PLAINTIFF'S EXHIBIT

TN-5777

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	
V.	:	
	:	CRIMINAL NO. 21,118
JOHNS-MANVILLE CORPORATION,	:	
KEASBEY & MATTISON COMPANY,	:	
ROBERT F. ORTH and	:	
ROBERT R. PORTER	:	

ORDER SUR MOTIONS OF ALL DEFENDANTS FOR JUDGMENTS OF ACQUITTAL

AND NOW, April 16, 1964, IT IS ORDERED that:

(A) the Motion of defendant Robert R. Porter for judgment of acquittal on all counts is GRANTED; and

(B) the Motions of defendants Robert F. Orth, Johns-Manville Corporation, and Keasbey & Mattison Company for judgment of acquittal are DENIED as to Count One and GRANTED as to Counts Two and Three.

/s/ Francis L. Van Dusen

J.

Part (A) of Order

See Document 179, being MEMORANDUM OF RULINGS ON OBJECTIONS TO EXHIBITS OFFERED AGAINST DEFENDANT PORTER dated April 9, 1964.

Part (B) of Order (Count One)

The evidence justifies a finding that the corporate defendants, during the period from 1954 to 1959, arranged f

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meetings of their subordinate employees to achieve uniformity in their price lists (note testimony that the purpose of the first meeting was to make prices uniform by raising K & M prices about 5% and J-M was to "bring (their prices up) accordingly" -- N. T. 3033). After the meetings, the Vice President of K & M approved the resultant price lists with minor changes, if any. Deviations from the price lists involving reductions were discussed between representatives of the companies and usually approved if not substantial (N. T. 3029-30, 3084-7, 3155-6, 3159, and 3166-9). The list prices of the corporate defendants remained substantially identical until the date of the Indictment (6/1/62).

By the year 1958, the volume of A-C (asbestos-cement) pipe imported from Europe was such as to cause both corporate defendants concern and their competition with it was vigorous. They expressed the desire to prevent it from securing a foothold in this country. At meetings in Europe, 1959 and 1960, defendant Orth, a Vice President of Johns-Manville in charge of Pipe Sales, complained of the unstabilizing effect of sales of European A-C pipe on the prices in the United States and the importance of stabilizing such prices (see Exhibit A). At these meetings, the restriction of imports of European A-C pipe to a definite amount were discussed and efforts were made by defendant Orth to secure some restrictions on imports (N. T. 7973) and price stabilization (see Exhibit A).

The jury may consider this evidence in its case against Keasbey & Mattison, its sole stockholder being Turner & Newell,



Ltd., at least in connection with the efforts by Mr. Orth to secure agreement of the European importers to stabilization of prices and restriction of imports:

A. In June 1959, Mr. Costa testified that at a meeting in Brussels, attended by Mr. Colton, Vice President of Johns-Manville International, Mr. Colton stated that Mr. Orth would come to Europe to discuss exports of A-C pipe from Europe to the United States with the European manufacturers of A-C pipe present at that meeting (N. T. 7895). On the evening of this meeting, Mr. Costa saw Mr. Colton in the presence of Mr. Bateman (managing partner of Turner & Newell, Ltd., which owned all the stock of Keasbey & Mattison Co.) in the hotel lobby (N. T. 7898-7900).

B. Mr. Costa testified at N. T. 7941 concerning the Paris meeting of March 1960:

> ". . . we raised . . . the question . . . even supposing that we make an arrangement with Johns-Manville, what about Keasbey & Mattison? In other words, if they do their own selling policy, what is the use of finding any arrangement whatsoever?
>
> "And I remember Mr. Orth saying that we should not have worried about it, because he would have gone to London to see Turner and Newall on the subjects of Keasbey & Mattison, or something like that. I don't remember when he said, when, or tomorrow or within a week, or that I don't remember."

Mr. Koons testified at N. T. 9338-9340 that Mr. Orth had stated at the March 1960 Paris meeting that "he had the permission to make agreements for and on be-



half of Keasbey & Mattison, vis-a-vis Turner & Newall, who were in London, ..." Mr. Orth stated that he had seen Mr. Suthill, one of the top managers of Turner & Newell, Ltd., in London (N. T. 9340). The day following this Paris meeting, Mr. Orth said he was returning to London (N. T. 9339-9340). On cross-examination, Mr. Koons testified that he does not believe Mr. Orth mentioned "Keasbey & Mattison" by name at the Paris meeting of March 1960 (N. T. 9799).

C. The activities of Mr. Orth at the European meetings were in furtherance of the ends and aims of the conspiracy in which the jury may find Keasbey & Mattison had been participating since 1954.

There is sufficient evidence, of the type described above, in the record from which a jury may find beyond a reasonable doubt /see United States v. Allard, 240 F. 2d 840 (3rd Cir. 1957), and United States v. Giuliano, 263 F. 2d 582, 584-5 (3rd Cir. 1959)/ a single, common plan, design and scheme constituting one conspiracy, rather than several. See Blumenthal v. United States, 332 U. S. 539, 553 and 556-8 (1947);[1] cf. Kotteakos v.

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1. The language at 556-7 makes clear that the Government need not show knowledge by each conspirator of all the activities of his co-conspirators in furtherance of the common plan, such as the sales of Asbestolite pipe, if the jury should find them in unreasonable restraint of trade. See Continental Ore Co. v. Union Carbide, etc., Corp., 370 U. S. 690, 699 & 707 (1962).

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United States, 328 U. S. 750, 771 (1946). It is noted that in Blumenthal the court found that the jury might find two separate agreements between different parties, some parties being common to each agreement, could be steps in the formation of a larger, ultimate and more general conspiracy. On this record, there is sufficient evidence to justify the jury in finding that the activities of the corporate defendants from 1954 to 1958 in pricing and the activities of Mr. Orth in the same pricing field, as well as in his alleged efforts to restrict imports by allocation agreements or otherwise, were "all directed to achieving the single unlawful end or result" of unreasonably restraining trade and commerce. See Blumenthal v. United States, supra, at 558. See, also, United States v. Green, 327 F. 2d 715, 717 (7th Cir. 1964).

See Exhibit B.

Defendant Johns-Manville Corporation moves for judgment of acquittal on the ground that the Government has introduced no evidence to establish liability of Johns-Manville Corporation, as distinguished from its subsidiaries, Johns-Manville Sales Corporation, Johns-Manville Products Corporation, and Johns-Manville Products Corporation of California. The motion, insofar as it is based on this argument, must be denied. N. L. R. B. v. Deena Artware, Inc., 361 U. S. 403, 404 (1960); Anderson v. Abbott, 321 U. S. 349, 362-3 (1944), and cases there cited, especially United States v. Milwaukee Refrigerator Transit Co., 142 Fed. 247 (E. D. Wisc. 1905); Eastern Industries v. Traffic Controls, 142 F. Supp. 301, 304 (D. Del. 1956); United States v. Watchmakers

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of Switzerland Inf. C., 134 F. Supp. 710 (S. D. N. Y. 1955); In re Investigation of World Arrangements, Etc., 13 F. R. D. 280, 285 (D. C. D. C. 1952); United States v. United States Machinery Co., 234 Fed. 127, 140-3 (E. D. Mo. 1916); Restatement, Agency 2d, § 14M and Reporter's Notes thereto; see, also, Northern Securities Co. v. United States, 193 U. S. 197 (1904); United States v. Goldberg, 206 F. Supp. 394, 405 (E. D. Pa. 1962).

There is sufficient evidence for the jury to find beyond a reasonable doubt either or both of the following:

(1) The corporate existence of the subsidiaries apart from the parent was mere form and the agents of the subsidiaries acted as agents for the parent, all of the corporations being one unitary enterprise.

(2) The subsidiaries were agents of the parent, and the employees of the subsidiaries acted as sub-agents of the parent corporation.

See N. T. 7935; see notes of testimony and Government exhibits cited by Government counsel at N. T. 10,076-10,081 and pages 1-9 of brief of Johns-Manville Corporation (Document 187).

The Government has not established that the American Society for Testing and Materials and the American Waterworks Association are co-conspirators or that they had knowledge of the conspiracy. Hence, the jury will be instructed to disregard § 7(b) and (c) of the Indictment (Document 1), which shall be considered as having been deleted therefrom.

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Part (B) of Order (Count Two)

Under the decision in American Tobacco Co. v. United States, 328 U. S. 781, 784-6 (1946), the Government is required under Count Two of the Indictment to submit evidence which establishes beyond a reasonable doubt that defendants have conspired to acquire or maintain the "power to control and dominate interstate trade and commerce in a commodity to such an extent that they are able, as a group, to exclude actual or potential competitors from the field, accompanied with the intention and purpose to exercise such power." At page 809, the court said:

> "A correct interpretation of the statute and of the authorities makes it the crime of monopolizing, under § 2 of the Sherman Act, for parties, as in these cases, to combine or conspire to acquire or maintain the power to exclude competitors from any part of the trade or commerce among the several states or with foreign nations, provided they also have such a power that they are able, as a group, to exclude actual or potential competition from the field and provided that they have the intent and purpose to exercise that power."

There is no evidence in this case from which the jury could find beyond a reasonable doubt that the defendants conspired to acquire or maintain power to raise prices or exclude competition in the relevant market. Although the Indictment alleges that the trade or commerce involved is asbestos-cement pipe and couplings (see pars. 8 - 12),[2] the evidence shows that the primary competitors for each of the corporate defendants were the sellers of metal pipe. N. T. 1273, 1274, 1277, 1278, 2081, 2099,

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2. A conspiracy to unreasonably restrain interstate and foreign trade and commerce in asbestos-cement pipe and couplings is alleged in Count One, a conspiracy to monopolize such trade and commerce is alleged in Count Two, and attempts to monopolize such trade and commerce are alleged in Count Three.

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2101-2, 2108, 2109, 2151 and 5441. For example, the 1960 Business Condition Report of Johns-Manville's Los Angeles Pipe District Office (GX-1253, p. 1) states concerning the outlook for 1961: "The competition is going to be tougher than we have yet experienced, both foreign and domestic - in A-C as well as metal pipes." At p. 3 of this Report, it is stated: "The steel pipe competitors have been even more aggressive than in the past." See, also, GX-1257, p. 2; GX-1256, p. 2; GX-1207, p. 3; GX-1209, p. 2; GX-1204, pp. 2 & 4; GX-1258, p. 3; GX-1259, pp. 2 & 6. The record is also replete with testimony concerning sales of concrete pipe (GX-1257, p. 3; N. T. 2055), tile pipe (N. T. 2049-53), plastic pipe (GX-1253, p. 4), clay pipe (GX-1257, p. 2; N. T. 2049-53, 2078, 2080), steel and wood pipe (N. T. 2086, 3036, 3084, 3100), etc., even though the only evidence of economic power in the field relates to the volume of asbestos-cement pipe sold by defendants. There is every indication in this record that the above types of pipe were "reasonably interchangeable" by consumers for the same purposes, except in certain soils such as are present in southwest Texas. See United States v. DuPont, 351 U. S. 377, 395 (1956). Even in such soils, plastic, tile and concrete pipe were used. In the DuPont case, supra, the court said at page 394:

> "But where there are market alternatives that buyers may readily use for their purposes, illegal monopoly does not exist merely because the product said to be monopolized differs from others."

The power of defendants to raise prices and to exclude competition might be negligible if the total sale of these apparently interchangeable products were substantially in excess of

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the sales of asbestos-cement pipe. The Government has clearly not sustained its burden of proof on this element of the crime charged in Count Two.

In its oral argument, the Government took the position that the language of footnote 23 on page 395 of the DuPont case, supra, made proof of the relevant market immaterial on a charge of conspiracy to monopolize pursuant to 15 U. S. C. § 2. Apparently, the Government takes the position adopted in Lessig v. Tidewater Oil Company, 427 F. 2d 359, 474-5 and 478, where language used at 474-5 was qualified on rehearing (9th Cir. 1964). However, the language in the above-mentioned footnote only states that "the scope of the market was not in issue" in Story Parchment Co. v. Paterson Co., 282 U. S. 555 (1931). An examination of that case indicates that neither counsel nor the court considered the issue of what was the relevant market and that the parties conceded, apparently, that interstate trade and commerce in vegetable parchment paper was a sufficient description of that market. To adopt the Government's position would be to disregard the approach of the above-cited decisions of the United States Supreme Court and the language concerning relevant market in such recent decisions as International Boxing Club v. United States, 358 U. S. 242, 249-251 (1959).

Part (2) of Order (Count Three)

The absence of evidence to prove beyond a reasonable doubt the existence of a relevant market of the type of trade and commerce alleged in the Indictment, as discussed under Count Two above, requires a grant of judgment of acquittal under Count Three.

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The evidence produced by the Government indicates that the fact that several types of pipe other than asbestos-cement pipe were actively competing with it may have had a controlling effect on the power to raise prices and to exclude competition. In American Tobacco Company v. United States, supra, the Supreme Court of the United States quoted with approval the following language from the trial court's charge:

> "The phrase 'attempt to monopolize' means the employment of methods, means and practices which would, if successful, accomplish monopolization, and which, though falling short, nevertheless approach so close as to create a dangerous probability of it, which methods, means and practices are so employed by the members of and pursuant to a combination or conspiracy formed for the purpose of such accomplishment."

This language was based on previous statements of the Supreme Court of the United States over many years, requiring not only intent but a "consequent dangerous probability" of the accomplishment of that intent. Swift and Company v. United States, 196 U. S. 375, 396 (1905). See United States v. Winslow, 227 U. S. 202, 218 (1913), and United States v. Socony-Vacuum Co., 310 U. S. 150, 226, fn. 59 (1940). More recent federal cases have stated that an attempt to monopolize "means the employment of methods and practices which are utilized for the specific purposes and with the specific intent to achieve or build a monopoly, and which, if successful, would be likely to accomplish such monopolization." See Kansas City Star Company v. United States, 240 F. 2d 643, 663 (1957). Such cases have discussed the relevant market and considered whether the evidence could establish beyond a reasonable doubt that the defendants' activities "would be likely to accomplish" monopolization. There is no proof

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in this record which would justify the jury in finding beyond a reasonable doubt that the activities and plans of the defendants, "if successful, would be likely to accomplish" monopolization, in view of the absence of any evidence concerning the relationship of competing pipes to the relevant market. Footnote 23 of the DuPont case, supra, does no more than point out that certain cases cited there were distinguishable because they involved attempts to monopolize, rather than the question of monopolization, which was before the court in the DuPont case. At the end of the footnote, the court considered United States v. Aluminum Company of America, 148 F. 2d 416 (2nd Cir. 1945), because it did involve the question of monopolization and pointed out that the court did make a finding in that case of the relevant market. There is no statement in the footnote that, in a case involving a charge of attempt to monopolize under 15 U. S. C. § 2, the Government may produce evidence which concerns only the product of two manufacturers where this same evidence shows active competition and interchangeability between that product and several other similar products. The ability to raise the price of this product (asbestos-cement pipe) may well depend upon the activities of competitors producing the competing product, and the ability to exclude foreign competition in this product may also be affected by the activities of such competitors producing other types of pipe. The factual background of the Lessig case, supra (see, for example, pages 469-470 and qualifying language on rehearing in the last paragraph on page 478), makes the above-mentioned language in that case inapplicable to this record.

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Also, it is noted that the Lessig case, supra, was a civil case, where the plaintiff's burden is not as great as that of the Government, which must establish every element of its case beyond a reasonable doubt.

The above viewpoint is supported by several civil cases involving charges of attempt to monopolize under 15 U. S. C. § 2: Cameron Iron Works v. Edmond Valve, Inc., 175 F. Supp. 423 (S. D. Tex. 1959); United States v. Singer, 205 F. Supp. 394 (S. D. N. Y. 1962). The Report of the Attorney General's National Committee to Study the Antitrust Laws (1955) uses this language at pages 47-48:

> "It is sometimes suggested that the words 'any part' of trade or commerce in section 2 refer merely to an amount of business sufficient in volume to overcome the objection de minimis non curat lex. But the concept of 'the market' is not brought into the antitrust laws by the words 'any part' in Section 2; rather it is integral to the basic concept of 'monopolization,' and the ideas of competition and monopoly on which it rests. Thus, Section 2 of the Sherman Act deals with monopolizations affecting markets which constitute 'any part' of the trade or commerce covered by the Act. To be sure, an appreciable amount of commerce is a 'part' of commerce, but control over an appreciable amount of commerce does not necessarily mean control over an identifiable market which constitutes an appreciable 'part' of commerce.
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> . . .
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> "Sometimes the part of commerce affected by the defendants' conduct will also be a market; but this does not necessarily follow. Without a finding as to the market involved, there is no way of determining whether or not the defendants have given degree of market power."

The briefs of counsel have been placed in the Clerk's file as Documents Nos. 186 - 190.

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EXHIBIT A

MISCELLANEOUS REFERENCES TO TESTIMONY OF MR. COSTA THAT MR. ORTH WAS CONCERNED WITH PRICE CUTTING IN THE UNITED STATES AND WAS INTERESTED IN STABILIZING THE UNITED STATES PRICES

N. T. 7922-3 Costa testified to discussion by Orth at Zurich in the summer of 1959 on the effect of cut-throat competition of foreigners on prices and his desire to stabilize prices.

N. T. 7930 Mr. Costa testified to discussion by Mr. Orth at Brussells, Belgium, in February 1960 (N. T. 7926) of "several cases, individual cases, of extreme competition" in the United States. Mr. Orth was complaining of price cutting as the result of sales of imported pipe and the falling price level (N. T. 7932). Mr. Orth was prepared to discuss the details ("This tender, or that tender, or that tender"*), but others present could not discuss the detailed facts without the presence of their "American agents." For this reason, it was decided to have a meeting with the American agents, which it was decided would be held in Paris in March 1960 (N. T. 7930-1 and 7933).

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*The witness used the word "tender" to refer to "bid" (N. T. 7932).

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EXHIBIT B

The defendants contend that Toulmin, Antitrust Laws, is, at best, a secondary source, a collection of dicta, and that the citation of 6 Toulmin, Antitrust Laws, 200, 201, on page 1 of Document 142, is not binding upon this court (N. T. 10,092). Suffice it to say that the court's examination of that reference, and the 13 cases cited in the footnotes there, reveals that Toulmin has stated the general rules relating to the continuity of a conspiracy and its relation to the statute of limitations accurately and succinctly. It was more convenient for the court to cite that work for the propositions quoted than to include its own quotes from, and references to, many cases, most of which are included in Toulmin's footnotes. That general rule, set out on page 1 of Document 142, is the law which is binding upon this court. More particularized references may be found in Hyde v. United States, 225 U. S. 347, 368-9 (1912); Heike v. United States, 227 U. S. 131 (1913); and Continental Baking Co. v. United States, 281 F. 2d 137, 154 (6th Cir. 1960).

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