

Trade Regulation Reporter - Trade Cases (1932 - 1992), United States v. Smith's Bakery, Inc., Smith's Bakery, and Colonial Baking Co. of Gulfport., U.S. District Court, S.D. Mississippi, 1978-2 Trade Cases ¶62,217, (Jun. 7, 1978)

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United States v. Smith's Bakery, Inc., Smith's Bakery, and Colonial Baking Co. of Gulfport.

1978-2 Trade Cases ¶62,217. U.S. District Court, S.D. Mississippi, Southern Division, Civil No. S77-0107, Entered June 7, 1978, (Competitive impact statement and other matters filed with settlement: 43 *Federal Register* 10736).

Case No. 2573, Antitrust Division, Department of Justice.

Sherman Act

Price Fixing: Bid Rigging: Allocation of Markets: Production Restrictions: Exchange of Information: Bakery Products: Consent Decree.— Three commercial bakeries were barred by a consent decree from fixing prices, rigging bids, restricting production, and allocating markets in connection with the sale of bakery products. The defendants were enjoined from soliciting, inducing, or coercing any other person to adopt or adhere to any price fixing, bid rigging, production restricting, or market allocation activities. Exchanges of information among the bakeries and others regarding prices or bid quotations were prohibited for a period of 10 years. The defendants were not barred from entering into a *bona fide* purchase, from communicating information in the course of those transactions, or from exchanging price information that had already been released and circulated.

For plaintiff: John H. Shenefield, Asst. Atty. Gen., William E. Swope, Charles F. B. McAleer, Donald A. Kinkaid, Gary Flack, Justin M. Nicholson, and Nicholas A. Lotito, Attys., Dept. of Justice. **For defendants:** Edwin J. Curran, Jr., of Vickers, Riis, Murray & Curran, Mobile, Ala., D. L. Middlebrook, of Levin, Warfield, Middlebrook, Mabie, Rosenbloum & Magie, P. A., Pensacola, Fla., Lawrence J. Franck, of Butler, Snow, O'Mara, Stevens & Cannada, Jackson, Miss., for Smith's Bakery, Inc. and Smith's Bakery; Fredrick R. Tulley, of Taylor, Porter, Brooks & Phillips, Baton Rouge, La., Vardaman S. Cox, of Cox & Dunn, Ltd., Jackson, Miss., for Colonial Baking Co. of Gulfport.

Final Judgment

Nixon, D. J.: Plaintiff, United States of America, having filed its complaint herein on March 21, 1977, and the plaintiff and the defendants, by their respective attorneys, having consented to the entry of this Final Judgment without trial or adjudication of any issue or fact or law herein and without admission by any party with respect to any such issue and without this Final Judgment constituting any evidence or admission by any party with respect to any such issue;

Now, Therefore, without adjudication of any issue of fact or law herein and upon consent of the parties hereto, it is hereby,

Ordered, Adjudged and Decreed as follows:

As To Count One

I

[*Jurisdiction*]

This court has jurisdiction over the subject matter herein and the parties hereto. Count One of the complaint states a claim against the defendants upon which relief may be granted under Section I of the Sherman Act, 15 U. S. C. §1.

II

[Definitions]

As used in this Final Judgment:

(A) "Bakery products" shall include, but not be limited to, items such as white sliced bread, whole wheat and other varieties of bread, rolls, buns, specialty items, cake, sweet rolls and other confectionaries;

(B) "Discount" means any percentage or other reduction from the regular or list prices charged by any of the defendants;

(C) "Person" means any individual, partnership, firm, association, corporation or other business or legal entity; and

(D) "Control" means at least a 50 percent direct or indirect ownership interest in the controlled person by the controlling person.

III

[Applicability]

The provisions of this Final Judgment are applicable to each defendant herein and to each of such defendant's officers, directors, agents, employees, subsidiaries, successors and assigns, and to all other persons in active concert or participation with any of them who shall have received actual notice of this Final Judgment by personal service or otherwise.

IV

[Price Fixing; Market Allocation]

Each defendant is enjoined and restrained from directly or indirectly entering into, adhering to, maintaining or furthering any contract, agreement, understanding, plan, program, combination or conspiracy with any other person engaged in the production and sale of bakery products to:

(1) Fix, determine, maintain or stabilize prices for the sale of bakery products;

(2) Fix, determine, maintain, stabilize or adhere to specific or uniform discounts for the sale of bakery products or to limit, reduce, remove or eliminate such discounts;

Submit noncompetitive, collusive or rigged bids or quotations or not to submit any bid or quotation for the sale of bakery products;

(4) Fix, determine, maintain, stabilize, limit or reduce the production or sale of bakery products;

(5) Allocate geographical territories or customers or both.

V

[Coercion]

Each defendant is enjoined and restrained from directly or indirectly soliciting, inducing or coercing any other person engaged in the production and sale of bakery products to:

(1) Adopt or adhere to uniform or specific prices for the sale of bakery products;

(2) Adopt or adhere to uniform or specific discounts for the sale of bakery products or to limit, reduce, remove or eliminate such discounts;

- (3) Refrain from bidding or submitting any price quotation for the sale of bakery products, or to submit a bid or price quotation at a uniform or specific price;
- (4) Limit or reduce the production or sale of bakery products;
- (5) Allocate geographical territories, or customers or both.

VI

[*Price Information*]

For a period of ten (10) years from the date of entry of this Final Judgment, each defendant is enjoined and restrained from directly communicating to any other person engaged in the production and sale of bakery products information concerning:

- (1) Future prices at which, or terms or conditions upon which, bakery products will be sold or offered for sale by said defendant;
- (2) Consideration by said defendant of charges or revisions in the prices at which, or the terms or conditions upon which, said defendant sells or offers to sell bakery products;
- (3) Whether any bid or price quotation will be submitted by said defendant to any person.

VII

[*Bona Fide Transactions*]

(A) Nothing in this Final Judgment shall prohibit any defendant from:

- (1) entering into or carrying out a bona fide purchase or sale transaction involving such defendant and any other person engaged in the production and sale of bakery products, when such person is either purchasing bakery products on his own behalf or acting as a purchasing agent or group buying representative on behalf of any third person; or
- (2) communicating information to another person engaged in the production and sale of bakery products in the course of, and related to, negotiating for, entering into, or carrying out a transaction as described in Section VII(A)(1).

(B) Nothing in Sections V or VI hereof shall prohibit the transmission, without additional comment or explanation, to another person engaged in the production and sale of bakery products, upon the request of said person, of such defendant's bakery products price list, or any change therein, regularly issued in the course of business, which price list, or said change, had been previously released and circulated to the trade generally.

VIII

[*Applicability of Injunctions*]

The injunctions contained in this Final Judgment shall not apply to relations solely between a defendant and a parent or subsidiary of, or corporation under common control with, such defendant or between the officers, directors, agents and employees thereof.

IX

[*Notice*]

Each defendant is ordered and directed to:

- (A) Furnish within ninety (90) days after the date of entry of this Final Judgment a copy thereof to each of its officers and directors, and to each of its agents and employees having sales, supervisory and/or pricing responsibility for bakery products;

(B) Furnish a copy of this Final Judgment to each successor to those officers, directors, agents and employees described in subsection (A) of this Section IX, within thirty (30) days after each such successor is employed by or becomes affiliated with the defendant.

(C) File with this Court and serve upon the plaintiff within one hundred twenty (120) days from the date of entry of this Final Judgment, an affidavit as to the fact and manner of its compliance with subsection (A) of this Section IX.

X

[Inspections]

(A) For the purpose of determining or securing compliance with this Final Judgment, any duly authorized representative of the Department of Justice shall, upon written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to any Defendant made to its principal office, be permitted, subject to any legally recognized privilege:

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

(2) Subject to the reasonable convenience of such defendant and without restraint or interference from it, to interview officers, directors, agents, partners or employees of such defendant, who may have counsel present, regarding any such matter.

(B) A defendant, upon the written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, shall submit such reports in writing, under oath if requested, with respect to any of the matters contained in this Final Judgment as may from time to time be requested.

No information or documents obtained by the means provided in this Section X 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.

If at any time information or documents are furnished by a defendant to plaintiff, such defendant represents and identifies in writing the material in any such information or documents which is 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 the Federal Rules of Civil Procedure", then 10 days notice shall be given by plaintiff to such defendant prior to divulging such material in any legal proceeding (other than a Grand Jury proceeding) to which the defendant is not a party.

As To Count Two

[Dismissal of Clayton Act Damages]

By agreement of all parties, It Is Ordered that Count II be, and hereby is Dismissed.

As To Count Three

I

[False Claims Act Damages]

This Court has jurisdiction over the subject matter herein and the parties hereto. Count Three of the complaint states a claim against the defendants, Smith's Bakery, a Mississippi corporation, and Colonial Baking Company of Gulfport, a Delaware corporation, upon which relief may be granted under the False Claims Act, 31 U. S. C. Sections 231-233. The case against Smith's Bakery, Inc., a Florida corporation, under said False Claims Act is hereby Dismissed.

II

[Damages and Penalties]

By agreement of Plaintiff, Defendant Smith's Bakery, a Mississippi corporation, and Defendant Colonial Baking Company of Gulfport, a Delaware corporation, judgment shall be and hereby is entered against defendants, Smith's Bakery, a Mississippi corporation, and Colonial Baking Company of Gulfport, a Delaware corporation, in the amount of \$300,000 each in full settlement of all alleged monetary claims in Plaintiff's complaint. Of this amount, \$170,000.00 shall be deemed damages with respect to alleged overcharges on sales by said Defendants to United States Governmental Installations, and \$130,000.00 shall be deemed forfeitures and penalties. For The Recovery Of These Amounts Let Execution Issue, provided, however, that Smith's Bakery, a Mississippi corporation, is to be accorded the privilege of paying said judgment against it as hereinafter set forth.

III

[Terms of Payment]

Defendant, Smith's Bakery, a Mississippi corporation, has the option of paying the judgment rendered against it under Count Three of the Complaint in five equal installments, provided, however, as follows:

- (a) At least 20 percent of the judgment under Count Three must be paid within thirty (30) days of the entry of this Final Judgment. The remaining principal balance of the judgment shall be payable in four equal annual installments, the first of which shall be payable one year from the date of this judgment and one on the same day of each succeeding year thereafter for the next three years.
- (b) The unpaid balance of said judgment against Smith's Bakery, a Mississippi corporation, under Count Three after thirty (30) days from the date of entry hereof shall bear interest at the rate of 7 percent per annum.
- (c) Smith's Bakery, Inc., a Florida corporation, by separate instrument will guarantee the balance of said judgment due by Smith's Bakery, a Mississippi corporation, to plaintiff.
- (d) Smith's Bakery may at any time prepay without penalty.
- (e) Should Smith's Bakery default on the payment of any installment of principal or interest as agreed, then the entire remaining balance of the judgment against it, together with accrued interest thereon, shall immediately become due and payable, For The Recovery Of Which Let Execution Issue.

As To All Counts

I

[Retention of Jurisdiction]

Jurisdiction is retained 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 or for the modification of any of the provisions herein and for the enforcement of compliance herewith and the punishment of the violation of any of the provisions contained herein.

II

[Costs]

The cost of this proceeding shall be taxed against the defendants.

III

[Public Interest]

The entry of this Final Judgment is in the public interest.