

MERGER ANTITRUST LAW

Unit 13: Adobe/Aldus

(Full Set of Case Materials)

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Complaint

118 F.T.C.

IN THE MATTER OF

ADOBE SYSTEMS INCORPORATED, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION
OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT

Docket C-3536. Complaint, Oct. 18, 1994--Decision, Oct. 18, 1994

This consent order permits the consummation of the acquisition of Aldus Corporation by Adobe Systems Incorporated and requires, among other things, the two software firms to divest Aldus Corporation's FreeHand professional-illustration computer software and name to Altsys Corporation within six months. In addition, for ten years, the order requires the respondents to obtain Commission approval before acquiring any stock or other interest in any firm engaged in the development or sale of professional-illustration software for the Macintosh or Power Macintosh.

Appearances

For the Commission: *Mary Lou Steptoe* and *Mark Menna*.

For the respondents: *Wayne D. Collins, Sherman & Sterling*, New York, N.Y. and *Harvey I. Saferstein, Irell & Manella*, Los Angeles, CA.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said act, the Federal Trade Commission (Commission), having reason to believe that respondent Adobe Systems Incorporated, a corporation, has agreed to acquire the Aldus Corporation, a corporation, in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that such 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, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. RESPONDENTS

1. Respondent Adobe Systems Incorporated (“Adobe”) is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its principal place of business at 1585 Charleston Road, Mountain View, California. Adobe, which had sales of approximately \$313.5 million in 1993, develops and markets computer software. Adobe develops and markets, among other graphics software, Illustrator, a professional illustration program.

2. Respondent Aldus Corporation (“Aldus”) is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Washington, with its principal place of business at 411 First Avenue South, Seattle, Washington. Aldus, which had sales of approximately \$206.5 million in 1993, is also a producer of computer software, with the majority of its revenue derived from graphics products. Aldus markets FreeHand, a professional illustration program, under license from Altsys Corporation, which initially developed the program and continues to develop it in consultation with Aldus.

II. JURISDICTION

3. Adobe and Aldus are, and at all time relevant herein have been, engaged in commerce as “commerce” is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and are corporations whose business is in or affects commerce as “commerce” is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

III. THE ACQUISITION

4. Adobe and Aldus entered into an agreement on or about March 15, 1994, pursuant to which Adobe intends to acquire essentially all of the stock of Aldus in exchange for Adobe stock valued at the time at approximately \$525 million. On or about July 14, 1994, Adobe and Aldus agreed to revise their March 15 agreement, reducing the value of the proposed acquisition to approximately \$455 million.

IV. MARKET STRUCTURE

5. One relevant line of the commerce in which to analyze the effects of the proposed acquisition is the development and sale of professional illustration software for use on Apple Macintosh and Power Macintosh computers. Illustrator and FreeHand are the only two products in that market, with combined 1993 worldwide sales of approximately \$60 million and combined 1993 U.S. sales of \$32 million, of which approximately 70 percent was attributed to sales of Illustrator and approximately 30 percent was attributable to sales of FreeHand.

6. Illustrator and FreeHand compete for sales to graphics arts professionals and are the only illustration programs which offer features and performance characteristics enabling graphics professionals efficiently and reliably to create and print high-quality illustrations.

7. Even if the relevant market is broadened to include the development and sale of all illustration software for use on Apple Macintosh and Power Macintosh computers, or is broadened even further to include the development and sale of illustration software for use on IBM-compatible computers with the Windows operating environment, the relevant market is highly concentrated and Adobe and Aldus have a combined share of more than 35% of sales. The products are differentiated and a significant share of sales in the broader markets is accounted for by customers who regard Illustrator and FreeHand as their first and second choices.

8. The relevant geographic market in which to consider the proposed acquisition is either the United States or worldwide. There are no significant impediments to the sale of imported illustration programs in the United States; however, most illustration software is published in the United States.

9. Entry into the market for professional illustration software for use on Apple Macintosh and Power Macintosh computers would not be timely, likely, or sufficient in its magnitude, character, and scope to deter or counteract anticompetitive effects. Developing a professional illustration program is difficult and time consuming. Marketing a technically comparable or even an improved illustration program would be difficult and time consuming because of network externalities associated with Illustrator's and FreeHand's extensive installed user bases. Repositioning of other programs to compete

with Illustrator and FreeHand would also be difficult, time consuming and unlikely.

10. Adobe and Aldus have competed vigorously against each other with respect to price and development of new versions of Illustrator and FreeHand.

V. EFFECTS OF THE ACQUISITION

11. The proposed acquisition, if consummated, may substantially lessen competition or tend to create a monopoly in the relevant markets in the following ways, among others:

- a. It will increase the already high concentration in the relevant markets;
- b. It will eliminate Aldus as a substantial independent competitive force in the relevant markets;
- c. It will eliminate actual, direct and substantial competition between Adobe and Aldus;
- d. It will eliminate competition between the two closest substitutes, Illustrator and FreeHand, among differentiated products in the relevant markets;
- e. It will allow the merged firm unilaterally to exercise market power;
- f. It will allow the merged firm to raise prices, either directly or through reduced discounting, promotions, or service, on either Illustrator or FreeHand or on both products;
- g. It will allow the merged firm to reduce innovation by delaying or reducing product development; and
- h. It will increase the likelihood of coordinated interaction.

VI. VIOLATIONS CHARGED

12. The acquisition agreement described in paragraph four of this complaint constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

13. The proposed acquisition of Aldus by Adobe, if consummated, would constitute 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.

Commissioner Varney not participating.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed acquisition by respondent Adobe Systems Incorporated of the stock of respondent Aldus Corporation, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission, having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Adobe Systems Incorporated is a corporation organized, existing, and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 1585 Charleston Road, Mountain View, California.
2. Respondent Aldus Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Washington, with its office and principal place of business located at 411 First Avenue South, Seattle, Washington.

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I.

It is ordered, That, as used in this order, the following definitions shall apply:

A. “*Adobe*” means Adobe Systems Incorporated, its predecessors, divisions, subsidiaries, groups and affiliates that it controls, and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

B. “*Aldus*” means Aldus Corporation, its predecessors, divisions, subsidiaries, groups and affiliates that it controls, and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

C. “*Respondents*” means Adobe and Aldus.

D. “*Altsys*” means Altsys Corporation, a Texas corporation located at 269 West Renner Parkway, Richardson, Texas.

E. “*Professional Illustration Software*” means a complete path-based illustration program native to Apple Macintosh or Power Macintosh computers, targeted to meet the needs of professional customers whose function is to create graphics for internal and external clients to be used in publications printed on a printing press, and excludes Computer Aided Design (CAD) and 3D programs.

F. “*FreeHand*” means the Professional Illustration Software program marketed and sold by Aldus under the name “Aldus FreeHand” pursuant to a Software License Agreement with Altsys dated as of July 20, 1987, as amended (the “License”); Aldus source code incorporated in FreeHand (for use in FreeHand); the name “FreeHand” (but not the name “Aldus”); the FreeHand customer names and addresses together with FreeHand specific information in the Aldus database (but not the underlying database application software); and all marketing, advertising, training and technical support information and materials for FreeHand.

G. “*Illustrator*” means the Professional Illustration Software program marketed and sold by Adobe under the name “Illustrator.”

H. “*Altsys Agreement*” means the July 11, 1994, agreement between Aldus and Altsys.

I. “*Acquisition*” means the stock acquisition of Aldus by Adobe.

J. “*Commission*” means the Federal Trade Commission.

II.

It is further ordered, That, pending divestiture of FreeHand, respondents shall take such action as is necessary to maintain the viability and marketability of FreeHand and shall not cause or permit the destruction, removal from the market, wasting, deterioration or impairment of FreeHand. Pending divestiture of FreeHand, employees of respondents involved in the development, marketing, or sale of Illustrator or FreeHand shall not be involved in the development, marketing or sale of the other product; and employees of respondents involved in the development, marketing or sale of Illustrator or FreeHand shall not receive or have access to or the use of any “material confidential information” not in the public domain, with respect to the other product except as such information would be available to those employees in the normal course of business if the acquisition had not taken place. (“Material confidential information,” as used herein, means competitively sensitive or proprietary information not independently known from sources other than those employees involved in the development, marketing, or sale of FreeHand or Illustrator.)

III.

It is further ordered, That within six (6) months after the acquisition is consummated respondents shall absolutely and in good faith divest FreeHand to Altsys in accordance with the Altsys agreement. Adobe and Aldus shall comply with all the terms of the Altsys agreement, except that the License shall be terminated no later than six (6) months after the acquisition. The purpose of the divestiture is to ensure the continuation of FreeHand as an ongoing viable Professional Illustration Software program, to maintain FreeHand as an independent competitor in the Professional Illustration Software business, and to remedy the lessening of competition resulting from the acquisition as alleged in the Commission’s complaint.

IV.

It is further ordered, That, within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until respondents have fully complied with the provisions of paragraphs II and III of this order, respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, or have complied with those provisions. Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with paragraphs II and III of this order.

V.

It is further ordered, That for a period of ten (10) years from the date on which this order becomes final, respondents shall not, without the prior approval of the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

A. Acquire any stock, share capital, equity or other interest in any concern, corporate or noncorporate, then engaged in the development or sale of Professional Illustration Software, provided, however, that an acquisition of such stock, share capital, equity or other interest will be exempt from the requirements of this paragraph if it is solely for the purpose of investment and respondents will hold no more than one percent of the shares of any class of security traded on a national securities exchange or authorized to be quoted in an interdealer quotation system of a national securities association registered with the United States Securities and Exchange Commission; or

B. Acquire any Professional Illustration Software or acquire or enter into any exclusive license to Professional Illustration Software; provided, however, that such an acquisition will be exempt from the requirements of this paragraph if the purchase price is less than \$2,000,000 (two million dollars).

VI.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, unless respondents are required to seek

prior approval from the Commission pursuant to paragraph V, respondents shall not, without providing advance written notification to the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise, acquire any Professional Illustration Software or any exclusive license to Professional Illustration Software;

Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as "the Notification"). Respondents shall provide to the Commission at least ten days prior to acquiring any such interest (hereinafter referred to as the "first waiting period"), both the Notification and supplemental information either in respondents' possession or reasonably available to respondents. Such supplemental information shall include a copy of the proposed acquisition agreement; the names of the principal representatives of each respondent and of the firm respondents desire to acquire who negotiated the acquisition agreement; and any management or strategic plans discussing the proposed acquisition. If, within the first waiting period, representatives of the Commission make a written request for additional information, respondents shall not consummate the acquisition until twenty days after submitting such additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted in the same manner as is applicable under the requirements and provisions of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. 18a.

VII.

One year from the date this order becomes final, annually for the next nine (9) years, and at other times as the Commission may require, respondents shall file with the Commission verified written reports setting forth in detail the manner and form in which they have complied and are complying with paragraphs V and VI of this order.

VIII.

It is further ordered, That, for the purposes of determining or securing compliance with this order, and subject to any legally recognized privilege, upon written request and on reasonable notice to

respondents, respondents shall permit any duly authorized representatives of the Commission:

A. Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of respondents relating to any matters contained in this order; and

B. Upon five (5) days notice to respondents, and without restraint or interference from respondents, to interview officers or employees of respondents, who may have counsel present, regarding such matters.

IX.

It is further ordered, That each respondent shall notify the Commission at least thirty (30) days prior to any proposed change in such respondent, such as dissolution, assignment, sale resulting in the emergence of a successor, or the creation or dissolution of subsidiaries or any other change that may affect compliance obligations arising out of this order.

Commissioner Varney not participating.