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15 UNITED STATES DISTRICT COURT  
16 SOUTHERN DISTRICT OF CALIFORNIA

17 UNITED STATES OF AMERICA,

18 Plaintiff,

19 v.

20 MERCK & CO., INC.,

21 Defendant.

22 Civil Action No. 79-0962-T

23 COMPETITIVE IMPACT STATEMENT

24 The United States, pursuant to Section 2(b) of the Antitrust  
25 Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h), files this  
26 Competitive Impact Statement relating to the proposed Final  
27 Judgment submitted for entry in this civil antitrust proceeding.

28 I

29 NATURE AND PURPOSE OF THE PROCEEDING

30 This civil action began on August 17, 1979, when the United  
31 States filed a Complaint challenging the acquisition of Alginate  
32 Industries Ltd. of England ("AIL") by Merck & Co., Inc. ("Merck")  
as a violation of Section 7 of the Clayton Act (15 U.S.C. § 18)  
and Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2). The  
Complaint alleges that by acquiring AIL, Merck would substantially  
lessen actual and potential competition, unreasonably restrain

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1 trade, and tend to create a monopoly in the United States in sales  
2 of alginate for several specified uses. The Complaint requests  
3 that Merck be prevented from owning any interest in AIL. A  
4 Stipulated Order of the Court requires Merck until final  
5 resolution of the case, to maintain AIL as an economically viable  
6 business, with separate assets and operations, and prohibits Merck  
7 from using any of AIL's confidential manufacturing technology.

8 The United States and Merck have stipulated that the proposed  
9 Final Judgment may be entered after compliance with the Antitrust  
10 Procedures and Penalties Act. Entry of the proposed Judgment will  
11 terminate the action, except the Court will retain jurisdiction to  
12 construe, modify, or enforce the proposed Judgment, and to punish  
13 violations of the proposed Judgment. The Stipulated Order will be  
14 dissolved upon entry of the proposed Judgment.

15 II

16 EVENTS GIVING RISE TO THE ALLEGED VIOLATION

17 In August 1979, Merck acquired AIL, a United Kingdom  
18 corporation primarily engaged in the production and sale of  
19 alginate. Alginate, a seaweed extract, is used to control  
20 water-based systems by thickening, stabilizing, suspending,  
21 film-forming, emulsifying, or gelling. Alginate is sold in  
22 several forms: alginic acid, its various salts, and its ester  
23 propylene glycol alginate ("PGA").

24 The Kelco Company ("Kelco"), a division of Merck primarily  
25 engaged in the production of alginate and xanthan gum, is the  
26 largest alginate producer in the United States and the second  
27 largest in the world. AIL is the largest alginate producer in the  
28 world. In 1978, Kelco and AIL together produced approximately  
29 62 percent of the worldwide alginate supply; Kelco produced  
30 approximately 80 percent of all alginate sold in the United  
31 States, and AIL produced approximately 75 percent of all alginate

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1 imported into the United States. Kelco is the only producer of  
2 PGA in the United States, and AIL is the only other significant  
3 producer of PGA in the world.

4 Alginate has many commercially significant uses. In  
5 particular, PGA is superior to other beer foam stabilizers and  
6 buttered syrup emulsifiers, and except for xanthan gum, to other  
7 pourable salad dressing stabilizers. Alginate's special  
8 properties make it unique for use as a gelling agent in some  
9 dental impression materials and as a foaming agent in some  
10 antacids. Alginate has distinct advantages over other  
11 antimigrants in dyeing textiles and print paste thickeners in  
12 printing textiles. The Complaint alleges the acquisition would  
13 impair competition in sales of alginate for these particular uses.

14 In 1978, sales of Kelco-brand alginate and xanthan gum  
15 accounted for a significant share of all pourable dressing  
16 stabilizers sold in the United States, and sales of Kelco-brand  
17 alginate accounted for a significant share of United States sales  
18 of products for the other uses. The following table lists the  
19 approximate share of sales accounted for by Kelco-brand products,  
20 along with the approximate, corresponding share accounted for by  
21 AIL-brand alginate.

22 1978 Market Shares

	<u>Kelco Share</u>	<u>AIL Share</u>
25 All Pourable Salad Dressing 26 Stabilizers	80	1
27 All Beer Foam Stabilizers	80	0
28 All Buttered Syrup Emulsifiers	93	7
29 Alginate Impression Material Gelling Agent	80	3
30 Alginate Antacid Foaming Agent	91	9
31 Alginate Antimigrant and 32 Print Paste Thickener	50	40

1 III

2 EXPLANATION OF THE PROPOSED FINAL JUDGMENT  
3 AND ITS ANTICIPATED EFFECTS ON COMPETITION

4 The United States brought this case because Merck's  
5 acquisition of AIL eliminated a competitive source of alginate for  
6 the United States. The anticompetitive effects of Merck's  
7 ownership of AIL would be eliminated if the actual and potential  
8 competition AIL provided is replaced. The object of the proposed  
9 Final Judgment is to create a new competitive source of alginate  
10 to replace AIL. The proposed Judgment requires Merck to sell  
11 Scotia Marine Products Limited ("Scotia Marine"), a wholly-owned  
12 Canadian subsidiary of Merck which manufactures alginate in Nova  
13 Scotia, Canada. The United States may have a trustee appointed to  
14 sell Scotia Marine if Merck does not. Merck is also obligated to  
15 furnish the purchaser of Scotia Marine certain information and  
16 assistance that should enable the purchaser to compete effectively  
17 in the United States in sales of alginate for the particular  
18 alginate uses that were the focus of the Complaint.

19 Scotia Marine currently produces alginate products that Merck  
20 sells in the United States, Canada, and elsewhere. In 1979,  
21 Scotia Marine's alginate was sold under the Kelco brand for use in  
22 various industries, including the textile, paper, and food  
23 industries. Scotia Marine employs a manufacturing process similar  
24 to the one used by AIL. This process uses significantly less  
25 energy than the energy-intensive process employed by Kelco in San  
26 Diego. Scotia Marine has a production capacity of about two  
27 million pounds per year, and is able to produce the complete line  
28 of sodium alginate products sold by Merck under its Keltex and  
29 Kelgin trademarks. Scotia Marine lacks equipment needed to  
30 produce PGA.

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1 One goal of the proposed Final Judgment is to provide Scotia  
2 Marine with the ability to produce economically and efficiently a  
3 full line of alginate products of the type sold by Kelco in the  
4 United States for the particular uses. The proposed Judgment sets  
5 as a standard of quality for the Scotia Marine products the  
6 corresponding alginate products produced by AIL. It obligates  
7 Merck to furnish the purchaser information and know-how relating  
8 to the production methods of AIL that may be reasonably necessary  
9 for Scotia Marine to produce the products economically and  
10 efficiently. The obligation includes furnishing data on  
11 constructing a production line capable of producing PGA.  
12 Moreover, Merck must make available qualified technical personnel  
13 to advise the purchaser on producing all of the products. With  
14 Merck's information, know-how, and advice, Scotia Marine should be  
15 able to produce all of the products, using AIL technology where  
16 needed to minimize production costs.

17 Since Scotia Marine will not be able immediately to produce  
18 all of the products, the proposed Judgment requires Merck to enter  
19 a contract to supply them to the purchaser. The purchaser may  
20 select whatever mixture of AIL products and Kelco products the  
21 purchaser wants, up to a maximum of 100,000 pounds in any  
22 six-month period. The purchaser may resell these products in the  
23 United States. The initial term of the supply contract is one  
24 year from the date of sale of Scotia Marine. Before the end of  
25 this one-year period, Scotia Marine should be able to produce all  
26 of the products that do not contain PGA. The term of the supply  
27 contract may be extended. During the extension, the purchaser's  
28 selection is limited to the products that contain PGA or that may  
29 be produced using a PGA production line. The supply contract will  
30 allow Scotia Marine, while it develops the ability to produce the  
31 products, both to compete for sales of them and to develop

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1 business contacts in preparation for the day when it can produce  
2 them.

3 Another goal of the proposed Judgment is to assure that Scotia  
4 Marine has access to sufficient seaweed to allow it to produce  
5 substantial amounts of alginate. Scotia Marine produces alginate  
6 primarily from a type of seaweed known as Ascophyllum, which it  
7 mechanically harvests from nearby tidal waters. Scotia Marine has  
8 exclusive, long-term rights to substantial amounts of  
9 Ascophyllum. Significantly more Ascophyllum is available in  
10 nearby tidal waters not leased by Scotia Marine.

11 In addition, Laminaria, another type of seaweed, grows in  
12 abundance beyond the tidal waters. Scotia Marine does not have  
13 the ability either to harvest this seaweed mechanically or to  
14 produce alginate from it, but AIL does. The proposed Judgment  
15 requires Merck to provide information and know-how and to advise  
16 the purchaser on harvesting Laminaria mechanically and producing  
17 alginate from it.

18 Scotia Marine will have available other sources of seaweed.  
19 The proposed Judgment requires Merck to have AIL grant to the  
20 purchaser an option for a period of one year to purchase the AIL  
21 facility for drying and milling seaweed at Keose, on the Isle of  
22 Lewis, Outer Hebrides, Scotland. This facility processes  
23 Ascophyllum gathered from the shores of the island. In addition,  
24 there are a number of companies that sell dried seaweed. In the  
25 past, Scotia Marine has obtained some seaweed from one of these  
26 companies. To help Scotia Marine compete for this dried seaweed  
27 if the need arises, the proposed Judgment requires Merck to  
28 provide information and know-how useful in obtaining dry seaweed.

29 Further goals of the proposed Judgment are to enable the  
30 purchaser to distribute its alginate for the particular uses and  
31 to conduct alginate research and development. To this end, among  
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1 other things, Merck must assist the purchaser to hire and train  
2 for the particular uses an alginate sales staff and a technical  
3 support staff. Merck must also assist the purchaser to design a  
4 laboratory for alginate research and development and furnish the  
5 purchaser all information Merck has regarding current AIL research  
6 and development on alginate and the particular uses.

7 The selection of the purchaser of Scotia Marine is an  
8 important aspect of the proposed Judgment. A suitable purchaser  
9 must have the ability to operate Scotia Marine as a single ongoing  
10 business and the intent to use Scotia Marine and Merck's aid to  
11 compete effectively in the United States in the sale of alginate  
12 for the particular uses. Merck cannot sell Scotia Marine to a  
13 firm that produces alginate, unless the United States approves the  
14 sale. If the United States objects to any other proposed  
15 purchaser, Merck may complete the sale if it demonstrates to the  
16 Court that the proposed sale is consistent with the proposed  
17 Judgment.

18 The divestiture of Scotia Marine should provide a replacement  
19 for AIL as a competitive source of alginate for the United  
20 States. Scotia Marine's current capacity of two million pounds of  
21 alginate per year is more than twice the amount of AIL-brand  
22 alginate sold in the United States in 1978. As a result of the  
23 substantial seaweed available and the information to be  
24 transferred, the purchaser should be able to expand significantly  
25 Scotia Marine's capacity and the line of alginate products it  
26 produces. With the combination of its own technology and AIL  
27 technology to be transferred, Scotia Marine should have production  
28 costs comparable to AIL's costs. In addition, since Scotia  
29 Marine's manufacturing plant is much closer to the United States  
30 than AIL's plant, Scotia Marine will have lower shipping costs in  
31 competing in the United States.

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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 attorney fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage actions. Under the provisions of Section 5(a) of the Clayton Act (15 U.S.C. § 16(a)), the proposed Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against the defendant.

V.

PROCEDURES AVAILABLE FOR MODIFICATION  
OF THE PROPOSED FINAL JUDGMENT

The United States and defendant have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the Antitrust Procedures and Penalties Act, provided that the United States has not withdrawn its consent. The Act conditions entry upon the Court's determination that the proposed Judgment is in the public interest.

The Act provides a period of at least sixty (60) days preceding the effective date of the proposed Judgment within which any person may submit to the government written comments regarding the proposed Judgment. Any person who wants 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 the comments, determine whether it should withdraw its consent, and respond to the comments. The comments and the response of the United States will be filed with the Court and published in the Federal Register.

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1 Written comments should be submitted to:

2 Roger B. Andewelt  
3 Assistant Chief  
4 Intellectual Property Section  
5 Antitrust Division (SAFE-704)  
6 U.S. Department of Justice  
7 Washington, DC 20530

8 VI

9 ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

10 The United States actually considered only one alternative to  
11 divestiture of Scotia Marine, divestiture of AIL. The proposed  
12 Final Judgment is considered superior for several reasons to  
13 seeking divestiture of AIL via a trial on the merits.

14 Scotia Marine may prove to be a superior competitor in the  
15 United States. While Scotia Marine's production costs parallel  
16 those of AIL, Scotia Marine's shipping costs are lower because it  
17 is closer to the United States than AIL. AIL does not have its  
18 own United States distribution force, but with Merck's aid, the  
19 purchaser of Scotia Marine will be able to develop an effective  
20 United States distribution force. Many potential purchasers of  
21 Scotia Marine have existing United States marketing forces selling  
22 related products. Such a firm would be able economically to add  
23 alginate to the products it markets in the United States.

24 Next, the proposed Judgment has the benefit of protecting  
25 competition in the United States without interfering with Merck's  
26 efforts to improve its competitive position in foreign markets.

27 Litigation of this case would be lengthy and expensive. Even  
28 if the United States were to prevail after a trial on the merits,  
29 and there is some risk it may not, the Court may order Merck to  
30 sell Scotia Marine, rather than AIL, because Scotia Marine should  
31 be a sufficient replacement for AIL as a competitive source of  
32 alginate for the United States.

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1 Under the circumstances, the United States believes that on  
2 balance, the proposed Final Judgment is in the public interest.

3 VII

4 OTHER MATERIALS

5 During the course of settlement discussions, Merck furnished  
6 to the United States materials that caused it to change its view  
7 on relief in the case. In the Complaint, the United States  
8 requested that Merck sell AIL; after reviewing these materials,  
9 the United States determined that the proposed Final Judgment was  
10 in the public interest. These materials include Merck written  
11 representations and transcripts of depositions the United States  
12 took of Merck personnel regarding Scotia Marine. These materials  
13 contain commercially sensitive business information, and a Court  
14 Protective Order prohibits their disclosure to the public.

15 Dated: August 25, 1980  
16

17 RESPECTFULLY SUBMITTED,

18   
19 ROGER B. ANDEWELT

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21 U.S. Department of Justice

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23 P. TERRY LUBECK

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