

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

v.

BELL RESOURCES LTD.,
a corporation,
WEEKS PETROLEUM LTD.,
a corporation, and
M.R.H. HOLMES a COURT

Defendants.

85 CIV 6202 (MJL)

Filed: 3/17/86

COMPETITIVE IMPACT STATEMENT

The United States files this Competitive Impact Statement, relating to the proposed Final Judgment submitted for entry in this case, in accordance with the procedures of Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. §§ 16 (b)-(h).

I.

Nature and Purpose of the Proceeding

On August 9, 1985, the United States, at the request of the Federal Trade Commission ("FTC"), filed a suit for a civil

penalty and injunctive relief under Section 7A of the Clayton Act, 15 U.S.C. § 18a, commonly known as the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act" or "Act"), alleging that the defendants, Weeks Petroleum Ltd. ("Weeks"), Bell Resources Ltd. ("Bell"), and Mr. M.R.H. Holmes a Court ("Holmes a Court") had violated the HSR Act. The HSR Act imposes certain notification and waiting period requirements on parties meeting size thresholds that are contemplating relatively large acquisitions of voting securities or assets.

The manifest congressional intent behind the HSR Act was to give the Government the information needed to determine whether such an acquisition would violate the antitrust laws, and an opportunity to block an anticompetitive acquisition, before it is consummated.

The complaint filed in this action alleges that defendants Weeks and Bell did not comply with the reporting and waiting period requirements of the HSR Act before Weeks, acting pursuant to the authorization and direction of Bell and Holmes a Court, acquired shares of Asarco Incorporated ("Asarco") on or about November 21, 1984, and in the period from November 21, 1984, through February 28, 1985. The complaint asked the Court to: (1) find that Defendants violated the HSR Act; (2) require defendant Weeks or defendant Bell to pay the maximum civil penalty provided by the HSR Act; and (3) restrain each of the defendants from further violations of the HSR Act.

The parties have today filed a proposed Final Judgment, Stipulation and this Competitive Impact Statement. Under the Stipulation, the proposed Final Judgment may be entered after compliance with the procedures of the Antitrust Procedures and Penalties Act. Entry of the proposed Final Judgment will terminate the action.

II.

Practices and Events Giving Rise to the Alleged Violation

Defendant Weeks is a Bermuda corporation with offices in New York, N.Y. Defendant Bell, a Western Australia corporation, owns over 90 percent of the voting securities of Weeks. Defendant Holmes a Court, a British citizen residing in Australia, is Chairman of the Board of Directors of Bell.

In its complaint, the United States alleged that on or about November 21, 1984, Weeks, which had previously acquired voting securities of Asarco, acquired additional Asarco shares, bringing Weeks' holdings of Asarco shares above \$15 million. Weeks continued to acquire Asarco shares through February 28, 1985. The complaint alleged that Weeks' acquisitions of Asarco shares were pursuant to the authorization and direction of Bell and Holmes a Court.

Because of the size of the parties to these transactions, the extent of Weeks' holdings of Asarco stock (above

\$15 million) and the involvement of the parties in interstate commerce, the transaction that occurred on or about November 21, 1984, and the subsequent transactions through February 28, 1985, were subject to the HSR Act notification and waiting requirements unless an exemption applied. See 15 U.S.C. § 18a(a). In the absence of such an exemption, the HSR Act and regulations promulgated thereunder, 16 C.F.R. § 800 et seq., required Bell, as the ultimate parent entity of Weeks, or Weeks, as an entity included within Bell and authorized by Bell to file on Bell's behalf, to file the notification and observe a waiting period before acquiring in excess of \$15 million of Asarco stock. Bell and Weeks did not comply with the reporting and waiting period requirements of the Act before crossing the \$15 million threshold, nor did they comply with those requirements before making the additional acquisitions of Asarco stock during the period through February 28, 1985.

The transaction by which Weeks' holding of Asarco crossed the statutory \$15 million threshold and Weeks' subsequent acquisitions of Asarco shares would be exempt from the requirements of the HSR Act if made "solely for the purpose of investment" as the term is used in the HSR Act, 15 U.S.C. § 18a(c)(9), and the Act's implementing regulations, 16 C.F.R. § 800 et seq. The FTC's investigation indicated that these acquisitions were not made solely for the purpose of

investment. Thus, the FTC and the Department of Justice concluded, as the complaint alleges, that these acquisitions violated the notification and waiting requirements of the HSR Act.

On March 8, 1985, Weeks filed on behalf of Bell a notification and report form under the HSR Act, stating an intention to acquire at least 25 percent of the voting securities of Asarco. The HSR Act waiting period relating to that filing expired on April 7, 1985, after which Weeks could acquire Asarco shares without violating the HSR Act. The complaint alleges that Defendants were in violation of the HSR Act through April 7, 1985.

III.

Explanation of the Proposed Final Judgment

The United States and the defendants have stipulated that the proposed Final Judgment may be entered by the Court at any time after compliance with the procedures of the Antitrust Procedures and Penalties Act. The proposed Final Judgment does not constitute an admission by the defendants as to any issue of law or fact. Under the provisions of the Antitrust Procedures and Penalties Act, entry of the proposed Final Judgment is conditioned upon a determination by the Court that the proposed Judgment is in the public interest.

The proposed Final Judgment requires defendant Weeks to pay a civil penalty to the United States Treasury of \$450,000. Section 2 of the HSR Act, 15 U.S.C. § 18a(g)(1), provides that any person who fails to comply with the requirements of the HSR Act shall be liable in an action brought by the United States for a civil penalty of not more than \$10,000 for each day during which such person is in violation.

The proposed judgment dismisses the action as to defendants Bell and Holmes a Court.

IV.

Competitive Effect of the Proposed Final Judgment

The relief encompassed in the Final Judgment is aimed at penalizing and thereby deterring non-compliance with the notification and waiting requirements of the HSR Act.

Prior to the passage of the HSR Act, the antitrust enforcement agencies often lacked sufficient time and information to obtain an adequate remedy for an anticompetitive acquisition. By ensuring that the antitrust enforcement agencies receive prior notification and information concerning significant acquisitions involving sizeable parties, the HSR Act has improved the effectiveness of antitrust enforcement. Strict compliance with the Act's notification and reporting requirements is essential if the government is to be effective in interdicting anticompetitive acquisitions.

The Final Judgment requires defendant Weeks to pay a civil penalty of \$450,000. While civil penalties are intended to penalize a defendant for violating the law and, unlike structural or other forms of injunctive relief in antitrust cases, have no competitive effect in and of themselves, the civil penalty in this case will help deter Defendants and others who in the future may be similarly situated from failing to comply with the notice and waiting requirements of the HSR Act. Compliance with these requirements will strengthen antitrust enforcement and thereby help to maintain competitive markets.

V.

Remedies Available to Potential
Private Litigants

Entry of the proposed Final Judgment in this proceeding will neither impair nor assist the bringing of any private action. Under Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed judgment has no prima facie effect in any private lawsuit that may be brought against the defendants.

VI.

Procedures Available for Modification
of the Proposed Final Judgment

The proposed Final Judgment is subject to a Stipulation between the United States and the defendants providing that the

United States may withdraw its consent to the proposed Judgment at any time before it is entered by the Court. The Antitrust Procedures and Penalties Act conditions entry upon the Court's determination that the proposed Judgment is in the public interest.

The Antitrust Procedures and Penalties Act provides a period of at least sixty days preceding the entry of the proposed Final Judgment within which any person may submit to the United States comments regarding the proposed Final Judgment. The United States will evaluate any such comments and determine whether it should withdraw its consent. The comments and the response of the United States to the comments will be filed with the Court and published in the Federal Register in accordance with the Antitrust Procedures and Penalties Act.

Written comments should be submitted to:

John W. Clark
Chief, Professions and Intellectual
Property Section
Antitrust Division
U.S. Department of Justice
Washington, D.C. 20530

VII.

Alternatives to the Proposed Final Judgment

In its complaint, the United States sought the maximum civil penalty (\$10,000 per day) provided by section 2 of the HSR Act, 15 U.S.C. § 18a(g)(1), from either Weeks or Bell. Since the United States alleged in the complaint that Weeks and

Bell were in violation of the HSR Act from November 21, 1984, through April 7, 1985--a period of 138 days--the maximum civil penalty would have amounted to \$1,380,000.

In addition to the civil penalty against Weeks or Bell, the complaint sought an injunction restraining each of the defendants from further violations of the HSR Act. Section 2 of the HSR Act, 15 U.S.C. § 18a(g)(2), provides that the court may grant equitable relief against any person, or any officer, director, partner, agent or employee thereof, who fails substantially to comply with the requirements of the Act. The United States considered, and discussed with the defendants, injunctive relief that would be aimed at enjoining each of the defendants from improperly relying on the investment exemption and that would require each of the defendants to provide the antitrust enforcement agencies with notice and information concerning any acquisition undertaken without the HSR notification in reliance on the investment exemption.

The United States considers the requirement of payment of a \$450,000 civil penalty by Weeks to achieve the basic objective of the litigation--detering the defendants and others who in the future may be similarly situated from failing to comply with the notice and waiting requirements of the HSR Act. While the United States was prepared to seek civil penalties totalling \$1,380,000 at trial, the uncertainties

inherent in any litigation led to acceptance of \$450,000 as an appropriate civil penalty for purposes of settlement. In particular, the United States' acceptance of a civil penalty significantly less than the maximum sought in the complaint was based on its view that while the evidence supported the allegations of the complaint that the acquisitions as early as November 21, 1984, were not made solely for the purpose of investment, the Government's evidence of a non-investment purpose was significantly stronger with respect to acquisitions that occurred significantly later.

Similarly, while the United States would have sought at trial injunctive relief restraining each of the defendants from further violations of the HSR Act, the deterrent effect of the \$450,000 civil penalty in this case, combined with the uncertainties inherent in any litigation, led to the conclusion that the settlement was the best means of realizing the basic objective of the case.

VIII.

Other Materials

There are no materials or documents of the type described in Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b), that were considered determinative in formulating the proposed judgment.

Dated:

OF COUNSEL:

ELLIOTT FEINBERG
Assistant Director
LUCY PRASHKER
Attorney
Bureau of Competition
Federal Trade Commission
Washington, D.C. 20580

DONALD J. RUSSELL
MARGARET H. FITZSIMMONS
JACK D. SIDOROV
Attorneys, Antitrust Division
United States Department of
Justice
Room 9414 Star Building
Washington, D.C. 20530
(202) 724-6452

RALPH T. GIORDANO
Attorney, Antitrust Division
United States Department of
Justice
26 Federal Plaza
New York, New York 10278
(212) 264-0391