UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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: January 21, 2004

COMPETITIVE IMPACT STATEMENT

Plaintiff United States, pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA" or "Tunney Act"), 15 U.S.C. § 16(b)-(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. NATURE AND PURPOSE OF THE PROCEEDING

On August 6, 2003, Defendant DNH International Sarl ("DNH"), through its wholly owned subsidiary Defendant Dyno Nobel, Inc. ("Dyno"), agreed to purchase certain assets of Defendant Coastal Chem, Inc. ("Coastal"), a subsidiary of Defendant El Paso Corporation ("El Paso"). These assets include two industrial grade ammonium nitrate ("IGAN") plants, one located in Cheyenne, Wyoming and the other in Battle Mountain, Nevada. Dyno currently owns a 50 percent interest in Geneva Nitrogen LLC, which owns an IGAN production facility in Vineyard, Utah (the "Geneva facility").

On December 2, 2003, the United States filed a civil antitrust lawsuit alleging that the proposed acquisition would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18. The Complaint alleges that Dyno's acquisition of Coastal's IGAN production facilities would substantially lessen competition in the production of IGAN for sale in Western North America. Coastal and one other firm are the primary suppliers of IGAN consumed in Western North America, accounting for over 80 percent of IGAN sales in that region, while Dyno's interest in the Geneva facility makes it the best located of the three fringe IGAN producers that supply the region. The acquisition would combine Coastal's Cheyenne and Battle Mountain facilities with Dyno's 50 percent interest in the Geneva facility. Such a reduction in competition would result in consumers of IGAN in the western United States paying higher prices for IGAN. Accordingly, the prayer for relief in the Complaint seeks (1) a judgment that the proposed acquisition would violate Section 7 of the Clayton Act and (2) a permanent injunction that would foreclose DNH or any of its subsidiaries from purchasing Coastal's Cheyenne and Battle Mountain IGAN production facilities.

At the same time the Complaint was filed, the United States filed a proposed settlement that would permit Dyno to complete its acquisition of the two Coastal IGAN production facilities but require Dyno to divest its interest in Geneva Nitrogen LLC in such a way as to preserve competition in the Western North American IGAN market. The settlement consists of a Hold Separate Stipulation and Order and a proposed Final Judgment.

According to the terms of the settlement, Dyno must divest its interest in Geneva Nitrogen LLC to a person acceptable to the United States, in its sole discretion, within ninety (90) calendar days after the filing of the Complaint in this matter, or within five (5) days after

notice of entry of the Final Judgment, whichever is later. The United States, in its sole discretion, may extend the time period for divestiture by an additional period of time, not to exceed sixty (60) calendar days. If Dyno does not complete the divestiture within the prescribed time period, then the United States may nominate, and the Court will appoint, a trustee who will have sole authority to divest Dyno's interest in Geneva Nitrogen LLC. If the trustee is unable to divest Dyno's interest in Geneva Nitrogen LLC in a timely manner, it shall, as directed by the United States in its sole discretion, divest the Battle Mountain facility that Dyno is acquiring from Coastal.

The parties have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the Tunney Act. 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 Judgment and to punish violations thereof.

II. DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATIONS OF THE ANTITRUST LAWS

A. *The Defendants and the Proposed Transaction*

DNH, a Luxembourg corporation headquartered in Oslo, Norway, is one of the world's largest explosives producers. DNH reported sales in 2002 of approximately $630 million. Its Dyno subsidiary is a Delaware corporation operating out of Salt Lake City, Utah. Dyno, which reported 2002 sales of roughly $31 6 million, is one of the two largest producers of explosives in North America.

El Paso, a Delaware corporation headquartered in Houston, Texas, reported 2002 sales of approximately $12 billion. El Paso is the leading provider of natural gas services and the largest pipeline company in North America. Its Coastal subsidiary, which also is incorporated in

Delaware and located in Houston, is one of the two largest IGAN producers in Western North America, reporting 2002 sales of roughly $146 million.

On August 6, 2003, Dyno agreed to purchase Coastal's IGAN production facilities in Battle Mountain, Nevada and Cheyenne, Wyoming. The acquisition would combine the two Coastal facilities with Dyno's 50 percent interest in the Geneva facility, which is the best located of the three fringe IGAN facilities that supply Western North America.

B. The Effects of the Transaction on Competition in the IGAN Market

1. The Relevant Market Is the Production of IGAN for Sale in Western North America.

The Complaint alleges that the production and sale of IGAN constitutes a relevant product market within the meaning of Section 7 of the Clayton Act. IGAN, which is in the form of low-density, porous prills (or granules), is an essential ingredient used in the production of blasting agents, one of two types of explosives used in the mining and construction industries. Blasting agents accounted for nearly all of the explosives sold in North America last year. They are used principally to mine coal, rock and other nonmetals, and metals such as gold and copper. The purchase of blasting agents constitutes a relatively small portion of the total costs of the mining or other industrial operations in which the blasting agents are used.

The other type of explosive commonly used in the mining and construction industries, high explosives, includes products such as dynamite. High explosives are much more expensive than blasting agents and are far more sensitive to detonation; high explosives can be detonated with only a blasting cap, while blasting agents are detonated using high explosives.

Virtually all blasting agents used in North America contain ammonium nitrate in the form of IGAN, and essentially all IGAN sold in North America is used to make blasting agents. The

most widely used blasting agent is known as ANFO, which is made by soaking IGAN in fuel oil (Ammonium Nitrate plus Fuel Oil). Although ammonium nitrate is also available in an agricultural grade, which is in the form of high-density prills, only the more porous, lower density IGAN prills are used to make ANFO. The greater porosity of the IGAN prill allows for significantly better absorption of the fuel oil and makes an explosive with a much higher sensitivity to detonation. IGAN is also used to make explosive slurries, gels, and emulsions, which can be used as blasting agents either alone or in combination with ANFO.

A small but significant increase in the price of IGAN would not cause consumers of IGAN to use sufficiently less IGAN so as to make such a price increase unprofitable. Accordingly, the production and sale of IGAN is a line of commerce and a relevant product market within the meaning of Section 7 of the Clayton Act.

The Complaint further alleges that "Western North America" constitutes a relevant geographic market in which IGAN is sold. The Complaint defines Western North America as the eleven contiguous western-most states in the United States and the Canadian provinces of British Columbia, Alberta, and Saskatchewan.

IGAN typically is shipped to customers in bulk either by rail or by truck. Freight costs are a significant component of the total delivered price of IGAN and limit the geographic area that an IGAN production facility profitably can serve. The physical characteristics of the product impose additional limitations on the geographic reach of an IGAN production facility. IGAN degrades over time as moisture in the air causes it to "cake," rendering it much less economical to use as an ingredient to make blasting agents. Also, the more IGAN is handled between production and use, the more the IGAN prills break down into unusable fine particles.

IGAN produced at Coastal's Battle Mountain, Nevada and Cheyenne, Wyoming facilities is regularly sold within Western North America. IGAN produced at the Geneva facility, in which Dyno has a 50 percent interest, is also regularly supplied into Western North America. Only three other firms own facilities that regularly produce IGAN for sale in Western North America. One of those three firms is Orica Limited ("Orica"), which owns the remaining 50 percent interest in the Geneva facility and also owns an IGAN facility located in Alberta, Canada. The other two facilities are located in Benson, Arizona and Manitoba, Canada.

No other firm owns an IGAN production facility from which it supplies IGAN on a regular basis to Western North America. Apart from the facilities referenced above, the IGAN facilities closest to Western North American customers are located along the Mississippi River. The additional transportation costs associated with supplying IGAN to Western North America from these facilities, coupled with the increased risk of degradation of the IGAN due to prolonged shipping and handling of the product, significantly limit the ability of these distant facilities to supply Western North America. A small but significant increase in the price of IGAN produced for sale in Western North America would not cause consumers of IGAN in Western North America to purchase sufficient amounts of IGAN produced at facilities that do not already regularly supply Western North America such that a price increase would be unprofitable. Accordingly, Western North America is a relevant geographic market, within the meaning of Section 7 of the Clayton Act, in which to assess the competitive effects of the proposed acquisition.

2. The Proposed Acquisition Would Result in Anticompetitive Effects.

The Complaint alleges that Dyno's acquisition of Coastal's Battle Mountain and Cheyenne IGAN production facilities likely will substantially lessen competition in the production of IGAN for sale in Western North America, eliminate actual and potential competition between Dyno and Coastal in the production of IGAN for sale in Western North America, and increase prices for IGAN produced for sale in Western North America.

Specifically, the Complaint alleges that two firms–Coastal and Orica–account for over 80 percent of IGAN sales in Western North America, which in 2002 exceeded $150 million, and that Dyno's interest in the Geneva facility makes it the best located of the three fringe producers that supply the market. After the proposed acquisition, the two dominant firms together would control roughly 90 percent of such sales, with Dyno and Coastal combined having a share of approximately 50 percent.

In Western North America, most IGAN-containing blasting agents are consumed in mines located in one of three areas: the Powder River Basin in Wyoming (coal mines); Northern Nevada (gold mines); and the so-called "Four-Corners Area" surrounding the junction of Utah, Colorado, New Mexico, and Arizona (coal mines). Coastal and Orica have facilities that are well-positioned to supply the Powder River Basin and Northern Nevada. The Geneva plant, which has an annual capacity of about 100,000 tons and is equally owned by Orica and Dyno, is located roughly equidistant from Northern Nevada, the Powder River Basin, and the Four-Corners Area and is well-positioned to serve all three areas. In contrast, the two other fringe firms that produce IGAN for sale in Western North America are located at the outer reaches of the relevant geographic market.

The proposed transaction, which would combine Coastal's Battle Mountain and Cheyenne facilities with Dyno's 50 percent interest in the Geneva facility, thus would eliminate independent competition from the best located of the three fringe IGAN producers that supply Western North America.

Successful entry into the Western North American IGAN market would be expensive and time-consuming, and thus would be unlikely to constrain an increase in the price of IGAN in Western North America. To be successful, a new entrant likely would require an efficient IGAN facility that could produce at least one-quarter of total IGAN sales in Western North America in order to cover the estimated $70 million cost of constructing such a facility. An IGAN facility with that capacity would take over two years to complete. Considering the time and capital expense required to construct such a production facility, entry is unlikely to occur in response to a small by significant increase in the price of IGAN in Western North America.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment will preserve competition in the production of IGAN for sale in Western North America. The Judgment requires that within ninety (90) calendar days after the filing of the Complaint in this matter, or within five (5) days after notice of entry of the Final Judgment, whichever is later, Dyno must sell its 50 percent interest in Geneva Nitrogen LLC, the owner of the Geneva facility, to an acquirer acceptable to the United States. The United States may extend this time period for divestiture for one additional period, not to exceed sixty (60) calendar days. Dyno must use its best efforts to divest its 50 percent interest in Geneva Nitrogen LLC as expeditiously as possible.

If Dyno does not accomplish the ordered divestiture within the prescribed time period, the United States will nominate, and the Court will approve and appoint, a trustee to assume sole power and authority to complete the divestiture of Dyno's 50 percent interest in Geneva Nitrogen LLC. Should the trustee determine that this divestiture cannot be accomplished expeditiously, the trustee shall notify the United States and the parties and provide 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 Coastal's Battle Mountain facility instead.

The United States considers the sale of Dyno's 50 percent interest in Geneva Nitrogen LLC to be satisfactory relief. The sale of that half-interest to a buyer that does not already produce IGAN for sale in Western North America would leave the post-acquisition market essentially the same as the pre-acquisition market, with the buyer replacing Dyno in the marketplace as the best positioned of the three fringe producers of IGAN in the region. The United States is optimistic that an acceptable buyer for Dyno's 50 percent interest in Geneva Nitrogen LLC can be found in a timely manner. If not, the United States is satisfied that the sale of Coastal's Battle Mountain facility to a buyer acceptable to the United States would be a suitable alternative divestiture. Although the Geneva facility is better located than the Battle Mountain plant with respect to the majority of IGAN-consuming customers in Western North America – those located in the gold mining region of Northern Nevada, and in the coal mining industries found in the "Four Corners Area" and the Powder River Basin – Dyno's share of the Geneva facility's output is less than the capacity of the Battle Mountain plant. Because of this capacity advantage, the competitive significance of an independent Battle Mountain facility should be comparable to that of the better-located Geneva facility.

DNH, Dyno, El Paso, and Coastal must cooperate fully with the trustee's efforts to divest either Dyno's 50 percent interest in Geneva Nitrogen LLC or, should the United States so direct, Coastal's Battle Mountain facility to an acquirer acceptable to the United States, and they must report periodically to the United States on their divestiture efforts. If the trustee is appointed, defendant DNH will pay all costs and expenses of the trustee. The trustee's commission will be based in part on the price obtained for the divested assets and the speed with which the divestiture is completed, thus providing an incentive for the trustee to accomplish a speedy divestiture. After its appointment becomes effective, the trustee will file monthly reports with the parties and the Court, setting forth the trustee's efforts to accomplish the divestiture. If the divestiture has not been accomplished within six months of the trustee's appointment, the trustee and the parties will make recommendations to the Court, which shall enter such orders as may be appropriate to carry out the purpose of the Final Judgment, including extending the trust and the term of the trustee's appointment.

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 attorneys' 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 defendants.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The parties 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 conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The Tunney Act provides a period of at least sixty days preceding the effective date of the proposed Final Judgment during which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty days of the date of publication of this Competitive Impact Statement in the Federal Register. The United States will evaluate and respond to the comments. All comments will be given due consideration by the Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to entry by the Court. 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:

Maribeth Petrizzi
Chief, Litigation II Section
Antitrust Division
United States Department of Justice
1401 H Street, NW, Suite 3000
Washington, D.C. 20530

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against defendants DNH, Dyno, El Paso, and Coastal. The United States could have continued the litigation to seek preliminary and permanent injunctions against Dyno's acquisition of Coastal's IGAN production facilities. The United States is satisfied, however, that the proposed relief, once implemented by the Court, will preserve and ensure competition in the relevant market.

VII. STANDARD OF REVIEW UNDER THE APPA FOR PROPOSED FINAL JUDGMENT

The APPA requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the Court shall determine whether entry of the proposed Final Judgment "is in the public interest." In making that determination, the Court *may* consider--

> (1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;
>
> (2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e). As the United States Court of Appeals for the District of Columbia Circuit has held, the APPA permits a court to consider, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the

decree may positively harm third parties. *United States v. Microsoft Corp.*, 56 F.3d 1448, 1458-62 (D.C. Cir. 1995).

In conducting this inquiry, "the Court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process."[1] Rather,

> absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.

United States v. Mid-America Dairymen, Inc., 1977-1 CCH Trade Cas. ¶ 61,508, at 71,980 (W.D. Mo. 1977).

Accordingly, with respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States v. BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (citing *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft*, 56 F.3d at 1460-62. Courts have held that

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "*within the reaches of the public interest*." More elaborate

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[1] 119 Cong. Rec. 24598 (1973); *see also United States v. Gillette Co.*, 406 F. Supp. 713, 715 (D. Mass. 1975). A "public interest" determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed by the Department of Justice pursuant to the APPA. Although the APPA authorizes the use of additional procedures, 15 U.S.C. § 16(f), those procedures are discretionary. A court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues. H.R. 93-1463, 93rd Cong. 2d Sess. 8-9, *reprinted in* (1974) U.S. Code Cong. & Ad. News 6535, 6538.

> requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[2]

The proposed Final Judgment, therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice or whether it mandates certainty of free competition in the future. Court approval of a final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'" *United States v. AT&T*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *Gillette*, 406 F. Supp. at 716), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); *see also United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy).

Moreover, the Court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States alleges in its Complaint, and does not authorize the Court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459. Because the "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

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[2] *Cf. BNS*, 858 F.2d at 463 (holding that the court's "ultimate authority under the [APPA] is limited to approving or disapproving the consent decree"); *Gillette*, 406 F. Supp. at 716 (noting that, in this way, the court is constrained to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass"). *See generally Microsoft*, 56 F.3d at 1461 (discussing whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'").

"effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Id*. at 1459-60.

VIII. DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: January 21, 2004

Respectfully submitted,

/s/

Michael K. Hammaker
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CERTIFICATE OF SERVICE

I, Joshua P. Jones, hereby certify that on January 21, 2004, I caused copies of the foregoing Competitive Impact Statement to be served on Defendants DNH International Sarl, Dyno Nobel, Inc., El Paso Corporation, and Coastal Chem, Inc., by facsimile and by mailing these documents first-class, postage prepaid, to duly authorized legal representatives of those parties, as follows:

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