IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Petitioner, v. SMITH INTERNATIONAL, INC., and SCHLUMBERGER LTD., Respondents.	Supplemental to Civil Action No. 93-2621 -- SS/AK Judge Stanley Sporkin

UNITED STATES' PROPOSED REPLY FINDINGS OF FACT AND CONCLUSIONS OF LAW

Proposed Reply Findings of Fact

114. If the joint venture is recinded, Schlumberger is capable of re-entering the U.S. drilling fluids market in a short amount of time. Schlumberger already possesses, or could quickly acquire, the necessary assets, employees, technology and know-how, sales and service locations, and research and development to compete in the U.S. drilling fluids business.

a. Schlumberger began competing in the Gulf of Mexico drilling fluids business in 1994. RX 9 at SL (MI) 000749. It took the company a couple of months from its decision to enter to generate drilling fluids revenues. Tr., 11/23/99, 99:13-19 (Grijalva).

b. Schlumberger's participation in the United States drilling fluids market has been marked by slowdowns or cutbacks every time it has contemplated merging with, or acquiring, another U.S. drilling fluids company.

(1) The company approved capital investments in the fourth quarter of 1995; construction was begun but halted because the company was in negotiations to acquire Chemrich. Those negotiations continued until May of 1996, but were unsuccessful. Ambar ultimately purchased Chemrich. At that point, capital investments were again approved. RX 9 at SL (MI) 000749-50, 754.

(2) Capital investments were put on hold a second time in 1996 while Schlumberger held discussions with Baker Hughes. In late August of 1996, authorization to resume capital investments was received. RX 9 at SL (MI) 000750. Schlumberger's five drilling fluid port facilities -- located in Berwick, Venice, Fourchon, Cameron, and Intracoastal City (all in Louisiana) -- have been under construction since 1995, and as of the summer of 1998, only one was completed. RX 9 at SL (MI) 000764, 766, 782-783.

(3) Following preliminary communications in February, March, and June of 1998, Schlumberger and Smith begin negotiations about combining their drilling fluid businesses in August of 1998. RX 27 at pages 2-5.

(4) That same month, Schlumberger reduced its drilling fluid staff in the Gulf of Mexico from 73 to 36 and then later to 21, supplemented by 14-16 contractors. In the fall of

1998, construction was, once again, stopped on its Louisiana facilities. GX 14 at pages 1, 4.

c. Schlumberger's U.S. oilfield service business remains substantial -- with approximately 8,000 employees and several hundred million dollars in revenues. Grijalva Dep. at 251:17-252:5 (Tr., 11/18/99, 81:9-18). Schlumberger generates about $2 billion in revenues from its North American operations. GX 36 at SL (MI) 100315. The company "provides virtually every type of exploration and production service required during the life of an oil and gas reservoir." GX 34. The Schlumberger drilling fluids business was conducted by its Dowell division, which continues to operate in the United States today producing and selling other oilfield services and products. Tr., 11/23/99, 61:24-62:10 (Grijalva).

d. Schlumberger still has assets in the United States that were used in its U.S. drilling fluid business and that Schlumberger planned to transfer to other Schlumberger business units. Three of the five Louisiana ports were transferred to other parts of Schlumberger. Those were Fourchon, Berwick, and Intercoastal City. Exhibit 46, Attachment 2.

e. Personnel who were key in Schlumberger's U.S. drilling fluids business are still employed in other parts of the company or are working for the joint venture. John Oliver, its former marketing manager, is now employed by the joint venture. Tr., 11/24/99, at 50:10-21 (Wilson). Don Williamson, former manager of its Gulf Coast drilling fluid operations, is now employed in a Schlumberger Product Center in Houston. Tr., 11/24/99, at 56:14-57:15 (Wilson). Other employees identified in the June Restructure Strategy document as key to a

reorganization of Schlumberger's Gulf Coast drilling fluids business work for other parts of Schlumberger: Kurt Hurzeler, Edward Derkach, and Steve Mason. GX 46 at SL (MI) 1000028; GX 14 at page 3. Eight other Gulf Coast drilling fluids employees have been transferred to other parts of the Schlumberger organization. GX 46 at SL (MI) 100028.

f. The primary research and development facility Schlumberger used for its U.S. drilling fluid business is in St. Austell, England. That facility was transferred to the joint venture. Tr., 11/23/99, 110:12-23 (Grijalva). If the joint venture were recinded, that facility would be returned to Schlumberger, and it could once again be used to support a U.S. drilling fluids business.

g. Schlumberger developed drilling fluid technology, which is protected by intellectual property rights, including patents and trademarks. The technology was offered to U.S. drilling fluids customers. That technology is still owned by Schlumberger. Tr., 11/23/99, 109:15-110:11 (Grijalva).

h. Schlumberger executives familiar with the drilling fluids business recommended that the company compete in the drilling fluids business absent the joint venture. John Yearwood, President of Dowell, recommended, as of July 4, that if the joint venture were not formed quickly, he would walk away from the transaction, "with the understanding that the DF [drilling fluid] segment can be managed as a new business in Schlumberger." GX 23. The possibility that Schlumberger might walk away from the joint venture occurred to Smith, and in July of 1999, Smith was concerned that Schlumberger might withdraw from the Revised Joint Venture

if consummation had to be postponed in order to obtain a modification of the Final Judgment. Rock Dep. at 190:20-193:8 (Tr., 11/18/99, at 156:25-159:21).

i. Don Williamson, manager of the Gulf Coast drilling fluids business of Schlumberger, stated in June of 1999 that Schlumberger was "presently in the best position in recent history to move the DF [drilling fluids] group into profitability. There are several new products with which we have been quite successful, several command high margins allowing us to significantly reduce our product cost from historical levels." GX 14 at SL (MI) 100393. Mr. Williamson is still employed by Schlumberger in its Houston offices and was described by the General Counsel of Schlumberger's Oilfield Services operations as "about the only person in [Schlumberger] who knows what drilling fluids are about." Tr., 11/24/99, at 56:14-57:15 (Wilson).

j. While Schlumberger has "no present intention to resume the manufacture and sale of drilling fluids in the United States, absent its joint venture with Smith," it has the capability of doing so (whether independently or by acquiring or forming a joint venture with another U.S. drilling fluids company). If the joint venture with Smith is recinded and Schlumberger no longer has access to the Gulf of Mexico drilling fluids business through the joint venture, it will make whatever decision it deems to best serve its business interests under the conditions that will exist then.

Proposed Reply Conclusions of Law

115. Respondents cite In re Holloway, 995 F.2d 1080, 1082 (D.C. Cir. 1993), cert. denied, 511 U.S. 1030 (1994), in their Proposed Conclusion of Law 9 for the proposition that Smith and

Schlumberger have a greater right than would an original party to the United States v. Baroid Corp., et al. litigation to rely on external aids to interpretation. Holloway states no such proposition. Rather, Holloway holds that an order which otherwise might not be considered clear will be held to be clear as it relates to "'conduct so gross as to fall within its core.'" Holloway, 995 F.2d at 1082 (quoting United States v. Turner, 812 F.2d 1552, 1567 (11th Cir. 1987)). Holloway supports the United States' argument that the Final Judgment is clear and unambiguous as applied to Respondents' joint venture. Smith's and Schlumberger's formation of the joint venture is not "fringe" conduct, but rather is right at the core of proscribed conduct under the Final Judgment.

116. The Supreme Court in United States v. ITT Continental Baking Co., 420 U.S. 223, 238 (1975) did not endorse generally the use of extrinsic materials to interpret a consent decree, contrary to Respondents' assertions in Proposed Conclusion of Law 10. Rather, any extrinsic materials must have been "expressly incorporated in the decree." Id. The complaint was a permissible aid to construction in ITT Continental Baking, when "the agreement incorporate[d] by reference an 'appendix,' which set[] forth at length the background leading to the complaint and the proposed order." Further, "the agreement provide[d] that 'the complaint may be used in construing the terms of the order.'" Id. No such express incorporation of the complaint or competitive impact statement can be found in the decree in this case.

117. Respondents' contention that ambiguities can be manufactured from plain language is not supported by the Seventh Circuit's decision in White v. Roughton, 689 F.2d 118, 119-20 (7th Cir. 1982). In that case, the court held that where a literal reading of a specific clause did violence to the

decree as a whole, it was necessary to consider the entire decree. The plaintiffs in White argued that decree provisions requiring certain procedures in a city welfare program prevented the city from abolishing the program. Id. at 119. The court, looking at the decree as a whole, found that its purpose related solely to procedural protections and created no requirement that the program be continued. Id. at 120-21. In so doing, the Seventh Circuit kept within the four-corners rule of Armour. See id. at 119 (citing Armour, 402 U.S. at 681-82). (Counter to Respondents' Proposed Conclusions of Law 12 & 16.)

118. Respondents claim that, even assuming the Court finds that they have violated a clear and unambiguous provision of the decree, they may not be held in contempt unless the Court also finds that the joint venture has a "direct, substantial, and reasonably foreseeable anticompetitive effect on U.S. commerce." GX 49. A Final Judgment can validly prohibit transactions, even if those transactions would not themselves independently violate the antitrust laws. A court's equitable power is broad, and not limited to enjoining illegal activity. The court can also impose prophylactic or remedial provisions that prohibit otherwise legal conduct if it concludes that those measures are an aid to, or are necessary or important for, ensuring effective relief. United States v. Loew's, Inc., 371 U.S. 38, 53 (1962); United States v. United States Gypsum Co., 340 U.S. 76, 88-89 (1950); see also United States v. Grinnell Corp., 384 U.S. 563, 580 (1966); FTC v. National Lead Co., 352 U.S. 419, 429 (1957). Thus, whether a combination of M-I and Schlumberger's non-U.S. assets would constitute a separate violation of Section 7 of the Clayton Act is irrelevant in a contempt action. The Court had the power to

prohibit such a transaction as a means of furthering the goal of protecting competition in the U.S. drilling fluids market. (Counter to Respondents' Proposed Conclusions of Law 23 & 24.)

119. The Court's jurisdiction over foreign firms and their assets in antitrust cases is firmly established, and U.S. courts may order relief involving foreign firms and foreign assets to protect competition in the United States. See United States v. Jos. Schlitz Brewing Co., 253 F. Supp. 129, 145, 147-48 (N.D. Cal.), aff'd, 383 U.S. 37 (1966); United States v. True Temper Corp., 1959 Trade Cas. (CCH) ¶ 69,441, at 75,663 (N.D. Ill. 1959); see also United States v. Imperial Chem. Indus., Ltd., 105 F. Supp. 215, 237 (S.D.N.Y. 1952). The standards for extraterritorial application of the antitrust laws are irrelevant here, as this is a contempt proceeding to enforce a lawfully entered court order, not a Clayton Act or Sherman Act case. Even if this were an antitrust action, extraterritorial standards would have no applicability, as Respondents' joint venture operates in the United States and is a combination of two firms operating in the United States. (Counter to Respondents' Proposed Conclusions of Law 23 & 24.)

120. Saahir v. Estelle, 47 F.3d 758 (5th Cir. 1955) and Lelsz v. Kavanagh, 807 F.2d 1243 (5th Cir. 1987), cert. dismissed, 483 U.S. 1057 (1987), which are cited in Respondents' Proposed Conclusion of Law 23 for the proposition that the Court does not have jurisdiction to enforce the Baroid Final Judgment, are inapplicable to this case. Saahir and Lelsz are based on principles of federalism under the Eleventh Amendment, and their holdings to do not apply to consent decrees and cases such as the instant case that are firmly rooted in federal law. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 98 (1984); Komyatti v. Bayh, 96 F.3d 955, 963 (7th Cir. 1996); Consumer Advisory Board

v. Glover, 151 F.R.D. 496, 501 (D. Me. 1993); Kozlowski v. Coughlin, 711 F. Supp. 83, 86 (S.D.N.Y. `988), aff'd 871 F.2d 241 (2nd Cir. 1989); Giesking v. Schafer, 672 F. Supp. 1249, 1266 (W.D. Mo. 1987).

121. United States v. Western Electric, 1990-2 Trade Cas. (CCH ¶ 69, 139, 64,244 (D.D.C. 1990), does not stand for the proposition that firms subject to a consent decree may disregard prohibitions on transactions that cannot have any harmful effect on competition in U.S. markets. In fact, Judge Greene specifically rejected the suggestion that he adopt a "general rule that would permit any Regional Company to acquire a ten percent interest in any prohibited business, or that any such waivers for foreign business ventures will be blindly granted in the future." Instead the court decided to evaluate future waiver requests (in essence, modifications of the underlying final judgment) "on a case by case basis." Id. at 64,246. (Counter to Respondents' Proposed Conclusion of Law 26.)

122. It is not a defense to a properly alleged charge of contempt in violation of a consent decree that the violation did not harm the other party, or that the violation was justified by the violator's need. Wyoming v. Colorado, 309 U.S. 572, 581 (1940); Brooks v. United States, 119 F.2d 636, 645-46 (9th Cir. 1941), cert. denied, 313 U.S. 594; United States v. Work Wear Corp., 602 F.2d 110, 116 (6th Cir. 1979); United States v. Dupont, 336 U.S. 316, 326-31 (1961). (Counter to Respondents' Proposed Conclusions of Law 29 & 51.)

123. As long as the Court has jurisdiction over the subject matter and persons involved in this matter, its consent decree must be obeyed unless and until the order has been modified, set aside or expired.

See United States v. United Mine Workers, 330 U.S. 258, 293 (1947). (Counter to Respondents' Proposed Conclusion of Law 35.)

124. The authorities cited by Respondents do not support their contention that they are not guilty of criminal contempt. In In re Brown, 454 F.3d 999 (D.C. Cir. 1971), the defendant relied on a court order -- issued after full disclosure on his part -- appointing him as pro bono counsel to an indigent defendant when violating the rule against practicing in the District of Columbia without a license. Id. His actions were not punishable by criminal contempt. Id. at 1008. By contrast, Respondents specifically avoided approaching the Court for a clarification of the Final Judgment as that might kill the deal, Tr., 11/24/99, at 30:13-31:3 (Wilson), although, had the Court interpreted the order in their favor, they would unquestionably have been immune from criminal contempt proceedings. See Brown, 454 F.2d at 1008. United States v. Mottweiler, 82 F.3d 769 (7th Cir. 1996), likewise dealt with a nearly innocent defendant, who missed the return of a jury verdict because his pager malfunctioned. Id. at 771-72. The evidence in this case reveals far more calculated conduct than the negligence found in Mottweiler. (Counter to Respondents' Proposed Conclusions of Law 36-39.)

125. To support their argument against recission, Respondents have again selectively quoted language from the concurrence in the Tenth Circuit decision in United States v. ITT Continental Baking Co., 485 F.2d 16 (10th Cir. 1973), rev'd, 420 U.S. 223 (1975): "[T]he purpose of divestiture as remedy to consent order is 'to fulfill the objective of the antitrust laws.'" Respondents' Proposed Conclusion of Law 45 (quoting Continental, 485 F.2d at 21 (concurring opinion)). Respondents omit the rest of the quote that indicates that a purpose of divestiture is also protection of the integrity of the

court's order. The full sentence reads, "Ordinarily a divestiture of the wrongfully acquired business would be the proper remedy, both to fulfill the objective of the antitrust laws, and to deter the defendant-appellant and other similarly situated entities from committing such abuses in the future." Continental, 485 F.2d at 21 (concurring opinion) (emphasis added).

126. Two cases cited by Respondents in their Proposed Conclusion of Law 46 are completely inapposite to whether this Court can order recission. In United States v. Automatic Fire Alarm Co., 1969 Trade Cas. (CCH) ¶ 72,696 (D.R.I. 1968), the court declined to impose criminal contempt sanctions where it concluded the violation was not willful. The court in Suntex Dairy v. Bergland, 591 F.2d 1063, 1067-68 (5th Cir. 1979), reviewing a federal milk marketing order, held that it had no power to invalidate the order based on an alleged violation of an antitrust consent decree entered by another court.

127. The cases cited by Respondents in their Proposed Conclusions of Law simply do not support their position that recission is not warranted because the activity prohibited does not constitute a violation of Clayton Act § 7. In United States v. Beatrice Foods Co., 493 F.2d 1259, 1272-73 (8th Cir. 1974), the court held that recission was an appropriate remedy where a defendant subject to a broad injunction that prohibited acquisitions of other dairy companies made such an acquisition. Significantly, there is no discussion whatsoever of whether the particular acquisition that violated the decree was itself a substantive antitrust violation. See id. Likewise, the court in United States v. Coca-Cola Bottling Co., 575 F.2d 222, 230 (9th Cir. 1978), in upholding a preliminary injunction in a Clayton Act § 7 case, held that recission is within the equitable power of a court. Respondents quote out of

context a statement by the court in Coca-Cola that there may be an equitable argument against recission in merger cases because the seller cannot technically violate Section 7, which bars acquisitions (rather than sales) that may tend to reduce competition. Id. This argument has no applicability here, where the Court may hold both

Respondents in contempt for violation of the Final Judgment. (Counter to Respondents' Proposed Conclusions of Law 47 & 49.)

Dated: December 7, 1999

Respectfully submitted,

"/s/"

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CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing UNITED STATES' REPLY PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW on the following counsel for Respondents by hand on December 7, 1999:

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