

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,
Department of Justice
Washington, D.C. 20530

Plaintiff,

v.

AMERICAN NATIONAL CAN CO.
Chicago, IL 60631

and

KMK MASCHINEN AG;
CH-8340 Hinwil, Switzerland

Defendants.

CIVIL ACTION NO. 96 CIV 01458

Filed: June 25, 1996

COMPLAINT

The United States of America, plaintiff, by its attorneys acting under the direction of the Attorney General of the United States, brings this civil action to prevent and restrain the defendants, American National Can, Co. ("ANC") and KMK Maschinen AG ("KMK"), from engaging in conduct having the purpose and effect of reducing competition in the North American markets for laminated tubes, laminated tube-making equipment, and laminated tube-making technology, and complains and alleges as follows:

Laminated tubes are multi-layered, collapsible tubular packages used primarily for toothpaste and some pharmaceuticals. The markets for laminated tubes and laminated tube-making equipment are highly concentrated, with three companies manufacturing over 95% of the laminated tubes sold in the United

States. Only three companies manufacture laminated tube-making equipment in the entire world.

In 1987, ANC and KMK were both vertically integrated companies that owned rights to laminated tube-making technology, manufactured laminated tube-making equipment for use in the United States, and manufactured and sold laminated tubes in the United States. KMK and ANC entered into a series of agreements, pursuant to which KMK exited the laminated tube market in North America by selling its U.S. affiliate, Swisspack Corporation, to ANC. KMK also gave ANC an exclusive license to use its laminated tube-making technology and an exclusive right to buy its laminated tube-making equipment in North America. In exchange, ANC agreed to purchase all its laminated tube-making equipment for use in North America from KMK, and agreed not to acquire or use any third party's equipment or technology there. At about the same time, ANC exited the laminated tube-making equipment market by discontinuing the manufacture of such equipment. As a result of these agreements, competition was restrained in the manufacture of laminated tube-making equipment, the licensing and development of laminated tube-making technology, and the sale of laminated tubes in North America.

I.

JURISDICTION AND VENUE

1. This complaint is filed under Section 4 of the Sherman Act, as amended (15 U.S.C. § 4), in order to prevent and restrain violations by the defendants of Section 1 of the Sherman Act (15 U.S.C. § 1). This court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331 and 1337.

2. Venue is properly laid in this District pursuant to Section 12 of the Clayton Act, 15 U.S.C. §22, and under 28 U.S.C. § 1391 because ANC is licensed to do business in the District of Columbia, and because KMK consents to this court's exercise of jurisdiction over it.

II.

DEFINITIONS

3. "Laminated tube" means a collapsible, squeeze-to-use tubular package with a sideseam that consists of a body of multiple laminated plastic layers separated by a layer of either plastic or aluminum foil that serves as a barrier to moisture, light, gases, or other agents; a tube head attached to the body; and may include a cap.

4. "Laminated tube-making equipment" means machinery, apparatus, or devices for making and/or assembling laminated tubes, including forming a tube head, sealing or otherwise connecting it to a laminated tube body, or capping the laminated tube.

5. "Laminated tube-making technology" means any form of intellectual property relating to (i) the design, development, construction, or operation of laminated tube-making equipment or any component, feature, or use thereof; (ii) the fabrication of laminated tubes or any component thereof; or (iii) the material used in making laminated tubes; but only to the extent such component, feature, use, or material relates to laminated tubes and not to other types of packaging.

III.

DEFENDANTS

6. American National Can Co. ("ANC") is a Delaware corporation licensed to do business in the District of Columbia.

7. KMK Maschinen AG ("KMK"), also known as KMK Karl Maegerle Lizenz AG, is a Swiss company; it conducted business in the United States through Swisspack Corporation ("Swisspack"), an affiliate incorporated in New Jersey.

IV.

TRADE AND COMMERCE

8. During the period covered by this complaint, there has been a continuous and uninterrupted flow in interstate commerce of ANC laminated tubes from ANC's facilities in Norwalk, Connecticut (among others) to toothpaste and pharmaceutical manufacturers throughout the United States.

9. Before entering into the agreements described in this complaint ("subject agreements"), ANC also produced and used laminated tube-making equipment in the United States, and sold

laminated tube-making equipment from its United States facilities to equipment customers abroad.

10. Before entering into the subject agreements, there was a continuous and uninterrupted flow in interstate commerce of laminated tubes from KMK's Swisspack facilities in New Jersey to toothpaste and pharmaceutical manufacturers in the United States.

11. Before entering into the subject agreements, KMK shipped laminated tube-making equipment into the United States to Swisspack for its use there.

V.

BACKGROUND

A. The Laminated Tube Market

12. Laminated tubes are multi-layered, collapsible tubular containers used to package virtually all toothpaste and many pharmaceutical products sold in the United States. These tubes preserve the product within a flexible tube without permitting air or moisture to enter the tube. Other packaging materials either cost more than or lack the barrier characteristics of laminated tubes. Thus, there are no economic substitutes for laminated tubes, and laminated tubes constitute a distinct relevant product market.

13. The relevant geographic market (and the area affected by the defendants' agreements) is North America. It is not economically feasible to ship laminated tubes into North America. Annual retail sales for laminated tubes in North America are about \$110 million, or 1.1 billion tubes, of which approximately

800 million are sold to toothpaste manufacturers; approximately 300 million are sold to pharmaceutical manufacturers and others.

14. The market for laminated tubes is highly concentrated. Three companies manufacture over 95% of such tubes sold in the United States. ANC is the largest competitor with total sales comprising over 60% of the United States toothpaste tube market. There are only two other competitors in the United States that have 5% or more of the laminated tubes market.

15. Successful new entry into, or expansion within, the laminated tube market is difficult. To be successful, a new entrant must acquire expensive laminated tube-making equipment and essential, related patented and unpatented laminated tube-making technology. The up-front investment in plant, machinery, research, technology, and sales is substantial relative to the profit opportunity available in this market.

16. Before entering into the subject agreements, KMK and ANC each manufactured and sold laminated tubes in the United States.

B. The Market For Laminated Tube-Making Equipment

17. Laminated tube-making equipment is machinery used to manufacture laminated tubes. This equipment cannot efficiently be used for any other purpose, nor can other machines be easily or efficiently converted or adapted to make laminated tubes. Therefore, there is no economic substitute for this equipment, and laminated tube-making equipment is a distinct relevant product market.

18. The market for laminated tube-making equipment is highly concentrated. Besides KMK, only two companies worldwide currently manufacture such equipment. (As described below, ¶28, one of those companies is a subsidiary of ANC's parent, Pechiney SA.)

19. KMK is one of only a very few firms in the world that can provide laminated tube-making equipment for sale in the United States. KMK has sold such equipment worldwide, and its equipment enjoys a good reputation in the industry. KMK has numerous patents in countries around the world, including the United States.

20. Successful new entry into, or expansion within, the market for laminated tube-making equipment is difficult. To be successful, a new entrant must acquire or develop essential patented and unpatented laminated tube-making technology. Such technology is expensive to acquire or develop relative to the sales opportunity for the equipment.

21. Before defendants entered into the subject agreements, KMK and ANC each manufactured laminated tube-making equipment for use in the United States.

C. The Market for Laminated Tube-Making Technology

22. The use of patented and unpatented tube-making technology is essential to the profitable manufacture of laminated tubes and laminated tube-making equipment. There are only a few competing forms of such technology today, and KMK, ANC, and an affiliate of

ANC's parent hold the rights to three of the four leading types of the technology worldwide.

23. Development of new competitive technology would require substantial investment with highly uncertain returns. New entry into the laminated tube technology market cannot reasonably be expected in the foreseeable future.

VI.

THE SUBJECT AGREEMENTS

24. In late 1987 ANC and KMK entered into several agreements, the purpose and effect of which was to eliminate competition between them in the North American laminated tube, tube-making equipment, and tube-making technology markets.

25. Pursuant to one of those agreements, ANC purchased Swisspack, KMK's U.S. affiliate, for just under \$15 million. The laminated tube-making equipment covered by the transaction was valued at less than \$5 million. As a result of ANC's acquisition of Swisspack, KMK exited the North American laminated tube market.

26. On the same day that ANC acquired Swisspack, ANC and KMK entered into a License and Technology Assistance Agreement ("LTAA"). Pursuant to that agreement, KMK gave ANC an exclusive license to use KMK's laminated tube-making technology, and an exclusive right to buy its laminated tube-making equipment, in North America ("exclusivity provisions"). In exchange, ANC agreed to license any laminated tube-making technology and buy all laminated tube-making equipment for use in North America only

from KMK, and not to acquire or use any third party's laminated tube-making equipment or technology there. At or about the time of these agreements, ANC discontinued the manufacture of laminated tube-making equipment.

27. By precluding KMK from selling laminated tube-making equipment or licensing laminated tube-making technology to others in North America, these agreements reduced competition in the North American laminated tube, laminated tube-making equipment, and laminated tube-making technology markets.

28. Several years after entering into these agreements, ANC was acquired by Pechiney SA, a French company, one of whose existing subsidiaries, Cotuplas SA, manufactures laminated tube-making equipment. Consequently, since being acquired by Pechiney SA, ANC has obtained substantially all its laminated tube-making equipment from that Pechiney subsidiary.

29. Despite obtaining its laminated tube-making equipment from Pechiney SA rather than KMK, ANC has enforced the exclusivity provisions of the LTAA against KMK, to prevent KMK, its equipment, and its technology from competing with ANC in North America.

VII.

CAUSE OF ACTION

30. The defendants have engaged in a combination and conspiracy in unreasonable restraint of interstate trade and commerce in violation of Section 1 of the Sherman Act, as amended (15 U.S.C. § 1).

31. This combination and conspiracy consisted of continuing agreements between defendants to eliminate or reduce competition in the North American markets for laminated tubes, laminated tube-making equipment, and laminated tube-making technology -- which resulted in KMK selling laminated tube-making equipment and licensing laminated tube-making technology exclusively to ANC, and ANC, but not KMK, selling laminated tubes.

32. These agreements had the following direct, substantial, and reasonably foreseeable anticompetitive effects:

(a) eliminating KMK as a competitor in the laminated tube market, thereby reducing competition among tube manufacturers in the United States;

(b) precluding KMK from selling laminated tube-making equipment or from licensing laminated tube-making technology to persons other than ANC for 15 years, and giving ANC effective control over KMK's existing laminated tube-making equipment in North America thereby reducing competition among equipment manufacturers in the United States; and

(c) giving ANC effective control over KMK's laminated tube-making technology in North America, thereby reducing competition generally in the United States laminated tube, laminated tube-making equipment, and related technology markets.

VIII.

PRAYER FOR RELIEF

WHEREFORE, plaintiff prays:

1. That the Court adjudge and decree that the defendants have agreed to restrain interstate trade and commerce in the laminated tube, laminated tube-making equipment, and laminated tube-making technology markets in violation of Section 1 of the Sherman Act.

2. That the defendants, their officers, directors, agents, employees and successors and all other persons acting or claiming to act on their behalf be enjoined and restrained from, in any manner, directly or indirectly, continuing, maintaining, or renewing the agreements herein alleged, or from engaging in any other combination, conspiracy, contract, agreement, understanding or concert of action having a similar purpose or effect, and from adopting or following any practice, plan, program, or device having a similar purpose or effect.

3. That plaintiff have such other relief as the Court may deem just and proper.

4. That plaintiff recover the costs of this action.

Dated: June 25, 1996



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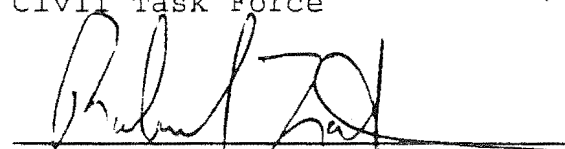
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