

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,
c/o Department of Justice
Washington, D.C. 20530
Plaintiff

v.

SARA LEE CORPORATION
Three First National Plaza
Chicago, Illinois 60602
Defendant.

Civil Action No.

~~1:96-cv-00196~~ 1:96-cv-00196

2/6/96

COMPLAINT FOR CIVIL PENALTIES
FOR VIOLATION OF PREMERGER REPORTING
REQUIREMENTS OF THE HART-SCOTT-RODINO ACT

The United States of America, Plaintiff, by its attorneys, acting under the direction of the Attorney General of the United States and at the request of the Federal Trade Commission, brings this civil action to obtain monetary relief in the form of a civil penalty against the Defendant named herein, and alleges as follows:

JURISDICTION AND VENUE

1. This Complaint is filed and these proceedings are instituted under Section 7A of the Clayton Act, 15 U.S.C. § 18a, also known as Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act" or "Act"), to recover a civil penalty for violation of the HSR Act.

2. This Court has jurisdiction over the defendant and over the subject matter of this action pursuant to Section 7A(g) of

the Clayton Act, 15 U.S.C. § 18a(g), and 28 U.S.C. §§ 1331, 1337(a), 1345 and 1355.

3. Venue in this District is proper by virtue of 28 U.S.C. §§ 1391 and 1395, and by virtue of the Defendant's consent, in the Stipulation relating hereto, to the maintenance of this action and entry of the Final Judgment in this District.

THE DEFENDANT

4. Defendant Sara Lee Corporation ("Sara Lee") is incorporated in the state of Maryland with its principal place of business at Three First National Plaza, Chicago, Illinois 60602-4260. Sara Lee is a multinational consumer packaged goods company. At the time of its acquisition of the assets of Reckitt & Colman plc in 1991, Sara Lee, through its subsidiary Kiwi Brands, Inc., was engaged, inter alia, in the shoe care products industry in the United States. At all times pertinent to this complaint, Sara Lee had total assets valued in excess of \$100 million. The defendant at all times pertinent to this proceeding was engaged in commerce, or in activities affecting commerce, within the meaning of Section 1 of the Clayton Act, 15 U.S.C. § 12, and Section 7A(a)(1) of the Clayton Act, 15 U.S.C. § 18a(a)(1).

OTHER ENTITIES

5. Sara Lee/DE NV. ("SLDE") is a wholly-owned subsidiary of defendant Sara Lee. At all times relevant to this complaint,

SLDE was a corporation organized under the laws of The Netherlands with its principal place of business at Vleutensevaart 100, 3532 AD Utrecht, The Netherlands. SLDE had management authority for defendant Sara Lee's worldwide shoe care businesses.

6. Kiwi Brands, Inc. ("Kiwi") is a wholly-owned subsidiary of defendant Sara Lee. At all times relevant to this complaint, Kiwi was a corporation organized under the laws of Delaware with its principal place of business at Route 662 North, Douglassville, Pennsylvania 19518.

7. Sara Lee Household & Personal Care UK Limited ("Sara Lee UK") is a wholly-owned subsidiary of defendant Sara Lee. At all times relevant to this complaint, Sara Lee UK was a corporation organized under the laws of the United Kingdom with its principal place of business at 225 Bath Road, Slough, Berkshire, SL1 4AU, England.

8. Reckitt & Colman plc ("Reckitt & Colman") was, at all times pertinent to this proceeding, a United Kingdom corporation with its principal place of business at One Burlington Lane, London W4 2RW, England. At the time of the acquisition of its shoe care assets by defendant Sara Lee in 1991, Reckitt & Colman was engaged principally in the consumer packaged goods industry throughout the world, including the shoe care products industry in the United States. At all times pertinent to this complaint, Reckitt & Colman was engaged in commerce, or in activities affecting commerce, within the meaning of Section 1 of the

Clayton Act, 15 U.S.C. § 12, and Section 7A(a)(1) of the Clayton Act, 15 U.S.C. § 18a(a)(1), and had total assets valued in excess of \$100 million.

THE HART-SCOTT-RODINO ACT AND RULES

9. The HSR Act requires certain acquiring persons and certain persons whose voting securities or assets are acquired ("acquired persons") to file notifications with the Department of Justice and the Federal Trade Commission and to observe a waiting period before consummating certain acquisitions of voting securities or assets. 15 U.S.C. § 18a(a) and (b). The notification and waiting period are intended to give the federal antitrust agencies prior notice of, and information about, proposed transactions. The waiting period is also designed to provide the antitrust agencies an opportunity to investigate proposed transactions and determine whether to seek an injunction to prevent transactions that may violate the antitrust laws.

10. The notification and waiting period requirements of the Act apply to direct or indirect acquisitions when the Act's "size-of-person," "commerce" and "size of transaction" tests are met. 15 U.S.C. § 18a(a).

11. The size of transaction test is met if, as a result of an acquisition, an acquiring person would hold an aggregate total amount of assets of an acquired person in excess of \$15 million when exempt assets are excluded. Section 802.50(a) of the Premerger Notification Rules, 16 C.F.R. § 800 et seq. ("HSR

Rules"), provides that the acquisition of certain assets located outside the United States shall be exempt from the requirements of the Act.

12. Section 801.10(b) of the HSR Rules provides that "[t]he value of assets to be acquired shall be the fair market value of the assets, or, if determined and greater than the fair market value, the acquisition price." 16 C.F.R. § 801.10(b).

13. Section 801.10(c)(3) of the HSR Rules provides that "[t]he fair market value shall be determined in good faith by the board of directors of the ultimate parent entity included within the acquiring person, or, if unincorporated, by officials exercising similar functions; or by an entity delegated that function by such board or officials. Such determination must be made as of any day within 60 calendar days prior to the filing of the notification required by the act, or, if such notification has not been filed, within 60 calendar days prior to the consummation of the acquisition." 16 C.F.R. § 801.10(c)(3).

14. Section 801.90 of the HSR Rules provides that "[a]ny transaction(s) or other device(s) entered into or employed for the purpose of avoiding the obligation to comply with the requirements of the act shall be disregarded, and the obligation to comply shall be determined by applying the act and these rules to the substance of the transaction." 16 C.F.R. § 801.90.

15. Where an acquisition is subject to the Act, the "ultimate parent entity" of an acquiring person is obligated by the HSR Rules to file premerger notification and report forms

with the Federal Trade Commission and the Department of Justice and to observe the required waiting period before consummating the acquisition.

VIOLATION ALLEGED

16. On or about October 4, 1991, defendant Sara Lee acquired, through Kiwi and Sara Lee UK, the shoe care products assets of Reckitt & Colman in the United States and the United Kingdom ("the Acquisition").

17. The Acquisition was accomplished through the use of two contracts, one for United States assets described in a U.S. Sale Agreement ("United States assets") and one for foreign assets described in a U.K. Sale Agreement ("United Kingdom assets"). Kiwi acquired the United States assets and Sara Lee UK acquired the United Kingdom assets.

18. SLDE officials, who were also officers of defendant Sara Lee, had the responsibility for negotiating the Acquisition on behalf of Sara Lee.

19. Throughout the extensive negotiations, SLDE did not make any separate offers for either the United States assets or the United Kingdom assets, but only made offers for the entire Acquisition.

20. At the time of the Acquisition, Sara Lee had a market share of approximately 90% of shoe polish sold through mass marketers in the United States, and Reckitt & Colman was one of its few remaining competitors with its Griffin brand.

21. The SLDE officials who had the responsibility for negotiating the Acquisition sought to undertake the Acquisition without making premerger HSR filings because they were concerned that the Federal Trade Commission or Department of Justice would challenge the Acquisition as a violation of the antitrust laws.

22. In negotiating the Acquisition, SLDE consistently conditioned its offers on the total price attributed to the United States assets being less than \$15 million.

23. The SLDE officials who had the responsibility for negotiating the Acquisition consistently estimated the value of the United States assets as being substantially higher than the value of the United Kingdom assets.

24. The SLDE officials who had the responsibility for negotiating the Acquisition and for justifying the acquisition price to the Sara Lee board valued the United States assets at approximately \$17.18 million, and the United Kingdom assets at approximately \$10.6 million, in cash flow projections.

25. The Sara Lee board approved the Acquisition pursuant to its usual procedure based on a written presentation, including a cash flow projection showing that the assets to be acquired would generate a rate of return sufficient to justify the Acquisition at a price of approximately \$27.8 million. The cash flow projection that was submitted to the Sara Lee Board combined the United States assets and the United Kingdom assets and did not break out the separate value of the United States assets.

26. The total price for the Acquisition, after adjustments, was approximately \$25.8 million.

27. The purchase price under the U.S. Sale Agreement was approximately \$13.1 million. The purchase price under the U.K. Sale Agreement was approximately \$12.7 million.

28. Neither the Board of Directors of Sara Lee, nor any entity within Sara Lee, determined in good faith, as required by Section 801.10(c)(3) of the HSR Rules, that the fair market value of the United States assets did not exceed \$15 million. In particular, the purchase price under the U.S. Sale Agreement was not a good faith determination of the fair market value of the United States assets within the meaning of the HSR Rules.

29. The fair market value of the United States assets acquired by Sara Lee was in excess of \$15 million.

30. The HSR Act and the HSR Rules required defendant Sara Lee to file premerger notification and observe a waiting period before acquiring in excess of \$15 million of assets (excluding exempt assets) of Reckitt & Colman.

31. Alternatively, Sara Lee employed its allocation of approximately \$13.1 million to the U.S. Sales Agreement together with its failure to make the good faith determination of fair market value required by the HSR Rules as a device for avoiding its obligation to comply with the HSR Act within the meaning of Section 801.90 of the HSR Rules.

32. Applying the Act and Rules to the substance of the transaction, as is required by Section 801.90 of the HSR Rules,

Defendant Sara Lee acquired and held an aggregate total amount of assets (excluding exempt assets) of Reckitt & Colman in excess of \$15 million, because the fair market value of the United States assets was in excess of \$15 million.

33. Defendant Sara Lee did not comply with the notification and waiting period requirements of the Act before consummating the Acquisition.

34. Sara Lee did not file under the HSR Act for the Acquisition until August 12, 1994. Reckitt & Colman filed under the HSR Act for the Acquisition on December 19, 1994. The waiting period expired on January 18, 1995.

35. On or about October 30, 1991, the Federal Trade Commission ("FTC") commenced an investigation to determine whether the Acquisition violated section 7 of the Clayton Act, 15 U.S.C. § 18, or section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

36. On or about April 30, 1992, the FTC issued a subpoena to Sara Lee requiring, among other things, the production of documents relevant to determining the lawfulness of the Acquisition.

37. On or about July 21, 1992, Sara Lee certified the completeness of its response to the FTC subpoena.

38. On or about August 24, 1994, the FTC, with the consent of Sara Lee, issued as final its complaint and order in In the matter of Kiwi Brands, Inc. and Sara Lee Corporation, Docket No. C-3523, which order among other things required the divestiture

of the assets relating to the Griffin brand of shoe polish, acquired in the Acquisition, and the assets relating to the Esquire brand of shoe polish, acquired from Knomark, Inc. in a previous transaction.

39. Defendant Sara Lee was in continuous violation of the HSR Act from October 4, 1991, until January 18, 1995 (i.e., until the expiration of the HSR Act waiting period).

40. Section 7A(g) (1) of the Clayton Act, 15 U.S.C. § 18a(g) (1), provides that any person, or any officer, director, or partner thereof, who fails to comply with the Act's provisions shall be liable to the United States for a civil penalty of not more than \$10,000 for each day during which such person is in violation of the Act.

PRAYER

WHEREFORE, Plaintiff prays that this Court:

1. Adjudge and decree that defendant Sara Lee's purchase of the United States assets from Reckitt & Colman on October 4, 1991, was in violation of the Hart-Scott-Rodino Act, 15 U.S.C. § 18a, and that defendant Sara Lee was in violation of the HSR Act each day during the period from October 4, 1991, through January 18, 1995;

2. Order defendant Sara Lee to pay to the United States an appropriate civil penalty as provided by Section 7A(g) (1) of the Clayton Act, 15 U.S.C. § 18a(g) (1);

3. Grant such other, further relief as the Court shall deem just, necessary or appropriate; and

4. Award plaintiff its costs of this suit.

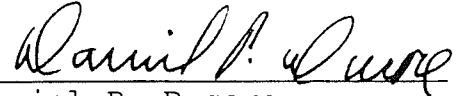
DATED: _____

FOR THE PLAINTIFF UNITED STATES OF AMERICA

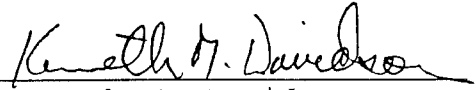


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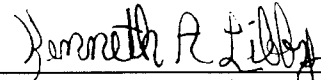
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