

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA
THOMASVILLE DIVISION

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.) Civil Action No.:
)
 ENGELHARD CORPORATION,) Filed:
 FLORIDIN COMPANY,)
 U.S. BORAX, INC., and)
 U.S. SILICA, INC,)
)
 Defendants.)
_____)

COMPLAINT

The United States of America, acting under the direction of the Attorney General, brings this civil action to obtain equitable and other relief and alleges as follows:

1. The United States seeks to enjoin a transaction that would combine under single ownership over 80% of the attapulgitic clay mining and processing business in this country.

2. Today, Engelhard Corporation ("Engelhard") and Floridin Company ("Floridin") are the two largest attapulgitic clay companies in the United States and are each other's most significant competitor. They compete vigorously to lower the costs of mining and processing attapulgitic clay, to produce and sell the best quality product at the lowest prices, and to provide the best technological, marketing, and customer support services. Engelhard and Floridin have proposed a transaction that will leave the already highly concentrated attapulgitic clay business with one overwhelmingly dominant mining and processing company -- Engelhard.

3. An integral part of Engelhard's plan is the closing of its Attapulgus, Georgia manufacturing plant, a facility that since 1921 continuously has produced high quality attapulgite clay for use in important sectors of the U.S. economy. The loss of this manufacturing facility likely will lead to higher prices for clay customers and reduce product innovation, service, and quality improvements.

4. Engelhard and Floridin attempted a similar transaction in 1987 but abandoned it after the United States announced that it would challenge the acquisition as violative of the antitrust laws. In an effort to avoid or overcome an antitrust challenge this time, Engelhard has devised a contract that it offers to substitute for the existing competition in an attempt to "fix" its illegal acquisition. The proposed fix enlists the aid of ITC Industrials, Inc. ("ITC"), currently a distributor of Floridin's attapulgite clay products outside of the United States. Simply put, the Engelhard/ITC arrangement essentially is a supply contract that gives ITC little more than the right to be a distributor of a portion of the gel clay that Engelhard will process at Floridin's plant.

5. The purported fix fails to remedy the harm to competition from Engelhard's acquisition because it gives ITC no assets or ownership interest in the attapulgite clay reserves or processing facilities, gives ITC only limited control over its own costs, and provides no product development or research facilities for ITC. As a result, the proposed fix fails to

preserve any ongoing competition in mining, processing, or product improvement. The purported fix is further flawed in its attempt to preserve marketing and price competition because it would allow Engelhard and ITC opportunities to coordinate marketing and pricing decisions to a much greater extent than Engelhard currently can with Floridin. Moreover, while this industry is now over 100 years old, the ITC contract will terminate in 10 years, leaving Engelhard with the business.

6. If consummated, the proposed acquisition, even accounting for the ITC supply contract, is likely to increase prices to customers and reduce product innovation and quality improvements. As a result, the proposed acquisition violates Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

I.

JURISDICTION, VENUE AND DEFENDANTS

7. This action is brought under Section 15 of the Clayton Act, as amended, 15 U.S.C. § 25, to restrain the violation by the defendants of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

8. Engelhard, a Delaware corporation with principal offices in Iselin, New Jersey, owns property, transacts business, and is found within the Middle District of Georgia, Thomasville Division. Engelhard owns and operates an attapulgitic clay processing plant in Attapulgus, Georgia. It also owns, leases or has mineral rights for about 10,000 acres of land in the

southwestern part of Georgia and the northwestern part of Florida.

9. Floridin is a Delaware corporation with principal offices in Berkeley Springs, West Virginia. It is a wholly owned subsidiary of U. S. Silica, a Delaware corporation with principal offices in Berkeley Springs, West Virginia. U.S. Silica is a wholly owned subsidiary of U.S. Borax, a Delaware corporation with principal offices in Valencia, California. Floridin, and through it, U. S. Silica and U.S. Borax, own property, transact business and are found within the Middle District of Georgia, Thomasville Division. Floridin operates a plant in Quincy, Florida that processes attapulgite clay. It also owns, leases or has mineral rights for approximately 11,000 acres of land in the southwestern part of Georgia and the northwestern part of Florida.

10. The defendants are engaged in interstate commerce and in activities substantially affecting interstate commerce. Engelhard and Floridin supply processed attapulgite clay to customers located throughout the United States.

11. The Court has jurisdiction over this action and the parties pursuant to 15 U.S.C. §§ 1331 and 1337. Venue is proper in this District under 15 U.S.C. § 22 and 28 U.S.C. § 1391(c).

II.

TRADE AND COMMERCE

The Relevant Markets

12. Attapulgite clay is a mineral that is mined in the United States only in the southwestern part of Georgia and the northwestern part of Florida. There are two basic types of attapulgite clay -- gellant quality attapulgite clay ("gel clay") and sorbent quality attapulgite clay ("sorbent clay"). Sorbent clay and gel clay have significantly different properties and are processed into various products that are sold for different end uses. Although sorbent clay and gel clay are both present in any attapulgite clay reserves, most of the processing of each type is done with different equipment at the Engelhard and Floridin plants.

13. Gel clay is used as a thickener or suspension agent. Many products in the construction, agriculture, and petroleum industries need the addition of such a thickener or suspension agent to maintain the proper consistency for application and prevent the separation of solids and liquids before, during or after application. For many of these products, such as asbestos-free asphalt coatings, ready-mix tape joint compounds, certain kinds of paint, molecular sieves, suspension fertilizers, and oil and gas well drilling fluids, the thickener or suspension agent of choice is gel clay.

14. Gel clay is processed into several grades based in substantial part on particle size and moisture content. Gel clay

list prices vary widely from approximately \$115 to \$720 per ton, depending on the grade. The grade a customer desires depends on its intended end use.

15. The mining, processing, and sale of gel clay is a relevant product market under the Clayton Act. There are no reasonably interchangeable substitutes for gel clay to which a significant number of gel clay customers would switch in response to a small but significant, nontransitory increase in the price of gel clay.

16. The relevant geographic market is the United States. Customers in the United States can obtain gel clay only from producers located in southwestern Georgia and northwestern Florida. Gel clay is not imported into the United States.

Competition and Entry

17. The United States gel clay market is highly concentrated, with only three producers. Floridin is the largest company in the market with approximately 49% of 1994 dollar sales. Engelhard is the second largest firm with about 34% of 1994 dollar sales. The third company that produces gel clay in the United States is Milwhite, Inc., which accounts for the remaining 17% of the market.

18. The United States gel clay market would become substantially more concentrated if Engelhard acquired Floridin's gel clay reserves and processing facility. As a result of the transaction, Engelhard would own the reserves and facilities that accounted for 83% of the United States gel clay market last year,

resulting in a significant increase in concentration. Using a measure of market concentration called the "HHI" (defined and explained in Appendix A), the transaction will increase the HHI in the United States gel clay market by nearly 3,400 points to a post-acquisition level of about 7,200 points.

19. Engelhard and Floridin are the two strongest and most significant competitors in the United States gel clay market. Milwhite, the third competitor, is not as significant as either Engelhard or Floridin, and for some customers, only Engelhard and Floridin gel clay products are acceptable. Aggressive competition by Engelhard and Floridin has given customers lower prices and improved quality for gel clay products.

20. New entry into the United States gel clay market would require the acquisition and permitting of reserves, the construction of a processing plant (with necessary permitting), and the development of a marketing presence and reputation for quality that would allow for significant sales. Such entry would be costly and would not be timely, likely or sufficient to counteract or deter a price increase or deterioration in service or product quality resulting from the loss of competition caused by the proposed transaction.

III.

VIOLATION ALLEGED

21. On June 5, 1995, Engelhard, Floridin, and U.S. Borax agreed that Engelhard will acquire Floridin's attapulгите clay

reserves and processing plant no later than April 3, 1996. Their agreement followed nearly 18 months of negotiations that began around January of 1994.

22. On March 22, 1995, Engelhard entered into a ten-year contract with ITC, conditioned on consummation of the proposed acquisition of the Floridin assets. Under the ITC contract, none of the assets or research and processing facilities will be owned by ITC. Instead Engelhard will own the attapulgitic clay reserves and processing plants of Engelhard and Floridin, and it will operate what is now the Floridin plant. ITC would have little more than the right to distribute and market for ten years up to approximately 50% of the gel clay capable of being produced by the Floridin plant. ITC would also receive certain "audit rights" to monitor the costs it pays Engelhard for gel clay.

23. The ITC contract with Engelhard will not replace the substantial competition that would be eliminated by Engelhard's acquisition of the Floridin assets and the closing down of Engelhard's plant. ITC's contract with Engelhard fails to address adequately many important dimensions of the now vigorous competition between Engelhard and Floridin, including competition in mining, processing, and product improvements. Even in the area of distribution -- where the proposed fix is claimed to preserve competition -- the contractual rights granted to ITC are limited and insufficient to accomplish that purpose. In short, ITC, operating under the contract, cannot effectively compete independently of Engelhard. ITC would not be nearly as

effective a competitor as Floridin currently is with its own plant and reserves.

24. Unless restrained, Engelhard's proposed acquisition of Floridin's attapulgate clay reserves and processing plant is likely to substantially lessen competition and to restrain trade unreasonably in the United States gel clay market in violation of Section 7 of the Clayton Act, even if Engelhard enters into the contemplated contract with ITC, in the following ways:

- a. Actual and potential competition between Engelhard and Floridin in the United States gel clay market will be eliminated; and
- b. Competition generally in the United States gel clay market is likely to be substantially lessened.

IV.

REQUEST FOR RELIEF

The United States requests (a) adjudication that Engelhard's proposed acquisition of Floridin's attapulgate clay reserves and processing plant would violate Section 7 of the Clayton Act, (b) permanent injunctive relief preventing consummation of the proposed acquisition, (c) an award to the United States of the

costs of this action, and (d) such other relief as is just and proper.

Dated: June 12, 1995

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