1:19-MC-15 (DNH)

**APPENDIX A:**

**FINAL JUDGMENTS**

**(Ordered by Year Judgment Entered)**

U.S. v. ALDEN PAPER COMPANY, ET AL.
Civil No.: 1312
Year Judgment Entered: 1930

**UNITED STATES OF AMERICA v. ALDEN PAPER COMPANY, ET AL., DEFENDANTS.**

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

In Equity No. 1312.

UNITED STATES OF AMERICA, PLAINTIFF

vs.

ALDEN PAPER COMPANY, UNITY PAPER MILLS, INC., Hopper Paper Company, American Writing Paper Company, Incorporated, Edward S. Alden, William R. Smith, Frank P. Barry, Matthew Burns, defendants.

DECREE.

This cause came on to be heard this 6th day of February, 1930, and plaintiff appearing by Oliver D. Burden, Esq., United States Attorney for the Northern District of New York, its solicitor, and George P. Alt, and James Maxwell Fassett, Esqs., Special Assistants to the Attorney General, of Counsel, and the defendants, Alden Paper Company and Edward S. Alden, appearing by their solicitor, Nathan P. Avery, Esq., the defendant American Writing Paper Co., Incorporated, appearing by Larkin, Rathbone & Perry, Esqs., and the defendants William R. Smith, Frank P. Barry, and Matthew Burns, appearing by their solicitors Hun, Parker & Reilly, Esqs., the defendant, Unity Paper Mills, Inc., having failed to answer within the time prescribed by the Equity Rules, and an Order for a Decree *pro confesso* as to said defendant Unity Paper Mills, Inc., having been duly entered by this Court on the 13th day of November, 1928, and no one appearing for the defendant, Hopper Paper Co., when this cause was called for trial this day, its default is hereby noted, and this decree entered against it upon its default, and it appearing to the satisfaction of the Court that it has jurisdiction of the subject matter alleged in the petition and of the parties, that the allegations of the petition state a cause of action against the defendants under the Act of Congress, approved July 2, 1890, known as the Sherman Anti-Trust Act, as amended and supplemented, and that the plaintiff is entitled to the relief hereinafter granted, the solictors for the defendants appearing this day consenting in open Court the rendition and entry of this decree, no testimony having been taken; it is, upon motion of the plaintiff for relief, due consideration having been had

ORDERED, ADJUDGED, AND DECREED

1. That all contracts, agreements, arrangements and understandings among the defendants limiting and restricting the sale and distribution of union-made paper to or through the Alden Paper Company, as described in the petition, be and the same are hereby declared null and void.

2. That the defendants, their officers, directors, agents, salesmen, servants and employees, and all persons acting by, through, under or in behalf of them or any of them, or claiming so to act, be and they are hereby perpetually enjoined and restrained from performing any act to continue in effect or further carry out any heretofore or now existing contract, agreement, arrangement or understanding to preserve or continue the unlawful monopoly of the Alden Paper Company in the

sale and distribution of union-made paper in the United States and Canada; provided that nothing in this decree contained shall be construed to impair or to abrogate the property right which the International Brotherhood of Paper Makers has in and to the watermark referred to in the petition herein and provided, further, that nothing in this decree contained shall be construed to limit the right of said International Brotherhood of Paper Makers, through its officers, past, present or future, to control the use of said watermark.

3. That jurisdiction of this cause be and the same is is hereby retained for the purpose of enforcing this decree and for the making of such further orders or decrees or taking such other action, if any, as may be necessary or appropriate to carry this decree into full effect.

4. That the plaintiff recover its costs herein, to be taxed by the Clerk, and have execution therefor against the defendants.

FREDERICK H. BRYANT,
*United States District Judge.*

ALBANY, N. Y., Feb. 6, 1930.

U.S. v. NATIONAL ASSOCIATION OF LEATHER GLOVE MANUFACTURERS INC., ET AL.
Civil No.: 3715
Year Judgment Entered: 1953

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF NEW YORK

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, Plaintiff, v. NATIONAL ASSOCIATION OF LEATHER GLOVE MANUFACTURERS, INC. et al., Defendants. | ) | CIVIL NO. 3715 (Filed Nov. 23, 1953) |

FINAL JUDGMENT

Plaintiff, the United States of America, having filed its complaint herein on July 7, 1950, and the defendants having appeared and filed their separate answers denying the substantive allegations thereof; and the plaintiff and defendants by their respective attorneys having severally consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein and without admission by any of the parties in respect to any such issue; and the Court having considered the matter and being duly advised;

NOW, THEREFORE, before the taking of any testimony and without trial or adjudication of any issue of fact or law herein, and upon consent of all parties hereto, it is hereby

ORDERED, ADJUDGED AND DECREED, as follows:

I

The Court has jurisdiction of the subject matter herein and of all the parties hereto. The complaint states a cause of action against the defendants under Section 1 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

As used in this Final Judgment:

(A) "Person" shall mean any individual, partnership, firm, association, corporation or any other legal entity;

(B) "Leather gloves" shall mean dress and semi-dress gloves and mittens for men, women and children, manufactured entirely of leather, of leather in combination with fabrics, and of leather lined with wool, other textiles or with fur;

(C) "Association" shall mean the defendant, National Association of Leather Glove Manufacturers, Inc., of Gloversville, New York;

(D) "Governmental authority" shall mean any Federal, State, County or Municipal agency.

III

The provisions of this Final Judgment, applicable to a defendant, shall apply only to such defendant, its officers, agents, servants, employees and attorneys, and to those persons in active concert or participation with any defendant who receive actual notice of this Final Judgment by personal service or otherwise. For the purpose of this Final Judgment, a defendant and its wholly owned subsidiaries, and a defendant or a wholly owned subsidiary and the respective officers, agents, servants, employees and attorneys thereof, shall be deemed to be one person.

IV

The Standard Glove Policies of the National Association of Leather Glove Manufacturers, Inc., and any agreement, understanding or arrangement amendatory thereof or supplemental thereto, is terminated and cancelled and each defendant is enjoined and restrained from entering into, adhering to, maintaining or furthering any agreement, understanding, plan, program or course of conduct with any other defendant or any other manufacturer of leather gloves for the purpose or with the effect of maintaining, reviving or reinstating the aforesaid Standard Glove Policies or any part thereof.

V

The defendants are jointly and severally enjoined and restrained from entering into, adhering to or enforcing, or suggesting or attempting to secure the adherence to, any contract, agreement, understanding, plan or program with any other defendant or any other manufacturer of leather gloves which has the purpose or effect of:

(A) Maintaining, fixing, establishing or following any rule, practice or policy:

(1) for the exchange, return or repair of leather gloves;

(2) for the terms upon which leather gloves returned to the manufacturer will be adjusted or credited;

(3) for the terms upon which special orders for leather gloves will be filled.

(B) Determining to whom or through whom leather gloves will be sold.

VI

The defendants are jointly and severally enjoined and restrained from entering into, adhering to, maintaining or furthering any combination, conspiracy, contract, agreement, understanding, plan or program, with any other defendant or any other manufacturer of leather gloves for the purpose or with the effect of fixing, determining, stabilizing, maintaining, adhering to, or inducing the adherence to prices, discounts or other terms or conditions of sale for leather gloves sold to third persons.

VII

The defendants are jointly and severally enjoined and restrained from:

(A) Entering into, adhering to, maintaining or furthering any combination, conspiracy, contract, agreement or understanding with any other defendant or any other manufacturer of leather gloves for the purpose or with the effect of:

(1) refusing to submit a bid for the sale of leather gloves, or making a bid therefor higher than, or identical with, the bid of any other person, or submitting collusively a bid therefor; provided, however, that a bona fide subcontract arrangement, standing alone and not based upon or involving the subcontractor's agreement or understanding not to bid, shall in no event be deemed to be a violation of this subsection (1);

(2) refusing to sell to any retailer or jobber of leather gloves;

(3) exchanging information concerning costs, production, sales, prices, terms or conditions of sale for leather gloves except for the exchange of available production capacity, prices or terms or conditions of sale in connection with a bona fide purchase or sale of leather gloves, or component parts of such gloves, or in connection with a bona fide arrangement for sub-contracting the manufacture of such gloves or component parts of such gloves;

(4) preparing, collecting, compiling, disseminating, publishing or circulating the names of retailers or jobbers who have not complied, or do not or will not comply, with prices, discounts or other terms or conditions of sale for leather gloves;

(5) refusing to extend credit to any retailer or jobber of leather gloves.

(B) Submitting information to any other person for use in compiling a list of retailers or jobbers who have not complied, or do not or will not comply with said defendant's prices, discounts or other terms or conditions of sale.

Provided, however, that the provisions of this Section VII shall not prohibit any defendant manufacturer from submitting to the Association and the Association from receiving and, upon the bona fide request of a credit grantor or credit reporting bureau, from disclosing the actual credit experience of any individual, specified jobber or retailer of leather gloves.

VIII

The defendants are jointly and severally enjoined and restrained from entering into, adhering to, maintaining or furthering any contract, agreement or understanding with any other defendant or any other manufacturer of leather gloves for the adoption of any uniform or specific system of accounting in the manufacture, sale or distribution of leather gloves.

IX

Nothing contained in this Final Judgment shall prevent:

(A) Any defendant, acting in good faith, from furnishing to any person hourly labor rates, piece labor rates, employee earnings, time studies, or terms or conditions of employment, solely in connection with collective bargaining, a labor dispute, the administration of a labor contract, fixing labor rates or a governmental investigation;

(B) Any defendant from furnishing to the Association its production figures and the Association from compiling, disseminating and communicating said figures in a general and composite form to all persons and the public generally without identifying the production figures gathered from any particular person;

(C) Any defendant from furnishing each year to the Association, for the sole purpose of determining dues and assessments, its gross annual sales figures or its total number of employees for the previous year;

(D) Any defendant from furnishing to a trade association of which it is a member, or such trade association from compiling and disseminating to any governmental authority, any relevant data, and also estimates on the cost of manufacture in the United States of a typical leather glove of foreign manufacture.

X

For the purpose of securing compliance with this Final Judgment, duly authorized representatives 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 the defendant, made to its principal office, be permitted, subject to any legally recognized privilege:

(A) Access, during the office hours of such defendant, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of such defendant, relating to any of the matters contained in this Final Judgment, and

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

Upon such request the defendant shall submit such reports in writing with respect to any of the matters contained in this Final Judgment as from time to time may be necessary to the enforcement of this Final Judgment. No information obtained by the means permitted 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 Department except in the course of legal proceedings, to which the United States is a party, for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

XI

Jurisdiction is retained solely 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 thereof, for the enforcement of compliance therewith and the punishment of violations thereof.

Dated: November 23rd, 1953

/s/ Stephen W. Brennan
United States District Judge

We hereby consent to the entry of the foregoing Final Judgment:

For the Plaintiff:

/s/ Stanley N. Barnes
Assistant Attorney General

/s/ John D. Swartz

/s/ Marcus A. Hollabaugh

/s/ Philip L. Roache, Jr.

/s/ W. D. Kilgore, Jr.

/s/ Charles F. B. McAleer

/s/ Richard B. O'Donnell

/s/ Charles L. Beckler

For the Defendants:

/s/ Coleman Taylor
Coleman Taylor,
of the firm of TAYLOR & KENNEDY,
Attorneys for Defendants,
National Association of Leather Glove Manufacturers, Inc., Gates-Mills, Inc., The Daniel Hays Company, Inc., Hilts-Willard Glove Corporation, Louis Meyers & Son, Inc., The Frank Russell Glove Company, Sellinger Glove Company, Speare Glove Company, Inc., James J. Casey, Jr., Justin O'Brien, Isabel O'Brien, Helen Hays and Douglas Hays, doing business as Ireland Bros., a co-partnership, and Joseph Lazarus, Jacob Lazarus, Milton Lazarus and David Frisch, doing business as Boyce-Lazarus Co., a co-partnership.

/s/ H. Andrew Schlusberg
H. Andrew Schlusberg,
Attorney for Defendants,
Louis Rubin, Joseph M. Rubin, Max Rubin, Harry Rubin, David Rubin and Abraham Rubin, doing business as J. M. Rubin & Sons, a co-partnership, Julius A. Higier and Edna Higier, doing business as Superb Glove Co., a co-partnership, Imperial Glove Company, Inc., and Acme Glove Corporation.

/s/ George F. Murphy

of the firm of MURPHY & NILES,
Attorneys for Defendant,
Glovecraft, Inc.

/s/ Herbert A. Friedlich

of the firm of
MAYER, MEYER, AUSTRIAN & PLATT,
Attorneys for Defendant,
The Joseph N. Eisendrath Company
(Name now Eisendrath Glove Company)

/s/ John M. Liddy

of the firm of
FERRIS, HUGHES, DORRANCE & GROBEN,
Attorneys for Defendant,
C. D. Osborn Co.

/s/ F. C. Fisher

of the firm of
DWIGHT, ROYALL, HARRIS, KOEGEL &
CASKEY,
Attorneys for Defendant,
Fownes Brothers & Co., Incorporated

U.S. v. THE ASSOCIATION OF KNITTED GLOVE & MITTEN MANUFACTURERS, ET AL.
Civil No.: 3716
Year Judgment Entered: 1953

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF NEW YORK

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, Plaintiff | : | |
| vs. | : | |
| THE ASSOCIATION OF KNITTED GLOVE & MITTEN MANUFACTURERS, et al., Defendants | : | CIVIL ACTION No. 3716 Filed December 23, 1953. |

FINAL JUDGMENT

Plaintiff, the United States of America, having filed its complaint herein on July 7, 1950, and the defendants, excepting American Knit Handwear Association, Inc., having appeared and filed their separate answers denying the substantive allegations thereof; and this Court having made and entered its order dated 1953, joining American Knit Handwear Association, a corporation organized under the laws of the State of New York subsequent to the commencement of this action, as a party defendant herein; and the plaintiff and defendants by their respective attorneys having severally consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein and without admission by any of the parties in respect to any such issue; and the Court having considered the matter and being duly advised;

NOW, THEREFORE, before the taking of any testimony and without trial or adjudication of any issue of fact or law herein, and upon consent of all parties hereto, it is hereby

ORDERED, ADJUDGED AND DECREED, as follows:

I

The Court has jurisdiction of the subject matter herein and of all the parties hereto. The complaint states a cause of action against the

defendants under Section 1 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

As used in this Final Judgment:

(A) "Person" shall mean any individual, partnership, firm, association, corporation or any other legal entity;

(B) "Knitted gloves" shall mean gloves, mittens and components thereof for men, women and children, knitted from wool, worsted, cotton, rayon, nylon, angora, cashmere or any other fibres, or any combinations of such products;

(C) "Association" shall mean the defendants The Association of Knitted Glove & Mitten Manufacturers or American Knit Handwear Association, Inc.;

(D) "Governmental authority" shall mean any Federal, State, County or Municipal agency.

III

The provisions of this Final Judgment applicable to a defendant, shall apply only to such defendant, its officers, agents, servants, employees and attorneys and to those persons in active concert or participation with any defendant who receive actual notice of this Final Judgment by personal service or otherwise. For the purpose of this Final Judgment, a defendant and its wholly-owned subsidiaries and a defendant or a wholly-owned subsidiary and the respective officers, agents, servants, employees and attorneys thereof, shall be deemed to be one person.

IV

The Standard Glove Policies of the National Association of Leather Glove Manufacturers, and any agreement, understanding or arrangement amendatory thereof or supplemental thereto, is terminated and canceled and each defendant is enjoined and restrained from entering into, adhering

to, maintaining or furthering, any agreement, understanding, plan, program or course of conduct with any other defendant or any other manufacturer of knitted gloves for the purpose or with the effect of maintaining, reviving or reinstating the aforesaid Standard Glove Policies or any part thereof.

V

The defendants are jointly and severally enjoined and restrained from entering into, adhering to or enforcing, or suggesting or attempting to secure the adherence to, any contract, agreement, understanding, plan or program with any other defendant or any other manufacturer or knitted gloves which has the purpose or effect of:

(A) Maintaining, fixing, establishing or following any rule, practice or policy:

(1) for the exchange, return or repair of knitted gloves;

(2) for the terms upon which knitted gloves returned to the manufacturer will be adjusted or credited;

(3) for the terms upon which special orders for knitted gloves will be filled.

(B) Determining to whom or through whom knitted gloves will be sold.

VI

The defendants are jointly and severally enjoined and restrained from entering into, adhering to, maintaining or furthering any combination, conspiracy, contract, agreement, understanding, plan or program, with any other defendant or with any other manufacturer of knitted gloves for the purpose or with the effect of fixing, determining, stabilizing, maintaining, adhering to, or inducing the adherence to prices, discounts or other terms or conditions of sale for knitted gloves sold to third persons.

VII

The defendants are jointly and severally enjoined and restrained from:

(A) Entering into, adhering to, maintaining or furthering any combination, conspiracy, contract, agreement or understanding with any other defendant or any other manufacturer of knitted gloves for the purpose or with the effect of:

(1) Refusing to submit a bid for the sale of knitted gloves, or making a bid therefor higher than, or identical with, the bid of any other person, or submitting collusively a bid therefor; provided however, that a bona fide subcontract arrangement, standing alone and not based upon or involving the subcontractor's agreement or understanding not to bid shall in no event be deemed a violation of this subsection (1);

(2) Refusing to sell to any retailer or jobber of knitted gloves;

(3) Exchanging information concerning costs, production, sales, prices, terms or conditions of sale for knitted gloves except for the exchange of available production capacity, prices or terms or conditions of sale in connection with a bona fide purchase or sale of knitted gloves, or component parts of such gloves, or in connection with a bona fide arrangement for sub-contracting the manufacture of such gloves or component parts of such gloves;

(4) Preparing, collecting, compiling, disseminating, publishing or circulating the names of retailers or jobbers who have not complied, or do not or will not comply, with prices, discounts or other

terms or conditions of sale for knitted gloves;

(5) Refusing to extend credit to any retailer or jobber of knitted gloves.

(B) Submitting information to any other person for use in compiling a list of retailers or jobbers who have not complied, or do not or will not comply with said defendant's prices, discounts or other terms or conditions of sale; provided, however, that the provisions of this Section VII shall not prohibit any defendant manufacturer from submitting to the Association and the Association from receiving and, upon the bona fide request of a credit grantor or credit reporting bureau, from disclosing the actual credit experience of any individual, specified jobber or retailer of knitted gloves.

VIII

Nothing contained in this Final Judgment shall prevent:

(A) Any defendant, acting in good faith, from furnishing to any person hourly labor rates, piece labor rates, employee earnings, time studies, or terms or conditions of employment, solely in connection with collective bargaining, a labor dispute, the administration of a labor contract, fixing labor rates or a governmental investigation;

(B) Any defendant from furnishing to the Association its production figures and the Association from compiling, disseminating and communicating said figures in a general and composite form to all persons and the public generally without identifying the production figures gathered from any particular person;

(C) Any defendant from furnishing each year to the Association, for the sole purpose of determining dues and assessment, its gross annual sales figures or its total number of employees for the previous year;

(D) Any defendant from furnishing to a trade association of which it is a member, or such trade association from compiling and

disseminating to any governmental authority, any relevant data, and also estimates on the cost of manufacture in the United States of a typical knitted glove of foreign manufacture.

IX

For the purpose of securing compliance with this Final Judgment, duly authorized representatives 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;

(A) Access, during the office hours of such defendant, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of such defendant, relating to any of the matters contained in this Final Judgment, and

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

Upon such request the defendant shall submit such reports in writing with respect to any of the matters contained in this Final Judgment as from time to time may be necessary to the enforcement of this Final Judgment. No information obtained by the means permitted in this Section IX shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

X

Jurisdiction is retained solely 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 thereof, for the enforcement of compliance therewith and the punishment of violations thereof.

Dated: December 23, 1953.
Utica, N. Y.

/s/ Stephen W. Brennan
United States District Judge

We hereby consent to the entry of the foregoing Final Judgment:

For the Plaintiff:

/s/ Stanley N. Barnes
Assistant Attorney General

/s/ John D. Swartz

/s/ Marcus A. Hollabaugh

/s/ Philip L. Roache, Jr.

/s/ W. D. Kilgore, Jr.

/s/ Charles F. B. McAleer

/s/ Richard B. O'Donnell

/s/ Charles L. Beckler

Attorneys for Plaintiff

For the Defendants:

/s/ Coleman Taylor
Coleman Taylor,
of the firm of TAYLOR & KENNEDY,
Attorneys for Defendants,
The Association of Knitted Glove & Mitten Manufacturers; National Association of Leather Glove Manufacturers, Inc.; James H. Casey, Jr.; Ackshand Knitting Co., Inc. (name now Ackerman Corporation); Albany Knitting Company, Inc.; Becopa Glove Mills, Inc.; D. C. Haber Knitting Company; Joseph A. Milstein Company, Inc. Sternwild Knitting Mills, Inc. and American Knit Handwear Association, Inc.

/s/ Lydon F. Maider
Lydon F. Maider,
of the firm of MAIDER, MAIDER & SMITH,
Attorneys for Defendants,
Gloversville Knitting Company; Scotsmoor Company, Inc.; and Leon F. Swears, Inc.

U.S. v. CARROLS DEVELOPMENT
CORPORATION, ET AL.
Civil No.: 76-CV-170
Year Judgment Ordered: 1978

# 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, 1978-2 Trade Cases ¶62,213, (Jul. 5, 1978)

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

1978-2 Trade Cases ¶62,213. U.S. District Court, N.D. New York, No. 76-CV-170, Entered July 5, 1978, (Competitive impact statement and other matters filed with settlement: 42 *Federal Register* 39281, 58208).

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

## Clayton Act

**Acquisitions: Motion Picture Theaters: Divestiture by Assignment or Sublease: Consent Decree.**– A motion picture theater operator was required by a consent decree to divest by assignment or sublease (for the entire remaining present term of the master lease less one day) motion picture theaters it acquired from a competitor. A trustee would be appointed to complete divestiture, if not accomplished within two years. Acquisitions of theaters would be prohibited for 10 years without government approval.

## Final Judgment

Munson, D. J.: Plaintiff, United States of America, having filed its complaint herein on April 23, 1976, and the defendants Carrols Development Corporation and Triple Schuyler Rome Corporation, having appeared and filed their answer to the complaint denying the material allegations thereof, 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 of fact or law herein and without this Final Judgment constituting any evidence or admission by any party with respect to any such issue;

Now, Therefore, before the taking of any testimony and without trial or adjudication of any issue of fact or law herein and without this Final Judgment constituting any evidence or admission by any party with respect to any such issue and upon the consent of the parties, it is hereby

Ordered, Adjudged and Decreed as follows:

I

[ *Jurisdiction*]

This Court has jurisdiction of the subject matter of this action and of the parties hereto. The complaint states a claim upon which relief may be granted against the defendants under Section 7 of the Act of Congress of October 15, 1914 (15 U. S. C. §18), commonly known as the Clayton Act, as amended.

II

[ *Definitions*]

As used in this Final Judgment:

(A) "CDC" shall mean defendants Carrols Development Corporation and Triple Schuyler Rome Corporation, and each of their subsidiaries and affiliates.

(B) "Eligible Purchaser" shall mean any person or persons, proposing to acquire any theatre for theatre purposes, to which the plaintiff, after notice, does not object, or if the plaintiff does object, of which the Court approves.

(C) "Person" shall mean any individual, partnership, corporation or other business or legal entity other than CDC.

(D) "Greater Syracuse Area" shall mean the area within a radius of approximately 12 miles from the center of the City of Syracuse, including Syracuse and all or part of the following towns in the State of New York: Salina, DeWitt, Geddes, Cicero, Manlius, Pompey, Lafayette, Onondaga, Marcellus, Camillus, Van Buren, Lysander and Clay.

(E) "Greater Utica Area" shall mean the area within a radius of approximately 10 miles from the center of the City of Utica, including Utica and all or part of the following towns in the State of New York: Schuyler, Newport, Frankfort, Litchfield, Paris, New Hartford, Kirkland, Whitestown, Westmoreland, Floyd, Marcy, Trenton and Deerfield.

III

[ *Applicability*]

The provisions of this Final Judgment shall apply to CDC, its successors and assigns, to each of their respective officers, directors, agents and employees, 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. Any Eligible Purchaser who acquires any assets by means of a divestiture pursuant to this Final Judgment shall not be considered a successor or assign of CDC.

IV

[ *Divestiture*]

(A) CDC is ordered and directed to divest to Eligible Purchasers, within 24 months from the date of entry of this Final Judgment, each of the theatres listed in Appendix A to this Final Judgment.

(B) Divestiture of the theatres listed in Appendix A shall be accomplished by assignment or sublease.

(C) With respect to any theatre which is divested by sublease, such sublease shall be for the entire remaining present term of the master lease less one day (such period is hereinafter referred to as the "Sublease Term").

(D) CDC shall make known the availability of the theatres listed in Appendix A by customary and usual means, including appropriate advertising. CDC shall furnish, on an equal and nondiscriminatory basis, to all bona fide prospective purchasers who so request, all necessary information regarding said theatres and shall permit them to make such inspection of the facilities and operations of the theatres as is reasonably necessary for a prospective purchaser to advise itself properly.

(E) Ninety days after the date of entry of this Final Judgment and every 90 days thereafter until CDC has divested each of the theatres listed in Appendix A, CDC shall submit written reports to the plaintiff, describing the steps which have been taken to comply with this Section IV. Each report shall include the name and address of each person who, during the preceding 90 days, had made an offer, expressed a desire, or entered into negotiations to acquire any theatre, together with full details of same. Each report shall also include the name and address of each person who, during the preceding 90 days, CDC has sought to interest in the acquisition of any theatre, together with full details of same.

(F) At least 60 days before the consummation, pursuant to this Section IV, of a divestiture to a proposed Eligible Purchaser of any theatre listed in Appendix A, CDC shall furnish in writing to the plaintiff the name and address of the proposed Eligible Purchaser, together with the terms and conditions of the proposed divestiture. At the same time, CDC shall list the name and address of each person not previously reported who offered or expressed a desire to acquire such theatre, together with full details of same. Within 20 days of the receipt of this information, the plaintiff may request in writing additional information concerning the transaction and parties thereto. If no request is made for additional information, the plaintiff shall advise CDC in writing no later than 20 days prior to the scheduled consummation date whether it has any objections to the proposed divestiture. If a request for additional information is made, the plaintiff shall advise CDC in writing within 30 days after receipt of all such information or within 30 days after receipt of a statement in writing from CDC that it does not have

the requested information, whether it has any objections to the proposed divestiture. If the plaintiff does not object within the periods specified, then the divestiture may be consummated. If the plaintiff does so object, the proposed divestiture shall not be consummated unless CDC obtains approval from the Court or the plaintiff's objection is withdrawn.

V

[ *Appointment of Trustee*]

If CDC does not divest itself, in accordance with the provisions of this Final Judgment, of each of the theatres listed in Appendix A within 24 months from the date of entry of this Final Judgment, the Court shall on application of the plaintiff appoint a trustee for the purpose of divesting the remaining theatres in accordance with the provisions of this Final Judgment. The trustee shall have full power and authority to dispose of each of the remaining theatres by assignment or sublease at whatever price and terms are obtainable by him subject to prior approval of the Court after the parties have had an opportunity to be heard with respect to each such proposed divestiture and the price and terms thereof. Any such sublease shall be for the applicable Sublease Term. The trustee shall use his best efforts to dispose of each of the theatres within 12 months of his appointment. Each divestiture by the trustee shall be in accordance with the provisions of this Final Judgment. The trustee shall serve, at the cost and expense of CDC, on such terms and conditions as the Court sees fit and shall account for all revenues derived from the disposal of the theatres and all expenses so incurred. After approval by the Court of the trustee's account, including fees for his services, all remaining monies shall be paid to CDC, or if there are remaining unsatisfied claims CDC shall pay them, and the trust created hereunder shall be terminated.

VI

[ *Termination of Operations*]

If any theatre listed in Appendix A is not divested in accordance with the provisions of this Final Judgment within 12 months of the appointment of a trustee pursuant to Section V herein, CDC shall, within 60 days thereafter, terminate its operation of such theatre unless it has obtained the written consent of the plaintiff to continue operating such theatre for the exhibition of feature motion pictures.

VII

[ *Subleased Theaters*]

Any assignment or sublease to an Eligible Purchaser of a theatre listed in Appendix A shall require the Eligible Purchaser to file with this Court its representation that it proposes to operate the theatre for the exhibition of feature motion pictures.

VIII

[ *Continued Operations*]

(A) Subject to the provisions of Section VI of this Final Judgment and subparagraph (2) of this Section VIII(C), CDC shall continue to operate each theatre listed in Appendix A for the exhibition of feature motion pictures until such theatre is divested in accordance with the provisions of this Final Judgment; provided, however, that nothing contained herein shall require CDC to continue the operation of the 258 Cinema City I, II and III prior to divestiture.

(B) CDC shall not participate in any way, directly or indirectly, in the management, operation or control of any theatre listed in Appendix A after it has been divested pursuant to this Final Judgment, nor shall CDC book or buy feature motion pictures for any such theatre after it has been divested. Where a theatre has been divested by sublease, these prohibitions shall be expressly set forth in the sublease.

(C) Notwithstanding the provisions of paragraph (B) of this Section VIII:

(1) CDC may enforce the terms and conditions of any sublease in accordance with its provisions or as provided by law, and may exercise the rights of a sublessor in the event of a default.

(2) In the event of reacquisition or repossession by CDC prior to the expiration of the Sublease Term of a subleased theatre divested hereunder, CDC shall promptly notify the plaintiff in writing and shall divest such theatre by assignment or sublease to an Eligible Purchaser within 12 months of reacquisition or repossession in accordance with the provisions of this Final Judgment. The minimum duration of any such subsequent sublease shall be the applicable Sublease Term less the period of time such theatre was operated by an Eligible Purchaser prior to reacquisition or repossession by CDC. If CDC is unable to divest any such theatre to an Eligible Purchaser within 12 months of reacquisition or repossession, CDC shall, within 60 days thereafter, terminate its operation of such theatre unless it has obtained the written consent of the plaintiff to continue operating such theatre for the exhibition of feature motion pictures.

**IX**

**[ *Acquisitions*]**

CDC is enjoined and restrained for a period of 10 years from the date of entry of this Final Judgment from acquiring, without the prior 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.

**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, on written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to CDC made to its principal office, be permitted, subject to any legally recognized privilege:

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

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

(B) CDC, 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 with respect to any of the matters contained in this Final Judgment, as may from time to time be requested.

No information obtained by the means provided in this Section 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 CDC to plaintiff pursuant to this Section and CDC represents that the material, or any portion thereof, in any such information or documents is of a type described in Rule 26(c)(7) of the Federal Rules of Civil Procedure, and CDC identifies such material in writing and marks each pertinent page thereof, "Subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure," then plaintiff shall give CDC 10 days notice prior to divulging such material in any legal proceeding (other than a Grand Jury proceeding) to which CDC is not a party.

**XI**

**[ *Retention of Jurisdiction*]**

Jurisdiction of this action 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 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 thereof, and for the enforcement of compliance therewith and punishment of violations thereof.

**XII**

**[ *Public Interest*]**

Entry of this Final Judgment is in the public interest.

## Appendix A

Genesee, 2100 W. Genesee St., Geddes, N. Y.

Shoppingtown I & II, Erie Blvd., East & Kinney Rd., DeWitt, N. Y.

Cinema, Commercial Dr., New Hartford, N. Y.

Marcy Drive-In, Rt. 49, Marcy, N. Y.

New Hartford Drive-In, Commercial Dr., New Hartford, N. Y.

Paris Cinema, 12 Genesee St., New Hartford, N. Y.

Skyler Drive-In I & II, Rt. 5, West Schuyler, N. Y.

258 Cinema City, I, II & III, 258 Genesee St., Utica, N. Y.

# 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.

U.S. v. NATIONAL BANK AND TRUST COMPANY OF NORWICH, ET AL.
Civil No.: 83-CV-537
Year Judgment Entered: 1984

# Trade Regulation Reporter - Trade Cases (1932 - 1992), United States v. National Bank and Trust Co. of Norwich and National Bank of Oxford., U.S. District Court, N.D. New York, 1984-2 Trade Cases ¶66,074, (Jun. 12, 1984)



United States v. National Bank and Trust Co. of Norwich and National Bank of Oxford.

1984-2 Trade Cases ¶66,074. U.S. District Court, N.D. New York, Civil Action No. 83-CV-537, Entered Filed June 12, 1984, (Competitive impact statement and other matters filed with settlement: 49 *Federal Register* 9630). Case No. 3076, Antitrust Division, Department of Justice.

## Clayton Act

**Mergers and Acquisitions: Banks: Required Divestiture of Acquiring Bank Offices: Hold-Separate Order for Non-Compliance: Consent Decree.**– The statutory stay against a bank merger was lifted under a consent decree, except that consummation of the merger was enjoined for 15 days, during which timt the acquiring bank was to divest two offices. In the event that the merger was consummated prior to the required divestiture, the acquired bank was to be held separate from the acquiring bank until the divestiture was completed.

**For plaintiff:** J. Paul McGrath, Asst. Atty. Gen., Douglas H. Ginsburg, Joseph H. Widmar, Stanley M. Gorinson and Jeffrey Blumenfeld, Attys., Antitrust Div., U.S. Dept. of Justice, John V. Thomas, Bruce P. White and David Schertler, Trial Attys., Antitrust Div., Washington, D. C. **For defendents:** Eugene J. Metzger and Michael E. Friedlander, of Metzger, Shadyac & Schwarz, Washington, D. C. **For intervenor:** Eugene Charles H. McEnerney and Eugene Katz, Office of the Comptroller of the Currency, Washington, D. C.

## Final Judgment

Miner, D.J.: Plaintiff, United States of America, having filed its Complaint on May 6, 1983, defendants and intervenor having filed their respective answers thereto, trial having commenced, but the Court having entered no substantive findings of fact or conclusions of law; and plaintiff and defendants, by their respective attorneys, having consented to the entry of this Final Judgment, and without this Final Judgment constituting an admission by any party with respect to any issue of law or fact herein, 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 defendants under Section 7 of the Clayton Act, as amended ( 15 U.S.C. §18).

II.

[ *Definitions*]

As used in this Final Judgment:

(A) "NBT" shall mean defendant National Bank and Trust Company of Norwich.

(B) "Oxford Bank" shall mean defendant National Bank of Oxford or, where the context so requires, that office of NBT which operates the business previously conducted by National Bank of Oxford while it operated as a separate legal entity.

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

(D) The "North Plaza Office" shall mean that branch of NBT currently situated adjacent to the North Plaza shopping center in the town of Norwich, Chenango County, New York.

(E) The "South Plaza Office" shall mean that branch of NBT currently situated in the South Plaza shopping center in the town of Norwich, Chenango County, New York.

(F) "Depository institution" shall mean any commercial bank, savings bank or savings and loan association.

III.

[ *Applicability*]

The provisions of this Final Judgment shall apply to defendants NBT and Oxford Bank and to their directors, officers, employees, agents, affiliates, successors, assigns, and to all persons in active concert or participation with them, who shall have received actual notice of this Final Judgment by personal service or otherwise.

IV.

[ *Injunction*]

A. Upon entry of this Final Judgment, the statutory stay, imposed under 12 U.S.C. §1828(c)(7)(A), that currently enjoins the merger of Oxford Bank into NBT, shall terminate. However, defendants are enjoined from consummating this merger until fifteen (15) days after defendantsfile with the Court, with a copy hand-delivered to the Chief, Special Regulated Industries Section, Antitrust Division, an affidavit stating that NBT has entered into binding contracts consistent with the terms of Section V below to sell the North Plaza and South Plaza Offices, together with a copy of said contract(s). Defendants also shall cooperate in providing to plaintiff such additional information about the purchaser as is in their possession. If within said fifteen day period, plaintiff files an objection with the Court, the Court shall determine whether to continue this injunction based solely upon whether defendants have entered into contracts consistent with the terms of Section V. It is further provided that plaintiff may, in its sole discretion, shorten the fifteen day period by agreeing in writing that it has no objection.

B. In the event Oxford Bank is merged into NBT before completion of all of the divestitures and the lifting of home office protection required by Section V. below, the assets and liabilities of Oxford Bank shall be held separate from the other assets and liabilities of NBT. This-hold separate obligation shall require that: (1) all deposit and loan accounts of Oxford Bank acquired by NBT through the merger, or subsequently generated at the NBT office in Oxford, shall be accounted for separately by NBT; (2) NBT shall take no action designed or intended to cause any existing or prospective customer of Oxford Bank to transfer accounts from the banking office in Oxford to any other office of NBT; (3) all other assets and liabilities of Oxford Bank acquired by NBT through the merger, or subsequently generated at the NBT office in Oxford, shall not be commingled with the other assets and liabilities of NBT in a way which would prevent such assets and liabilities from being readily identifiable as of the close of any business day; (4) NBT shall not transfer managerial employees of Oxford Bank to any other NBT office; and (5) no action shall be taken or omitted that would impair the viability of the NBT office in Oxford as a bank. In the event that it becomes necessary to divest the Oxford office pursuant to the provisions of Section VI of the Final Judgment, these separately accounted for assets and liabilities which are part of or derived from the Oxford Bank office shall all be divested, together with such personnel as wish to stay with the divested office. Except as set forth above, nothing herein shall preclude NBT, following the merger, from operating or managing the NBT office in Oxford in any manner it deems appropriate.

C. The restrictions imposed by paragraph B of this Section IV automatically shall terminate fifteen (15) calendar days after defendants file with the Court, with a copy hand-delivered to the Chief, Special Regulated Industries Section, Antitrust Division, an affidavit that the acts required by Section V have been completed; *provided, however,* that these restrictions shall not be lifted at the completion of the fifteen day period if during that period plaintiff files its objections with the Court. If such an objection is filed, the Court shall determine whether to lift

the conditions imposed by paragraph B of this Section IV based upon whether defendants have complied with Section V. It is further provided that plaintiff may, in its sole discretion, shorten the fifteen day period by agreeing in writing that compliance is complete.

**V.**

**[ *Divestiture*]**

A. NBT shall divest all direct and indirect ownership interest in and control over the North Plaza Office and the South Plaza Office. These two offices may be sold either separately or to a single purchaser, at the option of NBT. The purchaser(s) shall be independent of NBT, and shall be subject to approval by plaintiff; however, plaintiff may not unreasonably withhold its approval. The purchaser must be a depository institution, or a holding company for a depository institution, other than a depository institution that currently has a deposit taking office in Chenango County (other than in the towns of Greene, Coventry, Afton and Bainbridge). Any such purchaser must state in writing its present intention to make a good faith effort to operate each office it purchases within the city or town of Norwich, although such statement will not create any contractual right enforceable by any party hereto. Nothing herein shall preclude a purchaser from being acceptable solely on the grounds that the purchaser plans to relocate a purchased office to some other place within the city or town of Norwich.

B. NBT shall not transfer any management personnel out of these offices nor take any steps designed or intended to cause the diminution or destruction of the North Plaza or South Plaza Offices as viable branch offices, or designed or intended to cause any person to transfer any account attributable to such office to any other office of NBT; provided, however, that nothing herein shall preclude NBT from engaging in general advertising or from creating or expanding other banking offices or facilities.

C. NBT shall take all such steps as are necessary to end so-called "home office protection" as to it for the City of Norwich under N.Y. Banking Law §105. NBT may accomplish this result through any appropriate means, provided that NBT may not end home office protection for the City of Norwich in a manner that results in NBT enjoying "home office protection" in the Village of Oxford.

D. The divestitures and termination of home office protection specified in paragraphs A through C of this Section V are to be accomplished no later than August 22, 1984. If all such acts will not be accomplished before August 22, 1984, NBT may make a single application to the Court, in advance of August 22, 1984, for an extension of not more than six months within which to accomplish these acts. Upon such an application, and a showing of good cause, the Court shall grant an extension of time for accomplishing the required divestitures and lifting of home office protection, which extension shall be not more than six (6) months, or until February 22, 1985.

E. Under no circumstances will the acts required by Section V be completed later than February 22, 1985. The provisions of Section VI of this order will become automatically and irrevocably effective on August 22, 1984, unless that date is extended by the Court, and, if that date is extended under the terms of this Final Judgment, Section VI shall be automatically and irrevocably effective upon the expiration of that extension and in no event later than February 22, 1985.

**VI.**

**[ *Effect of Non-Compliance*]**

A. If all acts of the divestiture of both the North Plaza and South Plaza Offices, as well as lifting home office protection for the City of Norwich, as required by Section V of this Final Judgment, are not accomplished by the expiration of defendants' time under Section V to complete those acts, an independent sales agent shall be appointed by the Court, on notice to plaintiff and NBT. Such agent shall be appointed thirty (30) days prior to the expiration of defendants' time under Section V, including any extensions. The sales agent shall immediately begin preparations for the possible sale of the Oxford Bank branch office, and if Section V has not been fully complied with prior to February 22, 1985, the sales agent shall on that date immediately act to sell that branch. This sale shall be required without regard to any partial performance by NBT. However, if in good faith NBT has

been unable to complete compliance, but does complete compliance with the requirements of Section V after the expiration of the above referenced deadline, but prior to a sales contract being obtained by the sales agent, then such sale will not be required and NBT shall be deemed in full compliance. NBT shall fully cooperate with the selling agent to accomplish this sale. The sale of the Oxford Bank branch shall be conducted in a commercially reasonable manner; however, the sale shall be made at whatever price the selling agent is able to obtain at that time, and without regard to whether NBT believes the sale price is fair or reasonable. The sales agent shall notify the parties of the purchaser thirty (30) days prior to the sale. The sale of the Oxford Bank branch shall be to a purchaser reasonably satisfactory to plaintiff. The selling agent's reasonable fees and expenses shall be paid by NBT.

B. NBT may, if it so desires, elect to sell the Oxford Bank branch. NBT shall notify plaintiff of the purchaser thirty (30) days prior to the sale. The purchaser shall be reasonably satisfactory to plaintiff, but plaintiff may not unreasonably withhold its approval. If such sale is completed prior to August 22, 1984, or any Court extension of that date, then NBT will be relieved of its obligations under Sections V and VI.A. of this Final Judgment, and Section VI.A. shall no longer apply.

**VII.**

**[ *10-year Period*]**

At any time during the period of ten (10) years from the date of entry of this Final Judgment, and absent prior written approval of the plaintiff, NBT is enjoined and restrained from (a) acquiring directly or indirectly any branch office divested pursuant to the terms of this Final Judgment; or (b) taking any action to reestablish home office protection for the City of Norwich or the Village of Oxford.

**VIII.**

**[ *Reporting Requirements*]**

Sixty (60) days after the date of entry of this Final Judgment and every sixty days thereafter until NBT has complied with Section V hereof, NBT shall submit written reports to the plaintiff, addressed to the Chief, Special Regulated Industries Section, Antitrust Division, describing the steps which have been taken to comply with this Final Judgment. Each report from NBT shall include the name and address of each person, if any, who, since the last report (or in the case of the first report, each person who has to that date), made an offer, expressed an interest, or entered into negotiations to acquire either office to be divested.

**IX.**

**[ *Compliance*]**

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 the written request of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to NBT or Oxford Bank made to their principal offices, be permitted:

(i) Access during regular office hours of NBT or Oxford Bank to inspect and copy all non-privilege relevant books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of NBT or Oxford Bank and without restraint or interference from NBT or Oxford Bank, which may have counsel present; and

(ii) Subject to the reasonable convenience of NBT or Oxford Bank and without restraint or interference from them, to interview, under oath and on the record if requested by plaintiff, officers, employees, and agents of NBT or Oxford Bank, who may have counsel present.

B. Upon the written request of the Assistant Attorney General in charge of the Antitrust Division made to NBT's or Oxford Bank's principal offices, they 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 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.

**X.**

**[ *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 and for the enforcement of compliance therewith and the punishment of any violation hereof; provided, however, that there shall be no modification of the February 22, 1985 deadline absent a showing that defendants were unable to meet this deadline as a result of plaintiff's unreasonable conduct.

**XI.**

**[ *Abandonment of Merger*]**

If at any time before the comsummation of the proposed merger of NBT and Oxford Bank the defendants definitely abandon the proposed merger, or if subsequent to the merger, the Oxford Bank office is sold pursuant to the terms of this Final Judgment, then this Final Judgment shall no longer enjoin the actions of NBT and Oxford Bank.

**XII.**

**[ *Public Interest*]**

Entry of this Final Judgment is in the public interest.