

IN THE MATTER OF

SENSORMATIC ELECTRONICS CORPORATION

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

Docket C-3572. Complaint, April 18, 1995--Decision, April 18, 1995

This consent order prohibits, among other things, Sensormatic Electronics Corporation, a Florida-based manufacturer of electronic-article surveillance systems from acquiring patents and other exclusive rights for manufacturer installed disposable anti-shoplifting labels from Knogo Corporation, as they pertain to the United States and Canada. Also, the consent order requires Sensormatic, for ten years, to obtain Commission approval before acquiring certain rights in connection with Knogo's SuperStrip, or any significant acquisitions of entities engaged in, or assets used for, the research, development or manufacture of disposable labels, or acquisitions of patents or other intellectual property for such purposes.

Appearances

For the Commission: *Ann Malester, Arthur M. Strong and Melissa K. Heydenreich.*

For the respondent: *Wm. Randolph Smith, Crowell & Moring, Washington, D.C. and Steven A. Newborn, Rogers & Wells, Washington, D.C.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that Sensormatic Electronics Corporation ("Sensormatic"), hereinafter sometimes referred to as respondent, has agreed to acquire through a merger certain assets of the Knogo Corporation 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 ("FTC Act"), 15 U.S.C. 45; and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. DEFINITIONS

1. *"Hard goods EAS systems"* means electronic article surveillance systems and components designed to protect against shoplifting of hard goods merchandise by means of electronic hardware capable of detecting disposable labels attached to such merchandise.

2. *"Disposable labels"* means labels affixed to or embedded in retail merchandise and used in conjunction with hard goods EAS systems.

3. *"Source labelling"* means the process by which manufacturers, packagers, or independent wholesalers apply disposable labels to retail merchandise or its packaging.

4. *"SuperStrip"* means a proprietary material developed and patented by Knogo Corporation and used or intended for use in disposable labels.

5. *"United States"* means the fifty states, the District of Columbia, and Puerto Rico.

II. RESPONDENT

6. Respondent Sensormatic is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 500 N.W. 12th Avenue, Deerfield Beach, Florida.

7. Respondent is, and at all times relevant to this proceeding has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

III. ACQUIRED COMPANY

8. Knogo Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 350 Wireless Boulevard, Hauppauge, NY.

9. Knogo is, and at all times relevant to this proceeding has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose

business is in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

IV. ACQUISITION

10. On or about August 14, 1994, Sensormatic and Knogo entered into an agreement whereby Sensormatic agreed to acquire through a merger all of Knogo's assets outside of North America, along with patents related to SuperStrip ("Acquisition"). In addition, the agreement obligates Sensormatic and Knogo North America, Inc. ("Knogo/NA"), a successor corporation to Knogo's business and assets in the United States and Canada, to grant royalty-free cross licenses to one another for any improvements to patents or trade secrets related to SuperStrip.

V. TRADE AND COMMERCE

11. For purposes of this complaint, the relevant line of commerce in which to analyze the Acquisition is the research and development of disposable labels developed or used for source labelling and the research and development of processes to manufacture disposable labels.

12. For purposes of this complaint, the relevant geographic area is the United States and Canada.

13. The relevant market set forth in paragraphs eleven and twelve is highly concentrated.

14. Entry into the relevant market would not be timely, likely or sufficient to deter or counteract the adverse competitive effects described in paragraph sixteen of the complaint because of patent protection for important technology and the time required to develop the requisite technical skills to compete in the relevant line of commerce.

15. Sensormatic and Knogo are actual competitors in the relevant market.

VI. EFFECTS OF THE ACQUISITION

16. The effects of the Acquisition if consummated may be substantially to lessen competition in the relevant market in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the

Federal Trade Commission Act, 15 U.S.C. 45, in the following ways, among others:

- a. By reducing Knogo's incentives to research and develop disposable labels to be designed or used for source labelling;
- b. By decreasing the number of research and development tracks for disposable labels to be designed or used for source labelling; and
- c. By increasing Sensormatic's ability to unilaterally reduce research and development of disposable labels for source labelling.

17. All of the above increase the likelihood that firms in the relevant market will restrict output of research and development both in the near future and in the long term.

VII. VIOLATIONS CHARGED

18. The acquisition agreement described in paragraph ten constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

19. The acquisition described in paragraph ten, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the proposed acquisition by respondent of certain assets and businesses of the Knogo Corporation, and the respondent having been furnished thereafter with a copy of a draft of complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations 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; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by 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 respondent that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true 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 a 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, now in further conformity with the procedure described 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 Sensormatic Electronics Corporation ("Sensormatic") is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 500 N.W. 12th Avenue, Deerfield Beach, Florida.

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, as used in this order, the following definitions shall apply:

A. "*Respondent*" or "*Sensormatic*" means Sensormatic Electronics Corporation, its predecessors, subsidiaries, divisions, and groups and affiliates controlled by Sensormatic Electronics Corporation, their directors, officers, employees, agents, and representatives, and their successors and assigns.

B. "*Knogo*" means Knogo Corporation, its predecessors, subsidiaries, divisions, and groups and affiliates controlled by Knogo, their directors, officers, employees, agents, and representatives, and their successors and assigns.

C. "*KNA*" means Knogo North America, Inc., the successor corporation to Knogo Corporation's business and assets in the United States and Canada to be formed pursuant to the Contribution and Divestiture Agreement between Knogo Corporation and Knogo North America, Inc., its subsidiaries, divisions, and groups and affiliates controlled by Knogo North America, Inc., their directors, officers, employees, agents, and representatives, and their successors and assigns.

D. "*Commission*" means the Federal Trade Commission.

E. "*Acquisition*" means the transaction described in the Agreement and Plan of Merger among Sensormatic, Knogo, and KNA, dated August 14, 1994.

F. "*Hard goods EAS systems*" means electronic article surveillance systems and components designed principally to protect against shoplifting of hard goods merchandise (*e.g.*, books, audio recordings, health and beauty aids, groceries, and home center merchandise), by means of electronic hardware capable of detecting disposable labels attached to such merchandise, whether the systems or components generate, detect, or employ radio frequency, electromagnetic, microwave, acoustic magnetic, or other electronic signals. Such systems and components may include electronic signal transmitters and receivers, signal processing equipment, computer software, label activation equipment, label deactivators, automatic and manual label applicators, and other related devices.

G. "*Disposable labels*" means labels that can be affixed to or embedded in retail merchandise and used in conjunction with hard goods EAS systems.

H. "*Source labelling*" means the process by which manufacturers, packagers, or independent wholesalers apply disposable labels to retail merchandise or its packaging.

I. "*SuperStrip*" means:

1. The material, described in Exhibit A attached hereto and made a part hereof, used or intended for use in disposable labels; and
2. Disposable labels incorporating such material.

J. "*SuperStrip Technology*" means all existing patents, inventions, trade secrets, know-how, concepts, designs, technical information, processes, and intellectual property relating to the design, manufacture, or use of SuperStrip.

K. "*SuperStrip Improvements*" means all improvements, modifications, developments, revisions, or enhancements of SuperStrip or SuperStrip Technology, whether or not covered by a patent or otherwise protected against disclosure or unauthorized use by law.

L. "*Supply Agreement*" means Exhibit B to the Contribution and Divestiture Agreement, attached as Exhibit C to the Agreement and Plan of Merger among Sensormatic, Knogo, and KNA, dated August 14, 1994, that requires Sensormatic to purchase products and materials for hard goods EAS systems from KNA upon the terms and conditions set forth therein.

M. "*United States*" means the fifty states, the District of Columbia, and Puerto Rico.

II.

It is further ordered, That:

A. As of the date this order becomes final, respondent shall not hold, possess, receive, or otherwise obtain, or have held, possessed, received, or otherwise obtained, the SuperStrip Technology from Knogo or KNA. Provided, however, that no provision of this order shall prohibit an acquisition by respondent from Knogo or KNA of: (1) a non-exclusive license of the SuperStrip Technology to practice and use SuperStrip and SuperStrip Technology in the United States and Canada; and (2) ownership of, or other exclusive or non-exclusive legal or equitable rights to practice and use, SuperStrip, SuperStrip Technology, and SuperStrip Improvements outside of the United States and Canada.

B. Respondent shall comply with the terms and conditions of the Supply Agreement.

III.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, respondent shall not, without the prior approval of the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

A. Acquire any legal or equitable rights to practice and use SuperStrip, SuperStrip Technology, or SuperStrip Improvements in the United States and Canada other than: (1) rights to manufacture in the United States for export only; or (2) a non-exclusive license that is also offered to other manufacturers of hard goods EAS systems or disposable labels in connection with adoption of a retail segment standard;

B. Acquire any stock, share capital, equity or other interest in any person or concern, corporate or non-corporate, engaged at the time of such acquisition in, or within the two (2) years preceding such acquisition engaged in, the research, development, or manufacture of disposable labels designed or used for source labelling; provided, however, that individual employees or directors of respondent and each pension, benefit, or welfare plan or trust controlled by respondent may acquire, for investment purposes only, an interest of not more than one (1) percent of the stock or share capital of such person or concern; or

C. Acquire any patents, intellectual property, or other tangible or intangible assets, other than a non-exclusive license, used in or previously used in (and still suitable for use in) the research, development, or manufacture of disposable labels designed or used for source labelling.

Provided, however, that an acquisition pursuant to paragraph III.B. or III.C. shall be exempt from the prior approval requirements of this paragraph III if: (1) the stock, share capital, equity, or assets are acquired from a person or concern that had less than \$2 million in annual sales in the United States of disposable labels in either of the two (2) most recent calendar years preceding such acquisition; (2) the acquisition is of assets relating solely to the manufacture of, improvements of, or accessories to Sensormatic products that are in existence as of the time of the acquisition; (3) the acquisition is of assets from or an interest in a joint venture in which respondent is one participant and in which no other joint venture participant was at the time of the commencement of the venture engaged in the research, development, or manufacture of disposable labels in the United States; (4) the acquisition is of rights or other assets to be used solely in commercial or industrial (*i.e.*, non-retail) applications; or (5) the acquisition is of rights or other assets (other than United States or Canadian marketing rights to patents, trade secrets and other

intellectual property) to be used solely for products sold outside the United States and Canada.

IV.

It is further ordered, That within sixty (60) days after the date this order becomes final, one year (1) from the date this order becomes final, and annually for the next nine (9) years on the anniversary of the date this order becomes final, and at such other times as the Commission may require, respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with this order.

V.

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

VI.

It is further ordered, That, for the purpose of determining or securing compliance with this order, subject to any legally recognized privilege and upon written request with reasonable notice, respondent shall permit any duly authorized representatives of the Commission:

A. Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of respondent relating to any matters contained in this order; and

B. Upon five (5) days' notice to respondent and without restraint or interference from it, to interview officers, directors, or employees of respondent, who may have counsel present regarding such matters.

EXHIBIT A

SUPERSTRIP MATERIAL

- SuperStrip I: SuperStrip I is covered by Patent numbers 5,029,291 (docket number 85.151) and 5,304,987 (docket number 85.168) and one invention disclosure (as described in docket number 85.184). These patents and disclosure describe a new type of oxidized magnetic material with an asymmetrical hysteresis curve and the ability to become magnetically deactivated. SuperStrip I material is produced by a process, as described in Knogo's patent, that involves the cutting of amorphous magnetic material into short, tag-length segments and annealing these segments for several hours in the presence of a magnetic field.
- SuperStrip II: SuperStrip II is a modified version of Knogo's standard magnetic tag. Short deactivation segments are electroplated onto the soft part of the magnetic strip in a continuous process instead of being mechanically cut and adhered to the strip. A U.S. patent application (docket number 85.180) filed by Knogo is pending with respect to this process.
- SuperStrip III: SuperStrip III, which is the subject of a pending U.S. patent application (docket #85.191) filed by Knogo is a recent development involving the melt-spin casting of a specially formulated amorphous magnetic material in such a way as to produce a unique hysteresis curve in a manner similar to that of SuperStrip I, but without the use of any additional processing steps beyond casting the material.

STATEMENT OF MARY L. AZCUENAGA
CONCURRING IN PART AND DISSENTING IN PART

Today the Commission accepts a consent order that would settle allegations that Sensormatic Electronics Corporation's acquisition of Knogo Corporation's patents related to SuperStrip and the agreement to cross-license improvements to SuperStrip violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act. I

find reason to believe the transaction violates the law and concur in accepting the order. I dissent, however, from the allegations in the complaint defining the relevant market and from paragraph II(B) of the order, which requires that Sensormatic adhere to a private supply contract.

Sensormatic and Knogo produce and sell electronic article surveillance ("EAS") systems and components, used by retailers to protect against shoplifting. EAS systems provide a warning when a special label attached to merchandise by the retailer triggers an electronic signal on hardware located at the store's exit, unless the label has been neutralized by store employees at the time of sale. Because Sensormatic proposes to acquire only those assets of Knogo located outside North America, the competitive analysis of the transaction does not focus on the production and sale of existing EAS systems and labels to retailers in the United States and Canada.

Sensormatic, Knogo, and other firms, however, are also engaged in research and development to perfect a new "source labelling" system. In such a system, manufacturers would apply the EAS label to the merchandise or its packaging, which would eliminate the need for retailers manually to affix a label to each protected item of merchandise. No source labelling system is currently in use, but Knogo has developed and patented SuperStrip technology for use in labels, potentially including source labels, and other firms are developing their own source labelling technologies.

I concur that the relevant market involves competition in research and development, but question the market definition in paragraph eleven of the complaint, which is narrowly limited to the research and development of "disposable labels developed or used for source labelling" and processes to make them. In a Section 7 case, the Commission has the burden of proving the relevant product market, and distinguishing research and development of source labelling from other improvements in EAS systems may be difficult or impossible. I would not limit the product market to research and development in source labelling but would define the market as research and development in EAS systems and components, including source labelling.

I also dissent from paragraph twelve of the complaint, which limits the geographic market to the United States and Canada. Successful research and development yields intellectual property that can move freely across international boundaries. A foreign firm can

license intellectual property without establishing a manufacturing or sales presence in the United States. Limiting the geographic market to the United States and Canada excludes from the market the potentially important research activity of at least one European firm. Even if domestic firms are familiar with particular technologies and have a sizable base of equipment already installed in retail stores, research and development may yield an improvement significant enough to overcome the advantages of current market leaders. The market should not be so narrowly defined as to presume that only North American firms could effect a significant breakthrough that might alter the current competitive balance.

Applying Section 7 analysis to the product and geographic markets as I would define them, I find reason to believe the transaction would violate the law. The proposed acquisition would significantly increase concentration in the already highly concentrated world market for EAS system research and development. The proposed transaction, the transfer of patents from Knogo to Sensormatic and the agreement to grant royalty-free cross licenses on any improvements to SuperStrip, likely would diminish competition in research and development of new EAS systems and components. Accordingly, I concur in paragraph II(A) of the order.

Finally, I dissent from paragraph II(B) of the order, which provides that Sensormatic "shall comply with the terms and conditions" of a supply agreement between Sensormatic and Knogo North America, Inc., the successor corporation to Knogo's North American business. The supply agreement is a long, highly detailed commercial contract that was negotiated as part of the acquisition in question. The complaint contains no allegations establishing a relationship between this contract and the state of competition in any antitrust market. Absent a demonstrable link between the contract and competition, the contract provides no basis for liability and compliance with the contract does not appear necessary to effect relief.

Complaint

119 F.T.C.

IN THE MATTER OF

B.A.T INDUSTRIES P.L.C., ET AL.

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

Docket 9271. Complaint, Nov. 28, 1994--Decision, April 19, 1995

This consent order permits, among other things, B.A.T Industries and Brown & Williamson Tobacco Corporation to consummate the acquisition of American Tobacco Company, but requires them to divest, within twelve months, six American Tobacco discount cigarette brands and to divest to the purchaser of these brands three American Tobacco full-revenue brands, as well as the American Tobacco manufacturing facility in Reidsville, N.C. If the required divestitures are not completed on time, the consent order permits the Commission to appoint a trustee to complete the transactions. In addition, the consent order requires the respondents, for ten years, to obtain Commission approval before acquiring any interest in a cigarette manufacturer or any assets used to manufacture or distribute cigarettes in the United States.

Appearances

For the Commission: *Joseph Krauss, Howard Morse and William Baer.*

For the respondents: *Ronald S. Rolfe, Cravath, Swaine & Moore, New York, N.Y. Daniel J. O'Neill, Chadbourne & Parker, New York, N.Y. and Mark Crane, Hopkins & Sutter, Chicago, IL.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that respondent B.A.T Industries p.l.c., a corporation subject to the jurisdiction of the Federal Trade Commission, has agreed to acquire the American Tobacco Company, a corporation subject to the jurisdiction of the Federal Trade Commission, in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and it appearing to the Commission that a proceeding in respect thereof