

Trade Regulation Reporter - Trade Cases (1932 - 1992), United States v. BNS Inc. and Gifford-Hill & Co., Inc., U.S. District Court, C.D. California, 1988-2 Trade Cases ¶68,209, (Aug. 25, 1988)

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United States v. BNS Inc. and Gifford-Hill & Co., Inc.

1988-2 Trade Cases ¶68,209. U.S. District Court, C.D. California, Civil Action No. 88-01452-R, Entered August 25, 1988, (Competitive impact statement and other matters filed with settlement: 53 *Federal Register* 9994).

Case No. 3509, Antitrust Division, Department of Justice.

Sherman Act

Acquisitions: Sand and Gravel Companies: Divestiture: Consent Decree..— A sand and gravel company was required by a consent decree to divest Los Angeles area sand and gravel assets acquired from a takeover target in settlement of charges that the acquisition violated [Sec. 7 of the Clayton Act](#) by lessening competition in a relevant Southern California market. A preliminary injunction had placed the assets in the control of a trustee pending court approval of the decree.

For plaintiff: Charles F. Rule, Asst. Atty. Gen., Judy Whalley, John W. Clark, Gary R. Spratling, Howard J. Parker, Phillip R. Malone and James Figenshaw, Attys. Dept. of Justice, Antitrust Div., San Francisco, Cal. **For defendants:** Clearly, Gottlieb, Steen & Hamilton, Wash., D.C.

Final Judgment

Real, Ch. J.: Whereas, plaintiff, United States of America, having filed its Complaint herein on March 18, 1988, and plaintiff and 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 against or an admission by any party with respect to any issue of law or fact herein;

And Whereas, defendants have agreed to be bound by the provisions of this Final Judgment pending its approval by the Court;

And Whereas, prompt and certain divestiture is the essence of this agreement and defendants have represented to plaintiff that the divestiture required below can and will be made and that defendants will later raise no claims of hardship or difficulty as grounds for asking the Court to modify any of the divestiture provisions contained below;

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 the parties hereto, it is hereby Ordered, Adjudged, and Decreed as follows:

I

Jurisdiction

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

II

Definitions

As used in this Final Judgment:

- A. "Aggregate" means rock, sand and gravel suitable for mixture in asphalt concrete, Portland cement concrete, or other paving compounds or mixtures, or for other civil construction purposes.
- B. "Assets to be Divested" means all the assets identified in Section IV.A below.
- C. "Blue Diamond" means Blue Diamond Materials, a division of Sully-Miller Contracting Co., a California corporation and a wholly-owned subsidiary of Koppers Company, Inc., with its principal place of business in Long Beach, California.
- D. The "Irwindale Aggregate District" means that area of Los Angeles County and Orange County with the following boundaries: on the west and southwest, the Pacific Ocean; on the northwest, a line connecting the city centers of the City of Topanga Beach and the City of Altadena; on the north, the crest of the San Gabriel Mountain Range; and on the east and southeast, a line connecting the city centers of the City of San Dimas, the City of Santa Ana, and the City of Newport Beach.
- E. "Koppers" means Koppers Company, Inc., a Delaware corporation with its principal place of business in Pittsburgh, Pennsylvania.
- F. "Section V Trustee" means the trustee referred to in Section V.A of this Final Judgment.

III

Applicability

- A. The provisions of this Final Judgment apply to the defendants, to their successors and assigns, to their subsidiaries, affiliates, directors, officers, managers, agents, and employees, 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.
- B. Nothing contained in this Final Judgment shall suggest that any portion of this Final Judgment is or has been created for the benefit of any third party, and nothing herein shall be construed to provide any rights to any third party.
- C. Defendants shall require, as a condition of the sale or other disposition of all or substantially all of their assets in the Irwindale Aggregate District involved in the extraction, processing and sale of aggregate, that the acquiring party or parties agree to be bound by the provisions of this Final Judgment.

IV

Divestiture of Assets

- A. Defendants are hereby ordered and directed to divest, to an eligible purchaser or eligible purchasers, any and all interest that they have or shall acquire in all of the real and personal property used in the extraction, processing and sale of aggregate at Blue Diamond's aggregate property located at Irwindale, California.
- B. Until the Assets to be Divested are divested, the trustee appointed pursuant to this Court's Order of June 3, 1988, shall manage and remain in control of the operation of the Assets to be Divested, in accordance with the terms of such order, except that defendants shall have access to whatever records and information are necessary to effectuate the divestiture or are disclosed to potential purchasers of the Assets to be Divested. Except as superseded by Section V, the trustee referred to in this Section IV.B shall participate in the divestiture process and shall approve the purchaser or purchasers. The trustee referred to in this Section IV.B shall continue to be paid by the defendants in accordance with the agreement dated June 13, 1988, between that trustee and the defendants, plus such other fees as are agreed to between them.
- C. Unless plaintiff otherwise consents, divestiture under Section IV.A, or by the trustee appointed pursuant to Section V, shall be accomplished in such a way as to satisfy plaintiff, in its sole determination, that the Assets to be Divested can and will be operated by the purchaser or purchasers as a viable, ongoing business, engaged in the extraction, processing and sale of aggregate. Divestiture under Section IV.A, or by the Section V trustee,

shall be made to a purchaser or purchasers for whom it is demonstrated to plaintiff's satisfaction that (1) the purchase is for the purpose of competing effectively in the extraction, processing and sale of aggregate and (2) the purchaser or purchasers has or have the managerial, operational, and financial capability to compete effectively in the extraction, processing and sale of aggregate.

D. Nothing in this Final Judgment shall preclude defendants from entering into one or more contracts with the purchaser or purchasers for the purpose of supplying aggregate from the Assets to be Divested to defendants for the production of asphalt concrete, Portland cement concrete, or other aggregate-based products, provided, however, that defendants shall not enter into any such supply contracts, or into any discussions or negotiations, preliminary or otherwise, relating to such supply contracts, with the purchaser or purchasers, until after the divestiture required by this Final Judgment has been completed, unless the plaintiff otherwise consents.

E. Defendants shall take all reasonable steps to accomplish quickly the divestiture contemplated by this Final Judgment.

V

Appointment of Trustee

A. In the event that defendants have not divested all of their interest required by Section IV.A by January 1, 1989, the Court shall, on application of the plaintiff, appoint a trustee to effect the remainder of the divestiture required by Section IV.A. The trustee appointed pursuant to this Section V may or may not be the same individual who was appointed trustee pursuant to this Court's Order of June 3, 1988. After the appointment of this Section V trustee becomes effective, only such trustee shall have the right to sell the assets required to be divested pursuant to Section IV.A. The Section V trustee shall have the power and authority to accomplish the divestiture at the best price then obtainable upon a reasonable effort by such trustee, subject to the provisions of Section VI of this Final Judgment, and shall have such other powers as the Court shall deem appropriate. Defendants shall not object to a sale by the Section V trustee on any grounds other than such trustee's malfeasance. Any such objections by defendants must be conveyed in writing to plaintiff and the Section V trustee within fifteen (15) days after such trustee has provided the notice required under Section VI.

B. If defendants have not divested all of their interest required by Section IV.A by December 1, 1988, plaintiff and defendants shall immediately notify each other in writing of the names and qualifications of not more than two (2) nominees for the position of the Section V trustee who shall effect the required divestiture. The parties shall attempt to agree upon one of the nominees to service as such trustee. If the parties are able to agree on such trustee within thirty (30) days of the exchange of names, plaintiff shall notify the Court of the person upon whom the parties agreed, and the Court shall appoint such person as the Section V trustee. If the parties are unable to agree within that time period, plaintiff shall furnish the Court the names of each party's nominees. The Court may hear the parties as to the qualifications of the nominees and shall appoint one of the nominees as the Section V trustee.

C. The Section V trustee shall serve at the cost and expense of defendants, on such terms and conditions as the Court may prescribe, and shall account for all monies derived from the sale of the assets sold by the Section V trustee and all costs and expenses so incurred. After approval by the Court of the Section V trustee's accounting, including fees for its services, all remaining money shall be paid to defendants and the trust shall then be terminated. The compensation of the Section V trustee shall be based on a fee arrangement providing such trustee with an incentive based on the price and terms of the divestiture and the speed with which it is accomplished.

D. Defendants shall use their best efforts to assist the Section V trustee in accomplishing the required divestiture. Such trustee and any consultants, accountants, attorneys, and other persons retained by such trustee shall have full and complete access to the personnel, books, records, and facilities of the Assets to be Divested, and defendants shall develop financial or other information relevant to such assets as the Section V trustee may request, subject to reasonable protection for trade secret or other confidential research, development,

or commercial information. Defendants shall take no action to interfere with or impede the Section V trustee's accomplishment of the divestiture.

E. After its appointment, the Section V trustee shall file monthly reports with the parties and the Court setting forth such trustee's efforts to accomplish the divestiture ordered under this Final Judgment. If the Section V trustee has not accomplished such divestiture within six (6) months after its appointment, the Section V trustee shall thereupon promptly file with the Court a report setting forth (1) such trustee's efforts to accomplish the required divestiture, (2) the reasons, in the trustee's judgment, why the required divestiture has not been accomplished, and (3) the trustee's recommendations. The Section V trustee shall at the same time furnish such report to the parties, who shall each have the right to be heard and to make additional recommendations consistent with the purpose of the trust. The Court shall thereafter enter such orders as it shall deem appropriate in order to carry out the purpose of the trust, which may, if necessary, include extending the trust and the term of the Section V trustee's appointment.

VI

Notification

A. Defendants or the Section V trustee, whichever is then responsible for effecting the divestiture required herein, shall notify the plaintiff of any proposed divestiture required by Section IV or V of this Final Judgment. If the Section V trustee is responsible, it shall similarly notify defendants. The notice shall set forth the details of the proposed transaction and list the name, address, and telephone number of each person not previously identified who offered or expressed an interest or desire to acquire any ownership interest in any of the Assets to be Divested, together with full details of the same. Within fifteen (15) days after receipt of the notice, the plaintiff may request additional information concerning the proposed divestiture, the proposed purchaser, and any other potential purchaser. Defendants or the Section V trustee shall furnish the additional information within fifteen (15) days of the receipt of the request. Within thirty (30) days after receipt of the notice or within fifteen (15) days after receipt of the additional information, whichever is later, plaintiff shall notify in writing defendants and the Section V trustee, if there is one, if it objects to the proposed divestiture. If the plaintiff fails to object within the period specified, or if the plaintiff notifies in writing defendants and the Section V trustee, if there is one, that it does not object, then the divestiture may be consummated, subject only to defendants' limited right to object to the sale under Section V.A. Upon objection by the plaintiff or by defendants under Section V.A, the proposed divestiture shall not be accomplished unless approved by the Court.

B. Thirty (30) days from the date of entry of this Final Judgment and every thirty (30) days thereafter until the divestiture has been completed, defendants shall deliver to plaintiff a written report as to the fact and manner of compliance with Section IV of this Final Judgment. Each such report shall include, for each person who during the preceding thirty (30) days made an offer, expressed an interest or desire to acquire, entered into negotiations to acquire, or made an inquiry about acquiring any ownership interest in any of the Assets to be Divested, the name, address, and telephone number of that person and a detailed description of each contact with that person during that period. Defendants shall maintain full records of all efforts made to divest the Assets to be Divested.

VII

Financing

Defendants shall not finance all or any part of any purchase made pursuant to Sections IV or V of this Final Judgment without the prior consent of the plaintiff.

VIII

Preservation of Assets

Subject to the duties of the trustee under Section IV.B:

- A. Defendants shall preserve, hold, and continue to operate as a going business the Assets to be Divested, with its assets, management and operations separate, distinct and apart from those of defendants, unless plaintiff otherwise consents. Defendants shall use all reasonable efforts to maintain the Assets to be Divested as a viable and active competitor in the market for aggregates in the Irwindale Aggregate District.
- B. Defendants shall not sell, lease, assign, transfer or otherwise dispose of, or pledge as collateral for loans (except such loans as are currently outstanding or replacements or substitutes therefor), the Assets to be Divested, except that such component as is replaced in the ordinary course of business with a newly purchased component may be sold or otherwise disposed of, provided the newly purchased component is so identified as a replacement component for an Asset to be Divested.
- C. The provisions of Sections VIII.A and VIII.B include but are not limited to: preserving all plants and equipment used for the extraction and processing of aggregate and their right and ability to operate at the site(s) where they are located; preserving all air pollution and operating permits (including proceeding with such application or operation as is necessary to renew such permits or make permanent any temporary permits); and preserving all administrative and support facilities. These provisions do not preclude the sale in the ordinary course of business of the aggregate as may be produced by the Assets to be Divested.
- D. Defendants shall provide and maintain sufficient working capital to maintain the Assets to be Divested as a viable, ongoing business.
- E. Defendants shall provide and maintain sufficient lines and sources of credit to maintain the Assets to be Divested as a viable, ongoing business.
- F. Defendants shall preserve the Assets to be Divested, except those replaced with newly acquired assets in the ordinary course of business, in a state of repair equal to their state of repair as of the date of defendants' acquisition of control of Koppers.
- G. Defendants shall identify separately all assets or replacements for or proceeds therefrom that were used in the extraction, processing and sale of aggregate at the Assets to be Divested prior to defendants' acquisition of control of Koppers.
- H. Defendants shall maintain on behalf of the Assets to be Divested, in accordance with sound accounting practice, separate, true and complete financial ledgers, books and records reporting the profit and loss and liabilities of the Assets to be Divested on a monthly and quarterly basis.
- I. Defendants shall refrain from terminating or reducing one or more current employment, salary, or benefit agreements for one or more management, engineering, or other technical personnel employed in connection with the Assets to be Divested, except in the ordinary course of business, without the prior approval of plaintiff.
- J. Defendants shall refrain from taking any action that would have the effect of reducing the scope or level of competition between the Assets to be Divested and other producers of aggregate in the Irwindale Aggregate District, without the prior approval of plaintiff.
- K. Defendants shall refrain from taking any action that would jeopardize the sale of the Assets to be Divested as a viable going concern.

IX

Compliance 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, including consultants and other persons retained by the Department, shall, upon the written request of the Attorney General or of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to defendants made to their principal offices, be permitted:

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

2. subject to the reasonable convenience of defendants and without restraint or interference from them, to interview their officers, employees, and agents who may have counsel present, regarding any such matters.

B. Upon the written request of the Attorney General or of the Assistant Attorney General in charge of the Antitrust Division made to defendants at their principal offices, defendants 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 IX 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 (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If at the time information or documents are furnished by defendants to plaintiff, defendants represent and identify in writing the material in any such information or documents for which a claim of protection may be asserted under Rule 26(c)(7) of the Federal Rules of Civil Procedure, and defendants mark each pertinent page of such material, "subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure," then plaintiff shall give ten (10) days notice to defendants prior to divulging such material in any legal proceeding (other than a grand jury proceeding) to which defendants are not a party.

X

Retention of Jurisdiction

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction, implementation, or modification of any of the provisions of this Final Judgment, for the enforcement of compliance herewith, and for the punishment of any violations hereof.

XI

Termination

This Final Judgment will expire on the second anniversary of the completion of the divestiture required herein.

XII

Public Interest

Entry of this Final Judgment is in the public interest.