

Trade Regulation Reporter - Trade Cases (1932 - 1992), United States v. National Cranberry Association; A. D. Makepeace Co.; United Cape Cod Cranberry Co.; Marcus L. Urann; and John C. Makepeace., U.S. District Court, D. Massachusetts, 1957 Trade Cases ¶68,850, (Oct. 28, 1957)

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United States v. National Cranberry Association; A. D. Makepeace Co.; United Cape Cod Cranberry Co.; Marcus L. Urann; and John C. Makepeace.

1957 Trade Cases ¶68,850. U.S. District Court, D. Massachusetts. Civil Action No. 55-418-S. Filed October 28, 1957. Case No. 1232 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Combinations and Conspiracies—Monopolies—Consent Decree—Practices Enjoined—Exclusive Marketing Agreements—Cranberries.—An association engaged in the manufacturing and marketing of cranberry products was prohibited by a consent decree, (1) for a period of five years, from entering into any contract for the marketing of cranberries for a term of more than one year, unless such contract is terminable by the other party between June 1st and July 31st of any year, and (2) after the five-year period, from entering into any such contract for a term of more than three years, unless such contract is terminable by the other party between June 1st and July 31st of the third year and each subsequent third year of its term.

Combinations and Conspiracies—Monopolies—Consent Decree—Practices Enjoined—Interlocking Officers or Directors.—An association engaged in the manufacturing and marketing of cranberry products was prohibited by a consent decree from having as one of its officers or directors any person whom it knows to be engaged in, or to be an officer, director, or agent of, any other person engaged in, the marketing of cranberries or cranberry products in competition with the association.

Combinations and Conspiracies—Monopolies—Consent Decree—Practices Enjoined—Allocation of Markets.—An association engaged in the manufacturing and marketing of cranberry products was prohibited by a consent decree from entering into any agreement, with any other person engaged in the marketing of cranberries, to allocate or divide markets.

Combinations and Conspiracies—Monopolies—Consent Decree—Practices Enjoined—Production and Sale Control.—An association engaged in the manufacturing and marketing of cranberry products was prohibited by a consent decree from (1) contracting for the processing of any of its cranberries by any other processor at any time when it has available capacity and could process such cranberries itself, without incurring substantially greater expense, (2) receiving from any association member, for marketing, any cranberries which it knows to have been grown by a person not a member of the association, (3) exchanging with any person cranberries suitable for the fresh market for cranberries suitable only for processing to prevent such cranberries from being acquired by any competitor, or (4) entering into any agreement for the destruction of cranberries with any other person engaged in the marketing of cranberries. Also, growers of cranberries were prohibited from purchasing cranberries from others and reselling or otherwise disposing of them to artificially raise, depress, or stabilize market price levels of fresh or processed cranberries; or from delivering to the association any cranberries other than those grown by them or their subsidiaries.

Combinations and Conspiracies—Monopolies—Consent Decree—Practices Enjoined—Discriminations—Rebates and Preferences.—An association engaged in the manufacturing and marketing of cranberry products was prohibited by a consent decree from (1) following any sales policy which includes any element of rebate or discount from the purchase price, unless the amount or mathematical formula for calculating the amount is disclosed to the customer, or which grants any bonus or allowance to customers on the basis of business done prior to the period to which such bonus or allowance applies, (2) granting any allowance or subsidy on account of losses incurred by its customers on resale of products purchased from the association, (3) granting any manufacturers' discount to anyone other than a manufacturer, (4) receiving from any person not a member

of the association any cranberries, except on the same terms or conditions as would apply if such person were a member, or (5) discriminating among members in the administration of any pooling of cranberries. Also, growers of cranberries were prohibited from inducing or compelling any financial institution to take any action with respect to the granting or calling of loans for the purpose of discriminating against any borrower who is a competitor of the association.

Combinations and Conspiracies—Monopolies—Consent Decree—Practices Enjoined—Use of Stock Voting Rights.—In an action against an association engaged in the manufacturing and marketing of cranberry products, two growers of cranberries, and two individuals, a consent decree prohibited the growers and individuals from exercising voting rights on common stock of the association for a period of three years, except in two specified situations.

Department of Justice Enforcement and Procedure—Consent Decrees—Modification—Further Relief—Government Petition.—A consent decree provided that the Government could, within one year after the expiration of five years after the entry of the decree, petition the court for such further relief as it might deem necessary or appropriate. Also, the decree provided that, if the Government's petition prays for relief requiring a defendant association to divest itself of any processing facilities, the association and other defendants in the action would have the burden of showing cause why the requested relief should not be granted. The decree would not constitute a bar or estoppel as to any issue of law or fact raised in such proceeding.

Department of Justice Enforcement and Procedure—Consent Decrees—Modification—Legality of Marketing Agreements or Orders—Modification by Defendant.—A consent decree entered against an association engaged in the manufacturing and marketing of cranberry products provided that, in the event that any of the provisions of the decree should conflict with any provision of any marketing agreement with, or marketing order of, the Secretary of Agriculture, the association could petition the court for such modification of the decree as to permit compliance with such marketing agreement or order.

Department of Justice Enforcement and Procedure—Consent Decrees—Permissive Provisions—Foreign Activities.—A consent decree entered against an association engaged in the manufacturing and marketing of cranberry products, two growers of cranberries, and two individuals provided that the provisions of the decree should not be deemed to relate to activities or operations outside of the United States, its territories, and its possessions not affecting the domestic commerce of the United States.

For the plaintiff: Victor R. Hansen, Assistant Attorney General; Worth Rowley, W. D. Kilgore, Jr., Richard B. O'Donnell, William J. Elkins, and John J. Galgay, Attorneys, Department of Justice; and Anthony Julian, United States Attorney.

For the defendants: Charles B. Rugg of Ropes, Gray, Best, Coolidge & Rugg; and Whitney, North, Seymour, Simpson, Thacher & Bartlett for Natl. Cranberry Assn. Francis A. Brick, Jr., of Donovan, Leisure, Newton & Irvine; and Fletcher Clark, Jr., for A. D. Makepeace Co. and John C. Makepeace. Claude B. Cross, of Withington, Cross, Park & McCann, for United Cape Cod Cranberry Co. Lothrop Withington, of Withington, Cross, Park & McCann, for Marcus L. Urann.

Final Judgment

GEORGE C. SWEENEY, District Judge [*In full text*]: Plaintiff, United States of America, having filed its complaint herein on May 10, 1955, and the defendants herein, by their attorneys, having appeared and filed their answers to such complaint denying the substantive allegations thereof; and the plaintiff and each of defendants by their attorneys having severally consented to the making and entry of this Final Judgment without trial or adjudication of any issue of fact or law herein, and without admission by any party with respect to any such issue;

Now, Therefore, before any testimony has been taken, and without trial or adjudication of any issue of fact or law herein, and upon consent as aforesaid of all the parties hereto, it is hereby Ordered, Adjudged and Decreed as follows:

I

[*Sherman Act*]

The Court has jurisdiction of the subject matter herein and of the parties hereto. The complaint states a claim for relief against the defendants under Sections 1 and 2 of the Act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

II

[*Definitions*]

As used in this Final Judgment:

- (A) "NCA" shall mean the defendant National Cranberry Association, a cooperative corporation organized and existing under the laws of the State of Delaware, and with its principal office and place of business at Hanson, Massachusetts;
- (B) "ADM" shall mean the defendant A. D. Makepeace Co., a corporation organized and existing under the laws of the Commonwealth of Massachusetts, and with its principal place of business at Wareham, Massachusetts;
- (C) "United" shall mean the defendant United Cape Cod Cranberry Co., a corporation organized and existing under the laws of the Commonwealth of Massachusetts, and with its principal place of business at Hanson, Massachusetts;
- (D) "Urann" shall mean the defendant Marcus L. Urann, an individual;
- (E) "Makepeace" shall mean the defendant John C. Makepeace, an individual;
- (F) "Person" shall mean any individual, partnership, firm, corporation, association, trustee, cooperative or any other legal or business entity.

III

[*Applicability of Judgment*]

The provisions of this Final Judgment applicable to any defendant shall apply to such defendant, its successors, assigns, officers, directors, servants, employees and agents and to all persons in active concert or participation with such defendant who receive actual notice of this Final Judgment by personal service or otherwise.

IV

[*Association—Practices Enjoined*]

Defendant NCA is enjoined and restrained from:

- (A) Entering into, renewing, maintaining or adhering to, (1) during the five years immediately following the date of entry of this Final Judgment, any agreement for the marketing of cranberries for any person, for a term of more than one year unless any such agreement shall on its face be terminable by such person by written notice delivered between June 1st and July 31st of any year, and (2) after such five year period, from entering into any agreement for the marketing of cranberries for any person for a term of more than three years unless any such agreement shall on its face be terminable by such person by written notice delivered between June 1st and July 31st of the third year and each subsequent third year of its term;
- (B) Having, or allowing to serve, as one of its officers or directors, any person whom it knows to be engaged in, or to be an officer, director or agent of, any other person engaged in, the processing or marketing of cranberries or cranberry products in competition with NCA;
- (C) Entering into, renewing, maintaining or adhering to any agreement or arrangement with any other person engaged in the marketing of cranberries to allocate or divide markets;
- (D) Contracting for or otherwise arranging for the processing of any of NCA's cranberries by any other processor at any time when NCA has available capacity and could process such cranberries itself without incurring substantially greater expense;

(E)(1) Following any sales policy on cranberry products which includes any element of rebate or discount from the purchase price unless the amount of mathematical formula for calculating the amount is disclosed to the customer at or before the time of purchase by him, or which grants any bonus or allowance to customers on the basis of business done prior to the period to which such bonus or allowance applies;

(2) Granting any allowance or subsidy on account of losses incurred by NCA customers on resale of cranberry products purchased from NCA, except that this provision shall not apply to guarantees against, or allowances for,, general NCA price declines on floor stocks, or to guarantees against, or allowances for, losses due to damage or defects in quality;

(3) Granting any manufacturers' discount to anyone other than a manufacturer;

(F)(1) Receiving from any member for marketing any cranberries which it knows to have been grown by a person not a member of NCA or receiving from any person not a member of NCA for marketing any cranberries except on the same terms or conditions as to payment therefor as would apply if such person were a member;

(2) Discriminating among members in the administration of any pooling of cranberries;

(3) Exchanging with any person cranberries suitable for the fresh market for cranberries suitable only for processing, to prevent such cranberries from being acquired by any person engaged in the marketing of cranberry products in competition with NCA;

(G) Entering into, enforcing or adhering to any agreement or arrangement for the destruction of cranberries with any other person engaged in the processing or marketing of cranberries.

V

[*Further Relief*]

The plaintiff may, within one year after the expiration of five years immediately following the date of entry of this Final Judgment, and without the necessity of showing any change in circumstances occurring subsequent to the entry hereof, petition this Court for such further relief as it may then deem necessary or appropriate with respect to the marketing by defendant NCA of cranberries for processing and processed cranberries. In such event, if plaintiff's petition prays for relief requiring NCA to divest itself of any processing facilities, the defendants NCA, ADM and United shall be required to assume the burden of showing cause why the requested relief on the facts and the law should not be granted. Also in such event, neither the entry of this Final Judgment nor any of the provisions hereof shall operate as a bar or estoppel as to any issue of law or fact raised in such proceeding or bar or estop the plaintiff or the defendants NCA, ADM and United from introducing any evidence or testimony therein with respect to any such issue.

VI

[*Other Defendants—Practices Enjoined*]

Defendants ADM, United, Makepeace and Urann are jointly and severally enjoined and restrained from:

(A) Purchasing cranberries from others and reselling or otherwise disposing of them to artificially raise, depress or stabilize market price levels of fresh or processed cranberries;

(B) Delivering to NCA any cranberries other than those grown by them or their subsidiaries, or for them or their subsidiaries pursuant to agreement;

(C) Exercising voting rights on common stock of NCA for a period of three years immediately following the date of entry of this Final Judgment, except that:

(1) ADM, United, Makepeace and Urann may individually exercise their voting rights on common stock of NCA during the aforesaid three-year period for the election of directors of NCA, *provided, however*, that none of them may vote for more than 10% of the total number of directors to be elected in each such election; and

(2) ADM, United, Makepeace and Urann may individually exercise their voting rights on common stock of NCA during the aforesaid three-year period in connection with any matter under NCA's charter or by-laws or applicable Delaware statutes requiring a stockholders' vote and which is directly connected with the transfer, assignment, pledging, sale, liquidation or other disposition of capital assets of NCA, or with any amendment of the Certificate of Incorporation of NCA.

Provided, however, that this subsection (C) shall not be deemed to apply to any person acquiring in good faith common stock of NCA from any of said defendants by transfer or by operation of law, if such person is not an officer, director, servant, employee or agent of any of said defendants;

(D) Inducing or compelling, or attempting to induce or compel any financial institution to take any action with respect to the granting or calling of loans for the purpose of discriminating against any borrower who is a competitor of NCA.

VII

[*Government Marketing Orders*]

In the event that any of the provisions of this Final Judgment shall conflict with any provision of any marketing agreement with, or marketing order of, the Secretary of Agriculture, the defendant NCA, without showing any other change in circumstances and upon notice to the Assistant Attorney General in charge of the Antitrust Division, may petition this Court for such modification of such of the terms of this Final Judgment as is necessary to permit compliance with such marketing agreement or order.

VIII

[*Effective Date—Compliance*]

(A) This Final Judgment shall take effect upon the expiration of ten (10) days after the date of its entry.

(B) For the purpose of securing compliance with this Final Judgment and for no other purpose, duly authorized representatives of the Department of Justice shall, on written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to any consenting defendant made to its principal office, be permitted, subject to any legally recognized privilege:

(1) Access, during the office hours of said defendant, to those books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of said defendant which relate to any matter contained in this Final Judgment;

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

Upon written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, said defendant shall submit such reports in writing with respect to the matters contained in this Final Judgment as may from time to time be necessary to the enforcement of this Final Judgment.

No information obtained by the means permitted in this Section VIII shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice except in the course of legal proceedings in which the United States is a party for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

IX

[*Foreign Activities*]

The provisions of this Final Judgment shall not be deemed to relate to activities or operations outside of the United States, its territories and possessions not affecting the domestic commerce of the United States.

X

[*Jurisdiction Retained*]

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, for the modification of any of the provisions herein and for the enforcement of compliance therewith and punishment of violations thereof.