

Trade Regulation Reporter - Trade Cases (1932 - 1992), United States v. Acorn Engineering Co., U.S. District Court, N.D. California, 1982-1 Trade Cases ¶64,697, (Mar. 30, 1982)

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United States v. Acorn Engineering Co.

1982-1 Trade Cases ¶64,697. U.S. District Court, N.D. California, Civil No. C 80-3388 TEH, Entered March 30, 1982, (Competitive impact statement and other matters filed with settlement: 47 *Federal Register* 3435, 12886).

Case No. 2792, Antitrust Division, Department of Justice.

Clayton Act

Acquisitions: Vandal-Resistant Plumbing Fixtures: Partial Divestiture of Assets: Trademarks and Patents.— A producer of vandal-resistant, heavy-gauge stainless steel plumbing fixtures was required by a consent decree to divest assets of an acquired competition consisting of all tooling and component parts, all associated engineering drawings, and all patents relating to vandal-resistant plumbing fixtures obtained in the challenged acquisition. Associated trademarks or trade names also had to be sold, and a 10-year ban on acquisitions in the industry, without prior government approval, was imposed. Otherwise, the merger of the companies was allowed to stand.

For plaintiff: William F. Baxter, Asst. Atty. Gen., Mark Leddy, Anthony E. Desmond, Howard J. Parker, and Polly L. Frenkel, Attys., Dept. of Justice. **For defendant:** John J. Hanson, of Gibson, Dunn & Crutcher, Los Angeles, Cal.

Final Judgment

Henderson, D. J.: Plaintiff, United States of America, having filed its complaint on August 19, 1980, defendant having filed its answer thereto, plaintiff's motion for preliminary relief having been heard and granted by the Court, and plaintiff and defendant by their respective attorneys having consented to the entry of this Final Judgment, and without this Final Judgment constituting evidence or an admission by any party with respect to any issue consented to:

Now, Therefore, and upon a determination by this Court that entry of this Judgment will be in the public interest, it is hereby

Ordered, Adjudged and Decreed as follows:

I.

[*Jurisdiction*]

This Court has jurisdiction of the subject matter herein and of the parties consenting hereto. The complaint states a claim upon which relief may be granted against defendant under [Section 7 of the Clayton Act](#), as amended (15 U. S. C. §18).

II.

[*Definitions*]

As used in this Final Judgment:

A. "Acorn" shall mean defendant Acorn Engineering Company.

B. "APFC" shall mean Aluminum Plumbing Fixture Corporation, all the stock of which Acorn acquired on March 19, 1979.

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C. "Vandal-resistant plumbing fixtures" shall mean aluminum and stainless steel urinals, lavatory wash basins, water closets, and combination water closet/wash basins of a configuration and with characteristics designed to be break-resistant, tamper-resistant, and to be used in an environment where there is a significant potential for fixture abuse, such as in a jail.

D. "Super Secur tooling and component parts" shall mean the tooling (dies and patterns) and component parts identified in Appendix A hereto.

E. "Person" shall mean any individual, partnership, firm, corporation, association, or any other business or legal entity.

III.

[*Applicability*]

The provisions of this Final Judgment shall apply to Acorn and its officers, directors, agents, employees, subsidiary companies, affiliates, 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.

[*Divestiture*]

A. Acorn is ordered and directed to use its best efforts to divest itself completely, within 180 days of the date of this Final Judgment, as hereinafter provided, of all of its right, title, interest and obligations in the following: the Super Secur tooling and component parts; all engineering drawings associated with such tooling and component parts as listed in Appendix B; all letters patent relating to vandal-resistant plumbing fixtures, accessories, or fittings obtained by Acorn in its acquisition of APFC and in its prior acquisition of certain assets of Kelsey Hayes, which patents are listed in Appendix C.

B. Acorn is ordered and directed to use its best efforts to divest itself completely, within 180 days of the date of this Final Judgment, as hereinafter provided, of all of its right, title, and interest, except as expressly provided below, in the trademarks or trade names "Super Secur," "Super Secur Ware," and "Super Secur Manufacturing Co." and in all other trade names, trademarks, symbols and distinctive logos associated with APFC's vandal-resistant plumbing fixture line, all of which are identified in Appendix D. For a period of eighteen months from the date of entry of this Final Judgment, Acorn may use, in marketing, its prefabricated metal building catalogs printed before November 1, 1981, provided that after the divestiture ordered herein closes, each such catalog reveals on the cover in a conspicuous way that Acorn has divested its rights to use the "Super Secur" name, but printed the catalog before such divestiture.

C. The divestiture described in the two immediately preceding paragraphs shall be made to a single purchaser who shall reasonably demonstrate to the plaintiff and/or the Court, as hereinafter provided, that (1) the purchase is for the purpose of competing with Acorn in the United States in the vandal-resistant plumbing fixtures market, and (2) the purchaser has the management, operational and financial capability to compete effectively with Acorn. The purchaser shall not be Waltec, Inc. or any of its subsidiaries or affiliates, or any subsidiary or affiliate of Acorn.

V.

[*Prospective Purchasers*]

A. Acorn shall utilize its best efforts to make the divestiture herein ordered and to make known promptly the availability of the assets by all ordinary and usual means. Acorn shall permit prospective purchasers to make such inspection of the assets as may be helpful in promoting the divestiture. In the event that the divestiture has not been completed within seventy-five (75) days from the entry of this Final Judgment, Acorn shall augment its

best efforts by causing an advertisement offering the assets for sale to be published for a reasonable period in at least two trade or business publications of national circulation, including one circulated to the plumbing fixtures industry.

B. Acorn shall furnish to prospective purchasers all revenue and cost data for the operation formerly carried on by APFC, in the form prepared by APFC for calendar years 1976, 1977 and 1978; information concerning sources of supply for raw materials and parts for APFC vandal-resistant plumbing fixtures, specifically including the name and address of all such vendors indicating the item supplied; a list of all persons, and the address of each, who were sales representatives in 1978 or 1979 for vandal-resistant plumbing fixtures produced by APFC; and the name and address of major purchasers who placed orders, in 1978 and 1979, with APFC for the purchase of any vandal-resistant plumbing fixtures. Acorn shall not be required to submit any such information or materials to anyone unless the recipient thereof executes an affidavit requiring recipient to keep such information and/or materials confidential, not to reproduce the same, and to return the same to Acorn in the event a sale to such recipient is not consummated.

VI.

[*Reacquisition of Assets*]

The divestiture ordered and directed by this Final Judgment shall be made in good faith and shall be absolute and unqualified. Except upon written approval by the plaintiff or the Court, Acorn shall not reacquire any of the assets divested, nor accept any lien, mortgage, deed of trust or other form of security on or interest in any portion of the assets sold. Acorn shall take no action which will impair or impede the divestiture ordered by this Final Judgment.

VII.

[*Compliance*]

Each sixty (60) days following the entry of this Final Judgment until divestiture has been completed, or until the end of six (6) months from the date of entry of this Final Judgment, whichever first occurs, Acorn shall file with this Court and serve upon plaintiff an affidavit describing in detail the fact and manner of its efforts to accomplish the divestiture ordered by this Final Judgment. Such reports shall be supplemented by such additional information as the plaintiff may request.

VIII.

[*Proposed Purchasers*]

At least thirty (30) days in advance of the anticipated closing date of the contract of divestiture pursuant to this Final Judgment, Acorn shall submit to plaintiff the name of the proposed purchaser and all pertinent information respecting the proposed divestiture together with such additional information as plaintiff may request in writing. Within fourteen (14) days after Acorn has supplied the name of the proposed purchaser, the pertinent information regarding the proposed divestiture, and any requested additional information, plaintiff will advise Acorn in writing of plaintiff's approval or objections to the proposed divestiture. If plaintiff objects to the proposed divestiture, then such contract of divestiture shall not be consummated unless (1) plaintiff notifies Acorn in writing of any subsequent approval or unless (2) the Court approves after a hearing at which Acorn shall have the burden of proving that the proposed divestiture is to a person (a) who has the purpose of competing with Acorn in the vandal-resistant plumbing fixtures market, and (b) who has the management, financial and operational capability to compete effectively with Acorn.

IX.

[*Trustee Selection*]

If Acorn has not notified the plaintiff within one hundred twenty (120) days following the date of entry of this Final Judgment that it has entered into a contract of divestiture, each party shall notify the other in writing of the name and description of not more than two persons it wishes to nominate as a trustee to conduct a sale of the assets to be divested upon sealed or public bids. The parties shall seek to agree upon one of the nominees to serve. If they are unable to agree, the Court may select from said nominees after hearing the parties as to the qualifications of the candidates.

X.

[Trustee Sale]

If Acorn is unable to complete the divestiture required by this Final Judgment within the period prescribed in Section IV above, the Court shall appoint a trustee to serve for a maximum period of six (6) months except as hereinafter provided. The trustee's main endeavor shall be effectively to advertise the prospective sale of the assets to be divested and to conduct a sale to a single purchaser of such assets upon sealed or public bids, in order to accomplish a prompt and full divestiture of such assets for the purpose of effectively promoting competition in the vandal-resistant plumbing fixture market in the United States. The purchaser shall not be Waltec, Inc. or any of its subsidiaries or affiliates or any subsidiary or affiliate of Acorn.

XI.

[Compensation]

The trustee, who may be an investment banker or broker, a person engaged in the business of selling industrial plants or equipment, or a similarly qualified person, shall perform at the expense of Acorn under a schedule of court-approved fees, incentive compensation and costs to be fixed at the time of the trustee's appointment. The compensation shall be based at least in significant part on a commission arrangement which shall be contingent on the trustee causing the sale of the assets.

XII.

[Powers]

A. The trustee shall have all such powers as are necessary and proper to accomplish divestiture in accordance with the provisions of this Final Judgment. The trustee may require Acorn to convey all rights, titles, interests and obligations in the assets to be divested to any purchaser. Such conveyance shall be absolute and unqualified. The trustee shall have the right to assemble and permit inspection by prospective purchasers of the assets to be divested and to furnish to prospective purchasers the information furnished to prospective purchasers by Acorn, as described in paragraph B of Section V of this Final Judgment, and such other information pertaining to the assets to be divested as is reasonably necessary to accomplish the main endeavor of the trustee, as described in Section X of this Final Judgment.

B. Acorn shall also provide the trustee the revenue and cost data kept by Acorn in accord with paragraph 12 of the Preliminary Relief Order entered in this case on June 18, 1981 who shall have the right to furnish such data to prospective purchasers, provided however, Acorn may petition the Court to limit the disclosure permitted by this paragraph upon a showing that such disclosure would not aid the trustee in accomplishing his main endeavor, as described by Section X of this Final Judgment.

C. The trustee shall advise the parties of all significant matters arising in his efforts to make the divestiture ordered herein.

D. Acorn shall provide such reasonable assistance as the trustee may request to enable him to sell the assets to be divested.

XIII.

[Extension of Term]

In the event the trustee is unable to accomplish or complete the divestiture required by this Final Judgment during the term of the trust, such term shall be extended pending further orders of the Court. Plaintiff may apply to the Court for further instructions for the trustee in order to accomplish prompt and complete divestiture.

XIV.

[Notice to Buyers]

For two years following the date of closing of the contract of divestiture ordered herein, any person inquiring of Acorn, Elmco Sales, Inc., or Mechanical Sales, Inc., orally or in writing, about the possible purchase of any "Super Secur" vandal-resistant plumbing fixtures, including Super Secur replacement parts, promptly shall be informed of Acorn's divestiture of the Super Secur assets, and of the name and address of the person to whom Acorn divested such assets.

XV.

[Acquisition Ban]

At any time during the period of ten (10) years from the date of entry of this Final Judgment, without prior written approval of the plaintiff, Acorn is enjoined and restrained from acquiring:

- A. Any capital stock of any person engaged in the vandal-resistant plumbing fixture business in the United States;
- B. All or any part of the assets (except for the purchase of products, inventory, or equipment in the normal course of business) of a person engaged in the vandal-resistant plumbing fixture business in the United States.

XVI.

[Sales]

At any time during the period of ten (10) years from the date of entry of this Final Judgment, without prior written approval of the plaintiff, Acorn is enjoined and restrained from transferring, except as expressly provided in Section IV herein:

- A. Any of its capital stock to any person engaged in the vandal-resistant plumbing fixture business in the United States;
- B. All or any part of its assets (except for the transfer of products, inventory, or equipment in the normal course of business) to a person engaged in the vandal-resistant plumbing fixture business in the United States.

XVII.

[Inspection]

For the purpose of determining or securing compliance with this Final Judgment, 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 Acorn made to its principal offices, be permitted:

1. Access during regular office hours of Acorn to inspect and copy all relevant books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of Acorn and without restraint or interference from Acorn, who may have counsel present; and
2. Subject to the reasonable convenience of Acorn and without restraint or interference from Acorn, to interview officers, employees, and agents of Acorn, who may have counsel present;

B. Upon the written request of the Attorney General or of the Assistant Attorney General in charge of the Antitrust Division made to Acorn's principal offices, Acorn shall submit such written reports, under oath if requested, with respect to any of the matters contained in this Final Judgment as may be requested;

C. No information or documents obtained by the means provided in this Section XVII shall be divulged by a 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 the Final Judgment, or as otherwise required by law; and

D. If at the time information or documents are furnished by Acorn to plaintiff in accordance with this Section XVII, Acorn 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, and Acorn marks each pertinent page of such material "Subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure," then ten (10) days notice shall be given by plaintiff to Acorn prior to divulging such material in any legal proceedings (other than a grand jury proceeding) to which Acorn is not a party.

XVIII.

[*Acquiring Parties*]

Acorn shall require, as a condition of the sale or other disposition of all, or substantially all, of the assets of its vandal-resistant plumbing fixtures business, that the acquiring party agrees to be bound by the provisions of this Final Judgment. An acquiring party subject to this provision shall file with the Court, and serve upon the plaintiff, its consent to be bound by this Final Judgment.

XIX.

[*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 or 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 any violation hereof.

XX.

[*Public Interest*]

Entry of this Final Judgment is in the public interest.