

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