

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: William E. Kovacic, Chairman
Pamela Jones Harbour
Jon Leibowitz
J. Thomas Rosch

_____)
In the Matter of)
)
Flow International Corp.,) Docket No. C-
)
a corporation)
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_____)

DECISION AND ORDER

The Federal Trade Commission (“Commission”) having initiated an investigation of the proposed acquisition by Respondent Flow International Corporation (hereinafter “Flow International”, “Respondent”, or “Respondent Flow International”) of OMAX Corporation, and Respondent having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present 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 Consent Order (“Consent Agreement”), containing an admission by Respondent of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent 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 Respondent has violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order (“Order”):

1. Respondent Flow International is a corporation organized, existing and doing business under and by virtue of the laws of the State of Washington, with its offices and

principal place of business located at 23500 64th Avenue South, Kent, Washington 98032.

2. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and of Respondent, and the proceeding is in the public interest.

ORDER

I.

IT IS ORDERED that, as used in the Order, the following definitions shall apply:

- A. “Flow International” or “Respondent” means Flow International Corporation, its directors, officers, employees, agents, attorneys, representatives, predecessors, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Flow International Corporation, and the respective directors, officers, employees, agents, representatives, predecessors, successors, and assigns of each.
- B. “OMAX” means, OMAX Corporation, a corporation organized, existing and doing business under and by virtue of the laws of the State of Washington, with its offices and principal place of business located at 21409 72nd Avenue, Kent, Washington 98032; and its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by OMAX Corporation.
- C. “Commission” means the Federal Trade Commission.
- D. “Acquisition” means the proposed acquisition of OMAX by Flow International pursuant to an exclusive option agreement to negotiate the acquisition of Omax signed on December 5, 2007.
- E. “Acquisition Date” means the date the Acquisition is consummated.
- F. “Competitor” means any person that, during the five (5) years after this Order becomes final, is or seeks to become engaged in the research, development, manufacturing, marketing, or sale of Waterjet Cutting Systems or Waterjet Cutting System Controllers in the United States.
- G. “Confidential Business Information” means any information relating to the research, development, manufacture, distribution, marketing, or sale of Waterjet Cutting Systems or Waterjet System Cutting System Controllers by any Licensee or Authorized Sublicensee that comes into the possession or control of the Respondent as the result of the License, including, but not limited to, any information that any Licensee is required to provide to the Respondent under the terms of the License. “Confidential Business Information” includes, but is not limited to, any information provided to Respondent in any License Report.

- H. “Controller” means computer software and hardware that direct the cutting head.
- I. “License” means:
1. the license with a Licensee for the Licensed Patents attached as Exhibit A to this Decision and Order; or,
 2. a license that substantially complies with Exhibit A, that achieves the purposes of this Order, and that receives the prior approval of the Commission.
- J. “Licensed Patents” mean the OMAX ‘596 Patent and the OMAX ‘345 Patent.
- K. “Licensee” means any signatory (other than Respondent) to any License.
- L. “License Reports” means any report or information provided by any Licensee to Respondent under the terms of any License.
- M. “OMAX ‘345 Patent” means United States Patent No. 5,892,345, including all related patent applications, extensions, current or future United States patents that share a common parent application with or that claim a priority from an application for U.S. Patent No. 5,892,345, and all other rights included in the term Patent as it is defined in this Order.
- N. “OMAX ‘596 Patent” means United States Patent No. 5,508,596, including all related patent applications, extensions, current or future United States patents that share a common parent application with or that claim a priority from an application for U.S. Patent No. 5,508,596, and all other rights included in the term Patent as it is defined in this Order.
- O. “Patent” means the United States patent and all related patent applications and includes all reissues, divisions, continuations, continuations-in-part, substitutions, reexaminations, restorations, and/or patent term extensions thereof, all inventions disclosed therein, all rights therein provided by international treaties and conventions, and all rights to obtain and file for patents and registrations thereto in the United States.
- P. “Person” means any individual, partnership, joint venture, firm, corporation, association, trust, unincorporated organization, joint venture, or other business or governmental entity, and any subsidiaries, divisions, groups or affiliates thereof.
- Q. “Waterjet Cutting System” means a system that uses a high pressure stream of water to cut plastic, metal, composite, and other materials. A Waterjet Cutting System contains one or more of each of four main parts: (1) pump, (2) cutting head, (3) cutting table, and (4) controller.

II.

IT IS FURTHER ORDERED that:

- A. Respondent Flow International shall grant a License to any and all Competitors that, during the five (5) years after this Order becomes final, request a License. Respondent shall execute the License not more than thirty (30) days after Respondent receives a written request from a Competitor.
- B. At the request of a Licensee, and subject to the prior approval of the Commission, the Respondent shall enter into an agreement to modify the License if the modification reasonably is related to achieving the purpose of this Order.
- C. Respondent Flow International shall not threaten to file, file suit, or make any claim for damages against any Licensee relating to any actual or claimed infringement of any of the intellectual property that is the subject of and within the scope of the License.
- D. Respondent shall comply with all terms of each License, and any breach by Respondent of any term of a License shall constitute a violation of this Order. If any term of the License varies from the terms of this Order (“Order Term”), then to the extent that Respondent cannot fully comply with both terms, the Order Term shall determine Respondent’s obligations under this Order. Notwithstanding any paragraph, section, or other provision of the License, any modification of the License, without the prior approval of the Commission, shall constitute a failure to comply with this Order.
- E. The purpose of the License required by Paragraph II.A. of this Order is to create viable, independent Competitors to develop, manufacture, and sell Waterjet Cutting Systems or Waterjet Cutting System controllers, using the Licensed Patents, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission’s Complaint.

III.

IT IS FURTHER ORDERED that:

- A. Respondent shall:
 - 1. not provide, disclose or otherwise make available any Confidential Business Information to any Person except as set forth in Paragraph III.B. of this Order;
 - 2. not use any Confidential Business Information for any reason or purpose other than as otherwise required or permitted by the License and this Order; and,
 - 3. require all License Reports to be sent to the attention of Flow's general counsel, who shall not provide, disclose, or otherwise make available any information contained in any License Report except to persons whose duties relate solely to providing legal services and representation to Respondent.
- B. Respondent may use Confidential Business Information only (i) for the purpose of performing Respondent's obligations under this Order; and, (ii) for the purpose of exercising Respondent's rights explicitly granted to Respondent by the License.

IV.

IT IS FURTHER ORDERED that:

- A. If the Commission finds that Respondent has failed to grant a License as required by Paragraph II. of this Order within the time periods specified therein, then the Commission may appoint a Licensing Trustee to grant the License to any Competitors to satisfy the requirements of Paragraph II of this Order.
- B. Neither the decision of the Commission to appoint a Licensing Trustee, nor the decision of the Commission not to appoint a Licensing Trustee, to grant the License under this Paragraph IV shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, for any failure by the Respondent to comply with this Order.

- C. If a Licensing Trustee is appointed by the Commission or a court, Respondent shall consent to the following terms and conditions regarding the Licensing Trustee's powers, duties, authority, and responsibilities:
1. The Commission shall select the Licensing Trustee, subject to the consent of Respondent, which consent shall not be unreasonably withheld. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed Licensing Trustee within ten (10) days after notice by the staff of the Commission to Respondent of the identity of any proposed Licensing Trustee, Respondent shall be deemed to have consented to the selection of the proposed Licensing Trustee.
 2. Subject to the prior approval of the Commission, the Licensing Trustee shall have the exclusive power and authority to grant the License to a Competitor pursuant to the terms of this Order.
 3. Within ten (10) days after appointment of the Licensing Trustee, Respondent shall execute a (or amend the existing) trust agreement ("Licensing Trustee Agreement") that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the Licensing Trustee all rights and powers necessary to permit the Licensing Trustee to grant the License to a Competitor pursuant to the terms of this Order.
 4. The Licensing Trustee may grant the License to any Competitor pursuant to the terms of this Order at any time after the Licensing Trustee Agreement is effective.
 5. The Licensing Trustee shall have full and complete access to the personnel, books, records and facilities of Respondent related to each License, as the Licensing Trustee may request. Respondent shall develop such financial or other information as the Licensing Trustee may request and shall cooperate with the Licensing Trustee. Respondent shall take no action to interfere with or impede the Licensing Trustee's accomplishment of his or her responsibilities.
 6. The Licensing Trustee shall serve, without bond or other security, at the expense of Respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The Licensing Trustee shall have the authority to employ, at the expense of Respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Licensing Trustee's duties and responsibilities. The Licensing Trustee shall account for all monies derived from the divestiture and all expenses incurred. Respondent shall pay the Licensing Trustee's fees and expenses in accordance with the Licensing Trustee Agreement.

7. Respondent shall indemnify the Licensing Trustee and hold the Licensing Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Licensing Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Licensing Trustee.
 8. If the Commission determines that the Licensing Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute trustee in the same manner as provided in this Paragraph IV of this Order.
 9. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the Licensing Trustee issue such additional orders or directions as may be necessary or appropriate to comply with the terms of this Order.
 10. The Licensing Trustee shall report in writing to Respondent and to the Commission every two (2) months concerning his or her efforts to grant Licenses under this Order, and Respondent's compliance with the terms of this Order.
- D. Respondent shall comply with all terms of the Licensing Trustee Agreement, and any breach by Respondent of any term of the Licensing Trustee Agreement shall constitute a violation of this Order. Notwithstanding any paragraph, section, or other provision of the Licensing Trustee Agreement, any modification of the Licensing Trustee Agreement, without the prior approval of the Commission, shall constitute a failure to comply with this Order.

V.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to:

- A. any proposed dissolution of Respondent;
- B. any proposed acquisition, merger or consolidation of Respondent; or
- C. any other change in the Respondent, including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Order.

VI.

IT IS FURTHER ORDERED that:

- A. Within thirty (30) days after the date this Order becomes final and every thirty (30) days thereafter for one hundred and eighty (180) days, Respondent shall submit to the Commission (with simultaneous copies to the Licensing Trustee(s), as appropriate) verified written reports setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with Paragraph II of this Order. Respondent shall include in the reports, among other things that are required from time to time, the name, address, and phone number of each person who has inquired about receiving a License (whether or not Respondent granted a License to such person), the name, address, and phone number of each Person to whom Respondent granted a License, and a full description of any dispute between Respondent and any person to whom Respondent granted a License concerning any claimed actual or alleged breach (whether or not Respondent believes there has been a breach) of any License. Respondent shall include in the reports:
1. Copies of all Licenses executed in each reporting period, together with copies of all written communications to and from each Licensee; and,
 2. The name, address, and phone number of each person who requested a License, but to whom Respondent did not grant a License, together with a description in reasonable detail of the reasons why Respondent did not grant the person a license.
- B. One (1) year from the date this Order becomes final on the anniversary of the date this Order becomes final, annually for the next nine years on the anniversary of the date this Order becomes final, and at other times as the Commission may require, Respondent shall file verified written reports with the Commission setting forth in detail the manner and form in which it has complied and is complying with this Order. Respondent shall include in the reports, among other things that are required from time to time, the name, address, and phone number of each person who has inquired about receiving a License (whether or not Respondent granted a License to such person), the name, address, and phone number of each Person to whom Respondent granted a License, and a full description of any dispute between Respondent and any person to whom Respondent granted a License concerning any claimed actual or alleged breach (whether or not Respondent believes there has been a breach) of any License. Respondent shall include in the reports:
1. Copies of all Licenses executed in each reporting period, together with copies of all written communications to and from each Licensee; and,
 2. The name, address, and phone number of each person who requested a License, but to whom Respondent did not grant a License, together with a description in reasonable detail of the reasons why Respondent did not

grant the person a license.

VII.

IT IS FURTHER ORDERED that for the purpose of determining or securing compliance with this Order, upon written request, Respondent shall permit any duly authorized representative of the Commission:

- A. Access, during office hours and in the presence of counsel, to all facilities and access 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, employees, agents or independent contractors of Respondent relating to any matter contained in this Order.

VIII.

IT IS FURTHER ORDERED that this Order shall terminate ten (10) years from the date this Order becomes final.

By the Commission.

Donald S. Clark
Secretary

SEAL:
ISSUED: