

Trade Regulation Reporter - Trade Cases (1932 - 1992), United States v. Mrs. Smith's Pie Co., U.S. District Court, E.D. Pennsylvania, 1977-2 Trade Cases ¶61,606, (Apr. 28, 1977)

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United States v. Mrs. Smith's Pie Co.

1977-2 Trade Cases ¶61,606. U.S. District Court, E.D. Pennsylvania, Civil Action No. 74-419, Entered April 28, 1977, modified August 19, 1977.

Case No. 2370, Antitrust Division, Department of Justice.

Clayton Act

Acquisitions: Frozen Dessert Pie Manufacturers: Divestiture: Closure of an Unprofitable Plant: Litigated Judgment.— A manufacturer of frozen dessert pies that acquired a competitor in violation of [Sec. 7 of the Clayton Act](#) was ordered to divest the acquired company within two years and to keep the business operating as a going concern during that period. A six-year ban on acquisitions of frozen pie manufacturers, without the permission of the government or the court, was imposed. A modification allowed the manufacturer to close one of the acquired plants in order to avoid irreversible losses.

For plaintiff: Walter L. Devany and Norma B. Carter, Philadelphia, Pa. **For defendant:** Ellis Arnall, Cleburne E. Gregory, Jr., Allen I. Hirsch, William H. Kitchens, Harold E. Kohn, and Samuel E. Klein, Philadelphia, Pa.

Final Judgment

Newcomer, D. J.: Plaintiff, the United States of America, having filed its complaint herein on February 21, 1974, and the Court after a full trial and consideration of the evidence and briefs, and the Court having filed its Findings of Facts and Conclusions of Law herein on November 18, 1976, and having heard the parties with respect to the issue of relief it is hereby

Ordered, Adjudged and Decreed as follows:

I

[*Jurisdiction*]

This Court has jurisdiction of the subject matter hereof and of the parties hereto.

The acquisition by Mrs. Smith's Pie Company of Michigan, Lloyd J. Harriss Pie Co., Lloyd J. Harriss Pie Co., Douglas Cold Storage Co., and Food Industries of America, Inc., violated [Section 7 of the Clayton Act](#), as amended, 15 U. S. C. §18.

II

[*Definitions*]

As used in this Final Judgment:

(A) "Mrs. Smith's" means the defendant, Mrs. Smith's Pie Company.

(B) "Harriss" means individually and collectively, Michigan Lloyd J. Harriss Pie Co., Lloyd J. Harriss Pie Co., Douglas Cold Storage Co., and Food Industries of America, Inc.

(C) "Person" means any natural person, corporation, association, firm, partnership, or any other business or legal entity.

(D) "Purchaser" means any person who acquires the stock and/or assets of Harriss pursuant to this Final Judgment.

III

[Applicability]

The provisions of this Final Judgment applicable to Mrs. Smith's shall also apply to each of its officers, directors, agents, employees, subsidiaries, successors, and assigns, and to all other persons in active concert or participation with any of them who receive actual notice of this Final Judgment by personal service or otherwise.

IV

[Divestiture]

(A) Mrs. Smith's is ordered and directed to divest within two years of the date of entry of this Final Judgment, all of the stock and assets, including but not limited to trademarks and trade names of Harriss, under such terms and conditions as will maintain the four acquired companies comprising Harriss as a single going business concern and a viable competitive entity in the production and sale of frozen dessert pies at standards of operating performance prevailing at the time of entry of this Final Judgment.

(B) Upon the entry of this Final Judgment Mrs. Smith's shall promptly advise prospective purchasers of the availability of the assets and stock to be divested or offered to such purchasers pursuant to the provisions of this Final Judgment by making known the availability of Harriss for sale by ordinary and usual means for the sale of the business, and shall furnish to all bona fide prospective purchasers on an equal and nondiscriminatory basis all necessary information, including financial and business records, regarding the assets and stock to be divested, and shall permit bona fide prospective purchasers to have access to and to make inspection of such records, properties, and assets of Harriss as are reasonably necessary for the above purpose.

V

[Preservation of Going Business Concern]

Mrs. Smith's until the divestiture required by Section IV of this Final Judgment is accomplished shall:

(A) Take no action, directly or indirectly, which would impair or impede the viability of Harriss as a going business at standards of operating performance prevailing at the time of entry of this Final Judgment or which would impair or impede Mrs. Smith's ability to accomplish such divestiture.

(B) Not commingle any of the assets, equipment or properties of Harriss with its own or take any action, directly or indirectly, which has the effect of diminishing or impairing the value of the assets, equipment or properties of Harriss as prevailed at the time of the entry of this Final Judgment.

(C) Maintain Harriss in its present status as a separate and viable company.

(D) Make no changes in any of Mrs. Smith's record keeping which may hinder the divestiture of Harriss.

(E) Maintain the existing production and distribution facilities of Harriss except for changes in the ordinary course of business.

(F) Maintain a sales organization for Harriss that is separate from that of Mrs. Smith's.

(G) Maintain sufficient and adequate personnel at Harriss separate and distinct from Mrs. Smith's other personnel and capable of managing Harriss effectively after divestiture by Mrs. Smith's.

(H) Direct Harriss to continue to publicize, sell, and advertise distinctly the name of Harriss in connection with products made or distributed by Harriss.

VI

[Compliance]

(A) Mrs. Smith's shall keep written memoranda of all inquiries it receives, whether written, oral, telephonic, or otherwise, from persons seeking information regarding the business to be divested pursuant to Section IV. The memoranda shall include the name, business address, and business telephone number of each person seeking information, and shall indicate the nature of the inquiry, defendant's response to the inquiry, the date of the inquiry, and the date of Mrs. Smith's response.

(B) Beginning on the 90th day after entry of this Final Judgment, and on every 90th day thereafter until the divestiture ordered by Section IV has been completed, Mrs. Smith's shall furnish a written report to plaintiff detailing the efforts made by it to comply with the provisions of this Final Judgment which shall include:

(1) A list of all persons who contacted Mrs. Smith's during the reporting period seeking information about Harriss, plus copies of the memoranda required by Paragraph (A) of this Section; and

(2) A description of steps taken during the reporting period to accomplish divestiture and of the status of all ongoing negotiations for the divestiture of Harriss.

(C) At least sixty (60) days prior to the completion of the divestiture pursuant to this Final Judgment, Mrs. Smith's shall furnish in writing to the Court and to the plaintiff the complete details of the proposed divestiture, and shall promptly furnish in writing such supplementary information with respect to the proposed transaction as plaintiff may request.

(D) If plaintiff objects to the proposed transaction, it shall notify Mrs. Smith's and the Court in writing within thirty (30) days after receiving the last requested information from Mrs. Smith's. The transaction shall not be closed prior to the expiration of plaintiff's time to object unless plaintiff notifies Mrs. Smith's it does not object to the proposed transaction. In the event plaintiff notifies Mrs. Smith's that it objects to the transaction, the transaction shall not be closed unless plaintiff's objection is withdrawn or unless the transaction is approved by the Court.

VII

[Purchase Money Security]

Mrs. Smith's is authorized to retain the stock or assets of Harriss as security for the payment of the purchase price. If it becomes necessary for Mrs. Smith's to foreclose or exercise rights of ownership over the security, then Mrs. Smith's is required to redivest the Harriss companies within one year of the date of such exercise of ownership rights, under the terms and conditions as provided by this Final Judgment.

VIII

[Employees in Common]

Upon completion of the divestiture, pursuant to Section IV of this Final Judgment, Mrs. Smith's is enjoined and restrained from employing or continuing to employ any person, who occupies, at the same time, the position of director, officer, agent or employee of Harriss or any person acquiring Harriss.

IX

[Six-Year Acquisitions Ban]

Mrs. Smith's is enjoined and restrained for a period of six (6) years from the date of entry of this Final Judgment from acquiring, directly or indirectly, any interest in or any of the assets (except goods or services sold in the normal course of business), business, goodwill, or stock of any person engaged in the production and/or sale of frozen dessert pies within the United States, except with the prior written consent of the plaintiff, or if such consent is refused, with the prior approval of the Court.

X

[Inspection]

For the purpose of determining or securing compliance with this Final Judgment and for no other purpose, and subject to any legally recognized privilege, from time to time:

(A) Duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General or of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to a defendant made to its principal office, be permitted:

(1) Access during 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 matters 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, employees and agents of such defendant, who may have counsel present, regarding any such matters.

(B) Upon the reasonable written request of the Attorney General or of the Assistant Attorney General in charge of the Antitrust Division made to a defendant's principal office, such defendant shall submit such written reports, under oath if requested, with respect to any of the matters contained in this Final Judgment as may be reasonably 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 for the purpose of securing compliance with this Final Judgment, or as otherwise required by law. If at the 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 to which a claim of protection may be asserted under Rule 26(c)(7) of the Federal Rules of Civil Procedure or under some other legally recognized privilege, and said defendant marks each pertinent page of such material, "Subject to claim of protection" and specifies the applicable privilege, 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 that defendant is not a party.

XI

[Retention of Jurisdiction]

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.

XII

[Costs]

Plaintiff shall recover its costs in this action from Mrs. Smith's.

Modification of Final Judgment

Newcomer, D. J.: With the consent of the parties and after due consideration by the Court, the Final Judgment entered April 28, 1977, is hereby modified as follows:

[Discontinuance of Business]

(1) Mrs. Smith's at its option, may close the fresh-bake product routes now operated by the Chicago plant of the Lloyd J. Harriss Pie Company at any time after the entry of this modification of the Final Judgment and may discontinue the production of the fresh-baked products required to supply those routes.

[Continuation of Production]

(2) Subject to circumstances beyond its control, Mrs. Smith's shall continue until at least October 15, 1977, the production of frozen baked products at the Chicago plant of Lloyd J. Harriss Pie Company for the purpose of supplying the needs for such products to Michigan Lloyd J. Harriss Pie Company and, after the closing of the Chicago plant as hereinafter provided, shall furnish the Michigan Lloyd J. Harriss Pie Company with an inventory of frozen-baked products sufficient for at least seventy-five (75) days from the date of closing of the Chicago plant.

[Sale Offer Advertising]

(3) Promptly after the entry of this modification Mrs. Smith's shall publicly announce the availability for sale of the assets and stock of the Harriss Companies by all ordinary and usual means including but not limited to announcements in the Wall Street Journal, New York Times, and appropriate trade journals; and shall, without delay, commence contacting prospective purchasers, prepare a sales brochure, and shall, in all respects, comply with the provisions of paragraph IV(B) of said Final Judgment. In the event no bona fide agreement of sale has been entered into by February 28, 1978, the Court shall appoint an independent trustee on March 1, 1978, effective immediately in accordance with the trustee agreement attached hereto as Appendix A; said trustee to effect the expeditious divestiture of the Harriss Companies. If on February 28, 1978, Mrs. Smith's is then engaged in serious negotiations which it believes may result in divestiture, Mrs. Smith's shall so notify the Plaintiff and the Court. The Court may extend the sale period for a reasonable length of time to permit Mrs. Smith's to complete such negotiations.

[Plant Closure]

(4) For the purpose of avoiding irreversible losses, the Chicago plant of Lloyd J. Harriss Pie Co. may be closed at Mrs. Smith's option on or after October 15, 1977, in accordance with paragraph 2 hereof. Said plant, machinery and equipment shall be maintained in a dormant but fully operational condition so that it can be reactivated as of the date of divestiture at the option of the purchaser.

[Filling of Orders]

(5) Mrs. Smith's shall, and hereby agrees that it will after the closing of the Chicago plant, fill any orders of the Saugatuck Plant of the Michigan Lloyd J. Harriss Pie Company for baked frozen products as determined independently by the Harriss Companies in accordance with the contract attached hereto as Appendix B [not reproduced--CCH.]

[Entry of Judgment]

(6) This modification of the Final Judgment is signed and entered after the dismissal by Mrs. Smith's of the appeal from the Final Judgment to the Third Circuit Court of Appeals and shall supersede all provisions of said Final Judgment in conflict with this Order and shall further supersede the Order staying certain provisions of said Final Judgment. All other provisions of said Final Judgment shall remain in full force and effect.