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Department of Justice

ANTITRUST ENFORCEMENT IN THE SECOND TERM

REMARKS BY

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BEFORE THE

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CAMBRIDGE, MASSACHUSETTS

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IT IS A GENUINE PLEASURE TO APPEAR TODAY IN THIS FORUM TO TALK ABOUT MY PRIORITIES FOR ANTITRUST ENFORCEMENT. MY REMARKS WILL FOCUS ON THREE TOPICS: BID RIGGING, SENTENCING, AND ANTITRUST LAW REFORM.

PROSECUTION OF PER SE UNLAWFUL RESTRAINTS AFFECTING HORIZONTAL COMPETITION IS, AND SHOULD BE, THE ANTITRUST DIVISION'S PRIMARY ENFORCEMENT ACTIVITY. FULLY THREE QUARTERS OF ALL CASES WE FILED IN FISCAL 1985 INVOLVED CRIMINAL CHARGES AGAINST VARIOUS FORMS OF HORIZONTAL PRICE FIXING AND MARKET ALLOCATION. OUR EXPERIENCE SHOWS, HOWEVER, THAT DISCOVERING CONSPIRATORIAL AGREEMENTS IS A VERY INEXACT SCIENCE. HISTORICALLY, THE DIVISION'S DETECTION MECHANISMS HAVE RELIED LARGELY ON TIPS AND INFORMANTS, AND THAT IS STILL TRUE TODAY. WE ARE CONSTANTLY CONSIDERING WHETHER MORE SYSTEMATIC TECHNIQUES CAN BE EMPLOYED FOR EXPOSING ILLEGAL ACTIVITY, AND HAVE ATTEMPTED SEVERAL PROGRAMS DESIGNED TO GENERATE INVESTIGATIVE LEADS BASED ON INDUSTRY CHARACTERISTICS AND MARKET PRICE PATTERNS. ULTIMATELY, HOWEVER, THE SHERMAN ACT REQUIRES US TO PROVE THE EXISTENCE OF AN AGREEMENT, AND THAT TAKES HARD FACTS ABOUT THE ACTIVITIES OF SPECIFIC INDIVIDUALS.

IN RECENT YEARS, THE DIVISION HAS HAD PARTICULAR SUCCESS IN PROSECUTING BID RIGGING, ESPECIALLY IN ROAD AND AIRPORT CONSTRUCTION, ELECTRICAL CONTRACTING, AND UTILITY CONSTRUCTION. OVER 60 PERCENT OF OUR FISCAL 1985 CRIMINAL CASES INVOLVED BID RIGGING SCHEMES IN THOSE INDUSTRIES. THE

DIVISION WILL NOW BE SOLICITING LEADS AGGRESSIVELY IN OTHER SETTINGS WHERE BIDDING SYSTEMS ARE EMPLOYED AND OUR INVESTIGATORS CAN GET RELATIVELY EASY ACCESS TO PRICE DATA AND OTHER INFORMATION ABOUT THE MARKET CONDUCT OF SELLERS. THESE CONDITIONS EXIST IN DEFENSE AND OTHER FEDERAL GOVERNMENT CONTRACTING, AND I HAVE THEREFORE ALLOCATED RESOURCES TO INTENSIFY OUR INVESTIGATIVE EFFORTS IN THOSE FIELDS.

MAJOR WEAPONS SYSTEMS ARE, OF COURSE, DEVELOPED UNDER PROCUREMENT PROCEDURES THAT DO NOT ENTAIL CONVENTIONAL ADVERTISED BIDDING AND THEY ARE NOT THE FOCUS OF OUR EFFORT. INSTEAD, THE PROCUREMENT INITIATIVE WILL CONCENTRATE ON THE OFF-THE-SHELF PRODUCTS AND SERVICES (INVOLVING BILLIONS OF TAX DOLLARS) THAT ARE PROCURED BY BID. OFTEN, SUCH PROCUREMENTS ARE CONDUCTED AT RELATIVELY LOCALIZED LEVELS, SUCH AS INDIVIDUAL MILITARY BASES, OR INVOLVE SPECIFIC CONSTRUCTION PROJECTS UNDERTAKEN BY THE CORPS OF ENGINEERS. THEY ALSO USUALLY ENTAIL A CONTINUING SERIES OF CONTRACTS WITH A RELATIVELY STABLE GROUP OF SELLERS.

RECENTLY, SENIOR ANTITRUST DIVISION REPRESENTATIVES HAVE MET WITH DEFENSE DEPARTMENT OFFICIALS TO DISCUSS WAYS OF ENHANCING OUR ABILITY TO DISCOVER COLLUSIVE SCHEMES IN MILITARY CONTRACTING. OUR CONTACTS HAVE INCLUDED PROCUREMENT OFFICERS, AUDIT COMMANDS, GENERAL COUNSEL STAFFS, THE INSPECTOR GENERAL'S OFFICE, AND THE DEFENSE LOGISTICS AGENCY. WE ARE COORDINATING OUR EFFORTS WITH THE DEFENSE PROCUREMENT FRAUD UNIT IN THE

JUSTICE DEPARTMENT'S CRIMINAL DIVISION, AND WITH THE CIVIL DIVISION, SO AS TO MAXIMIZE THE FEDERAL GOVERNMENT'S ABILITY TO PROSECUTE RELATED CRIMES AND RECOVER OUR OWN DAMAGES AS WELL. WE PLAN TO EXPAND EXISTING EDUCATIONAL PROGRAMS AIMED AT HELPING DEFENSE PROCUREMENT PERSONNEL DETECT BID RIGGING AND MARSHAL EVIDENCE OF COLLUSION. AND WE WILL CONSIDER WHAT, IF ANY, NEW PROCEDURES CAN BE DEVISED TO DISCOURAGE BID RIGGING AND OTHER COLLUSIVE ARRANGEMENTS IN THE LETTING OF DEFENSE CONTRACTS.

OUR INITIATIVE AGAINST COLLUSION IN DEFENSE CONTRACTING IS GENERATING A NUMBER OF GRAND JURY INVESTIGATIONS. FOR EXAMPLE, THE DIVISION'S FIELD OFFICE IN ATLANTA, WITH ASSISTANCE FROM THE DEFENSE DEPARTMENT'S CRIMINAL INVESTIGATION SERVICE, IS EXAMINING ALLEGED COLLUSIVE ACTIVITIES IN THE DREDGING INDUSTRY ON THE SOUTHEAST ATLANTIC COAST.

WHILE WE ARE PLEASED WITH OUR SUCCESS IN CRIMINAL ENFORCEMENT OVER THE LAST FEW YEARS, MUCH WORK REMAINS TO BE DONE. I THINK WE HAVE MERELY SCRATCHED THE SURFACE OF DEFENSE PROCUREMENT COLLUSION. OUR INITIATIVE, WHICH WILL INVOLVE A SIGNIFICANT DEGREE OF COLLABORATION BETWEEN THE DEPARTMENTS OF JUSTICE AND DEFENSE, EXEMPLIFIES THE ADMINISTRATION'S COMMITMENT TO COMBATING FRAUD, WASTE, AND ABUSE IN GOVERNMENT.

SENTENCING IS ANOTHER MATTER OF GREAT CONCERN TO ME. IT IS REGRETTABLY TRUE THAT THE DIVISION'S EFFORTS TO HALT HARD CORE ANTITRUST CRIME HAVE NOT ALWAYS BEEN ADEQUATELY SUPPORTED BY

THE FEDERAL COURTS. WITH DISCOURAGING FREQUENCY, THE PRICE FIXERS AND BID RIGGERS WE DO BRING TO JUSTICE SLIP OFF WITH TOKEN PUNISHMENT. FOR EXAMPLE, IN FISCAL 1984, ALTHOUGH WE RECOMMENDED THAT 64 OF THE 69 INDIVIDUALS CONVICTED OF CRIMINAL ANTITRUST VIOLATIONS BE SENTENCED TO JAIL, ONLY 31 ACTUALLY RECEIVED PRISON SENTENCES. IN FISCAL 1985, JUDGES WERE EVEN MORE RELUCTANT TO ORDER INCARCERATION OF ANTITRUST FELONS. ONLY 10 OF 55 INDIVIDUALS CONVICTED OF BID RIGGING AND PRICE FIXING SERVED TIME, DESPITE THE FACT THAT WE RECOMMENDED INCARCERATION ON 41 OCCASIONS.

MOREOVER, INSTEAD OF SENDING ANTITRUST FELONS TO JAIL, JUDGES ARE INCREASINGLY INCLINED TO FASHION "CREATIVE" ALTERNATIVE SENTENCES INVOLVING "COMMUNITY SERVICE." FOR EXAMPLE, ONE DEFENDANT'S COMMUNITY SERVICE INVOLVED ORGANIZING A GOLF TOURNAMENT FUND RAISER FOR THE RED CROSS. A DEFENDANT IN ANOTHER ANTITRUST PROCEEDING WAS REQUIRED TO COORDINATE AN ANNUAL RODEO INSTEAD OF GOING TO JAIL. PRESUMABLY, THE SENTENCING JUDGE IN SUCH CASES PERCEIVES THE DEFENDANT, OFTEN A PROMINENT CITIZEN, AS A PERSON WHO'S SIMPLY HAD AN UNFORTUNATE SCRAPE WITH THE LAW. THERE ARE NO GRISLY CRIME-SCENE PHOTOGRAPHS, NO BEREAVED WIDOWS, NO DRUGS, AND THE DEFENDANT DOES NOT SEEM LIKE MUCH OF A DANGER TO SOCIETY. THE JUDGE CONCLUDES THAT THERE IS MORE HARM THAN GOOD IN LOCKING HIM AWAY, ESPECIALLY SINCE JAIL IS SUCH AN EXPENSIVE FORM OF PUNISHMENT AND THE PRISONS ARE ALREADY OVERCROWDED.

SUCH THINKING, HOWEVER, IGNORES THE ABSOLUTELY CRITICAL ROLE THAT DETERRENCE PLAYS IN CRIMINAL ANTITRUST ENFORCEMENT. IT IS A COMMONPLACE PROPOSITION AMONG LAW ENFORCEMENT THEORETICIANS THAT, FOR DETERRENCE PURPOSES, THE PUNISHMENT FOR A CRIME MUST BE INVERSELY PROPORTIONAL TO ITS RATE OF DETECTION. IF RELATIVELY FEW PERPETRATORS ARE DISCOVERED BECAUSE THE CRIME IS HARD TO DETECT, THE PENALTY FOR THOSE WHO DO GET CAUGHT MUST BE HIGH. IF THE CRIMINAL PENALTY IS TRIVIALIZED BY COURTS, THERE WILL BE NO EFFECTIVE DETERRENT TO PRICE FIXING. PURCHASERS, AND TAXPAYERS, WILL BE THE VICTIMS.

I BELIEVE THAT THE INCLINATION OF COURTS TO IMPOSE INAPPROPRIATE ALTERNATIVE ANTITRUST SENTENCES MUST BE CURTAILED. TO THAT END, THE DIVISION WILL VIGOROUSLY URGE THE UNITED STATES SENTENCING COMMISSION TO STRESS STIFF FINES AND JAIL SENTENCES AS THE APPROPRIATE PUNISHMENT FOR CRIMINAL ANTITRUST BEHAVIOR. THE COMMISSION, WHICH WAS CREATED BY THE COMPREHENSIVE CRIME CONTROL ACT OF 1984, IS RESPONSIBLE FOR ESTABLISHING SENTENCING GUIDELINES FOR USE IN FEDERAL CASES. JUDGES WILL BE REQUIRED TO ADHERE TO ITS GUIDELINES UNLESS THEY CAN CITE A COMPELLING JUSTIFICATION TO DO OTHERWISE. MOREOVER, THE GOVERNMENT WILL HAVE AN AUTOMATIC RIGHT TO APPEAL SENTENCES THAT ARE INCONSISTENT WITH THE GUIDELINES.

WHEN CONGRESS INCREASED PENALTIES FOR ANTITRUST VIOLATIONS IN 1974, IT AGREED WITH THE EXECUTIVE BRANCH THAT CRIMINAL ANTITRUST BEHAVIOR WAS FELONIOUS AND SHOULD BE PUNISHED

ACCORDINGLY. THE JUDICIARY MUST PLAY ITS ROLE IN IMPLEMENTING THAT POLICY. THE ANTITRUST DIVISION, FOR ITS PART, WILL CONTINUE PROSECUTING CRIMINAL ANTITRUST CONSPIRATORS TO THE FULLEST EXTENT OF THE LAW.

FINALLY, I WANT TO EMPHASIZE THE NEED FOR LEGISLATIVE ANTITRUST REFORM. DURING THIS ADMINISTRATION, THE DIVISION HAS SOUGHT--BY ADMINISTRATIVE ACTION WHERE POSSIBLE, THROUGH THE COURTS WHERE APPROPRIATE, AND IN THE CONGRESS--TO ELIMINATE UNDUE LEGAL RESTRICTIONS ON EFFICIENT BUSINESS CONDUCT. WE WORKED HARD TO SECURE CONGRESSIONAL PASSAGE OF BOTH THE EXPORT TRADING COMPANY ACT IN 1982 AND THE NATIONAL COOPERATIVE RESEARCH ACT IN 1984. BY LIMITING THE ANTITRUST LIABILITY OF EXPORT TRADING COMPANIES AND JOINT R&D VENTURES, THESE STATUTORY CHANGES HAVE REDUCED LEGAL OBSTACLES TO DESIRABLE RESEARCH AND EXPORT PROMOTION EFFORTS.

I AM PLACING A HIGH PRIORITY ON ACHIEVING FURTHER AND MORE FAR REACHING STATUTORY REFORMS. THE ADMINISTRATION'S LEGISLATIVE PROPOSALS TO IMPROVE THE COUNTRY'S TRADE PERFORMANCE WILL INCLUDE ANTITRUST AND PATENT LAW AMENDMENTS DESIGNED TO FOSTER EFFICIENT LICENSING ARRANGEMENTS THAT ARE TODAY VULNERABLE TO UNJUSTIFIED LEGAL ATTACK. THE ANTITRUST DIVISION HAS BEEN PROMOTING CHANGE IN THE INTELLECTUAL PROPERTY AREA FOR SEVERAL YEARS IN THE BELIEF THAT INNOVATORS SHOULD BE BETTER ABLE TO PROTECT AND EXPLOIT THE VALUE OF THEIR PATENTS AND OTHER RIGHTS IN TECHNOLOGY.

AN ADMINISTRATION WORKING GROUP, OF WHICH ASSISTANT TREASURY SECRETARY MANUEL JOHNSON AND I ARE CO-CHAIRMEN, IS DEVELOPING AND EVALUATING A VARIETY OF POSSIBLE ANTITRUST LEGISLATIVE REFORM PROPOSALS. AFTER COMPLETING ITS DELIBERATIONS, THE WORKING GROUP WILL FORWARD A SET OF RECOMMENDATIONS FOR CABINET-LEVEL CONSIDERATION BY THE ECONOMIC AND DOMESTIC POLICY COUNCILS. WE EXPECT THAT A PACKAGE OF PROPOSALS WILL BE READY FOR CONGRESSIONAL ACTION IN EARLY 1986. WHILE I CANNOT SAY WHICH PARTICULAR RECOMMENDATIONS WILL BE ADOPTED BY THE CABINET, I BELIEVE THAT SPECIAL ATTENTION SHOULD BE PAID TO THE AREA OF ANTITRUST REMEDIES, AND IN PARTICULAR, TO TREBLE DAMAGES IN PRIVATE SUITS.

AT PRESENT, TREBLE DAMAGES SERVE TWO IMPORTANT PURPOSES. FIRST, THEY PUNISH AND THUS DETER VIOLATIONS OF THE ANTITRUST LAWS. MULTIPLE DAMAGES DISCOURAGE PROSPECTIVE ANTITRUST VIOLATORS FROM CONCLUDING THAT THE LIKELY PAYOFF FROM ILLEGAL BEHAVIOR IS WORTH THE POTENTIAL PENALTY. AS I NOTED EARLIER, COLLUSION IS SURREPTITIOUS AND HARD TO DETECT, AND THE PENALTY MUST THEREFORE BE HIGH ENOUGH TO OFFSET THE LOW EXPECTATION OF BEING CAUGHT.

SECOND, TREBLE DAMAGES ENCOURAGE THE VICTIMS OF ANTICOMPETITIVE CONDUCT TO DEVOTE MORE RESOURCES TO DETECTING SUCH VIOLATIONS AND TO OBTAINING COMPENSATION FOR THEIR LOSSES. THE PRESENCE OF SUCH PRIVATE ATTORNEYS GENERAL, OF COURSE, ALSO CONTRIBUTES TO DETERRENCE.

NOTING THAT TREBLE DAMAGES HAVE BENEFICIAL CONSEQUENCES WITH RESPECT TO COLLUSION IS NOT, HOWEVER, THE WHOLE OF THE MATTER. A SYSTEM OF ANTITRUST REMEDIES SHOULD NOT ONLY EFFECTIVELY DISCOURAGE ANTICOMPETITIVE BEHAVIOR, IT SHOULD DO SO WITHOUT DETERRING GENUINELY PROCOMPETITIVE CONDUCT AND WITHOUT GENERATING UNDUE OPERATING COSTS IN THE ENFORCEMENT PROCESS. A GROWING BODY OF SCHOLARSHIP SUGGESTS, HOWEVER, THAT THE UNIVERSAL ANTITRUST TREBLE DAMAGES RULE CHILLS COMPETITION AS WELL AS COLLUSION. THE PROSPECT OF MULTIPLE RECOVERY INVITES PLAINTIFFS TO PURSUE DOUBTFUL CLAIMS, BOTH BECAUSE THE PROSPECTIVE PAYOFF IS SO GREAT AND BECAUSE THE DEFENDANT MAY BE WILLING TO BUY OFF THE CLAIM TO AVOID EVEN A REMOTE POSSIBILITY OF A DISASTROUS JUDGMENT. AS A CONSEQUENCE, POTENTIAL DEFENDANTS AVOID FORMS OF COMPETITIVE CONDUCT THAT ARE VULNERABLE TO MISCHARACTERIZATION AND ATTACK. THE WORKING GROUP WILL CAREFULLY CONSIDER WHETHER SOME FORM OF DETREBLING WOULD EFFECTIVELY MAINTAIN ADEQUATE DETERRENCE WHILE SIMULTANEOUSLY DISCOURAGING ANTICOMPETITIVE SUITS.

A CLOSELY RELATED PROBLEM IS THE FACT THAT SOME PRIVATE ANTITRUST CASES ARE FILED FOR DIRECTLY ANTICOMPETITIVE PURPOSES. THERE IS, OF COURSE, A SAD IRONY IN THE SPECTACLE OF THE CLAYTON ACT BEING EXPLOITED TO RETARD COMPETITION, BUT IT IS A SPECTACLE THAT RECURS WITH DEPRESSING FREQUENCY. I THINK IT IS EXTREMELY IMPORTANT FOR JUDGES TO DEAL WITH THIS PHENOMENON BY CAREFULLY SCRUTINIZING EACH PLAINTIFF'S STANDING

TO SUE. UNDER THE CLAYTON ACT, A DAMAGE CLAIM MUST ALLEGE "ANTITRUST INJURY," AND THAT CRITERION IS NOT MET WHEN A PLAINTIFF'S ALLEGED DAMAGE FLOWS FROM VIGOROUS COMPETITION. THIS POINT IS ESPECIALLY RELEVANT WHEN THE CLAIM IS FILED BY A MARKET RIVAL OF THE DEFENDANT.

JUST MONDAY, THE DEPARTMENT FILED AN AMICUS BRIEF ADDRESSING THIS ISSUE IN CONNECTION WITH THE DEFENDANT'S CERTIORARI PETITION IN MONFORT OF COLORADO, INC. V. CARGILL, INC. 1/ IN THAT CASE, A BEEF PACKING FIRM, MONFORT OF COLORADO, OBTAINED AN INJUNCTION AGAINST THE MERGER OF TWO OTHER BEEF PACKERS, EXCEL CORPORATION AND THE SPENCER BEEF DIVISION OF LAND O' LAKES, INC. THE PLAINTIFF'S THEORY WAS THAT THE EMERGING FIRM WOULD SEEK TO INCREASE ITS MARKET SHARE BY RAISING PRICES PAID TO CATTLE RAISERS AND CUTTING PRICES CHARGED FOR BOXED BEEF. THIS "PRICE-COST SQUEEZE" WOULD FORCE OTHER BEEF PACKERS FROM THE MARKET AND ULTIMATELY CONFER MARKET POWER ON THE MERGED DEFENDANTS.

IN ESSENCE, MONFORT ASSERTS THAT THE MERGER SHOULD BE DENIED BECAUSE THE RESULTING COMPANY WILL BE ABLE TO PRICE AT PREDATORILY LOW LEVELS. OUR BRIEF ARGUES THAT COURTS SHOULD BE EXTREMELY WARY WHENEVER A RIVAL WHO STANDS TO SUFFER FROM AGGRESSIVE PRICE COMPETITION CHALLENGES A MERGER ON AN

1/ 761 F.2D 570 (10TH CIR. 1985), PETITION FOR CERT. FILED, 54 U.S.L.W. 3229 (SEPT. 19, 1985) (NO. 85-473).

"INCIPIENT PREDATION" THEORY. AT THE VERY LEAST, THE PLAINTIFF SHOULD HAVE TO SHOW THAT THE MERGER WILL PRODUCE A MARKET STRUCTURE IN WHICH PREDATION IS AN ECONOMICALLY CREDIBLE POSSIBILITY, SOMETHING THAT THE PLAINTIFF IN MONFORT WOULD BE UNABLE TO DEMONSTRATE. WITHOUT SUCH A SHOWING, THE PLAINTIFF'S FEAR OF PREDATION IS FANCIFUL, AND THE KIND OF "ANTITRUST INJURY" NECESSARY FOR CLAYTON ACT STANDING IS NOT PRESENT. THE COURTS SHOULD THEREFORE DISMISS SUCH CLAIMS AT THE OUTSET.

STANDING TO SUE AND THE AVAILABILITY OF TREBLE DAMAGES ARE ISSUES OF GREAT CONCERN TO THE DEPARTMENT OF JUSTICE. IN THESE AREAS, AS IN THE PROSECUTION OF DEFENSE PROCUREMENT BID RIGGING AND THE PUNISHMENT OF PRICE FIXERS, OUR OBJECTIVE IS TO FORESTALL PRIVATE CONDUCT INIMICAL TO COMPETITION, AND TO ENSURE THAT ANTITRUST ENFORCEMENT, BOTH PUBLIC AND PRIVATE, DOES NOT DISCOURAGE BUSINESS FIRMS FROM EFFICIENT, PROCOMPETITIVE CONDUCT.

I WOULD LIKE TO FINISH MY REMARKS BY MENTIONING ONE ADDITIONAL MATTER. FROM TIME TO TIME, THE DIVISION ISSUES GUIDELINES THAT DESCRIBE OUR ENFORCEMENT POLICIES WITH RESPECT TO A CLASS OF COMMERCIAL ACTIVITY, SUCH AS MERGERS OR VERTICAL DISTRIBUTION RESTRAINTS. BEFORE PUBLISHING SUCH GUIDELINES IN THEIR FINAL FORM, WE TYPICALLY CIRCULATE THEM TO MEMBERS OF THE ANTITRUST COMMUNITY FOR INFORMAL COMMENT. HENCEFORTH, HOWEVER, ABSENT EXTRAORDINARY CIRCUMSTANCES, WE WILL RELEASE LAW ENFORCEMENT GUIDELINES TO THE PUBLIC IN DRAFT FORM AND SOLICIT

COMMENT FROM ALL INTERESTED PERSONS BEFORE PROMULGATING A FINAL VERSION. THE ATTORNEY GENERAL AND I FIRMLY BELIEVE THAT WHATEVER DELAY AND RESOURCE EXPENDITURE ARE CAUSED BY THIS PROCEDURE WILL BE JUSTIFIED BY BROADER PARTICIPATION IN THE POLICY PROCESS AND A BETTER FINAL PRODUCT.

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