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United States v. R. J. Reynolds Tobacco Co.

1969 Trade cases ¶72,886. U.S. District Court, D. New Jersey. Civil No. 345-65. Entered September 22, 1969. Case No. 1848 in the Antitrust Division of the Department of Justice.

Clayton and Sherman Acts

Acquisitions—Corn and Potato Starch Firm by Tobacco Company—Divestiture as Going Concern—Consent Decree.—A tobacco company that is a substantial purchaser of paper and packaging products was required by a consent decree to divest itself of a subsidiary corn starch producing company that it acquired, divestiture to be as a going, viable concern engaged in the development, research, production, distribution and sale of products produced by the corn wet milling process, including specified products, and the potato starch business that involves the extraction from potatoes and the sale of specified potato products and derivatives. Assets must include substantially the same functional organization as before the acquisition, together with improvements, betterments, replacements and all other assets added by the acquirer or by the acquired and utilized by the latter after the acquisition until divestiture. Divestiture must be made by: (a) sale of assets, either totally or—with government consent—as separate corn starch and potato starch concerns, (b) distribution of stock to the acquirer's shareholders, subject to limitations, (c) sale of stock to the public through an underwriter, or (4) a combination of one or more of such methods. Reacquisition is barred for five years, as is acquisition or holding interests in competitors of the divested firm or engaging in its business.

For the plaintiff: Richard W. McLaren, Asst. Atty. Gen., Charles D. Mahaffie, Jr., W. D. Kilgore, Samuel Karp, Robert N. Kaplan, and Joseph A. Tate, Attys., Dept. of Justice, Washington, D. C.

For the defendant: James D. Carpenter, of Carpenter, Bennett & Morrissey, Taggart Whipple, Davis Polk & Wardwell, Daniel F. Kolb, Guy M. Struve, and Jeffrey Small.

Final Judgment

COOLAHAN, D. J.: Plaintiff, the United States of America, having filed its amended complaint herein on August 9, 1965; a motion by plaintiff for preliminary injunction having been denied after a hearing thereon; defendant R. J. Reynolds Tobacco Company having filed its answer denying the substantive allegations of such amended complaint, and the parties 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 any admission by any party in respect to any such issue.

Now, Therefore, without trial or the taking of testimony 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 of the subject matter hereof and of the parties hereto. The complaint states claims upon which relief may be granted against defendant 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, and under Section 7 of the Act of Congress of October 15, 1914, entitled "An

Act to supplement existing laws against unlawful restraints and monopolies and for other purposes,” commonly known as the Clayton Act, as amended.

II

[Definitions]

As used in this Final Judgment:

- (A) “Person” means any individual, partnership, firm, corporation, association or other business or legal entity;
- (B) “Penick & Ford” means Penick & Ford, Limited, a Delaware corporation and a wholly owned subsidiary of defendant;
- (C) “Subsidiary” means any person controlled by, or more than fifty percent of whose voting stock is directly or indirectly controlled by, defendant.

III

[Applicability]

The provisions of this Final Judgment shall apply to defendant and to each of its United States subsidiaries, successors and assigns, and to each of their respective officers, directors, agents, employees, successors and assigns, and to those persons in active concert or participation with any of them who receive actual notice of this Final Judgment by personal service or otherwise. A purchaser of the assets or stock pursuant to this Final Judgment shall not be considered a successor bound by this Final Judgment.

IV

[Divestiture]

Defendant is ordered and directed, within two years from the date of entry of this Final Judgment, to divest itself of all its interest in Penick & Ford as a going, viable concern engaged in (a) the development, research, production, distribution and sale of products produced by the corn wet milling process, including starch, dextrin, gums, syrup, gluten feed, gluten meal, grits and crude corn oil, and related corn derivatives, and (b) the potato starch business which involves the extraction from potatoes and the sale of potato starch, potato flake, potato flour, and related potato derivatives.

There shall be included in the said going, viable concern divested, substantially those assets, with substantially the same functional organization, as were held and utilized in whole or in part in the conduct of the businesses referred to in (a) and (b) above by the former company known as Penick & Ford, Ltd., Incorporated at the time of its acquisition by defendant in 1965, coupled with such improvements, betterments, replacements and all other assets which have been added by defendant or Penick & Ford and utilized by Penick & Ford since such acquisition up to the date of the divestiture. In any instance where, at the time of entry of the Final Judgment, any such facility or asset is used by Penick & Ford in conjunction with any other phase of defendant's business, such as the grocery business, preference shall be given to transfer of such facility or asset to Penick & Ford, or a suitable alternative facility or asset shall be substituted therefor.

V

[Method of Divestiture]

The divestiture ordered in Section IV above may be made by:

- (A) A negotiated sale of all the assets of Penick & Ford, provided that if plaintiff consents divestiture of Penick & Ford as separate corn starch and potato starch concerns may be accomplished;
- (B) A negotiated sale of some or all of the stock of Penick & Ford;

- (C) Distribution of the stock of Penick & Ford (i) to holders of defendant's common stock on a pro rata basis or (ii) to holders of defendant's common and/or preferred stock who shall elect to exchange shares of such stock for shares in Penick & Ford or (iii) to holders of transferable rights distributed to the holders of defendant's common stock on a pro rata basis to purchase the stock of Penick & Ford;
- (D) Sale or sales of the stock of Penick & Ford to the public through an underwriter or underwriters; or
- (E) A combination of (B), (C) and (D) above or any two of them.

VI

[Pre-divestiture Obligation]

Defendant shall use its best efforts to maintain Penick & Ford, until the time of divestiture thereof, as a going, viable concern, at standards of operating performance, including personnel, applicable to Penick & Ford at the time of entry of this Final Judgment.

VII

[Ineligible Purchasers]

Neither sale of the assets, nor sale of stock under Section V(A) or (B) of Penick & Ford shall be made knowingly, directly or indirectly, to any person who is at the time of divestiture (a) an officer, director, employee, or agent of defendant, or (b) who beneficially owns, or has power to vote, or controls, or has rights to own or control, more than one (1) percent of the outstanding shares of common stock of defendant, or (c) in whom defendant has a financial interest whether by any equity interest or otherwise.

VIII

[Information for Government]

(A) If defendant proceeds with divestiture under Section V(A) or in whole or in part under V(B) of this Final Judgment, not less than forty-five (45) days prior to the closing date designated in any contract for the sale of the assets or stock of Penick & Ford, defendant shall advise plaintiff in writing of the name and address of the proposed purchaser together with the terms and conditions of the proposed sale, and such other information concerning the transaction as plaintiff may request within fifteen (15) days from the receipt of the aforesaid advice. At the same time, defendant shall also make known to plaintiff in writing the names and addresses of any other person or persons who have made an offer in writing, or expressed in writing a desire, to purchase such assets or stock together with the terms and conditions thereof.

(B) Not more than twenty-one (21) days after the receipt of the information required by this Section VIII, plaintiff shall advise defendant in writing whether it objects to the proposed sale. If plaintiff does not object to the proposed sale, it may be consummated, but if objection is made, then the proposed sale shall not be consummated until defendant obtains approval by the Court or unless plaintiff's objection is withdrawn.

(C) The time period set forth in Section IV shall be tolled during the pendency of any proceeding in this Court under this Final Judgment relating to approval of a proposed sale which delays the consummation of the divestiture transaction proposed by defendant.

IX

[Individuals' Sale of Stock]

If divestiture is accomplished in whole or in part by distribution of stock under Section V(C) of this Final Judgment, defendant shall arrange that any officer or director of defendant, or any stockholder of defendant, beneficially owning or controlling, or having rights, in excess of an aggregate of one percent (1%) of defendant's

outstanding shares entitled to vote and stock convertible to such shares, shall within six (6) months of receipt of the Penick & Ford stock dispose of said stock to a person not an officer or director of defendant.

X

[Limitation on Stock Sale]

If divestiture is accomplished in whole or in part under Section V (D) of this Final Judgment, defendant shall prohibit any officer or director of it from acquiring any stock of Penick & Ford, so long as he remains in any such position.

XI

[Limitation on Stock Acquisition]

In the event that defendant receives, as consideration for the divestiture ordered in Section IV above, securities of any person engaged in the corn wet milling business or potato starch business, or of any person acquiring the divested assets, defendant shall transfer such securities to a trustee, approved by plaintiff, who shall not exercise any voting rights except with the consent of plaintiff, and said trustee shall dispose of such securities within three (3) years from the date such securities are transferred to said trustee to a person or persons who at the time of such disposal are not under the direction or control of defendant or a person described in subparagraphs (a), (b) or (c) of Section VII above.

XII

[Reacquisition]

Defendant is enjoined from reacquiring Penick & Ford, and, subject to the provisions of Section XI above, for a period of five (5) years after the divestiture required in Section IV above, from (a) acquiring or holding after such acquisition any assets of or stock or other beneficial interest in any person engaged in the manufacture for sale, or in the sale, of (i) starch, dextrin or gums produced by the corn wet milling process, or (ii) potato starch, and (b) engaging in such manufacture for sale or in such sale.

XIII

[Inspection & Compliance]

For the purpose of securing or determining compliance with this Final Judgment, and not for any other purpose:

(A) Any duly authorized representative or representatives of the Department of Justice shall, upon written request by the Attorney General or the Assistant Attorney General in charge of the Antitrust Division and on reasonable notice to defendant made to its principal office, be permitted, subject to any legally recognized privilege:

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

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

(B) Upon such written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, defendant shall submit such reports in writing with respect to any matters contained in this Final Judgment as from time to time may be requested.

(C) No information obtained by the means provided for in this Section XIII 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 plaintiff is a party for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

XIV

[*Jurisdiction Retained*]

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