UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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| **UNITED STATES OF AMERICA,** | ) | |
| | ) | CASE NUMBER 1:96CV00165 |
| Plaintiff, | ) | |
| | ) | JUDGE: James Robertson |
| v. | ) | DECK TYPE: Antitrust |
| | ) | |
| **PACIFIC SCIENTIFIC COMPANY,** | ) | DATE STAMP: 01/30/96 |
| | ) | |
| Defendant. | ) | |

## 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

The United States filed a civil antitrust Complaint on January 30, 1996, alleging that the proposed acquisition of all of the outstanding shares of Met One, Inc. ("Met One") by Pacific Scientific Company ("Pacific Scientific") would violate Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 1 of the Sherman Antitrust Act, 15 U.S.C. §1. Pacific Scientific and Met One are the nation's two leading manufacturers of drinking water particle counters.

The Complaint alleges that the combination of these major competitors would substantially lessen competition in the manufacture and sale of drinking

water particle counters in the United States. The prayer for relief seeks: (1) a judgment that the proposed acquisition would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 1 of the Sherman Antitrust Act, 15 U.S.C. §1; and (2) a preliminary and permanent injunction preventing Pacific Scientific and Met One from carrying out the proposed merger, or any similar agreement, understanding or plan.

Shortly before that suit was filed, a proposed settlement was reached that would permit Pacific Scientific to complete its acquisition of Met One's stock, yet preserve competition in the market in which the transaction would raise significant competitive concerns. A Stipulation and a proposed Final Judgment embodying the proposed settlement were filed as well.

The Stipulation effects a hold separate agreement that, in essence, requires Pacific Scientific to ensure that, until the divestiture mandated by the Final Judgment has been accomplished, Met One's operations will be held separate and apart from, and operated independently of, Pacific Scientific's assets and businesses.

The proposed Final Judgment orders defendant to sell all of Pacific Scientific's U.S. assets and rights relating to the research and development, manufacture and sale of Pacific Scientific's Drinking Water Quality Monitoring Systems, other than real property, and Met One's software relating to Drinking Water Quality Monitoring Systems, and other assets if necessary, to make an economically viable competitor in the manufacture and sale of drinking water

particle counters.

The United States and Pacific Scientific 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 the 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

### A. The Defendant and the Proposed Transaction

Defendant Pacific Scientific Company is a California corporation with its headquarters in Newport Beach, California. Pacific Scientific Company reported annual sales in 1994 of approximately $234,700,000. HIAC/ROYCO, the division of Pacific Scientific that manufactures and sells drinking water particle counters, reported 1994 sales of $13,011,000, of which $1,270,000 came from drinking water particle counter sales.

Met One, Inc. is a California corporation with its headquarters in Grants Pass, Oregon. Met One reported net sales in 1994 of approximately $11,800,000, of which approximately $1,180,000 came from drinking water particle counter sales. Louis J. Petralli, Jr. is the majority and controlling owner of Met One.

Pacific Scientific proposes to acquire all outstanding stock of Met One for Pacific Scientific stock, and merge Met One into a newly created acquisition subsidiary.

B. The Drinking Water Particle Counter Market

Drinking water particle counters are devices sold largely to municipalities for the purpose of protecting against contamination of public drinking water supplies. The drinking water particle counters made and sold by defendant are capable of detecting particles the size of potentially deadly microorganisms that may exist in public drinking water supplies. Drinking water particle counters such as those made by defendant generally include four components: a sensor, which directs a laser beam from a laser diode through the water being tested; a sampler, which provides a means to transport a sample of the water in which the particles are being counted undisturbed through the sensor; a counter, which sorts the signals from the sensor by voltage and assigns a particle size to the signals; and software, which translates data into a readable format.

Because drinking water particle counters are able to detect potentially harmful contaminants in public drinking water with greater sensitivity and efficiency than other technologies, such as turbiditymeters and microscopes, municipalities purchase them to satisfy their concerns for the purity and safety of their drinking water. For example, in 1993, 28 people in Milwaukee died as a result of drinking water contamination by one such microorganism -- *Cryptosporidium*. At the time of that tragedy, Milwaukee had installed turbiditymeters but had not installed drinking water particle counters. Since

1993, Milwaukee has installed drinking water particle counters.[1]

Municipalities generally purchase drinking water particle counters through formal bid procedures. Although price is an important factor, municipalities also consider quality, reliability, service, and the reputation of the qualifying firms. Municipalities routinely request from each firm as part of that firm's bid package a list of references from past successful bids. Municipalities also routinely invite drinking water particle counter competitors to demonstrate the capabilities of their respective devices prior to the municipality's determination of the bid winner.

C. Competition Between Pacific Scientific and Met One

Pacific Scientific and Met One compete directly in the manufacture and sale of drinking water particle counters. Pacific Scientific's Water Particle Counting System and Met One's on-line particle counting systems are regarded by municipalities as close substitutes, for they offer similar functionality, performance and features.

Pacific Scientific and Met One recognize the rivalry between their products in the relevant geographic market. Each firm has engaged in comparative selling

[1] Turbiditymeters are not part of the relevant market. Turbidity is an optical measurement of solid contamination suspended as particles in a fluid. Turbiditymeters have significantly different attributes than drinking water particle counters. For example, turbiditymeters cannot detect small quantities of microorganisms such as *Cryptosporidium*, as particle counters can. And, unlike drinking water particle counters, turbiditymeters do not provide exact data for the size and number of particles in a given medium. Municipalities do not consider turbiditymeters to be substitutes for drinking water particle counters.

techniques and competitive pricing strategies against the other firm in order to increase the likelihood of successful sales. Through these activities, Pacific Scientific and Met One have each operated as a significant competitive constraint on the other's prices and have each provided impetus for technological improvements in the other's systems. For example, when Met One was awarded the 1994 contract for particle counters provided to the City of San Francisco, Pacific Scientific wrote the city reminding it that Pacific Scientific rather than Met One was the low bidder. In its letter, Pacific Scientific also provided the city a detailed comparison of the Pacific Scientific product versus the Met One product. It has been common practice for municipalities to conduct side by side evaluations or demonstrations of the Pacific Scientific and Met One drinking water particle counters in considering the merits of each product's software and hardware capabilities.

D. Anticompetitive Consequences of the Acquisition

The Complaint alleges that the acquisition of Met One, Inc. by Pacific Scientific Company would reduce substantially or eliminate competition in the drinking water particle counter market in the United States and decrease incentives to maintain high levels of quality and service and to keep prices low.

Specifically, the Complaint alleges that the acquisition would increase concentration significantly in what is already a highly concentrated market.[2]

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[2] The Herfindahl-Hirschman Index ("HHI") is a widely-used measure of market concentration. Following the acquisition, the approximate post-merger HHI, calculated from 1994 dollar sales, would be 4842, an increase of 2108 from

After the acquisition, the combined Pacific Scientific/Met One entity would dominate the drinking water particle counter market. Based on 1994 sales, the market share of the combined entity would be 65% of drinking water particle counters sold in the United States.

The Complaint also alleges that entry into the market by a new firm selling drinking water particle counters would not likely be either timely or sufficient to prevent the harm to competition caused by Pacific Scientific's acquisition of Met One.

## III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment would preserve competition in the manufacture and sale of drinking water particle counters in the United States. Within 30 days after entry of the Final Judgment, defendant will divest certain of Pacific Scientific's U.S. assets and rights relating to the research and development, manufacture and sale of Pacific Scientific's Drinking Water Quality Monitoring Systems, other than real property, and Met One's software relating to Drinking Water Quality Monitoring Systems, and other assets if necessary, to create an economically viable new competitor in the manufacture and sale of drinking water particle counters (in general, the "Divestiture Assets").

The proposed Final Judgment provides for the imposition of civil contempt penalties as an additional incentive for defendant to carry out the prompt

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the premerger HHI.

divestiture of the Divestiture Assets and maintain competition in the drinking water particle counter market.

If defendant fails to divest the Divestiture Assets within 30 days after entry of the Final Judgment, the Court, upon application by the United States, shall appoint a trustee nominated by the United States to effect the divestiture of the Divestiture Assets. If a trustee is appointed, the proposed Final Judgment provides that Pacific Scientific will pay all costs and expenses of the trustee. The proposed Final Judgment also provides that the compensation of the trustee and of any professionals and agents retained by the trustee shall be both reasonable in light of the value of the Divestiture Assets and based on a fee arrangement providing the trustee with an incentive based on the price and terms of the divestiture and the speed with which it is accomplished. After appointment, the trustee will file monthly reports with the parties and the Court setting forth the trustee's efforts to accomplish the divestiture ordered under the proposed Final Judgment. If the trustee has not accomplished the divestiture within six (6) months after its appointment, the trustee shall promptly file with the Court a report setting forth (1) the trustee's efforts to accomplish the required divestiture, (2) the reasons, in the trustee's judgment, why the required divestiture has not been accomplished, and (3) the trustee's recommendations. At the same time the trustee will furnish such report to the parties, who will each have the right to be heard and to make additional recommendations consistent with the purpose of the trust.

The proposed Final Judgment requires that Pacific Scientific and Met One be maintained separate and apart as independent entities prior to the divestiture contemplated by 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 court to recover three times the damages the person has suffered, as well as costs 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 prima facie effect in any subsequent private lawsuit that may be brought against defendant.

## V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and the defendant have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the 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 the Court and published in the Federal Register.

Written comments should be submitted to:

Craig W. Conrath
Chief, Merger Task Force
Antitrust Division
United States Department of Justice
1401 H Street, N.W., Suite 3700
Washington, D.C. 20530.

The proposed Final 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 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 of its Complaint against Pacific Scientific. The United States is satisfied, however, that the divestiture of the assets and other relief contained in the proposed Final Judgment will preserve viable

competition in the manufacture and sale of drinking water particle counters that would otherwise be adversely affected by the acquisition. Thus, the proposed Final Judgment would achieve the relief the government would have obtained through litigation, but avoids the time, expense and uncertainty of a full trial on the merits of the government's Complaint.

## 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-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--
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> > (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 United States Court of Appeals for the D.C. Circuit recently held, this statute 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, 56 F.3d 1448, 1461-62 (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,

> 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.

United States v. Mid-America Dairymen, Inc., 1977-1 Trade Cas. ¶ 61,508, at 71,980 (W.D. Mo. 1977).

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,

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[3] 119 Cong. Rec. 24598 (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. 93-1463, 93rd Cong. 2d Sess. 8-9, reprinted in (1974) U.S. Code Cong. & Ad. News 6535, 6538.

454 U.S. 1083 (1981); see also Microsoft, 56 F.3d at 1460-62. 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.[4]

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 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.' (citations omitted)."[5]

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[4]United States v. Bechtel, 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 Microsoft, 56 F.3d at 1461 (whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest.'") (citations omitted).

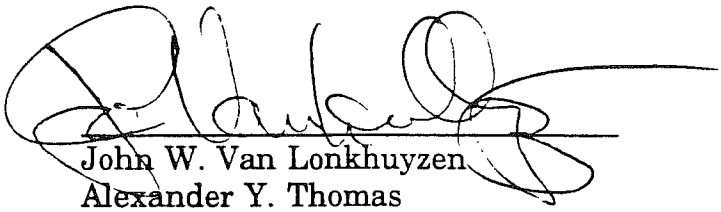
[5]United States v. American Tel. and Tel Co., 552 F. Supp. 131, 150 (D.D.C. 1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983), quoting United States v. Gillette Co., supra, 406 F. Supp. at 716; United States v. Alcan Aluminum, Ltd., 605 F. Supp. 619, 622 (W.D. Ky. 1985).

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: January 30, 1996

Respectfully submitted,



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