Trade Regulation Reporter - Trade Cases (1932 - 1992), United States v. Carrols Development Corp. and Triple Schuyler Rome Corp., U.S. District Court, N.D. New York, 1982-1 Trade Cases ¶64,510, (Oct. 16, 1981)

United States v. Carrols Development Corp. and Triple Schuyler Rome Corp.

1982-1 Trade Cases ¶64,510. U.S. District Court, N.D. New York, Civil Action No. 76-CV-170, Filed October 16, 1981.

Case No. 2513, Antitrust Division, Department of Justice.

Clayton Act

Department of Justice Enforcement: Modification of Consent Decrees: Changed Competitive Circumstances: Divestiture of Motion Picture Theaters.– Modification of a consent decree calling for divestiture of motion picture theaters acquired by defendants was warranted because of changed competitive circumstances. The competition posed by the entry of new theaters into the market and by cable television, together with defendants' inability to divest themselves of the theaters in question despite uncontroverted good-faith efforts and the standing injunction against future acquisitions, made it unlikely that the competitive evils sought to be avoided by the decree would recur. Requiring divestiture of any of the theaters specified in the decree would inflict a wholly pointless, grievous wrong. The government had agreed that modification of the decree was warranted, but still sought divestiture of three of the six theaters subject to the decree. Defendants' motion to modify the decree was granted, and the government's motion for the appointment of a trustee to complete divestiture was denied.
Modifying 1978-2 Trade Cases ¶62,213.

For plaintiff: Dept. of Justice, Antitrust Div., New York, N. Y. (Melvin Lublinski, Anne C. Pollaro, Ralph T. Girodano and Philip F. Cody, of counsel). **For defendants:** Farber & Cohen, New York, N. Y. (Morton H. Farber and Frank R. Cohen, of counsel).

Memorandum Decision and Order

Munson, Ch. D. J.: In 1976 the Government filed a complaint alleging that the defendants' acquisition of certain motion picture theaters in the Greater Syracuse and Greater Utica Areas violated Section 7 of the Clayton Act, 15 U. S. C. §18. In 1978, the Court approved a consent agreement entered into by the parties and directed the Clerk's office to enter the agreement as a Final Judgment [1978-2 Trade Cases ¶62,213]. At this time, the defendants operated nine of ten theaters in the Greater Utica Area. Under the terms of the Judgment, the defendants were to refrain for a period of 10 years from acquiring, without the written consent of the plaintiff, any part of the assets or stock of any operating motion picture theatre in the Greater Syracuse or Greater Utica Areas. Additionally, the defendants were to divest themselves within 24 months of three Greater Syracuse Area theaters--Genesee and Shoppingtown I and II--and nine Greater Utica Area theaters--Cinema New Hartford, Marcy Drive-In, New Hartford Drive In, Paris Cinema, Sykler Drive-In I and II, and 258 Cinema City I, II, and III. Also under the terms of the Judgment, the Court, upon application of the Government, would appoint a trustee for the purpose of divesture in the event that the defendants failed to timely divest themselves of the theaters that were the subject of the Judgment. To date, it appears that the defendants have divested themselves only of three of the nine Greater Utica Area theaters--258 Cinema City I, II, and III.

[*Enforcement/Modification of Consent Decree*]

Presently before the Court are motions by the Government for the appointment of a trustee for the purpose of divesting all the Syracuse Theaters and three of the Utica Area Theaters, and by the defendants to modify the Judgment in one or more of the following respects: (1) to eliminate therefrom its theaters in the Greater Utica Area; (2) to eliminate the requirement that the defendants continue to operate each of their theaters in the

Greater Utica Area pending divestiture; and (3) to postpone the time for which the Government can petition for appointment of a trustee. A hearing was held on July 2, 1981, in regard to both motions.

I.

[*Changed Competitive Circumstances*]

In their motion to modify, the defendants argue that circumstances have changed, since the entry of Judgment in this case, which have increased the competitive market in the Utica Area. Four factors appear to be cited in support of this position: (1) the entry of a new competitor in the Utica Market; (2) the growing competition posed by cable television's Home Box Office; (3) general demographic features of the Utica area; and (4) the inability of the defendants to sell the theaters that are the subject of the Judgment.

With respect to the first factor, the defendants now operate nine theaters in the Utica Area. Three of the theaters, located at the Riverside Mall, are exempt from the Judgment. This Mall is a relatively new multi-screen complex, with three small auditoriums that have a total seating capacity of 900; it is primarily a “first-run” unit, showing films immediately upon release. Four of the theaters are drive-in facilities that are open only six months a year and feature “second-run” films, which are less expensive than newly released films because they have already been in circulation. The remaining two theaters are indoor screens: The Paris Cinema, located in downtown Utica, is an older theater seating 400 to 700 persons and showing an increasing number of second-run films, and the Cinema New Hartford, located in a more affluent part of the Utica area, seats 1000 persons and is a first-run theater. Lease obligations expire in 1989 on all these theaters except three, the Paris Cinema and Sykler Drive-In I and II, whose leases expire in October, 1984.

[*New Entry--First-Run Market*]

In June or July, 1980, a “six-plex” theater opened at Sangertown Square, located across the street from the defendants' Cinema New Hartford and New Hartford Drive-In. Owned by Theater Management, Inc., a Boston, Massachusetts corporation, the multi-screen complex has six small auditoriums that have a total seating capacity of 1800 and show first-run products. According to the defendants, because of the decreased costs involved in running multiple theaters under one roof, as compared to running theaters in different locations, because multiple screens can present a wide variety of films, and because of other factors that make such complexes more attractive to distributors than older theaters with large seating capacities, the Sangertown theaters present fierce competition for first-run films, which tend to be more profitable than second-run films.

At the present time, the defendants maintain the overall competitive situation in the Utica area is as follows. There are 17 theaters in all: six are located at Sangertown; six belong to the defendants and are subject to the Judgment; three belong to the defendants but are exempt from the decree; one theater, the Uptown Theater, is a second-run facility located in downtown Utica with a seating capacity of 700 to 1000; and one theater, the Singeltary, is City-operated facility with a seating capacity of 1500 to 2000 and features performing arts in addition to films. The defendants thus operate roughly 50% of the total number of screens. In addition, the defendants receive approximately 50% of the total sales revenue in the Utica area market, if one includes the three exempt Riverside Mall theaters. Specifically, while, in fiscal year 1981, the new Sangertown Square six-plex theaters are estimated to have grossed $1,200,000 in sales, the defendants' nine theaters grossed $1,375,000, approximately $590,000 of which derives from the Riverside Mall theaters and the balance of which derives from the six theaters that are the subject of the Judgment. The 1981 total sales figure of $1,375,000, however, is down roughly 23%, or $400,000 from the total sales figures for 1979 and 1980 respectively. Both the decree theaters and Riverside Mall lost approximately $200,000 in sales in 1981 as compared to the sales figures for 1979 and 1980. Besides sales, the net profit and location net income of the defendants' theaters are also down for fiscal year 1981, as compared to fiscal years 1979 and 1980. The decreases, according to the defendants, are attributable to the competition posed by the Sangertown theaters. Despite the losses, however, the defendants claim that they are financially better off by operating their theaters rather than by closing them, so

long as their losses remain less than their fixed costs. For this reason, the defendants state that at this point they would continue to operate all six theaters if they prevail on their motion.

[*Cable Television--Second-Run Market*]

With respect to the second factor, namely, Home Box Office, the defendants contend that this service of cable television, and any other cable movie channels, reduce competition for second-run products because they televise movies only two to three months after the first run of these films in movie theaters. Because their theaters depend heavily upon the second-run market, the impact of cable movies, the defendants indicate, has been significant. Moreover, the defendants testified that the only way one can make money in the theater business today is to play first-run prior to Home Box Office. In this regard, the defendants note that between 9,000 and 9,300 homes in the Utica area subscribe to Home Box Office, paying a total of $90,000 and $95,000 per month for such a service. According to 1975 statistics, the defendants report, the City of Utica had a population of approximately 90,000 and the Utica metropolitan area had a population of approximately 140,000.

[*Demography*]

With respect to the third factor, namely, demography, the defendants state that people in good-sized cities like Utica tend to visit better sections of their communities for their recreation and entertainment. Because many of their theaters are not situated in convenient areas, the defendants argue that they are at a competitive disadvantage to a facility like Sangertown. In support of this argument, the defendants observe that 258 Cinema, which is a multitheater complex in downtown Utica, has been vacant since 1978.

[*Inability to Divest*]

Finally, the defendants claim that their inability to divest is further evidence of a diminished competitive situation in the Utica market. Despite efforts to sell the decree theaters, the defendants contend that buyers seem attracted only to the exempt, newer theaters at Riverside, because these theaters are better able to compete against Sangertown than the other theaters. According to the defendants, buyers are not interested in the theaters that are subject to the Judgment because they are marginal facilities economically, and thus not particularly salable.

[*Government Modification Proposal*]

Without presenting evidence to challenge these factual assertions of the defendants, the Government claims that the defendants have not met the rigorous legal standards for modification of this Court's Judgment. The Government, however, states that it recognizes that the entry of the Sangertown Square theaters has changed the complexion of the Utica market and thus also seeks a modification of the Judgment, namely, the appointment of a trustee for the divestiture of only three of the six Utica theaters that are subject to the Judgment. The three Syracuse theaters, however, would still be subject to complete divestiture.

II.

A.

[*Sec. 7, Clayton Act Goals*]

A discussion of the merits of the parties' arguments cannot proceed without a consideration of the aims of Section 7 of the Clayton Act. This section proscribes any acquisition of stock or assets where “the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.” 15 U. S. C. §18. As explained in *Brown Shoe Company v. United States* [1962 Trade Cases ¶70,366], 370 U. S. 294, 315-21, 334-35 (1962), Congress's intent in enacting Section 7 and its amendments was to prevent economic concentrations that tend to lessen competition in a line of commerce. See *United States v. General Dynamics* [1974-1 Trade Cases ¶74,967], 415 U. S. 486, 497 (1974). The anticompetitive effects of any acquisition were to

be measured under a functional analysis, with reference to relevant product and geographic markets; statistics concerning market share and concentration were to be significant, but not conclusive, factors.

> Congress indicated plainly that a merger had to be functionally viewed, in the context of its particular industry. That is, whether the consolidation was to take place in an industry that was fragmented rather than concentrated, that had been a recent trend toward domination by a few leaders or had remained fairly consistent in its distribution of market shares among the participating companies, that had experienced easy access to suppliers by buyers or had witnessed foreclosures of business, that had witnessed the ready entry of new competition or the erection of barriers to prospective entrants, all were aspects, varying in importance with the merger under consideration, which would properly be taken into account.... Statistics reflecting the shares of the market controlled by the industry leaders of the parties to the merger are, of course, the primary index of market power; but only a further examination of the particular market--its structure, history, and probable future--can provide the appropriate setting for judging the probably anticompetitive effect of the merger.

Brown Shoe Co. v. United States [1962 Trade Cases ¶70,366], 370 U. S. at 321-333 & n. 38. See *United States v. General Dynamics Corp.* [1974-1 Trade Cases ¶74,967], 415 U. S. at 497, 499; *Brown Shoe Co. v. United States* [1962 Trade Cases ¶70,366], 370 U. S. at 234-36.

It is against this statutory background that this Court shall weigh the proposed modifications of the Judgment.

B.

[*Decree Modification Standards*]

In its seminal decision in *United States v. Swift,* 286 U. S. 106 (1938), the Supreme Court reaffirmed "the power of a court of equity to modify an injunction to adaption to changed conditions though it was entered by consent." *Id.* at 114. See *United States v. United Shoe Machinery Corp.* [1968 Trade Cases ¶72,457], 391 U. S. 244, 248 (1968). As the Court stated: "[A] court does not abdicate its power to recover or modify its mandate if satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong." *United States v. Swift,* 286 U. S. at 114-15. Noting that the question presented by a defendant's motion to modify is "whether [modification] can be made without prejudice to the interests of the classes whom this particular restraint was intended to protect," *id.* at 117-18, the Court went on to specify the standards that govern such a motion:

> There is need to keep in mind steadily the limits of inquiry proper to the case before us. We are not framing a decree. We are asking ourselves whether anything has happened that will justify us now in changing a decree .... The inquiry for us is whether the changes are so important that dangers, once substantial, have become attenuated to a shadow.... Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed....

Id. at 119. In applying these principles to the facts before it, the Court in *Swift* denied the defendant's motion to modify, observing that the changes urged by the defendants had not "eradicate[d] the ancient peril", *id.* at 118, and that the defendants were "not suffering hardships so extreme and unexpected as to justify [the Court] in saying that they are the victims of oppression," *id.* at 119.

Subsequent decision of the Supreme Court have adhered to the *Swift* doctrine. For example, in *United States v. United Shoe Machinery Corp.* [1968 Trade Cases ¶72,457], 391 U. S. 244 (1968), the Court made this statement:

> *Swift* teaches us that a decree may be changed upon an appropriate showing, and it holds that it may *not* be changed in the interests of the defendant if the purposes of the litigation as incorporated in the decree (the elimination of monopoly and restrictive practices) have not been fully achieved.

Id. at 248.

Among lower courts the *Swift* teachings have been further explicated. The Eighth Circuit has set forth this guideline:

> That modification is only cautiously to be granted; that the dangers which the decree was meant to foreclose must almost have disappeared; that hardship and oppression, extreme and unexpected, are significant; and that the movant's task is to provide close to an unanswerable case. To repeat: caution, substantial changes, unforeseeness, oppressive hardship, and a clear showing are the requirements.

Humble Oil & Refining Company v. American Oil Company, 405 F. 2d 803, 813 (8th Cir.), cert. denied, 395 U. S. 905 (1969). Von Kalinowski, 15 *Anti-Trust Laws and Trade Regulation,* §114.03[2], at 114-17. The Tenth Circuit has closely followed the formulation of the Eighth Circuit. See *S. E. C. v. Jan-Dal Oil & Gas, Inc.,* 433 F. 2d 304, 305 (10th Cir. 1970); *Ridley v. Phillips Petroleum Company,* 427 F. 2d 19, 22 (10th Cir. 1970). Other courts seem content with a straightforward adoption of the language in *Swift.* See. e. g., *United States v. Shubert* [1958 Trade Cases ¶69,073], 163 F. Supp. 123, 124 (S. D. N. Y. 1958) (Kaufmann, J.); *United States v. Besser Manufacturing Company* [1955 Trade Cases ¶67,977], 125 F. Supp. 710, 713 (E. D. Mich. 1954).

C.

[*Disposition*]

In the case at bar, both the Government and the defendants seem to agree, with respect to the Utica area theaters, that unforeseen changes have occurred in the Utica market which warrant modifiaction of the Judgment. The only bone of contention concerns the form of the modification, namely, whether the Court should order divestiture of three, or fewer, theaters, or whether the Court should order no divestiture of any Utica theater.

On this score, the Court is of the opinion that substantial justice and the public good would be served by altogether removing the divestiture requirements regarding the Utica theaters.

It is true that, in terms of statistics, the defendants today play a significant role in the Utica area market. However, the entry and success of the Sangertown Square first-run theaters, with contemporary features that are well-suited to present day motion picture economic arrangements, are persuasive evidence of the absence of any continued anticompetitive effects resulting from the defendants' presence in the Utica market. In view of the dated, second-run nature of most of the defendants' theaters and the seasonal nature of the defendants' drive-in theaters, the competition posed by the new theaters, by Home Box Office, and by other cable movie stations establishes to this Court's satisfaction that the “ancient peril” has become “attenuated to a shadow.” Because of this conclusion, because of the defendants' uncontroverted good faith efforts to divest themselves of their Utica theaters, and because of the standing injunction in the Judgment against future acquisitions, this Court believes that “a return of the evils which the Judgment herein endeavors to circumvent,” *United States v. Savannah Cotton & Naval Exchange, Inc.* [1960 Trade Cases ¶69,866], 192 F. Supp. 256, 258 (S. D. Ga. 1960), aff'd without opinion *sub nom. Turpentine & Rosin Factors, Inc v. United States,* 365 U. S. 298 (1961) (per curiam), is unlikely, and that a requirement that the defendants divest any of their Utica area theaters would inflict a wholly pointless, “grievous wrong.”

With respect to the three Syracuse area theaters, the present status of this matter is unclear. The Court shall therefore not pass at this time upon the Government's motion for the appointment of a trustee for the purpose of divesting these theaters.

For the foregoing reasons, the defendants' motion to modify is granted, and the Government's motion for the appointment of a trustee is denied as to the divestiture of the Utica area theaters, and dismissed without prejudice as to the divestiture of the Syracuse area theaters.

It is so Ordered.