EXHIBIT A

adverse effects of surface coal mining operations west of the 100th meridian. Part 822 requires the permittee to install, maintain, and operate a monitoring system in order to provide specific protection for alluvial valley floors. This information is necessary to determine whether the unique hydrologic conditions of alluvial valley floors are protected according to the Act.

Bureau Form Number: None.

Frequency of Collection: Annually.

Description of Respondents: Surface coal mining operators who operate on alluvial valley floors.

Total Annual Responses: 27.

Total Annual Burden Hours: 2,970.

Dated: February 10, 2004.

Sarah E. Donnelly,

Acting Chief, Division of Regulatory Support.

[FR Doc. 04–3286 Filed 2–13–04; 8:45 am]

BILLING CODE 4310–05–M

INTERNATIONAL TRADE COMMISSION

[Inv. No. 337–TA–489]

In the Matter of Certain Sildenafil or any Pharmaceutically Acceptable Salt Thereof, Such as Sildenafil Citrate, and Products Containing Same; Notice of Commission Decision Not to Review an Initial Determination Terminating Investigation as to One Respondent on the Basis of a Settlement Agreement; Notice of Issuance of General Exclusion Order; Termination of the Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined not to review an initial determination (Order No. 22) issued by the presiding administrative law judge ("ALJ") terminating the investigation as to respondent Biovea on the basis of a settlement agreement. Notice is also hereby given that, having previously found a violation of section 337 of the Tariff Act of 1930, 19 U.S.C. 1337, the Commission has issued a general exclusion order under section 337(d)(2) and terminated the investigation.

FOR FURTHER INFORMATION CONTACT: Wayne Herrington, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone 202–205–3090. Copies of all nonconfidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone 202–205–2000. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov*. Hearing-impaired persons are advised that information on the matter can be obtained by contacting the Commission's TDD terminal on 202–205–1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on March 6, 2003, based on a complaint filed by Pfizer, Inc. ("Pfizer") of New York, New York. 68 FR 10749 (March 6, 2003). The complaint, as supplemented, alleged violations of section 337 of the Tariff Act of 1930 in the importation into the United States, sale for importation, and sale within the United States after importation of certain sildenafil or any pharmaceutically acceptable salt thereof, such as sildenafil citrate, and products containing same by reason of infringement of claims 1–5 of Pfizer's U.S. Patent No. 5,250,534 ("the '534 patent").

Fifteen respondents were named in the Commission's notice of investigation. Thirteen of these were successfully served with the complaint and notice of investigation. One respondent has previously been terminated from the investigation on the basis of a settlement agreement.

Eleven respondents were found to be in default, including respondent #1 Aabaaca Viagra LLC ("Aabaaca"). On October 27, 2003, the ALJ issued an initial determination ("ID") (Order No. 19) finding that Pfizer had demonstrated that there is a violation of section 337 by reason of the defaulting respondents' importation and sale of sildenafil, sildenafil salts, or sildenafil products that infringe one or more of claims 1–5 of the '534 patent. He also found that Pfizer had established the existence of a domestic industry. He recommended the issuance of a general exclusion order, but did not recommend the issuance of a cease and desist order against defaulting respondent Aabaaca, as had been requested by Pfizer. The ALJ also recommended that the bond permitting temporary importation during the Presidential review period be set at 100 per cent of entered value. On November 24, 2003, the Commission issued notice that it had determined not to review the ALJ's ID and set a schedule for written submissions on remedy, the public interest, and bonding. Both Pfizer and the Commission investigative attorney timely filed initial submissions on remedy, the public interest, and bonding. The Commission investigative attorney filed a reply submission.

On January 6, 2004, the ALJ issued an initial determination (Order No. 22) terminating respondent Biovea on the basis of a settlement agreement. No petitions for review of Order No. 22 were filed.

Having reviewed the record in this investigation, including the recommended determination of the ALJ and the written submissions of the parties, the Commission determined (1) to not review Order No. 22, terminating respondent Biovea on the basis of a settlement agreement and (2) to terminate the investigation with the issuance of a general exclusion order under section 337(d)(2) prohibiting the unlicensed entry for consumption of sildenafil or any pharmaceutically acceptable salt thereof, such as sildenafil citrate, and products containing same which infringe one or more of claims 1–5 of the '534 patent.

The Commission also determined that the public interest factors enumerated in section 337(d) do not preclude the issuance of the aforementioned general exclusion order and that the bond during the Presidential review period shall be 100 percent of the entered value of the articles in question.

This action is taken under the authority of section 337 of the Tariff Act of 1930, 19 U.S.C. 1337, the Administrative Procedure Act, and §§ 210.41–210.51 of the Commission's Rules of Practice and Procedure, 19 CFR 210.41–210.51.

Issued: February 6, 2004.

By order of the Commission.

Marilyn R. Abbott,

Secretary.

[FR Doc. 04–3306 Filed 2–13–04; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Antitrust Division

United States v. DNH International Sarl, Dyno Nobel, Inc., El Paso Corp., and Coastal Chem, Inc.; Competitive Impact Statement, Proposed Final Judgment and Complaint

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b) through (h), that a

Complaint, proposed Final Judgment, Hold Separate Stipulation and Order, and Competitive Impact Statement were filed with the United States District Court for the District of Columbia in *United States of America* v. *DNH International Sarl, Dyno Nobel, Inc., El Paso Corp., and Coastal Chem, Inc.*, Civil Action No. 1:03CV2486. On December 2, 2003, the United States filed a Complaint alleging that the proposed acquisition by DNH International Sarl subsidiary Dyno Nobel, Inc. ("Dyno"), of two industrial grade ammonium nitrate ("IGAN") production plants owned by El Paso Corporation subsidiary Coastal Chem, Inc. ("Coastal"), would violate Section 7 of the Clayton Act, 15 U.S.C. 18. The proposed Final Judgment, filed at the same time as the Complaint, requires Dyno to divest its interest in a Vineyard, Utah, IGAN production facility, or, in the alternative and at the direction of the United States, its Battle Mountain, Nevada, IGAN production facility just acquired from Coastal. A Competitive Impact Statement filed by the United States describes the Complaint, the proposed Final Judgment, and the remedies available to private litigants who may have been injured by the alleged violations.

Copies of the Complaint, proposed Final Judgment and Competitive Impact Statement are available for inspection at the Department of Justice, Antitrust Division, in Suite 215 North, 325 7th Street, NW., Washington, DC 20530 (telephone: 202–514–2481), and at the Office of the Clerk of the United States District Court for the District of Columbia, 333 Constitution Avenue, NW., Washington, DC 20001. Copies of these materials may be obtained upon request and payment of a copying fee.

Public comment is invited within the statutory 60-day comment period. Such comments, and responses thereto, will be published in the **Federal Register** and filed with the Court. Comments should be directed to Maribeth Petrizzi, Chief, Litigation II Section, Suite 3000, 1401 H Street, NW., Washington, DC 20530 (telephone: 202–307–0924).

Dorothy B. Fountain,

Deputy Director of Operations, Antitrust Division.

United States District Court for the District of Columbia

Case No. 1: 03CV02486; JUDGE: Gladys Kessler; DECK TYPE: Antitrust; DATE STAMP: January 21, 2004

United States of America, Plaintiff, v. DNH International Sarl, Dyno Nobel, Inc., El Paso Corp., and Coastal Chem, Inc., Defendants; Competitive Impact Statement

Plaintiff United States, pursuant to section 2(b) of the Antitrust Procedures and Penalties Act ("APPA" or "Tunney Act"), 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 August 6, 2003, Defendant DNH International Sarl ("DNH"), through its wholly owned subsidiary Defendant Dyno Nobel, Inc. ("Dyno"), agreed to purchase certain assets of Defendant Coastal Chem, Inc. ("Coastal"AAA), a subsidiary of Defendant El Paso Corporation ("El Paso"). Theses assets include two industrial grade ammonium nitrate ("IGAN") plants, one located in Cheyenne, Wyoming and the other in Battle Mountain, Nevada. Dyno currently owns a 50 percent interest in Geneva Nitrogen LLC, which owns an IGAN production facility in Vineyard, Utah (the "Geneva facility").

On December 2, 2003, the United States filed a civil antitrust lawsuit alleging that the proposed acquisition would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18. The Complaint alleges that Dyno's acquisition of Coastal's IGAN production facilities would substantially lessen competition in the production of IGAN for sale in Western North America. Coastal and one other firm are the primary suppliers of IGAN consumed in Western North America, accounting for over 80 percent of IGAN sales in that region, while Dyno's interest in the Geneva facility makes it the best located of the three fringe IGAN producers that supply the region. The acquisition would combine Coastal's Cheyenne and Battle Mountain facilities with Dyno's 50 percent interest in the Geneva facility. Such a reduction in competition would result in consumers of IGAN in the western United States paying higher prices for IGAN. Accordingly, 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) a permananet injunction that would foreclose DNH or any of its subsidiaries from purchasing Coastal's Cheyenne and Battle Mountain IGAN production facilities.

At the same time the Complaint was filed, the United States filed a proposed settlement that would permit Dyno to complete its acquisition of the two Coastal IGAN production facilities but require Dyno to divest its interest in Geneva Nitrogen LLC in such a way as to preserve competition in the Western North American IGAN market. The settlement consists of a Hold Separate Stipulation and Order and a proposed Final Judgment.

According to the terms of the settlement, Dyno must divest its interest in Geneva Nitrogen LLC to a person acceptable to the United States, in its sole discretion, within ninety (90) calendar days after the filing of the Complaint in this matter, or within five (5) days after notice of entry of the Final Judgment, whichever is later. The United States, in its sole discretion, may extend the time period for divestiture by an additional period of time, not to exceed sixty (60) calendar days. If Dyno does not complete the divestiture within the prescribed time period, then the United States may nominate, and the Court will appoint, a trustee who will have sole authority to divest Dyno's interest in Geneva Nitrogen LLC. If the trustee is unable to divest Dyno's interest in Geneva Nitrogen LLC in a timely manner, it shall, as directed by the United States in its sole discretion, divest the Battle Mountain facility that Dyno is acquiring from Coastal.

The parties have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the Tunney Act. 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 Judgment and to punish violations thereof.

II. Description of the Events Giving Rise to the Alleged Violations of the Antitrust Laws

A. The Defendants and the Proposed Transaction

DNH, a Luxembourg corporation headquartered in Oslo, Norway, is one of the world's largest explosives producers. DNH reported sales in 2002 of approximately $630 million. Its Dyno subsidiary is a Delaware corporation operating out of Salt Lake City, Utah. Dyno, which reported 2002 sales of roughly $336 million, is one of the two largest producers of explosives in North America.

El Paso, a Delaware corporation headquartered in Houston, Texas, reported 2002 sales of approximately $12 billion. El Paso is the leading provider of natural gas services and the largest pipeline company in North America. Its Coastal subsidiary, which also is incorporated in Delaware and located in Houston, is one of the two largest IGAN producers in Western North America, reporting 2002 sales of roughly $146 million.

On August 6, 2003, Dyno agreed to purchase Coastal's IGAN production facilities in Battle Mountain, Nevada and Cheyenne, Wyoming. The acquisition would combine the two Coastal facilities with Dyno's 50 percent interest in the Geneva facility, which is the best located of the three fringe IGAN facilities that supply Western North America.

B. The Effects of the Transaction on Competition in the IGAN Market

1. The Relevant Market Is the Production of IGAN for Sale in Western North America

The Complaint alleges that the production and sale of IGAN constitutes a relevant product market within the meaning of section 7 of the Clayton Act. IGAN, which is in the form of low-density, porous prills (or granules), is an essential ingredient used in the production of blasting agents, one of two types of explosives used in the mining and construction industries. Blasting agents accounted for nearly all of the explosives sold in North America last year. They are used principally to mine coal, rock and other nonmetals, and metals such as gold and copper. The purchase of blasting agents constitutes a relatively small portion of the total costs of the mining or other industrial

operations in which the blasting agents are used.

The other type of explosive commonly used in the mining and construction industries, high explosives, includes products such as dynamite. High explosives are much more expensive than blasting agents and are far more sensitive to detonation; high explosives can be detonated with only a blasting cap, while blasting agents are detonated using high explosives.

Virtually all blasting agents used in North America contain ammonium nitrate in the form of IGAN, and essentially all IGAN sold in North America is used to make blasting agents. The most widely used blasting agent is known as ANFO, which is made by soaking IGAN in fuel oil (Ammonium Nitrate plus Fuel Oil). Although ammonium nitrate is also available in an agricultural grade, which is in the form of high-density prills, only the more porous, lower density IGAN prills are used to make ANFO. The greater porosity of the IGAN prill allows for significantly better absorption of the fuel oil and makes an explosive with a much higher sensitivity to detonation. IGAN is also used to make explosive slurries, gels, and emulsions, which can be used as blasting agents either alone or in combination with ANFO.

A small but significant increase in the price of IGAN would not cause consumers of IGAN to use sufficiently less IGAN so as to make such a price increase unprofitable. Accordingly, the production and sale of IGAN is a line of commerce and a relevant product market within the meaning of section 7 of the Clayton Act.

The Complaint further alleges that "Western North America" constitutes a relevant geographic market in which IGAN is sold. The Complaint defines Western North America as the eleven contiguous western-most states in the United States and the Canadian provinces of British Columbia, Alberta, and Saskatchewan.

IGAN typically is shipped to customers in bulk either by rail or by truck. Freight costs are a significant component of the total delivered price of IGAN and limit the geographic area that an IGAN production facility profitably can serve. The physical characteristics of the product impose additional limitations on the geographic reach of an IGAN production facility. IGAN degrades over time as moisture in the air causes it to "cake," rendering it much less economical to use as an ingredient to make blasting agents. Also, the more IGAN is handled between production and use, the more the IGAN prills break down into unusable fine particles.

IGAN produced at Coastal's Battle Mountain, Nevada and Cheyenne, Wyoming facilities is regularly sold within Western North America. IGAN produced at the Geneva facility, in which Dyno has a 50 percent interest, is also regularly supplied into Western North America. Only three other firms own facilities that regularly produce IGAN for sale in Western North Americas. One of those three firms is Oricas Limited ("Orica"), which owns the remaining 50 percent interest in the Geneva facility and also owns an IGAN facility located in Alberta, Canada. The other two facilities are located in Benson, Arizona and Manitoba, Canada.

No other firm owns an IGAN production facility from which it supplies IGAN on a regular basis to Western North America. Apart from the facilities referenced above, the IGAN facilities closest to Western North American customers are located along the Mississippi River. The additional transportation costs associated with supplying IGAN to Western North America from these facilities, coupled with the increased risk of degradation of the IGAN due to prolonged shipping and handling of the product, significantly limit the ability of these distant facilities to supply Western North America. A small but significant increase in the price of IGAN produced for sale in Western North America would not cause consumers of IGAN in Western North America to purchase sufficient amounts of IGAN produced at facilities that do not already regularly supply Western North America such that a price increase would be unprofitable. Accordingly, western North America is a relevant geographic market, within the meaning of section 7 of the Clayton Act, in which to assess the competitive effects of the proposed acquisition.

2. The Proposed Acquisition Would Result in Anticompetitive Effects

The Complaint alleges that Dyno's acquisition of Coastal's Battle Mountain and Cheyenne IGAN production facilities likely will substantially lessen competition in the production of IGAN for sale in Western North America, eliminate actual and potential competition between Dyno and Coastal in the production of IGAN for sale in Western North America, and increase prices for IGAN produced for sale in Western North America.

Specifically, the Complaint alleges that two firms—Coastal and Orica—account for over 80 percent of IGAN sales in Western North America, which in 2002 exceeded $150 million, and that Dyno's interest in the Geneva facility makes it the best located of the three fringe producers that supply the market. After the proposed acquisition, the two dominant firms together would control roughly 90 percent of such sales, with Dyno and Coastal combined having a share of approximately 50 percent.

In Western North America, most IGAN-containing blasting agents are consumed in mines located in one of three areas: the Powder River Basin in Wyoming (coal mines); Northern Nevada (gold mines); and the so-called "Four-Corners Area" surrounding the junction of Utah, Colorado, New Mexico, and Arizona (coal mines). Coastal and Orica have facilities that are well-positioned to supply the Powder River Basin and Northern Nevada. The Geneva plant, which has an annual capacity of about 100,000 tons and is equally owned by Orica and Dyno, is located roughly equidistant from Northern Nevada, the Powder River Basin, and the Four-Corners Area and is well-positioned to serve all three areas. In contrast, the two other fringe firms that produce IGAN for sale in Western North America are located at the outer reaches of the relevant geographic market.

The proposed transaction, which would combine Coastal's Battle Mountain and Cheyenne facilities with Dyno's 50 percent interest in the Geneva facility, thus would eliminate independent competition from the best located of the three fringe IGAN producers that supply Western North America.

Successful entry into the Western North American IGAN market would be expensive and time-consuming, and thus would be unlikely to constrain an increase in the price of IGAN in Western North America. To be successful, a new entrant likely would require an efficient IGAN facility that could produce at least one-quarter of total IGAN sales in Western North America in order to cover the estimated $70 million cost of constructing such a facility. An IGAN facility with that capacity would take over two years to complete. Considering the time and capital expense required to construct such a production facility, entry is unlikely to occur in response to a small by significant increase in the price of IGAN in Western North America.

III. Explanation of the Proposed Final Judgment

The proposed Final Judgment will preserve competition in the production of IGAN for sale in Western North America. The Judgment requires that within ninety (90) calendar days after the filing of the Complaint in this matter, or within five (5) days after notice of entry of the Final Judgment, whichever is later, Dyno must sell its 50 percent interest in Geneva Nitrogen LLC, the owner of the Geneva facility, to an acquirer acceptable to the United States. The United States may extend this time period for divestiture for one additional period, not to exceed sixty (60) calendar days. Dyno must use its best efforts to divest its 50 percent interest in Geneva Nitrogen LLC as expeditiously as possible.

If Dyno does not accomplish the ordered divestiture within the prescribed time period, the United States will nominate, and the Court will approve and appoint, a trustee to assume sole power and authority to complete the divestiture of Dyno's 50 percent interest in Geneva Nitrogen LLC. Should the trustee determine that this divestiture cannot be accomplished expeditiously, the trustee shall notify the United States and the parties and provide the reasons supporting its conclusion. Upon receipt of such notice from the trustee, the United States, in its sole discretion, shall have the right to direct the trustee to sell Coastal's Battle Mountain facility instead.

The United States considers the sale of Dyno's 50 percent interest in Geneva Nitrogen LLC to be satisfactory relief. The sale of that half-interest to a buyer that does not already produce IGAN for sale in Western North America would leave the post-acquisition market essentially the same as the pre-acquisition market, with the buyer replacing Dyno in the marketplace as the best positioned of the three fringe producers of IGAN in the region. The United States is optimistic that an acceptable buyer for Dyno's 50 percent interest in Geneva Nitrogen LLC can be found in a timely

manner. If not, the United States is satisfied that the sale of Coastal's Battle Mountain facility to a buyer acceptable to the United States would be a suitable alternative divestiture. Although the Geneva facility is better located than the Battle Mountain plant with respect to the majority of IGAN-consuming customers in Western North America—those located in the gold mining region of Northern Nevada, and in the coal mining industries found in the "Four Corners Area" and the Powder River Basin—Dyno's share of the Geneva facility's output is less than the capacity of the Battle Mountain plant. Because of this capacity advantage, the competitive significance of an independent Battle Mountain facility should be comparable to that of the better-located Geneva facility.

DNH, Dyno, El Paso, and Coastal must cooperate fully with the trustee's efforts to divest either Dyno's 50 percent interest in Geneva Nitrogen LLC or, should the United States so direct, Coastal's Battle Mountain facility to an acquirer acceptable to the United States, and they must report periodically to the United States on their divestiture efforts. If the trustee is appointed, defendant DNH will pay all costs and expenses of the trustee. The trustee's commission will be based in part on the price obtained for the divested assets and the speed with which the divestiture is completed, thus providing an incentive for the trustee to accomplish a speedy divestiture. After its 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. If the divestiture has not been accomplished within six months of the trustee's appointment, the trustee and the parties will make recommendations to the Court, which shall enter such orders as may be appropriate to carry out the purpose of the Final Judgment, including extending the trust and the term of the trustee's appointment.

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 attorneys' 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. 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 entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The Tunney Act provides a period of at least sixty days preceding the effective date of the proposed Final Judgment during which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty 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 by the Court. 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:

Maribeth Petrizzi, Chief, Litigation II Section, Antitrust Division, United States Department of Justice, 1401 H Street, NW., Suite 3000, Washington, DC 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 against defendants DNH, Dyno, El Paso, and Coastal. The United States could have continued the litigation to seek preliminary and permanent injunctions against Dyno's acquisition of Coastal's IGAN production facilities. The United States is satisfied, however, that the proposed relief, once implemented by the Court, will preserve and ensure competition in the relevant market.

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-day comment period, after which the Court shall determine whether entry of the proposed Final Judgment "is in the public interest." In making 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). As the United States Court of Appeals for the District of Columbia Circuit has 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. *United States* v. *Microsoft Corp.*, 56 F.3d 1448, 1458–62 (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." [1] 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 and its responses to comments in order to determine whether those explanations are reasonable under the circumstances."

United States v. *Mid-America Dairymen, Inc.*, 1977–1 CCH Trade Cas. ¶ 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) (citing *United States* v. *Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft*, 56 F.3d at 1460–62. Courts have held that

"[t]he 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."

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[2]

The proposed Final Judgment, therefore, should not be reviewed under a standard of

[1] 119 Cong. Rec. 24598 (1973); *See also United States* v. *Gillette Co.*, 406 F. Supp. 713, 715 (D. Mass. 1975). A "public interest" determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed by the Department of Justice pursuant to the APPA. Although the APPA authorizes the use of additional procedures, 15 U.S.C. 16(f), those procedures are discretionary. A court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues. H.R. 93–1463, 93rd Cong. 2d Sess. 8–9, *reprinted in* (1974) U.S. Code Cong., & Ad. News 6535, 6538.

[2] *Cf. BNS*, 858 F.2d at 463 (holding that the court's "ultimate authority under the [APPA] is limited to approving or disapproving the consent decree"), *Gillette*, 406 F. Supp. at 716 (noting that, in this way, the court is constrained to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass"). *See generally Microsoft*, 56 F.3d at 1461 (discussing whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest' ").

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 of acceptability or is 'within the reaches of public interest.'" *United States* v. *AT&T*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *Gillette*, 406 F. Supp. at 716), *aff'd sub nom. Maryland* v. *United States*, 460 U.S. 1001 (1983); *see also United States* v. *Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy).

Moreover, the Court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States alleges in its Complaint, and does not authorize the Court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459. Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Id.* at 1459–60.

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: January 21, 2004.

Respectfully submitted,

Michael K. Hammaker
D.C. Bar No. 233684
U.S. Department of Justice
Antitrust Division, Litigation II Section
1401 H Street, NW., Suite 3000
Washington, DC 20530

Certificate of Service

I, Joshua P. Jones, hereby certify that on January 21, 2004, I caused copies of the foregoing Competitive Impact Statement to be served on Defendants DNH International Sarl, Dyno Nobel, Inc., El Paso Corporation, and Coastal Chem, Inc., by facsimile and by mailing these documents first-class, postage prepaid, to duly authorized legal representatives of those parties, as follows:

Counsel for DNH International Sarl and Dyno Nobel, Inc.
Raymond J. Etcheverry, Esquire
Parsons, Behle & Latimer
201 South Main Street, Suite 1800
Salt Lake City, UT 84111

Counsel for El Paso Corporation and Coastal Chem, Inc.
Eric H. Queen, Esquire
John R. Ingrassia, Esquire
Fried, Frank, Harris, Shriver & Jacobson
One New York Plaza
New York, NY 10004

Joshua P. Jones
GA Bar No. 091645
Antitrust Division
U.S. Department of Justice
1401 H Street, NW., Suite 3000
Washington, DC 20530
(202) 307–1031

United States District Court for the District of Columbia

Case No. 1:03CV02486; Judge: Gladys Kessler; Deck Type: Antitrust; Date Stamp: 12/02/2003

United States of America, Plaintiff, v. DNH International Sarl, Dyno Nobel, Inc., El Paso Corporation, and Coastal Chem, Inc., Defendants; Final Judgment

Whereas, plaintiff, United States of America, filed its Complaint on December 2, 2003, and plaintiff and defendants, DNH International Sarl, Dyno Nobel, Inc., El Paso Corporation and Coastal Chem, Inc., by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law, and without this Final Judgment constituting any evidence against or admission by any party regarding any issue of fact or law;

And Whereas, defendants agree to be bound by the provisions of this Final Judgment pending its approval by the Court;

And Whereas, the essence of this Final Judgment is the prompt and certain divestiture of certain rights or assets by the defendants to assure that competition is not substantially lessened;

And Whereas, plaintiff requires defendants to make certain divestitures for the purpose of remedying the loss of competition alleged in the Complaint;

And Whereas, defendants have represented to the United States that the divestiture required below can and will be made and that defendants will later raise no claim of hardship or difficulty as grounds for asking the Court to modify any of the divestiture provisions contained below;

Now Therefore, before any testimony is taken, without trial or adjudication of any issue of fact or law, and upon consent of the parties, it is *ordered, adjudged and decreed:*

I. Jurisdiction

This Court has jurisdiction over the subject matter of and each of the parties to this action. The Complaint states a claim upon which relief may be granted against defendants under section 7 of the Clayton Act, as amended, 15 U.S.C. 18.

II. Definitions

As used in this Final Judgment:

A. "Acquirer" means the entity or entities to whom defendants divest the Geneva Production Asset or, alternatively, the Battle Mountain Production Asset.

B. "DNH" means defendant DNH International Sarl, a Luxembourg corporation with its headquarters in Oslo, Norway, its successors and assigns, and its subsidiaries (including defendant Dyno Nobel, Inc.), divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

C. "El Paso" means El Paso Corporation, a Delaware corporation with its headquarters in Houston, Texas, and its successors and assigns, its subsidiaries, divisions (including defendant Coastal Chem, Inc.), groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

D. "IGAN" means low density or industrial grade ammonium nitrate which, when mixed with fuel oil, forms an explosive known as ANFO.

E. "Geneva Production Asset" means, unless otherwise noted, DNH's 50 percent membership interest in Geneva Nitrogen, LLC, a Delaware limited liability company which owns an IGAN production facility located at 1165 North Geneva Road, Vineyard, Utah 84601, including all of DNH's rights, titles, and interests in the following:

1. The tangible assets of the Geneva facility and the real property on which the Geneva facility is situated; any facilities used for research, development, engineering or other support to the Geneva facility, and any real property associated with those facilities; manufacturing and sales assets relating to the Geneva facility, including capital equipment, vehicles, supplies, personal property, inventory, office furniture, fixed assets and fixtures, materials, on- or off-site warehouses of storages facilities, and other tangible property or improvements; all licenses, permits and authorizations issued by any governmental organization relating to the Geneva facility; all contracts, agreements, leases, commitments, and understandings pertaining to the operations of the Geneva facility; supply agreements; all customer lists, accounts, and credit records; and other records maintained by DNH in connection with the operations of the Geneva facility; and

2. The intangible assets of the Geneva facility, including all patents, licenses and sublicenses, intellectual property, trademarks, trade names, service marks, service names, technical information, know-how, trade secrets, drawings, blueprints, designs, design protocols, specifications for materials, specifications for parts and devices, safety procedures for the handling of materials and substances, quality assurance and control procedures, design tools and simulation capability, and all manuals and technical information DNH provides to its employees, customers, suppliers, agents or licensees in connection with the operations of the Geneva facility.

F. "Battle Mountain Production Asset" means, unless otherwise noted, all of El Paso's rights, titles, and interests in the IGAN production facility located in Battle Mountain, Nevada, including:

1. All tangible assets of the Battle Mountain facility and the real property on which the Battle Mountain facility is situated; any facilities used for research, development, engineering or other support to the Battle Mountain facility, and any real property associated with those facilities; manufacturing and sales assets relating to the Battle Mountain facility, including capital equipment, vehicles, supplies, personal property, inventory, office furniture, fixed assets and fixtures, materials, on- or off-site warehouses or storages facilities, and other tangible property or improvements; all

licenses, permits and authorizations issued by any governmental organization relating to the Battle Mountain facility; all contracts, agreements, leases, commitments, and understandings pertaining to the operations of the Battle Mountain facility; supply agreements; all customer lists, accounts, and credit records; and other records maintained by El Paso in connection with the operations of the Battle Mountain facility; and

2. All intangible assets of the Battle Mountain facility, including all patents, licenses and sublicenses, intellectual property, trademarks, trade names, service marks, service names, technical information, know-how, trade secrets, drawings, blueprints, designs, design protocols, specifications for materials, specifications for parts and devices, safety procedures for the handling of materials and substances, quality assurance and control procedures, design tools and simulation capability, and all manuals and technical information El Paso provides to its employees, customers, suppliers, agents or licensees in connection with the operations of the Battle Mountain facility.

III. Applicability

A. This Final Judgment applies to DNH and El Paso, as defined above, and all other persons in active concert or participation with any of them who receive actual notice of this Final Judgment by personal service or otherwise.

B. Defendants shall require, as a condition of the sale or other disposition of all or substantially all of their assets or of lesser business units that include the Geneva Production Facility or the Battle Mountain Production Facility, that the purchaser agrees to be bound by the provisions of this Judgment, provided, however, that defendants need not obtain such an agreement from the Acquirer.

IV. Divestiture

A. Defendant DNH is ordered and directed, within ninety (90) calendar days after the filing of the Complaint in this matter, or five (5) days after notice of the entry of this Final Judgment by the Court, whichever is later, to divest the Geneva Production Asset in a manner consistent with this Final Judgment to an Acquirer acceptable to the United States in its sole discretion. The United States, in its sole discretion, may agree to one or more extensions of this time period, not to exceed in total sixty (60) calendar days, and shall notify the Court in each such circumstance. Defendant DNH agrees to use its best efforts to divest the Geneva Production Asset as expeditiously as possible.

B. In accomplishing the divestiture ordered by this Final Judgment, defendant DNH promptly shall make known, by usual and customary means, the availability of the Geneva Production Asset. Defendants shall inform any person making inquiry regarding a possible purchase of the Geneva Production Asset that it will be divested pursuant to this Final Judgment and provide that person with a copy of this Final Judgment. Defendant DNH shall offer to furnish to all prospective Acquirers, subject to customary confidentially assurances, all information and documents relating to the Geneva Production Asset customarily provided in a due diligence process except such information or documents subject to the attorney-client or work-product privilege. Defendant DNH shall make available such information to the United States at the same time that such information is made available to any other person.

C. Defendant DNH shall provide prospective Acquirers of the Geneva Production Asset and the United States information relating to the personnel involved in the production, operation, development, and sale of the Geneva Production Asset to enable the Acquirer to make offers of employment. Defendants will not interfere with any negotiations by the Acquirer to employ any of defendant DNH's employees whose responsibilities include the production, operation, development, or sale of the products of the Geneva Production Asset.

D. Defendant DNH shall permit prospective Acquirers of the Geneva Production Asset to have reasonable access to personnel and to make inspections of the physical facilities of the Geneva Production Asset; access to any and all environmental, zoning, and other permit documents and information; and access to any and all financial, operational, or other documents and information customarily provided as part of a due diligence process.

E. Defendant DNH shall warrant to the Acquirer of the Geneva Production Asset that each asset therein that was operational as of the date of filing of the Complaint in this matter will be operational on the date of divestiture.

F. Defendants shall not take any action that will impede in any way the permitting, operation, or divestiture of the Geneva Production Asset.

G. Defendant DNH shall warrant to the Acquirer of the Geneva Production Asset that there are no material defects in the environmental, zoning, or other permits pertaining to the operation of the Geneva Production Asset, and following the sale of the Geneva Production Asset, defendants shall not undertake, directly or indirectly, any challenges to the environmental, zoning, or other permits relating to the operation of the Geneva Production Asset.

H. Unless the United States otherwise consents in writing, the divestiture pursuant to Section IV, or by trustee appointed pursuant to section V, of this Final Judgment, shall include the entire Geneva Production Asset or, alternatively, pursuant to section V(B), the entire Battle Mountain Production Asset, and shall be accomplished in such a way as to satisfy the United States, in its sole discretion, that the divested asset can and will be used by the Acquirer as part of a viable, ongoing business engaged in the manufacture and sale of IGAN. Divestiture of the Geneva Production Asset or, alternatively, the Battle Mountain Production Asset may be made to an Acquirer, provided that it is demonstrated to the sole satisfaction of the United States that the divested asset will remain viable and the divestiture of such asset will remedy the competitive harm alleged in the Complaint. The divestitures, whether pursuant to section IV or section V of this Final Judgment,

1. Shall be made to an Acquirer that, in the United States's sole judgment, has the managerial, operational, and financial capability to compete effectively in the manufacture and sale of IGAN; and

2. Shall be accomplished so as to satisfy the United States, in its sole discretion, that none of the terms of any agreement between an Acquirer and defendants give defendants the ability unreasonably to raise the Acquirer's costs, to lower the Acquirer's efficiency, or otherwise to interfere in the ability of the Acquirer to compete effectively.

V. Appointment of Trustee To Effect Divestiture

A. If defendant DNH has not divested the Geneva Production Asset within the time period specified in Section IV(A), it shall notify the United States of that fact in writing. Upon application of the United States, the Court shall appoint a trustee selected by the United States and approved by the Court to effect the divestiture of the Geneva Production Asset.

B. After the appointment of a trustee becomes effective, only the trustee shall have the right to sell the Geneva Production Asset. Should the trustee determine that a sale of the Geneva Production Asset cannot be expeditiously accomplished, the trustee shall notify the United States and the parties of its conclusion and the reasons supporting its conclusion. Upon receipt of such notice from the trustee, the United States, in its sole discretion, shall have the right to direct the trustee to sell the Battle Mountain Production Asset as an alternative to the Geneva Production Asset. The trustee shall have the power and authority to accomplish the divestiture of the Geneva Production Asset or, should the United States so direct, the Battle Mountain Production Asset to an Acquirer acceptable to the United States at such price and on such terms as are then obtainable upon reasonable effort by the trustee, subject to the provisions of Sections IV, V, and VI of this Final Judgment, and shall have such other powers as this Court deems appropriate. Subject to Section V(D) of this Final Judgment, the trustee may hire at the cost and expense of defendant DNH any investment bankers, attorneys, or other agents, who shall be solely accountable to the trustee, reasonably necessary in the trustee's judgment to assist in the divestiture.

C. Defendants shall not object to a sale by the trustee on any ground other than the trustee's malfeasance. Any such objections by defendants must be conveyed in writing to the United States and the trustee within ten (10) calendar days after the trustee has provided the notice required under section VI.

D. The trustee shall serve at the cost and expense of defendant DNH, on such terms and conditions as plaintiff approves, and shall account for all monies derived from the sale of the Geneva Production Asset or, alternatively, the Battle Mountain Production Asset, and all costs and expenses so incurred. After approval by the Court of the trustee's accounting, including fees for its services and

those of any professionals and agents retained by the trustee, all remaining money shall be paid to defendant DNH and the trust shall then be terminated. The compensation of the trustee and any professionals and agents retained by the trustee shall be reasonable in light of the value of the asset to be divested and based on a fee arrangement providing the trustee with an incentive based on the price and terms of the divestiture and the speed with which it is accomplished, but timeliness is paramount.

E. Defendants shall use their best efforts to assist the trustee in accomplishing the required divestiture. The trustee and any consultants, accountants, attorneys, and other persons retained by the trustee shall have full and complete access to the personnel, books, records, and facilities of the business to be divested, and defendants shall develop financial and other information relevant to such business as the trustee may reasonably request, subject to customary confidentiality protection for trade secret or other confident research, development, or commercial information. Defendants shall take no action to interfere with or to impede the trustee's accomplishment of the divestiture.

F. After its appointment, the trustee shall file monthly reports with the United States and the Court setting forth the trustee's efforts to accomplish the divestiture ordered under this Final Judgment. To the extent such reports contain information that the trustee deems confidential, such reports shall not be filed in the public docket of the Court. Such reports shall include the name, address, and telephone number of each person who, during he preceding month, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the Geneva Production Asset or, alternatively, the Battle Mountain Production Asset, and shall describe in detail each contact with any such person. The trustee shall maintain full records of all efforts made to divest either asset.

G. If the trustee has not accomplished such divestiture within six months after its appointment, the trustee shall promptly file with the Court a report setting forth (1) the trustee's efforts to accomplish the required divestiture; (2) the reasons, in the trustee's judgment, why the required divestiture has not been accomplished; and (3) the trustee deems confidential, such reports shall not be filed in the public docket of the Court. The trustee shall at the same time furnish such report to the plaintiff who shall have the right to make additional recommendations consistent with the purpose of the trust The Court thereafter shall enter such orders as it shall deem appropriate to carry lout the purpose of the Final Judgment, which may, if necessary, include extending the trust and the term of the trustee's appointment by a period requested by the United States.

VI. Notice of Proposed Divestiture

A. Within two (2) business days following execution of a definitive divestiture agreement, defendant DNH or the trustee, whichever is then responsible for effecting the divestiture required herein, shall notify the United States of any proposed divestiture required by Section IV or V of this Final Judgment. If the trustee is responsible, it shall similarly notify defendants. The notice shall set forth the details of the proposed divestiture and list the name, address, and telephone number of each person and not previously identified who offered or expressed an interest in or desire to acquire any ownership interest in the Geneva Production Asset or, alternatively, the Battle Mountain Production Asset, together with full details of the same.

B. Within fifteen (15) calendar days of receipt by the United States of such notice, the United States may request from defendants, the proposed Acquirer, any other third party, or the trustee if applicable additional information concerning the proposed divestiture, the proposed Acquirer, and any other potential Acquirer. Defendants and the trustee shall furnish any additional information requested within fifteen (15) calendar days of the receipt of the request, unless the parties shall otherwise agree.

C. Within thirty (30) calendar days after receipt of the notice or within twenty (20) calendar days after the United States has been provided the additional information requested from defendants, the proposed Acquirer, any third party, and the trustee, whichever is later, the United States shall provide written notice to defendants and the trustee, if there is one, stating whether or not it objects to the proposed divestiture. If the United States provides written notice that it does not object, the divestiture may be consummated, subject only to defendants' limited right to object to the sale under section V(C) of this Final Judgment. Absent written notice that the United Sates does not object to the proposed Acquirer or upon objection by the United States, a divestiture proposed under Section IV or Section V shall not be consummated. Upon objection by defendants under section V(C), a divestiture proposed under section V shall not be consummated unless approved by the Court.

VII. Financing

Defendants shall not finance all or any part of any purchase made pursuant to section IV or V of this Final Judgment.

VIII. Hold Separate

Until the divestiture required by this Final Judgment has been accomplished, defendants shall take all steps necessary to comply with the Hold Separate Stipulation and Order entered by this Court. Defendants shall take no action that would jeopardize the divestiture ordered by this Court.

IX. Affidavits

A. Within twenty (20) calendar days of the filing of the Complaint in this matter, and every thirty (30) calendar days thereafter until the divestiture has been completed under Section IV or V, defendants shall deliver to the United States an affidavit as to the fact and manner of its compliance with Section IV or V of this Final Judgment. Each such affidavit shall include the name, address, and telephone number of each person who, during the preceding thirty days, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the Geneva Production Asset or, alternatively, the Battle Mountain Production Asset, and shall describe in detail each contact with any such person during that period. Each such affidavit shall also include a description of the efforts defendants have taken to solicit buyers for the asset to be divested, and to provide required information to any prospective Acquirer, including the limitations, if any, on such information. Assuming the information set forth in the affidavit is true and complete, any objection by the United States to information provided by defendants, including limitations on the information, shall be made within fourteen (14) days of receipt of such affidavit.

B. Within twenty (20) calendar days of the filing of the Complaint in this matter, defendants shall deliver to the United States an affidavit that describes in reasonable detail all actions defendants have taken and all steps defendants have implemented on an ongoing basis to comply with Section VIII of this Final Judgment. Defendants shall deliver to the United States an affidavit describing any changes to the efforts and actions outlined in defendants' earlier affidavits filed pursuant to this section within fifteen (15) calendar days after the change is implemented.

C. Defendants shall keep all records of all efforts made to preserve the Geneva Production Asset and the Battle Mountain Production Asset and to divest either asset until one year after such divestiture has been completed.

X. Compliance Inspection

A. For purposes of determining or securing compliance with this Final Judgment, or of determining whether the Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time duly authorized representatives of the United States Department of Justice, including consultants and other persons retained by the United States, shall, upon written request of a duly authorized representative of the Assistant Attorney General in charge of the Antitrust Division, an don reasonable notice to defendants, be permitted:

1. Access during defendants' office hours to inspect and copy, or at plaintiff's option, to require defendants to provide copies of, all books, ledgers, accounts, records and documents in the possession, custody, or control of defendants, relating to any matters contained in this Final Judgment; and

2. To interview, either informally or on the record, defendants' officers, employees, or agents, who may have their individual counsel present, regarding such matters. The interviews shall be subject to the reasonable convenience of the interviewee and without restraint or interference by defendants.

B. Upon the written request of a duly authorized representative of the Assistant Attorney General in charge of the Antitrust Division, defendants shall submit written reports, under oath if requested, relating to any of the matters contained in this Final Judgment as may be requested.

C. No information or documents obtained by the means provided in this section shall be divulged by the United States to any person other than an 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 (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If at the time information or documents are furnished by defendants to the United States, defendants represent and identify 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 defendants mark each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure," then the United States shall give defendants ten (10) calendar days notice prior to divulging such material in any legal proceeding (other than a grand jury proceeding).

XI. No Reacquisition

Defendants may not reacquire any part of the asset divested under this Final Judgment during the term of this Final Judgment.

XII. Retention of Jurisdiction

This Court retains jurisdiction to enable any party to this Final Judgment to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

XIII. Expiration of Final Judgment

Unless this Court grants an extension, this Final Judgment shall expire ten years from the date of its entry.

XIV. Public Interest Determination

Entry of this Final Judgment is in the public interest.

Date: _____

Court approval subject to procedures of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16.

_____

United States District Judge

United States District Court for the District of Columbia

CASE NUMBER 1: 03CV02486; JUDGE: Gladys Kessler; DECK TYPE: Antitrust; DATE STAMP: 12/02/2003

United States of America, U.S. Department of Justice Antitrust Division 1401 H Street, NW Suite 3000 Washington, DC 20530, Plaintiff, v. DNH International Sarl, 23 Avenue Monterey L-2086 Luxemburg, Dyno Nobel, Inc., 50 S. Main Street Salt Lake City, UT 84144; El Paso Corporation, 1001 Louisiana Street Houston, TX 77002; and Coastal Chem, Inc., 1001 Louisiana Street Houston, TX 77002, Defendants; Complaint

The United States of America, acting under the direction of the Attorney General of the United States, brings this civil antitrust action to obtain injunctive relief against defendants, and alleges as follows:

1. DNH International Sarl ("DNH") intends to acquire, through its wholly-owned subsidiary Dyno Nobel, Inc. ("Dyno"), certain assets associated with the nitrogen products businesses of El Paso Corporation ("El Paso"). The assets to be acquired include two industrial grade ammonium nitrate ("IGAN") manufacturing facilities owned by Coastal Chem, Inc. ("Coastal"), a wholly-owned subsidiary of El Paso. One of these facilities is located in Battle Mountain, Nevada, and the other is in Cheyenne, Wyoming.

2. Dyno and Coastal sell IGAN in the United States. IGAN is an essential ingredient in nearly all blasting agents. Coastal and one other firm are the primary suppliers of IGAN consumed in the western United States and western Canada ("Western North America"), accounting for over 75 percent of all plant capacity regularly used to make IGAN for sale in that region. Dyno, which owns a 50 percent interest in an IGAN production facility near Salt Lake City, Utah, is the best located of a few fringe IGAN suppliers in Western North America.

3. Unless the proposed acquisition is enjoined, Dyno's acquisition of Coastal's Battle Mountain and Cheyenne IGAN production facilities will substantially lessen competition in the production of IGAN for sale in Western North America, and consumers of IGAN in that region likely will pay higher process as a result of the reduced competition.

Jurisdiction and Venue

4. This Complaint is filed by the United States under section 15 of the Clayton Act, as amended, 15 U.S.C. 25, to prevent and restrain defendants from violating section 7 of the Clayton Act, 15 U.S.C. 18.

5. DNH, through Dyno, and El Paso, through Coastal, produce and sell IGAN in the flow of interstate commerce. DNH's and El Paso's activities in producing and selling IGAN substantially affect interstate commerce. This Court has jurisdiction over the subject matter of this action pursuant to section 12 of the Clayton Act, 15 U.S.C. 22, and 28 U.S.C. 1331, 1337(a), and 1345.

6. DNH, Dyno, El Paso, and Coastal have consented to personal jurisdiction and venue in this judicial district.

II. Defendants

7. DNH is a Luxembourg corporation with its headquarters in Oslo, Norway. DNH is one of the world's largest producers of explosives. In 2002, DNH reported total sales of approximately $630 million. Dyno, a subsidiary of DNH, is a Delaware corporation with its principal place of business in Salt Lake City, Utah. Dyno, one of the two largest producers of IGAN in North America, reported 2002 sales of about $316 million.

8. El Paso is a Delaware corporation with its headquarters in Houston, Texas. El Paso is the leading provider of natural gas services and the largest pipeline company in North America. In 2002, El Paso reported sales of roughly $12 billion. Coastal, a subsidiary of El Paso, is a Delaware corporation with its principal place of business in Houston, Texas. Coastal, one of the two largest producers of IGAN in Western North America, reported 2002 sales of approximately $146 million.

III. The Proposed Transaction

9. Pursuant to an Asset Purchase Agreement dated August 6, 2003, Dyno, a wholly-owned subsidiary of DNH, intends to acquire certain assets of the nitrogen products businesses owned by El Paso's subsidiaries. The assets to be acquired include Coastal's IGAN manufacturing facilities in Battle Mountain, Nevada and Cheyenne, Wyoming.

IV. Trade and Commerce

A. The Relevant Product Market

10. IGAN, which is in the form of low-density, porous prills (or granules), is used to make blasting agents, one of two types of explosives for industrial uses like mining and construction. The other type is high explosives like dynamite, which are much more expensive than blasting agents. The principal physical difference between high explosives and blasting agents is in their sensitivity to detonation; a high explosive can be detonated with only a blasting cap, while blasting agents are detonated using high explosives. Blasting agents, which accounted for nearly all of the explosives sold in North America last year, are used principally to mine coal, rock and other nonmetals, and metals such as gold and copper. Blasting agents constitute a relatively small portion of the costs of mining and the other industrial uses to which they are put.

11. Virtually all blasting agents used in North America contain ammonium nitrate in the form of IGAN, and essentially all IGAN sold in North America is used to make blasting agents. The most widely used blasting agent is known as ANFO, which is made by soaking IGAN in fuel oil (Ammonium Nitrate plus Fuel Oil). Although ammonium nitrate is also available in an agricultural grade, which is in the form of high-density prills, the more porous IGAN prills are used to make ANFO. The greater porosity of the IGAN prill allows for significantly better absorption of the fuel oil and makes an explosive with a much higher sensitivity to detonation. IGAN is also used to make explosive slurries, gels, and emulsions, which can be used as blasting agents either alone or in combination with ANFO.

12. A small but significant increase in the price of IGAN would not cause consumers of IGAN to use sufficiently less IGAN so as to make such a price increase unprofitable. Accordingly, the production and sale of IGAN is a line of commerce and a relevant product market within the meaning of section 7 of the Clayton Act.

B. The Relevant Geographic Market

13. IGAN typically is shipped to customers in bulk either by rail or by truck. Freight costs are a significant component of the total delivered price of IGAN and limit the geographic area that an IGAN production facility profitably can serve. In addition, IGAN degrades over time as moisture in the air causes it to "cake," rendering it much less economical to use as an ingredient to make

blasting agents. Also, the more IGAN is handled between production and use, the more the IGAN prills break down into unusuable fine particles.

14. El Paso, through Coastal, produces IGAN at two facilities, one located in Battle Mountain, Nevada and the other in Cheyenne, Wyoming. IGAN produced at these facilities is sold within Western North America. DNH, through Dyno, owns a 50 percent interest in an IGAN plant near Salt Lake City, Utah (known as the "Geneva plant") from which it supplies IGAN into Western North America. Only three other firms own facilities that regularly produce IGAN for sale in the eleven contiguous western-most states in the United States and the Canadian provinces of British Columbia, Alberta, and Saskatchewan ("Western North America"). One of those three firms is Orica Limited ("Orica"), which owns the remining 50 percent interest in the Geneva plant and also owns an IGAN facility located in Alberta, Canada. The other two facilities are located in Benson, Arizona and Manitoba, Canada.

15. No other firm owns an IGAN production facility from which it supplies IGAN on a regular basis to Western North America. Apart from the facilities referenced in paragraph 14 above, the IGAN facilities closest to Western North American customers are located along the Mississippi River. The additional transportation costs needed to supply Western North America from these facilities, coupled with the increased risk of degradation of the IGAN due to prolonged shipping and handling, significantly limit the ability of these distant facilities to supply IGAN to Western North America.

16. A small but significant increase in the price of IGAN produced for sale in Western North America would not cause consumers of IGAN in Western North America to purchase sufficient amounts of IGAN produced at facilities not already regularly supplying IGAN to Western North America that such a price increase would be unprofitable. Accordingly, Western North America is a relevant geographic market within the meaning of Section 7 of the Clayton Act.

C. Anticompetitive Effects

17. Two firms account for over 80 percent of IGAN sales in Western North America. After the proposed acquisition, the two dominant firms together would control about 90 percent of sales, with Dyno and Coastal combined having a share of about 50 percent. Total sales of IGAN in Western North America exceed 750,000 tons annually, or over $150 million a year.

18. Concentration in the Western North American IGAN market would increase significantly if DNH, through Dyno, acquired Coastal's IGAN production facilities in Battle Mountain and Cheyenne. The proposed acquisition would increase the Herfindahl-Hirschman Index ("HHI"), a measure of market concentration defined and explained in Appendix A, by approximately 220 points, based on plant capacity, resulting in a post-merger HHI of roughly 3400, well in excess of levels that ordinarily would raise significant antitrust concerns.

19. IGAN-containing blasting agents are used primarily in four industries in North America: Coal mining, which accounted for about 70 percent of total consumption in the United States in 2002; quarrying and nonmetal mining (13 percent); metal mining (8 percent); and construction (8 percent). In Western North America, most IGAN-containing blasting agents are consumed in mines located in one of three areas: The Powder River Basin in Wyoming (coal mines); North Nevada (gold mines); and the so-called "Four-Corners Area" surrounding the junction of Utah, Colorado, New Mexico, and Arizona (coal mines).

20. The two leading producers of IGAN sold in Western North America, Coastal and Orica, have facilities that are well-positioned to supply the Powder River Basin and Northern Nevada. The Geneva plant, which has a capacity of about 100,000 tons/year and is equally owned by Orica and Dyno, is located roughly equidistant from Northern Nevada, the Powder River Basin, and the Four-Corners Area and is well-positioned to serve all three areas.

21. The proposed transaction would combine Coastal's Battle Mountain and Cheyenne facilities with Dyno's 50 percent interest in the Geneva plant, thus eliminating independent competition from Dyno, the best located of three fringe IGAN producers that supply Western North America. Unlike the Geneva plant, which is centrally located to all three primary IGAN-containing blasting agent-consuming areas in Western North America, the two remaining fringe firms are located at the outer reaches of the relevant geographic market.

22. Purchasers of IGAN in Western North America have benefitted from competition between Dyno and Coastal through lower prices for IGAN. By acquiring Coastal's Battle Mountain and Cheyenne IGAN production facilities, DNH would eliminate that competition.

D. Entry Unlikely To Deter a Post-Acquisition Exercise of Market Power

23. Successful entry into the IGAN market in Western North America would not be timely, likely, or sufficient to deter any coordinated exercise of market power as a result of the transaction.

24. Significant barriers prevent de novo entry into the production of IGAN for sale in Western North America. De novo entry would be a lengthy process. The two most time-consuming steps—construction of the IGAN plant itself and the obtaining of permits needed to construct the plant—would take over two years. Also, economies of scale in plant capacity are significant. To be successful, a new entrant likely would require a facility that could produce at least one-quarter of total IGAN sales in Western North America. An IGAN facility with that capacity would cost over $70 million. All of these factors make entry unlikely in response to a small but significant increase in IGAN prices.

V. Violations Alleged

25. DNH's proposed acquisition from El Paso of Coastal's IGAN production facilities in Battle Mountain, Nevada and Cheyenne, Wyoming, likely will lessen competition substantially and tend to create a monopoly in interstate trade and commerce in violation of Section 7 of the Clayton Act.

26. The transaction likely will have the following anticompetitive effects, among others:

a. Competition generally in the production of IGAN for sale in Western North America will be substantially lessened;

b. Actual and potential competition between Dyno and Coastal in the production of IGAN for sale in Western North America will be eliminated; and

c. Prices for IGAN produced for sale in Western North America likely will increase.

27. Unless prevented, the acquisition by DNH of Coastal's Battle Mountain and Cheyenne IGAN production facilities would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18.

VI. Requested Relief

28. Plaintiff requests:

a. That DNH's proposed acquisition from El Paso of Coastal's IGAN production facilities in Battle Mountain, Nevada and Cheyenne, Wyoming, be adjudged and decreed to be unlawful and in violation of section 7 of the Clayton Act, as amended, 15 U.S.C. 18;

b. That defendants and all persons acting on their behalf be permanently enjoined and restrained from carrying out any contract, agreement, understanding, or plan, the effect of which would be to combine DNH and Coastal's Battle Mountain and Cheyenne IGAN production facilities;

c. That plaintiff recover the costs of this action; and

d. That plaintiff receive such other and further relief as the case requires and this Court may deem proper.

Dated: December 2, 2003.

Respectfully submitted,

For Plaintiff United States of America:

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Appendix A—Herfindahl-Hirschman Index Calculations

"HHI" means the Herfindahl-Hirschman Index, a commonly accepted measure of market concentration. It is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. For example, for a market consisting of four firms with shares of thirty, thirty, twenty, and twenty percent, the HHI is 2600 ($30^2 + 30^2 + 20^2 + 20^2 = 2600$). The HHI takes into account the relative size and distribution of the firms in a market and approaches zero when a market consists of a large number of firms of relatively equal size. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases.

Markets in which the HHI is between 1000 and 1800 points are considered to be moderately concentrated, and those in which the HHI is in excess of 1800 points are considered to be highly concentrated. Transactions that increase the HHI by more than 100 points in highly concentrated markets presumptively raise antitrust concerns under the Horizontal Merger Guidelines issued by the U.S. Department of Justice and the Federal Trade Commission. *See Merger Guidelines* § 1.51.

[FR Doc. 04–3384 Filed 2–13–04; 8:45 am]

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DEPARTMENT OF LABOR

Employee Benefits Security Administration

[Exemption Application No. D–11030]

Withdrawal of Notice of Proposed Exemption Involving Blue Cross and Blue Shield of Kansas (the Company) and Anthem Insurance Companies, Inc. (Anthem) Located in Topeka, KS

In the **Federal Register** dated January 3, 2002, the Department of Labor (the Department) published a notice of proposed exemption (the Notice) from the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 and from certain taxes imposed by the Internal Revenue Code of 1986, as amended. The Notice provided prospective exemptive relief for the receipt of cash consideration by any eligible policyholder of the Company and Anthem which was an employee benefit plan (the Plan), including the Company's own in house Plan, in exchange for the termination of such Plan's membership interest in the Company, in accordance with the terms of a plan of conversion adopted by the Company and implemented pursuant to Kansas Law. Due to the length of time since the publication of the proposal and unresolved litigation between the Company and the Kansas Commissioner of Insurance regarding the contemplated demutualization, the Department does not believe the Notice, as originally published, currently reflects accurate and complete material facts and representations. Therefore, the Department has decided to withdraw the Notice from the **Federal Register**.

Signed at Washington, DC, this 10th day of February, 2004.

Ivan L. Strasfeld,

Director of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor.

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DEPARTMENT OF LABOR

Employee Benefits Security Administration

[Prohibited Transaction Exemption 2004–02 *et al.*; Exemption Application No. D–11047 *et al.*]

Grant of Individual Exemptions; Bank of America, N.A.

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Grant of individual exemptions.

SUMMARY: This document contains exemptions issued by the Department of Labor (the Department) from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (the Act) and/or the Internal Revenue Code of 1986 (the Code).

A notice was published in the **Federal Register** of the pendency before the Department of a proposal to grant such exemption. The notice set forth a summary of facts and representations contained in the application for exemption and referred interested persons to the application for a complete statement of the facts and representations. The application has been available for public inspection at the Department in Washington, DC. The notice also invited interested persons to submit comments on the requested exemption to the Department. In addition the notice stated that any interested person might submit a written request that a public hearing be held (where appropriate). The applicant has represented that it has complied with the requirements of the notification to interested persons. No requests for a hearing were received by the Department. Public comments were received by the Department as described in the granted exemption.

The notice of proposed exemption was issued and the exemption is being granted solely by the Department because, effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1 (1996), transferred the authority of the Secretary of the Treasury to issue exemptions of the type proposed to the Secretary of Labor.

Statutory Findings

In accordance with section 408(a) of the Act and/or section 4975(c)(2) of the Code and the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990) and based upon the entire record, the Department makes the following findings:

(a) The exemption is administratively feasible;

(b) The exemption is in the interests of the plan and its participants and beneficiaries; and

(c) The exemption is protective of the rights of the participants and beneficiaries of the plan.

Bank of America, N.A., Located in Charlotte, North Carolina

[Prohibited Transaction Exemption 2004–02; Exemption Application No. D–11147]

Exemption

Section I—Covered Transactions

The restrictions of section 406(a) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reasons of section 4975(c)(1)(A) through (D) of the Code, shall not apply, as of January 1, 2003, to:

(A) The granting to Bank of America, N.A. (Bank), either as an agent (the Agent) for a group of financial institutions (Lender(s)), or as a sole Lender, that will fund a so-called "credit facility" (Credit Facility) providing credit to certain investment funds (Fund(s)), by the Fund of a security interest in and lien on the capital commitments (Capital Commitments), reserve amounts, and capital contributions (Capital Contributions) of certain investors, including employee benefit plans (a Covered Plan, as defined in Section III(A)), investing in the Fund;

(B) Any collateral assignment and pledge by the Fund to the Agent, or to the Bank as sole Lender, of its security interest in each Investor's equity interest, including a Covered Plan's equity interest, in the Fund;

(C) The granting by the Fund to the Agent, or to the Bank as sole Lender, of