

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	Civil Action No.
)	
v.)	Filed: December 16, 1980
)	
HERCULES INCORPORATED,)	
)	
Defendant.)	
)	
)	

COMPETITIVE IMPACT STATEMENT

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

I

The Nature and Purpose of the Proceeding

On January 11, 1980, the Department of Justice filed a civil antitrust complaint under Section 4 of the Sherman Act (15 U.S.C. § 4), alleging that the defendant violated Section 2 of the Sherman Act (15 U.S.C. § 2). The Complaint alleged that the defendant has attempted to monopolize and has monopolized the production and sale of industrial nitrocellulose in the United States.

The Complaint sought equitable relief to prevent continuing violations of the Sherman Act by Hercules, Inc. ("Hercules"), which have had the effect of restraining actual and potential competition in the production and sale of industrial nitrocellulose in the United States.

Description of the Practices Giving Rise to
the Alleged Violation of the Antitrust Laws

Industrial nitrocellulose is used in combination with other chemicals as a bonding agent in various coatings. Applied in solutions, industrial nitrocellulose forms hard, smooth finishes known for their short drying time and attractive appearance. Industrial nitrocellulose is widely used in wood finishes, lacquers, paints, primers, textile and paper coatings, book bindings, printing inks, cellophane film, coatings and fingernail polishes.

Before July 1977, Hercules and E. I. duPont de Nemours and Company, Inc. ("duPont") produced and sold all of the industrial nitrocellulose used in the United States. In 1977, approximately 64 million pounds of industrial nitrocellulose were sold in the United States. Hercules' sales accounted for approximately 65 percent of 1977 U.S. sales, and duPont's sales accounted for approximately 35 percent of the U.S. total.

On July 19, 1977, duPont announced its decision to discontinue the production and sale of industrial nitrocellulose at the end of 1977. This decision left Hercules as the sole domestic nitrocellulose producer.

Shortly after the duPont announcement, foreign industrial nitrocellulose producers, especially those based in Europe, began to consider selling this product in the United States in competition with Hercules. For its part, Hercules did not have sufficient capacity to supply the entire U.S. demand, and was considering expanding its production.

Hercules' first effort, before it decided whether to expand, was to seek to ensure sufficient supplies of industrial nitrocellulose at reasonable prices for the short term. Hercules

proposed to European producers that it act as the importer for all European producers interested in selling industrial nitrocellulose in the United States. After that effort was abandoned, Hercules continued to have meetings and other communications with foreign producers, the purpose and effect of which were to control the price of industrial nitrocellulose in the United States. During those communications, present prices and future price intentions were exchanged. In the last quarter of 1977 and throughout 1978, the dry weight price of substantially all the industrial nitrocellulose sold by Hercules, Societe Nationale des Poudres et Explosifs ("SNPE"), and Wolff walsrode A.G. ("Wolff") was stabilized, exclusive of drum and duty costs.

In 1978, Hercules' sales accounted for more than 75 percent of the industrial nitrocellulose sold in the United States. The balance purchased in the United States in 1978 was produced and sold by foreign manufacturers in Europe and Japan. In that year, Hercules announced a plan to expand its industrial nitrocellulose plant capacity by 30 million pounds, by mid-1980, enough to enable Hercules to more than satisfy the entire American demand for industrial nitrocellulose.

The Complaint alleges that Hercules' actions have had the following effects, among others: (a) the defendant has monopolized and continues to monopolize the industrial nitrocellulose market in the United States; (b) actual and potential competition in the production and sale of industrial nitrocellulose in the United States has been restrained; and (c) purchasers of industrial nitrocellulose have been denied the benefits of a free and competitive market.

III

A. Explanation of the Proposed Final Judgment.

The United States and the defendant have stipulated that the Court may enter the proposed Final Judgment after compliance with the APPA, 15 U.S.C. § 16(b)-(h). The proposed Final Judgment provides that its entry does not constitute any evidence against or an admission by any party with respect to any issue of fact or law. Under the provisions of Section 2(e) of the APPA, the proposed Final Judgment may not be entered until the Court determines that entry is in the public interest.

1. Prohibited Conduct

Paragraph IV(A) of the proposed Final Judgment prohibits the defendant from furnishing to or requesting from any other nitrocellulose producer, or the distributor in the United States for such producer, information concerning the prices, terms, or other conditions of sale which any nitrocellulose producer intends to charge, or is considering submitting to any actual or prospective purchaser of industrial nitrocellulose, and from furnishing to or requesting from such producer and distributor for such producer, any information concerning industrial nitrocellulose production capacity, excess production capacity, or production available for export. This Paragraph does allow price and capacity information to be disseminated to the public in the form of a press release, public announcement, or written notification to all or to a class of customers.

Paragraph IV(B) enjoins Hercules from acting as a distributor or agent for industrial nitrocellulose produced by any other nitrocellulose producers.

Paragraph V provides that nothing in the proposed Final Judgment shall be applicable to any discussions of price or other terms and conditions of sale offered by Hercules to any other nitrocellulose producer or offered by any other nitrocellulose producer to Hercules in connection with a bona fide purchase or sale of industrial nitrocellulose between Hercules and such other nitrocellulose producer. Bona fide situations include those which are the result of temporary inability of a producer to meet the demand of a growing market, shortage or cessation of supply capabilities, interruption of manufacturing or distribution capabilities because of explosion, fire, accident, strike, or other work stoppage; or because of the desire or need of a producer to obtain a type of industrial nitrocellulose it does not manufacture.

Paragraph VI provides that the Final Judgment is not applicable to information furnished or requested in connection with a possible acquisition, sale or licensing situation, provided that Hercules is required to advise the Government of the nature of any such transaction before furnishing or requesting such information.

2. Affirmative Obligations

The proposed Final Judgment (Paragraph VII) requires that the defendant furnish a copy of the Final Judgment to each of its officers, directors, sales managers, and to each successor of those persons within thirty (30) days after each successor is employed, together with a statement advising each person of his or her obligations under the Final Judgment, of the possible disciplinary actions for non-compliance, and of the availability of advice from the company's legal advisers. Paragraph VI also requires the defendant to serve on the

plaintiff within ninety (90) days after entry of the Final Judgment, and annually thereafter, an affidavit as to the fact and manner of its compliance with Paragraph VII. Paragraph VII requires the defendant to serve plaintiff with certain information concerning bona fide purchases and sales of industrial nitrocellulose, including the identity of the purchaser and the seller, the amount of industrial nitrocellulose involved, the price, and, if Hercules is the purchaser, a statement of the reason for the purchase.

Section VIII of the Final Judgment will provide the Justice Department with access, upon reasonable notice, to Hercules' records and personnel in order to determine Hercules' compliance with the Judgment. Paragraph X will require any purchaser of all or substantially all the assets used by Hercules in its nitrocellulose business to enter an agreement to be bound by the provisions of the Final Judgment, and to file that agreement with the Court.

3. Scope of the Proposed Judgment

The proposed Final Judgment will remain in effect for a period of ten (10) years from the date of entry. It applies to the defendant Hercules and to all other persons in active concert or participation with any of them who shall have received actual notice of the Final Judgment, by personal service or otherwise.

4. Effect of the Proposed Judgment on Competition

The relief in the proposed Final Judgment is designed to prevent any recurrence of the activities alleged in the Complaint. The prohibitive language of the Judgment is designed to ensure that Hercules will act independently in determining prices, terms and conditions at which it will sell or offer to sell

industrial nitrocellulose. It will also prevent Hercules from controlling the price or distribution in the United States of foreign-produced industrial nitrocellulose. The affirmative obligations are designed to ensure that Hercules' employees are aware of their obligations under the decree in order to avoid a repetition of the kinds of behavior that occurred.

The Department of Justice believes that the proposed Final Judgment contains adequate provisions to prevent further violations by the defendant of the type of activities upon which the Complaint is based. The Department believes that disposition of the lawsuit without further litigation is appropriate because the proposed Judgment provides all the relief which the United States sought in its Complaint, and the additional expense of litigation would not result in additional public benefit.

IV

Procedures 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 suffered, as well as costs and reasonable attorneys fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of such actions. Under the provisions of Section 5(a) of the Clayton Act (15 U.S.C. § 16(a)), the Judgment has no prima facie effect in any subsequent lawsuits that may be brought against this defendant.

Procedures Available for Modification of the
Proposed Judgment

As provided by the Antitrust Procedures and Penalties Act, any person believing that the proposed Final Judgment should be modified may submit written comments to Kevin R. Sullivan, Antitrust Division, United States Department of Justice, Washington, D.C. 20530 within the 60-day period provided by the Act. These comments, and the Department's responses, will be filed with the Court and published in the Federal Register. All comments will be given due consideration by the Department of Justice, which remains free to withdraw its consent to the proposed Judgment at any time prior to entry. The 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 its modification, interpretation or enforcement.

VI

Alternatives to the Proposed Final Judgment

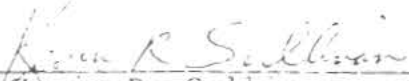
The Department considers the substantive language of the Judgment to be of sufficient scope and effectiveness to make litigation on relief unnecessary, as the Judgment provides all relief which reasonably could have been expected after trial.

The Division considered, but did not propose, relief which would include divestiture of part of Hercules' industrial nitrocellulose production capacity. This possibility was not prayed for in the Complaint and was not requested from the defendant because it did not seem warranted by the facts, and because Hercules' single plant production capacity could not practicably be divided.


VII

Determinative Materials and Documents

No materials or documents were considered determinative by the United States in formulating the proposed Final Judgment. Therefore, none are being filed pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(h).



Kevin R. Sullivan
Attorney, United States
Department of Justice



Jane C. Luxton
Attorney, United States
Department of Justice