UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *Plaintiff,* v. L'OREAL USA, INC., L'OREAL S.A., and CARSON, INC., *Defendants.*	Civil Action No. 1:00CV01848 Judge Royce C. Lamberth Filed: August 8, 2000

COMPETITIVE IMPACT STATEMENT

The United States, pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act, ("APPA") 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 July 31, 2000, the United States filed a Complaint alleging that the acquisition of Carson, Inc. ("Carson") by L'Oreal USA, Inc. ("L'Oreal") would substantially lessen competition in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18. The Complaint alleges that Carson and L'Oreal are, respectively, the nation's largest and third largest suppliers of adult women's hair relaxer kits sold in the United States. The proposed acquisition of Carson by L'Oreal will result in L'Oreal's controlling three of the top five selling brands and approximately 50 percent of adult women's hair relaxer kits sold through retail channels in the United States. As alleged in the Complaint, the elimination of Carson as a significant competitor substantially increases the likelihood that L'Oreal will raise prices of adult women's hair relaxer kits post-acquisition, thereby harming consumers.

Accordingly, the prayer for relief in the Complaint seeks among other things: (1) a judgment that the proposed acquisition would violate Section 7 of the Clayton Act; and (2) permanent injunctive relief that would prevent Defendants from carrying out the acquisition or otherwise combining their businesses or assets.

At the same time the Complaint was filed, the United States also filed a proposed settlement that would permit L'Oreal and L'Oreal S.A. to complete their acquisition of Carson provided that certain assets are divested to preserve competition. The settlement consists of a Proposed Final Judgment and a Hold Separate Stipulation and Order.

The Proposed Final Judgment orders Defendants to divest the *Gentle Treatment*® and *Ultra Sheen*® brands and associated assets to an acquirer approved by the United States. Defendants must complete these divestitures within ninety (90) calendar days after the filing of the Complaint, or five days after notice of the entry of the Final Judgment, whichever is later. If Defendants do not complete the divestitures within the prescribed time, then, under the terms of the proposed Final Judgment, this Court will appoint a trustee to sell the brands and associated assets. In the event a trustee is appointed, the Proposed Final Judgment provides that the trustee shall have the right, upon approval by the United States, to divest Carson's manufacturing facility in Chicago, Illinois.

The Hold Separate Stipulation and Order, which this Court entered on July 31, 2000, and the Proposed Final Judgment require Defendants to maintain the products sold under the *Gentle Treatment*® and *Ultra Sheen*® brands as an economically viable part of an ongoing competitive business, with competitively sensitive business information and decision-making relating to the products

sold under the two brands kept separate from L'Oreal's other businesses. Defendants have designated two Carson employees to monitor and ensure their compliance with these requirements.

The United States and Defendants have stipulated that the Proposed Final Judgment may be entered after compliance with the APPA. Entry of the Proposed Final Judgment would terminate this action, except that this Court would retain jurisdiction to construe, modify or enforce the provisions of the Proposed Final Judgment and to punish violations thereof.

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

A. The Defendants

1. *L'Oreal S.A. and L'Oreal USA, Inc.*

L'Oreal S.A., a French corporation based in Paris, France, is the world's largest hair care and cosmetics company, with operations in over 150 countries and over 42,000 employees. Last year, L'Oreal S.A. reported over $10 billion in worldwide annual sales and $11 billion in total assets. Among L'Oreal S.A.'s wholly owned subsidiaries is L'Oreal USA, Inc. ("L'Oreal"), a Delaware corporation headquartered in New York, New York. Both L'Oreal S.A. and L'Oreal manufacture and market such well known brands as *L'Oreal*®, *Lancome*®, *Maybelline*®, *Laboratories Garnier*®, *Redken 5th Ave NYC*®, *Ralph Lauren Fragrances*®, *Giorgio Armani Parfums*®, *Biotherm*® and *Helena Rubinstein*®. Soft Sheen Products, Inc. ("Soft Sheen"), based in Chicago, Illinois, is a wholly owned subsidiary of L'Oreal. L'Oreal acquired Soft Sheen in 1998. Soft Sheen makes and sells ethnic hair care products, which are products primarily formulated for, and marketed to, African-American consumers. These products include hair relaxer kits, hair color kits, hair dressings, shampoos

and conditioners. Soft Sheen's brands include *Optimum Care*®, the top-selling retail brand of adult women's hair relaxer kits in the United States. It also sells retail adult women's hair relaxer kits under the *Alternatives*® and *Frizz Free*® brands.

2. *Carson, Inc.*

Carson is a Delaware corporation headquartered in Savannah, Georgia. Founded in 1901, Carson is a global leader in products specifically formulated to address the physiological characteristics of hair of consumers of African descent. Carson makes and sells a complete line of ethnic hair care products, including hair relaxers, shampoos, conditioners, hair oils, hair colors, and shaving cremes. It is the nation's leading manufacturer of adult women's hair relaxer kits, which are sold through retail channels under the brands *Dark & Lovely*®, *Gentle Treatment*®, and *Ultra Sheen*®. Carson reported worldwide sales for 1999 of approximately $169 million.

B. The Proposed Acquisition

On or about February 25, 2000, L'Oreal entered into an agreement with Carson to purchase for $5.20 per share the common stock of Carson. The value of the cash tender offer is approximately $79 million. This proposed combination, which would substantially lessen competition in the sale of adult women's hair relaxer kits in the United States, precipitated the United States's antitrust suit.

C. The Hair Relaxer Industry and the Competitive Effects of the Acquisition

1. *The Relevant Market Is Adult Women's Hair Relaxer Kits Sold Through Retail Channels in the United States*

The Complaint alleges that the development, production and sale of adult women's hair relaxer kits through retail outlets is a relevant product market under Section 7 of the Clayton Act. Hair relaxers

are chemicals used primarily by African-American women to straighten their naturally curly hair prior to styling. Unless an African-American woman with naturally curly hair relaxes her hair, any hair style she adopts, aside from a totally natural look, will be short-lived. By relaxing her hair, an African-American woman has more styling options. Between 65 and 80 percent of adult African-American women routinely relax their hair, spending in excess of $200 million annually on hair relaxers and associated products.

Adult women's hair relaxer kits are marketed specifically to African-American women for home use. Each relaxer kit typically contains everything needed to relax hair, including: (i) a complete set of instructions; (ii) gloves; (iii) two bottles of chemicals (the activator and relaxer base) that, when mixed, form the chemical that relaxes the hair (invariably the active chemical in relaxer kits is "no-lye" calcium hydroxide); (iv) a bottle of a neutralizing shampoo to deactivate the relaxer; (v) conditioners to repair split ends and make the hair appear thicker or fuller; and in some kits, (vi) a gel to protect against scalp injury.

There are no good substitutes for adult women's hair relaxer kits. The unique qualities and characteristics of these hair relaxer kits distinguish them from products such as hot combs and professional hair relaxers sold in bulk to beauticians. Because of the unique qualities and characteristics of adult women's hair relaxer kits, a small but significant increase in the price of women's hair relaxer kits would not cause a sufficient number of purchasers to switch to other products so as to make such a price increase unprofitable. Thus, the Complaint alleges that a relevant product market in which to assess the competitive effects of this acquisition is the development, production and sale of adult women's hair relaxer kits through retail outlets.

The Complaint further alleges that the United States constitutes a relevant geographic market within the meaning of Section 7 of the Clayton Act. L'Oreal's and Carson's adult women's hair relaxer kits are manufactured in, and sold and compete throughout, the United States. Virtually no adult women's hair relaxer kits are imported into the United States. A small but significant increase in the price of adult women's hair relaxer kits would not cause a sufficient number of purchasers to switch to hair relaxer kits manufactured outside the United States to make the price increase unprofitable.

2. *Anticompetitive Consequences of the Acquisition*

The Complaint alleges that L'Oreal's acquisition of Carson will likely have the following anticompetitive effects: (i) competition generally in the development, production and sale of adult women's hair relaxer kits would be substantially lessened; (ii) the actual and potential competition between L'Oreal and Carson would be eliminated; and (iii) prices for adult women's hair relaxer kits would likely increase. Specifically, the Complaint alleges that Carson and L'Oreal are respectively the nation's largest and third largest suppliers of adult women's hair relaxer kits, and together own three of the top five selling brands. L'Oreal's *Optimum Care®*, *Alternatives®*, and *Frizz Free®* brands and Carson's *Dark & Lovely®*, *Gentle Treatment®*, and *Ultra Sheen®* brands of adult women's hair relaxer kits operate as significant competitive constraints on each firm's prices for its brands. If L'Oreal is permitted to acquire Carson, the substantial competition between the two companies would be eliminated, and L'Oreal would have the power to profitably increase prices unilaterally for one or more of its brands of retail adult women's hair relaxer kits, to the detriment of consumers.

This acquisition would increase concentration significantly. The market for adult women's hair relaxer kits is highly concentrated under a standard measure of market concentration employed by

economists, called the Herfindahl-Hirschman Index ("HHI"). In this highly concentrated market, with a HHI of approximately 2,100, L'Oreal has a share of about 17 percent and Carson has a share of about 33.5 percent of total dollar sales of adult women's hair relaxer kits through retail channels. After acquiring Carson, L'Oreal would dominate the market with approximately a 50.5 percent share, making it nearly twice the size of its next largest competitor. Following the acquisition, the HHI would increase by over 1100 points from approximately 2100 to over 3200, well in excess of levels that raise significant antitrust concerns.

The Complaint alleges that entry is unlikely to be timely, likely or sufficient to restore the competition lost through this transaction. Barriers to entering this market include: (i) the substantial time and expense required to build a brand reputation to overcome existing consumer preferences; (ii) the substantial sunk costs for promotional and advertising activity to secure the distribution and placement of a new entrant's kit in retail outlets; (iii) the inability of a new entrant to recoup quickly its substantial and largely sunk costs[1] in promoting its brand; and (iv) the difficulty of securing shelf-space in retail outlets. Most hair relaxer kits introduced in recent years have been unable to gain significant sales within several years after entering. This is due in part to the degree of consumer loyalty and brand recognition for long-established, well-regarded brands such as Carson's *Dark & Lovely*®, *Gentle Treatment*® and *Ultra Sheen*® and L'Oreal's *Optimum Care*®. To succeed, an entrant must gain consumer confidence and trust, as hair relaxers contain powerful chemicals that may pose significant

[1] The term "sunk costs" as used in this context includes the costs of acquiring tangible and intangible assets that cannot be recovered through the redeployment of these assets outside the relevant market -- in other words, costs uniquely incurred to enter the adult women's hair relaxer kit market, and which cannot be recovered when a firm leaves the relaxer market or enters another market.

health risks, such as burning one's scalp and hair. Developing a reputation for quality, reliability, and performance of one's hair relaxer kit generally takes many years of effort. In short, new entry into the development, production and sale of adult women's hair relaxer kits through retail channels in the United States is time-consuming, expensive and difficult, and thus is unlikely to deter Defendants from exercising market power in the reasonably foreseeable future.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The Proposed Final Judgment requires significant divestitures that will preserve competition in the sale of adult women's hair relaxer kits through retail channels in the United States. Within ninety (90) calendar days after July 31, 2000, the date the Complaint was filed, or five days after notice of entry of the Final Judgment, whichever is later, Defendants must divest the *Gentle Treatment*®, and *Ultra Sheen*® brands and associated assets (including the "Johnson Products Co., Inc." and "JP" names) to an acquirer that, in the United States's sole judgment, has the intent and capability (including the necessary managerial, operational, technical and financial capability) of competing effectively in the business of adult women's hair relaxer kits.[2] This relief has been tailored to ensure that the ordered divestitures restore competition that would have been eliminated as a result of the acquisition, and prevent L'Oreal from exercising market power in the adult women's hair relaxer kit market after the acquisition.

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[2] The assets to be divested are defined and described in the Proposed Final Judgment as the "Hair Care Assets." *See* Section II(D) of the proposed Final Judgment. These assets also include other products (in addition to hair relaxer kits) sold under the *Gentle Treatment*® and *Ultra Sheen*® brands, but exclude the *Precise*® and *Perfect Performance*® brands. *See* Section II (H) of the Proposed Final Judgment. The divestiture of other ethnic hair care products sold under the *Gentle Treatment*® and *Ultra Sheen*® brands will enhance the acquirer's ability to compete post-divestiture.

Defendants must use their best efforts to divest these assets as expeditiously as possible. The Proposed Final Judgment provides that the assets must be divested in such a way as to satisfy the United States, in its sole discretion, that the acquirer can and will use the assets as part of a viable, ongoing business engaged in the sale of adult women's hair relaxer kits through retail channels in the United States. Until the ordered divestitures take place, Defendants must cooperate with any prospective purchasers.

If Defendants do not accomplish the ordered divestitures within the prescribed time period, then Section V of the Proposed Final Judgment provides that this Court will appoint a trustee, selected by the United States, to complete the divestitures. Section V of the Proposed Final Judgment also empowers the trustee to sell, if necessary, certain additional production assets to effect the divestitures. These additional assets entail all the assets at Carson's Chicago, Illinois facility that the United States determines are reasonably necessary for an acquirer to compete effectively and viably in the ethnic hair care industry.

If a trustee is appointed, the Proposed Final Judgment provides that Defendants must cooperate fully with the trustee and pay all of the trustee's costs and expenses. The trustee's compensation will be structured to provide an incentive for the trustee based on the price and terms of the divestiture and the speed with which it is accomplished. After the trustee's appointment becomes effective, the trustee will file monthly reports with the United States and this Court setting forth the trustee's efforts to accomplish the required divestiture. If at the end of six months after that appointment, the divestiture has not been accomplished, then the trustee, the United States, and

Defendants will make recommendations to this Court, which shall enter such orders as appropriate to carry out the purpose of the Final Judgment.

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 district court to recover three times the damages the person has suffered, as well as the costs of bringing a lawsuit 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 effect as *prima facie* evidence in any subsequent private lawsuit that may be brought against Defendants.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The parties have stipulated that the Proposed Final Judgment may be entered by this Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry of the decree upon this Court's determination that the Proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) days preceding the effective date of the Proposed Final Judgment within 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 (60) 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. The comments and the response of the United States will be filed with this Court and published in the *Federal Register*. Written comments should be submitted to:

J. Robert Kramer II
Chief, Litigation II Section
Antitrust Division
United States Department of Justice
1401 H Street, N.W., Suite 3000
Washington, D.C. 20530

The Proposed Final Judgment provides that this Court retains jurisdiction over this action, and the parties may apply to this 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. The United States is satisfied, however, that the divestiture of the *Gentle Treatment*® and *Ultra Sheen*® brands, associated assets, and other relief contained in the Proposed Final Judgment will establish, preserve and ensure a viable competitor in the relevant market identified by the United States. Thus, the United States is convinced that the Proposed Final Judgment, once implemented by the Court, will prevent L'Oreal's acquisition of Carson from having adverse competitive effects.

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 (60) 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) (emphasis added). As the Court of Appeals for the District of Columbia 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. *See 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."[3] Rather,

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[3] 119 CONG. REC. 24,598 (1973). *See 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 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. *See* H.R. Rep. No. 93-1463, 93rd Cong. 2d Sess. 8-9 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6535, 6538.

> 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.[4]

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), *quoting United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir.), *cert. denied*, 454 U.S. 1083 (1981); *see also Microsoft*, 56 F.3d at 1458. Precedent requires that

> the 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 requirements might undermine the effectiveness of antitrust enforcement by consent decree.[5]

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

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[4] *United States v. Mid-America Dairymen, Inc.*, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977); *see also United States v. Loew's Inc.*, 783 F. Supp. 211, 214 (S.D.N.Y. 1992); *United States v. Columbia Artists Mgmt., Inc.*, 662 F. Supp. 865, 870 (S.D.N.Y. 1987).

[5] *United States v. Bechtel Corp.*, 648 F.2d at 666 (citations omitted) (emphasis added); *see United States v. BNS, Inc.*, 858 F.2d at 463; *United States v. National Broadcasting Co.*, 449 F. Supp. 1127, 1143 (C.D. Cal. 1978); *United States v. Gillette Co.*, 406 F. Supp. at 716. *See also United States v. American Cyanamid Co.*, 719 F.2d 558, 565 (2d Cir. 1983), *cert. denied*, 465 U.S. 1101 (1984).

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.'"[6]

Moreover, the court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged 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. Since 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 "effectively redraft the complaint" to inquire into other matters that the United States might have but did not pursue. *Id.*

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:____August 8, 2000.
Washington, D.C.

Respectfully submitted,

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[6] *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (*quoting Gillette*, 406 F. Supp. at 716), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); *United States v. Alcan Aluminum, Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985); *United States v. Carrols Dev. Corp.*, 454 F. Supp. 1215, 1222 (N.D.N.Y. 1978).

/s/

Maurice E. Stucke
U.S. Department of Justice
Antitrust Division
Litigation II Section
1401 H Street, N.W., Suite 4000
Washington, D.C. 20530
202-305-1489

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing Competitive Impact Statement via First Class United States Mail, this 8th day of August, 2000, on:

Peter D. Standish, Esquire
Weil, Gotshal & Manges, LLP
767 Fifth Avenue
New York, NY 10153-0119
Counsel for Defendants L'Oreal USA, Inc. and L'Oreal S.A.

Charles Westland, Esquire
Milbank, Tweed, Hadley & McCloy, LLP
One Chase Manhattan Plaza
New York, NY 10005
Counsel for Defendant Carson, Inc.

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Damian G. Didden
Trial Attorney
U.S. Department of Justice
Antitrust Division
1401 H Street, N.W., Suite 3000
Washington, D.C. 20530
(202) 307-0935