

Complaint

103 F.T.C.

IN THE MATTER OF

SCHLUMBERGER, LTD., ET AL.

DISMISSAL ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7
OF THE CLAYTON ACT*Docket 9164. Complaint, Jan. 28, 1983—Dismissal Order, Feb. 17, 1984*

On Feb. 17, 1984, the Federal Trade Commission issued an order dismissing the complaint against Schlumberger, Ltd., citing "changed circumstances since the issuance of the Commission's complaint."

Appearances

For the Commission: *George Cary.*

For the respondents: *Werner L. Polak, Shearman & Sterling, New York City.*

COMPLAINT

The Federal Trade Commission, having reason to believe that the acquisition by Schlumberger, Ltd. ("Schlumberger") of Accutest Corporation ("Accutest") violates Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45); and it appearing that a proceeding by the Commission in respect thereof would be in the public interest, the Commission hereby issues its Complaint, pursuant to Section 11 of the Clayton Act (15 U.S.C. 21) and Section 5(b) of the Federal Trade Commission Act (15 U.S.C. 45(b)), stating its charges as follows:

I. Definitions

1. For the purposes of this Complaint, the following definitions shall apply:

a. *Digital integrated circuit automatic test equipment (DIC/ATE)* means a computer controlled test system, the basic functions of which are to ascertain the operating characteristics of digital integrated circuits and to determine if those characteristics are within allowable limits. The uses of DIC/ATE are design engineering characterization, product engineering, incoming inspection, production testing and quality assurance of digital integrated circuits.

b. *Large scale integration and very large scale integration digital integrated circuit automatic test equipment (LSI/VLSI ATE)* means

a computer controlled test system, the basic functions of which are to ascertain the operating characteristics of large scale integration or very large scale integration digital integrated circuits designed to perform logic or microprocessor functions and to determine if those characteristics are within allowable limits. The uses of LSI/VLSI ATE are design engineering characterization, product engineering, incoming inspection, production testing, and quality assurance of large scale integration and very large scale integration digital integrated circuits designed to perform a logic or microprocessor function.

c. *Memory integrated circuit automatic test equipment (memory IC/ATE)* means a computer controlled test system, the basic functions of which are to ascertain the operating characteristics of digital integrated circuits designed to perform memory functions and to determine if those characteristics are within allowable limits. The basic uses of memory DIC/ATE are design engineering characterization, product engineering, incoming inspection, production testing, and quality assurance of digital integrated circuits designed to perform a memory function.

II. *Schlumberger, Ltd.*

2. Schlumberger is a Dutch Antilles Corporation headquartered in New York and Paris.

III. *Fairchild Camera and Instrument Corporation*

3. Fairchild is a Delaware corporation, with headquarters in Mountain View, California. In 1979, Fairchild was acquired by Schlumberger and Fairchild has been since that time and is now a wholly owned subsidiary of Schlumberger.

IV. *Accutest Corporation*

4. Accutest Corporation is a Massachusetts corporation, with its headquarters in Chelmsford, Massachusetts. In 1982, Accutest was acquired by Fairchild and Accutest has been since that time and is now a wholly-owned subsidiary of Fairchild.

V. *Jurisdiction*

5. At all times relevant herein, each of the companies named in this complaint have been engaged in or affected commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and Section 4 of the Federal Trade Commission Act as amended, 15 U.S.C. 44.

VI. *The Acquisition*

6. On October 22, 1982 Schlumberger acquired Accutest in a cash transaction and subsequently merged it into one of its own wholly-owned subsidiaries.

VII. *Trade and Commerce*

7. The relevant product markets are the following:

- (a) the production or sale of DIC/ATE;
- (b) the production or sale of memory IC/ATE; and
- (c) the production or sale of LSI/VLSI ATE.

8. The relevant geographic markets are the United States and the world.

9. Concentration in each of the relevant product and geographic markets is high.

10. Barriers to entry into the manufacture and sale of each of the relevant products are substantial.

11. Both Fairchild and Accutest are substantial competitors in each of the relevant product markets.

VIII. *Effects of the Acquisition*

12. The effect of the acquisition may be substantially to lessen competition or tend to create a monopoly in the relevant markets in violation of Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45), in the following ways, among others:

(a) Substantial actual competition between Fairchild and Accutest will be eliminated;

(b) Substantial potential competition between Fairchild and Accutest will be eliminated;

(c) Substantial actual competition between Accutest and other companies engaged in the production or sale of relevant products will be eliminated;

(d) Substantial potential competition between Accutest and other companies engaged in the production or sale of relevant products will be eliminated;

(e) The elimination of Accutest as a substantial technological innovator;

(f) The elimination of the potential future expansion of Accutest in the markets in which it currently competes;

(g) Fairchild, as the dominant firm in the relevant markets, will be further strengthened and entrenched at the expense of its competitors;

(h) The already high levels of industry concentration in the relevant markets will be significantly increased; and

(i) Barriers to entry in the relevant markets will be significantly raised.

IX. Violations Charged

The acquisition constitutes a violation of Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45).

ORDER

The respondents in this matter have moved to dismiss the complaint on the grounds of changed circumstances since the issuance of the Commission's complaint. Complaint counsel do not oppose the motion. The motion is granted and the complaint in this matter is dismissed.

It is so ordered.

Commissioner Pertschuk dissented.

DISSENTING STATEMENT OF COMMISSIONER PERTSCHUK

I agree that Schlumberger's divestiture of Accutest adequately resolves the immediate antitrust problem involved in this proceeding. However, I cannot support the Commission's decision to dismiss the complaint because it leaves unresolved the important question of the need for a prospective order subjecting future acquisitions by Schlumberger to the prior approval of the Commission.

The administrative law judge, the parties, and the Commission have decided that in light of the Accutest divestiture further litigation over the sole issue of prospective relief would be an unjustified expenditure of resources. As I understand the law, this is not the correct test for deciding whether an order is justified. That test is whether, regardless of abandonment of the alleged unlawful conduct during the course of litigation, there is a "cognizable danger of recurrence" of similarly unlawful behavior by the respondent in the future. *United States v. W. T. Grant, Co.*, 345 U.S. 629 (1953). Moreover, in deciding whether further litigation here is necessary, we must consider the value of the Commission's well-established policy favoring fencing-in orders in merger cases. In merger cases specifically, the Commission has recognized that "prophylactic relief, not merely the after-the-fact remedy of divestiture, is essential if the Congressional policy expressed in Section 7 of the Clayton Act is to be effectively carried out. . . ." *Beatrice Foods Co.*, 68 F.T.C. 1003, 1006 (1965). Such

relief deters illegal behavior not only by the respondent in the case at hand but other firms as well, thus serving broad law enforcement objectives. Until and unless the Commission can reasonably conclude on the basis of the record in this proceeding that Schlumberger is unlikely to make any similarly suspect acquisitions in the future, this case is not moot and should be continued in the public interest.

Though agreeing to Schlumberger's motion to dismiss, complaint counsel actually have made a powerful case for continuing this litigation to consider the necessity for a prospective remedy. They have argued that:

A ten year ban is particularly appropriate in this case for three reasons. First, Schlumberger/Fairchild have a proclivity for expanding their presence in the ATE industry through acquisition, having made six acquisitions in the overall industry and four in the particular markets alleged in the Complaint. Second, in reporting the acquisition of Accutest pursuant to the Hart-Scott-Rodino Act's Premerger Notification Form, Schlumberger reported its sales of semiconductor test equipment under a standard industrial classification code number not found in Bureau of Census publications. A ten year prior approval requirement would reduce the likelihood that any future acquisitions would be consummated prior to full Commission review. Finally, even if the requirements of the H-S-R Act are adhered to, because of the extremely high technology involved in these markets, acquisitions not reportable under the Hart-Scott-Rodino Premerger Act may be competitively quite significant if they involve small firms that are technological innovators. Complaint Counsel's Assent to Respondents' Motions to Dismiss, Sept. 13, 1983, at 3.

After chronicling these cogent reasons favoring litigation over the issue of "prior approval," complaint counsel lamely recommend dismissal of the complaint because "litigation of this matter will require the expenditure of significant resources. . . ." not warranted "solely to achieve a ten year merger ban." This conclusion, adopted by the Commission, is difficult to understand. If a prior approval requirement seems "particularly appropriate" at this juncture of the case to protect the public against possible anticompetitive acquisitions by Schlumberger in the future, then the Commission is duty-bound to pursue it, even if that means more litigation.

The majority's decision to dismiss the complaint, particularly in circumstances where a prospective order may well be appropriate, is flatly inconsistent with the Commission's policy of insisting on prior approval provisions where necessary in merger cases. That policy recognizes that prior approval provisions serve both as an efficient fencing-in measure against repetitions of unlawful conduct by the same firm and as a deterrent against possibly illegal mergers by other firms. Until this case at least, prior approval had remained an important remedial tool in merger law enforcement. Indeed, past Commission merger orders have invariably had prior approval provisions.

Moreover, just last year the Commission turned down a respondent's request for the complete elimination of a prior approval provision from an outstanding order. *Damon Corp.*, C-2916 (March 29, 1983). [101 F.T.C. 689]

It is sometimes argued that the Hart-Scott-Rodino Act reporting requirements obviate the need for prior approval provisions in Commission orders. But the Hart-Scott-Rodino Act is just that, a reporting act, not an approval requirement. The Act's reporting requirements neither reach nor prevent all anticompetitive acquisitions. The reporting party can consummate the acquisition unless the Commission takes *affirmative* legal action to prevent it, and if the acquisition does go forward, expensive litigation is necessary to "unscramble" it. Further, as the H-S-R misreporting episode in this very case showed, the Act does not guarantee that the Commission will automatically uncover all anticompetitive overlaps even when an acquisition is reported. Until today, the Commission's consistent policy of including prior approval clauses in merger orders has been a clear indication that the Commission has not felt that Hart-Scott-Rodino offers perfect or even sufficient protection.

The message that today's decision sends to aggressive firms is that they can gamble fairly painlessly in entering into mergers and acquisitions of dubious legality under the Clayton and FTC Acts. If sued by the Commission—itsself a rather remote prospect in the current administration—they can extricate themselves from a sticky legal situation through simple divestiture and move on, scot-free, to their next legally risky acquisition. Moreover, it would not be surprising if this decision precipitated an avalanche of petitions for relief from prior approval provisions from companies presently under FTC merger orders. The time and resources consumed by these appeals—not to mention the cost to the public—will, I suspect, end up being far greater than the relatively small expense of continuing this litigation over the question of whether to impose a prior approval requirement on Schlumberger.

IN THE MATTER OF
CENTURION INTERNATIONAL, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF
THE FEDERAL TRADE COMMISSION ACT AND THE MAGNUSON-MOSS
WARRANTY—FEDERAL TRADE COMMISSION IMPROVEMENT ACT

Docket C-3131. Complaint, Feb. 22, 1984—Decision, Feb. 22, 1984

This consent order requires three Texas manufacturers-sellers of mobile homes and related services, among other things, to timely honor and fully satisfy valid warranty and service contract claims. The order prohibits respondents from disclaiming any implied warranties; excluding in any warranty or service contract incidental or consequential damages arising from any consumer injury without disclosing that some states do not allow for such exclusions; failing to disclose in their warranties that certain states may provide legal rights beyond those contained in the warranty; and failing to include in their warranties procedures a consumer must follow in order to obtain performance on warranty obligations. Additionally, respondents must provide consumer redress to those persons who were entitled to but did not receive performance under a warranty or service contract issued or sold by the companies, or under a warranty implied by state law.

Appearances

For the Commission: *George E. Schulman and Paul M. Updegrave.*

For the respondents: *A. Stephen Hut, Jr. and Leslie C. Seeman, Wilmer, Cutler & Pickering, Washington, D.C. and Frank D. Thomas, Jr., in-house counsel, Waco, Tex.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and of the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Centurion International, Inc., a corporation, Centurion Homes Corporation, Inc., a corporation, and Centurion Homes of California, Inc., a corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Acts, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Centurion International, Inc., is a corpo-