

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
v.)	CIVIL ACTION NO.: 80-2346
)	
WHEELABRATOR-FRYE INC., and)	FILED: September 15, 1980
PULLMAN INCORPORATED,)	
)	ENTERED: April 29, 1981
Defendants.)	

FINAL JUDGMENT

Plaintiff United States of America, having filed its complaint herein on September 15, 1980, and defendants Wheelabrator-Frye Inc. ("WFI") and Pullman Incorporated ("Pullman") having appeared, and plaintiff and defendants, by their respective attorneys, having consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein, and without this Final Judgment constituting any evidence against, or any admission by, any party with respect to any issue of fact or law herein;

Now, therefore, before the taking of any testimony, and without trial or adjudication of any issue of fact or law herein, and upon consent of the parties hereto, it is hereby Ordered, Adjudged and Decreed:

I

This Court has jurisdiction over the subject matter herein and the parties hereto. The Complaint states a claim upon which relief may be granted against the defendants under Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

II

Definitions

As used in this Final Judgment:

A. "Rust Chimney" means the Rust Chimney Division of the Rust Engineering Company, a subsidiary of WFI, and all assets of the Division including leaseholds, executory contracts, accounts receivable, engineering drawings, customer lists, goodwill and physical assets; and shall include the exclusive right to use the name "Rust Chimney" for a period of three years from the date of sale of Rust Chimney, provided that such name is used in conjunction with the name of the purchaser, and provided further that WFI shall not use the name "Rust Chimney," for a period of five years from the date of sale of Rust Chimney.

B. "Metallurgical" means the Metallurgical Division of Whiting Corporation, a subsidiary of WFI, and all assets of the Division including executory contracts, accounts receivable, inventory, work-in-process, engineering drawings, customer lists, goodwill, patents, trademarks and physical assets; and shall include the exclusive right to use the name "Whiting Furnace" for a period of three years from the date of sale of Metallurgical in connection with the sale of industrial furnaces, provided that such name is used in conjunction with the name of the purchaser, and provided further that WFI shall not use the name "Whiting Furnace," for a period of five years from the date of sale of Metallurgical.

C. "Industrial Furnace" means the Industrial Furnace Group of Pullman-Swindell Division, a division of Pullman, and

all assets of the Group including executory contracts, accounts receivable, engineering drawings, customer lists, licenses, goodwill and physical assets; and shall include the exclusive right to use the names "Swindell Furnace" and "Swindell-Dressler Furnace" for a period of three years from the date of sale of Industrial Furnace, in connection with the sale of industrial furnaces, provided that such names are used in conjunction with the name of the purchaser, and provided further that WFI shall not use the names "Swindell Furnace" or "Swindell-Dressler Furnace," for a period of five years from the date of sale of Industrial Furnace.

III

The provisions of this Final Judgment shall apply to the defendants and to each of their subsidiaries, successors and assigns, and to each of their officers, directors, agents, employees and attorneys, and upon those persons in active concert or participation with them who receive actual notice of this Final Judgment by personal service or otherwise.

IV

A. Within 12 months of the date of WFI's acquisition of the engineering and construction business of Pullman or the date of the merger of Pullman into WFI, whichever shall first occur (collectively the "Date of Acquisition"), WFI shall divest itself of:

- (1) Rust Chimney, and
- (2) Either Metallurgical or Industrial Furnace, at WFI's option.

B. Divestiture shall be made only to a person or persons who represent to the Court that it or they intend to continue in the divested business and have the capacity to do so.

C. WFI shall promptly report the details of any proposed divestiture, including relevant underlying documentation, to the plaintiff. Plaintiff shall have the right to make reasonable requests for additional information relating thereto. Following the receipt of any plan of divestiture and such additional information, plaintiff shall have 30 days in which to object to the proposed divestiture by submitting written notice to WFI. If plaintiff objects to the proposed plan of divestiture, the proposed divestiture shall not be consummated unless plaintiff withdraws its objection or the Court gives its approval to the plan. If plaintiff does not object, the plan shall be submitted to the Court for approval. If WFI shall have submitted a pending plan of divestiture of a business prior to the close of the 12-month period under subsection A, the time period for divestiture of such business shall be extended until the Court acts upon such plan and any approved sale is consummated.

D. If WFI shall not have divested Rust Chimney within 10 months after the Date of Acquisition, plaintiff and WFI shall promptly initiate the selection of a trustee (the "Rust Chimney Trustee") for appointment by the Court. If WFI shall not have divested Metallurgical or Industrial Furnace within 10 months after the Date of Acquisition, plaintiff and WFI shall promptly initiate the selection of a trustee (the "Furnace Trustee") for appointment by the Court. The Rust Chimney Trustee and the Furnace Trustee shall not be the same

person. The Court shall appoint such trustees from a list of not more than 6 persons nominated one-half by plaintiff and one-half by WFI for each trustee position.

E. If WFI shall not have divested Rust Chimney within the time period for divestiture, the Rust Chimney Trustee shall have the power and authority to sell Rust Chimney. If, within such time period, WFI shall not have divested either Metallurgical or Industrial Furnace, the Furnace Trustee shall have the power and authority to sell either Metallurgical or Industrial Furnace, but not both, at the Furnace Trustee's option. Any sale by either trustee shall be in accordance with the provisions of this Final Judgment. Each trustee shall have full and complete access to the books, records and facilities of the business for which he has the duty to sell, and WFI shall develop such financial information relevant to the assets to be divested as each trustee may reasonably request.

F. The power and authority of the trustee or trustees to sell shall be at whatever price and terms obtainable. The trustee or trustees shall serve at the cost and expense of WFI on such terms and conditions as this Court may set, and shall account for all monies derived from the sale and all expenses incurred. After approval by this Court of the account of each trustee, including fees for his or her services, all remaining monies shall be paid to WFI and that trust shall be terminated.

G. Divestiture hereunder shall be complete and final, provided that WFI may retain a security interest to secure payment of any unpaid portion of the purchase price or

to secure performance of the contract of sale. If WFI reacquires any previously divested business more than 12 months after the Date of Acquisition, it shall immediately provide written notice to plaintiff and the Court. The Court shall thereupon appoint a trustee, in accordance with subsection D, to sell any such reacquired business in accordance with subsections D, E and F.

H. Until the Date of Acquisition, Pullman shall continue the normal business operations of Industrial Furnace and maintain its personnel, assets and working capital at a level commensurate with its business activity, but in no event shall Pullman permit such assets or working capital (adjusted for inflation) to fall below the levels on December 31, 1979, or the level of such personnel to fall below the average during the 12 months preceding September 1, 1980.

I. WFI shall continue the normal business operations of Rust Chimney separately from the Pullman chimney business until Rust Chimney is divested and of Metallurgical and Industrial Furnace (upon its acquisition by WFI) separately from each other until one or the other is divested, and shall during such time period maintain the personnel, assets and working capital of each business at a level commensurate with its level of business activity, but in no event shall WFI permit such assets or working capital (adjusted for inflation) to fall below the level on December 31, 1979, or the number of such personnel to fall below the average level during the 12 months preceding September 1, 1980.

J. WFI shall not employ without the consent of plaintiff any person who is an employee of the divested

business at the time of the divestiture for a period of three years from the date of divestiture. Such consent shall not be unreasonably withheld.

V

A. WFI shall maintain records of its efforts to sell Rust Chimney, Metallurgical and Industrial Furnace, including identification of any persons to whom each business has been offered, the terms and conditions of each offer to sell, the identification of any persons expressing interest in purchasing each business, and the terms and conditions of each offer to purchase.

B. Every three months from entry of this Final Judgment until the divestiture has been completed, WFI shall file with this Court and serve on plaintiff an affidavit together with relevant documentation (including the names of parties who have been contacted) as to the fact and manner of compliance with Section IV of this Final Judgment.

VI

For the purpose of determining or securing compliance with this Final Judgment, and subject to any legally recognized privilege:

A. Any duly authorized representative or representatives of the Department of Justice shall, upon written request by the Attorney General or the Assistant Attorney General in charge of the Antitrust Division and on reasonable notice to WFI or Pullman made to its principal office, be permitted

(1) Access during the office hours of the defendants, which may have counsel present, to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of defendants relating to any matters contained in this Final Judgment; and

(2) Subject to the reasonable convenience of defendants and without restraint or interference from them, to interview officers or employees of defendants, who may have counsel present, regarding any such matters.

B. No information or documents obtained by the means provided in Sections V and VI hereof shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the United States, except in the course of legal proceedings to which the United States is a party, or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

C. If at the time information or documents are furnished by defendants to plaintiff, WFI or Pullman represents and identifies in writing the material in any such information or documents of a type described in Rule 26(c)(7) of the Federal Rules of Civil Procedure, and said defendant marks each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure," then 10 days' notice shall be given by plaintiff to said defendant prior to divulging such material in any legal proceeding (other than a Grand Jury proceeding) to which that defendant is not a party.

VII

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification of any of the provisions hereof, for the enforcement of compliance therewith, and for the punishment of violations thereof.

VIII

Entry of this Final Judgment is in the public interest.

Barrington Parker
District Judge

Entered: 4/29/81