

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 CALMAR INCORPORATED and)
 REALEX CORPORATION,)
)
 Defendants.)

CIVIL ACTION
NO. 84-5271 (DRD)

COMPETITIVE IMPACT STATEMENT

Pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b), the United States files this Competitive Impact Statement, relating to the proposed Final Judgment submitted for entry in this case.

I.

Nature and Purpose of the Proceeding

On December 20, 1984, the United States filed a civil antitrust suit alleging that the acquisition of Realex Corporation by Calmar Incorporated would violate Section 7 of the Clayton Act, 15 U.S.C. § 18. Calmar manufactures regular sprayers, regular dispensers, other dispensing devices, plastic bottles, plastic closures, and other molded plastic packaging components at its plants in City of Industry, California, and

Washington Court House, Ohio. It had net sales of approximately \$62 million in 1983. Realex manufactures regular sprayers, regular dispensers, other dispensing devices, plastic closures, and other molded plastic packaging components at its plant in Lee's Summit, Missouri. Realex is also engaged in various other businesses. It had net sales of approximately \$25 million for the year ended October 31, 1983.

The complaint alleged that the acquisition of Realex by Calmar would eliminate actual and potential competition in the manufacture and sale of regular sprayers and regular dispensers, increase concentration in the regular sprayer and regular dispenser markets, and substantially lessen competition in the regular sprayer and regular dispenser markets. The complaint asked that the Court adjudge the proposed acquisition a violation of Section 7 of the Clayton Act and issue preliminary and permanent injunctions preventing the acquisition.

The District Court held an evidentiary hearing on the Government's Motion for Preliminary Injunction from January 21 to January 25, 1985. On January 30, 1985, the Court issued an opinion denying the motion and entered its findings of fact and conclusions of law. The Government decided not to appeal the denial of its Motion for Preliminary Injunction. On or about February 11, 1985, Calmar acquired Realex. Shortly thereafter, the parties commenced negotiations to reach a settlement of the case.

Accompanying this Competitive Impact Statement are a proposed Final Judgment and Stipulation. Under the Stipulation, 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. The Court will retain jurisdiction to interpret, modify, or enforce compliance with the provisions of the proposed Final Judgment.

II.

The Nature of the Alleged Violations

Regular sprayers and regular dispensers are plastic mechanical pump devices which sit on the top of containers. They are operated by vertically depressing the head of the pump mechanism. A regular sprayer dispenses from the container more than one-half cubic centimeter of liquid in the form of a spray. A regular dispenser dispenses from the container up to three cubic centimeters of liquid in the form of a stream. Regular sprayers and regular dispensers are made from injection-molded plastic parts, metal springs, and metal or plastic balls.

Regular sprayers and regular dispensers are sold to manufacturers and packagers of consumer products, who incorporate them into the packages in which their products are sold. Regular sprayers are generally placed on containers of

liquids that are most conveniently applied in the form of a thick, heavy spray, such as household cleaners, window cleaners, hair sets and conditioners, automotive care products, and plant care products. Regular dispensers are generally placed on containers of viscous liquid products, such as hand and body lotion and liquid soap.

The manufacture and sale of regular sprayers in the United States is a highly concentrated industry. Prior to the acquisition of Realex by Calmar, there were three domestic manufacturers and sellers of regular sprayers. Calmar was by far the largest, with approximately 60 percent of the market. Realex was the second largest, with an approximately 23 percent market share. The HHI (the Herfindahl-Hirschman Index, a measure of market concentration calculated by squaring the market share of each firm in the market and then summing the resulting numbers) was approximately 4,400. The acquisition of Realex by Calmar increased the HHI by more than 2,700, to over 7,100.

The manufacture and sale of regular dispensers in the United States is also a highly concentrated industry. Prior to the acquisition of Realex, there were four domestic manufacturers and sellers of regular dispensers (plus one large user of regular dispensers that manufactured dispensers only for its own use under license from Realex). Calmar was by far the largest, with approximately 58 percent of the market. Realex was the second largest, with an approximate 21 percent

market share. The HHI was approximately 4,000. The acquisition of Realex by Calmar increased the HHI by more than 2,400, to over 6,400.

In its January 30, 1985, opinion, the Court concluded that "the relevant [product] market includes regular sprayers, regular dispensers, fine mist sprayers, large dispensers and trigger sprayers." In the market defined by the Court, Calmar's market share was approximately 41 percent and Realex's was approximately 9 percent. The pre-merger HHI was approximately 2,300. The acquisition increased the HHI by more than 700, to over 3,000. Thus, the Court recognized that "the merger will result in a degree of concentration which establishes prima facie that it is likely to cause a substantial lessening of competition." However, relying upon United States v. Waste Management, Inc., 743 F.2d 976 (2d Cir. 1984), the Court then concluded that "even after the proposed merger the ease of entry into the market would prevent any supplier from exercising market power." Therefore, in the Court's view, the merger was unlikely to violate Section 7.

III.

Explanation of the Proposed Final Judgment

The proposed Final Judgment provides that for a period of eight years Calmar shall not merge with or acquire any entity which has been engaged in the manufacture of regular sprayers

or regular dispensers for sale within the United States within one year prior to the proposed transaction, without first obtaining the permission of the Department of Justice or the Court. For an additional two years Calmar shall not merge with or acquire any such entity without giving sixty days advance written notice of the proposed transaction to the Department of Justice. The proposed Final Judgment also provides that for a period of five years Calmar shall license certain patents obtained from Realex on a non-exclusive basis and upon reasonable and non-discriminatory terms and conditions. These patents are listed in Appendix A to the Final Judgment.

IV.

Competitive Effect of the Proposed Final Judgment

Both the regular sprayer and the regular dispenser markets are relatively small. Total sales of regular sprayers in the United States in 1984 amounted to approximately 200 million units worth about \$25 million. Total sales of regular dispensers in 1984 were nearly 130 million units worth \$16 million. Firms not currently selling regular sprayers or regular dispensers in the United States, including foreign manufacturers, could become a factor in these markets with assets and sales that, compared to other industries, are not large.

Acquisitions having a significant adverse effect on competition in these markets can therefore involve dollar amounts that do not require reporting under the premerger reporting program created by Section 7A of the Clayton Act, 15 U.S.C. § 18(a). The proposed Final Judgment eliminates the possibility that Calmar could make such acquisitions without prior notice to the government for the next ten years.

One large user of regular dispensers manufactures its requirements under a patent license obtained from Realex. Availability of a non-exclusive patent license upon reasonable and non-discriminatory terms and conditions may assist others to enter the market, either for sale to third parties or to manufacture for their own use. The proposed Final Judgment requires Calmar to make available such licenses for the patents specified in Appendix A to the Judgment.

V.

Remedies Available to Private Parties

Entry of the proposed Final Judgment will have no effect on the rights of persons who may have been injured by the alleged violation. Private plaintiffs may sue for any remedy they deem appropriate. However, pursuant to Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), this judgment may not be used as prima facie evidence in private litigation.

VI.

Procedures Available for Modification of the Proposed Final Judgment

For a period of 60 days following the filing of the proposed Final Judgment and its publication in newspapers and the Federal Register, interested persons may submit written comments to Alan L. Marx, Chief, General Litigation Section, Antitrust Division, United States Department of Justice, Washington, D.C. 20530. These comments and the government's response will be filed with the Court and published in the Federal Register. The government will carefully consider all comments to determine if there is any reason for withdrawing its consent to the proposed judgment, which it may do at any time before the decree is entered by the Court. The Court will retain jurisdiction over the judgment following its entry so as to permit any of the parties to apply for orders modifying or enforcing the decree.

VII.

Alternatives to the Proposed Final Judgment

The primary alternative considered was litigating the case on the merits in order to obtain divestiture of Realex. A trial on the merits, together with possible appeals, could have required the expenditure of substantial time and resources without any certainty of ultimate success. Even if the

government prevailed on the merits, it is not certain that Realex would eventually be restored as a viable independent competitor in the manufacture and sale of regular sprayers and regular dispensers. Therefore, we concluded that the proposed Final Judgment was the best alternative available to the government at the current time.

The government also considered requiring advance approval or notification of proposed mergers or acquisitions by Calmar of entities manufacturing or selling other types of dispensing devices. However, neither the complaint nor the government's evidence at the preliminary injunction hearing alleged that the acquisition of Realex had any competitive impact on the manufacture or sale of dispensing devices other than regular sprayers and regular dispensers. The government remains free to bring actions under the antitrust laws if Calmar attempts to acquire an entity engaged in activities not subject to the proposed Final Judgment if the effect of such an acquisition may be substantially to lessen competition.

VII.

Determinative Documents and Materials

There are no materials or documents that the United States considered determinative in formulating the proposed Final

Judgment. Accordingly, none are being filed with this
Competitive Impact Statement.

Respectfully submitted,

Dated:


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