move the Court for entry of the proposed Final

Judgment as being "in the public interest." 15 U.S.C. § 16(e). The Court, in making its public interest determination, should apply a deferential standard and should withhold its approval only under limited conditions. Specifically, the Court should review the proposed Final Judgment in light of the violations charged in the complaint and "withhold approval only if any of the terms appear ambiguous, if the enforcement mechanism is inadequate, if third parties will be positively injured, or if the decree otherwise makes 'a mockery of judicial power.'" *Mass. Sch. of Law v. United States*, 118 F.3d 776, 783 (D.C. Cir. 1997) (quoting *United States v. Microsoft Corp.*, 56 F.3d 1448, 1462 (D.C. Cir. 1995)).

It is not proper during a Tunney Act review "to reach beyond the complaint to evaluate claims that the government did *not* make and to inquire as to why they were not made." *Microsoft*, 56 F.3d at 1459; *see also United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6-7 (D.D.C. 2003) (rejecting argument that court should consider effects in markets other than those raised in the complaint); *United States v. Pearson PLC*, 55 F. Supp. 2d 43, 45 (D.D.C. 1999) (noting that a court should not "base its public interest determination on antitrust concerns in markets other than those alleged in the government's complaint"). Because "[t]he court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place" it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters the United States might have but did not pursue. *Microsoft*, 56 F.3d at 1459-60; *see also United States v. W. Elec. Co.*, 993 F.2d 1572, 1577 (D.C. Cir. 1993) (noting that a Tunney Act proceeding does not permit "*de novo* determination of facts and issues" because "[t]he balancing of competing social and political interests affected by a proposed antitrust decree must be left, in

the first instance, to the discretion of the Attorney General" (citations omitted)).

Moreover, the United States is entitled to "due respect" concerning its "prediction as to the effect of proposed remedies, its perception of the market structure, and its view of the nature of the case." *Archer-Daniels-Midland Co.*, 272 F. Supp. 2d at 6 (citing *Microsoft*, 56 F.3d at 1461).

## III. Summary of Public Comment

The United States received a comment from one entity, Visiontec (comment attached as Exhibit 1). Visiontec, a company providing electronic services, states that it entered into a manufacturing agreement with Spacelabs in September 2001, prior to Instrumentarium's purchase of Spacelabs. Visiontec expressed concerns about Instrumentarium's adherence to this manufacturing agreement, claiming that Instrumentarium made a deliberate decision not to adhere to the agreement after its purchase of Spacelabs, and that the pace at which Visontec is being disengaged has accelerated since General Electric's acquisition of Instrumentarium was announced. Visiontec asked that the United States provide assistance, including the imposition of provisions to protect it, prior to approving the acquisition of Spacelabs.

## IV. The United States' Response to Comment

The concerns raised in the comment appear to relate to a possible contractual dispute between Visiontec and Spacelabs, Instrumentarium, or GE. They do not relate to the sufficiency of the relief in the proposed Final Judgment, whether the proposed Final Judgment is in the public interest, or otherwise raise issues appropriate for action by the Antitrust Division. Thus, Visiontec's concerns do not provide any basis for establishing any conditions in connection with the divestitures required by the proposed Final Judgment or warrant any other action by the

United States.

## V. Conclusion

After careful consideration of this public comment, the United States has concluded that entry of the proposed Final Judgment will provide an effective and appropriate remedy for the antitrust violation alleged in the Complaint and is, therefore, in the public interest. Pursuant to Section 16(d) of the Tunney Act, the United States is submitting the public comment and Response to the *Federal Register* for publication. After the comment and Response are published in the *Federal Register*, the United States will move this Court to enter the proposed Final Judgment.

Dated this 28th day of January 2004.

Respectfully submitted,

/s/

Joan Hogan, D.C. Bar No. 451240
Litigation III Section
Antitrust Division
United States Department of Justice
325 7th Street, N.W., Suite 300
Washington, D.C. 20530

**EXHIBIT 1**

October 24, 2003

Mr. James R. Wade
Chief, Litigation III Section
Antitrust Division
U.S. Department of Justice
325 Seventh Street
N.W. Suite 300
Washington D.C. 20530

Dear Mr. Wade,

I am writing with regard to the proposed acquisition of Instrumentarium OYJ by General Electric Corporation, specifically the part of the settlement reached that includes General Electric divestiture of Instrumentarium's Spacelabs subsidiary.

Visiontec is a privately held company providing electronic manufacturing services located in Spokane, Washington. It began a seven-year manufacturing agreement with Spacelabs in September 2001, prior to being purchased by Instrumentarium in 2002. Visiontec produces approximately 50% of the electronic circuit cards used in Spacelabs medical equipment sold to hospitals. Spacelabs is Visiontec's largest customer.

After the Instrumentarium purchase of Spacelabs completed in June of 2002, Instrumentarium made a deliberate decision not to adhere to the manufacturing agreement originally between Spacelabs and Visiontec prior to the acquisition. Since General Electric's acquisition announcement of Instrumentarium, the pace and approach at which to disengage Visiontec has accelerated.

As Instrumentarium's subsidiary Spacelabs is being positioned to be sold, it has selectively and deliberately moved product from Visiontec, delayed and then cancelled orders that should have been produced by the terms of the manufacturing agreement. Instrumentarium has effectively and so stated that the manufacturing agreement was only a working document. These actions are preventing Visiontec the ability to pay back an obligation originally established with Spacelabs as well as preventing a recovery of the investment made by Visiontec.

As a result of Instrumentarium positioning Spacelabs in the most favorable position to be sold, some of that favorable positioning is coming at Visiontec's unwarranted expense. This is causing Visiontec cash flow and financial distress, severely damaging its ability to service its other customers, and a loss of fifty percent of its high-tech manufacturing work force.

Mr. James R. Wade

Chief, Litigation III Section
Antitrust Division
October 24, 2003

It appears Instrumentarium's approach is to cause so much financial distress, that Visiontec becomes a non-viable company and thereby allowing them to remove Visiontec and the existing orders from the Spacelab books to better position Spacelabs for the prospective buyers.

Due to Visiontec's size, we would like to request assistance from the Department of Justice as to what kind of positive options may be available prior to approving the acquisition. We also request that the business practices of Instrumentarium's subsidiary Spacelabs dealing with Visiontec regarding the seven-year manufacturing agreement originally established with Spacelabs be reviewed.

Prior to completion of the acquisition approval by the Department of Justice, Visiontec would ask for suitable provisions to be established allowing Visiontec to remain viable for at least two years, otherwise the result is the company closes down.

Sincerely,

Rick L. Hansen
President & CEO

RLH\2355

c. Attorney General –State of Washington
Chuck Cleveland, P.S.

**CERTIFICATE OF SERVICE**

The undersigned certifies that a copy of the Response to Public Comment was served on the following counsel by electronic mail in PDF format or hand delivery, this 28th day of January 2004:

Deborah L. Feinstein
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/s/
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