

IN THE MATTER OF

BIRD & SON, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE
CLAYTON ACT

Docket C-2805. Complaint, Mar. 8, 1976—Decision, Mar. 8, 1976

Consent order requiring an East Walpole, Mass., manufacturer of building materials, among other things to divest itself of the Tuscaloosa, Ala., Logan-Long asphalt roofing manufacturing facility within 18 months, while permitting respondent to retain the two remaining Logan-Long plants in Chicago, Ill., and Franklin, Ohio. Further, respondent is prohibited for 10 years from acquiring any manufacturer of asphalt roofing products without prior approval of the Commission.

Appearances

For the Commission: *Peter W. Kitson.*

For the respondent: *Arnold Manthorne, Warner & Stackpole,*
Boston, Mass. and *Miles Kirkpatrick and Coswell Hobbs, Morgan,*
Lewis & Bockius, Washington, D.C.

COMPLAINT

In the exercise of authority vested in it by the Federal Trade Commission Act, the Federal Trade Commission, having reason to believe that respondent, Bird & Son, Inc., a corporation, has violated Section 7 of the Clayton Act, as amended (15 U.S.C. §18) and/or Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. §45) and that a proceeding in respect thereof would be in the public interest, issues this complaint charging as follows:

I. DEFINITIONS

For the purpose of construing this complaint the following definitions shall be controlling:

(a) "Asphalt and tar roofing" includes asphalt or tar saturated felts and roll roofing, and asphalt shingles made from an organic felt, asbestos felt or fiberglass base, saturated and/or coated with asphalt or coal tar pitch.

(b) "Saturated felts" include both organic and inorganic mats saturated or impregnated, but not coated, with asphalt or tar.

(c) "Roll roofing" is made from a saturated or impregnated felt by applying an additional coating of more viscous weather-resistant asphalt and fine surfacings or mineral granules.

(d) "Asphalt shingles" are mineral-surfaced saturated felts machine-cut into squares or strips.

(e) "Asphalt roofing products" refers to any or all of the products described in (b) through (d) above, but specifically excludes accessory items such as asphalt cements, adhesives, primers, and mineral granules.

II. RESPONDENT

1. Bird & Son, Inc. (hereafter "Bird") is a publicly-held corporation chartered and operating under the laws of the Commonwealth of Massachusetts, with a principal place of business at Washington St., East Walpole, Massachusetts.

2. Bird is a manufacturer of building materials, primarily asphalt roofing products. It has roofing plants in Norwood, Massachusetts; Shreveport, Louisiana; Charleston, South Carolina; Perth Amboy, New Jersey; Portland, Oregon; Martinez, California; Wilmington, California; and felt mills in Phillipsdale, Rhode Island; Chicago, Illinois; Shreveport, Louisiana; and Portland, Oregon. It also operates a paper-board products division, and has a wholly-owned subsidiary, Bird Machine Company, Inc., which manufactures and sells machinery, being principally screening and stock cleaning equipment for the paper industry, and centrifugal and filtration equipment used in chemical and other process industries and in pollution control. For its fiscal year ending December 31, 1974, Bird & Son reported revenues in excess of \$170 million of which \$120 million consisted of asphalt roofing products, a net income in excess of \$14 million from all products lines, and total assets of approximately \$95 million.

3. On September 10, 1975, Bird announced its agreement in principle for Bird to purchase all of the stock of The Logan-Long Company, a manufacturer of asphalt roofing products. Upon consummation of definitive agreements subsequently entered into, The Logan-Long Company will become a fully-owned subsidiary of Bird & Son, Inc. on or before March 31, 1976.

4. At all times relevant to this complaint Bird has sold and shipped, and continues to sell and ship, its products in interstate commerce throughout the United States. Consequently, Bird was, at the date of the acquisition in question here, and is now, engaged in commerce as "commerce" is defined in the Clayton Act (15 U.S.C. §12), and in the Federal Trade Commission Act (15 U.S.C. §44).

III. LOGAN-LONG COMPANY

5. The Logan-Long Company (hereafter "Logan-Long") is a

corporation chartered and operating under the laws of the State of Ohio with a principal place of business at 6600 So. Central Ave., Chicago, Illinois

6. At the time of the agreement, Logan-Long was a manufacturer of asphalt roofing products. Approximately 80 percent of the outstanding stock of the company is owned by the Logan and Long families. For its fiscal year ending March 31, 1975, Logan-Long produced and sold approximately \$20 million in asphalt roofing products, realized total net income of approximately \$1.3 million, and had total assets of approximately \$10 million. Logan-Long has plants for the manufacture and sale of asphalt roofing products in Chicago, Illinois; Franklin, Ohio; and Tuscaloosa, Alabama, a dry felt plant in Franklin, Ohio, a small lightweight dry felt plant facility in St. Matthews, Kentucky, and five wholesale building materials distribution warehouses.

7. At all times relevant to this complaint Logan-Long sold and shipped products in interstate commerce and was, therefore, engaged in commerce as that term is defined in the Clayton Act (15 U.S.C. §12), and in the Federal Trade Commission Act (15 U.S.C. §44).

IV. THE ACQUISITION

8. On September 10, 1975, Bird agreed in principle with Logan-Long for Bird to purchase all of the common shares of Logan-Long. Upon consummation of the agreements referred to in Paragraph 3 of the complaint, the purchase transactions will be closed on or before March 31, 1976 and Bird will thereupon become the owner of all of the common shares of Logan-Long or such smaller number of shares as Bird may elect to purchase if it has failed to gain the agreement of all shareholders of Logan-Long.

V. TRADE AND COMMERCE

9. Functionally, the production of asphalt roofing products breaks down into two distinct processes: (1) the preparation of a base (organic felt, asbestos felt, or fiberglass) mat; and (2) the conversion of this mat into saturated felts, roll roofing, or shingles.

10. Today over 80 percent of all roofing applied in the United States is produced by the asphalt roofing industry. There are approximately 33 domestic manufacturers of asphalt roofing products operating a total of 125 plants in the United States.

11. Asphalt roofing products are manufactured, transported, sold, and applied throughout the United States. For the year 1972, total sales of asphalt roofing products, as defined herein, amounted to \$765.4 million, of which \$530.4 million represented sales of shingles and \$235.0

million were sales of saturated felts and roll roofing. The eight largest manufacturers of these products reported sales of \$649.0 million or 84.8 percent of all sales; the four largest manufacturers realized \$453.2 million in sales, or 59.2 percent of all sales of asphalt roofing products.

12. For the year 1972, Bird ranked 5th in sales of all asphalt roofing products and 4th in the sale of shingles. Bird represented 9.9 percent and 10.5 percent of industry sales of asphalt roofing products, and shingles respectively, for that year. During the same year The Logan-Long Company ranked 9th in both the sales of all asphalt roofing products and shingles.

VI. EFFECTS OF THE ACQUISITION

13. The effect of the acquisition of the Tuscaloosa, Ala. asphalt roofing plant of The Logan-Long Company by Bird may be substantially to lessen competition or to tend to create a monopoly in the manufacture, sale and distribution of asphalt roofing products in the Southeastern United States, in the following ways:

(a) By eliminating actual competition between Bird & Son, Inc., and The Logan-Long Company in the manufacture, sale and distribution of asphalt roofing products.

(b) The entry of new asphalt roofing products manufacturers may have been, and may be, significantly discouraged or retarded.

(c) The ability of purchasers of asphalt roofing products, as defined herein, to select from alternative manufacturers in the Southeastern United States has been and may be substantially limited.

VII. VIOLATION

14. The acquisition of The Logan-Long Company by Bird constitutes a violation of Section 7 of the Clayton Act (15 U.S.C. §18), as amended, and/or Section 5 of the Federal Trade Commission Act (15 U.S.C. §45), as amended.

DECISION AND ORDER

The Commission having determined to issue its complaint charging the respondent named in the caption hereto with violation of Section 7 of the Clayton Act and/or Section 5 of the Federal Trade Commission Act and the respondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint to

issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its Rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Bird & Son, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, its office and principal place of business located at Washington St., East Walpole, Massachusetts.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

For the purposes of this order, the following definitions shall apply:

(a) "Asphalt and tar roofing" includes asphalt or tar saturated felts and roll roofing, and asphalt shingles made from an organic felt, asbestos felt, or fiberglass base, saturated and/or coated with asphalt or coal tar pitch.

(b) "Saturated felts" include both organic and inorganic mats saturated or impregnated, but not coated, with asphalt or tar.

(c) "Roll roofing" is made from a saturated or impregnated felt by applying an additional coating of more viscous, weather-resistant asphalt and fine surfacings or mineral granules.

(d) "Asphalt shingles" are mineral-surfaced saturated felts machine-cut into squares or strips.

(e) "Asphalt roofing products" refers to any or all of the products described in (b) through (d) above, but specifically excludes accessory items such as asphalt cements, adhesives, primers, and mineral granules.

I

It is ordered, That Bird & Son, Inc. (hereafter "Bird"), within a period not exceeding 18 months from March 31, 1976, or from such other date upon which Bird shall become the owner of all or any substantial part

of the share capital or assets of The Logan-Long Company (hereafter "Logan-Long"), shall divest absolutely and in good faith by sale, or by spinoff into and sale of the stock of a new corporation formed for such purpose, subject to prior approval of the Federal Trade Commission, all properties (hereafter "properties") associated with the Tuscaloosa, Alabama, Plant (hereafter "Plant") of Logan-Long including, but not limited to, all land, buildings, improvements, equipment, machinery, inventory, and customer lists relating to such Plant and acquired by Bird as a result of its acquisition of Logan-Long together with all additions and improvements to such properties; *provided, however*, that approval of a proposed divestiture hereunder shall not be withheld solely on the ground that the proposed acquirer is a manufacturer of asphalt roofing products.

II

It is further ordered, That, in the event that a new corporation is established as provided herein, Bird shall make reasonable efforts to assure that such new corporation will remain properly staffed with adequate administrative, sales and service personnel to carry on the business to be transferred to the new corporation, to assist such new corporation in retaining, rehiring, or replacing such personnel, and to insure the retention of customers associated with the divested plant.

III

It is further ordered, That, if respondent is unable to sell or dispose of the Plant outright, nothing in this order shall be deemed to prohibit respondent from retaining, accepting and enforcing in good faith any security interest therein, not to exceed five (5) years in duration, for the sole purpose of securing to respondent full payment of the price, with interest, at which the Plant is sold or disposed of; *provided, however*, that if after a good faith divestiture pursuant to this order, respondent reacquires any of the divested assets by virtue of such security interest, respondent shall redinvest such assets within six (6) months.

IV

It is further ordered, That none of the properties to be divested, as described in Part I of this order, shall be sold or transferred, directly or indirectly, to any person who is at the time of the divestiture an officer, director, employee, or agent of or under the control or direction of, Bird or any of Bird's subsidiary or affiliate corporations, or anyone who owns or controls, directly or indirectly, more than one percent of the

outstanding shares of common stock of Bird, or to anyone who is not approved in advance by the Federal Trade Commission.

V

It is further ordered, That if Bird divests the properties described in Part I of this order, to a new corporation or corporations, the stock of each of which is wholly-owned by Bird, and if Bird then distributes all the stock in said corporation or corporations to the stockholders of Bird, in proportion to their holdings of Bird stock, Part IV of this order shall be inapplicable, and the following Parts VI and VII shall take force and effect in its stead.

VI

It is further ordered, That no person who is an officer, director, or executive employee of Bird, or who owns or controls, directly or indirectly, more than 1 percent of the stock of Bird, shall contemporaneously therewith be an officer, director, or executive employee of any new corporation or corporations described in Part V, or shall contemporaneously therewith own or control, directly or indirectly, more than one percent of the stock of any new corporation or corporations described in Part V.

VII

It is further ordered, That any person who must sell or dispose of a stock interest in Bird or the new corporation or corporations, described in Part V, in order to comply with Part VI of this order may do so within six (6) months after the date on which distribution of the stock of the said corporation or corporations is made to stockholders of Bird.

VIII

It is further ordered, That, pending divestiture, Bird shall not make any changes or permit any deterioration, other than in the ordinary course of business, in any of the plants, machinery, buildings, equipment or other property or assets of the plant to be divested which may impair its present capacity or market value; *provided, however,* that nothing in this order shall prevent respondent from exercising reasonable business judgment with respect to conducting the business and operations of the plant pending divestiture.

IX

It is further ordered, That for a period of ten (10) years from the date

upon which Bird shall become the owner of all or any substantial part of the share capital or assets of Logan-Long, Bird shall not acquire, directly or indirectly, without the prior approval of the Commission, the share capital or assets (other than products acquired for use or resale in the ordinary course of business), of any manufacturer of asphalt roofing products having direct sales within the United States. Direct sales shall include all sales to purchasers for those purchasers' subsequent use in the United States or those purchasers' subsequent resale in the United States.

X

It is further ordered, That Bird shall, within six (6) months of the date upon which it shall become the owner of all or any substantial part of the share capital of Logan-Long, and every six (6) months thereafter, until Bird has fully complied with Part I of this order, submit to the Federal Trade Commission a detailed written report of its actions, plans and progress in complying with the provisions of Part I of this order.

XI

It is further ordered, That Bird notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in Bird which may affect compliance obligations arising out of this order, such as dissolution, assignment or sale resulting in the emergence of a successor corporation or the creation or dissolution of subsidiaries.

IN THE MATTER OF
KOSCOT INTERPLANETARY, INC., ET AL.

CLARIFYING ORDER, ETC., IN REGARD TO ALLEGED VIOLATION
OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 2 OF THE
CLAYTON ACT

Docket 8888. Final Order, Nov. 18, 1975—Clarifying Order, Mar. 9, 1976

Order clarifying previous Commission order issued Nov. 18, 1975, 86 F.T.C. 1106, 40 F.R. 60044, because of apparent misunderstanding as to the significance of order compliance Paragraph VI. Paragraph VI, which requires respondents to deliver copies of Section II of the order to several individuals, is construed by the Commission to impose an obligation on each named respondent only to notify persons who are now or may in the future be acting *on behalf of that particular respondent*. Further, order denies petition of individual respondent Ben Bunting for reconsideration and modification of said order with respect to himself.

ORDER DENYING PETITION FOR RECONSIDERATION

Individual respondent Ben Bunting has filed a petition for reconsideration of the Commission's order in this matter, asking that Paragraph VI of the order be deleted as to him. While the Commission does not believe that modification of the order is necessary or appropriate, we will take this opportunity to clarify the meaning of Paragraph VI, inasmuch as there is apparently some misunderstanding as to its significance.

Paragraph VI requires several named respondents, including respondent Bunting, to deliver a copy of Section II of the Commission's order to:

* * * all present and future salespeople, franchisees, distributors, participants, or other persons engaged in the sale of franchises, distributorships, products, or services on behalf of respondents, and secure from each such person a signed statement acknowledging receipt thereof.

The Commission construes the foregoing paragraph to impose an obligation on each named respondent only to notify persons who are now or may in the future be acting *on behalf of that particular respondent*. Thus, respondent Bunting has no obligation under the order to make notification to salespeople of the corporation Koscot Interplanetary, Inc., since he is no longer affiliated with the company. However, if respondent Bunting should in the future establish a new business involving salespeople operating on his behalf, Paragraph VI of the order would then impose a notification obligation upon him.

If, in the future, the respondent Bunting chooses to constitute such a new business he may petition the Commission to reopen and modify