

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

MAY 24 2004

NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)

Plaintiff,)

v.)

DNH INTERNATIONAL SARL,)
DYNO NOBEL, INC.,)
EL PASO CORP., and)
COASTAL CHEM, INC.,)

Defendants.)
_____)

Case No. 1:03CV02486

JUDGE: Gladys Kessler

DECK TYPE: ANTITRUST

DATE STAMP:

FINAL JUDGMENT

WHEREAS, plaintiff, United States of America, filed its Complaint on December 2, 2003, and plaintiff and defendants, DNH International Sarl, Dyno Nobel, Inc., El Paso Corporation and Coastal Chem, Inc., by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law, and without this Final Judgment constituting any evidence against or admission by any party regarding any issue of fact or law;

AND WHEREAS, defendants agree to be bound by the provisions of this Final Judgment pending its approval by the Court;

AND WHEREAS, the essence of this Final Judgment is the prompt and certain divestiture of certain rights or assets by the defendants to assure that competition is not

(2)

substantially lessened;

AND WHEREAS, plaintiff requires defendants to make certain divestitures for the purpose of remedying the loss of competition alleged in the Complaint;

AND WHEREAS, defendants have represented to the United States that the divestiture required below can and will be made and that defendants will later raise no claim of hardship or difficulty as grounds for asking the Court to modify any of the divestiture provisions contained below;

NOW THEREFORE, before any testimony is taken, without trial or adjudication of any issue of fact or law, and upon consent of the parties, it is ORDERED, ADJUDGED AND DECREED:

I. Jurisdiction

This Court has jurisdiction over the subject matter of and each of the parties to this action. The Complaint states a claim upon which relief may be granted against defendants under Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

II. Definitions

As used in this Final Judgment:

A. "Acquirer" means the entity or entities to whom defendants divest the Geneva Production Asset or, alternatively, the Battle Mountain Production Asset.

B. "DNH" means defendant DNH International Sarl, a Luxembourg corporation with its headquarters in Oslo, Norway, its successors and assigns, and its subsidiaries (including defendant Dyno Nobel, Inc.), divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

C. "El Paso" means El Paso Corporation, a Delaware corporation with its headquarters in Houston, Texas, and its successors and assigns, its subsidiaries, divisions (including defendant Coastal Chem, Inc.), groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

D. "IGAN" means low density or industrial grade ammonium nitrate which, when mixed with fuel oil, forms an explosive known as ANFO.

E. "Geneva Production Asset" means, unless otherwise noted, DNH's 50 percent membership interest in Geneva Nitrogen, LLC, a Delaware limited liability company which owns an IGAN production facility located at 1165 North Geneva Road, Vineyard, Utah 84601, including all of DNH's rights, titles, and interests in the following:

1. the tangible assets of the Geneva facility and the real property on which the Geneva facility is situated; any facilities used for research, development, engineering or other support to the Geneva facility, and any real property associated with those facilities; manufacturing and sales assets relating to the Geneva facility, including capital equipment, vehicles, supplies, personal property, inventory, office furniture, fixed assets and fixtures, materials, on- or off-site warehouses or storage facilities, and other tangible property or improvements; all licenses, permits and authorizations issued by any governmental organization relating to the Geneva facility; all contracts, agreements, leases, commitments, and understandings pertaining to the operations of the Geneva facility; supply agreements; all customer lists, accounts, and credit

records; and other records maintained by DNH in connection with the operations of the Geneva facility; and

2. the intangible assets of the Geneva facility, including all patents, licenses and sublicenses, intellectual property, trademarks, trade names, service marks, service names, technical information, know-how, trade secrets, drawings, blueprints, designs, design protocols, specifications for materials, specifications for parts and devices, safety procedures for the handling of materials and substances, quality assurance and control procedures, design tools and simulation capability, and all manuals and technical information DNH provides to its employees, customers, suppliers, agents or licensees in connection with the operations of the Geneva facility.

F. “Battle Mountain Production Asset” means, unless otherwise noted, all of El Paso’s rights, titles, and interests in the IGAN production facility located in Battle Mountain, Nevada, including:

1. all tangible assets of the Battle Mountain facility and the real property on which the Battle Mountain facility is situated; any facilities used for research, development, engineering or other support to the Battle Mountain facility, and any real property associated with those facilities; manufacturing and sales assets relating to the Battle Mountain facility, including capital equipment, vehicles, supplies, personal property, inventory, office furniture, fixed assets and fixtures, materials, on- or off-

- site warehouses or storage facilities, and other tangible property or improvements; all licenses, permits and authorizations issued by any governmental organization relating to the Battle Mountain facility; all contracts, agreements, leases, commitments, and understandings pertaining to the operations of the Battle Mountain facility; supply agreements; all customer lists, accounts, and credit records; and other records maintained by El Paso in connection with the operations of the Battle Mountain facility; and
2. all intangible assets of the Battle Mountain facility, including all patents, licenses and sublicenses, intellectual property, trademarks, trade names, service marks, service names, technical information, know-how, trade secrets, drawings, blueprints, designs, design protocols, specifications for materials, specifications for parts and devices, safety procedures for the handling of materials and substances, quality assurance and control procedures, design tools and simulation capability, and all manuals and technical information El Paso provides to its employees, customers, suppliers, agents or licensees in connection with the operations of the Battle Mountain facility.

III. Applicability

- A. This Final Judgment applies to DNH and El Paso, as defined above, and all other persons in active concert or participation with any of them who receive actual notice of this Final Judgment by personal service or otherwise.

B. Defendants shall require, as a condition of the sale or other disposition of all or substantially all of their assets or of lesser business units that include the Geneva Production Facility or the Battle Mountain Production Facility, that the purchaser agrees to be bound by the provisions of this Final Judgment, provided, however, that defendants need not obtain such an agreement from the Acquirer.

IV. Divestiture

A. Defendant DNH is ordered and directed, within ninety (90) calendar days after the filing of the Complaint in this matter, or five (5) days after notice of the entry of this Final Judgment by the Court, whichever is later, to divest the Geneva Production Asset in a manner consistent with this Final Judgment to an Acquirer acceptable to the United States in its sole discretion. The United States, in its sole discretion, may agree to one or more extensions of this time period, not to exceed in total sixty (60) calendar days, and shall notify the Court in each such circumstance. Defendant DNH agrees to use its best efforts to divest the Geneva Production Asset as expeditiously as possible.

B. In accomplishing the divestiture ordered by this Final Judgment, defendant DNH promptly shall make known, by usual and customary means, the availability of the Geneva Production Asset. Defendants shall inform any person making inquiry regarding a possible purchase of the Geneva Production Asset that it will be divested pursuant to this Final Judgment and provide that person with a copy of this Final Judgment. Defendant DNH shall offer to furnish to all prospective Acquirers, subject to customary confidentiality assurances, all information and documents relating to the Geneva Production Asset customarily provided in a due diligence process except such information or documents subject to the attorney-client or

work-product privilege. Defendant DNH shall make available such information to the United States at the same time that such information is made available to any other person.

C. Defendant DNH shall provide prospective Acquirers of the Geneva Production Asset and the United States information relating to the personnel involved in the production, operation, development, and sale of the Geneva Production Asset to enable the Acquirer to make offers of employment. Defendants will not interfere with any negotiations by the Acquirer to employ any of defendant DNH's employees whose responsibilities includes the production, operation, development, or sale of the products of the Geneva Production Asset.

D. Defendant DNH shall permit prospective Acquirers of the Geneva Production Asset to have reasonable access to personnel and to make inspections of the physical facilities of the Geneva Production Asset; access to any and all environmental, zoning, and other permit documents and information; and access to any and all financial, operational, or other documents and information customarily provided as part of a due diligence process.

E. Defendant DNH shall warrant to the Acquirer of the Geneva Production Asset that each asset therein that was operational as of the date of filing of the Complaint in this matter will be operational on the date of divestiture.

F. Defendants shall not take any action that will impede in any way the permitting, operation, or divestiture of the Geneva Production Asset.

G. Defendant DNH shall warrant to the Acquirer of the Geneva Production Asset that there are no material defects in the environmental, zoning, or other permits pertaining to the operation of the Geneva Production Asset, and following the sale of the Geneva Production Asset, defendants shall not undertake, directly or indirectly, any challenges to the environmental,

zoning, or other permits relating to the operation of the Geneva Production Asset.

H. Unless the United States otherwise consents in writing, the divestiture pursuant to Section IV, or by trustee appointed pursuant to Section V, of this Final Judgment, shall include the entire Geneva Production Asset or, alternatively, pursuant to Section V(B), the entire Battle Mountain Production Asset, and shall be accomplished in such a way as to satisfy the United States, in its sole discretion, that the divested asset can and will be used by the Acquirer as part of a viable, ongoing business engaged in the manufacture and sale of IGAN. Divestiture of the Geneva Production Asset or, alternatively, the Battle Mountain Production Asset may be made to an Acquirer, provided that it is demonstrated to the sole satisfaction of the United States that the divested asset will remain viable and the divestiture of such asset will remedy the competitive harm alleged in the Complaint. The divestitures, whether pursuant to Section IV or Section V of this Final Judgment,

1. Shall be made to an Acquirer that, in the United States' sole judgment, has the managerial, operational, and financial capability to compete effectively in the manufacture and sale of IGAN; and
2. Shall be accomplished so as to satisfy the United States, in its sole discretion, that none of the terms of any agreement between an Acquirer and defendants give defendants the ability unreasonably to raise the Acquirer's costs, to lower the Acquirer's efficiency, or otherwise to interfere in the ability of the Acquirer to compete effectively.

V. Appointment of Trustee to Effect Divestiture

- A. If defendant DNH has not divested the Geneva Production Asset within the time

period specified in Section IV(A), it shall notify the United States of that fact in writing. Upon application of the United States, the Court shall appoint a trustee selected by the United States and approved by the Court to effect the divestiture of the Geneva Production Asset.

B. After the appointment of a trustee becomes effective, only the trustee shall have the right to sell the Geneva Production Asset. Should the trustee determine that a sale of the Geneva Production Asset cannot be expeditiously accomplished, the trustee shall notify the United States and the parties of its conclusion and the reasons supporting its conclusion. Upon receipt of such notice from the trustee, the United States, in its sole discretion, shall have the right to direct the trustee to sell the Battle Mountain Production Asset as an alternative to the Geneva Production Asset. The trustee shall have the power and authority to accomplish the divestiture of the Geneva Production Asset or, should the United States so direct, the Battle Mountain Production Asset to an Acquirer acceptable to the United States at such price and on such terms as are then obtainable upon reasonable effort by the trustee, subject to the provisions of Sections IV, V, and VI of this Final Judgment, and shall have such other powers as this Court deems appropriate. Subject to Section V(D) of this Final Judgment, the trustee may hire at the cost and expense of defendant DNH any investment bankers, attorneys, or other agents, who shall be solely accountable to the trustee, reasonably necessary in the trustee's judgment to assist in the divestiture.

C. Defendants shall not object to a sale by the trustee on any ground other than the trustee's malfeasance. Any such objections by defendants must be conveyed in writing to the United States and the trustee within ten (10) calendar days after the trustee has provided the notice required under Section VI.

D. The trustee shall serve at the cost and expense of defendant DNH, on such terms and conditions as plaintiff approves, and shall account for all monies derived from the sale of the Geneva Production Asset or, alternatively, the Battle Mountain Production Asset, and all costs and expenses so incurred. After approval by the Court of the trustee's accounting, including fees for its services and those of any professionals and agents retained by the trustee, all remaining money shall be paid to defendant DNH and the trust shall then be terminated. The compensation of the trustee and any professionals and agents retained by the trustee shall be reasonable in light of the value of the asset to be divested and based on a fee arrangement providing the trustee with an incentive based on the price and terms of the divestiture and the speed with which it is accomplished, but timeliness is paramount.

E. Defendants shall use their best efforts to assist the trustee in accomplishing the required divestiture. The trustee and any consultants, accountants, attorneys, and other persons retained by the trustee shall have full and complete access to the personnel, books, records, and facilities of the business to be divested, and defendants shall develop financial and other information relevant to such business as the trustee may reasonably request, subject to customary confidentiality protection for trade secret or other confidential research, development, or commercial information. Defendants shall take no action to interfere with or to impede the trustee's accomplishment of the divestiture.

F. After its appointment, the trustee shall file monthly reports with the United States and the Court setting forth the trustee's efforts to accomplish the divestiture ordered under this Final Judgment. To the extent such reports contain information that the trustee deems confidential, such reports shall not be filed in the public docket of the Court. Such reports shall

include the name, address, and telephone number of each person who, during the preceding month, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the Geneva Production Asset or, alternatively, the Battle Mountain Production Asset, and shall describe in detail each contact with any such person. The trustee shall maintain full records of all efforts made to divest either asset.

G. If the trustee has not accomplished such divestiture within six months after its appointment, the trustee shall promptly file with the Court a report setting forth (1) the trustee's efforts to accomplish the required divestiture; (2) the reasons, in the trustee's judgment, why the required divestiture has not been accomplished; and (3) the trustee's recommendations. To the extent such reports contain information that the trustee deems confidential, such reports shall not be filed in the public docket of the Court. The trustee shall at the same time furnish such report to the plaintiff who shall have the right to make additional recommendations consistent with the purpose of the trust. The Court thereafter shall enter such orders as it shall deem appropriate to carry out the purpose of the Final Judgment, which may, if necessary, include extending the trust and the term of the trustee's appointment by a period requested by the United States.

VI. Notice of Proposed Divestiture

A. Within two (2) business days following execution of a definitive divestiture agreement, defendant DNH or the trustee, whichever is then responsible for effecting the divestiture required herein, shall notify the United States of any proposed divestiture required by Section IV or V of this Final Judgment. If the trustee is responsible, it shall similarly notify defendants. The notice shall set forth the details of the proposed divestiture and list the name,

address, and telephone number of each person not previously identified who offered or expressed an interest in or desire to acquire any ownership interest in the Geneva Production Asset or, alternatively, the Battle Mountain Production Asset, together with full details of the same.

B. Within fifteen (15) calendar days of receipt by the United States of such notice, the United States may request from defendants, the proposed Acquirer, any other third party, or the trustee if applicable additional information concerning the proposed divestiture, the proposed Acquirer, and any other potential Acquirer. Defendants and the trustee shall furnish any additional information requested within fifteen (15) calendar days of the receipt of the request, unless the parties shall otherwise agree.

C. Within thirty (30) calendar days after receipt of the notice or within twenty (20) calendar days after the United States has been provided the additional information requested from defendants, the proposed Acquirer, any third party, and the trustee, whichever is later, the United States shall provide written notice to defendants and the trustee, if there is one, stating whether or not it objects to the proposed divestiture. If the United States provides written notice that it does not object, the divestiture may be consummated, subject only to defendants' limited right to object to the sale under Section V(C) of this Final Judgment. Absent written notice that the United States does not object to the proposed Acquirer or upon objection by the United States, a divestiture proposed under Section IV or Section V shall not be consummated. Upon objection by defendants under Section V(C), a divestiture proposed under Section V shall not be consummated unless approved by the Court.

VII. Financing

Defendants shall not finance all or any part of any purchase made pursuant to Section IV or V of this Final Judgment.

VIII. Hold Separate

Until the divestiture required by this Final Judgment has been accomplished, defendants shall take all steps necessary to comply with the Hold Separate Stipulation and Order entered by this Court. Defendants shall take no action that would jeopardize the divestiture ordered by this Court.

IX. Affidavits

A. Within twenty (20) calendar days of the filing of the Complaint in this matter, and every thirty (30) calendar days thereafter until the divestiture has been completed under Section IV or V, defendants shall deliver to the United States an affidavit as to the fact and manner of its compliance with Section IV or V of this Final Judgment. Each such affidavit shall include the name, address, and telephone number of each person who, during the preceding thirty days, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the Geneva Production Asset or, alternatively, the Battle Mountain Production Asset, and shall describe in detail each contact with any such person during that period. Each such affidavit shall also include a description of the efforts defendants have taken to solicit buyers for the asset to be divested, and to provide required information to any prospective Acquirer, including the limitations, if any, on such information. Assuming the information set forth in the affidavit is true and complete, any objection by the United States to information provided by defendants,

including limitations on the information, shall be made within fourteen (14) days of receipt of such affidavit.

B. Within twenty (20) calendar days of the filing of the Complaint in this matter, defendants shall deliver to the United States an affidavit that describes in reasonable detail all actions defendants have taken and all steps defendants have implemented on an ongoing basis to comply with Section VIII of this Final Judgment. Defendants shall deliver to the United States an affidavit describing any changes to the efforts and actions outlined in defendants' earlier affidavits filed pursuant to this section within fifteen (15) calendar days after the change is implemented.

C. Defendants shall keep all records of all efforts made to preserve the Geneva Production Asset and the Battle Mountain Production Asset and to divest either asset until one year after such divestiture has been completed.

X. Compliance Inspection

A. For purposes of determining or securing compliance with this Final Judgment, or of determining whether the Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time duly authorized representatives of the United States Department of Justice, including consultants and other persons retained by the United States, shall, upon written request of a duly authorized representative of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to defendants, be permitted:

1. access during defendants' office hours to inspect and copy, or at plaintiff's option, to require defendants to provide copies of, all books, ledgers, accounts, records and documents in the possession, custody, or control of

- defendants, relating to any matters contained in this Final Judgment; and
2. to interview, either informally or on the record, defendants' officers, employees, or agents, who may have their individual counsel present, regarding such matters. The interviews shall be subject to the reasonable convenience of the interviewee and without restraint or interference by defendants.

B. Upon the written request of a duly authorized representative of the Assistant Attorney General in charge of the Antitrust Division, defendants shall submit written reports, under oath if requested, relating to any of the matters contained in this Final Judgment as may be requested.

C. No information or documents obtained by the means provided in this section shall be divulged by the United States to any person other than an authorized representative of the executive branch of the United States, except in the course of legal proceedings to which the United States is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If at the time information or documents are furnished by defendants to the United States, defendants represent and identify in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(7) of the Federal Rules of Civil Procedure, and defendants mark each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure," then the United States shall give defendants ten (10) calendar days notice prior to divulging such material in any legal proceeding (other than a grand jury proceeding).

XI. No Reacquisition

Defendants may not reacquire any part of the asset divested under this Final Judgment during the term of this Final Judgment.

XII. Retention of Jurisdiction

This Court retains jurisdiction to enable any party to this Final Judgment to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

XIII. Expiration of Final Judgment

Unless this Court grants an extension, this Final Judgment shall expire ten years from the date of its entry.

XIV. Public Interest Determination

Entry of this Final Judgment is in the public interest.

Date:

May 21, 2004

Court approval subject to procedures of the Antitrust Procedures
and Penalties Act,
15 U.S.C. § 16.

Gladys Kessler
United States District Judge