UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. S.C. JOHNSON & SON, INC. and BAYER A.G., Defendants.	Civil No. 94 C 50249 Filed: 8/4/94

COMPETITIVE IMPACT STATEMENT

Pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h), the United States submits this Competitive Impact Statement relating to the proposed Final Judgment (or "the Judgment") submitted for entry against S.C. Johnson & Son, Inc. ("Johnson") and Bayer A.G. ("Bayer") in this civil antitrust proceeding.

I.

NATURE AND PURPOSE OF THE PROCEEDING

The United States of America, acting under the direction of its Attorney General, filed this civil antitrust suit on August 4, 1994, alleging that defendants violated Section 1 of the Sherman Act, 15 U.S.C. § 1, by entering into an agreement and understanding that unreasonably restrained interstate trade in the manufacture and sale of household insecticides. The agreement featured an exclusive license arrangement and the transfer by Bayer to Johnson of the assets assembled by a Bayer

subsidiary, Miles, Inc., to compete in the sale of household insecticides in the United States with a new product, called Laser. Laser's chief active ingredient was Cyfluthrin, which Bayer developed and patented. Specifically, the Complaint alleges that defendants engaged in the following activities:

(a) Bayer licensed Johnson to use Clyfluthrin in household insecticides in the United States, and granted Johnson a right of first refusal for exclusive rights for the United States on future active ingredients developed by Bayer for household insecticides;

(b) Bayer refrained from licensing Johnson's competitors to use or sell Cyfluthrin; and

(c) Bayer ended its plans to market Laser and compete with Johnson in the United States household insecticides market.

The Complaint alleges that the appropriate product market in which to access the competitive effect of the Cyfluthrin license and transfer of assets is the market for the manufacture and sale of household insecticides. This is the appropriate market because other types of insect killers, such as agricultural pesticides, are not good substitutes for household insecticides used to kill ants, roaches, and other insects that typically infest dwellings. The Complaint alleges that the entire United States is the relevant geographic market. In this market, the Complaint alleges, Johnson is the largest firm, and the licensing arrangement helped it to maintain its commanding position.

The Judgment enjoins Johnson and Bayer from entering into any agreement to allocate territories or markets for the distribution or sale of household insecticides, unless such an agreement relates exclusively to markets other than the United States and has no effect on United States commerce, and requires that Bayer license Cyfluthrin to any person on reasonable terms and conditions.[1] Further, the Final Judgment provides the Department with the opportunity to review any future exclusive licenses for new active ingredients that Johnson might seek to obtain from Bayer or any other person.[2]

The Judgment requires the defendants to file annual reports with the Government that certify that each has distributed the Final Judgment to responsible executives and explained the terms of the Judgment to them. Entry of the Final Judgment will terminate the Government's action against the defendants,[3] except that the Court will retain jurisdiction over the matter for

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[1]In this respect, the Judgment provides relief somewhat similar to the terms of a settlement of private litigation to which the defendants were also parties, Koerber v. S.C. Johnson & Son, Inc. and Bayer A.G., Civil No. 93C 20267, N.D. Ill. 1993. However, the Judgment, unlike the private settlement, leaves Bayer free to decide whether to license Cyfluthrin to others on terms more favorable than its license with Johnson.

[2]The Judgment would prevent Bayer and Johnson from entering into any exclusive license for any active ingredient if the Department of Justice has disapproved such license within 90 days after receiving notice of defendants' intent to enter into the agreement.

[3]Bayer and Johnson have cooperated with the Department of Justice in this matter.

further proceedings that may be required to interpret, enforce or modify the Judgment, or to punish violations of any of its provisions.

II.

DESCRIPTION OF THE ACTIVITIES INVOLVED IN THE ALLEGED VIOLATIONS

During a three-year period between 1985 and March 1988, Miles, Inc., a U.S. subsidiary of Bayer, developed a new line of household insecticides to be marketed under the brand name "Laser." The Laser products were to have contained a potent new active ingredient, Cyfluthrin, a chemical compound developed and patented by Bayer. Cyfluthrin promised to provide Laser a significant competitive advantage over existing U.S. household insecticides because it extended the insecticide's killing power up to three months after initial application.

By early 1988, Miles had substantially completed its preparations to enter the U.S. household insecticides market. Evidence indicates that its entry would have been successful. According to Miles' projections, first-year sales of Laser products would have made Miles one of the nation's leading makers of household insecticides.

In March 1988, however, Bayer cancelled the Laser project. It instead agreed to sell Miles' Laser-related product research and packaging design to Johnson, and to license Johnson to use

Cyfluthrin in its household insecticide products.[4]

Under the terms of that ten-year license agreement, Johnson agreed to pay Bayer a minimum of $5.2 million annually in addition to a specified per pound fee for the use of Cyfluthrin. In addition, Johnson acquired a right of first refusal to any other active ingredient Bayer later developed.

Through this agreement, the United States alleges, Bayer effectively chose not to compete in the U.S. household insecticides market, instead, licensing to Johnson the right to use those assets Bayer had assembled and would require to compete in the United States.

The agreement helped ensure Johnson's continued dominance of the highly concentrated U.S. household insecticides market. Johnson is the leading maker of household insecticides with somewhere between 45-60 percent of total market sales. It is significantly larger than any of its six major competitors, whose market shares range from 6 to 12 percent of overall sales. By purchasing some of the assets Bayer would have used in entering the market, and entering into what was in effect an exclusive license for Cyfluthrin, Johnson effectively eliminated competition that could have helped drive down prices or improve the quality of household insecticides. Because new entry or expansion in this market is difficult in light of the high cost

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[4]Although the patent license states that it is nonexclusive, the United States believes that the license was actually exclusive. Bayer was subsequently approached by several Johnson competitors for Cyfluthrin licenses; it declined to license them to use the compound.

and significant time it takes to comply with federal and state governmental regulations, new entry into or expansion within this market is unlikely to militate against the anticompetitive effects of the defendants' agreement.

III.

EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The United States, Johnson and Bayer have stipulated that the Court may enter the proposed Final Judgment at any time after compliance with the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h). The Judgment provides that its entry does not constitute any evidence or admission by any party with respect to any issue of fact or law.

Under the provisions of Section 2(e) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(e), the Judgment may not be entered unless the Court finds entry is in the public interest. Section XI of the proposed Final Judgment sets forth such a finding.

A. Terms

The Judgment provides that:

(1) Johnson and Bayer are each enjoined and restrained from entering into any agreement or understanding, the purpose or effect of which would be to allocate or divide territories or markets for the distribution or sale of household insecticides, unless any such agreement or understanding relates exclusively to markets other than the United States and has no effect on United States commerce.

(2) Johnson and Bayer are each enjoined and restrained from entering into any exclusive license between them for any active ingredient, the patent rights to which are beneficially owned by Bayer, that the U.S. Department of Justice disapproves in writing. To ensure the Department of Justice has adequate notice of such agreements, Johnson and Bayer each must provide the Department at least 90 days' written notice of their intent to enter into such an exclusive license agreement, and if requested by the Department of Justice within 30 days after its receipt of such notice, Johnson and Bayer must supply within 30 days of such request, all information in their possession reasonably necessary to enable the Department of Justice to determine the competitive effect of such license agreement.

(3) Johnson and Bayer are each enjoined and restrained from entering into, carrying out, or operating under any exclusive license to make, use or sell Cyfluthrin in the United States. Bayer must offer to any person who requests, a license to use or sell Cyfluthrin in the United States, upon reasonable and mutually agreeable terms and conditions, but no minimum royalty payment shall be required under such license; and

(4) No more than 180 days nor less than 90 days before entering into any exclusive license with any person other than Bayer, for any active ingredient other than Cyfluthrin, Johnson must provide the Department of Justice written notice of such license and, if requested by the Department of Justice within 30 days after its receipt of such notice, Johnson must supply within

30 days after such request, all information in its possession reasonably necessary to determine the competitive effect of such license agreement.

B. Effect on Competition

The proposed Final Judgment will ensure that Johnson's competitors will have access to Cyfluthrin and thus likely promote competition in the household insecticide market. Nonexclusive licenses will be made available to Johnson's competitors on reasonable terms and conditions that are at least as favorable as the terms and conditions Bayer accorded Johnson, except that there will be no minimum royalty payments under such licenses. In addition, by prohibiting any market allocation agreements between the defendants, the Final Judgment ensures that the defendants will not be able to restrict potential competition in the U.S. household insecticides market.

In addition, the proposed Final Judgment ensures that any exclusive or co-exclusive license agreement between Johnson, which is dominant in the household insecticides market, and Bayer for new active ingredients will not restrict competition in the household insecticides market. The proposed relief also ensures that the United States receives prior notice of any exclusive or co-exclusive license agreement between Johnson and any active ingredient manufacturer other than Bayer, and thus an opportunity to challenge any such agreement that the United States believes may substantially lessen competition in the household insecticides market. At the same time, Department of Justice

review of any exclusive or co-exclusive license agreement for active ingredients contemplated by Johnson should not unreasonably restrict Johnson's ability to obtain the necessary active ingredients to formulate its household insecticide products and remain competitive in the household insecticides market.

IV.

REMEDIES AVAILABLE TO 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 attorney's 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 Johnson and Bayer in this matter.

V.

PROCEDURES AVAILABLE FOR
MODIFICATION OF THE PROPOSED FINAL 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 Gail Kursh, Chief, Professions and Intellectual Property Section, U.S. Department of Justice, Antitrust Division, 555 4th Street, N.W., Room 9903,

Washington, D.C. 20001, within the 60-day period set forth in 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, pursuant to a stipulation signed by the United States and Bayer and Johnson, to withdraw its consent to the Judgment at any time prior to entry. Section IX of 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 modification, interpretation, or enforcement of the Judgment.

VI.

DETERMINATIVE MATERIALS/DOCUMENTS

Materials or documents of the type described in Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b), were considered in formulating the proposed Final Judgment.

VII.

ALTERNATIVE TO THE PROPOSED FINAL JUDGMENT

The alternative to the proposed Judgment is a full trial on the merits. While the Department is confident of its ability to succeed in such a trial, the litigation involves difficult issues of law and fact. A favorable outcome is not a certainty. The Final Judgment agreed to by the parties provides all the relief

that the United States sought in its complaint.

Dated: August 3, 1994.

Respectfully submitted,

ANTHONY E. HARRIS
Bar No. 01133713

KURT SHAFFERT

Attorneys
Antitrust Division
U.S. Department of Justice
555 4th Street, N.W., Room 9901
Washington, D.C. 20001
202/307-0951

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UNITED STATES' EXPLANATION OF CONSENT DECREE PROCEDURES

The United States submits this short memorandum summarizing the procedures regarding the Court's entry of the proposed Final Judgment. The Judgment would settle this case pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) (the "APPA"), which applies to civil antitrust cases brought and settled by the United States.

1. Today, the United States has filed a proposed Final Judgment and a Stipulation between the parties by which they agreed to the Court's entry of the proposed Final Judgment following compliance with the APPA.

2. The United States has also filed a Competitive Impact Statement relating to the proposed Judgment [15 U.S.C. § 16(b)].

3. The APPA requires that the United States publish the proposed Final Judgment and Competitive Impact Statement in the Federal Register and in certain newspapers at least 60 days prior to entry of the Final Judgment. The notice will inform members

of the public that they may submit comments about the Final Judgment to the United States Department of Justice, Antitrust Division [15 U.S.C. §16(b)-(c)].

4. During the 60-day period, the United States will consider and respond to any comments it receives, and it will publish the comments and responses in the Federal Register.

5. After the expiration of the 60-day period, the United States will file with the Court the comments, the government's responses, and a Motion For Entry of the Final Judgment (unless the United States decides to withdraw its consent to entry of the Final Judgment, as permitted by Paragraph 2 of the Stipulation) [see 15 U.S.C. §16(d)].

6. At that time, pursuant to the APPA, 15 U.S.C. § 16(e)-(f), the Court may enter the Final Judgment without a hearing, if the Court determines that the Final Judgment is in the public interest.

Dated: August 4, 1994.

Respectfully submitted,

ANTHONY E. HARRIS
Bar No. 01133753

KURT SHAFFERT

Attorneys
U.S. Department of Justice
Antitrust Division
555 4th Street, N.W., Rm. 9901
Washington, D.C. 20001
202/307-0951