

ANALYSIS OF AGREEMENT CONTAINING CONSENT ORDERS TO AID PUBLIC COMMENT

In the Matter of Thermo Electron Corporation, File No. 0610187

I. Introduction

The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an Agreement Containing Consent Orders (“Consent Agreement”) from Thermo Electron Corporation (“Thermo”). The purpose of the Consent Agreement is to remedy the anticompetitive effects resulting from Thermo’s acquisition of Fisher Scientific International Inc. (“Fisher”). Under the terms of the Consent Agreement, Thermo is required to divest Genevac Limited and Genevac, Inc. (hereinafter referred to together as “Genevac”), which together comprise the entirety of Fisher’s centrifugal vacuum evaporator (“CVE”) business, within five months after the date Thermo signed the Consent Agreement.

The Consent Agreement has been placed on the public record for thirty days to solicit comments from interested persons. Comments received during this period will become part of the public record. After thirty days, the Commission will again review the Consent Agreement and the comments received, and will decide whether it should withdraw from the Consent Agreement or make it final.

Pursuant to an Agreement and Plan of Merger dated May 7, 2006, Thermo proposes to acquire Fisher in a transaction valued at approximately \$12.8 billion. The Commission’s complaint alleges that the proposed acquisition, if consummated, would violate 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, by lessening competition in the market for high-performance CVEs.

II. The Parties

Headquartered in Waltham, Massachusetts, Thermo is one of the largest and most diversified suppliers of analytical instruments in the world. Founded in 1956, the company now employs 11,000 people worldwide with offices in thirty countries. Thermo owns many well-known laboratory equipment brands and sells high-performance CVEs under its Savant Speedvac brand. Thermo’s 2005 worldwide revenue was \$2.6 billion and its North American sales were approximately \$1.2 billion.

Fisher is headquartered in Hampton, New Hampshire. Founded in 1902 to supply equipment and consumables to laboratories, Fisher today employs 19,500 people worldwide, 13,000 of those in the United States. The company is divided into three segments: biopharma services, scientific equipment and products, and distribution. Fisher has many well-known laboratory equipment and instrument brands and sells its CVE products under the Genevac brand. Through its distribution operations, Fisher sells approximately 600,000 scientific and laboratory products and serves over 350,000 customers worldwide. Fisher’s 2005 worldwide revenue was \$5.6 billion, of which \$4.1 billion was achieved in the United States.

III. High-Performance CVEs

High-performance CVEs apply heat, vacuum, and centrifugal force to rapidly remove solvents from samples suspended in solution in the wells of microtiter plates or test tubes, while preventing any molecular degradation or cross-contamination of the samples. High-performance CVEs are used primarily in combinatorial chemistry laboratories, which develop processes to simultaneously synthesize large collections of potentially biologically-active molecules, a process called parallel synthesis. The collections of molecules then can be tested for activity against identified targets as potential drug candidates during the early stages of the drug discovery process. In academic laboratories, high-performance CVEs are used to aid in the creation of chemical libraries of potentially biologically-active molecules for research purposes. High-performance CVEs typically cost between \$25,000 and \$100,000, depending on features and throughput capabilities.

CVEs are available in both high-performance and lower-performance models. High-performance CVEs differ from their lower-performance counterparts in a number of significant respects. High-performance CVEs can process hundreds of samples at a time and include advanced control and monitoring capabilities to prevent cross contamination between samples or degradation of the molecules as they are evaporated. They also are compatible with corrosive and environmentally sensitive solvents, such as hydrochloric acid and acetonitrile. In addition, high-performance models offer sophisticated programming capabilities. All of these features are considered useful and necessary by high-performance CVE purchasers because they enhance the efficiency of their work and reduce the likelihood of sample loss, degradation, and contamination. High-performance CVE purchasers do not consider lower-performance CVEs to be viable alternatives because of the high value of the samples, which in many cases take a week or more to synthesize and can represent the entire quantity of the compound that the scientist has developed. The repercussions of a sample loss or degradation resulting from a failure of the CVE are simply too great to justify the use of lower performance CVEs in these applications.

Besides the use of CVEs, there are also other methods available for removing solvents and drying samples, such as freeze drying and nitrogen blowdown. These technologies, however, have many limitations as compared to high-performance CVEs. Freeze drying, also called lyophilisation, is an effective technique for drying samples suspended in aqueous solvents. Lyophilisation is far less effective, however, with solvents that are not water-based and can be significantly more time consuming than high-performance CVEs when evaporating a large number of samples. Nitrogen blowdown equipment, which circulates nitrogen – a very dry gas – across the samples' surface to evaporate the solvent, does not capture the evaporated solvent and does not maintain a constant temperature during evaporation. These drawbacks, among others, prevent the alternative technologies from being viable alternatives to high-performance CVEs.

The United States is the relevant geographic market in which to analyze the effects of Thermo's proposed acquisition of Fisher in the market for high-performance CVEs. Firms that lack significant U.S. business operations cannot compete meaningfully in the United States.

Successful participation in the U.S. high-performance CVE market requires substantial domestic, even local service and support. Because many purchasers use their high-performance CVEs daily, breakdowns may halt work in the lab. Such delay is costly, so customers demand reliable equipment and, in the event of a breakdown, that required service, support, and replacement parts be readily available. Thus, establishing a reputation for high quality products and strong after-sales support is necessary to gain acceptance among customers and succeed in the U.S. high-performance CVE market.

IV. Competitive Effects and Entry Conditions

Thermo and Fisher are the only two significant suppliers in the approximately \$10 million U.S. high-performance CVE market. Thermo and Fisher account for approximately 30 percent and 70 percent of the market, respectively, and compete directly on price, service, and product innovations. The evidence gathered in the Commission's investigation demonstrates that customers receive lower prices and other economic benefits, such as favorable service or payment terms, as a result of the competition between Thermo and Fisher. Indeed, many customers fear that the proposed transaction would allow the merged entity to increase prices of high-performance CVE's considerably, as they would have no alternative but to go along with a price increase imposed by the combined Thermo/Fisher. The evidence also shows that the parties compete on the basis of product performance, features, and innovation resulting in product improvements, such as enhanced vacuum and monitoring capabilities. If the proposed transaction were consummated, Thermo would obtain a virtual monopoly in the U.S. high-performance CVE market.

Martin Christ GmbH ("Martin Christ"), which is based in Germany, also offers high-performance CVEs. Martin Christ currently is not a significant competitor in the United States, however, and is not expected to be in the future. Martin Christ has had minimal sales of its high-performance CVE products in the United States during the last three years, and its sales are not likely to increase sufficiently to restore the lost competition.

Entry into the relevant market that would be sufficient to deter or counteract the anticompetitive effects of proposed transaction is unlikely to occur in a timely manner, as there are significant impediments to entry and expansion. First, a firm would have to design, develop, and test a product with functionality and reliability nearly equivalent to the products offered by incumbent models, while designing around, or obtaining licenses to, any intellectual property protecting the features and design of the incumbent high-performance CVEs. Second, if a prospective entrant does not have a pre-existing sales force directly selling related products, it also would have to establish a distribution channel by building a sales force and initiating a marketing effort sufficient to convince customers to buy its new high-performance CVE. Third, because high-performance CVEs are used regularly to perform critical laboratory functions, a new entrant must build a reputation for product quality and reliability and for responsive service in order to succeed. Finally, even if an entrant could overcome these barriers to entry, the relatively small high-performance CVE market, and correspondingly limited profit opportunities

available to a new entrant, likely are insufficient to justify the investment necessary to enter the high-performance CVE market.

V. The Consent Agreement

The Consent Agreement effectively remedies the anticompetitive effects that are likely to occur as a result of the proposed transaction on the high-performance CVE market by requiring Thermo to divest Genevac, Fisher's stand alone CVE subsidiary. Pursuant to the Consent Agreement, Thermo is required to divest Genevac to a Commission-approved buyer, at no minimum price, within five months after the date Thermo signed the Consent Agreement. The Commission's goal in evaluating and approving purchasers of divested assets is to ensure that the competitive environment that existed prior to the acquisition is maintained. A proposed acquirer of divested assets must not itself present competitive problems.

Should Thermo fail to accomplish the divestiture within the time and in the manner required by the Consent Agreement, the Commission may appoint a trustee to divest the assets. If approved, the trustee would have the exclusive power and authority to accomplish the divestiture within six months of being appointed, subject to any necessary extensions by the Commission. The Consent Agreement requires Thermo to provide the trustee with access to information related to the Genevac business as necessary to fulfill his or her obligations.

The Order to Hold Separate and Maintain Assets ("Hold Separate Order") that is included in the Consent Agreement requires that Thermo hold separate and maintain the viability of Genevac as a competitive operation until the business is transferred to the Commission-approved acquirer. Furthermore, it contains measures designed to ensure that no material confidential information is exchanged between Thermo and Genevac (except as otherwise provided in the Consent Agreement) and provisions designed to prevent interim harm to competition in the high-performance CVE market.

The Hold Separate Order provides that the Commission may appoint a Hold Separate Trustee who is charged with the duty of monitoring Thermo's compliance with the Consent Agreement. Pursuant to that order, the Commission has appointed Harry Cole as Hold Separate Trustee to oversee Genevac prior to its divestiture and to ensure that Thermo complies with its obligations under the Consent Agreement. Mr. Cole was employed by Genevac from its incorporation in 1990 until 2005 and held numerous production, service, sales, and management positions, including serving as General Manager of Genevac with plenary responsibility for Genevac's performance. Mr. Cole's extensive background in the CVE market and intimate knowledge of Genevac uniquely qualify him to serve as the Hold Separate Trustee. The Hold Separate Order will become effective upon the date the Commission accepts the Consent Agreement for placement on the public record and will remain in effect until Thermo divests Genevac to a Commission-approved buyer. In the event that Thermo does not divest Genevac within the five-month time period, the Consent Agreement allows the Commission to appoint a trustee to divest Genevac.

The Consent Agreement contains several further provisions designed to help ensure that the divestiture of Genevac is successful. First, because a few of Genevac's lower-performance CVEs are currently sold through Fisher's catalog, the Consent Agreement requires Thermo, at the acquirer's option, to enter into a distribution agreement with the acquirer for Genevac's products to continue to be sold via the Fisher catalog, ensuring that Thermo cannot diminish Genevac's competitiveness by disrupting Genevac's distribution channels. Second, so that key Genevac employees stay with Genevac through the divestiture process, the Consent Agreement requires Thermo to implement and fund a retention plan for key employees. Third, the Consent Agreement prohibits Thermo from soliciting Genevac employees for at least a year after the divestiture of Genevac. For key Genevac employees, including its management and head of research and development, this prohibition is extended to two years.

In order to ensure that the Commission remains informed about the status of the Genevac business pending divestiture, and about the efforts being made to accomplish the divestiture, the Consent Agreement requires Thermo to file periodic reports with the Commission until the divestiture is accomplished.

The purpose of this analysis is to facilitate public comment on the Consent Agreement, and it is not intended to constitute an official interpretation of the Decision and Order or the Hold Separate Order, or to modify their terms in any way.