ORIGINAL

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA and STATE OF TEXAS, Plaintiffs, v. KIMBERLY-CLARK CORPORATION and SCOTT PAPER COMPANY, Defendants.	Civil Action No.: 3:95-CV-3055-P Entered: April 4, 1996

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ENTERED ON DOCKET PURSUANT TO F. R. C. P. RULES 58 AND 79a

FINAL JUDGMENT

WHEREAS, plaintiffs, the United States of America and the State of Texas, having filed their Complaint herein on December 12, 1995, and plaintiffs and defendants, by their respective attorneys, having consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein, and without this Final Judgment constituting any evidence against or an admission by any party with respect to any issue of law or fact herein;

AND WHEREAS, defendants have agreed to be bound by the provisions of this Final Judgment pending its approval by the Court;

AND WHEREAS, prompt and certain divestiture of certain rights and assets to assure that competition is not substantially lessened are the essence of this agreement;

AND WHEREAS, plaintiffs require defendants to make certain divestitures for the purpose of establishing viable competitors in the sale of baby wipes and facial tissue;

AND WHEREAS, defendants have represented to plaintiffs that the divestitures required below can and will be made and that defendants will later raise no claims of hardship or difficulty as grounds for asking the Court to modify any of the divestiture provisions contained below;

NOW, THEREFORE, before the taking of any testimony, and without trial or adjudication of any issue of fact or law herein, and upon consent of the parties hereto, it is hereby ORDERED, ADJUDGED, AND DECREED as follows:

I. JURISDICTION

This Court has jurisdiction over each of the parties hereto and the subject matter of this action. The Complaint states a claim upon which relief may be granted against defendants under Section 7 of the Clayton Act, as amended (15 U.S.C. § 18).

II. DEFINITIONS

As used in this Final Judgment:

A. "Kimberly-Clark" means defendant Kimberly-Clark Corporation, a Delaware corporation with its headquarters in Dallas, Texas, and includes its successors and assigns, and its subsidiaries, directors, officers, managers, agents, and employees.

B. "Scott" means defendant Scott Paper Company, a Pennsylvania corporation with its headquarters in Boca Raton, Florida, and includes its successors and assigns, and its subsidiaries, directors, officers, managers, agents, and employees.

C. "Relevant Wet Wipes Assets" means:

(1) the Dover, Delaware plant of Scott, including all tangible assets used by Scott in connection with its business of researching, developing, making, having made, packaging, distributing, or selling products of the Dover plant, including but not limited to: the manufacturing plant and associated web making, converting, packaging and distributing equipment and facilities, inventory, real property, and any other interests, or tangible assets or improvements, associated with the Dover plant;

(2) a twenty-five year, exclusive, royalty-free and assignable license, perpetually renewable at the licensee's option, to make, have made, use or sell in the United States any label of any baby wipes product currently produced at the Dover, Delaware plant, including but not limited to the Baby Fresh, Wash-a-Bye Baby, Baby Fresh Gentle Touch, and Kid Fresh labels, and any improvement to or line extension of those labels; and

(3) all intangible assets, wherever located, that relate in any way to the tangible assets and labels described above (including but not limited to: manufacturing, converting, packaging and distribution know-how); exclusive, assignable rights to all patents, proprietary technology, supply contracts, and business information solely dedicated to the tangible assets or the labels described above; rights in real and personal property; and nonexclusive, assignable rights to all related

patents, proprietary technology and business information used in connection with, but not solely dedicated to the tangible assets or the labels described above.

D. "Relevant Facial Tissue Assets" means:

(1) a twenty-five year, exclusive, royalty-free and assignable license, perpetually renewable at the licensee's option, to make, have made, use or sell in the United States any facial tissue under the Scotties label, and a covenant that defendants shall not make, have made, use or sell in the United States any facial tissue under the Scott or Scotties label;

(2) any two of the following four tissue mills: the Scott tissue mill in Marinette, Wisconsin; the Scott tissue mill in Ft. Edward, New York; the Kimberly-Clark Lakeview tissue mill in Neenah, Wisconsin; and the Kimberly-Clark Badger-Globe tissue mill in Neenah, Wisconsin; *provided, however,* that in the event a purchaser elects to purchase the Marinette, WI tissue mill of Scott, defendants shall not be required to divest the DRC tissue machine and associated converting assets, located in an adjacent facility on the Marinette tissue mill site and not currently used for making facial tissue, in which case defendants shall, at the option of the purchaser, enter into an arrangement with respect to the measures necessary to separate the DRC tissue machine from the rest of the Marinette tissue mill, including but not limited to a long-term agreement to provide, on a

nondiscriminatory basis, shared utilities, such as water, electric, steam, and treatment of waste or effluent;

(3) at the purchaser's option, (a) a commitment by defendants to enter into up to a three-year agreement to sell to purchaser, at such rates as to which purchaser and defendants may agree, as much as 25,000 metric tons/year of tissue parent rolls; and (b) a commitment by defendants to enter into up to a three-year agreement to buy from the purchaser, at such rates as to which purchaser and defendants may agree, as much as 25,000 metric tons/year of tissue parent rolls;

(4) all tangible assets used solely in connection with the business of making, having made, using, converting, packaging, distributing, or selling any product from any of the tissue mills identified in Section II(D)(2), including but not limited to: the tissue mill and associated papermaking, converting, packaging and distribution equipment and facilities; real property; or tangible assets or improvements, associated with the tissue mill; and

(5) all intangible assets, not otherwise addressed above, wherever located, that relate in any way solely to the tangible assets described above or the Scotties label (including but not limited to: papermaking, converting, packaging and distributing know-how); exclusive, assignable rights to all patents, proprietary technology, supply contracts, and business information and rights in real and personal property solely dedicated to the tangible assets or

the Scotties label; and nonexclusive, assignable rights to all related patents, proprietary technology and business information used in connection with, but not solely dedicated to the tangible assets or the Scotties label.

E. "Label" means all legal rights associated with a brand's trademarks, trade names, copyrights, designs, and trade dress (and any improvements, extensions or modifications); the brand's trade secrets; know-how or other proprietary information for making, having made, using and selling the brand, including, but not limited to, packaging, sales, marketing and distribution know-how and documentation, such as customer lists.

III. APPLICABILITY

A. The provisions of this Final Judgment apply to the defendants, their successors and assigns, their subsidiaries, directors, officers, managers, agents, and employees, and all other persons in active concert or participation with any of them who shall have received actual notice of this Final Judgment by personal service or otherwise.

B. Defendants shall require, as a condition of the sale or other disposition of all or substantially all of the Relevant Wet Wipes Assets and Relevant Facial Tissue Assets, that the purchaser or purchasers agree to be bound by the provisions of this Final Judgment.

IV. DIVESTITURES

A. Defendants are hereby ordered and directed, within 150 days after filing of the Final Judgment, to divest to a purchaser

the Relevant Wet Wipes Assets, in accordance with the procedures specified in this Final Judgment.

Defendants are ordered and directed, within 180 days after filing of the Final Judgment, to divest to one or more purchasers the Relevant Facial Tissue Assets, in accordance with the procedures specified in this Final Judgment.

B. Defendants agree to take all reasonable steps to accomplish the divestitures as expeditiously and timely as possible. Plaintiffs may, in their sole discretion, extend the time period for any divestiture for an additional period of time not to exceed two months.

C. In accomplishing the divestitures ordered by this Final Judgment, defendants promptly shall make known, by usual and customary means, the availability of the Relevant Wet Wipes Assets and Relevant Facial Tissue Assets. Defendants shall provide any person making an inquiry regarding a possible purchase with a copy of the Final Judgment. Defendants shall also offer to furnish to all bona fide prospective purchasers, subject to customary confidentiality assurances, all reasonably necessary information regarding the Relevant Wet Wipes Assets and the Relevant Facial Tissue Assets, except such information subject to attorney-client privilege or attorney work product privilege. Defendants shall make available such information to plaintiffs at the same time that such information is made available to any other person. Defendants shall permit prospective purchasers of the Relevant Wet Wipes Assets and Relevant Facial Tissue Assets to have access to personnel and to

make such inspection of physical facilities and any and all financial, operational, or other documents and information as may be relevant to the divestitures required by this Final Judgment.

D. Unless plaintiffs otherwise consent in writing, divestitures under Section IV(A), or by the trustee appointed pursuant to Section V, shall include the Relevant Wet Wipes Assets and Relevant Facial Tissue Assets and be accomplished in such a way as to satisfy plaintiffs, in their sole discretion, that the Relevant Wet Wipes Assets and Relevant Facial Tissue Assets can and will be used by the purchaser or purchasers as part of viable, ongoing businesses engaged in the selling of baby wipes and facial tissue at wholesale to retail stores. Each divestiture shall be made to a purchaser or purchasers for whom it is demonstrated to plaintiffs' satisfaction that (1) the purchase or purchases are for the purpose of competing effectively in making and selling branded baby wipes and/or facial tissue at wholesale to retail stores and other customers; and (2) the purchaser or purchasers have or soon will have the managerial, operational, and financial capability to compete effectively in making and selling branded baby wipes and/or facial tissue at wholesale to retail stores; and (3) none of the terms of any agreement between the purchaser or purchasers and defendants give defendants the ability artificially to raise the purchaser's or purchasers' costs, lower the purchaser's or purchasers' efficiency, or otherwise interfere in the ability of the purchaser or purchasers to compete effectively. Although Sections II(D)(2) and IV(A) require a sale of any two of four

tissue mills, plaintiffs can, in their sole discretion, approve a divestiture involving a sale of less than two tissue mills listed in Section II(D), if convinced that such divestiture is sufficient to satisfy their competitive concerns.

E. Defendants shall exercise any residual right in any label licensed pursuant to this Final Judgment solely for the purpose of protecting their lawful intellectual property rights. Defendants shall not, in any circumstance, exercise any such right to impair or inhibit in any way a licensee's ability to compete, and they shall not exercise such right, directly or indirectly, to obtain competitively-sensitive information pertaining to any licensee.

V. APPOINTMENT OF TRUSTEE

A. If defendants have not accomplished any divestiture required by Section IV within the time specified therein, defendants shall notify plaintiffs of that fact in writing. Within ten (10) calendar days of their receipt of such written notice, plaintiffs shall provide defendants with written notice of the names and qualifications of not more than two (2) nominees for the position of trustee for the required divestiture. Defendants shall notify plaintiffs within five (5) calendar days thereafter whether either or both of such nominees are acceptable. If either or both of such nominees are acceptable to defendants, plaintiffs shall notify the Court of the person upon whom the parties have agreed and the Court shall appoint that person as the trustee. If neither nominee is acceptable to defendants, they shall furnish to plaintiffs, within ten (10)

calendar days after plaintiffs provide the names of their nominees, written notice of the names and qualifications of not more than two (2) nominees for the position of trustee for the required divestiture. If either or both of such nominees are acceptable to plaintiffs, plaintiffs shall notify the Court of the person upon whom the parties have agreed and the Court shall appoint that person as the trustee. If neither nominee is acceptable to plaintiffs, plaintiffs shall furnish the Court the names and qualifications of its and defendants' proposed nominees. The Court may hear the parties as to the nominees' qualifications and shall appoint one of the nominees as the trustee.

B. If defendants have not accomplished either of the divestitures required by Section IV of this Final Judgment at the expiration of the time period specified therein, subject to the selection process described in Section V(A), the appointment by the Court of the trustee shall become effective. The trustee shall then take steps to effect the divestiture(s) specified in Section IV(A).

C. After the trustee's appointment has become effective, only the trustee shall have the right to sell the Relevant Wet Wipes Assets or Relevant Facial Tissue Assets. The trustee shall have the power and authority to accomplish the divestiture(s) to a purchaser acceptable to plaintiffs at such price and on such terms as are then obtainable upon the best reasonable effort by the trustee, subject to the provisions of Section IV of this Final Judgment, and shall have such other powers as this Court

shall deem appropriate. Defendants shall not object to the sale of the Relevant Wet Wipes Assets or Relevant Facial Tissue Assets by the trustee on any grounds other than the trustee's malfeasance. Any such objection by defendants must be conveyed in writing to plaintiffs and the trustee no later than fifteen (15) calendar days after the trustee has notified defendants of the proposed licensing and sale in accordance with Section VI of this Final Judgment.

D. The trustee shall serve at the cost and expense of defendants, shall receive compensation based on a fee arrangement which provides an incentive based on the price and terms of the divestiture and the speed with which it is accomplished, and shall serve on such other terms and conditions as the Court may prescribe; provided however, that the trustee shall receive no compensation, nor incur any costs or expenses (other than related to the selection process), prior to the effective date of his or her appointment. The trustee shall account for all monies derived. After approval by the Court of the trustee's accounting, including fees for its services, all remaining monies shall be paid to defendants and the trust shall then be terminated.

E. Defendants shall take no action to interfere with or impede the trustee's accomplishment of the divestiture of the Relevant Wet Wipes Assets or Relevant Facial Tissue Assets and shall use its best efforts to assist the trustee in accomplishing the required divestiture. Subject to a customary confidentiality agreement, the trustee shall have full and complete access to the

personnel, books, records, and facilities related to the Relevant Wet Wipes Assets or the Relevant Facial Tissue Assets, and defendants shall develop such financial or other information necessary to the divestiture of the Relevant Wet Wipes Assets and Relevant Facial Tissue Assets.

F. After its appointment becomes effective, the trustee shall file monthly reports with the parties and the Court setting forth the trustee's efforts to accomplish divestiture of the Relevant Wet Wipes Assets and Relevant Facial Tissue Assets as contemplated under this Final Judgment; provided however, that to the extent such reports contain information that the trustee deems confidential, such reports shall not be filed in the public docket of the Court. Such reports shall include the name, address, and telephone number of each person who, during the preceding month, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the Relevant Wet Wipes Assets and Relevant Facial Tissue Assets, and shall describe in detail each contact with any such person during that period. The trustee shall maintain full records of all efforts made to divest these operations.

G. Within six (6) months after its appointment has become effective, if the trustee has not accomplished the divestiture required by Section IV of this Final Judgment, the trustee shall promptly file with the Court a report setting forth (1) the trustee's efforts to accomplish the required divestiture, (2) the reasons, in the trustee's judgment, why the required divestiture

has not been accomplished, and (3) the trustee's recommendations; provided however, that to the extent such reports contain information that the trustee deems confidential, such reports shall not be filed in the public docket of the Court. The trustee shall at the same time furnish such reports to the parties, who shall each have the right to be heard and to make additional recommendations consistent with the purpose of the trust. The Court shall thereafter enter such orders as it shall deem appropriate in order to carry out the purpose of the trust, which shall, if necessary, include augmenting the assets to be divested, and extending the trust and the term of the trustee's appointment.

VI. NOTIFICATION

Within two (2) business days following execution of a definitive agreement, contingent upon compliance with the terms of this Final Judgment, to effect, in whole or in part, any proposed divestiture pursuant to Sections IV or V of this Final Judgment, defendants or the trustee, whichever is then responsible for effecting the divestiture, shall notify plaintiffs of the proposed divestiture. If the trustee is responsible, it shall similarly notify defendants. The notice shall set forth the details of the proposed transaction and list the name, address, and telephone number of each person not previously identified who offered to, or expressed an interest in or desire to, acquire any ownership interest in the assets that are the subject of the binding contract, together with full details of same. Within fifteen (15) calendar days of receipt by

plaintiffs of such notice, plaintiffs may request additional information concerning the proposed divestiture and the proposed purchaser. Defendants and the trustee shall furnish any additional information requested within twenty (20) calendar days of the receipt of the request, unless the parties shall otherwise agree. Within thirty (30) calendar days after receipt of the notice or within twenty (20) calendar days after plaintiffs have been provided the additional information requested (including any additional information requested of persons other than defendants or the trustee), whichever is later, plaintiffs shall provide written notice to defendants and the trustee, if there is one, stating whether or not it objects to the proposed divestiture. If plaintiffs provide written notice to defendants and the trustee that it does not object, then the divestiture may be consummated, subject only to defendants' limited right to object to the sale under the provisions in Section V(C). Absent written notice that the plaintiffs do not object to the proposed purchaser, a divestiture proposed under Section IV shall not be consummated. Upon objection by either plaintiff, a divestiture proposed under Section IV shall not be consummated. Upon objection by either plaintiff, or by defendants under the proviso in Section V(C), a divestiture proposed under Section V shall not be consummated unless approved by the Court.

VII. AFFIDAVITS

Within ten (10) calendar days of the filing of this Final Judgment and every thirty (30) calendar days thereafter until the divestiture has been completed or authority to effect divestiture

passes to the trustee pursuant to Section V of this Final Judgment, defendants shall deliver to plaintiffs an affidavit as to the fact and manner of compliance with Sections IV and V of this Final Judgment. Each such affidavit shall include, *inter alia*, the name, address, and telephone number of each person who, at any time after the period covered by the last such report, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the Relevant Wet Wipes Assets or Relevant Facial Tissue Assets, and shall describe in detail each contact with any such person during that period. Defendants shall maintain full records of all efforts made to divest these operations.

VIII. FINANCING

With prior written consent of the plaintiffs, defendants may finance all or any part of any purchase made pursuant to Sections IV or V of this Final Judgment.

IX. PRESERVATION OF ASSETS

Until the divestitures required by the Final Judgment have been accomplished:

A. Defendants shall take all steps necessary to ensure that the Relevant Wet Wipes Assets will be maintained as an independent, ongoing, economically viable and active competitor in the sale of baby wipes in the United States, with proprietary technology, management operations, books, records and competitively-sensitive sales, marketing and pricing information and decision-making kept separate and apart from, and not

influenced by, that of Kimberly-Clark's Huggies baby wipes business.

B. Defendants shall operate the Relevant Facial Tissue Assets to ensure a distinct and economically viable product line, which actively competes in the sale of facial tissue in the United States, with competitively-sensitive sales, marketing and pricing information and decision-making kept separate and apart from, and not influenced by, that of Kimberly-Clark's Kleenex facial tissue business.

C. Defendants shall use all reasonable efforts to maintain and increase sales of baby wipes under any label required to be divested pursuant to Sections II(C) and IV(A) and facial tissue under the Scotties label, and they shall maintain at 1995 or previously approved levels, whichever is higher, promotional, advertising, marketing and merchandising support for baby wipes under labels in the Relevant Wet Wipes Assets and facial tissue under the Scotties label.

D. Defendants shall take all steps necessary to ensure that the Relevant Wet Wipes Assets and Relevant Facial Tissue Assets are fully maintained in operable condition at their current capacity configurations, and shall maintain and adhere to normal repair and maintenance schedules for such assets.

E. Defendants shall not, except as part of a divestiture approved by plaintiffs, sell any Relevant Wet Wipes Assets or Relevant Facial Tissue Assets, other than in the ordinary course of business.

F. Defendants shall take no action that would jeopardize the sale or license of the Relevant Wet Wipes Assets or the Relevant Facial Tissue Assets. Within 21 days after filing of the Final Judgment, defendants shall discontinue making and selling facial tissue under the Scott label and make and sell facial tissue under the Scotties label; provided, however, that defendants may sell inventory of facial tissue produced under the Scott Label until such inventory is depleted.

X. COMPLIANCE INSPECTION

Only for the purposes of determining or securing compliance with the Final Judgment and subject to any legally recognized privilege, from time to time:

A. Duly authorized representatives of the United States Department of Justice, upon written request of the Attorney General or of the Assistant Attorney General in charge of the Antitrust Division, or of the Attorney General of the State of Texas, and on reasonable notice to defendants made to their principal offices, shall be permitted:

(1) Access during office hours of defendants to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of defendants, who may have counsel present, relating to enforcement of this Final Judgment; and

(2) Subject to the reasonable convenience of defendants and without restraint or interference from them,

to interview officers, employees, and agents of defendants, who may have counsel present, regarding any such matters.

B. Upon the written request of the Attorney General or of the Assistant Attorney General in charge of the Antitrust Division, or of the Attorney General of the State of Texas, made to defendants' principal offices, defendants shall submit such written reports, under oath if requested, with respect to enforcement of this Final Judgment.

C. No information or documents obtained by the means provided in this Section X shall be divulged by a representative of either plaintiff to any person other than a duly authorized representative of the Executive Branch of the United States or of the State of Texas, except in the course of legal proceedings to which the United States is a party (including grand jury proceedings); or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If at the time information or documents are furnished by defendants to plaintiffs, defendants represent and identify in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(7) of the Federal Rules of Civil Procedure, and defendants mark each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure," then ten (10) calendar days notice shall be given by plaintiff to defendants prior to divulging such material in any legal proceeding (other than a grand jury proceeding).

XI. RETENTION OF JURISDICTION

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification of any of the provisions hereof, for the enforcement of compliance herewith, and for the punishment of any violations hereof.

XII. TERMINATION

Unless this Court grants an extension, this Final Judgment will expire on the tenth anniversary of the date of its entry.

XIII. PUBLIC INTEREST

Entry of this Final Judgment is in the public interest.

Dated: December 22, 1995

Entered: April 4, 1996

United States District Judge