UNITED STATES OF AMERICA
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|---|---|---|
| UNITED STATES OF AMERICA<br><br>Plaintiff,<br><br>v.<br><br>BAXTER TRAVENOL LABORATORIES, INC. and AMERICAN HOSPITAL SUPPLY CORPORATION,<br><br>Defendants. | ) | CIVIL ACTION NO: 85C-09856<br>FILED: 11/22/85 |

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 of America files this Competitive Impact Statement relating to the proposed Final Judgment against the defendants in this civil antitrust proceeding.

I

Nature and Purpose of the Proceedings

On November 22, 1985, the United States filed a civil antitrust complaint under Section 15 of the Clayton Act, 15 U.S.C. § 25, challenging the acquisition of, and the merger with, American Hospital Supply Corporation ("American") by Baxter Travenol Laboratories, Inc. ("Baxter") as a violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. The complaint alleges that the effect of the acquisition may be substantially to lessen competition in United States markets for the

manufacture and sale of parenteral solutions, fluid administration sets, electronic flow control devices, therapeutic hemapheresis equipment, and surgeons and procedure gloves.

Plaintiff and defendants have stipulated that the proposed Final Judgment may be entered after compliance with the Antitrust Procedures and Penalties Act. Entry of the proposed Final Judgment will terminate the action, except that the Court will retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations of the proposed Final Judgment.

II

Events Giving Rise to the Alleged Violations

On July 15, 1985, Baxter and American entered into an agreement and plan of acquisition pursuant to which Baxter will acquire all of the outstanding stock of American at a price of $51 per share in cash, or cash in combination with Baxter securities. Both companies' shareholders are scheduled to meet on November 22 to vote on the proposed acquisition. The sale would, in effect, merge all of American's businesses into Baxter, and give Baxter complete control of American's operation.

Baxter and American are both large, diversified healthcare companies. Baxter's net sales of all products were about $1.8 billion in 1984. American's net sales of all products in 1984 were about $3.4 billion, 46 percent of which represented the sale of products manufactured by American and the remainder

consisting of products made by other companies but distributed by American. Both Baxter and American manufacture and sell, among other things, parenteral solutions, fluid administration sets, electronic flow control devices, therapeutic hemapheresis equipment, and surgeons and procedure gloves.

A. Parenteral Solutions

Parenteral solutions are sterile intravenous ("IV") fluids, including: general IV solutions (such as sterile water and dextrose, sodium, chloride, or electrolytes); premix specialty IV solutions (such as dopamine in dextrose and sterile water); nutritional fluids (such as amino acids, fats, and carbohydrates); irrigation and urological solutions (such as saline, distilled water, glycine, and sorbitol irrigation solution); and peritoneal dialysis solutions. Parenteral solutions have five major uses: the replacement of fluids and electrolytes; the provision of nutrition to patients suffering from a disturbance of the normal metabolic flow of nutrients; as a medium for administering drugs; as a cleansing, washing, or irrigating agent in procedures requiring the use of sterile fluids; and in the treatment of kidney failure.

Most parenteral solutions are packaged in glass containers and either flexible plastic bags or semi-rigid plastic containers. Baxter manufactures parenteral solutions packaged in glass containers and flexible plastic bags. American manufactures parenteral solutions packaged in glass and semi-rigid plastic containers. Customers consider a particular

kind of solution packaged in any of the three types of containers to be substitutes. Most hospitals contract to purchase all of their parenteral solutions from one manufacturer pursuant to contracts that run for two to five years.

Baxter and American are direct competitors in the manufacture and sale of parenteral solutions in the United States. Baxter is the largest manufacturer of parenteral solutions in the United States. In 1984, Baxter's sales of parenteral solutions in the United States were approximately $505.6 million, accounting for approximately 50.5% of total sales of parenteral solutions in the United States. American, through its American McGaw division, is the third largest manufacturer of parenteral solutions in the United States. In 1984, American's sales of parenteral solutions in the United States were approximately $166.4 million, accounting for approximately 16.6% of the total sales of parenteral solutions in the United States.

The manufacture and sale of parenteral solutions is highly concentrated. In 1984, the three largest manufacturers in the United States accounted for about 95% of the total sales of parenteral solutions in the United States. The Herfindahl-Hirschman Index ("HHI"), a measure of market concentration, calculated on the basis of 1984 sales in the United States is about 3648. Baxter's proposed acquisition of American would increase this HHI by about 1682 to about 5330.

Based upon the foregoing and other facts, the complaint alleges that the manufacture and sale of parenteral solutions comprises a relevant product market for antitrust purposes and that the effect of the acquisition may be substantially to lessen competition in the manufacture and sale of parenteral solutions in the United States in violation of Section 7 of the Clayton Act.

B. Fluid Administration Sets

Fluid administration sets are disposable devices and related add-on components which are attached to parenteral solution or blood containers and through which the parenteral solution or blood flows to the patient. Basic fluid administration sets consist of single-use plastic tubing, filters, and clamps. Fluid administration sets are pre-assembled and packaged in a wide variety of configurations; and additional add-on components, such as extension sets, Y-sites, backcheck valves, and filters may be purchased separately and added to the pre-assembled sets.

The three major parenteral solutions producers (Baxter, American and Abbott) are also the primary suppliers of fluid administration sets. The fluid administration sets manufactured by the three parenteral solutions producers generally may be used with each other's parenteral solutions containers. Nevertheless, hospitals generally contract to purchase all of their fluid administration sets from one

manufacturer, usually their parenteral solutions supplier. In fact, both parenteral solutions and fluid administration sets are often purchased pursuant to the same contract.

Baxter and American are direct competitors in the manufacture and sale of fluid administration sets in the United States. Baxter is the second largest manufacturer of these sets in the United States. In 1984, Baxter's sales in the United States of fluid administration sets were approximately $172.2 million, accounting for approximately 39.3% of total sales in the United States. American, through its American McGaw division, is the third largest manufacturer of fluid administration sets in the United States. In 1984, American's sales in the United States were approximately $61 million, accounting for approximately 13.9% of total sales in the United States.

The manufacture and sale of fluid administration sets is highly concentrated. In 1984, the three largest firms accounted for about 90% of the total sales of fluid administration sets in the United States. The HHI calculated on the basis of 1984 sales in the United States is approximately 3307. Baxter's proposed acquisition of American would increase this HHI by about 1098 to about 4405.

Based upon the foregoing and other facts, the complaint alleges that the manufacture and sale of fluid administration sets comprises a relevant product market for antitrust purposes

and that the effect of the acquisition may be substantially to lessen competition in the manufacture and sale of fluid administration sets in the United States in violation of Section 7 of the Clayton Act.

C. Electronic Flow Control Devices

Electronic flow control devices are electro-mechanical intravenous fluid infusion control devices which are designed to pump, infuse or meter fluids, including parenteral solutions and drugs, at pre-determined rates into a patient during intravenous therapy. There are two basic types of electronic flow control devices: IV pumps, which monitor and regulate the fluid infusion rate by pumping the fluid into the patient under positive pressure; and IV controllers, which mediate the rate of infusion by electronically monitoring the flow rate of the fluid, but do so only under the force of gravity. These devices are used in conjunction with the administration of parenteral solutions and/or blood and ensure that the fluid and/or blood is infused into the patient at the rate requested by the user. Because electronic flow control devices allow parenteral solutions to be administered far more accurately than is possible through the use of fluid administration sets, they serve a distinct set of hospital patients--primarily patients in the critical and intensive care units.

Most electronic flow control devices require the use of a dedicated fluid administration set that plugs directly into the device. A manufacturer's dedicated administration set will

work only in conjunction with its electronic flow control device, and the two products are marketed together. Contracts for the purchase of electronic flow control devices and their dedicated administration sets typically run for two to three years.

Baxter and American are direct competitors in the sale of electronic flow control devices in the United States. Baxter is the fifth largest seller of electronic flow control devices in the United States. The company manufactures some of the devices it sells and also acts as the exclusive distributor of a substantial number of devices that are manufactured by other companies, but sold under the Baxter name. In 1984, Baxter sold approximately 8,900 electronic flow control devices in the United States, accounting for approximately 9.5% of the total sales of electronic flow control devices in the United States.

American is the second largest seller of electronic flow control devices in the United States. American Edwards, a subsidiary of American, manufactures IV pumps which are sold exclusively by American's American McGaw division. The McGaw division also distributes electronic flow control devices for other manufacturers, and, under its own name, IV controllers manufactured for it by IVENT. In 1984, American sold approximately 20,000 electronic flow control devices in the United States, accounting for approximately 21.3% of the total sales of electronic flow control devices in the United States.

The manufacture and sale of electronic flow control devices is highly concentrated. In 1984, the five largest firms accounted for about 91% of the total United States sales of electronic flow control devices. The HHI calculated on the basis of 1984 unit sales in the United States is about 1917. Baxter's proposed acquisition of American would increase the HHI by about 402 to about 2319.

Based upon the foregoing and other facts, the complaint alleges that the manufacture and sale of electronic flow control devices comprises a relevant product market for antitrust purposes and that the effect of the acquisition may be substantially to lessen competition in the manufacture and sale of electronic flow control devices in the United States in violation of Section 7 of the Clayton Act.

D. Therapeutic Hemapheresis Equipment

Therapeutic hemapheresis equipment includes centrifugal blood cell separators and plasma membrane separators, and related disposable systems, that are used to separate whole blood into components for therapeutic purposes.

Baxter and American are direct competitors in the manufacture and sale of therapeutic hemapheresis equipment in the United States. In 1984, the three largest producers accounted for about 85% of all sales of therapeutic hemapheresis equipment and products in the United States.

Baxter is the second largest manufacturer of therapeutic hemapheresis equipment in the United States. The company manufactures and sells both centrifugal blood cell separators

and plasma membrane separators, and their related disposable products, in the United States. In 1984, Baxter sold approximately 91 machines and 75,665 disposable products in the United States, accounting for approximately 28% of the total United States sales of therapeutic hemapheresis equipment.

American, which manufactures and sells centrifugal blood cell separators and disposable products through its American Haemonetics subsidiary, is the third largest producer of therapeutic hemapheresis equipment in the United States. In 1984, it sold in the United States approximately 74 machines and 75,500 disposable products, accounting for approximately 23% of total sales of hemapheresis therapeutic equipment in the United States.

The manufacture and sale of therapeutic hemaperesis equipment is highly concentrated. The HHI calculated on the basis of 1984 sales of therapeutic hemapheresis equipment in the United States is about 2700. Baxter's proposed acquisition of American would increase this HHI by about 1300 to about 4000.

Based upon the foregoing and other facts, the complaint alleges that the manufacture and sale of therapeutic hemapheresis equipment comprises a relevant product market for antitrust purposes and that the effect of the acquisition may be substantially to lessen competition in the manufacture and sale of therapeutic hemapheresis equipment in the United States in violation of Section 7 of the Clayton Act.

E. Surgeons and Procedure Gloves

Surgeons gloves are anatomically correct (right and left handed with an offset thumb), long cuffed, talc-free, sterile, thin latex gloves that are sized according to palm circumference and designed specifically for use in gowned surgical procedures performed inside the operating room and non-gowned surgical procedures performed outside the operating room. Procedure gloves are designed for use in ungowned surgical procedures, such as biopsies, suturing, and lumbar punctures, performed outside the operating room. Procedure gloves are either cosmetically defective surgeons gloves or anatomically correct, sized, talc-free, sterile thin latex gloves with slightly shorter cuffs. Surgeons and procedure gloves, because of their design, sizing, and thinness, closely resemble the shape of a surgeon's hand and fit the hand more exactly, thereby allowing the surgeon dexterity and tactile sensitivity while decreasing the possibility of hand fatigue. Surgeons and procedure gloves are generally purchased pursuant to one year contracts, but surgeons have strong brand preferences and are reluctant to switch their sources of supply of surgeons and procedure gloves.

Baxter and American are direct competitors in the manufacture and sale of surgeons and procedure gloves in the United States. Baxter is the largest manufacturer of surgeons and procedure gloves in the United States. In 1984, Baxter sold approximately 71 million pairs of surgeons and procedure gloves in the United States, accounting for approximately 26.2% of total United States sales of surgeons and procedure gloves.

American is the second largest manufacturer of surgeons and procedure gloves in the United States and is the only company that produces a procedure glove using specially-designed molds that are shorter than surgeons gloves molds, as opposed to selling cosmetically defective surgeons gloves as procedure gloves. American's Pharmaseal division is responsible for manufacturing and marketing American's surgeons gloves made in Tucson, Arizona and procedure gloves made in Johnson City, Tennessee. In 1984, American sold approximately 36.5 million pairs of surgeons and procedure gloves in the United States, accounting for approximately 13.5% of the total sales of surgeons and procedure gloves in the United States.

The production and sale of surgeons and procedure gloves is highly concentrated. In 1984, the six largest producers accounted for about 90% of all United States sales of surgeons and procedure gloves. The HHI calculated on the basis of 1984 sales in the United States is about 1667. Baxter's proposed acquisition of American would increase this HHI by about 708 to about 2375.

Based upon the foregoing and other facts, the complaint alleges that the manufacture and sale of surgeons and procedure gloves comprises a relevant product market for antitrust purposes and that the effect of the acquisition may be substantially to lessen competition in the manufacture and sale of surgeons and procedure gloves in the United States in violation of Section 7 of the Clayton Act.

## III

## Explanation of the Proposed Final Judgment

The United States brought this action because the acquisition of American by Baxter would likely lessen competition in violation of Section 7 of the Clayton Act in the manufacture and sale of parenteral solutions, fluid administration sets, electronic flow control devices, therapeutic hemapheresis equipment, and surgeons and procedure gloves. American and Baxter are among the most significant competitors in each of these five highly concentrated markets.

Prior to the filing of the complaint in this action, the defendants entered into a series of contracts, described below, which, if executed, would solve the competitive problems that otherwise would be created by the merger. These contracts, through the divestiture of assets or by other means, would create an independent, viable competitor in each of the markets, thereby replacing the significant competitor being eliminated by the merger.

The contracts involved have been signed and there are no conditions precedent to their execution. However, under their terms the contracts will not be executed until a short time after Baxter acquires all of the stock of American. The purpose of the proposed Final Judgment is to ensure that the defendants execute, close on and perform each of the contracts involved and also to ensure, if they do not do so, that independent, viable competitors nevertheless will be created in

each of the relevant product markets. The proposed Final Judgment accomplishes this by providing that if all of the tangible and intangible assets to be transferred by the defendants under these contracts are not transferred by the date of entry of this proposed Final Judgment, that these assets shall be immediately transferred to a trustee who will proceed to sell the assets to a purchaser acceptable to the plaintiff.

Since the proposed Final Judgment provides for divestiture of the assets defined in existing contracts, a brief description of these contracts is appropriate to understand the scope of the relief secured.

The contract that addresses potential competitive problems in the parenteral solutions, fluid administration sets and electronic flow control devices markets is the "Purchase and Sale Agreement Dated November 1, 1985 Among American Hospital Supply Corporation and American Hospital Supply Del Caribe, Inc., and The Kendall Company, NDM Corporation, NDM Corporation of Puerto Rico, Inc. and Anatros Corporation Relative to the Assets of the McGaw Division and the NDM and Anatros Operations." This contract, with incorporated ancillary agreements, provides that Kendall, a subsidiary of Colgate-Palmolive, will acquire, among other things, all of the tangible and intangible assets of American's American McGaw division. American McGaw manufactures all of American's parenteral solutions and fluid administration sets and has its own sales force.

In addition to divestiture of McGaw, the ancillary agreements contain a series of short term provisions that Kendall negotiated to assure its competitive viability. These agreements provide, among other things, that Kendall will have access to American's distribution centers for about one year; that Kendall will receive the right to use certain significant technology from Baxter, not presently available to American, relating to the packaging of parenteral solutions in flexible plastic bags; that Baxter will not actively solicit, for a limited period of time not to exceed 18 months, current customers under contract with McGaw; and that American will buy a fixed amount of certain parenteral solutions from McGaw for the next five years. Taken together, these provisions should create an independent and effective competitor to Baxter in parenteral solutions and fluid administration sets.

As to the electronic flow control devices market, Kendall becomes an independent, effective competitor through an ancillary agreement, which gives Kendall immediate distribution rights to certain products and access to the technology necessary to independently manufacture, or have manufactured for it, certain products.

American currently manufactures and distributes one flow control device, the "Accupro" pump, and distributes, under its own name, one flow control device manufactured by IVENT, an independent firm. The "McGaw Contract" provides for an assignment to Kendall of American's rights to distribute

IVENT's product. In addition, Kendall receives a three-year nonexclusive right to distribute (at a firm purchase price) three other flow control devices: the Accupro pump, the "Flo-Guard" pump, currently manufactured by Baxter, and the Anatros controller, currently manufactured by Anatros Corp., now a subsidiary of Kendall. Anatros Corp. will be divested to American as part of the "McGaw contract." */ Kendall also receives the right to have Baxter modify the Flo-Guard pump and to exclusively distribute that product for three years. In addition, American agreed to develop jointly with Kendall an improved Accupro pump.

With respect to the technology necessary to manufacture these products, Kendall receives an option for a 5% royalty license on all technology related to the Accupro pump, the improved Accupro pump, and the Anatros pump. In addition, if an improved Accupro pump is not developed by July 1987, Kendall receives a nonexclusive 5% royalty license to all technology necessary to manufacture the modified Flo-Guard pump, and if there is not a modified Flo-Guard pump in existence at that time, to the existing unmodified Flo-Guard pump. In combination, these provisions create a firm that is a current threat to Baxter in the electronic flow control devices market and a firm that should remain so for the foreseeable future.

---

*/ Kendall will receive the right to distribute cassettes used in these pumps and controllers for six years.

We were concerned, however, that if Baxter and Kendall agreed to modify the ancillary agreement's terms relating to the prices at which Baxter will sell electronic flow control devices to Kendall, some of the incentive for Kendall to compete with Baxter could be thwarted. Therefore, the Final Judgment provides that Baxter and American shall not in any way modify the contract to sell electronic flow control devices to Kendall at a price that is dependent in any way on the price at which Kendall then resells the devices. This provision ensures that Kendall will be in a position to independently price the devices that it is distributing.

The therapeutic hemapheresis market is addressed by an October 18, 1985 contract between American and Latham Labs, Inc. American manufactures and distributes its therapeutic hemapheresis equipment through its American Haemonetics subsidiary. Under the contract, American will sell all the relevant assets to current Haemonetics management. This should have the effect of reestablishing American Haemonetics under a different name as an independent competitor to Baxter in the marketplace.

The potential competitive problem in the surgeons and procedure glove market is addressed in a contract between American and Ansell, Inc. Under the contract, Ansell will acquire American's Tucson, Arizona surgeons glove manufacturing facility, American's Juarez, Mexico plant, which includes glove

packaging equipment, and all procedure glove molds that American currently owns that are not presently in the Tucson plant. This divestiture should enable Ansell immediately to produce and market the identical surgeons and procedure gloves currently manufactured by American. In addition, American will not have the immediate capability to manufacture these same gloves.

However, the ability to manufacture a quality glove does not assure its acceptance in this market. Brand name recognition is very significant in this market, and surgeons are hesitant to purchase a product without an established brand name. To address this problem, Ansell secured the exclusive right for one year to use the "Pharmaseal" trademark on its surgeons and procedure gloves. American currently uses this mark on the gloves it sells. This one year period during which Ansell can market the product as "Pharmaseal by Ansell" should permit Ansell to develop the reputation for quality necessary to compete effectively in the market.

Ansell also negotiated other provisions intended to assure its viability as a seller, including a two year ancillary agreement obligating American to purchase from it a fixed amount of gloves per year at a fixed price, and an agreement by American not to use the "Pharmaseal" mark on surgeons or procedure gloves for three years.

After a careful and lengthy investigation, the United States concluded, for the reasons explained above, that the proposed transfers of assets provided in these contracts would

solve all competitive problems in the five markets potentially affected. Therefore, the proposed Final Judgment was designed to assure that if for some reason these transfers did not occur pursuant to the contracts, that they would be accomplished through sale by a trustee. The trustee will have three months after he receives the assets to find a purchaser. If no purchaser is found within that time for any of the assets, they will be sold at auction at the best obtainable price.

The plaintiff and the defendants have stipulated that the proposed Final Judgment may be entered by the Court at any time after compliance with the Antitrust Procedures and Penalties Act. The proposed Final Judgment constitutes no admission by either party as to any issue of fact or law. 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 Final Judgment is in the public interest.

## 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 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 the defendants.

V

## Procedure Available for Modification of the Proposed Final Judgment

The United States and defendants 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 Final Judgment is in the public interest.

The Act 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 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.

Written comments should be submitted to:

Judy Whalley, Chief
Midwest Office
Antitrust Division
United States Department of Justice
Room 3820 Kluczynski Federal Building
230 South Dearborn Street
Chicago, Illinois 60604

VI

Alternatives to the Proposed Final Judgment

As an alternative to a consent decree, the United States had considered seeking a preliminary injunction to block Baxter's acquisition of, and merger with, American. The United States decided to accept the proposed Final Judgment rather than seek to enjoin the acquisition because it concluded, for the reasons stated above, that the divestiture of the relevant assets should create independent, viable competitors in each of the relevant markets and prevent the merger from having anticompetitive effects.

In this regard, in the electronic flow control devices market, after careful examination, we concluded that it was not necessary that the proposal include the divestiture of the assets now used by American to manufacture its pumps at its American Edwards subsidiary. We concluded that the combination of distribution and technology rights secured by Kendall would put Kendall in at least as good a competitive position as it would be in if it acquired American Edwards' pump manufacturing capability. With respect to surgeons and procedure gloves, we concluded that it was not necessary that American divest its

Johnson City, Tennessee plant, which manufactures procedure gloves. The divestiture of American's Tucson facility plus the transfer of the procedure glove molds will give Ansell the capability to manufacture twice as many surgeons and procedure gloves as American sold in 1984. Ansell will thus be in a position to increase output sufficiently to constrain any collusive price increase.

VII

Determinative Documents

The United States considered determinative in formulating this proposed Final Judgment the contracts summarized above. There are no other determinative materials or documents.

Respectfully submitted,


JUDY L. WHALLEY

LORENZO BRACY

DAVID MARX, JR.

BEVERLY A. SHARPE

MILDRED L. CALHOUN

Attorneys, Department of Justice
Room 3820 John C. Kluczynski Bldg.
Chicago, Illinois 60604
(312) 353-7530