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' REPLY POST-TRIAL BRIEF

Most of Respondents' post-trial brief, as most of the testimony they offered at trial, is consumed with a desperate attempt to manufacture an ambiguity in the plain language of the Final Judgment where none exists, and with arguments concerning the merits of the transaction under Section 7 of the Clayton Act, an issue completely irrelevant to these contempt proceedings. Ultimately, however, Respondents cannot avoid the fact that, by consummating a joint venture transaction that combined the drilling fluid businesses of Smith and Schlumberger, they willfully violated a clear and unambiguous provision of the Final Judgment. Accordingly, they should be found in civil and criminal contempt, and the Court should order recission of the joint venture and disgorgement of its profits and impose a significant criminal fine.

I. Respondents Offer No Convincing Support for Their Interpretation

The clear, unambiguous language of Paragraph IV.F of the Final Judgment is not disputed by Respondents. Tr., 11/24/99, at 86:8-86:18 (Sutton). Likewise, the purpose of the Final Judgment is clear and undisputed: to protect competition in the U.S. drilling fluids market. Respondents spend much of their brief citing to various "extrinsic evidence" to reconfirm this point, with which the United States fully agrees. What Respondents fail to acknowledge (or even mention) is that this purpose to protect U.S. competition was implemented by requiring a divestiture that included U.S. and international operations and assets. See U.S. Post-Trial Br. at 8. Respondents further ignore the fact that the 1996 Anchor modification required a divestiture that included more than Anchor's U.S. assets and operations.[1]

The plain language of Paragraph IV.F is completely consistent with protecting the U.S. market through divestitures that include foreign assets and operations. That paragraph contains a clear prohibition on the sale to, or combination of the divested drilling fluids business with, certain specified companies, one of which is Schlumberger. The presence of Schlumberger, then a tiny participant in the U.S. market, on this list can only be logically explained by the fact that Schlumberger, as the one of the

[1] Respondents' reliance on the United States' willingness to consent to modification of the decree in 1996 is also misplaced. United States v. Atlantic Refining Co., 360 U.S. 19, 22 (1959), does not support their argument. In that case, the Supreme Court held that a previously advanced authoritative interpretation could bind the government. Id. In this case, neither the United States nor the Court purported to interpret the decree. Moving for modification in a particular instance simply does not amount to an "interpretation" of the decree.

largest oil field services companies in the world, was viewed as an important potential entrant.[2] Indeed, Smith's outside counsel testified he believed that Schlumberger was included "because people thought at that time that they might grow their business." Tr., 11/22/99, at 28:14-28:21 (Boland).

Unable to find language within the four corners of the decree to justify their conduct, Respondents resort to various external sources: the Complaint, the Competitive Impact Statement, Sean Boland's "knowledge" of the oil field service industry, Schlumberger's experience in the U.S. drilling fluid business, and substantive antitrust law. Respondents' wide-ranging search to justify their "interpretation" is not supported by any authority they cite.[3]

A decree must be interpreted by looking to its four corners. United States v. Armour & Co., 402 U.S. 673, 682 (1971). In United States v. ITT Continental Baking Co., 420 U.S. 223, 238 (1975), the Supreme Court did not, as Respondents' claim, endorse generally the use of extrinsic materials to interpret a consent decree. Rather, as even the language quoted in Respondents' brief

---

[2] As Respondents' own witnesses testified, other drilling fluid companies with larger shares of the U.S. drilling fluid business than Schlumberger were not included on the list of prohibited buyers. Tr., 11/23/99, at 62:11-63:2 (Grijalva).

[3] Respondents attempt to further confuse the issues in this case by citing the Department's reference to the Alcoa/Reynolds matter. Resp. Post-Trial Br. at 14 n.11, 17. Collier, Shannon, Rill & Scott and specifically Sean Boland, counsel for Smith in this case, was also counsel for Reynolds in the Alcoa/Reynolds matter and know full well that there too, one of the companies said it had made an "irrevocable" business decision to exit that it claimed should eliminate any concern by the Division about the transaction. But in fact, the Reynolds facility that was the subject of the Division's investigation and subsequent suit under Section 7 of the Clayton Act (a suit dismissed by the United States after the transaction was abandoned) is still operating and did not exit the market. Similarly, Schlumberger is still capable of competing in the U.S. drilling fluid business in the future, as it possesses both assets and people in the United States with which it could compete (see the United States proposed reply findings of fact).

demonstrates, any extrinsic materials must have been "expressly incorporated in the decree." 420 U.S. at 238.[4] Furthermore, Respondents have cited no case, and the United States has found none, where a court has departed from the plain language of a consent decree in reliance on external sources.[5] Respondents' approach is likewise 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.[6]

Respondents claim that they were forced to use extraneous materials to interpret the Final Judgment because they were not parties to the original suit and were not privy to the decree negotiations. Resp. Post-Trial Br. at 5 n.1. Given this acknowledged disadvantage,[7] it is even more

---

[4] In ITT Continental Baking, the complaint was a permissible aid to construction 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.

[5] See ITT Continental Baking, 420 U.S. at 237 (referring to external sources to amplify a question which the decree did not address); United States v. Western Elec. Co., 894 F.2d 1387, 1391-92 (D.C. Cir. 1990) (confirming interpretation of text by considering the competitive impact statement); United States v. NYNEX Corp., 814 F. Supp. 133, 137 (D.D.C.), rev'd, 8 F.3d 52 (D.C. Cir. 1993) (bolstering interpretation by reference to the competitive impact statement).

[6] In White, plaintiffs argued that decree provisions requiring certain procedures in a city welfare program prevented the city from abolishing the program. 689 F.2d 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).

[7] Speculation by a person not party to decree negotiations on what the parties must have meant is unreliable and entitled to little weight. See Keith v. Volpe, 118 F.3d 1386, 1392 & n.8 (9th Cir. 1997) (rejecting affidavits of persons not involved in negotiating decree).

unreasonable for Respondents to ignore the clear warning of the Department of Justice -- which was a party to the original decree -- that the transaction violated the Final Judgment.[8] Moreover, having failed to seek guidance from the Court, Respondents proceeded with their tortured interpretation at their own risk. See United States v. Greyhound Corp., 508 F.2d 529, 532-33 (7th Cir. 1974).

II. Proof of a Section 7 Violation is Not an Element of Contempt

Respondents attempt, in the guise of "interpreting" Paragraph IV.F, to make new law by imposing on the United States the additional requirement in a contempt case of showing that the Smith/Schlumberger joint venture would harm competition in the U.S. drilling fluids markets -- in effect, a showing that the transaction would violate Section 7 of the Clayton Act. Respondents make the extraordinary assertion that the United States has the burden of proving a "fourth element" of contempt -- an "adverse effect" on U.S. competition. Resp. Post Trial Brief at 17. 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,

[8] Again demonstrating their dogged refusal to confront the plain language of any document that does not serve their purposes, Respondents claim that they did not understand from the Nannes letter why the Department of Justice took the position that the joint venture violated the decree. Resp. Post-Trial Brief at 20. In fact, the letter quoted the relevant language of Paragraph IV.F and stated that the joint venture would violate the decree. If Respondents truly did not understand the letter they could have inquired. In fact they did not because by that time they had decided to close the transaction despite the prohibitory language of Paragraph IV.F and despite the Nannes letter. They had decided to roll the dice, calculating that the United States might take no action, and that even if it did the Court might buy their tortured reading of the decree, and that even if the Court found a violation they might get off with a civil fine. See GX 15; Sutton Dep. at 201:12-204:1 (Tr., 11/18/99, at 169:24-172:8). The calculus was very clear.

substantial, and reasonably foreseeable anticompetitive effect on U.S. commerce." GX 49. A key purpose of having clear, objective prohibitions in a consent decree is to avoid future litigation of an antitrust case on its merits. 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.[9] 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 fluid market.[10]

Respondents also argue that the Court would not have jurisdiction under the antitrust laws to

---

[9] Respondents cite repeatedly to their own witnesses' self-serving testimony that there are no "adverse effects." The United States offered no evidence on this irrelevant issue.

[10] 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 extra-territorial 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.

bar a transaction that does not affect U.S. commerce, and therefore, absent proof of such an effect, this transaction is not covered by the Final Judgment. See Resp. Post-Trial Br. at 10-11. But it is no defense to a contempt charge that the Respondents thought the Court could do nothing to punish their violation. A good faith, but mistaken, belief that a court lacks jurisdiction to enforce an order does not provide a defense for a person who willingly engages in conduct falling within the prohibitions contained in the order. Good faith reliance on counsel's advice to violate a court order does not constitute a defense to the specific intent element of a crime. See Cheek v. United States, 498 U.S. 192, 206 (1991); United States v. Armstrong, 781 F.2d 700, 706 & n.4 (9th Cir. 1986); see also In re Novak, 932 F.2d 1397, 1409 (11th Cir. 1991); United States v. Revie, 834 F.2d 1198, 1205-06 (5th Cir. 1987). Even if Smith and Schlumberger genuinely believed this Court lacked jurisdiction over their joint venture, they nonetheless acted willfully to violate the language of the Final Judgment and cannot advance a good-faith defense to criminal contempt.

III. Respondents Willfully Violated the Final Judgment

The evidence adduced at trial proves beyond a reasonable doubt that Smith and Schlumberger acted with reckless disregard for this Court's order, and accordingly they should be found in criminal contempt. See United States v. Rapone, 131 F.3d 188, 192 (D.C. Cir. 1997). Respondents failed to comply with the clear, plain meaning of the Court's order, relying instead on a twisted and tortured interpretation advanced by their outside counsel, U.S. Post-Trial Br. at 6-7 -- which the evidence at trial demonstrated was devised in the face of prior reasoned conclusions that the decree clearly prohibited the joint venture, id. at 10-12. Smith's and Schlumberger's general counsels either failed to read the Final Judgment or did not think about it, id. at 14-15, clearly an unreasonable course for

sophisticated, counseled corporations, see John Hopkins Univ. v. CellPro, 978 F. Supp. 184, 190, 194 (D. Del. 1997). Respondents inexplicably continued despite a warning from the Department of Justice that it considered the joint venture to violate the order. id. at 15-19; see United States v. Benson, 941 F.2d 598, 614 (7th Cir. 1991) (discovering reason to doubt the advice will defeat the advice of counsel defense). Most damning, Respondents did not avail themselves of the one fail-safe means of avoiding violation of the decree by steadfastly refusing, despite the availability and ease of the procedure, to approach the Court for modification or clarification. U.S. Post-Trial Br. at 19-20.

The authorities cited by Respondents do not support their contention that they are not guilty of criminal contempt, and indeed serve to illustrate the outrageousness of their conduct. In In re Brown, 454 F.2d 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, U.S. Post-Trial Br. at 19-20, 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.[11]

---

[11] Floershiem v. Engman, 494 F.2d 949 (D.C. Cir. 1973), which Respondents cite four times in their Post-Trial Brief, merely states some basic propositions in dictum on its way to dismissing the

IV. Recission is the Appropriate Remedy for Respondents' Civil Contempt

Respondents' action in consummating a transaction that is expressly enjoined by a consent decree is almost unprecedented in the long annals of antitrust enforcement. For this reason, as Respondents correctly point out, there is little case law specifically discussing the appropriate remedy for such a brazen violation. Where, as here, a party has violated a clear and unambiguous order, the appropriate remedy in civil contempt is the remedy that most effectively restores the status quo ante. In this case, that remedy is recission, and Respondents have offered no convincing reason for any lesser remedy.

The cases cited by Respondents simply do not support their position that recission is not warranted.[12] 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 Section 7 case, held that

---

case for a lack of subject-matter jurisdiction. Id. at 952-53, 954.

[12] Two cases cited by Respondents are completely inapposite. 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.

recission is within the equitable power of a court.[13]

Whether the transaction violates Section 7 is completely irrelevant to the issue of whether Respondents are in contempt and it is likewise irrelevant to the appropriate remedy. Indeed, introducing Section 7 issues into the remedy formulation would undermine the very purpose of antitrust consent decrees. The Government enters into consent decrees to settle antitrust cases because a decree provides a remedy for competitive concerns without the burden and expense of fully litigating an antitrust case. If the Government were forced to prove that every decree violation was also a substantive antitrust violation in order to get relief, the effectiveness of consent decrees as an enforcement tool would be eviscerated.

[13] 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 lessen competition. 575 F.2d at 230. This argument has no applicability here, where the Court may hold both Respondents in contempt for violation of the Final Judgment.

CONCLUSION

The evidence in this case shows that Respondents have willfully violated a clear and unambiguous provision of the Final Judgment. Respondents should be held in civil and criminal contempt, and the Court should order the recission of the joint venture and disgorgement of its profits and impose a significant criminal fine.

Dated: December 7, 1999

Respectfully submitted,

"/s/"

ANGELA L. HUGHES
Member of The Florida Bar, #211052

ROBERT L. McGEORGE
MICHAEL D. BILLIEL
MATTHEW O. SCHAD
MAX R. HUFFMAN

BERNARD M. HOLLANDER
Senior Trial Attorney

325 7th Street, N.W., Suite 500
Washington, D.C. 20530
Telephone: 202/307-6410
Facsimile: 202/307-2784

Attorneys for the United States

CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing UNITED STATES' REPLY POST-TRIAL BRIEF on the following counsel for Respondents by hand or facsimile on December 7, 1999:

Wm. Bradford Reynolds
Sean F. Boland
Thomas D. Fina
Mary Jean Fell
Collier, Shannon, Rill & Scott, PLLC
3050 K Street, N.W.
Washington, D.C. 20007

Counsel for Smith International

Rufus W. Oliver, III
J. Bruce McDonald
Baker & Botts, L.L.P.
One Shell Plaza
910 Louisiana Street
Houston, TX 77002

Harold D. Murry, Jr.
Mary C. Spearing
Baker & Botts, L.L.P.
The Warner
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Counsel for Schlumberger Ltd.

"/s/"
Angela L. Hughes