UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff; v. BAROID CORPORATION, BAROID DRILLING FLUIDS, INC., DB STRATABIT (USA) INC., and DRESSER INDUSTRIES, INC.; Defendants.	)))))))))))))	Civil Action No.: 93-2621 (RCL)

RESPONSE OF THE UNITED STATES TO PUBLIC COMMENT
ON THE PROPOSAL TO MODIFY FINAL JUDGMENT

The United States and Diamond Products International ("DPI") have filed a motion seeking modification of a provision of the Final Judgment that restrains DPI's ability to sell the diamond drill bit business divested to it by the defendants. With the modification, Paragraph V.F. would be changed from a prohibition on DPI's ability to sell the business to a provision requiring DPI to give the United States advance notice if it proposes a transaction with certain specified companies, so that the United States would have an opportunity to review it under the antitrust laws.

Notice of the proposed modification and the 60-day comment period was published in the Federal Register and the Washington Post; the comment period ended on June 19, 2000. One comment was submitted, a copy of which is attached. The author of the comment is Halliburton

Company ("Halliburton"), the successor to the defendants and a major competitor of DPI in the diamond drill bit business.

The United States has carefully reviewed the comment and has found no reason to alter its conclusion that the modification is in the public interest. The filing of the comment and this response with the Court satisfies the remaining step in the modification procedures described by the United States in a pleading filed on March 30, 2000. The United States therefore is filing, concurrently with this response, a motion for entry of the proposed Order modifying the Final Judgment.

<u>Background on the Complaint and the Final Judgment</u>

<u>The Complaint</u>

This action commenced on December 23, 1993, when the United States filed a civil antitrust complaint alleging that the proposed merger of Dresser Industries, Inc. ("Dresser") and Baroid Corporation ("Baroid") would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18. Dresser and Baroid were two major providers of products and services to companies drilling for oil and natural gas. The complaint alleged that the proposed Dresser/Baroid merger was likely to reduce competition in two U.S. markets: the manufacture and sale of drilling fluids, and the manufacture and sale of diamond drill bits. Also named as defendants were the Baroid subsidiaries that conducted the company's drilling fluids and diamond drill bit operations.

<u>The Final Judgment</u>

Simultaneously with the filing of the Complaint, the United States filed a Stipulation by which it and the defendants consented to entry of a proposed Final Judgment designed to eliminate the anticompetitive effects of the transaction. Following a public notice and comment period, during which no comments were received, the Court ordered entry of the Judgment on April 12, 1994, having found it to be in the public interest. To resolve the diamond drill bit competitive concerns, the defendants were required to divest "all of their direct and indirect ownership and control of Baroid's diamond [drill] bit business," which was defined in Paragraph II.E. as including "all assets owned or controlled by Baroid . . . that are or have been used in the United States to research, develop, test, manufacture, service, or market its diamond drill bits." The definition then specified the precise assets included in the diamond drill bit divestiture package. The goal of the divestiture was to maintain the independent, competitive roles that Dresser and Baroid held in the United States diamond drill bit market so that the merged Dresser/Baroid and the purchaser of the divested assets would continue to compete against each other as Dresser and Baroid had prior to the merger. Competitive Impact Statement at 9-10.

Paragraph V.F. of the Final Judgment contained restrictions on who could buy the divested diamond drill bit assets. It barred the defendants from divesting the assets to their major competitors -- Smith International, Inc. ("Smith"), Baker Hughes, Inc. ("Baker Hughes"), and Camco International, Inc. (now owned by Schlumberger Ltd.). Paragraph V.F. also barred the purchaser of the divested diamond drill bit assets from selling the divested business to, or combining it with the competing business of, those three companies or Dresser for the 10-year life of the decree.

Following the filing of the Complaint, Stipulation, and proposed Final Judgment, Dresser and Baroid merged, with the divestiture assets held separate and their viability maintained as required by the Final Judgment. In the summer of 1994, the United States approved the divestiture by the defendants of Baroid's U.S. diamond drill bit business to International Superior Products, Inc., which is now known as DPI. In 1998, Dresser merged with Halliburton, making Halliburton the successor to all of the defendants.

At various times over the years, DPI has asked the Department to move to modify Paragraph V.F. to eliminate the restrictions on its rights to sell or combine its business, which would still leave such transactions subject to the antitrust laws. The Department has now decided to consent to certain modifications of Paragraph V.F. Restrictions on a purchaser's sale of the divestiture assets to other parties are not typically included in decrees. The provision here was designed to allow the purchaser of the divested assets to develop independently of its most significant competitors, preventing further market concentration in a market that had experienced a number of consolidations.[1] Six years have

[1] Dresser had acquired the bulk of its diamond drill bit business three years earlier from Baker Hughes, which was required to divest its diamond drill bit business to eliminate anticompetitive concerns the Department believed would result from Baker Hughes' acquisition of Eastman Christensen. The earlier decree barred Baker Hughes from divesting the assets to its major competitors (including Diamont Boart Stratabit, which was later acquired by Baroid), but contained no restrictions on the ability of the purchaser (Dresser) to resell the assets to any other diamond drill bit producers. United States v. Baker Hughes Incorporated, et al., United States District Court for the District of Columbia, Civil Action No. 90-0825. The Dresser/Baroid transaction threatened to undermine the relief obtained in the Baker Hughes/Eastman Christensen Final Judgment by bringing under common ownership the former Diamont Boart Stratabit and Baker Hughes diamond drill bit businesses. The Department challenged the Dresser/Baroid transaction under Section 7 to prevent that result, and Paragraph V.F. eliminated the possibility that the Department would soon be required again to reinvestigate these lines

now passed since DPI purchased the divestiture assets, and the Department has concluded that it would be in the public interest to place DPI in the same position as virtually all purchasers of divestiture assets under antitrust consent decrees -- it would be barred only from selling the assets back to the defendants,[2] but would otherwise be free to sell the assets subject to the antitrust laws.

If DPI enters into an acquisition agreement with Baker Hughes, Schlumberger or Smith, the proposed modification would require it to provide the notice and information called for by the Hart-Scott-Rodino Antitrust Improvements Act to the Department, even if the transaction would not otherwise trigger a filing requirement.[3] The Department would thus have the opportunity to conduct an analysis to determine whether the proposed transaction would violate Section 7 of the Clayton Act. If the United States concluded that the transaction would be anticompetitive, it would have the opportunity to seek to enjoin it.

Halliburton's Comment

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of business to assure that new transactions did not threaten to undo relief obtained in earlier consent decrees.

[2] The Final Judgment required the defendants to sell the divestiture assets. Implicit in the Final Judgment is a prohibition against the reacquisition of the divestiture assets by the defendants for the life of the decree. Absent such a prohibition, a defendant could divest the assets and then turn right around and reacquire them, effectively undoing the relief provided by the decree.

[3] The Act requires parties to transactions meeting certain size criteria to provide the Department with advance notice of a proposed transaction and certain information and to await a specified period of time before consummating it. See 15 U.S.C. § 18a. The proposed modification would require the parties to provide the notice and information and observe the waiting period even if the transaction did not meet the size criteria.

Halliburton is a multi-billion dollar international oilfield service company that provides a full line of products and services for the exploration and production of oil and natural gas, including diamond drill bits. It is the largest diamond drill bit manufacturer and seller in the United States.

In its comment, Halliburton puts forth two types of arguments: it claims that the proposed modification is contrary to the public interest, and it additionally argues that the proposed modification should be reviewed under a more stringent standard than the public interest standard.

Halliburton's Public Interest Arguments

While Halliburton contends that the proposed modification is contrary to the public interest, the concerns it identifies relate to protecting its private interest from competition, rather than protecting the public interest in competition. Halliburton first contends that the proposed modification is contrary to the public interest in the finality of judgments, that Dresser relied upon that interest in entering the Judgment, and that Halliburton (its successor) would be harmed, as the modification would "put Halliburton in a disadvantageous position as to its competitors." Halliburton Comment at 3.

While finality is an important interest, courts have recognized that consent decrees are not contracts between the parties that are immutable unless all parties agree to changes. The Court of Appeals for the District of Columbia Circuit addressed this issue in United States v. Western Electric Co., 46 F.3d 1198, 1205 (D.C. Cir. 1995):

> [BellSouth] urges us to treat the consent decree as if it were a contract containing, by design, broad provisions forbidding activities in the distant future no matter how improbable these seemed during the drafting, provisions that must remain immutable. . . . [W]e do not find BellSouth's contractual perspective an appropriate view of the district court's discretion. While the decree was "in some respects . . . contractual in

> nature," it was "enforceable as a judicial decree that is subject to the rules generally applicable to other judgments and decrees." United States v. Rufo, 502 U.S. 367, 378 (1992). A consent decree, in other words, is subject to modification to the same extent as if it had been entered as a final judgment after a full trial. The Supreme Court so held in System Federation No. 91 v. Wright, 364 U.S. 642, 651 (1961): "The parties cannot, by giving each other consideration, purchase from a court of equity a continuing injunction."

Halliburton thus had no basis to assume the decree would never be modified unless it consented. The Final Judgment permitted Dresser to consummate its merger with Baroid, subject to the required divestitures, and the proposed modification of Paragraph V.F. does not impose any greater burden on the defendants -- or Halliburton as the successor to the defendants -- than the original Final Judgment. While Halliburton contends that approving this modification would make parties more reluctant to settle cases with the Department in the future, the Department does not share that concern.

Halliburton next argues that the proposed modification would not advance the public interest because there has not been a significant change in concentration levels or structure of the diamond drill bit industry since the Judgment was entered. In making this argument Halliburton fails to understand that a modification can be in the public interest, even when there has been no change in circumstances since the Judgment was entered. Because there may be a range of settlement options consistent with the public interest, a finding that inclusion of a provision in a decree is in the public interest does not mean that removal of that provision from the decree is contrary to the public interest.[4] As noted above,

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[4] See United States v. Western Elec. Co., 900 F.2d 283, 309 (D.C. Cir.), cert. denied sub nom. MCI Communications Corp. v. United States, 498 U.S. 911 (1990), quoting United States v. Bechtel Corp., 648 F.2d 660, 666 (9th Cir.), cert. denied, 454 U.S. 1083 (1981), quoting United States v. Gillette Co., 406 F. Supp. 713, 716 (D. Mass. 1975).

the Department has concluded that sufficient time has passed since entry of the Final Judgment to warrant removal of restrictions upon DPI that do not customarily apply to other similarly situated purchasers of divestiture assets. Halliburton has not shown that this modification is contrary to the public interest in competition. Halliburton also argues that it is arbitrary to propose a modification that permits DPI to combine with Smith, Schlumberger or Baker Hughes, but not with Halliburton.[5] As we explained in the memorandum in support of the modification motion, however, only Halliburton is a successor to the original defendants. Thus, allowing Halliburton to reacquire the divested assets would permit it to undo the relief provided by the decree. See Note 2, supra. The purpose of the modification is to restore to DPI the same alienation rights that divestiture purchasers typically have, not undo the original divestiture. The essence of the settlement in the Final Judgment was that Dresser was permitted to acquire Baroid, subject to the required divestitures. Halliburton received the benefit of that settlement when it subsequently acquired Dresser; it is not arbitrary to require that it maintain the restrictions agreed to by Dresser in the Final Judgment.

Halliburton's final public interest argument is that the proposed modification would limit judicial review because DPI would not have to seek modification of the decree to merge with any of its major competitors. But prior judicial approval of mergers is highly unusual; courts ordinarily review mergers only after the government or a private party initiates a suit challenging the transaction as anticompetitive.

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[5] It must be emphasized that a modification would not necessarily permit DPI to combine with those entities. Any proposed DPI transaction would be subject to review under the antitrust laws, and DPI would be expressly required to notify the Department of any proposed transaction between it and any of the three enumerated entities.

We do not believe there is any public interest in judicial review of transactions that are neither alleged to violate the antitrust laws nor undermine the effectiveness of the Final Judgment divestiture.

The Appropriate Standard of Review Is the Public Interest

At the end of its comment, Halliburton contends that the motion is "procedurally deficient." In Halliburton's view, its objection requires the Court to apply a more stringent standard than the public interest test that generally applies to removal of restrictions in a final judgment with the government's consent. The Department submits that, contrary to Halliburton's contention, the proper standard to apply here is the public interest standard.

The legal standard applicable to motions for decree modification is a question of law. Western Elec., 900 F.2d at 293-94. The modification motion was filed with the Court pursuant to Paragraph XIV of the Judgment, which enables any party to apply to the Court for modification "of any of the provisions hereof . . . ." The Judgment does not specify the standard that applies to Paragraph XIV motions. Thus, that paragraph must be read to incorporate the common law standards applicable to antitrust decree modifications.

Rule 60(b)(5) of the Federal Rules of Civil Procedure states the general common law principle for judgment modification: "On motion and upon terms as are just, a court may relieve a party . . . from a final judgment . . . [if] it is no longer equitable that the judgment should have prospective application . . . ." This principle gives rise to different standards in different circumstances. In the context of consent decrees in government antitrust cases, two distinct standards have been applied.

When the government and an antitrust defendant agree to modify or remove a decree restriction, the courts consistently apply the common law "public interest" standard, which also governs review of proposed consent decrees. See Bechtel, 648 F.2d at 665-66. This standard accords broad discretion to the Department of Justice to prosecute antitrust litigation and to settle it on terms that the Department determines will best serve the public interest in antitrust enforcement. See, e.g., Western Elec., 900 F.2d at 305-09; Bechtel, 648 F.2d at 665-66; Gillette, 406 F. Supp. at 715-17. See also United States v. American Cyanamid Co., 719 F.2d 558, 565 (2d Cir. 1983), cert. denied, 465 U.S. 1101 (1984); United States v. National Fin. Adjusters, 1985-2 Trade Cas. (CCH) ¶66,856, at 64,248 (E.D. Mich. 1985). Under the public interest standard, the court has the important but limited role of "insuring that the government has not breached its duty to the public in consenting to the decree." Bechtel, 648 F.2d at 666. In reviewing the Department's decision to agree to a decree modification, the court is not to "engage in an unrestricted evaluation of what relief would best serve society." Id. As the D.C. Circuit Court of Appeals has emphasized, "the court's function is not to determine whether the resulting array of rights and liabilities 'is the one that best serve society,' but only to confirm that resulting 'settlement is "within the reaches of the public interest."'" Western Elec., 900 F.2d at 309 (quoting Bechtel, 648 F.2d at 666 (quoting Gillette, 406 F. Supp. at 716)) (emphasis added in 900 F.2d).

When the government and an antitrust defendant do not agree to modify or remove a decree restriction, courts generally apply a more strict standard. Such circumstances usually arise when a defendant wants to be relieved from a decree restriction, but the Department believes that the restriction should continue in effect. The proper standard in such circumstances requires the court to consider whether there has been a "significant change in factual conditions or law" and whether the proposed modification is suitably tailored to the changed circumstances. Rufo, 502 U.S. at 384-91 (quoted in Western Elec., 46 F. 3d at 1203-04).

This case presents an unusual situation: the United States has consented to a request from a non-party that is bound by the Judgment for a modification to relieve it of restrictions placed on it, but a defendant with no interest protected by the decree objects and claims that its objection requires application of the more stringent standard. The decree was designed to preserve competition between Dresser's and Baroid's diamond drill bit businesses, and the provision at issue was designed to prevent further concentration in the market. Neither the decree as a whole nor Paragraph V.F., including the language that would be modified, was designed to benefit or protect Halliburton. In these circumstances, when the modification satisfies the public interest standard, it would be inequitable to retain a restriction upon a non-party or examine it under a more stringent standard based solely on Halliburton's objection.

This approach can be reconciled with two cases in which the D.C. Circuit applied the standard for contested modifications to a situation in which the United States and the party restrained by the judgment consented to a modification removing the restraint but another decree party objected. These cases both arose under the unique AT&T consent decree in circumstances not present here.

In United States v. Western Electric, 969 F.2d 1231 (D.C. Cir. 1992), the court concluded that AT&T's objection compelled analysis of the proposed modification under the standard provided in that decree for contested modifications of its restrictions, which was stricter than the public interest standard. Western Elec., 969 F.2d at 1241. The 1982 consent decree breaking up the Bell System separated the Bell Operating Companies ("BOCs") and their monopolies over local telephone service from AT&T and its long distance service. So that the BOCs would have neither the ability nor the incentive to abuse their local monopolies to the detriment of long distance competition, the decree also prohibited the BOCs from providing long distance service and required them to provide equal access for all long distance carriers to their local exchange monopolies. Western Elec., 969 F.2d at 1233. Later advancements in telecommunications technology made it more efficient to separate signaling from the voice transmissions themselves.[6] The BOCs sought a modification of the long distance prohibition so that they could carry certain signaling across exchange boundaries, and AT&T objected. Id. at 1234-36. In reaching its conclusion that a stricter standard than the public interest should be applied, the court considered that the restriction at issue, in addition to protecting the public interest in long distance competition, also protected AT&T and other long distance companies from being discriminated against by the BOCs. Id. at 1238. The situation here stands in stark contrast to the Western Electric case in two respects: first, the constraint on DPI's alienation rights was not designed

[6] The telephone call that a BOC passes to a long-distance company is composed of two parts: 1) the actual voice communication of the person called and the person calling and 2) network control signaling, which directs the operation of the telecommunications network, telling the switches and circuits how and when to set up and disconnect a call. The signaling indicates when the receiver has picked up, what digits were dialed, whether the phone is busy or ringing, and when the phone is hung up, providing the capability for caller I.D., call waiting, and call forwarding. Western Elec., 969 at 1234.

to provide the defendants with any benefit or protection, and second, Halliburton seeks not protection from anticompetitive conduct, but protection from competition.[7] Thus, the protection it seeks would be contrary to the public interest.

In 1993, the D.C. Circuit again reviewed a motion to modify the AT&T consent decree that the Justice Department supported; this time one of the BOCs objected to AT&T's request for a waiver of a restriction that applied only to AT&T.[8] United States v. Western Elec. Co., 46 F.3d 1198 (D.C. Cir. 1995). In light of prior decisions, the district court had applied the more strenuous standard for contested modifications and found that that standard had been satisfied. The court of appeals affirmed on that ground. Thus, the issue of whether the district court was required to apply that

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[7] Courts have recognized that competitors should not be permitted to invoke the antitrust laws to protect themselves from having to compete. Cargill, Inc. v. Monfort, Inc., 479 U.S. 104, 115 (1986); Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 487-89 (1977). We note that no comments adverse to the modification were filed by customers of DPI.

[8] In a previous decision, the D.C. Circuit had ruled that BOCs did not violate the consent decree by providing cellular exchange services outside of their exchange regions. United States v. Western Elec. Co., 797 F.2d 1082, 1091 (D.C. Cir. 1986). The ruling led to many BOCs purchasing cellular licenses to provide cellular services outside their geographic region. Western Elec., 46 F.3d at 1200-01. In 1994, AT&T announced its intention to merge with McCaw Cellular Communications, Inc. ("McCaw"), a company that owned stakes in many of the same cellular licenses also partly owned by BOCs. Id. at 1201. Section IV(C) of the AT&T consent decree defined a "Bell Operating Company" as any one of the original 22 BOCs and "any entity directly or indirectly owned or controlled by a BOC or affiliated through substantial common ownership." Id. at 1201 n.1. Under section IV(C) of the consent decree, some of the McCaw cellular systems were therefore BOCs, and AT&T, under Section I(A)(4) of the decree, was prevented from acquiring them. AT&T requested a limited modification of the decree for the transaction and BellSouth, one of the BOCs, objected. Id. at 1201.

stricter standard rather than the public interest standard was not presented to or considered by the court of appeals.

The United States submits that Halliburton has no legal or equitable status to warrant any departure from the public interest standard in reviewing a proposed modification that would remove a restriction against DPI and to which the United States has consented. The proposed modification would not affect Halliburton's decree obligations or any Halliburton interest protected by the decree. Halliburton may disagree with the Department's conclusion that the public interest supports modification, but its opposition should not displace the public interest standard because its interest is no different from the interests of any third-party competitors. In government antitrust litigation, the Department represents the public interest in competition. It must weigh and balance a variety of competitive costs and benefits in deciding whether to consent to a decree or decree modification. There is no reason in this case to limit the discretion afforded the Department under the public interest standard.

Conclusion

We have considered Halliburton's arguments. For the reasons explained here, those arguments do not change the Department's view that the proposed modification is in the public interest. Halliburton's opposition to the proposed modification, which would give DPI the same alienation rights that purchasers of divestiture assets usually enjoy, is simply an attempt to control disposition of the precise assets that the Final Judgment ordered its predecessor to divest to remedy an otherwise illegal merger. The Court should reject Halliburton's arguments and order the proposed modification.

Dated: September 6, 2000

Respectfully submitted,

“/s/”

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of September, 2000, I have caused a copy of the foregoing Response of the United States to Public Comment on the Proposal to Modify Final Judgment and a copy of the Public Comment submitted by Halliburton Company to be served on counsel for defendants and other affected companies by first class mail, postage prepared, and by facsimile.

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