UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK
ROCHESTER DIVISION

UNITED STATES OF AMERICA, STATE OF NEW YORK, COMMONWEALTH OF PENNSYLVANIA and STATE OF OHIO, Plaintiffs, v. CARGILL INC., AKZO NOBEL, N.V., AKZO NOBEL, INC. and AKZO NOBEL SALT, INC., Defendants.	Civil No. 97-CV-06161 L Filed: May 5, 1997

REVISED 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

On April 21, 1997, the United States, the states of New York and Ohio, and the Commonwealth of Pennsylvania filed a civil antitrust complaint, which alleges that Cargill Inc.'s acquisition of the Western Hemisphere salt assets of Akzo Nobel, N.V. ("Akzo") would violate Section 7 of the Clayton Act, 15 U.S.C. § 18. Cargill and Akzo are two of only four competitors engaged in the production and sale of rock salt for bulk deicing purposes ("rock deicing salt") in the Northeast Interior Market,

an area of the United States centered around the eastern portion of Lake Erie, and which comprises the western portions of Pennsylvania and Massachusetts, upstate New York, eastern Ohio, all of Vermont, and major cities such as Buffalo and Rochester, New York, Erie, Pennsylvania, and Burlington, Vermont. Cargill and Akzo are also the second and third largest firms engaged in the production and sale of food grade evaporated salt in that part of the United States east of the Rocky Mountains.

The Complaint alleges that a combination of Cargill and Akzo would substantially lessen competition in the production and sale of rock deicing salt and food grade evaporated salt in two relevant geographic markets. The prayer for relief in the Complaint seeks: (1) a judgment that the proposed acquisition would violate Section 7 of the Clayton Act; and (2) permanent injunctions that would prevent Cargill from acquiring control of Akzo's bulk deicing and food grade evaporated salt business, or otherwise combining them with its own business in the United States.

At the same time the suit was filed, the United States, the states of New York and Ohio, and the Commonwealth of Pennsylvania also filed a proposed settlement that would permit Cargill to complete its acquisition of Akzo's Western Hemisphere salt operations, but require it to divest certain bulk deicing and evaporated salt assets in such a way as to preserve competition in these markets. This settlement consists of a Stipulation and Order and a proposed Final Judgment. Both impose obligations on

American Rock Salt Company LLC ("American"), a third party that voluntarily submitted to the jurisdiction of the Court for purposes of ensuring effective relief in the rock deicing salt market.

The proposed Final Judgment orders Cargill to divest Akzo's Watkins Glen, New York evaporated salt plant and certain tangible and intangible assets that relate to that plant. It also orders Cargill and Akzo to divest a number of bulk deicing salt assets to American, a prospective new entrant in the sale of bulk deicing salt in the Northeast Interior Market. The deicing salt assets to be sold by Akzo to American include options to develop a new rock salt mine site in Hampton Corners, New York.[1] The deicing salt assets to be sold by Cargill to American include a mammoth 872,000 ton stockpile of bulk deicing salt located in Retsof, New York; a three-year contract (with an optional fourth year) for the supply of rock deicing salt to be sold at $10 a ton; and a number of terminals throughout the Northeast that have been used by Akzo for storage and transshipment of deicing salt. With these assets, American can immediately begin competing in the sale of rock deicing salt, while constructing its own rock salt mine in Hampton Corners, New York, now scheduled to begin full scale operations in 1999.

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[1] The final agreement reached between Cargill and Akzo did not include the sale of the Hampton Corners rights to Cargill; thus, Akzo is responsible for divesting these rights.

Cargill must complete its divestiture of the Watkins Glen evaporated salt plant and related assets within 150 days, or five days after entry of the Final Judgment, whichever is later. Cargill must complete its divestiture of the supply contract and salt terminals to American within thirty (30) days and must contract to sell the Retsof Stockpile within one hundred and twenty (120) days after filing of the Complaint. Akzo's sale of the Hampton Corners rights to American must be consummated no later than September 1, 1998.

The Stipulation and Order and proposed Final Judgment require Cargill and Akzo to ensure that, until the divestitures mandated by the proposed Final Judgment are accomplished, Akzo's Watkins Glen evaporated salt plant and related assets will be maintained and operated as a saleable and economically viable, ongoing concern, with competitively-sensitive business information and decision-making divorced from Cargill's own salt business. Cargill and Akzo will each appoint a person or persons to monitor and ensure their compliance with these requirements of the proposed Final Judgment.

The parties 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 VIOLATIONS ALLEGED IN THE COMPLAINT

A. The Defendants and the Proposed Transaction

Cargill is a large, privately-held concern that, *inter alia*, mines, produces and sells bulk deicing and food grade evaporated salt throughout the United States. Cargill owns and operates a rock salt mine in South Lansing, New York that produces bulk deicing salt sold throughout the Northeast. Cargill also operates evaporated salt plants in Beaux Bridge, Louisiana; Hutchinson, Kansas; and Watkins Glen, New York that compete in the production and sale of food grade evaporated salt in states east of the Rocky Mountains. In 1996, Cargill's total sales of all types of salt exceeded $250 million.

Akzo also mines, produces and sells bulk deicing and food grade evaporated salt throughout the United States. Akzo owns rock salt mines in Cleveland, Ohio and on Avery Island, Louisiana. It also operated a rock salt mine in Retsof, New York, until the mine flooded and was closed in 1995. Before the mine closed, however, Akzo salvaged as much rock salt as it could, creating a huge stockpile of salt on the Retsof site, from which Akzo continued to sell rock deicing salt to customers in the Northeast Interior Market. Akzo had plans to increase production out of its Cleveland mine and ship significantly greater quantities of rock deicing salt from there into the Northeast Interior Market, directly in competition against Cargill's South Lansing, New York mine.

Akzo owns and runs evaporated salt plants in St. Clair, Michigan; Akron, Ohio; and Watkins Glen, New York, that directly compete against Cargill in the sale of food grade evaporated salt in the area of the country east of the Rocky Mountains. In 1996, Akzo had total sales of all kinds of salt of about $370 million.

In August 1996, Cargill agreed to acquire the Western Hemisphere salt operations of Akzo for about $160 million. This transaction, which would combine the nation's second and third largest salt producers in already highly concentrated markets for salt, precipitated the governments' antitrust suit.

B. The Effects of the Transaction on Competition in the Sale of Bulk Rock Deicing Salt in the Northeast Interior Market

Bulk deicing salt is a medium or coarse grade of rock or solar salt purchased primarily by state and municipal government agencies for use in deicing roads and sidewalks. Because of its unique combination of highly desirable features -- low cost, general availability and superior ice and snow melting capabilities -- there are no good substitutes for bulk deicing salt.

Either rock or solar salt may be used for bulk deicing purposes. As a practical matter, however, in the Northeast Interior Market, only rock salt can be economically used for bulk deicing purposes. Sources of solar salt are too far away from the Northeast Interior Market to be effective competitive factors, and solar salt itself, because of its high moisture content, will not perform well in the low winter temperatures

prevalent in the Northeast. For these reasons, for bulk deicing purposes, solar salt is not a good substitute for rock salt in the Northeast Interior Market.

The Complaint alleges that, for purposes of antitrust analysis, the production and sale of rock salt for bulk deicing purposes constitutes a line of commerce, or relevant product market, and that the Northeast Interior Market, because of its distance and relative isolation from other areas, constitutes a section of the country, or relevant geographic market.

Only four firms produce and sell rock deicing salt in the Northeast Interior Market -- Cargill, Akzo, Morton, and North American Salt ("NAMSCO") -- and each bids on contracts to supply state and municipal governments with this critical winter safety product. Entry is time-consuming and difficult. Absent the acquisition, and despite the closure of Akzo's Retsof mine, Akzo and Cargill would have actively bid against each other for customers in the relevant market. The evidence developed in this investigation indicates that the combination of Cargill and Akzo likely would result in an increase in the amount of the price of winning bids for state salt contracts, to the detriment of consumers, even if the three remaining bidders do not actively collude or cooperatively interact.

While the proposed acquisition was pending, Akzo contracted to sell its rights to develop the Hampton Corners salt mine site to American, a prospective new entrant. The opening of a new mine by American, or any other new firm, would eliminate any anticompetitive effect in the Northeast Interior Market from

Cargill's acquisition of Akzo. An analysis of this "fix", however, must recognize that American has not yet closed on its purchase of the mine development rights, and even when it does, it will not complete its development of the Hampton Corners mine until at least 1999. Until the mine is completed and opened, the effect of Cargill's acquisition of Akzo's huge Retsof Stockpile, Cleveland, Ohio rock salt mine, and Northeast rock salt terminals may be to substantially lessen competition in the production and sale of bulk deicing salt in the Northeast Interior Market.

C. The Effects of the Transaction on Competition in the Market for the Production and Sale of Food Grade Evaporated Salt East of the Rocky Mountains

Food grade evaporated salt, unlike rock or solar salt, is a highly refined product (at least 99.7% purity) that contains few contaminants such as bacteria, silica or dirt and meets high purity standards established by the Food and Drug Administration for salt intended for human consumption. One of the purest forms of salt available, food grade evaporated salt is primarily used by food makers as a spice to help preserve, or to enhance the flavor of, a very wide variety of baked, packaged, canned and frozen foods and snacks, everything from apple pie to canned zucchini.

Because of its high purity, food makers strongly prefer to use food grade evaporated salt and they will pay a significant premium for that salt before switching to any other products. There is no good substitute for food grade evaporated salt.

The Complaint alleges that, for antitrust purposes, the manufacture and sale of food grade evaporated salt constitutes a

line of commerce, or relevant product market, and that the area east of the Rocky Mountains constitutes a section of the country, or relevant geographic market. The Complaint alleges that in this market, the effect of Cargill's acquisition of Akzo may be to lessen competition substantially in the manufacture and sale of food grade evaporated salt.

There are three major producers of food grade evaporated salt in the East of the Rocky Mountains Market: Cargill, Akzo and Morton. NAMSCO and United, which also produce food grade evaporated salt, do not have significant shares of the East of the Rocky Mountains Market. IMC Global, a new entrant into the production of evaporated salt, has not opened its plant, much less made significant sales of food grade salt. Moreover, it would take any new entrant, including IMC, years to build a reputation for consistent production of high purity salt, a critical requirement for successfully marketing this product to the nation's food processors.

In this highly concentrated market, a combination of Cargill and Akzo, the Complaint alleges, would likely lead to an increase in prices for food grade evaporated salt east of the Rocky Mountains, a $200 million market. Cargill's acquisition of Akzo is likely to diminish competition by enabling the remaining competitors to engage more easily, frequently, and effectively in coordinated pricing interaction that harms customers. With the elimination of Akzo, market incumbents will no longer compete for

business as aggressively since they will not have to worry about losing business to Akzo.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment would preserve competition in the sale of bulk deicing salt in the Northeast Interior Market and in the sale of food grade evaporated salt in the East of the Rockies Market. The Judgment requires that within one hundred fifty (150) days after the Complaint in this action is filed (or five days after it receives notice that the Judgment has been entered), Cargill must divest Akzo's Watkins Glen, New York evaporated salt plant and related assets to a acquirer acceptable to the United States. The Watkins Glen, New York plant has sufficient production capacity for food grade evaporated salt and, due to high margins for food grade evaporated salt, the incentive to increase output and discipline any attempt to increase prices by Cargill and Morton, the major players in food grade evaporated salt. A Watkins Glen plant not owned by the current major food grade evaporated salt competitors would alleviate the anticompetitive concerns raised by Cargill's acquisition of Akzo's St. Clair, Michigan and Akron, Ohio plants. To ensure that the plant remains independent and viable before sold, the Judgment mandates that Cargill keep operations, pricing, and marketing for that plant separate from those of its other operations.

To preserve competition in the sale of rock salt for bulk deicing purposes in the Northeast Interior Market, the Judgment

affirmatively requires that Akzo divest the Hampton Corners mine rights to American, or if American fails to secure financing and defaults, that it divest to an acquirer willing to compete by building a new mine at the Hampton Corners mine site. To preserve market competition in the interim period preceding the construction of a new mine by American or any other firm, the Judgment requires that Cargill must divest to American the Retsof, New York rock salt stockpile; a three-year contract (with an optional fourth year) for the supply of bulk deicing salt, at $10 a ton, from Cargill's South Lansing, New York and Akzo's Cleveland, Ohio rock salt mines; and a number of terminals or depots currently used by Akzo to store or transship bulk deicing salt to customers. If American defaults on its contract to purchase the Retsof Stockpile, Cargill must divest the Retsof Stockpile.

In the event that American defaults on the Hampton Corners mine rights purchase, or on its Retsof Stockpile purchase, the divestiture of these assets must be made to an acquirer acceptable to the United States, New York and Pennsylvania, in their sole discretion.

Until the ordered divestitures take place, defendants must take all reasonable steps necessary to accomplish the divestitures, and cooperate with any prospective acquirer. If defendants do not accomplish the ordered divestitures within the specified time periods, the proposed Judgment provides procedures by which the Court shall appoint a trustee to complete the

divestitures. The defendants must cooperate fully with the trustee.

If a trustee is appointed, the proposed Final Judgment provides that party initially responsible for making the divestiture will pay all costs and expenses of the trustee. The trustee's compensation will be structured so as to provide an incentive for the trustee to obtain the highest price then available for the assets to be divested, and to accomplish the divestiture as quickly as possible.

After the effective date of his or her appointment, the trustee shall serve under such other conditions as the Court may prescribe. After his or her appointment becomes effective, the trustee will file monthly reports with the parties and the Court, setting forth the trustee's efforts to accomplish the divestiture. At the end of six (6) months, if the mandated divestiture has not been accomplished, the trustee shall file promptly with the Court a report that sets forth the trustee's efforts to accomplish the divestiture, explain why the divestiture has not been accomplished, and make any recommendations. The trustee's report will be furnished to the parties and shall be filed in the public docket, except to the extent the report contains information the trustee deems confidential. The each affected party will have the right to make additional recommendations to the Court. The Court shall enter such orders as it deems appropriate to carry out the purpose of the trust.

The relief sought in the various markets alleged in the Complaint has been tailored to ensure that purchasers of food grade evaporated salt and bulk deicing salt will not experience anticompetitive prices or other contract terms as a consequence of the proposed acquisition.

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's fees. Entry of the proposed Final Judgment neither will impair nor assist the bringing of any private antitrust damage action. Under the provision 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 Cargill and Akzo.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The parties 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 the entry of the decree on 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 should comment 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:

J. Robert Kramer II
Chief, Litigation II Section
Antitrust Division
United States Department of Justice
1401 H Street, NW, Suite 3000
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 the defendants. 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 food grade evaporated salt and bulk deicing salt in the relevant geographic markets that otherwise would be affected adversely by the

acquisition. Thus, the proposed Final Judgment would achieve the relief the federal and state governments would have obtained through litigation, but avoids the time, expense and uncertainty a full trial on the merits of the governments' 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 (60) day comment period, after which the court shall determine whether entry of the proposed Final Judgment "is in the public interest." In make that determination, the court may consider --

> (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 Court of Appeals for the District of Columbia Circuit recently held, the APPA 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 (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." 119 Cong. Rec. 24598 (1973). 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 an its response 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. (CCH) ¶ 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, 454 U.S. 1083 (1981); see also Microsoft, 56 F.3d 1448 (D.C. Cir. 1995). 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. United States v. Bechtel, 648 F.2d 660, 666 (9th Cir. 1981) (emphasis added).

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 acceptability or is 'within the reaches of public interest.'" (citations omitted). 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).

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: May 2, 1997.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Anthony E. Harris, hereby certify that on May 2, 1997, I caused copies of the foregoing Revised Competitive Impact Statement to be served on plaintiffs states of New York and Ohio and Commonwealth of Pennsylvania, and on defendants Cargill Inc., Akzo Nobel, N.V., Akzo Nobel, Inc., and Akzo Nobel Salt Inc., and on American Rock Salt Company, LLC, by mailing the pleading first-class, postage prepaid, to those parties as follows:

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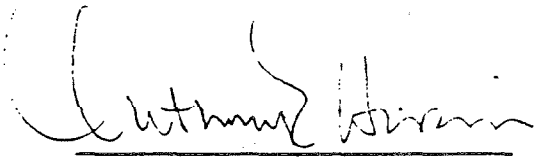

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