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)

MEMORANDUM IN SUPPORT OF UNITED STATES'
EMERGENCY MOTION FOR AN INJUNCTION PENDING APPEAL

Plaintiff United States respectfully submits this memorandum in support of its emergency motion for a thirty-day injunction of Engelhard's proposed acquisition of the Floridin assets, and for an injunction pending appeal in the event that the Solicitor General authorizes an appeal. In the alternative, the United States requests entry of an injunction pending resolution by the Court of Appeals of the government's motion for an injunction pending appeal. Plaintiff seeks this injunction to prevent the defendants from consummating Engelhard's proposed acquisition of Floridin's assets, and taking the subsequent actions of consolidating the two companies' attapulgite clay operations, including sharing confidential mining, production, and marketing information; moving Engelhard equipment into the Floridin plant; and demolishing the Engelhard plant in Attapulgus, Georgia. The defendants have refused plaintiff's request not to proceed

with the transaction and will make no representation that they will maintain the status quo for any period of time, however brief.

The thirty-day injunction is necessary to give the Antitrust Division and the Solicitor General an opportunity to review this Court's opinion and determine whether an appeal should be taken. If plaintiff does decide to appeal, an injunction pending the resolution of the appeal is necessary to avoid irreparable harm to competition in the gel clay business and the consequent harm to the plaintiff's appeal. Even if plaintiff were to succeed on appeal, the restoration of competition would be virtually impossible if Engelhard's and Floridin's operations had been combined and the Engelhard plant demolished. An injunction is appropriate here to maintain the status quo.

I. The United States Satisfies the Eleventh Circuit's Test for an Injunction Pending Appeal

The Eleventh Circuit applies a four-factor test to evaluate a request for an injunction pending appeal:

(1) the likelihood the moving party will prevail on the merits;

(2) the prospect of irreparable injury to the moving party if relief is withheld;

(3) the possibility of harm to other parties if relief is granted; and

(4) the public interest.

Freeman v. Cavazos, 923 F.2d 1434, 1437 (11th Cir. 1991). Accord Ruiz v. Estelle, 650 F.2d 555, 565 (5th Cir. 1981), (per curiam), cert. denied, 460 U.S. 1042 (1983); see also Pine Ridge Recycling, Inc., et al. v. Betts County Georgia, et al., 874 F. Supp. 1383, 1386 (M.D. Ga. 1995). Where "'the balance of the equities identified in factors 2, 3, and 4 [above] weighs heavily in favor of granting the stay,'" the movant can satisfy the first

factor by showing it has a "'substantial case on the merits.'" Garcia-Mir v. Meese, 781 F.2d 1450, 1453 (11th Cir. 1986), cert. denied, 479 U.S. 889 (1986) (quoting Ruiz v. Estelle, 650 F.2d at 565); accord ("[a]n order maintaining the status quo is appropriate when a serious legal question is presented, when little if any harm will befall other interested persons or the public, and when denial of the order would inflict irreparable injury on the movant.") Ruiz v. Estelle, 650 F.2d at 565, (quoting Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 844 (D.C. Cir. 1977)). Such is the case here.

A. Serious Legal Questions Are Present in This Case

From the beginning the United States has stressed that this case presents four major issues:

(1) whether the defendants' assertions that gel clay does not constitute a separate product market are contrary to Supreme Court precedents;

(2) whether the defendants can create a novel defense or claim contrary to existing precedent under the antitrust laws based on a self-declared intent to exit that is not supported by objective evidence of imminent failure or weakness;

(3) whether the defendants' claimed efficiencies fail to meet the rigorous standards established by the Eleventh Circuit in F.T.C. v. University Health, Inc., 938 F.2d 1206 (11th Cir. 1991); and

(4) whether, contrary to the Clayton Act's intent to preserve independent competitors, competitive harm from a merger in a highly concentrated industry can be remedied through a limited contractual relationship in which the "new" company would be dependent on its major competitor for its supply.

The seriousness of the legal issues in this case is self-evident from the extensive briefs filed by both plaintiff and defendants and the time and care this Court has taken in resolving them. That this Court has now struck the balance for the defendants does not

detract from the significance of the issues in controversy in this case. See, e.g. Sweeney v. Bond, 519 F. Supp. 124, 133 (E.D. Mo. 1981), aff'd 669 F.2d 542 (8th Cir. 1982), cert. denied sub nom., Schenberg v. Bond, 459 U.S. 878 (1982).

B. The Balance of Equities Weigh Heavily In Favor of an Injunction

1. The United States Will Be Irreparably Harmed If An Injunction Is Not Granted

When it acquires Floridin, Engelhard plans to move equipment to Floridin's plant, terminate its production operations at its plant, tear down its plant, merge the workforces, and fire more than 100 employees. See DX1010 at page 18; Trial Testimony of LaTorre, Volume 8, page 52, lines 2-11. Indeed, the savings from shutting down one plant and discharging employees were the major sources of the defendants' efficiency claims. See Trial Testimony of Baumann, Volume 9, page 37, lines 12-21. Those actions would permanently eliminate a competitor from the gel clay market and foreclose effective relief if the United States prevails on appeal. As a result, the United States and the consumers it represents would be irreparably harmed. See Isaly Co. v. Kraft, Inc., 622 F. Supp. 62, 63 (M.D. Fla. 1985)("[I]t is probable that denying a stay would moot the appeal for all practical and economic purposes.")

Consummation of the Engelhard/Floridin transaction would cause serious and permanent harm to competition. First, customers would lose the benefits competition between the two companies has provided, including cost improvements in clay mining and production that have led to lower prices, product modifications for specific customers' needs, and quality improvements. If the plaintiff wins on appeal and Engelhard is ordered to divest the Floridin assets, competition in the marketplace could

not readily be reestablished. A second competitor would have to be created from assets owned by Engelhard. With no management, no employees, no customers, no confidential mining, production or marketing information, and none of the myriad working relationships Floridin now has with its suppliers and customers, the competitive force Floridin now represents could not readily be resurrected and might possibly never exist again.

Should the plaintiff succeed on appeal, the Court of Appeals' decision could be little more than an empty formality without injunctive relief, because restoration of competition would be very difficult. Divestiture orders are inherently deficient. Because most acquisitions present the probability that corporate assets and operations will be commingled and consolidated, reliance upon an ability to "unscrambled the eggs" is generally misplaced. FTC v. Elders Grain, Inc., 868 F.2d 901, 904 (7th Cir. 1989); FTC v. Warner Communications, Inc., 742 F.2d 1156, 1159 (9th Cir. 1989); United States v. Ivaco, 704 F. Supp. 1409, 1429 (W.D. Mich. 1989); FTC v. Rhinechem Corp., 459 F. Supp. 785, 790 (N.D. Ill. 1978); FTC v. Lancaster Colony Corp., Inc., 434 F. Supp. 1088, 1090 (S.D.N.Y. 1977); United States v. Ingersoll-Rand, 218 F. Supp. 530, 542 (W.D. Penn. 1963), aff'd, 320 F.2d 509 (3rd Cir. 1963).

Second, the acquisition of the Floridin assets by Engelhard would result in the sharing of sensitive data relating to pricing, marketing, and operating. Such data cannot be "unlearned" if the Court of Appeals concludes that the transaction should be permanently enjoined. The Floridin employees who are retained could not simply forget all that they had learned about Engelhard's mining, production, and marketing operations, and the Engelhard employees who are retained could not forget what they

had learned about Floridin. And this knowledge of each other's operations would make it much easier for the companies to collude.

2. An Injunction Will Not Harm The Defendants

In contrast, the defendants would not suffer irreparable harm if the transaction is enjoined. The proposed acquisition of Floridin's assets by Engelhard was under consideration by the companies long before they actually signed an agreement. Discussions between them were initiated in the fall of 1993, about 18 months before they signed the contract that is the subject of this lawsuit, and the contract contemplated that the transaction could occur almost a year after it was signed.

Entering an injunction would simply maintain the status quo and mean that Engelhard and Floridin would continue to compete, as they have done since they started discussing a possible transaction in 1993. While this might delay Floridin's receipt of the proceeds of the sale and Engelhard's occupation of the Floridin plant, it could in no way harm the defendants as seriously as a failure to enter an injunction would harm the United States.[1] See Corbin v. Corbin, 429 F. Supp. 276, 282-283 (M.D. Ga. 1977)("While as shown above the plaintiff will be irreparably harmed if an injunction does not issue, it is unlikely that the defendants will be significantly injured. The

[1] The defendants may argue that an injunction would harm them because Floridin may choose to abandon the transaction rather than wait until the appeal is resolved. Such an argument is inappropriate and should be given no weight. The defendants may or may not choose to abandon their purchase agreement. Indeed, Floridin may decide to sell its assets to an alternative purchaser who raises no antitrust concerns. Courts have noted in preliminary injunction cases that a defense argument that preliminary relief might permanently foreclose the particular acquisition being proposed would not warrant withholding an injunction. United States v. White Consolidated Industries, Inc., 323 F. Supp. 1397, 1399 (N.D. Ohio 1971); United States v. Ingersoll-Rand Co., 218 F. Supp. at 546-7. Such an argument does not warrant withholding an injunction here.

injunction does no more than perpetuate the status quo until the merits can ultimately be resolved, and does not deny [the defendants] the ability to do anything which is consistent with normal business practices and the conduct of corporate affairs in good faith.")

In contrast to the United States' public interest in preserving competition and ensuring the adequacy of final relief, the defendants' can only claim financial harm. Courts have consistently held that private interests must yield to the public interest in government antitrust cases, particularly when the only private hardship is financial harm. FTC v. Weyerhaeuser, 665 F.2d 1072, 1083 (D.C. Cir. 1981); FTC v. Food Town Stores, Inc., 539 F.2d 1339, 1346 (4th Cir. 1976); Christian Schmidt Brewing Co. v. G Heileman Brewing Co., 600 F. Supp. 1326,1332 (E.D. Mich. 1985), aff'd, 753 F.2d 1354 (6th Cir. 1989); United States v. Columbia Pictures Industries, Inc., 507 F. Supp. 412, 434 (S.D.N.Y. 1980).

3. An Injunction Is Necessary to Protect the Public Interest

It is in the public's best interests to have violations of the antitrust laws adjudicated. Absent an injunction, the defendants' actions would eliminate competition and effectively prevent relief should the Court of Appeals rule that the acquisition is a violation of Section 7 of the Clayton Act. The loss of competition and the inability to reestablish that competition should the Court of Appeals permanently enjoin the transaction would forever deprive consumers of the benefits they now enjoy from the existence of both Engelhard and Floridin in the gel clay business. Thus, the public interest would be served by the entering of an injunction.

II. The United States At Least Should Be Allowed Time to Seek An Injunction Pending Appeal from the Court of Appeals

In any event, the Court should grant an injunction pending a decision by the Court of Appeals on an application by plaintiff to that court for an injunction pending appeal. As the D.C. Circuit indicated in FTC v. Weyerhauser Co., 665 F.2d at 1076, it is "not consistent with the fair, effective administration of justice for the district judge to deny to a party, situated as [is] the government in this case, even a brief holding order affording time to apply to this court for provisional relief."

If plaintiff is foreclosed from seeking an injunction pending appeal from the Court of Appeals, the United States will effectively lose its opportunity to secure effective relief against the acquisition, and the public interest will be permanently, and irreparably, injured. Once the acquisition has been consummated, it will not longer be possible for that transaction to be enjoined. See Honig v. Students of California School for the Blind, 471 U.S. 148, 149 ("no order of this Court could affect the parties' rights with respect to the [district court order the court of appeals is being] called upon to review.") Accordingly, if the acquisition is not enjoined at this time, the United States and the public interest will be irreparably harmed.

Moreover, plaintiff is amenable to an expedited appeal schedule from the Eleventh Circuit, and, accordingly, any incremental delay occasioned by the grant of injunctive relief in this will cause little, if any damage. The small impact a short delay may have on defendants' plans is far outweighed by the substantial public interest in maintaining a competitive market.

CONCLUSION

For the foregoing reasons, the United States asks this Court to enjoin Engelhard's proposed acquisition of the Floridin assets for thirty days, and if the United States files an appeal, to extend the injunction until the date the appeal is resolved by the Eleventh Circuit. In the alternative, the United States request entry of an injunction pending resolution by the Court of Appeals of the government's motion for an injunction pending appeal.

Dated: March _____, 1997

Respectfully submitted,

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