

IN THE MATTER OF
PILKINGTON BROTHERS P.L.C.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF
THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket C-3136. Complaint, June 22, 1984—Decision June 22, 1984

This consent order requires a British corporation, among other things, to divest within five years, its shares in Ford Glass Limited (FGL) to either Ford Motor Company or another Commission-approved buyer. Respondent must remove any director, alternate director or representative also serving on the board of FGL or Vitro Plan S.A., its Canadian and Mexican joint venture partners engaged in the manufacture of float glass. Although the order permits the firm to discuss the technical aspects of float glass production with its partners, discussions concerning competitive issues are prohibited. The company is further required to waive most of its rights under the Pilkington-Ford Motor Co. Unanimous Shareholder Agreement; vote its Vitro Plan shares in favor of any proposal to increase the Mexican firm's production of float glass; and refrain from invoking a provision of a 1965 agreement barring Mexican investors from producing float glass independently of the joint venture. Additionally, the company is prohibited from acquiring any concern engaged in the production of float glass in North America without prior Commission approval, for a period of ten years.

Appearances

For the Commission: *Robert W. Doyle, Jr.*

For the respondent: *Miles W. Kirkpatrick, Morgan, Lewis & Bockius*, Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that the acquisition by Pilkington Brothers P.L.C. (PB) of 30 percent of the outstanding voting securities of Libbey-Owens-Ford Company (LOF) violates Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and it appearing that a proceeding by the Commission in respect thereof would be in the public interest, the Commission hereby issues its complaint, pursuant to Section 11 of the Clayton Act, 15 U.S.C. 21, and Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), stating its charges as follows:

I. DEFINITIONS

1. For the purpose of this complaint the following definitions shall apply:

(a) *Respondent* means PB, and its subsidiaries, divisions, affiliates, successors and assigns;

(b) *Flat glass* is a generic term for all glass produced in flat form and later cut or shaped into various products; and

(c) *Float glass*, in either clear or tinted form, is unprocessed flat glass manufactured by floating molten glass over a bed of molten material or materials.

II. PILKINGTON BROTHERS P.L.C.

2. PB is a corporation organized and existing under the laws of England, with its principal place of business located at Prescott Road, St. Helens, Merseyside, England. PB is engaged in the manufacture and sale of float glass, float glass products, and other glass products.

3. PB owns 49 percent of Ford Glass Limited, a Canadian float glass manufacturer. Ford Motor Company owns the remaining 51 percent of Ford Glass Limited.

4. PB owns 35 percent of Vitro Plan S.A., a Mexican corporation which owns Mexican operations engaged in the manufacture and sale of float glass, float glass products, or other glass products.

III. LIBBEY-OWENS FORD COMPANY

5. LOF is a corporation organized and existing under the laws of the State of Ohio with its principal place of business located at 811 Madison Avenue, P.O. Box 799, Toledo, Ohio. LOF is engaged in the manufacture and sale of float glass, float glass products, fluid power system components, and laminated and molded plastic products.

IV. JURISDICTION

6. At all times relevant herein, PB has been engaged in and affected "commerce" as that term is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

V. THE ACQUISITION

7. Subject to an outstanding escrow agreement which expired on April 30, 1983, on or about December 31, 1982, PB acquired 30 percent of the outstanding voting securities of LOF.

VI. TRADE AND COMMERCE

8. The relevant market is the manufacture or sale of float glass in North America (the United States, Mexico, and Canada).

9. Both PB and LOF are substantial competitors in the relevant market.

10. Concentration in the relevant market is high.

11. Barriers to entry in the relevant market are substantial.

VII. EFFECTS OF THE ACQUISITION

12. The effect of the acquisition may be to substantially lessen competition in the United States in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, in the following ways, among others:

(a) Substantial actual and potential competition between PB and LOF in the relevant market will be eliminated;

(b) Substantial actual and potential competition between LOF and other companies in the relevant market will be eliminated;

(c) LOF will be eliminated as a substantial independent technological innovator and competitor; and

(d) The already high levels of concentration in the relevant market will be significantly increased.

VIII. VIOLATIONS CHARGED

13. The acquisition constitutes a violation of Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45).

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission and Clayton Acts; and

The respondent, its attorneys, 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 aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents 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 thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Pilkington Brothers is a corporation organized, existing and doing business under and by virtue of the laws of England, with its offices and principal place of business located at Prescott Road, St. Helens, Merseyside, England.

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

I.

It is ordered, That for the purposes of this order, the following definitions shall apply:

1. *Pilkington* means Pilkington Brothers P.L.C., a corporation organized, existing and doing business under the laws of England, with its principal offices at Prescott Road, St. Helens, Merseyside, England, its officers, employees, agents, representatives, parents, divisions, subsidiaries, successors, assigns, and the officers, employees or agents of Pilkington's parents, divisions, subsidiaries, successors, and assigns.

2. *FGL* means Ford Glass Limited, a corporation organized, existing and doing business under the laws of Canada, with its principal offices at 101 Richmond Street West, Toronto, Ontario, Canada, its officers, employees, agents, parents, divisions, subsidiaries, affiliates, successors, assigns, and the officers, employees or agents of FGL's parents, divisions, subsidiaries, affiliates, successors and assigns.

3. *Vitro Plan* means Vitro Plan S.A., a corporation organized, existing and doing business under the laws of Mexico, with its principal offices in Monterrey, Nuevo Leon, Mexico, its officers, employees, agents, parents, divisions, subsidiaries, affiliates, successors, assigns.

and the officers, employees or agents of Vitro Plan's parents, divisions, subsidiaries, affiliates, successors and assigns.

4. *LOF* means Libbey-Owens-Ford Company, a corporation organized, existing and doing business under the laws of Ohio, with its principal offices at 811 Madison Avenue, Toledo, Ohio, its officers, employees, agents, parents, divisions, subsidiaries, affiliates, successors, assigns, and the officers, employees or agents of LOF's parents, divisions, subsidiaries, affiliates, successors and assigns.

5. *Flat glass* is a generic term for all glass produced in flat form and later cut or shaped into various products.

6. *Float glass*, in either clear or tinted form, is unprocessed flat glass manufactured by floating molten glass over a bed of molten material or materials.

7. The *relevant geographic market* is the United States, Canada and Mexico.

II.

It is further ordered, That Pilkington, within five (5) years from the date of service of this order, shall divest its shares in FGL to one or more acquirers which shall be subject to the prior approval of the Federal Trade Commission, *provided, however*, that the divestiture of the shares to Ford Motor Company, or a subsidiary thereof, shall not require the prior approval of the Federal Trade Commission.

III.

It is further ordered, That Pilkington, within thirty (30) days from the date of service of this order, shall remove its directors, alternate directors, or any other representatives from the Boards of Directors of FGL and Vitro Plan and shall not thereafter have representatives of any kind on the Boards of FGL or Vitro Plan without the prior approval of the Federal Trade Commission.

IV.

It is further ordered, That Pilkington shall waive all rights under the Unanimous Shareholders Agreement between Pilkington and Ford Motor Company, dated July 29, 1981, except rights provided by Paragraph 5 of said Agreement, *provided, however*, (1) that such waiver shall not affect the rights provided by said Unanimous Shareholders Agreement to any acquirer or acquirers of Pilkington's shares in FGL, and (2) that if FGL seeks to make any major change, except as may be required by applicable law, in the pension or retirement plans

of FGL, including the principal methods of funding those plans, Pilkington may oppose any such change.

V.

It is further ordered, That if the Series "A" shares of Vitro Plan are voted in favor of (1) any proposal to increase Vitro Plan's production capacity, production operating rates, or sales of float glass in the relevant geographic market, or (2) any proposal necessary to implement a proposed increase in Vitro Plan's production capacity, production operating rates, or sales of float glass in the relevant geographic market, then Pilkington shall vote its Series "B" shares in favor of such proposals.

VI.

It is further ordered, That Pilkington, at all ordinary and extraordinary general shareholders' meetings of Vitro Plan and FGL, shall exclude itself from all discussions or communications regarding any issues of a competitive nature, including but not limited to, issues relating to float glass capacity expansions or restrictions, production operating rates, production costs or any other costs, pricing, sales, marketing, market projections or forecasts, and further that Pilkington, including a proprietary examiner as defined in Article 42 of the Estatutos Sociales of Vitro Plan, S.A., dated March 2, 1981, shall be prohibited from discussing, communicating or expressing its opinion, in any way, with any other shareholders, directors, or officials of Vitro Plan or FGL regarding these issues at any other time, either prior to or subsequent to the aforesaid meetings, *provided, however,* that nothing in this paragraph shall prohibit discussions or communications between Pilkington and Vitro Plan or FGL regarding technical support relating to Vitro Plan's or FGL's production of flat glass (including float glass) or flat glass products, *provided further,* that nothing in this paragraph shall prohibit discussions or communications between Pilkington and Ford Motor Company on matters not related to FGL.

VII.

It is further ordered, That Pilkington shall, for a period of ten (10) years after the effective date of this order:

1. Maintain complete files and records of all correspondence and other communications, whether in the United States or elsewhere,

between Pilkington and Vitro Plan and between Pilkington and FGL, other than in providing technical support to Vitro Plan's or FGL's production of flat glass (including float glass) or flat glass products.

2. Maintain logs of all meetings and nonwritten communications, other than in providing technical support to Vitro Plan's or FGL's production of flat glass (including float glass) or flat glass products, whether in the United States or elsewhere, between Pilkington and Vitro Plan and between Pilkington and FGL, including in such logs the names and corporate positions of all participants, the dates and locations of the meetings or other communications and a summary or description of the matters discussed in each such meeting or other communications.

3. Retain and make available to the Federal Trade Commission on request the complete files, records and logs required by subparagraphs 1 and 2.

4. Submit annually to the Federal Trade Commission a detailed sworn statement setting forth the manner and form in which Pilkington has complied with Paragraphs VI and VII of this order.

Provided, however, That nothing in this Paragraph VII shall require Pilkington to maintain files, records or logs of any communications with Ford Motor Company on matters not related to FGL or to report the same to the Federal Trade Commission.

VIII.

It is further ordered, That Pilkington shall not vote its shares in Vitro Plan to amend or in any way alter the Estatutos Sociales of Vitro Plan, S.A., dated March 2, 1981, without the prior approval of the Federal Trade Commission.

IX.

It is further ordered, That Pilkington shall not invoke the provisions of Article VIII of the Agreement between Pilkington and Fomento de Industria y Comercio S.A., dated March 29, 1965, so as to prevent Vitro S.A. from engaging in the manufacture of float glass in Mexico through companies other than Vitro Plan.

X.

It is further ordered, That for a period commencing on the date of service of this order and continuing for ten (10) years from and after the date of service of this order, Pilkington shall cease and desist from acquiring, without prior approval of the Federal Trade Commission,

directly or indirectly, through subsidiaries or otherwise, any interest in, or the whole or any part of the stock, or share capital of any company engaged in the production of float glass in the relevant geographic market, or assets used in the production of float glass of any company which is now or has previously been engaged in the production of float glass in the relevant geographic market, *provided, however*, that such prior approval of the Federal Trade Commission is not required for (1) further acquisition of stock of LOF, or (2) further acquisition of the capital stock of Vitro Plan, *provided, however*, such further acquisition does not increase Pilkington's holdings in Vitro Plan above 35%.

XI.

It is further ordered, That Pilkington shall, within sixty (60) days from the date of service of this order, and annually thereafter until the tenth anniversary thereof, submit in writing to the Federal Trade Commission a report setting forth in detail the manner and form in which it intends to comply, is complying and has complied with the terms of this order, and such additional information relating thereto as may from time to time reasonably be required.

XII.

It is further ordered, That Pilkington shall, within sixty (60) days from the date of service of this order, and every one hundred and twenty (120) days thereafter until it has fully complied with Paragraph II of this order, submit in writing to the Federal Trade Commission a report setting forth in detail the manner and form in which it intends to comply, is complying and has complied with the terms of Paragraph II of this order and such additional information relating thereto as may from time to time reasonably be required.

XIII.

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

XIV.

It is further ordered, That Pilkington shall use its best efforts to obtain promptly any approval by the Canadian government, or any subdivision thereof, that is necessary to its compliance with this order.

Due to insufficient information supplied by respondent SCM Corporation, Commission was unable to determine whether proposed interlocking directorate would violate provisions of Final Order entered against SCM. (92 F.T.C. 416 (1978)) [*Kraftco Corporation, et al., Dkt. 9035*]

June 18, 1984

Dear Mr. Willis:

This is in response to your request for advice as to whether Dr. Richard R. West may serve simultaneously on the boards of directors of SCM Corporation ("SCM") and Bohemia, Inc. ("Bohemia") without violating the prohibition against interlocking directorates contained in the Commission's order in Docket No. 9035 ("the order") [92 F.T.C. 416 (1978)]. This request was made on behalf of SCM, which became subject to the Commission's order on October 6, 1980 [14 C.D. 23 (612 F.2d 707 (1980), *cert. denied*, 449 U.S. 821 (1980))].

According to your request, Dr. West is presently a member of the SCM board and would like to rejoin the Bohemia board, provided that his simultaneous service on the two boards would not violate the order. Your request involves a product overlap that occurs between SCM's subsidiary, Allied Paper, Incorporated ("Allied") and Bohemia; however, there is no direct product overlap between the two parent companies, SCM and Bohemia. You advise that Dr. West is not a director of Allied and that he is not involved with Allied's operating policies.

Your request states that Allied owns and operates a lumber mill in Jackson, Alabama which sells lumber products, primarily to customers in the Southeast, under the "M.W. Smith Lumber Company" ("M.W. Smith") trade name. For the fiscal year ended June 30, 1982, the total sales of Allied and its subsidiaries were \$288 million including \$6.9 million total sales of all forms of lumber. You state that Bohemia and M.W. Smith both sell lumber products in 18 states. The total annual sales of lumber products in the 18 states is \$5.2 million for Bohemia and \$4.1 million for M.W. Smith. Bohemia and M.W. Smith each have sales of \$100,000 or more of lumber products only in two states, Louisiana and Oregon and neither company is aware of any instance in which they have sold products to the same customers. The total sales of Bohemia and M.W. Smith combined account for less than 1% of all sales included under SIC Code No. 2421 - Sawmills & Planing Mills, General. You state that the only information which the SCM board sees with respect to M.W. Smith "would be a sales and a profit line in the annual budget and in long range plans."

We believe that the order in Docket No. 9035 would be applicable by its terms to this interlock. Paragraph I of the order prohibits SCM

from having a common director with any corporation which competes with SCM in the production or sale of any product or service. The order does not contain any *de minimis* exception.

Nor can we say that any of the other possible grounds for exception are applicable here. The Commission has considered whether the Docket No. 9035 order is applicable to situations where the prospective interlock is between parent companies but the competition occurs between one parent and the subsidiary of the other parent. As stated above, the order prohibits SCM from having a director interlock with Kraft or with any other corporation (other than a subsidiary, parent, or sister of SCM) which competes with SCM in the production or sale of any product or service. The order thus contains a specific exemption for interlocks arising solely between SCM and its subsidiaries, and it does not provide any exemption for the activities of subsidiaries in other contexts. The Commission concludes that no such exemption was intended and that the language of the order is broad enough to encompass the prospective interlock described in your request.

The Commission has likewise considered whether it is appropriate to impute Allied's activities to SCM for the purpose of determining order coverage. In this connection, the Commission's opinion in *Borg-Warner Corporation*, Docket No. 9120 (Slip Opinion, June 3, 1983) [101 F.T.C. 863 at 919], discussed the question of when it was appropriate to impute a subsidiary's activities to a parent corporation for Section 8 purposes. The Commission stated that the relevant inquiry under Section 8

is whether the parent company should be regarded as a "competitor" of the subsidiary's competitors, and whether an interlocked director is so placed as to be able to exercise control or even to substantially influence decisionmaking at the director level so as to dampen competitive relationships between divided corporate interests. The common law "control" inquiry is relevant insofar as it is an indication of the likelihood of collusion and anticompetitive transfer of information among competitors.

The staff invited you to supply detailed information on the control and other factors deemed relevant by the Commission in *Borg-Warner* as they relate to the relationship between SCM and M.W. Smith, but you did not do so, with the exception of stating that SCM knows "of no communication whatsoever between M.W. Smith (or Allied) and Bohemia." Accordingly, based on the limited information that you have supplied, the Commission is unable to determine that it would be inappropriate in this instance to impute Allied's activities to SCM for the purpose of determining order coverage.

In the light of the fact that the information supplied in your request is insufficient to resolve the question of whether Allied's activities should be imputed to SCM, the Commission is unable to determine

whether the simultaneous service of Dr. West on the boards of SCM and Bohemia would violate Paragraph I of the order.

By direction of the Commission.

Letter of Request

February 15, 1983

Dear Mr. Feinberg:

This is a request made on behalf of respondent, SCM Corporation ("SCM"), for your determination that the simultaneous service of Dr. Richard R. West on the boards of directors of SCM and Bohemia, Inc. ("Bohemia") would not violate the Order in the above matter.

Dr. West became a member of the Board of Directors of SCM in December, 1982. He had previously been a member of the Board of Directors of Bohemia, but he resigned from that position pending resolution of the question which we are raising in this letter. If you determine that Dr. West's simultaneous service on the boards of SCM and Bohemia would not violate the Order, Dr. West intends to rejoin the Bohemia board.

Dr. West is the Dean of the Amos Tuck School of Business Administration, Dartmouth College. He is a director of The Dorsey Corporation (a manufacturer of cargo trailers and plastic containers), Liberty Communications Inc. (a cable TV and TV broadcasting company), Vornado, Inc. (a real estate holding company), and several investment companies.

Bohemia has its principal office in Eugene, Oregon and is engaged in the manufacture and sale of a variety of forest products, including lumber, plywood, veneer, particleboard and laminated beams, in marine construction and in the production of rock, gravel and aggregates. For the fiscal year ended April 30, 1982, Bohemia had total sales of \$155 million; of those sales \$65 million were sales of lumber.

SCM has its principal office in New York, New York and had total sales for the fiscal year ended June 30, 1982 of \$1.9 billion. As you know, the company's major businesses are chemicals, coatings and resins, paper products, foods, and typewriters and appliances.

SCM owns Allied Paper, Incorporated, a Delaware corporation ("Allied"), with its principal office in Kalamazoo, Michigan. Allied's operations include a paper mill located in Jackson, Alabama. In conjunction with its paper mill, Allied owns and operates a lumber mill, also located in Jackson, Alabama; the lumber mill sells lumber products, mainly to customers in the Southeast, under the "M.W. Smith Lumber Company" trade name ("M.W. Smith"). For the fiscal year ended June 30, 1982, the total sales of Allied and its subsidiaries were \$288 million, including \$6.9 million total sales of all forms of lumber.

The lumber products of Bohemia and M.W. Smith are all included under SIC Code No. 2421 - Sawmills & Planing Mills, General. This product line is dominated by such industry giants as Weyerhaeuser Co. Inc., Louisiana-Pacific Corp., Georgia-Pacific Corp., St. Regis Paper Co. Inc., Boise Cascade Corp. and many others. Bohemia's market share of this category is approximately one-half of 1% and M.W. Smith's share is infinitesimal.

There are 18 states in which Bohemia and M.W. Smith both sell at least some quantity of lumber products. (See attached list.) The total annual sales of lumber products sold in those 18 states is \$4.1 million for M.W. Smith and approximately \$5.2 million for Bohemia (annualizing the six-months sales of the California mills—see footnote to attached list). You will note that the list shows only two states (Louisiana and Oregon) in which Bohemia and M.W. Smith each have sales of \$100,000 or more of lumber products.

Of M.W. Smith's lumber sales, approximately 46% are to "office wholesalers" (non-stocking); 25% are to "yard wholesalers" (stocking); and the balance are direct sales to retailers or manufacturers. Of Bohemia's lumber sales, less than 15% are to office wholesalers; and most of Bohemia's sales are to yard wholesalers, contractors and retailers.

M.W. Smith and Bohemia have each checked with their sales personnel, and none knew of any direct competition between the two companies, that is, instances in which both companies were competing for the business of the same customer. It is, of course, possible that, unknown to the present sales personnel of the two companies, they have sold some product or products to the same customers. Even here there is not likely to be any substantial competition in view of the fact that the sales were quite small in each state and the principal channels of distribution employed by the two companies differ.

Dr. West does not serve on the board of the SCM subsidiary, Allied. Nor in his capacity as a director of SCM would he be involved with the operating policies of Allied or M.W. Smith.

Although both Bohemia and M.W. Smith market some of the same products, they market in only 18 states in common, the sales volume is minimal in each state and one markets principally to office wholesalers while only 15% of the other's sales are to such customers. Further, the sawmills and planing mills category is so large that even the combined share of Bohemia and M.W. Smith is miniscule.

In these circumstances, we do not believe that either the Act or the Order were intended to bar Dr. West's service on the boards of SCM and Bohemia.

We respectfully request that you indicate that you have no objection to service by Dr. West on the board of directors of Bohemia.

Thank you for your early consideration of this request.

Sincerely,

/s/ William E. Willis

Sales of Board ("B"), Standard
Dimension ("D"), Industrial ("I"), Saps ("S"),
Flooring ("F"), Sidings ("Si"), Prime ("P"),
Wolmanized Lumber ("W") Products by
Bohemia, Inc., (FY ended 4/30/82)*
and M.W. Smith Lumber Co. (FY ended 6/30/82)

State	Bohemia		M.W. Smith	
	\$000's	Prod.	\$000's	Prod.
AL	70	B,D	2,340	B,D,I, S,F,Si, P,W
FL	100	D	90	D
GA	30	B,D	170	B,D,I, F,Si
IL	50	B,F	30	B,F,W
KY	10	B	290	B,D,I, F,Si,W
LA	470	B,D	100	B,D,I, Si,W
MD	20	B	10	B,Si
MI	110	D	10	D,I
MN	190	B	10	B
MO	160	B,D	70	B,D,I
NC	70	B	100	B,D,I
NY	30	D	20	B,D,I
OH	20	D	140	B,D,I, F,W
OR	2,120	B,D	180	B,D,F
PA	20	D	5	D
TN	30	B,D	430	B,D,F, Si
TX	950	B,D,I	50	B,D,I
VA	30	D	40	D,I,S

* Sales for Bohemia in these states are based on annual sales for Oregon mills (representing 80% of all sales) and six-months sales for California mills.

Second Letter of Request

August 26, 1983

Dear Mr. Feinberg:

In connection with our pending request on behalf of SCM Corporation ("SCM") for your determination that the service of Dr. Richard R. West on the Boards of Directors of SCM and Bohemia, Inc. is not in violation of the Order entered in the above Docket, I would like to call your particular attention to the recent decision of the Commission *In the Matter of Borg-Warner Corporation, et al.*, Docket No. 9120. [101 F.T.C. 863 (1983)]

The *Borg-Warner* decision confirms, I believe, that in view of all of the circumstances the service of Dr. West on the Boards of the two companies would neither violate the law nor the outstanding Order.

The Commission clearly articulated in *Borg-Warner*: "A parent corporation is not a competitor of another corporation merely because its subsidiary is. (citing cases)" (at p. 16), and further declared: "The relevant inquiry under Section 8 is . . . whether an interlocked director is so placed as to be able to exercise control or even to substantially influence decision making at the director level so as to dampen competitive relationships between divided corporate interests" (at p. 18).

The Board of Directors of SCM is not involved in and does not participate in the operation and policies of the M.W. Smith Lumber Company, an operating group which is a part of SCM's subsidiary, Allied Paper, Incorporated. As we have previously disclosed to you, M.W. Smith's sales are a small fraction of 1% of SCM's total sales. M.W. Smith's sales are in a sense generated as a by-product of Allied's principal business, the manufacture of pulp and paper products; thus, the M.W. Smith Lumber Company is located near Allied's Jackson, Alabama pulp and paper mill and was acquired by SCM, in 1981, mainly as an adjunct to the pulp mill because it provided a local source of wood chips, timber and timber cutting rights.

The monthly and annual financial operating reports which are presented to the SCM Board of Directors include data as to each of SCM's divisions with some breakouts for operating groups; but there are no such breakouts for the small M.W. Smith operations. The only such information which the Board sees with respect to M.W. Smith would be a sales and a profits line in the annual budget and in long range plans.

In the case of SCM and M.W. Smith we have a relationship which is even more remote than the Commission faced in *Borg-Warner* inasmuch as the SCM subsidiary, Allied, is essentially a pulp and paper producer and only this small group in Jackson, Alabama, representing about 2% of Allied's sales, is engaged in activities which could be competitive with Portland, Oregon-based Bohemia, Inc.

In fact, of course, as indicated in our prior submission, neither the Bohemia management nor the M.W. Smith management consider the other company to be a competitor, and neither management knew of any specific instances in which any of their products were sold in competition with the products of the other company.

Unlike the situation in *Borg-Warner*, we know of no communications whatsoever between M.W. Smith (or Allied) and Bohemia.

The Commission in *Borg-Warner* placed great emphasis upon the purposes of Section 8, noting that interlocking directorates were seen by Congress as "likely to facilitate collusion" (p. 25) "and anti-competitive transfer of information among competitors" (at p. 18). It is the possibility of such "collusion", the Commission declared, that renders the "control" inquiry relevant.

The absence of SCM Board involvement in the M.W. Smith activities, the fact that M.W. Smith itself is merely part of a larger subsidiary of SCM and the fact that M.W. Smith's sales are tiny in comparison both to the total sales of SCM and of its subsidiary Allied, render non-existent the risk of collusion which underlies the purpose of Section 8 of the Clayton Act and the Order which has been rendered in this proceeding. Furthermore, when one realizes that the total share of the lumber market enjoyed by Bohemia and M.W. Smith together does not reach 1%, and that in fact the companies are not even aware of any competition between them, any fear of collusion is beyond belief.

We renew our pending request that you indicate no objection to the service of Dr. West on the Board of Directors of Bohemia, Inc.

Sincerely,

/s/ William E. Willis

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*Commodities involved in dismissing or vacating orders are *italicized*.

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