UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA
THOMASVILLE DIVISION

UNITED STATES OF AMERICA, Plaintiff; v. ENGELHARD CORPORATION, FLORIDIN COMPANY, U.S. BORAX INC., and U.S. SILICA COMPANY; Defendants.	)	Civil Action No.: 6-95-cv-45(WLS)

UNITED STATES' MOTION FOR LEAVE TO SUPPLEMENT ITS MEMORANDUM IN SUPPORT OF EMERGENCY MOTION FOR AN INJUNCTION PENDING APPEAL

On March 7, 1995, plaintiff filed an Emergency Motion for an Injunction Pending Appeal. Because the defendants had not agreed to delay their transaction in the event of a ruling in their favor, the motion and its supporting memorandum were prepared before the Court's decision on the antitrust claim and were filed immediately after the decision was issued.

Plaintiff has now had an opportunity to review the Court's decision. Plaintiff believes, with respect, that that decision presents serious legal issues and that the Solicitor General, who is now considering the matter, may decide shortly to appeal the decision to the United States Court of Appeals for the Eleventh Circuit. Accordingly. plaintiff hereby asks leave to supplement its memorandum in order to describe those

legal issues for the benefit of the Court in its consideration of plaintiff's Emergency Motion for Injunction Pending Appeal.

The Court's Order of March 7 addressed only plaintiff's contention that the relevant product market should be defined as gel clay. In deciding that plaintiff had not carried its burden of proving that gel clay is a relevant product market, the Court rejected as inadequate evidence that customers would pay 5-10% more rather than switch from gel clay to another thickener. The Court essentially found that an unwillingness by customers to switch in the face of a 5-10% increase in the price of a product was insufficient to show that demand for that product was inelastic and that the product was a relevant market under Section 7 of the Clayton Act.

The Court's decision raises significant legal and methodological issues under the Clayton Act. The Court appears to have ruled, as a matter of law, that the Clayton Act places upon the government a different (and higher) market definition standard when an input product constituting a small portion of some other final product is involved -- that for such a product, the ability to raise prices 10% is insufficient for market definition purposes. In doing so, this Court focused not upon the seller's power to raise prices, but upon the buyers' alleged "complacency" in the face of such power.

To our knowledge, the Court's ruling is unprecedented. No other court has declined to find a relevant market where the evidence showed that buyers would not switch to other products in response to a 10% price increase, and several cases are to the contrary. See, e.g., U.S. v. Archer-Daniels-Midland Co., 866 F.2d 242 (8th Cir. 1988), cert. denied, 493 U.S. 809 (1989), in which the court discussed the standards for analyzing the product market in a case involving the combination of two producers of

high fructose corn syrup (HFCS), an input in a number of foods and beverages. The court held that the market included only HFCS, and not sugar, even though sugar could be used for the same purposes as HFCS. The court stated that "[t]he appropriate question is whether a slight increase in the price of HFCS causes a considerable number of buyers of HFCS to switch to sugar." 866 F.2d at 248 (emphasis added). Because the answer to that question was "no", HFCS constituted a relevant market.

We believe that the Court's ruling about the size of the hypothetical price increase needed to determine whether gel clay is a relevant product market for purposes of analyzing this merger presents a serious legal question that satisfies the first factor of the four-part test for issuing an injunction pending appeal. As explained in our original memorandum, the other factors -- the serious harm to the public interest and the plaintiff should the transaction proceed as compared with the financial cost that the defendants would bear if an injunction is issued -- weigh heavily in favor of an injunction. A combination of the Engelhard and Floridin assets would eliminate competition immediately and would irreparably harm the ability of the United States to obtain effective relief in the event of a successful appeal. The defendants' potential

private harm, by contrast, merits little weight. See FTC v. University Health, Inc., 938 F.2d 1206, 1225 (11th Cir. 1991).

Dated: April 3, 1997

Respectfully submitted,

United States Department of Justice
Antitrust Division

By _____

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