

Trade Regulation Reporter - Trade Cases (1932 - 1992), United States v. Hercules Inc., U.S. District Court, D. New Jersey, 1981-1 Trade Cases ¶63,968, (Mar. 27, 1981)

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United States v. Hercules Inc.

1981-1 Trade Cases ¶63,968. U.S. District Court, D. New Jersey, Civil Action No. 80-136, Entered March 27, 1981.

(Competitive impact statement and other matters filed with settlement: 45 *Federal Register* 85840). Case No. 2733, Antitrust Division, Department of Justice.

Sherman Act

Exchange of Information: Price, Production Capacity or Acquisition Information: Good Faith Transactions: Domestic Industrial Nitrocellulose: Consent Decree.— Exchanging price or production capacity information with any other producer or U. S. distributor of industrial nitrocellulose was barred by a consent decree agreed to by a domestic producer. The exchange of information prohibition should not apply to press releases, public announcements or written notifications to customers. The domestic producer was barred from acting as a distributor or agent in the United States for industrial nitrocellulose produced by others. Good faith transactions were permitted under the decree, as well as exchange of information in connection with a possible acquisition, sale of assets or joint venture provided the government was informed about it.

For plaintiff: Sanford M. Litvack, Asst. Atty. Gen., Joseph H. Widmar, Charles F. B. McAleer, Spec. Asst. for Judgment Negotiations, Charles S. Stark, Kevin R. Sullivan, Jane C. Luxton, and James J. Egan. **For defendant:** Thomas L. Morrissey, of Carpenter, Bennett & Morrissey, and Ephraim Jacobs, of Foley, Lardner, Hollabaugh & Jacobs.

Final Judgment

Debevoise, D. J.: Plaintiff, United States of America, having filed its complaint herein on January 11, 1980, and plaintiff and defendant, Hercules Incorporated (“Hercules”), by their respective attorneys, having consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein and without this Final Judgment’s constituting any evidence or an admission by any party with respect to any such issue;

Now, Therefore, before the taking of any testimony and without trial or adjudication of any issue of fact or law herein and upon consent of the parties hereto, it is hereby,

Ordered, Adjudged, and Decreed as follows:

I

[*Jurisdiction*]

This Court has jurisdiction of the subject matter of this action and of the parties consenting hereto. The complaint states a claim upon which relief may be granted against the defendant under [Section 2 of the Sherman Act](#) (15 U. S. C. §2).

II

[*Definitions*]

As used in this Final Judgment, the term:

(A) “Person” means any individual, corporation, partnership, firm, association, or other business or legal entity;

(B) "Industrial nitrocellulose" means a dry white amorphous synthetic chemical produced by the chemical action of nitric acid on cellulose. Commonly made from the cellulose found in wood pulp or cotton linters, industrial nitrocellulose is classified by its uses and has a nitrogen content between 10.8 percent and 12.2 percent;

(C) "Nitrocellulose producer" means those persons engaged in the business of manufacturing nitrocellulose;

(D) "Distributor" means (so long as they serve in that capacity) any person in the U. S. who has been publicly designated as an agent or distributor, or whose designation as such is otherwise made known to the defendant by the producer, distributor, or agent;

(E) "Subsidiary" shall mean a company of which the parent owns more than 50% of capital stock; and

(F) "Affiliate" shall mean an entity of which the defendant has more than 50% non-stock ownership interest or has less than 50% interest and exercises or has the right to exercise control.

III

[*Applicability*]

This Final Judgment applies to the defendant, Hercules, and to its officers, directors, agents, employees, subsidiaries, affiliates, successors, and assigns, and to all other persons in active concert or participation with any of them who shall have received actual notice of this Final Judgment by personal service or otherwise.

IV

[*Price Information*]

Subject to the exceptions provided in Articles V and VI herein, defendant Hercules is enjoined and restrained from:

(A) Furnishing to or requesting from any other industrial nitrocellulose producer, or distributor in the U. S. for such producer:

1. information concerning the prices, terms or other conditions of sale which any industrial nitrocellulose producer intends to charge or is considering submitting to any actual or prospective purchaser of industrial nitrocellulose; provided that this prohibition shall not apply to information disseminated in the form of a press release or public announcement, or to written notification to all or to a class of customers or prospective customers; and

2. information concerning industrial nitrocellulose production capacity, excess production capacity, or production available for export; provided that this prohibition shall not apply to information disseminated in the form of a press release or public announcement, or to written notification to all or to a class of customers or prospective customers; and

(B) Acting as a distributor or agent in the United States for industrial nitrocellulose produced by any other industrial nitrocellulose producer.

V

[*Good Faith Sales*]

Nothing in this Final Judgment shall be applicable to any communications with any other industrial nitrocellulose producer, or distributor in the United States for such producer, concerning price, other terms and conditions of sale, or production available for sale, in connection with a bona fide potential purchase or sale of industrial nitrocellulose between Hercules and such other industrial nitrocellulose producer, or distributor in the United States for such producer. The parties agree that, while it is not possible to anticipate all bona fide situations that might lead to buyer-seller relations between producers in the purchase or sale of industrial nitrocellulose, usually such relations are the result of: temporary inability of a producer to meet the demands 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; and the desire or need of a producer to obtain a type or grade of industrial nitrocellulose it does not manufacture.

VI

[*Acquisitions*]

Nothing in this Final Judgment shall be applicable to the furnishing or requesting of information described in Article IV hereof in connection with a possible acquisition, sale or licensing of assets, business or stock, or a joint venture; provided that in such circumstances, defendant is ordered and directed, prior to the furnishing or requesting of such information, to advise plaintiff of the nature of the transaction and of the information to be furnished or requested.

VII

[*Compliance*]

Defendant is ordered and directed to:

(A) Furnish a copy of this Final Judgment to each of its officers, directors, sales and service managers concerned with the production or sale of industrial nitrocellulose within thirty (30) days of entry of this Final Judgment;

(B) Furnish a copy of this Final Judgment to each successor to those persons described in Paragraph VII (A) hereof within sixty (60) days after each such successor is employed;

(C) Attach to each copy of this Final Judgment furnished pursuant to Subparagraphs VII (A) and (B) hereof a statement advising each person of his or her obligations; such statement shall include (1) an instruction that noncompliance with this Final Judgment will result in appropriate disciplinary action determined by the defendant which may include dismissal, and (2) advice that the defendant's legal advisers are available at all reasonable times to confer with such persons regarding any compliance question or problem;

(D) File with this Court and serve upon the plaintiff within ninety (90) days after the date of entry of this Final Judgment and annually thereafter on the anniversary of this Final Judgment an affidavit as to the fact and manner of its compliance with Paragraph VII hereof; and

(E) Serve upon the plaintiff annually on the anniversary of this Final Judgment the following information concerning bona fide purchases and sales of industrial nitrocellulose between Hercules and any other industrial nitrocellulose producer pursuant to Article V hereof: identity of purchaser and seller; amount of industrial nitrocellulose purchased or sold; and price of nitrocellulose purchased or sold. If Hercules is the purchaser, the information so furnished shall include a statement of the reasons for such purchase.

VIII

[*Inspections*]

For the purpose of determining or securing compliance with this Final Judgment, and subject to any legally recognized privilege, from time to time:

(A) Duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General or of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to defendant made to its principal office, be permitted:

(1) Access during regular office hours of defendant to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of defendant, who may have counsel present; and

(2) Subject to the reasonable convenience of defendant and without restraint or interference from it, to interview officers, employees, and agents of defendants, who may have counsel present;

(B) Upon the written request of the Attorney General or of the Assistant Attorney General in charge of the Antitrust Division made to defendant's principal office, defendant shall submit such written reports, under oath if requested, with respect to any of the matters contained in this Final Judgment as may be requested;

(C) No information or documents obtained in the means provided in this Section VIII shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the United States, except in the course of legal proceedings to which the United States is a party, or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law; and

(D) If at the time information or documents are furnished by defendant to plaintiff by the means provided in this Section VIII, and defendant at the time represents and identifies in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(7) of the Federal Rules of Civil Procedure, and said defendant marks each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure," then ten (10) days notice shall be given by plaintiff to defendant prior to divulging such material in any legal proceedings (other than a grand jury proceeding) to which defendant is not a party.

IX

[Retention of Jurisdiction]

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders or directions as may be necessary or appropriate for the construction or the carrying out of this Final Judgment, for the modification of any of the provisions hereof, for the enforcement of compliance herewith, or for the punishment of violation hereof.

X

[Acquirers]

Defendant shall require, as a condition of the sale or disposition of all, or substantially all, of the assets used by it in its industrial nitrocellulose business, that the acquiring party agree to be bound by the provisions of this Final Judgment, and that such agreement be filed with the court.

XI

[10-Year Term]

The term of this Final Judgment shall be ten (10) years from the date of entry.

XII

[Public Interest]

Entry of this Final Judgment is in the public interest.