

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA,)	x
)	
Plaintiff,)	Civil Action No. 80-149
)	
v.)	Filed: December 19, 1980
)	
SOCIETE NATIONALE DES POUDRES)	Entered:
ET EXPLOSIFS AND FAYETTE)	
CHEMICAL CORPORATION,)	
)	
Defendants.)	
)	x

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 submits this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I

The Nature and Purpose of the Proceeding

On January 18, 1980, the Department of Justice filed a civil antitrust complaint under Section 4 of the Sherman Act (15 U.S.C. §4), alleging that the defendants violated Section 1 of the Sherman Act (15 U.S.C. §1). The complaint alleges a combination and conspiracy consisting of a continuing agreement, understanding, and concert of action among the defendants and various co-conspirators to fix the price and allocate the sales of industrial nitrocellulose imported for sale in the United States by defendants and co-conspirators.

The complaint seeks a judgment by the Court declaring that the defendants engaged in an unlawful combination and conspiracy in restraint of trade in violation of the Sherman Act. It also seeks an order by the Court to enjoin and restrain the defendants from any such activities or other activities having a similar purpose or effect in the future.

II

Description of the Practices Giving Rise To The Alleged Violations of the Antitrust Laws

Industrial nitrocellulose is used in combination with other chemicals as a bonding agent in various coatings. Applied in solutions, industrial nitrocellulose forms hard, smooth finishes known for their short drying time and attractive appearance. Industrial nitrocellulose is widely used in wood finishes, lacquers, paints, primers, textile and paper coatings, book bindings, printing inks, cellophane film coatings and fingernail polishes.

Before July 1977, Hercules, Incorporated ("Hercules") and E.I. du Pont de Nemours and Company, Inc. ("duPont") produced and sold all of the industrial nitrocellulose used in the United States. On July 19, 1977, duPont announced its decision to discontinue the production and sale of industrial nitrocellulose at the end of 1977. This decision left Hercules as the sole domestic industrial nitrocellulose producer, and also left the possibility of a large shortfall of supplies of industrial nitrocellulose for customers in the United States.

Shortly after the duPont announcement, foreign industrial nitrocellulose producers, including SNPE, began to consider selling industrial nitrocellulose in the United States. SNPE had meetings with other European producers of industrial

nitrocellulose, and formed a "pool" of companies for the purpose of selling this product in the United States, and alleviating the possible shortage of supplies. Defendant Fayette was named as the pool's agent in an announcement on October 30, 1977 at the National Paint and Coatings Association meeting Houston, Texas. The other companies in the pool were: Explosivos Rio Tinto, Societa Italiana Prodotti Esploidenti, Mazzuchelli celluloide, S.P.A., Bofors, and Wassag Chemie GmbH.

In the last quarter of 1977 and throughout 1978, the dry weight price of substantially all the nitrocellulose sold by SNPE and pool member SIPE was stabilized. Bofors withdrew from the pool at an early date, and other pool members did not sell in the United States. The dry weight price, exclusive of drum and duty costs, of SNPE and SIPE was also stabilized with the dry weight price of Hercules and Wolff Walsrode A.G. during this same time period.

The Complaint alleges that the combination and conspiracy had the following effects, among others:

- (a) Prices of industrial nitrocellulose sold by the defendant corporations and their co-conspirators were fixed and maintained at and non-competitive levels;
- (b) Competition in the sale of industrial nitrocellulose to purchasers in the United States was restrained; and
- (c) United States purchasers of industrial nitrocellulose have been deprived of free and open competition in the sale of industrial nitrocellulose.

III

A. Explanation of the Proposed Final Judgment

The United States and the defendants have stipulated that the Court may enter the proposed Final Judgment after compliance

with the Antitrust Procedures and Penalties Act, 15 U.S.C. §16(b)-(h). The proposed Final Judgment provides that the entry of the Final Judgment does not constitute any evidence against or an 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, the proposed Final Judgment may not be entered until the Court determines that entry is in the public interest.

1. Prohibited Conduct

Paragraph IV(A) of the proposed Final Judgment prohibits defendant SNPE and from entering, adhering to, participating in, maintaining, furthering, enforcing, or claiming either directly or indirectly any rights under, any contract, agreement, understanding, arrangement, plan, program, combination, or conspiracy with any person to: restrict supplies of industrial nitrocellulose for the United States, allocate customers in the United States, set prices or terms of sale for industrial nitrocellulose in the United States or use a common sales agent or distributor to sell or distribute industrial nitrocellulose in the United States.

Paragraph IV(B) of the proposed Final Judgment prohibits defendant SNPE from furnishing to or requesting from any other nitrocellulose producer, information concerning the prices terms or other conditions of sale in the United States for industrial nitrocellulose, unless this information has previously been disseminated to the trade at large in the form of a press release, price lists or other public announcement.

Paragraph V(A) of the proposed Final Judgment prohibits defendant Fayette from directly or indirectly entering into, adhering to , maintaining, furthering, participating in, enforcing or claiming any rights under any contract, agreement, arrangement, understanding, combination or conspiracy between

or among two or more nitrocellulose producers to do any of the things prohibited in Paragraph V(A). This Paragraph makes clear, however, that rendering services as an agent, and/or selling or promoting the sale of nitrocellulose purchased from, any nitrocellulose producer which defendant Fayette knows is a party to any such contract, agreement, arrangement, understanding, combination, or conspiracy shall not, in and of itself, constitute a violation of sub-Paragraph V(A).

Paragraph V(B) prohibits defendant Fayette from acting as an agent or sub-agent concurrently for more than one producer of nitrocellulose with respect to the sale of industrial nitrocellulose. Defendant Fayette is not prohibited from buying industrial nitrocellulose for its own account from more than one producer and reselling such industrial nitrocellulose, so long as no agreement or understanding exists between Fayette and any of the producers concerning the resale price Fayette charges.

Paragraph VI provides that nothing in the proposed Final Judgment shall be applicable to any discussions of price or other terms and conditions of sale offered by SNPE to any other nitrocellulose producer or offered by other nitrocellulose producers to SNPE in connection with a bona fide purchase or sale of industrial nitrocellulose between SNPE and such other nitrocellulose producer. Bona fide situations include those which are the result of temporary inability of a producer to meet the demand of a growing market, shortage or cessation of supply capabilities, interruption of manufacturing or distribution capabilities because of explosion, fire, accident, strike, or other work stoppage; or because of

the desire of need of a producer to obtain a type of industrial nitrocellulose it does not manufacture.

B. Affirmative Obligations

The proposed Final Judgment (Paragraph VII) requires that each defendant furnish a copy of the Final Judgment 1/ to each of its officers, directors, agents, and employees responsible for the sale of industrial nitrocellulose in the United States, and to each successor of any of the aforementioned persons within thirty (30) days after each successor is employed along with a statement advising each person of the requirements of this Final Judgment, of the criminal and civil penalties which may be imposed upon him or her and/or upon such defendant for violation of the Final Judgment, that any agent or employee who fails to comply may be subject to disciplinary action to be determined by the defendant, and that defendant's legal advisors are available to confer regarding compliance questions or problems. Paragraph VII further requires that defendants furnish a copy of the Final Judgment to every nitrocellulose producer identified in Paragraph 6 of the Complaint, and to serve on the plaintiff and file with the Court, within Sixty (60) days from the date of entry and annually thereafter, an affidavit as to the fact and manner and of its compliance with Paragraph VII.

1/ Defendant SNPE is required to serve a French Translation of the Final Judgment to its officers, directors, agents, and employees responsible for the sale of industrial nitrocellulose in the United States.

Finally, under Section XI of the Final Judgment, the Justice Department will have access, upon reasonable notice to each defendants' records and personnel in order to determine each defendants' compliance with the Judgment.

C. Scope of the Proposed Judgment

The proposed Final Judgment will remain in effect for a period of ten (10) years from the date of entry. It applies to each defendant and to all other persons in active concert or participation with any of them who shall have received actual notice of the Final Judgment by personnel service or otherwise.

D. Effect of the Proposed Judgment on Competition

The relief in the proposed Final Judgment is designed to prevent any recurrence of the activities alleged in the complaint. The prohibitive language of the Judgment is designed to ensure that each defendant will act independently in determining prices, terms and conditions at which they will sell or offer to sell industrial nitrocellulose. The affirmative obligations are designed to ensure that each defendants' employees are aware of their obligations under the decree in order to avoid a repetition of behavior that occurred.

The Department of Justice believes that the proposed Final Judgment contains adequate provisions to prevent further violations by the defendant of the type upon which the complaint is based. The Department believes that disposition of the lawsuit without further litigation is appropriate because the proposed Judgment provides all the relief which the United States sought in its complaint, and the additional expense of litigation would not result in additional public benefit.

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 suffered, as well as costs and reasonable attorneys 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 these defendants.

V

Procedures Available for Modification of the Proposed 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 Kevin R. Sullivan, Attorney, Antitrust Division, United States Department of Justice, Washington, D.C. 20530 within the 60-day period provided by 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 to withdraw its consent to the proposed Judgment at any time prior to entry. 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 its modification, interpretation or enforcement.

VI

Alternatives to the Proposed Final Judgment


The Department considers the substantive language of the Judgment to be of sufficient scope and effectiveness to make litigation on relief unnecessary, as the Judgment provides all relief which reasonably could have been expected after trial.

VII

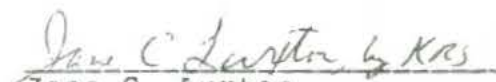
Determinative Materials and Documents

No materials or documents were considered determinative by the United States in formulating the proposed Final Judgment. Therefore, none are being filed pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b).

Dated: December 19, 1980



Kevin R. Sullivan
Attorney, United States
Department of Justice



Jane C. Luxton
Attorney, United States
Department of Justice